IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 13-10026

JOSEPH JONES, DESMOND THURSTON, and ANTWUAN BALL,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE RESPONDENT

Team 11
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether it violates a defendant's constitutional rights when a sentencing court bases its sentence on conduct of which the defendant has been acquitted, where Supreme Court precedent, statutory authority and Federal Circuit Court precedent explicitly permit acquitted conduct to be considering during sentencing.

II. Whether it violates the Sixth Amendment for a federal district court to consider acquitted conduct when it calculates the applicable Federal Sentencing Guidelines range, where the conduct has been proven by at least a preponderance of the evidence and the actual sentences imposed are well below the statutory maximum for the crime of conviction.

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STATEMENT OF THE FACTS

In 2005, a grand jury charged Joseph Jones ("Jones"), Desmond Thurston ("Thurston"), and Antwuan Ball ("Ball") (collectively "the Petitioners") along with fifteen named coconspirators with narcotics and racketeering offenses arising from their membership in a loose-knit gang known as the Congress Park Crew. *United States v. Jones*, 744 F.3d 1362, 1365 (2014). For nearly thirteen years, the Congress Park Crew operated a market for crack cocaine ("crack") in the Congress Park neighborhood of Southeast Washington, D.C. *Id.* After the indictment, eleven of the coconspirators pled guilty, and one was convicted at a trial of his own. *Id.* Then, in 2007, the Petitioners went to trial, where they were charged with distribution of crack and conspiracy to distribute crack. *Id.*

At trial, the Government provided extensive evidence in support of the Petitioners' participation in the conspiracy. *Id.* The evidence included recordings of the Petitioners engaging in the sale of crack and the testimony of several cooperating witnesses. *Id.* The cooperating witnesses, some of whom were members of the conspiracy and others who had purchased crack from the Petitioners, provided in-depth testimony about the Petitioners' involvement in the Congress Park Crew's illegal drug business. *Id.* at 1367. In particular, they confirmed that the Petitioners were members of the Congress Park Crew, sold crack in Congress Park during the period of the conspiracy, shared sales proceeds with other conspirators, and protected their control of the Congress Park drug trade against outside competitors. *Id.* These facts were independently corroborated multiple times by both physical and testimonial evidence. *Id.*

On November 28, 2007, the jury convicted the Petitioners of distributing crack, but acquitted them of the conspiracy charge. *Id.* at 1366. Despite the acquittal, the sentencing court found that there was "clear evidence" that all three Petitioners had engaged in a conspiracy and

that their crimes were part of a common scheme to distribute crack in Congress Park. *Id.*

The court came to this conclusion based on the highly corroborated testimony of the witnesses and the weight of additional evidence *Id.* Specifically, the court found that the evidence established the requisite attributes of a conspiracy: (1) a common goal of selling crack in Congress Park; (2) interdependence, in the form of shared sales proceeds and the protection of turf against encroachment by outsiders; and (3) overlapping membership, both across time and among different cliques. *Id.* at 1368.

Based on such clear evidence, the District Court considered the conspiracy conduct when it calculated the Petitioners' advisory guidelines range under the Federal Sentencing Guidelines. *Id.* at 1366. Based on the Guidelines calculation, the maximum penalties for Jones, Thurston, and Ball were thirty, twenty, and forty years, respectively. *Id.* However, the actual sentences imposed for each petitioner vary far below the advisory guidelines range, as well as the prescribed statutory maximum for the crime of conviction—crack distribution. *Id.* at 1368. None were sentenced to terms in excess of nineteen years. *Id* The Petitioners now appeal, arguing that their sentences were procedurally and substantively unreasonable and that they were unconstitutionally predicated upon acquitted conduct. *Id.*

SUMMARY OF THE ARGUMENT

The Respondent respectfully requests this Court to affirm the judgment of the lower court because the Petitioners' constitutional rights were not violated when the sentencing court considered their acquitted conduct. Sentencing courts are not limited by information reflected in the jury verdict. Instead, judges are granted broad discretion to consider all relevant information when determining a sentence, and they should not be required to turn a blind-eye to conduct underlying an acquitted charge. In fact, Supreme Court precedent, statutory authority and Federal Circuit Court precedent explicitly permit acquitted conduct to be considering during sentencing, so long as that conduct has been proved by a preponderance of the evidence and the actual sentence imposed does not exceed the statutory maximum for the crime of conviction.

Furthermore, the Respondent urges this Court to affirm the judgment of the lower court because the Petitioners' Sixth Amendment rights were not violated when the sentencing court considered their acquitted conduct. The sentencing court is permitted to consider any information related to a defendant's character and conduct, so long as it deems it relevant. In addition, the advisory guidelines system makes clear that reliance on acquitted conduct does not present a Sixth Amendment issue. Additionally, sentencing enhancements promote the goals of the Sentencing Guidelines and therefore, are valid. Finally, the Petitioners' sentences are both procedurally and substantively reasonable. In light of this, the Petitioners' Sixth Amendment claims lack merit and therefore, must be dismissed.

ARGUMENT

I. THE COURT DID NOT VIOLATE THE PETITIONERS' CONSTITUTIONAL RIGHTS WHEN IT BASED ITS SENTENCE UPON ACQUITTED CONDUCT BECAUSE THE DISCRETION GRANTED TO JUDGES IS BROAD ENOUGH TO INCLUDE ACQUITTED CONDUCT, THE SENTENCING COURT FOUND BY A PREPONDERANCE OF THE EVIDENCE THAT THE PETITIONERS ENGAGED IN THE ACQUITTED CONSPIRACY CONDUCT, AND THE ACTUAL SENTENCES IMPOSED WERE WITHIN THE STATUTORY RANGE AUTHORIZED BY THE JURY VERDICT.

This Court should affirm the judgment of the lower court because the Constitution permits the consideration of acquitted conduct when calculating an appropriate sentence, so long as that conduct has been proven by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum for the crime of conviction.

The Fifth Amendment provides that "[n]o person shall be…deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." U.S. Const. Amend. VI. Under the Fifth and Sixth Amendment, "facts that increase the prescribed [statutory] range of penalties to which a criminal defendant is exposed" must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). However, courts have broad discretion to consider various kinds of information when determining a particular sentence. *Williams v. New York*, 377 U.S. 241, 245 (1949). In fact, statutory authority provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. The language of § 3661 is broad enough to include acquitted conduct. *United States v. Watts*, 519 U.S. 148, 152 (1997). Thus, the Supreme Court has authorized the use of acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proven by a preponderance

of the evidence and the actual sentence imposed does not exceed the statutory maximum for the crime of conviction. *Id.* at 156-57.

Here, the Petitioners claim the sentencing court violated their Fifth Amendment right to due process and their Sixth Amendment right to a trial by jury by calculating their sentences based on acquitted conduct. However, the use of acquitted conduct at sentencing is clearly supported by statute, Supreme Court precedent, and the opinion of every federal circuit court that has ruled on the issue since the Federal Guidelines were rendered advisory.[1]

A. The Discretion Granted To Judges To Consider All Relevant Information When Determining A Sentence Is Broad Enough To Include Acquitted Conduct.

The Supreme Court and federal circuit courts recognize the principle that a sentencing court may rely on acquitted conduct when calculating an appropriate sentence, so long as that conduct has been proven by a preponderance of the evidence and the actual sentence imposed does not increase the penalty beyond what is legally prescribed by the crime of conviction. *United States v. Dorcely*, 454 F.3d 366 (2006) (citing *Watts*, 519 U.S. at 156-57 (1997); *see also United States v. White*, 551 F.3d 381, 383 (6th Cir. 2008) (holding that the Sixth Amendment does not prevent a court from considering acquitted conduct when selecting a sentence within the prescribed statutory range). The ability of a sentencing court to consider acquitted conduct is derived from the longstanding principle that courts have "broad discretion to consider various types of information when determining a particular sentence." *Williams*, 377 U.S. at 245; *United States v. Booker*, 543 U.S. 220, 233 (2005) (holding that the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range has never been doubted).

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[1] *See, e.g., United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Ashworth*, 139 Fed. Appx. 525, 527 (4th Cir. 2005); *White*, 551 F.3d at 383-84, *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005); *United States v. Settles*, 530 F.3d 920, 923 (2008).

In *Williams*, the jury recommended that a defendant receive life in prison after he was convicted of murder, but the judge sentenced him to death. 377 U.S. at 247. Relying on a state statute permitting judges to seek "any information" when determining a proper sentence, the judge explained that the death penalty was appropriate based on the brutality of the crime and other information in the defendant's probation report that was not available to the jury. *Id*. at 243. The defendant argued that this violated his due process rights because his sentence enhancement was based on information supplied by witnesses whom he had not been able to confront or cross-examine. *Id*.

The Supreme Court upheld the sentence, finding that the sentencing phase and the trial phase serve two distinct purposes, and thus are not subject to the same procedural safeguards. *Id*. at 245-47; *see also United States v. Mitchell*, 484 F.3d 762, 776 (5th Cir. 2007) (holding that hearsay evidence is admissible at sentencing); *United States v. Ryan*, 236 F.3d 1268, 1272 (10th Cir. 2001) (holding that evidence obtained by an illegal search is admissible at sentencing). While the trial court is "confined to the narrow issue of guilt," the sentencing judge is tasked with determining the "extent of punishment [appropriate] after the issue of guilt has been determined." *Id*. at 247. This distinction has both historical and practical justifications. *Id*. Historically, courts in the United States have allowed sentencing judges to exercise "wide discretion in the sources and types of evidence" they consider when determining the extent of punishment to be imposed. *Id.* at 246. Practically, "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant . . . if not essential" to selecting an appropriate sentence. *Id* at 247.

Similarly here, the sentencing court exercised its discretion in considering all of the relevant information necessary to select an appropriate sentence. Due to the severity of the crime

committed and the manner in which it was orchestrated, the sentencing judge determined that the appropriate sentence for each petitioner ranged from fifteen to nineteen years, taking into account their individual levels of culpability and criminal history. Requiring a sentencing court to turn a blind-eye to aggravating factors would permit a gross miscarriage of justice.

B. The Fifth And Sixth Amendments Do Not Require Sentencing Courts To Find That Sentencing Factors Have Been Proven Beyond A Reasonable Doubt.

Sentencing courts are not constitutionally required to find sentencing factors be proven beyond a reasonable doubt. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (holding that the requirements of due process are "flexible" and not all judicial proceedings require the same procedural safeguards); *Watts*, 519 U.S. at 155 (holding that the trial phase and the sentencing phase are subject to different burdens of proof); *United States v. Bradley*, 628 F.3d 394, 400 (7th Cir. 2010) (holding that due process requires that sentencing determination be based on reliable evidence, not speculation or unfounded allegations). Therefore, even if a jury does not find a charge proven beyond a reasonable doubt, the sentencing court is not precluded from considering such conduct, because sentencing courts are not required to find sentencing factors be proven beyond a reasonable doubt. Instead, sentencing courts are permitted to find sentencing factors be proven by a preponderance of the evidence. *Watts*, 519 U.S. at 155.

1. The Fifth Amendment was not violated because the conspiracy conduct was found to be true by a preponderance of the evidence.

In *Watts*, police discovered cocaine, two loaded guns, and ammunition inside the defendant's home. *Id.* at 149. A jury convicted him of cocaine possession with intent to distribute, but acquitted him of using a firearm in relation to a drug offense. *Id*. Despite the acquittal, the district court found by a preponderance of the evidence that the defendant had

possessed the guns and enhanced his sentence accordingly. *Id* at 150. The Court of Appeals for the Ninth Circuit reversed and held that sentencing courts could not consider acquitted conduct. *Id*. at 149.

The Supreme Court upheld the sentence, expressly authorizing courts to consider acquitted conduct at sentencing. *Id.* at 154. The Court elaborated by stating that "[t]he Court of Appeals failed to appreciate the significance of the different standards of proof that govern trial and sentencing . . . an acquittal is not a finding of any fact . . . an acquittal can only be an acknowledgment that the Government failed to prove an essential element of the offense beyond a reasonable doubt." *Id.* at 155. The Court explicitly upheld the preponderance of the evidence standard, noting that the application of the "preponderance standard at sentencing generally satisfies due process." *Id.* at 156. Thus, a jury does not necessarily reject any facts when it returns a verdict of not guilty, and therefore sentencing courts are not precluded from considering conduct underlying the acquitted charge under a lower standard of proof. *Id*. The court also addressed the general nature of sentencing enhancements, noting that sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime. *Id*. at 154.

Like *Watts*, the Petitioners' sentences are not constitutionally problematic. The sentencing court found by a preponderance of the evidence that the Petitioners had engaged in a conspiracy to distribute crack cocaine. Testimony from several corroborated witnesses established that the Petitioners were members of a gang that collectively "ran a market for crack cocaine" for nearly thirteen years. As a result, their sentences were enhanced because the manner in which they were selling crack involved a conspiracy. This information was considered as a

sentencing factor after they had been found guilty beyond a reasonable doubt. Therefore, their Fifth Amendment rights were not violated.

2. The Sixth Amendment was not violated because the Petitioners' sentences did not exceed the statutory maximum authorized by the jury verdict.

The Sixth Amendment requires that any fact which "increase[s] the prescribed [statutory] range of penalties to which a criminal defendant is exposed" be proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476. However, facts that increase a sentence within the statutory range authorized by the jury verdict can be proven by a preponderance of the evidence. *Booker,* 543 U.S. at 220. In other words, although a jury may acquit a defendant of a particular charge, the jury's guilty verdict still controls the outer limits of the sentence because the sentencing court is confined to work within its boundaries. *Settles,* 530 F.3d at 923-24. Thus, the right to a trial by jury is still honored. *Id.*

In *McMillan,* the defendant challenged the constitutionality of a state law which provided that anyone convicted of certain enumerated felonies receive an enhanced sentence if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the crime. 477 U.S. at 81. The Supreme Court concluded that the statute was constitutional and that "visibly possess[ing] a firearm" was a permissible sentencing factor. *Id.* In reaching this decision, the Court emphasized that the statute did not alter the maximum prescribed sentence. *Id*. at 91. Thus, the sentence enhancement was not constitutionally problematic because the actual sentence imposed was below the statutory maximum authorized by the jury verdict. *Id.*

In *Apprendi*, the defendant was sentenced to twelve years in prison based on a state statute that increased the maximum possible sentence from ten years to twenty years if the judge found by a preponderance of the evidence that the defendant committed the crime with "racial

bias." 530 U.S. at 466. The Supreme Court struck down the statute, and held that the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction, must be submitted to a jury and proven beyond a reasonable doubt." *Id.* Because the statute increased the penalty beyond the maximum sentence authorized by the jury verdict, "committ[ing] the crime with racial bias" was a fact that needed to be submitted to a jury and proven beyond a reasonable doubt. *Id* at 467. Therefore, the sentence enhancement was unconstitutional because it exceeded the statutory maximum. *Id.*

In *Settles*, the court rejected a Fifth and Sixth Amendment challenge to the use of acquitted conduct during sentencing. 530 F.3d at 923. A jury convicted the defendant of unlawful possession of a firearm by a convicted felon, but acquitted him of possession with intent to distribute cocaine and of using or carrying a firearm during a drug-trafficking offense. *Id* at 922. Despite the acquittal, the judge determined that the Government had proven, by a preponderance of the evidence, that the defendant had possessed the gun with intent to distribute. *Id.* at 923. Relying on this finding, the district court ultimately sentenced him to an inflated term of 57 months. *Id.* The judge's decision was upheld on appellate review because the sentence did not exceed the statutory maximum authorized by the jury verdict. *Id.*

Like in *McMillian* and *Settles*, the sentence enhancements here do not violate the Petitioners' constitutional rights. The sentencing court found by a preponderance of the evidence that the Petitioners had engaged in a conspiracy to distribute crack cocaine. Additionally, the maximum penalties for Jones, Thurston, and Ball were thirty, twenty, and forty years, respectively; however, none of the Petitioners were sentenced to terms that exceed nineteen years. Therefore, their sentences conform to the principles of *McMillan*, *Apprendi*, and *Settles.*

C. Title 18 U.S.C. § 3661 Authorizes The Use Of Acquitted Conduct At Sentencing.

The language of 18 U.S.C. § 3661 ("§ 3661") is broad enough to include acquitted conduct, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense…for the purpose of imposing an appropriate sentence." *Watts*, 519 U.S. at 152 (citing 18 U.S.C. § 3661).

The *Watts* court referred to § 3661 to expressly authorize the use of acquitted conduct at sentencing. *Id.* The Court emphasized that neither the broad language of § 3661 nor Supreme Court precedent suggests any basis to "invent a blanket prohibition" on the use of acquitted conduct. *Id.* Rather, the broad language of § 3661 encompasses acquitted conduct. *Id*. As a result, the Supreme Court permits sentencing courts to consider acquitted conduct, so long as the sentencing court finds by a preponderance of the evidence that the defendant did in fact engage in such conduct. *Id. at* 149; *White*, 551 F.3d at 381 (holding that the *Booker* opinion did not alter the holding in *Watts*); *United States v. Mercado*, 474 F.3d 645 (9th Cir. 2008) (holding that the core principle of *Watts* lives on).

Here, the Petitioners are not being punished for crimes they did not commit. Rather, their sentences were enhanced because the manner in which they were selling crack involved a conspiracy. The consideration of such conduct is authorized under the broad language of § 3661.

D. Permitting The Use Of Acquitted Conduct Promotes A Penal System With Individualized Sentences.

Preserving the distinct roles of judges and juries is integral to upholding the goals of our criminal justice system and ensuring a penal system with individualized sentences. Otherwise, individuals with differing levels of culpability will be given equal sentences, which would be unfair. In the long run, allowing judges to look at all relevant information when determining sentences promotes fairness.

Historically, judges were not required to consult a standardized sentencing framework when determining sentences, but instead were given unfettered discretion to select sentences within an authorized statutory range. Kathryn M. Zainey, *The Constitutional Infirmity of the Current Federal Sentencing System*, 56 Loy. L. Rev. 375 (2010). As a result, judges often imposed incongruent punishment for similar offenses without providing any justification. *Id*. at 287.

Today, however, courts have struck an appropriate balance. Judges are still allowed broad discretion within the statutory maximum, but incongruent and inexplicable sentencing disparities no longer exist because judges are required to consult the Federal Guidelines when calculating sentences. Additionally, the broad language of the Sentencing Reform Act of 1984 ("SRA"), which encourages courts to look at all relevant conduct when determining an appropriate sentence, reflects the legislature's intent that acquitted conduct be factored into sentencing, William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 495 (1990).

This is sound policy for several reasons. Allowing the consideration of all relevant conduct permits the court to look beyond the conviction offense to the actual criminal conduct of the defendant. The referenced provision of the SRA assesses the seriousness of the real conduct of the defendant and his accomplices to ensure that the punishment imposed is the appropriate fit for the defendant's individual actions. In other words, the punishment should fit the *offender*, not merely the crime. Here, the Petitioners' sentences were not incongruent because their sentences were calculated by using a standardized guideline framework that reflected their individual culpability.

In sum, the judgment of the lower court should be affirmed because the Fifth and Sixth Amendments permit the consideration of acquitted conduct when calculating an appropriate sentence as long as that conduct has been proven by a preponderance of the evidence and the actual sentence imposed does not exceed the statutory maximum for the crime of conviction.

II. THE COURT DID NOT VIOLATE THE PETITIONERS' SIXTH AMENDMENT RIGHTS BY CONSIDERING THEIR ACQUITTED CONSPIRACY CONDUCT WHEN CALCULATING THEIR ADVISORY GUIDELINES RANGE BECAUSE THE GUIDELINES ARE NO LONGER MANDATORY, A FINDING OF ACQUITTAL DOES NOT MEAN A DEFENDANT IS INNOCENT AND THE SENTENCES IMPOSED WERE BOTH PROCEDURALLY AND SUBSTANTIVELY REASONABLE.

This Court should affirm the judgment of the lower court and hold that the sentences imposed are reasonable for three reasons. First, the sentencing court is permitted to consider any information related to a defendant's character and conduct, so long as it deems the information relevant. Second, the advisory guidelines system makes clear that reliance on acquitted conduct does not present a Sixth Amendment issue. Finally, sentencing enhancements promote the goals of the Federal Sentencing Guidelines and therefore, are valid. For these reasons, this Court should affirm the judgment of the lower court because it properly imposed reasonable sentences.

A. A District Court May Consider Acquitted Conduct At Sentencing Under The Advisory Guidelines System.

The authority of a judge to exercise broad discretion in imposing a sentence within a statutory range has never been doubted. *Booker*, 543 U.S. at 226. Therefore, 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 facts that the judge deems relevant. *Id.*

In *Booker*, the Supreme Court assessed the Federal Sentencing Guidelines in consideration of two recent opinions—*Apprendi v. New Jersey* and *Blakely v. Washington*. *Id. See Apprendi*, 530 U.S. at 490 (holding that the Sixth Amendment right to jury trial requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (holding "statutory maximum" 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).

The substantive opinion of the *Booker* case held that the current guidelines violated the Sixth Amendment because they were mandatory, and therefore mandated particular sentencing outcomes based on predetermined rules, sometimes exceeding the maximum prescribed sentence based on a preponderance of the evidence standard. *See Apprendi* 530 U.S. at 490; *Blakely* 542 U.S. at 303. Therefore, pursuant to *Apprendi*, the right to a trial by jury was violated because any fact that increases the maximum penalty must be proven beyond a reasonable doubt. *Booker*, 543 U.S. at 233. The Court corrected this constitutional defect by removing the two provisions of the SRA that made the Guidelines binding. *Id.* at 245. This left the Guidelines in place as "effectively advisory." *Id.*

Today, the modified SRA requires judges to consider the Guidelines range, but allows judges to "tailor" sentences in light of the sentencing goals articulated in 18 U.S.C. § 3553(a). *Id.* In effect, federal judges are no longer tied to the sentencing range indicated in the Guidelines. *Id.* at 233. Rather, they are free to exercise their discretion to select a specific sentence within a defined range. *Id.*

Now, sentencing requires two steps. *United States v. Talley*, 431 F.3d 784, 786 (2005). First, the district court must consult the Guidelines and properly calculate the range provided by

them. *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005). Second, the court must consider several factors to determine a reasonable sentence, including but not limited to: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to protect the public; and (4) any pertinent policy statement. *See* 18 U.S.C. § 3553(a). Nevertheless, a district court judge has broad discretion to place weight disproportionately on any one of these factors.

Here, the District Court properly adhered to the post-*Booker* structure. Following the trial, the court consulted the Guidelines and properly calculated the applicable Guidelines range. The court then considered the various factors articulated in 18 U.S.C. § 3553(a) and reflected the individualized assessments of the Petitioners' conduct, the manner in which the crimes were committed and the full range of sentences meted out for their crimes of conviction. In light of this, the judge selected distinct sentences for each petitioner.

Not only were the sentences within the prescribed range authorized by the jury verdict, they were also well below the Guidelines recommendation. This Court has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Therefore, the judge's action in selecting a sentence within the range authorized by the jury verdict satisfies the requirements of the Sixth Amendment. This comports with the *Booker* application and therefore, does not amount to a Sixth Amendment violation.

B. Statutory Authority And Supreme Court Precedent Indicate That Reliance On Acquitted Conduct At Sentencing Does Not Violate The Sixth Amendment.

Statutory authority and Supreme Court precedent indicate that reliance on acquitted conduct at sentencing poses no Sixth Amendment issues. *Dorcely*, 454 F.3d at 372. The Supreme Court has repeatedly stressed that a sentencing court may consider uncharged or acquitted

conduct in determining an appropriate sentence, so long as that conduct has been proven by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum for the crime of conviction. *Settles,* 530 F.3d at 923 (citing *Watts,* 519 U.S. at 156-57); *see also Dorcely,* 454 F.3d at 371. In fact, consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes. *Booker,* 543 U.S. at 220; *see also Settles,* 530 F.3d at 920.

In *Dorcely,* the Court relied on both the substantive and remedial opinions of *Booker* to reach its holding. *Dorcely,* 454 F.3d at 372. First, *Dorcely* observed that the remedial opinion expressly endorsed 18 U.S.C. § 3661 and concluded that it poses no Sixth Amendment problem. *Id.* This permits a sentencing court to consider acquitted conduct. *See Watts,* 510 U.S. at 151. This is true even when consideration of the acquitted conduct multiplies a defendant's sentence dramatically—as happened in the instant case. *Dorcely,* 454 F.3d at 372.

Second, the *Dorcely* court noted the longstanding principle that a criminal defendant has no right to a jury determination of facts that the judge deems relevant to sentencing. *Id.* (citing *Booker,* 543 U.S. at 233). The sentencing range for a particular offense is determined on the basis of all "relevant conduct" in which the defendant was engaged, not just the conduct underlying the offense of conviction. *Witte v. United States,* 515 U.S. 389, 393 (1995). The relevant conduct guideline, USSG § 1B1.3, "directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction" when determining the applicable Guidelines range. *Watts,* 519 U.S. at 153-54. For drug-related offenses, relevant conduct includes any acts described in § 1B1.3(a)(1)(B) "that were part of the same course of conduct or common scheme . . . as the offense of conviction." *See* United States Sentencing Commission, Guidelines Manual, §1B1.3 (a)(2) (Nov. 2014).

Like in *Dorcely*, this Court should dispose of the Petitioners' categorical challenge to the reasonableness of a sentencing court's consideration of acquitted conduct because the Guidelines expressly authorize it. The District Court found that the Petitioners' crimes of drug distribution were committed pursuant to the conspiracy. Therefore, the conspiracy conduct qualifies under § 1B1.3(a)(2) as conduct that was "part of the same . . . common scheme . . . as the offense of conviction." The Petitioners' participation in the conspiracy was proven by at least a preponderance of the evidence. The Government provided extensive evidence in support of this finding, including recordings of the Petitioners engaging in sales of crack and testimony from several witnesses, some of whom were members of the conspiracy and others who had purchased crack from the Petitioners. The cooperating witnesses provided in-depth testimony about the Petitioners' actions with the Congress Park Crew.

In particular, they confirmed that the Petitioners associated with the named conspirators, sold crack in Congress Park during the period of the conspiracy, shared sales proceeds with other conspirators, and protected their control of the Congress Park drug trade from outside competitors. This established all three attributes of a single conspiracy. Additionally, all three Petitioners were sentenced to terms below the statutory maximum. Therefore, the District Court did not err in considering the Petitioners' conspiracy conduct in determining their appropriate sentences. Thus, their claims must be rejected because no valid Sixth Amendment issue has been raised.

The Petitioners argue that the court's conspiracy finding was improper because it relied on testimony of witnesses that are untrustworthy. Specifically, the Petitioners point to several witnesses that have criminal records, a history of drug abuse and a history of deceitful behavior

towards authorities. However, the District Court only relied on testimony that was corroborated by at least one, and usually several other witnesses.

Further, the court noted that the credibility issues of the witnesses could not undermine the host of mutually corroborative evidence establishing the Petitioners' involvement in the conspiracy. Given the immensely corroborated accounts of the Petitioners' conspiratorial conduct and the weight of the evidence, it was not erroneous to find that the Petitioners had conspired to distribute crack in Congress Park. Accordingly, this conduct was rightfully integrated into the Sentencing Guidelines calculation under the relevant conduct provision.

C. An Acquittal On Criminal Charges Does Not Prove That The Defendant Is Innocent.

An acquittal on criminal charges does not prove that the defendant is innocent. *Watts,* 519 U.S. at 154. It merely proves the existence of a reasonable doubt to his guilt. *Id.* The Petitioners claim that allowing an increase in their sentences based on the conspiracy conduct is effectively punishing them for an offense of which they are innocent. This, however, is not so.

This principle was reiterated in *United States v. Watts* where the Court stressed that sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase the sentence for the manner in which the crimes were committed. *Id*. (citing *Witte,* 515 U.S. at 389). Furthermore, the Guidelines seek to punish those who exhibit a pattern of "criminal conduct," not merely a pattern of criminal convictions. *See* United States Sentencing Commission, Guidelines Manual, Ch. 4, Pt.A intro. comment (Nov. 2014). Accordingly, the Guidelines do not bind a district court to the category into which simple addition places the defendant.

Here, the Petitioners are not being punished for any offense other than the one of which they were convicted. Rather, they are being punished for distributing crack in a manner that

involved a conspiracy. In short, the crime was committed "in a fashion that warrants increased punishment." *See Nichols v. United States,* 511 U.S. 738, 747 (1994). The Petitioners' crimes were part of a large-scale organized crime operation that was ongoing for roughly thirteen years. The specifics of their criminal conduct play a vital role in their sentencing and warrant an increased punishment.

D. Sentencing Enhancements Comport With The Goals Of The Sentencing Guidelines.

Furthermore, the upward sentencing adjustment employed comports with several aims of the Sentencing Guidelines, including the need for the punishment to reflect the seriousness of the offense and to provide just punishment for the offense committed. The Petitioners challenge the substantive reasonableness of their sentences, stressing that their sentences far exceed the norm for their crimes. In effect, the Petitioners argue that all crimes should be treated uniformly and the same. However, the judicial system must take into account that, in reality, no two crimes are ever the same and therefore, punishment must vary case-by-case. Further, depriving judges of extra-verdict information would undermine the goals of Congress in adopting the Guidelines. This was adequately phrased in *Booker* when the court stated,

> "To engraft the Court's constitutional requirement [of jury fact-finding] onto the sentencing statutes…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. In doing so, it would…weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker,* 543 U.S. at 251.

Therefore, this Court should *encourage*, not prohibit, judges from considering all information available to them at sentencing in order to promote the goals that Congress originally intended and to ensure that a defendant's sentence is reflective of his real conduct. Here, the Petitioners'

sentences reflect individualized assessments of their culpability and criminal conduct. Thus, the Petitioners' sentences are parsimonious.

In addition, and as a matter of policy, the judgment of the lower court should be affirmed due to the severity of the Petitioners' offenses. This Court addressed the serious nature of drug trafficking offenses in *United States v. Cooper* where it held that a sentence even at the *highest* end of the Guidelines range was not unreasonable when related to drug charges. *United States v. Cooper*, 437 F.3d 324, 333 (2006).

In *Cooper*, the appellant plead guilty to conspiracy to distribute and possess with intent to deliver cocaine base. *Id.* at 325. The appellant had two prior convictions and thus, was classified as a career offender. *Id.* After determining the applicable advisory guidelines range, the Court considered the appropriate sentence. *Id.* at 326. The appellant argued for an 84-month sentence, asserting mitigating factors that included the large time lapse between her offenses and the small amount of drugs involved in her prior crimes. *Id.* The Court rejected her argument and sentenced her to 105 months in prison—the highest end of the Guidelines range. *Id.* Addressing her request for a lighter sentence, the Court stated:

> "But the nature of the offense is so serious. This was a very serious drug trafficking business, which the defendant was an integral part of…and I cannot ignore the effects of her involvement in this case on the public and all the users through the years. I don't feel, if I didn't impose a sentence that I intend to impose, I would be fulfilling my obligations as a Judge…" *Id.*

The judge's rationale in *Cooper* can be similarly applied in the instant case. The Petitioners' crimes are severe drug offenses. Jointly and separately, they were part and parcel of a large drug ring for a long period of time. Their increased sentences reflect the severity of their charges, as well as the need to protect the public.

E. The Petitioners' Sentences Are Both Procedurally and Substantively Reasonable.

The remedial opinion in *Booker* directed appellate courts to apply a reasonableness standard of review to sentences that depart from the Guidelines. *Booker,* 543 U.S. at 261. This standard advises appellate courts to examine the numerous factors set forth in § 3553(a) in determining whether or not a sentence is unreasonable. *Id.* The Court provided further guidance on the nature of appellate "reasonableness" review in *Rita v. United States* where it held that appeals courts may apply a presumption of reasonableness to a sentence imposed within a properly calculated Guidelines range. *Rita v. United States,* 551 U.S. 338, 347 (2007). The *Rita* court illustrated the permissibility of the presumption of reasonableness by stating,

> "the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the sentencing commission will have reached the same conclusion as to the proper sentence in that particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Id.*

This Court reviews the reasonableness of a sentence in two steps. First, the Court ensures that the District Court committed no significant procedural error, such as improperly calculating the Guidelines range. *Gall v. United States,* 552 U.S. 38, 46 (2007). If the sentence is procedurally sound, the Court then considers the substantive reasonableness of the sentence. *Id.* Both procedural and substantive reasonableness are assessed under an "abuse of discretion" standard. *Id.*

As noted above, the lower court committed no significant procedural error in finding that the Petitioners' relevant conduct included knowingly participating in the charged conspiracy to distribute crack in Congress Park. The court made adequate and explicit findings about the scope of each Petitioner's conspiratorial agreement based on the sum of highly corroborated testimony

and evidence. In light of this, the court correctly calculated the Guidelines and thus, the sentences are procedurally sound.

Further, the Petitioners' sentences are substantively reasonable for several reasons. First, as noted in *Rita,* sentences within the applicable Guidelines range are entitled to a presumption of reasonableness. In fact, even circuit courts that have declined to adopt a formal presumption of reasonableness recognize that a within-Guidelines sentence will usually be reasonable, because it reflects both the sentencing commission and the sentencing court's judgment as to what is an appropriate sentence for a given offender. *See Cooper,* 437 F.3d at 331; *United States v. Fernandez,* 443 F.3d 19, 47 (2006); *Talley*, 431 F.3d at 788.

As previously noted, the Petitioners' sentences were all significantly lower—Jones' by 144 months, Thurston's by 68 months, and Ball's by 67 months—than the bottom of the applicable Guidelines ranges. As the court noted below, "it is hard to imagine' how a sentence '*below* the range we ordinarily view as reasonable' could be unreasonably high." *United States v. Lopesierra-Gutierrez,* 708 F.3d 193, 208 (D.C. Cir. 2013) (quoting *United States v. Mejia*, 597 F.3d 1329, 1343 (D.C. Cir. 2010)). In light of this, the challenge to the substantive reasonableness of their sentences falls short.

Finally, the *Dorcely* case provides sound illustration regarding the merits of an appellant's claim that his sentence is unreasonable. *Dorcely, 454* F.3d at 374. In *Dorcely*, the appellant makes two arguments. *Id.* First, he argues that "*any* substantial increase in a sentence based on acquitted conduct should be deemed unreasonable *per se*, regardless whether such an increase is determined to violate the accused's constitutional rights." *Id.* Second, Dorcely contends that even if the Court should reject a per se rule, it should nonetheless find that the

sentence he received is unreasonable because it results in a fourfold increase in his term of incarceration. *Id.* The Court rejects both of these arguments. *Id.*

The categorical challenge to the reasonableness of a sentencing court's consideration of acquitted conduct is easily disposed of by pointing out that both Section 3661 of Title 18 *and* the Guidelines permit the sentencing court to consider acquitted conduct. *Id.* at 375. In regards to the second argument, the Court agrees that a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness. *Id.* at 376. The Court further articulates that part of any criminal sentence is a component of retribution. *Id.* This provides a just rationale for the implication of lengthy terms of incarceration. *Id.*

Here, the Petitioners have failed to demonstrate that their sentences are unreasonable—either procedurally or substantively. In addition, the Petitioners' challenges do not survive the widely accepted presumption of reasonableness and likewise, they have not shown that the sentencing judge exceeded the bounds of allowable discretion in determining the sentences handed down. Courts have recognized that there is a range of reasonable sentences from which a district court may choose. *See Talley*, 431 F.3d at 788. Under this logic, when a district court imposes a sentence within the advisory guidelines range, it is ordinarily accepted as reasonable. *Id.* Finally, following *Dorcely*, the mere fact that the Petitioners' sentences were increased several fold on the basis of acquitted conduct is not dispositive and does not render their sentences unreasonable per se. They have failed to meet their burden of demonstrating unreasonableness. Additionally, they have failed to show that their case is exceptional and therefore, their constitutional challenges must be dismissed.

In sum, the court properly considered the Petitioners' conspiracy conduct in calculating their Guidelines range, and the sentences the court imposed were reasonable in light of those ranges.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the judgment of the District Court be affirmed.

DATED: March 9, 2015

Respectfully Submitted,

Team 11
REDACTED