

IN THE
Supreme Court of the United States

JOSEPH JONES, DESMOND THURSTON, AND ANTUWAN BALL
Petitioners,

v.

UNITED STATES,
Respondent.

**On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia**

BRIEF OF RESPONDENTS

TEAM 13

Council for Respondent

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ISSUES PRESENTED FOR REVIEW

1. Whether a sentencing court violates a defendant's constitutional rights when the court basis its sentence upon conduct of which the jury has acquitted.
2. Whether a federal district court violates the Sixth Amendment when it calculates the applicable U.S. Sentencing Guideline range and imposes a much higher sentence than the Guidelines would otherwise recommend based upon its findings that the Defendant had engaged in conduct of which the jury had acquitted him.

STATEMENT OF CASE

When determining an appropriate sentence, 18 U.S.C. § 3661 provides that no limitation should be placed on the information about a defendant's background, character and other conduct that a judge can consider.¹ Beginning with *Williams v. New York* and continuing through *United States v. Booker*, this Court has continually upheld the constitutionality of acquitted conduct sentencing so long as certain requirements are met. First, the court can only consider conduct that the government proved by a preponderance of the evidence.² Second, any facts that would increase a sentence beyond the statutory maximum must be either found by a jury or admitted to by the defendant.³ So long as these requirements are met, this Court has ruled acquitted conduct sentencing is constitutionally permissible.

¹ 18 U.S.C. § 3661.

² *United States v. Watts*, 519 U.S. 148, 157 (1997).

³ *Apprendi v. New Jersey*, 530 U.S. 466, at 490 (2000).

In the case at bar, a jury convicted appellants Joseph Jones, Desmond Thurston, and Antwuan Ball of distributing small quantities of crack cocaine. Fifteen named conspirators were charged with narcotics and racketeering as members of the Congress Park Crew, a gang that dealt in crack cocaine for nearly thirteen years in Washington, D.C. Eleven of the conspirators plead guilty, one was convicted in his own trial, and then appellants proceeded to trial. The jury acquitted all three of conspiracy to distribute drugs. The sentencing court, however, found that the defendants had in fact engaged in conspiracy by a preponderance of the evidence. Jones was sentenced in May, 2008. The district court found by a preponderance of the evidence that he was part of a scheme to distribute crack cocaine, and as a result the sentencing Guidelines recommended a range of 324 to 405 months in prison. However, the court imposed an actual sentence of only 180 months because the court expressed concerns about the severity of crack cocaine offenses, as well as Jones's previous crimes. The court sentenced Thurston and Ball in 2010. The Guidelines recommended a range of 262 months to 327 months in prison for Thurston, and 292 months to 365 months for Ball. The district court instead sentenced Thurston to 194 months in prison and sentenced Ball to 225 months. These downward adjustments were based on the same concerns present in Jones's case.

Defendants appealed the decision of the district court on the grounds that their sentences were unreasonable because they were unconstitutionally based on acquitted conduct. The District of Columbia Court of Appeals affirmed the appellants' sentences, and stated that under Current Supreme Court Precedent, "every numbered circuit has addressed the constitutionality of

sentencing based on acquitted conduct, and each one has reached the same conclusion reached by this court.”⁴

SUMMARY OF ARGUMENT

A sentencing Court does not violate a defendant’s constitutional rights by considering acquitted conduct. Even after consideration by the Supreme Court, the relevant law still states that there must be no prohibition on a judge’s discretion when sentencing. Congress passed this law in order to ensure that judge’s had the necessary freedom to investigate real conduct. Investigating and discovering real conduct underlying a jury’s conviction allows a sentencing court to impose a more just and apt punishment.

Furthermore, this Court has addressed the constitutionality of this statutory provision that protects judges and provides them this broad discretion. The Court has consistently upheld and supported a sentencing court’s right to consider acquitted conduct at sentencing. The reasons for this are varied and persuasive. This country has long held that judges must have discretion in considering information that is otherwise not permitted in a trial. Such discretion is permitted to ensure accurate and fair sentencing. This tradition has been upheld and incorporated into standing law. Furthermore, this tradition has been supported at the Supreme Court and embedded into our legal system by the lower courts. Any concerns about limitations on this discretion have been addressed by the Supreme Court and have resulted in two main restrictions on a sentencing court’s discretion to consider acquitted conduct to ensure that the safety and rights of the defendant are not jeopardized.

⁴ United States v. Jones, 744 F.3d 1362 (D.C. Cir. 2014).

Additionally, the policy behind acquitted conduct sentencing is compelling enough to support it. The motivations behind a sentencing court's broad discretion is to ensure that not only accurate, but oftentimes merciful sentences can be imposed. This occurred in the case at bar, where every defendant got a much lower sentence than the guidelines recommend. The opportunity to consider real conduct in sentencing allows Courts to consider all relevant aspects and apply a more lenient sentence for those who merit such mercy, and a harsher sentence for more heinous crimes. Even as the Supreme Court has supported acquitted conduct sentencing, it has put in place safeguards to ensure that the ultimate goal of the practice is met: just; fair; and when possible lenient application of the law at sentencing.

Finally, courts do not violate the Sixth Amendment when they use acquitted conduct to sentence defendants to prison terms longer than the Federal Sentencing Guidelines would otherwise require. This Court considered that very question in *Apprendi v. New Jersey* and determined that any fact which increase the statutory maximum penalty for a crime must be decided by a jury or admitted by a defendant. This Court clarified that decision in *United States v. Booker* when it held that the statutory maximum referred to is the maximum punishment a judge could give when considering only the facts decided by the jury. The statutory maximum is not referring to the maximum set by the Federal Sentencing Guidelines, and therefore the Sixth Amendment is not violated if acquitted conduct is used to increase the sentencing guidelines rather than the statutory maximums.

This current understanding of the *Apprendi* decision provides adequate Sixth Amendment protections for defendants while still allowing for judicial discretion. It ensures that a defendant

cannot be sentenced to a prison term longer than Congress determined appropriate for that particular crime and maintains the jury's traditional role of fact finder.

The case at bar meets all the constitutional safeguards this Court has placed on acquitted conduct sentencing. The government proved the acquitted conduct by a preponderance of the evidence and the appellants were all sentenced to prison terms less than the statutory maximum allowed for the crimes they were convicted of. Accordingly, respondent respectfully requests this Court uphold the decision of the lower court and find the appellants sentences valid.

ARGUMENT

- I. A sentencing court does not violate a defendant's constitutional rights when it basis its sentence upon conduct of which the jury has acquitted him because doing so is in keeping with the law of the land, the Supreme Court's interpretation of the law, and the public policy that underlies both.**

Acquitted conduct sentencing does not violate constitutional rights because limiting the practice is statutorily prohibited. Congressional elected officials encoded acquitted conduct sentencing into the law in the Federal Sentencing Guidelines. The Supreme Court reviewed this statute, excised unconstitutional portions therein, and left the provision ensuring that no limits are imposed on a court's discretion at sentencing. There is no merit to the argument that the law is constitutional and should be struck down by this court. The Supreme Court has upheld the principle of acquitted conduct sentencing not just once with respect to the Federal Sentencing Guidelines, but in multiple cases over more than sixty years. The Lower courts have followed suit, leaving no doubt that the traditional practice of permitting judges to practice broad discretion at sentencing is not unconstitutional. Finally, the policy for allowing acquitted conduct sentencing is to ensure that judges can consider real conduct and thus apply more fair,

and sometimes more merciful sentences on defendants. The Supreme Court has addressed any concerns as to the dangers of judicial broad discretion going too far by placing some reasonable restrictions on acquitted conduct sentencing. These restrictions allow courts to provide real justice on an individual level. For these reasons, acquitted conduct sentencing is not unconstitutional.

1. A sentencing court must be permitted to base its sentence upon conduct of which the jury has acquitted the defendant because such is in keeping with Statutory Law.

Congress has clearly stated and codified into law the idea that a sentencing court can and should be permitted to base its sentence upon conduct of which the jury has acquitted the defendant. 18 U.S.C. § 3661 states that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”⁵ Refusing to allow a sentencing court to consider crimes for which the defendant had been acquitted is a “limitation” on the “background, character, and conduct” of the defendant, and is therefore contrary to law.⁶

The Supreme Court held in *United States v. Booker* that Congress passed the Sentencing Reform Act of 1984 with the statutory goal of “diminishing sentence disparity.”⁷ Congress ensured that a sentencing court must consider “the nature and circumstances of the offense and the history and characteristics of the defendant.”⁸ The *Booker* court also noted that in context, this provision refers to “the judge without the jury,” and not the judge and jury working

⁵ 18 U.S.C. § 3661.

⁶ *Id.*

⁷ *United States v. Booker*, 534 U.S. 220, 251 (2005).

⁸ 18 U.S.C. § 3553(a)(1) (2000 ed. and Supp. IV).

together.⁹ The legislative history of the Sentencing Reform Act of 1984 further demonstrates that the act was to “guide the judge in making” decisions on sentencing.¹⁰ The text of the statute and the legislative history demonstrate that the Act clearly authorizes judges to make sentencing decisions apart from the jury, and to consider history, characteristics, background and conduct of the defendant. Such background and character considerations surely include crimes for which the defendant was charged, even if the jury acquitted him.

The goal of the statute was to bring some uniformity to sentencing. However, that goal could only be obtained inasmuch as the statute provided judges the ability to “base punishment upon, the *real conduct* underlying the crime.”¹¹ Determining real conduct requires the ability to assess actions of which the defendant has been acquitted.

Furthermore, Judges have long been permitted by law to look at a defendant’s real conduct, conduct that would otherwise be impermissible during a jury trial, to apply a just sentence. For example, Judges have looked at presentence reports prepared by probation officers to gather information that was usually unavailable until the conclusion of the trial to determine the manner in which the defendant committed a crime he was convicted of.¹² The Sentencing Reform Act did not introduce or invent a sentencing court’s right to consider acquitted conduct; it simply codified prior law in ensuring that “no limitation shall be placed” on the information necessary to impose “an appropriate sentence.” The *Booker* Court explained that placing such limitations on a sentencing court would “weaken the tie between a sentence and an offender’s

⁹ United States v. Booker, 534 U.S. 220, 249 (2005).

¹⁰ S.Rep. No. 98–225, p. 51 (1983).

¹¹ United States v. Booker, 534 U.S. 220, 251 (2005).

¹² *Id.* at 251.

real conduct,” and “undermine the sentencing statute’s basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.”¹³

The law, as passed by elected representatives of the people, clearly ensures that there is no limitation on a sentencing court’s right to consider information beyond that upon which a jury based its conviction. United States Code, supported by clarity in congressional intent, dictates that a sentencing court must be permitted to base its sentence upon acquitted conduct.

2. A sentencing court must be permitted to base its sentence upon conduct of which the jury has acquitted the defendant because the Supreme Court has consistently ruled that acquitted conduct sentencing is constitutional.

A Sentencing Court must be permitted to base its sentence upon conduct of which the jury has acquitted the defendant because this court has historically supported judges’ broad discretion at sentencing. Appellants may argue that the Court should hold in their favor because acquitted conduct is unconstitutional. However, such a holding would conflict with the Supreme Court’s previous holdings: the Court has consistently supported the sentencing court’s right to consider acquitted conduct.

Long before the landmark case of *United States v. Booker* the Supreme Court has supported acquitted conduct sentencing. As early as 1949 the court ruled that a “sentencing judge ... is not confined to the narrow issue of guilt.”¹⁴ In *Williams v. People of State of New York*, a jury convicted the defendant of murder and recommended life imprisonment, but the judge imposed the death sentence as a result of “additional information obtained through the court’s ‘Probation Department, and through other sources.’”¹⁵ The Supreme Court supported the

¹³ *Booker*, at 252.

¹⁴ *Williams v. New York*, 337 U.S. 241, 247 (1949).

¹⁵ *Id.* at 242.

sentencing Judge's right to consider other sources, and stated that with current law individualizing punishments, it had become more and more necessary that "a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."¹⁶

Appellant may argue that judges should not be allowed such broad discretion in sentencing, nor should Juries be limited in critical fact finding that affects a defendant's sentence. For this reason, Plaintiff contends that the Court should re-evaluate acquitted conduct sentencing and ensure that the jury has some say in all facts that apply. After all, Appellant may claim, years have passed since the *Williams* decision, and Plaintiff may contend that the *Williams* decision should be overturned. However, the Supreme Court has already addressed this issue far more recently, and the Court upheld acquitted conduct sentencing. In *United States v. Watts*, the jury convicted the defendant of a drug offense, but acquitted him of using or carrying a firearm.¹⁷ The sentencing court considered the conduct of carrying a firearm in relation to the drug offense in imposing the defendant's sentence.¹⁸ Two panels of the Court of Appeals for the Ninth Circuit held in favor of the defendant, despite the fact that every other Court of Appeals in the country consistently held that a sentencing court may consider acquitted conduct in sentencing, so long as the conduct is established by a preponderance of the evidence.¹⁹ The Supreme Court granted *Certiorari* and held that "neither the broad language of § 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing."²⁰ In fact, the court went so far as to say that pre-

¹⁶ *Id.*

¹⁷ *United States. v. Watts*, 519 U.S. 148, 157 (1997).

¹⁸ *Id.* at 149.

¹⁹ *Id.*

²⁰ *Id.* at 152.

Guidelines, it was “well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.”²¹ The Guidelines, according to the *Watts* Court, did not alter that particular aspect of the sentencing court’s authority.²²

Appellants may argue that even while upholding the principle of acquitted conduct sentencing, this court should impose some limits on the discretion of a sentencing court. Once again, that question has already been addressed by the *Watts* Court. The Court agreed with the majority of circuit courts and held that “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”²³

The Court imposed additional limits in *Apprendi v. New Jersey*.²⁴ The Supreme Court held that a fact that increased the sentence for a crime beyond prescribed statutory maximum had to be proved beyond a reasonable doubt by a jury.²⁵ Thus, although Judges have been permitted both by statute and by the courts to consider acquitted conduct in sentencing, protections and limitations on that discretion have been set up to ensure fairness in the judicial system.

Appellants may contend that this Court’s recent decisions such as *Apprendi* and *Booker* should be construed so as to impose limitations on what information a sentencing court can consider. However, the Supreme Court itself has clearly stated just the opposite. The Court ruled that the Guidelines were advisory, and could not be mandatory because they did not allow for the broad discretion in imposing sentences within statutory ranges that the Court has always

²¹ *Id.* quoting *United States v. Donelson*, 695 F.2d 583, 590 (C.A.D.C.1982).

²² *Id.* at 152.

²³ *Id.* at 157.

²⁴ 530 U.S 466 (2000).

²⁵ *Id.* at 490.

supported.²⁶ The *Booker* holding does not decrease a judge's discretion to sentence. It does the opposite, providing more discretion to sentence outside of the set-in-stone Guidelines that had previously governed sentencing.

The Supreme Court addressed the application of *Apprendi* in *Oregon v. Ice*, where the Court addressed consecutive sentences, a sentencing function in which “jury traditionally played no part.”²⁷ The Supreme Court held that such decisions are entrusted to judges in a tradition that “extended down centuries into the common law” and, such decisions are not within the jury function. The Supreme Court has consistently applied *Booker* and *Apprendi* in a manner that encourages, not discourages judicial discretion and acquitted conduct sentencing.

As the Supreme Court noted in *Watts*, Circuit Courts have been supporting acquitted conduct sentencing in accordance with the Supreme Court's consistent rulings on the matter. In *United States v. Ibanga*, the Fourth Circuit sitting en banc ruled that a court must not categorically exclude acquitted conduct.²⁸ The District Court had conducted in depth sentencing efforts, including three separate sentencing hearings and off-the-record status conferences.²⁹ After including acquitted conduct, the Guidelines recommended a sentence of 151 to 188 months in prison.³⁰ The District Court, however, specifically requested that the probation officer calculate the Guidelines range without considering acquitted conduct, which reduced the Guidelines range to just 51 to 63 months in prison.³¹ The District Court justified its choice to exclude all acquitted conduct from the sentencing decision because considering such conduct

²⁶ *Booker*, at 233.

²⁷ *Oregon v. Ice*, 555 U.S. 160, 163 (2009).

²⁸ *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008).

²⁹ *Id.* at 300.

³⁰ *Id.*

³¹ *Id.*

“makes the constitutional guarantee of a right to a jury trial quite hollow.”³² The Fourth Circuit overturned the decision, and held that a categorical exclusion of acquitted conduct at sentencing disregarded the policy behind the Federal Sentencing Guidelines.³³

The Supreme Court has clearly supported acquitted conduct sentencing. The Court has considered constitutional challenges and found acquitted conduct sentencing not in violation of the constitution. It has considered the Legislature upon which acquitted conduct is based and has supported the Guidelines as advisory, and allowed the portions of the Act that support acquitted conduct to stand. The court has placed such limitations as are necessary on acquitted conduct sentencing to preserve rights and ensure uniformity in sentencing, therefore arguments that the court must limit or reign in judicial discretion at sentencing are moot. The Supreme Court has fulfilled its obligation to protect the constitution and apply the law, and in doing so has authorized acquitted conduct sentencing.

3. A sentencing court must be permitted to base its sentence upon conduct of which the jury has acquitted the defendant because doing so supports essential public policy.

This Court and the United States Congress have clearly upheld the principle of acquitted conduct sentencing. Yet, even if this Court were to challenge the legislature as it now stands and consider overturning prior case law, the Court should still rule in favor of acquitted conduct sentencing for policy reasons.

Acquitted Conduct sentencing preserves a judge’s ability to impose a just sentence. Plaintiff may argue that a Court should not be allowed to impose sentences that are more extreme than that of the convicted conduct. Plaintiff’s may even argue that such a broadening of judicial

³² United States v. Ibanga, 454 F. Supp 2.d 532 (E.D.Va 2006).

³³ United States v. Ibanga, 271 F. App’x 298, 300 (4th Cir. 2008).

discretion leads directly to increased severity in imposed sentences. However, Courts that have upheld judicial discretion do so to preserve justice, not to limit it. In the earliest acquitted conduct sentencing case, the Court discussed the importance of individualized punishments.³⁴ The Court addressed concerns that a judge's discretion has the potential to make convictions worse for defendants. "On the contrary," explained the Court, a motivating force for allowing such discretion had been "the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."³⁵ To achieve such individualized punishments, investigative techniques bear an important role.³⁶ For example, the Probation workers investigate with an intent to "aid offenders," not to preserve constitutional rights."³⁷ Therefore, although probation reports may not be admissible in a trial court, a sentencing court highly values them.³⁸ The same principles apply to acquitted conduct. Sentencing courts must be permitted to investigate this information, because "careful study of the lives and personalities" of the convicted allows courts to impose just sentences.³⁹

The *Booker* Court cited these same concerns. The Court found that the Guidelines were unconstitutional inasmuch as they required judges to increase sentences based on facts that had not been found by the jury.⁴⁰ In short, the Court rendered the Guidelines advisory in order to insure that the statute did not limit judicial discretion.⁴¹ The Court stated that such limitations and restrictions on a sentencing court had to be eliminated from the statute and that it had "never

³⁴ *Williams v. New York*, 337 U.S. 241, 249 (1949).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *United States v. Booker*, 534 U.S. 220, 232 (2005).

⁴¹ *Id.* at 233.

doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”⁴²

Plaintiff may respond that such discretion may lead to unrestricted injustice in sentencing courts. However, the Supreme Court has also addressed this concern. In *Gall v. United States*, the Court held that sentencing decisions are still limited by a reasonableness standard.⁴³ If a district judge departs from the Guidelines to an unusually lenient or an unusually harsh sentence, he must provide sufficient justifications as to the reasonableness of that departure.⁴⁴

For the foregoing reasons, acquitted conduct sentencing is absolutely essential. A sentencing court is only able to impose accurate sentences and true justice when it can investigate the true characteristics of the defendant and the crime, including conduct of which the jury acquitted him. Any concerns about the dangers of such broad discretion have already been addressed by the Supreme Court. Acquitted conduct sentencing provides the court with the means to be fair and just, and the checks and balances to keep the defendant safe from injustice.

II. Whether the 6th Amendment is Violated when a Federal District Court uses Acquitted Conduct to Impose a Much Higher Sentence than the Guidelines Would Otherwise Recommend

The United States District Court for the District of Columbia did not violate the appellants’ 6th Amendment right when it used acquitted conduct to impose a higher sentence than the Federal Sentencing Guidelines would otherwise recommend for the following three reasons. First, as mentioned above, this Court has continually held that acquitted conduct sentencing does

⁴² *Id.*

⁴³ *Gall v. United States*, 552 U.S. 38, 46 (2007).

⁴⁴ *Id.*

not violated the Sixth Amendment when the conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime.⁴⁵ The case at bar meets both of these requirements. Second, the Apprendi requirement adequately protects defendants Sixth Amendment rights and should not be extended. Finally, this Court's current acquitted sentencing doctrine comports with traditional notions of the Sixth Amendment.

1. Court Precedent Supports Appellants' Sentence

The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....”⁴⁶ In a series of cases beginning in 1949, this Court recognizes that imposing sentences above the Federal Sentencing Guidelines based on acquitted conduct is satisfied the Sixth Amendment so long as there is a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime.

a. Williams v. New York: Acquired Conduct Sentencing Constitutional

This Court first found acquitted conduct sentencing constitutional in *Williams v. New York*. In *Williams*, the Court reasoned that a sentencing judge does not deal with the narrow issue of guilt, but rather with the extent of the punishment after guilt has been determined.⁴⁷ “Highly relevant – if not essential – to [the judge’s] selection of an appropriate sentence is the

⁴⁵ See *United States v. Watts*, 519 U.S. 148, 156-57.

⁴⁶ U.S. Const. amend. VI.

⁴⁷ *Williams v. New York*, 337 U.S. 241 (1949).

possession of the fullest information possible concerning the defendant's life and characteristics".⁴⁸

The decision in *Williams* left judges with broad discretion not only in choosing what sentences convicted criminals would receive, but also the information the judges could use to determine the appropriate sentence. Judges were not required to explain their reasons and such sentences were usually immune from appeal.⁴⁹ In an effort to bring more uniformity to sentences given in United States Courts, Congress passed the Sentencing Reform Act of 1984 (SRA) which provided mandatory sentencing guidelines.⁵⁰

In *United States v. Booker* this Court addressed the question of whether making the sentencing guidelines mandatory violates the Sixth Amendment. The Court held that making the sentencing guidelines mandatory "is incompatible with the United States Supreme Court's constitutional holding that the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing."⁵¹ This Court then struck 18 USCS § 3553(b)(1) from the Sentencing Reform Act making the sentencing guidelines advisory rather than mandatory.⁵² While no longer mandatory, district courts were instructed to continue consulting the sentencing guidelines and taking them into account when sentencing.⁵³

b. Defining the Scope of Acquitted Conduct Sentencing

⁴⁸ *Id.* at 247.

⁴⁹ U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf

⁵⁰ *Id.*

⁵¹ *United States v. Booker*, 543 U.S. 220, at 245 (2005).

⁵² *Id.*

⁵³ *Id.*

While the Court reaffirmed the *Williams* decision in subsequent cases, it also added important limitations to acquitted conduct sentencing. First, in *United States v. Watts* the Court added to the understanding of added a limitation to acquitted conduct sentencing by declaring, “A sentencing court may consider conduct of the defendant’s underlying charges of which defendant is acquitted, if the government establishes that conduct by a preponderance of the evidence.”⁵⁴ Next, in *Apprendi v. New Jersey*, held that the Sixth Amendment requires that “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury and provided beyond a reasonable doubt.”⁵⁵ The statutory maximum as understood by *Apprendi* 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” not the sentencing guideline maximum.⁵⁶

c. Appellant’s Sentence meets the Apprendi-Watts Standard

A jury convicted appellants of cocaine distribution, but acquitted them of a conspiracy charge.⁵⁷ During sentencing, the court found by a preponderance of the evidence that the appellants crimes were part of a common scheme to distribute crack. This meets the Watts standard of allowing a judge to consider acquitted conduct during sentencing. Based “solely on the basis of the facts reflected in the jury verdict” the statutory maximum for each of the defendants is as follows: Appellant Jones – 360 months; Appellant Thurston – 240 months; and Appellant Ball – 480 months.⁵⁸ After considering the acquitted conduct of the appellants, they were eventually sentenced as follows: Appellant Jones – 180 months; Appellant Thurston – 194

⁵⁴ *United States v. Watts*, 519 U.S. 148 (1997).

⁵⁵ *Apprendi v. New Jersey*, 530 U.S. 466, at 490 (2000), emphasis added

⁵⁶ *United States v. Booker*, 543 U.S. 220, at 232 (2005).

⁵⁷ *United States v. Jones*, 744 F.3d 1362, at 1365 (2014).

⁵⁸ *Id.*

months; Appellant Ball 225 months.⁵⁹ The sentence of each of the appellants fell below the maximum statutory sentence in full compliance with the *Apprendi* standard.

This Court has reviewed the issue of acquitted conduct sentencing as it relates to maximum statutory guidelines multiple times. Each time the Court, while adding additional constitutional safeguards, held that acquitted conduct sentencing constitutional. The additional constitutional safeguards require two things. The government must prove the acquitted conduct by a preponderance of the evidence, and the jury must make a determination on any factors which increase the sentence beyond the statutory maximum. Both of these safeguards were met in the case at bar. Accordingly the respondent respectfully requests this court uphold the decision of the lower court and find the appellants sentences valid.

2. *Apprendi* Adequately Protects Defendant's Sixth Amendment Rights

Currently *Apprendi* requires that any fact a judge considers during sentencing, which would increase the sentence beyond the statutory maximum, must be decided by a jury. The statutory maximum is the maximum sentence a judge could impose if they considered only the conduct for which the jury found the defendant guilty. This acquitted conduct sentencing requirement ensures that a person cannot be sentenced to a prison term longer Congress determined appropriate for that given crime. Extending the *Apprendi* protection to guideline maximums goes against the spirit of the *Booker* decision by making the sentencing guidelines virtually mandatory.

a. Statutory Maximum vs. Guideline Maximums

⁵⁹ *Id.*

Statutory minimum and maximums are set by Congress when it creates a criminal law. Once created they can only be amendment and appealed through an act of Congress and they are mandatory except for a few well defined exceptions. Sentencing guidelines, in contrast, are written by the U.S. Sentencing Commission and must be approved by Congress before taking effect. Sentencing guidelines post *Booker* are no longer mandatory but still carry an advisory role.

b. Effect of Broadening Apprendi

Acquitted conduct sentencing post *Apprendi* strikes an appropriate balance between Sixth Amendment protections and allowing judge discretion in sentencing. If *Apprendi* were to be broadened to include sentencing guideline maximums, then a judge could not consider any fact that would increase the sentence above the Sentencing Guidelines maximum unless the jury found that fact to be true. By so doing, the sentencing guidelines would become virtually mandatory again. A judge would not have the discretion to sentence a defendant even to the maximum that Congress has set if the sentencing guidelines fall below that amount.

The result of this extension is a destruction of judge discretion, return of mandatory sentencing that this Court found unconstitutional in *Booker*, all while infringing on Congress' authority to set statutory maximum sentences that they find appropriate. The extension also provides little, if any, additional Constitutional protection. For all of these reasons, the *Apprendi* standard should not be extended.

3. Current Acquitted Conduct Sentencing Doctrine Comports with Traditional Notions of the Sixth Amendment

The core right of the Sixth Amendment is a guarantee to an impartial trial by jury before the state can deprive you of your life or liberty. Justice Ginsburg in *Oregon v. Ice* declared that,

“The Court’s application of *Apprendi*’s rule must honor the ‘long-standing common-law practice’ in which the rule is rooted. The rule’s animating principle is the preservation of the juries historic role as a bulwark between the State and the accused at the trial for an alleged offense.”⁶⁰ The Court in *Blakely* further clarified that, “The Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.”⁶¹ Using these cases as a guide, it becomes clear that acquitted conduct sentencing comports with the traditional understanding of the Sixth Amendment because the jury remains a “bulwark” between the State and the accused and the province of the jury is not infringed.

a. Jury as a Bulwark

The jury stands as a bulwark between the accused and the State in two important ways. First, the State can take no action against the accused without a conviction handed down by the jury. Second, the jury decision ultimately determines the maximum sentence a defendant can receive. Acquitted conduct sentencing changes neither of these functions. The State is still required to acquire a conviction before they can move forward to deprive a defendant of his life or liberty, thus the first bulwark function is preserved.

The jury also still decides the maximum sentence a defendant can receive. Though the statutory maximums for a crime are set by Congress, the jury’s decision of which crime to convict decides which maximum will apply. If the jury convicts a defendant of petty theft, the judge cannot sentence the defendant to one hundred years hard labor. Despite the fact that a

⁶⁰ *Oregon v. Ice*, 555 U.S. 160 at 161 (2009).

⁶¹ *Blakely v. Washington*, 542 U.S. 296, at 308 (2004).

judge can increase a defendant's sentence based on acquitted conduct, she still cannot increase that sentence beyond the statutory maximum prescribed for the convicted crime.

b. Province of the Jury

The common law understood juries as fact finders.⁶² During a trial, the jury decides which facts are true and ultimately whether to convict or acquit a defendant. Once a jury performs this fact finding function, a judge then determines the appropriate sentence based on the jury's verdict.⁶³ Acquitted conduct sentencing maintains the jury's role as fact finder. When a judge relies on acquitted conduct for sentencing she is not taking away from the fact finding function of the jury because the jury never decided that the defendant was innocent of those charges. When a jury convicts or acquits, what they are actually saying is whether the government proved its case beyond a reasonable doubt or not.⁶⁴ "An acquittal is not a finding of fact... [a]cquittal on criminal charges does not prove that the defendant is innocent."⁶⁵

Under acquitted conduct sentencing the jury still determines which facts are true and whether to convict the defendant. If the jury convicts, they give the judge the authority to sentence a criminal for any period of time between the statutorily established minimum and maximum for that crime. When the judge uses acquitted conduct to influence her decision on the length of the sentence, she is doing no more than using the discretion given to her by the jury's decision to convict. For these above mentioned reasons, acquitted conduct sentencing comports with traditional notions of the Sixth Amendment.

⁶² The Robbins Collection, The Common Law and Civil Law Traditions, University of California at Berkeley, *available at* <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.

⁶³ *Id.*

⁶⁴ Watt, 519 U.S. 148.

⁶⁵ *Id.*

CONCLUSION

This Court has consistently held acquitted conduct sentencing does not violate a defendant's constitutional rights so long as two conditions are met. The government proved the acquitted conduct relied on by a preponderance of the evidence, and any fact used by the sentencing judge that would increase the statutory maximum allowed must be decided by a jury. Together these restrictions on acquitted conduct sentencing protect the Constitutional rights of the accused while still providing judges the discretion needed to make sentencing decisions based on the individual circumstances before them.

In the case at bar, the government proved the acquitted conduct by a preponderance of the evidence, and each appellant's ultimate sentence fell below the statutory maximum allowed for their convictions. According to Court precedent, meeting these requirements means the appellants' constitutional rights were not violated. Therefore, the respondents respectfully request this Court uphold the decision of the lower courts and find the appellants' sentences valid.