
**In the
SUPREME COURT OF THE UNITED STATES**

No. 13-10026

Joseph Jones, Desmond Thurston, and Antuwan Ball,

Petitioners,

v.

United States,

Respondent.

On Appeal from the Appellate Court of the District of Columbia

BRIEF OF RESPONDENT

March 8, 2015

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Team #

I. Questions Presented

- a. Are a defendant's constitutional rights violated when a sentencing court bases its sentence upon conduct of which the jury had acquitted him?
- b. Does it violate the Sixth Amendment for a federal district court to calculate the applicable U.S. Sentencing Guidelines range, and to impose a much higher sentence than the Guidelines would otherwise recommend, based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him?

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II. Constitutional Amendment at Issue

United States Constitution, Sixth Amendment

In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

III. Statement of the Case

In 2005, a grand jury charged the petitioners and fifteen coconspirators with narcotics and racketeering offenses arising from their alleged membership in the Congress Park Crew gang, an organization known to run crack cocaine in the Congress Park neighborhood of Southeast Washington, D.C. In 2007, the petitioners proceeded to their trial on charges of crack distribution and participation in a crack distribution conspiracy.

During trial, the prosecution presented damaging evidence against the petitioners, including recordings of petitioners selling crack cocaine and testimony from several witnesses, including members of the alleged conspiracy and individuals who had purchased crack from the petitioners. At the conclusion of their trial, the jury acquitted them on the crack distribution conspiracy charge but convicted them of the crack distribution charge.

In accordance with 21 U.S.C. § 841(b)(1), based on Jones's and Thurston's criminal records, their maximum sentences for possession with intent to distribute crack was thirty years and twenty years imprisonment, respectively. Due to the higher amount of narcotics involved in Ball's conviction, 21 U.S.C. § 841(b)(1) required a maximum sentence of forty years imprisonment.

In May 2008, the district court conducted Jones's sentencing hearing. By a preponderance of the evidence, the district court found that Jones's crimes were indeed part of a common scheme to distribute crack in Congress Park with foreseeable sales in excess of 500 grams of crack cocaine by his coconspirators. Based on these findings, the district court determined that the U.S. Sentencing Guidelines recommended a sentence range of 324 to 405 months imprisonment. Nevertheless, due to concerns about the severity of punishments for crack offenses and considerations related to Jones's background and criminal history, the

district court imposed a reduced sentence of 180 months (nearly half of the minimum sentence recommended by the U.S. Sentencing Guidelines).

Believing that Thurston's and Ball's convictions may be affected by another co-defendant's post-trial motion, the district court decided it would be prudent to delay their sentencing hearings. The post-trial motion was resolved in July 2010 and, shortly after, Thurston's and Ball's sentencing hearings took place.

At both Thurston's and Ball's sentencing hearings, the district court found that their crimes involved a conspiracy to distribute crack in Congress Park with foreseeable sales of, minimally, 1500 grams of crack cocaine by their coconspirators. Based largely on these findings, the district court calculated Thurston's Guidelines range as 262 to 327 months and Ball's Guidelines range as 292 to 365 months. Nevertheless, the district court imposed reduced sentences for each: Thurston to 182 months (nearly 40% less than the minimum recommended by the U.S. Sentencing Guidelines) and Ball to 210 months (nearly 30% less than the minimum recommended by the U.S. Sentencing Guidelines). The district court justified the downward variances due to concerns about the overall severity of punishments for crack offenses and to account for any prejudice sustained due to the delay in their sentencing.

IV. Summary of the Argument

A. Sentencing Courts do not Violate the Constitution when they Consider Acquitted Conduct to Determine an Appropriate Sentence.

Sentencing is the stage of the judicial process in which a judge determines a just sentence for crimes that have been committed. In making sentencing determinations, judges must possess, to the fullest extent possible, information concerning the defendant's life and characteristics. *United States v. Watts*, 519 U.S. 148, 152 (U.S. 1997). Acquitted conduct, subject to a preponderance standard, is an appropriate consideration when determining a just sentence. *Rita v. United States*, 551 U.S. 338, 352 (2007). Judges are in the best position to determine whether or not acquitted conduct is relevant to sentencing. The jury is required to determine, beyond a reasonable doubt, whether or not a crime has been committed. After that burden has been met, the judge must consider all the relevant factors when determining the punishment for the crime. If a judge thinks that a preponderance of the evidence suggests a crime should increase the sentence within the statutory range, the judge should consider that conduct. Denying a judge that right would be adverse to the principle of justice and would encourage judicial dishonesty. It is wise and just to allow judges to consider acquitted conduct during sentencing.

B. Enhanced Sentences Do Not Violate the Sixth Amendment, Even If Federal Courts Considered Acquitted Conduct.

The Sixth Amendment provides: "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury." U.S. Const. amend. VI. Although the Sixth Amendment does not specifically address sentencing, the Supreme Court has held that, other than prior convictions, any fact that increases the maximum authorized sentence, must be "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530

U.S. 466, 489 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). On the other hand, minimum authorized sentences may rely on judicial fact-finding, as long as the minimum range does not exceed the maximum authorized sentence based on jury fact-finding. *United States v. Booker*, 543 U.S. 220 (2005). Additionally, this Court has ruled that a sentence based on acquitted conduct will not violate the Sixth Amendment as long as the conduct is proven by a preponderance of the evidence standard and the sentence does not exceed the maximum authorized sentence for the crime. *United States v. Watts*, 519 U.S. 148 (1997). Based on this doctrine, this Court should hold that sentences imposed based on judicial fact-finding, even those involving acquitted conduct, do not violate the Sixth Amendment so long as the imposed sentence does not exceed the statutory maximum sentence.

V. Argument

A. Sentencing Courts do not Violate the Constitution when they Consider Acquitted Conduct to Determine an Appropriate Sentence.

1. Acquitted Conduct Should be Considered at Sentencing When the Conduct is Established by a Preponderance of the Evidence.

The first issue is whether or not the petitioner's constitutional rights were violated when the district court considered conduct of which the petitioners had been acquitted when determining the sentence for cocaine possession. A litany of decisions have established that sentencing courts may consider acquitted conduct in sentencing decisions so long as the conduct has been established by a preponderance of the evidence. This common practice not only reinforces the role of judicial discretion, it also maintains the distinct roles of judge and jury.

Petitioners Joseph Jones, Desmond Thurston, and Antuwan Ball were all convicted of distributing crack cocaine in Washington, D.C. However, petitioners were acquitted of conspiracy to distribute drugs with fifteen alleged co-conspirators. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The standard of proof for criminal charges is "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 362 (U.S. 1970). The jury found that the United States Government met this standard for possession of crack cocaine, but not for the charge of conspiracy. It is important to note that although the government did not meet its burden for the conspiracy charge, the acquittal is not, in any way whatsoever, a factual finding that the defendants are innocent. This Court has consistently emphasized this point, noting that "an acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government fails to prove an essential element of the offense beyond a reasonable doubt." *United States v. Watts*, 519 U.S. 148, 155 (U.S. 1997). The

reality is that the defendants are guilty. They were convicted of cocaine possession. We are not dealing with individuals that have been acquitted of all charges. If that were the case, there would be no sentencing. Here, the defendants are guilty and the statutory range of punishment spans 40 years. The sentencing judge needs to possess all the available facts in order to determine a just sentence within such a range. To deny a judge the ability to consider acquitted conduct would severely impede his or her ability to perform his or her duties.

In *Watts*, this Court recognized that “[h]ighly relevant--if not essential--to the judge’s selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Id.* at 152. Judges are not required to prove all elements of a defendant’s life and characteristics beyond a reasonable doubt, and yet the Court makes it clear that these are factors which a sentencing judge should consider. Furthermore, this Court has considered uncharged and acquitted conduct to be a part of the information about the defendant the judge should consider, writing, “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.” *Id.* at 149. In the present case, the United States outlined extensive evidence of a criminal conspiracy. The district court relied only on testimony that was corroborated by at least one other witness. *United States v. Jones*, 744 F.3d 1362, 1367 (D.C. Cir. 2014). The defense raised credibility concerns with regard to the witnesses. During the trial, these concerns were apparently enough to cause reasonable doubt in the minds of the members of the jury. The district court, however, found by a preponderance of the evidence that the defendants were part of the conspiracy. This finding should only be reversed if there is an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 72 (U.S. 2007). The corroborated evidence certainly provides a

reasonable basis for the district court's finding. Substantively, there is no basis for overturning the decision of the district court. Petitioners instead argue that the established practice of considering acquitted conduct is unconstitutional. In *Patterson v. New York*, 432 U.S. 197, 201 (1977) this court held that the State has the power "to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." This is a right reserved by the legislature. The Court embraced the use of a preponderance of the evidence standard, adding that "a State does not have to prove beyond a reasonable doubt every fact . . . affecting the degree of culpability or the severity of the punishment." *Id.* at 207. The legislature has the discretion to determine the burden of persuasion when determining punishments. The judiciary is charged with interpreting these standards on a case by case basis. Judges are trusted with the role of considering the particularities of the cases and reaching appropriate conclusions. That is, in fact, the exact type of determination that judges are best at making.

2. The Use of Acquitted Conduct in Sentencing Gives Judges Appropriate Discretion and Reinforces the Role of the Judge and the Jury.

Petitioners assert that the consideration of the acquitted conduct, regardless of the standard use or weight given to the conduct, is a violation of their constitutional rights. Addressing their arguments in turn, it is clear that none of the petitioners' constitutional rights were violated when acquitted conduct was considered at sentencing. Petitioners claim that considering acquitted conduct violates their due process rights by imposing punishment for a crime of which they were found not guilty by a jury. This argument fails in several respects. First, acquitted conduct is simply a factor among many and is not dispositive. As outlined in *Rita v. United States*, 551 U.S. 338 (2007) a sentencing judge is required to consider a whole host of factors when determining a sentence:

18 U.S.C.S. § 3553(a) tells a sentencing judge to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) just punishment (retribution), (b) deterrence, (c) incapacitation, and (d) rehabilitation; (3) the sentences legally available; (4) the U.S. Sentencing Guidelines Manual; (5) U.S. Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. The provision also tells the sentencing judge to impose a sentence sufficient, but not greater than necessary, to comply with the basic aims of the sentencing as set out in the statute.

Acquitted conduct is only one consideration among many and it is not dispositive when applied. In making a sentencing decision, the judge examines many factors that are not determined by a jury. This is a balancing test performed by the judge. Several of these factors may be in conflict with one another and if one is particularly determinative, other factors may become less relevant. Certainly if there is extremely weak evidence that resulted in an acquittal, that conduct would not be a factor up for consideration. However, in determining a sentence, if a preponderance of the evidence suggests that an accused has committed a crime, that evidence should factor into the judge's decision to determine a just punishment. The opinion in *Rita* explicitly states that "the U.S. Supreme Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 352. Petitioners may argue that this process gives the judge undue discretion. However, this is exactly the type of determination that our judicial system firmly places in the hands of judges. Judges are continuously called upon to make this type of balancing determination throughout the trial phase as well, as when weighing the prejudicial nature of evidence. A judge is uniquely positioned to make sentencing determinations. Judges have a plethora of experience and legal knowledge that the jury lacks. Judges have seen all of the evidence, much of which the jury may not have seen. It is worth noting that juries make incorrect judgments. They often make

decisions based on their conception of fairness, not on the weight of the evidence. Sometimes guilty men go free. Sometimes juries acquit the accused of greater charges to show mercy, even though that is distinctly not their job. Allowing the judge to simply consider acquitted conduct is a necessity in this conduct. It is another safeguard to assure uniformity of punishment. Our judicial system is predicated on trusting judges to be impartial in their judgments. Weighing factors in a sentencing test, including acquitted conduct is exactly the type of determination that is supposed to be decided by judges.

3. Allowing Judges to Consider Acquitted Conduct at Sentencing Encourages Just Sentencing and Judicial Transparency.

Petitioners may also argue that this process is not transparent enough for the imposition of sentences. The Court in *Rita* noted that “18 U.S.C.S. § 3553(c) requires a sentencing judge, at the time of sentencing, to state in open court the reasons for its imposition of the particular sentence.” *Id.* at 356. This assures that the judge’s reasoning and basis for imposing the sentence are known to the defendants and is able to be overruled if the judge abuses his or her discretion. This practice encourages transparency and discourages dishonesty- an important distinction that will be discussed further in a later section. The Court in *Rita* further explained that “a sentencing judge should set forth enough to satisfy an appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decision-making authority.” *Id.* If the acquitted conduct was so unsupported as to make an increased sentence unreasonable, the finding could be overruled upon review. If however, the evidence suggests that the acquitted conduct most likely occurred, a modest increase in sentence should be at the disposal of the judge. Judges must continue to have the authority to use this discretion to promote justice.

This Court opined in *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (U.S. 2013) that “broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.” The court continued, “the exercise of sentencing discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts.” *Id.* The United States Supreme Court has a long-standing practice of encouraging appropriate judicial discretion. In this case, the Trial Court had a plethora of evidence in front of it to suggest that there was a conspiracy to distribute crack cocaine. In *Alleyne* this Court noted that “[j]udges may exercise sentencing discretion through an inquiry broad in scope, largely unlimited either as to the kind of information they may consider, or the source from which it may come.” *Id.* at 2163. The Court made the determination, based on a variety of sources, that the evidence was strong enough to conclude that the defendants probably engaged in said conspiracy and the judge sentenced them accordingly. Certainly that is not judicial overreach, but rather a requisite exercise of judicial discretion. Indeed, some courts have even found that categorically excluding acquitted conduct from consideration is a significant procedural error. *United States v. Ibanga*, 271 Fed. Appx. 298, 301 (2008).

In *United States v. Booker*, 543 U.S. 220, 233 (U.S. 2005) this Court held that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” Here, the trial Judge calculated the applicable range for the conduct of which the petitioners were convicted. The Judge exercised his discretion and selected a sentence within that range. These actions are plainly prescribed by *Booker*. It is not the role of the jury to determine which facts are relevant for sentencing- that is the exclusive role of the judge. Judges are given factors to determine a just sentence, but as long as the sentence is reasonable, the

particular facts for determining the sentence are to be decided not by a jury without legal expertise, but by a judge.

It is not in doubt that prior convictions are relevant in sentencing determinations. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (U.S. 2000) Based on the criminal records of the petitioners, the maximum sentences for the petitioners ranged from twenty to forty years. Even after considering the conspiracy of the petitioners, the sentence received for each petitioner was below the maximum sentence they could have received based on the current conviction and the prior conviction alone. While this is not determinative, it does implicate an important practical matter. If acquitted conduct is categorically removed from official consideration, it could create a new problem- encouraging judicial dishonesty. If, for example, a judge determines that acquitted conduct necessitates a somewhat increased sentence, the sentencing judge could simply increase the sentence and attribute the increase to one of the many factors that were listed earlier. Having already heard the evidence of all the conduct of the defendants, it is unrealistic to expect judges to forget the evidence that was presented. Judges do not receive limiting instructions. If judges believe that a preponderance of the evidence suggests that the charged conduct was actually committed, the sentence will likely be increased and the judge could simply attribute the increase to one of many “allowable” factors. Judges cannot simply forget evidence with which they are presented. There are certainly limits to judicial discretion, but if a judge sentences within the statutory range for the crime, it is illogical to place artificial limits on how they can sentence within the range.

B. A Federal District Court May Enhance Sentences By Considering Acquitted Conduct Without Violating the Sixth Amendment.

1. By Making the Federal Sentencing Guidelines Advisory, the Sixth Amendment is not Implicated.

The Sixth Amendment guarantees criminal defendants the rights to a public trial without unnecessary delay, a lawyer, an impartial jury, and to know their accusers. Although the Sixth Amendment does not specifically address sentencing, in 2000, the Supreme Court held that, other than prior convictions, any fact used by a sentencing court to increase a sentence beyond what otherwise would be a statutory maximum must be alleged in the indictment and proved beyond a reasonable doubt to the jury. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In 2005, this Court reaffirmed the *Apprendi* rule and held that the Sixth Amendment is violated when a sentencing judge imposes an enhanced sentence under the United States Sentencing Guidelines (“Guidelines”) based on a determination of a fact, other than a prior conviction, which was not found by a jury or admitted by the defendant. *United States v. Booker*, 543 U.S. 220, 245 (2005). Finding that the Sixth Amendment jury requirement was incompatible with the Federal Sentencing Act, this Court held that severance of the provisions which made the Guidelines mandatory, 18 U.S.C. § 3553(b) (Supp. 2004), and adopting a reasonableness standard for appellate review for sentencing, 18 U.S.C. § 3742(e) (Supp.2004), was essential. *United States v. Booker*, 543 U.S. 220 (2005). This Court correctly reasoned that, by severing these provisions within the Federal Sentencing Act, the Sixth Amendment would *not* be implicated when a sentencing judge exercises broad discretion in imposing a sentence within a statutory range. *United States v. Booker*, 543 U.S. 220, 233 (2005) (emphasis added).

Thus, so long as a sentence does not exceed a statutory maximum, there is no Sixth Amendment concern with the advisory guidelines scheme.

2. Sentencing Courts Have Broad Discretion and Sentences Within Guidelines Range May Be Presumed Reasonable.

According to section 3661 of Title 18, sentencing courts have broad discretion to consider various kinds of information. “No 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. Furthermore, the Federal Sentencing Guidelines have made it clear that this long standing doctrine still remains lawful so long as the sentences imposed are reasonable. “[T]he court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” USSG § 1B1.4.

In light of these principles, it is a well-established rule that sentencing courts have broad discretion when determining the sentences they impose on defendants. *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (“Nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into considering various factors relating both to offense and offender- in imposing a judgment within the range prescribed by statute.”)

The remedial majority’s decision in *Booker* makes “reasonableness” the new standard of appellate review in all federal sentencing cases. *United States v. Booker*, 543 U.S. 220 (2005). Additionally, this Court has clarified that appellate courts may apply a non-binding presumption of reasonableness to sentences falling within the now advisory Sentencing Guidelines range *without* implicating the Sixth Amendment. *Rita v. United States*, 551 U.S.

338 (2007) (emphasis added). This Court justified its holding by explaining that the Sentencing Guidelines represent years of study and analysis of sentencing decisions by the Sentencing Commission and that the Guidelines as enacted “reflect a rough approximation of sentences that might achieve §3553(a)’s objectives.” *Rita v. United States*, 551 U.S. 338, 350 (2007). In *Rita*, this Court recognized that the law does not require a judge to write extensively on how he arrived at a sentence but only that he “articulate[s] enough to satisfy the appellate court he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Rita v. United States*, 551 U.S. 338, 339-40 (2007).

This broad discretion of a sentencing court includes consideration of conduct for which a defendant was acquitted of. *United States v. Watts*, 519 U.S. 148, 156-57 (1997). This Court reiterated this principle when it held that “highly relevant-if not essential to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics” where a defendant challenged the sentencing court’s reliance on past criminal history for which he had not been convicted. *Williams v. New York*, 337 U.S. 241, 247 (1949). In fact, consideration of acquitted conduct is so valuable that a Fourth Circuit Court of Appeals held that a district court erred when it refused to consider acquitted conduct in determining a sentence. *United States v. Ibanga*, 271 Fed. Appx. 298 (4th Cir. Va. 2008).

In light of the advisory nature of the Sentencing Guidelines, every circuit court post-*Booker* has held that acquitted conduct may be used in calculating a guidelines sentence as long as it was proved by a preponderance of the evidence standard. *See, e.g., United States v. Gobbi*, 471 F.3d 302, 313–14 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 527 (2d

Cir. 2005) (Sotomayor, J.); *United States v. Hayward*, 2006 U.S. App. LEXIS 10317 (3d. Cir. 2006); *United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006); *United States v. Young*, 553 F.3d 1035, 1051 (6th Cir. 2009); *United States v. Waltower*, 643 F.3d 572, 578-79, (7th Cir. 2011); *United States v. Canania*, 532 F.3d 764, 777-78 (8th Cir. 2008); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir.2005); *United States v. Faust*, 456 F.3d 1342, 1347–48 (11th Cir.2006); *United States v. Settles*, 530 F.3d 920, 923–24 (D.C.Cir.2008).

A sentencing court’s broad discretion coupled with a presumption for reasonableness means a sentencing court will be found to be compliant with the Sixth Amendment’s requirements so long as the imposed sentence does not exceed a statutory maximum sentence. Therefore, while exercising their broad discretion, there will be no Sixth Amendment concerns when sentencing courts consider acquitted conduct information when imposing enhanced sentences.

3. Enhanced Sentences, Even When Considering Acquitted Conduct, Are Constitutional If Within Prescribed Statutory Maximum.

In keeping with these long-standing principles, an enhanced sentence imposed under the broad discretion of a sentencing court should be upheld as long as that sentence imposed does not go beyond what otherwise would be a statutory maximum for the convicted offense. *United States v. Settles*, 530 F.3d 920, (2008). Conversely, an enhanced sentence imposed under the broad discretion of a sentencing court should be overruled if the sentence imposed goes beyond what otherwise would be a statutory maximum for the convicted offense. *Apprendi v. Jersey*, 530 U.S. 466 (2000).

In *United States v. Settles*, the District of Columbia Circuit Court held a sentence does not violate the Sixth Amendment by using acquitted conduct if that conduct was proved by preponderance of the evidence and the defendant's sentence did not exceed the statutory maximum. *United States v. Settles*, 530 F.3d 920, 923 (2008). In *Settles*, the defendant was convicted of one count of unlawful possession of a firearm and ammunition but acquitted him of possession with intent to distribute cocaine and of using or carrying a firearm during a drug-trafficking offense. *Settles*, 530 F.3d at 922. Under section 924(a)(2) of Title 18, the defendant's conviction carried a maximum statutory sentence of ten years of imprisonment. *Id.* However, under the now advisory Guidelines, the defendant's sentencing range for his conviction was thirty-seven to forty-six months of imprisonment. *Id.* The probation office's presentence investigation report recommended an adjusted Guidelines range of fifty-seven to seventy-one months of imprisonment, based on conduct of which the jury had acquitted the defendant. *Id.* After the defendant's sentencing hearing, the court held that the Government had proved by preponderance of the evidence that the defendant had engaged in the conduct for which he was acquitted and sentenced him to fifty-seven months of imprisonment. *Id.* On appeal, the defendant argued that the upward adjustment to his sentence violated his Sixth Amendment rights because the adjustment was based on conduct for which he was acquitted. *Settles*, 530 F.3d at 923. The court rejected the defendant's argument finding that using acquitted conduct to adjust the Guidelines range does not pose a problem because they are only advisory. *Id.* Further, the court found that using acquitted conduct did not violate his Sixth Amendment rights because the conduct in question was proved by preponderance of the evidence and his sentence did not exceed the statutory maximum of ten years. *Id.*

In *Apprendi v. Jersey*, this Court held that, other than prior convictions, any fact that increases a sentence beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt. *Apprendi v. Jersey*, 530 U.S. 466 (2000). In 1994, the defendant was promptly arrested after firing several bullets into the home of an African-American family that had recently moved to his neighborhood. *Id.* at 469. While being questioned, the defendant admitting shooting the victims' home because they were black and he did "not want them in the neighborhood." *Id.* The defendant entered into a plea agreement and pled guilty to several counts of possession of firearms for an unlawful purpose and unlawful possession of an antipersonnel bomb. *Id.* at 469-70. Under state law, those offenses carried penalties ranging from three to ten years. *Id.* at 470. However, state law allowed that, if the sentencing court found that the offenses were committed with a biased purpose, higher enhanced sentences could be imposed. *Id.* at 470-71. After the defendant's sentencing hearings, the court found that the crime was in fact motivated by racial bias and held that the enhanced sentences may be applied and sentenced him to twelve years of imprisonment. *Id.* at 471. In review of the defendant's sentence, this Court held that it was unconstitutional for laws to remove from the jury the assessment of facts that increased prescribed ranges to which defendants could be exposed to. *Id.* at 490. Further, other than prior convictions, any facts that increased the penalty for a crime beyond prescribed statutory maximum sentences must be submitted to a jury and proved beyond a reasonable doubt. *Id.*

In *Settles*, the Court held that an enhanced sentence will not violate the Sixth Amendment, even when acquitted conduct is considered, so long as the sentence does not exceed the statutory maximum period. However, if an enhanced sentence exceeds the statutory maximum allowed period, like it did in *Apprendi*, that sentence will be found to

violate a defendant's Sixth Amendment rights. Clearly, for an enhanced sentence to be upheld as constitutional, federal district courts may exercise their broad discretion at a sentencing hearings, provided the imposed sentence falls under the maximum period allowed by statute.

Like in *Settles*, the grand jury charged the Petitioners with two charges. However, unable to convince a jury beyond reasonable doubt for both charges, both juries acquitted the defendants in one charge while convicting them of another. *Apprendi* is distinguishable from the present case in that the defendant was not found guilty by a jury. Instead, he entered a plea agreement after being charged with his offenses. Nevertheless, all the cases (*Settles*, *Apprendi* and the case at bar) are similar in that there were no disputes over the statutory maximum sentences corresponding to the convicted charges. In *Settles*, the defendant's statutory maximum was ten years; in *Apprendi*, the statutory maximum was also ten years; in the case at bar, the Petitioners' statutory maximums varied (twenty years for Thurston, thirty years for Jones and forty years for Ball).

The dispute in all these cases arose from the fact that all the defendants' sentences were ultimately enhanced because of information considered by the sentencing court. In *Settles*, the court held that at a sentencing hearing, the facts considered by courts need only meet a lower standard of proof, that is by a preponderance of the evidence. And, finding that the acquitted conduct was proved by this lower standard, the court held it was appropriate to consider the conduct when determining the defendant's sentence. In *Apprendi*, the court did not enhance the defendant's sentence because it considered acquitted conduct. Rather, the court enhanced the defendant's sentence when the sentencing court found that the offenses were committed with a biased purpose. Ultimately, the court in *Apprendi* conceded that

sentencing courts have discretion in considering factors related to the offense and offender. However, the court held that, other than prior convictions, an enhanced sentence would be overruled if it exceeded the prescribed statutory maximum. In other words, in *Apprendi*, this Court was not so much concerned about *what* type of information was considered to enhance a sentence, it was only concerned if the information considered enhanced the sentence beyond what was statutorily allowed for the convicted offense. Like in *Apprendi*, the Petitioners' sentences were enhanced. However, unlike *Apprendi*, those sentences were not enhanced beyond the statutory maximum sentences. Therefore, it would follow that the Petitioners' enhanced sentences should be upheld.

Based on the foregoing reasons, this Court should hold that the enhanced sentences imposed on the Petitioners did not violate the Sixth Amendment.

4. Section 3553(a) Requirements and the Purpose of Sentencing Demand Deference to a Sentencing Judge's Judgments.

Section 3553(a)(1) requires a sentencing court to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available; (3) the kinds of sentence and the sentencing range; (4) any pertinent policy statement issued by the Sentencing Commission; (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (6) the need to provide restitution to any victims of the offense. Section 3553(a)(2)(A) requires judges to consider 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.” *Gall v. United States*, 552 U.S. 38, 53 (2007).

In light of these requirements, one can easily conclude that the fundamental purposes of sentencing are to punish criminals and prevent crimes. Michael Tonry, *Purposes and*

Functions of Sentencing, 34 Crim & Just. 1, 10 (2006). Further, to be compliant with § 3553's requirements, the fundamental purposes of sentencing require sentencing judges to take into consideration information that is not always available to juries. According to section 991(b)(1)(B) of Title 28, sentencing judges should avoid "unwarranted sentencing disparities among defendants while maintaining sufficient flexibility to permit individualized sentences." In *Kimbrough*, this Court acknowledged that judges are at a better position to do this because they have "greater familiarity with the individual case and the individual defendant." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). As a result, the sentencing judge is in a "superior position to find facts and judge their import under § 3553(a) in each particular case." *Id.*

Without a doubt, sentencing judges play an integral part of maintaining the integrity of the fundamental purposes of sentencing while imposing fair and consistent sentences among criminal defendants. This Court has already determined that sentencing judges are better positioned to make sentencing decisions. Consequently, as a matter of public policy, this Court should rule that federal district courts do not violate the Sixth Amendment by imposing higher sentences than they would normally recommend, based upon their findings that defendants engaged in acquitted conduct.

VI. Conclusion

Based on the arguments presented, Respondent respectfully requests this Court hold that the sentences imposed based on judicial fact-finding, even those involving acquitted conduct, do not violate the Sixth Amendment so long as the imposed sentence does not exceed the statutory maximum sentence.