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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 13-10026

Joseph JONES, Desmond Thurston,
and Antuwan Ball,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF FOR THE RESPONDENT

Respondent,
Team # 19

QUESTIONS PRESENTED

(1) Whether a defendant's constitutional rights are violated when a sentencing court bases its sentence upon conduct of which the jury had acquitted him.

(2) Whether it violates the Sixth Amendment for a federal district court to calculate the applicable U.S. Sentencing Guidelines range, and to impose a much higher sentence that 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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OPINION BELOW

The opinion of the three-judge appellate panel of the United States Court of Appeals for the D.C. Circuit is officially published and contained at United States v. Jones, 744 F.3d 1363 (D.C. Cir. 2014).

JURISDICTIONAL STATEMENT

A formal Statement of Jurisdiction has been waived by the Rules of the 2015 Herbert Wechsler National Criminal Law Moot Court Competition.

CONSTITUTIONAL PROVISIONS & STATUTES

The following constitutional provisions relevant to the determination of this case are set forth in the Appendix: United States Constitution Article III, section 2, clause 3; Fifth, Sixth, and Eighth Amendments.

STATEMENT OF FACTS

In November of 2007, a jury convicted Joseph Jones, Desmond Thurston, and Antuwan Ball (collectively Petitioners) of distributing crack cocaine. United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The same jury acquitted Petitioners of conspiracy to distribute drugs in the Congress Park neighborhood, Southeastern Washington, D.C. Id. Based on the distribution convictions, Jones's maximum sentence was thirty years imprisonment and Thurston's maximum sentence was twenty years imprisonment. Id. Ball's conviction carried a minimum of five years and maximum of forty years imprisonment, due to a larger quantity of crack cocaine involved. Id. From the distribution conviction alone, the United States Sentencing Guidelines Manual carried a term of imprisonment between twenty-seven and seventy-one months. Id. at 1368-69. At sentencing, the district judge found that each of the Petitioners were part of a collective agreement to distribute crack cocaine in Congress Park for almost thirteen

years. Id. at 1365-66. The judge further found that each Petitioner could "foresee sales of over 500 grams of crack by his coconspirators." Id. at 1365.

In May of 2008, Petitioner Jones was sentenced to 180 months imprisonment. Id. at 1366. This was based partly on the conspiracy finding, which resulted in a Sentencing Guidelines calculation of 324 to 405 months' imprisonment. Id. 1365-66. The district judge varied below the Guideline's range due to concerns about crack offenses sentencing, Jones's background and prior criminal convictions. Id. at 1366. In October of 2010, Petitioner Ball was sentenced to 225 months. Id. In March of 2011, Petitioner Thurston was sentenced to 194 months. Id. Again, both sentences factored in the judge found scheme to distribute crack cocaine in Congress Park. Id. With the additional finding, Petitioner Ball's Guideline range was between 292 and 365 months and Petitioner Thurston's Guideline range was between 262 to 327 months. Id. The district court explained the reduction below the Guideline's recommendation because of reasons similar to Jones's sentencing, as well as to remedy the delay in sentencing. Id.

Following the sentencing, Petitioners appealed to the United States Court of Appeals for the District of Columbia. Id. at 1365. Petitioners argued the sentences were procedurally and substantively unreasonable, as well as unconstitutional on Sixth Amendment ground. Id. The D.C. Circuit affirmed the district court sentencing. Id.

SUMMARY OF ARGUMENT

A sentencing judge's use of acquitted conduct in determining the length of a criminal defendant's sentence does not violate the Constitution. The use of acquitted conduct does not violate the Sixth Amendment's right to a trial by an impartial jury because judges enjoy broad discretion to find facts at sentencing, so long as those facts are found by a preponderance of the evidence. This allows the judge to consider the manner in which the crime was committed,

which may include acquitted conduct. There is no violation of the Fifth Amendment's double jeopardy clause because a sentence is based not on specific acts that did or did not happened as determined by the jury, but by the manner in which the crime was committed. In other words, the jury finds whether a crime was committed and if certain facts meet those elements. The judge at sentencing finds facts to determine the manner in which the crime was committed. There is no violation of due process because the use of acquitted conduct to not rise to the level of fundamental unfairness. Lastly, the Eighth Amendment's prohibition of cruel and unusual punishment is not violated because the sentence falls within the statutory maximum.

The Sixth Amendment protects a criminally accused individual from an overzealous government in a criminal trial by placing a jury of peers between an accused and conviction. However, this protection is all but completely lost in a district court when sentencing. So long as a jury convicts, the only upward limit to the sentence is from the applicable United States Code. The United States Sentencing Guidelines Manual offers a streamlined guide for determining a convictions monthly range, however it is but one factor a court can consider at sentencing, and in no way binding on the district court. In making a sentencing determination, the district court is thereby free to even consider conduct that underlies a conviction, but also underlies an acquitted charge as well. This is allowable so long as the district judge finds the conduct to a preponderance of the evidence. In doing so, the district court may be forced to go beyond the Sentencing Guidelines range for the convicted offense. While sentenced individuals may see an ethical or procedural flaw, the inclusion of found, relevant acquitted conduct in sentencing provides the most complete view of the offender and the offense. Even when varying well above the Sentencing Guidelines range, such an inclusion does not violate the Sixth Amendment protections of a criminal defendant.

ARGUMENT

I. A DEFENDANT'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED WHEN A SENTENCING COURT BASES THE SENTENCE UPON CONDUCT OF WHICH THE JURY HAD ACQUITTED HIM.

A. Introduction.

Prior to the Sentencing Reform Act, judges enjoyed broad discretion in finding facts in support of the sentence imposed on criminal defendants, including conduct for which the jury acquitted the defendant. United States v. Magallanez, 408 F.3d 672, 684 (10th Cir. 2005), cert. denied, 546 U.S. 955 (2005). The United States Sentencing Guidelines codified this traditional discretion stating that the sentencing judge shall have no limitations placed upon the information the judge uses at sentencing "concerning the background, character, and conduct" of the criminal defendant. 18 U.S.C. § 3661. Significantly, this provides the judge the traditional broad discretion in the use of acquitted conduct at sentencing. See Magallanez, 408 F.3d at 684.

Before this Court is the issue of whether this traditional broad discretion should be secure against the rights guaranteed in the Constitution. Specifically at issue are the Sixth Amendment right to a trial by jury, the Fifth Amendment's double jeopardy and due process rights, and the Eighth Amendment's bar on cruel and unusual punishment. The standard of review on questions of law is *de novo*. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995).

B. The Sixth Amendment's right to a trial by an impartial jury does not bar a judge from using conduct for which the defendant was acquitted when imposing a sentence for the convicted crime.

The Sixth Amendment does not prohibit the use of acquitted conduct at sentencing by the district judge. In all criminal prosecutions, the accused shall have the right to a trial by an impartial jury. U.S. Const. amend. VI. The right to a jury determination of a fact at sentencing is implicated when a judge relies on facts reflected in the verdict when determining the defendant's

sentence. Blakely v. Washington, 542 U.S. 296, 301 (2004). It is nevertheless well settled that every criminal defendant is protected against a conviction but for the jury finding every fact of the charged crime beyond a reasonable doubt. United States v. Booker, 543 U.S. 220, 230 (2005). Every fact that would increase the defendant's sentence beyond that which the criminal statute authorizes must be submitted to a jury for determination beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000). The characterization of a fact as an element of the crime or a sentencing factor, however, is not determinative of whether the judge or jury decides the fact. Booker, 543 U.S. at 233.

Sentencing courts have broad discretion when determining facts for the imposition of a sentence within the statutory range. Id. Customarily, district judges consider "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue" when imposing a sentence. Gall v. United States, 552 U.S. 38, 52 (2007) (quoting Koon v. United States, 518 U.S. 81, 98 (1996)). This Court held in Booker that judges maintain such broad discretion so long as the sentence does not exceed the maximum authorized by statute. Booker, 543 U.S. at 233. Importantly, "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." Id. (emphasis added). This is because "'[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.'" United States v. Watts, 519 U.S. 148, 151-52 (1997) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Accordingly, a sentencing judge may use acquitted conduct at sentencing without violating the Sixth Amendment.

Significantly, every Circuit Court of Appeals to decide on this issue post-Booker has held that a judge's use of acquitted conduct when determining a sentence does not violate the Sixth Amendment if it is within the statutory range and found by a preponderance of the evidence. See United States v. Waltower, 643 F.3d 572, 577 (7th Cir. 2011), cert. denied, 132 S. Ct. 562 (2011) (citing 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.), cert. denied, 547 U.S. 1060 (2011); United States v. Grubbs, 585 F.3d 793, 799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Farias, 469 F.3d 393, 399 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 385 (6th Cir. 2008), cert. denied, 556 U.S. 1215 (2009); United States v. Price, 418 F.3d 771, 787-88 (7th Cir. 2009); United States v. No Neck, 472 F.3d 1048, 1055 (8th Cir. 2007); United States v. Mercado, 474 F.3d 654, 657 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 684 (10th Cir. 2005), cert. denied, 546 U.S. 955 (2005); United States v. Faust, 456 F.3d 1342, 1347-48 (11th Cir. 2006), cert. denied, 549 U.S. 1046 (2006); United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009)).

In United States v. Settles, for example, that court held that a sentencing judge's use of acquitted conduct did not violate the defendant's Sixth Amendment rights because of long-standing precedents of this Court which established "that a sentencing judge may consider uncharged or even acquitted conduct in calculating appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum of conviction." 530 F.3d 920, 923 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009). Such a reliance on acquitted conduct, that court noted, poses no problem to the Sixth Amendment post-Booker because Booker mandated that the jury find facts for sentencing

purposes that reach beyond the prescribed statutory maximum. Id. Furthermore, the court reasoned that "the Supreme Court has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'" Id. (quoting United States v. Booker, 543 U.S. 220, 233 (2005)). As such, post-Booker, district judges retain the traditional broad discretion to find facts necessary to sentence within the statutory range, including acquitted conduct. See id.; see also United States v. Vaughn, 430 F.3d 518, 527 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2011) (holding the broad discretion upheld in Booker allows sentencing judges to use acquitted conduct at sentencing so long as the sentence falls within the statutory maximum).

Accordingly, the purpose of the Sixth Amendment right to a trial by jury is to ensure that every fact to prove an element of a crime or any fact used in support of a sentence that exceeds the authorized limit must be found by a jury. Booker, 543 U.S. at 233. Allowing a sentencing judge to use acquitted conduct comports with this purpose because it allows the judge to base the sentence on the manner in which the crime was committed, but only if that sentence stays within the authorized limit and is found by a preponderance of the evidence. See Watts, 519 U.S. at 149. As such, sentencing judges may use acquitted conduct without violating the Sixth Amendment.

C. A judge's use of acquitted conduct in determining a criminal defendant's sentence does not violate the Double Jeopardy Clause of the Fifth Amendment.

The use of acquitted conduct at sentencing does not violated the Double Jeopardy Clause of the Fifth Amendment. No person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. This clause proscribes "successive prosecution or multiple punishment for 'the same offense" and prevents punishment for the same offence and double trial of the charged crime. Witte v. United States, 515 U.S. 389, 391, 396 (1995). The language of this clause serves to safeguard "against more than the actual imposition of two

punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* for such punishment." Id. at 396 (emphasis in original). As such, the Double Jeopardy Clause prohibits second punishments for a crime of which a jury had acquitted the criminal defendant. See id. (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

Sentences based on acquitted conduct do not doubly punish a defendant for his convicted and acquitted crimes, but rather the defendant is punished only for the way he committed the convicted crime. See Watts, 519 U.S. at 154. Moreover, this Court articulated in Witte, that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Witte, 515 U.S. at 402. Furthermore, an "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); see also United States v. Waltower, 643 F.3d 572, 575 (7th Cir. 2011) (stating acquittal cannot be conflated with a declaration of actual innocence). Indeed, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge. Watts, 519 U.S. at 155. Accordingly, the use of acquitted conduct is not punishment for a crime a jury acquitted the defendant.

Moreover, it is imprecise to say a jury "'necessarily rejected' any facts when it returns a general verdict of not guilty." Id. When the government seeks to re-litigate an issue of which a jury acquitted a criminal defendant, the Double Jeopardy Clause does not prevent the government from doing so if the standard of proof is preponderance of the evidence. Dowling v. United States, 493 U.S. 342, 349 (1990). As such, this Court in Watts 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."

Watts, 519 U.S. at 154. Acquitted conduct, therefore, has not been rejected by the jury and the sentencing judge may use such conduct when determining the sentence length.

Accordingly, the purpose of the Double Jeopardy Clause is to prevent double sentencing or sentencing one crime based on another acquitted crime. Witte, 515 U.S. at 396 (quoting Ex parte Lange, 85 U.S. 163, 173 (1874)). The use of acquitted conduct in determining a sentence comports with the requirements of this clause because the judge is not double punishing the criminal defendant, but imposing a sentence based upon the manner in which the crime was committed. See Watts, 519 U.S. at 151-52. As such, the Double Jeopardy Clause does not bar a sentencing judge from considering acquitted conduct when determining a defendant's sentence.

D. A sentence based upon acquitted conduct does not violate the criminal defendant's Fifth Amendment due process rights.

No person shall be deprived of life, liberty, or property without due process of the law. U.S. Const. amend. V. Standing alone, this operates limitedly. Dowling v. United States, 493 U.S. 342, 352 (1990). To succeed on a pure Fifth Amendment Due Process claim, the challenger must show the judge's decision to use acquitted conduct when determining the sentence violates fundamental fairness," which the Court construes very narrowly. Id. Judges may not define due process to conform to their personal understanding of fairness and "disregard the limits that bind judges in their judicial function." United States v. Lovasco, 431 U.S. 783, 790 (1997) (quoting Rochin v. California, 342 U.S. 165, 170 (1952)).

A sentencing judge's use of acquitted conduct when determining a criminal defendant's sentence term is not fundamentally unfair. Indeed, this Court has held that an acquittal is not a declaration of innocence, and it does not tell the world that the criminal did not in fact commit the charged crime. Watts, 519 U.S. at 154. An acquittal is merely a finding by the jury that the prosecution did not meet the beyond a reasonable doubt standard. See id. Furthermore, a

sentencing judge does not impose a sentence based only on the charged conduct, but upon the entirety of the surrounding circumstances of the charged conduct. See id. Accordingly, the practice of using acquitted conduct by a sentencing judge when imposing a punishment on the criminal defendant is not fundamentally unfair and does not therefore violate the Fifth Amendment's Due Process Clause.

E. The Eighth Amendment's proscription of cruel and unusual punishment does not bar a sentencing judge from using acquitted conduct in determining the length of the criminal defendant's sentence.

A judge's use of acquitted conduct at sentencing does not amount to cruel and unusual punishment. The government may not impose cruel and unusual punishment. U.S. Constitution amend. VIII. This clause proscribes "the imposition of inherently barbaric punishments under all circumstances." Graham v. Florida, 560 U.S. 48, 59 (2010), modified July 6, 2010. This Court has expressed reluctance to review legislatively mandated prison sentences under the Eighth Amendment Cruel and Unusual Punishment Clause. Rummel v. Estelle, 445 U.S. 263, 274 (1980). The challenges this Court has considered under the cruel and unusual punishment clause have been based on disproportionate level of punishment to the crime committed. Graham, 560 U.S. at 59. These cases generally fall within two classifications: unconstitutionally excessive sentence lengths and violations of "categorical rules" defining the parameters of the Eighth Amendment. Id. The issue is therefore whether the judge's use of acquitted conduct at sentencing raises the punishment to cruel and unusual when the sentence falls within the statutory range.

Regardless of which category applies in this case, Petitioners do not have a colorable Cruel and Unusual Punishment claim because their sentences fell within the statutory maximum. It is well settled that a sentence within the statutory maximum cannot be cruel and unusual. United States v. Dawson, 400 F.2d 194, 200 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969);

see also United States v. Organek, 65 F.3d 60, 62 (6th Cir. 1995); United States v. Collins, 690 F.2d 670, 674 (8th Cir. 1982); Martin v. United States, 317 F.2d 753, 755 (9th Cir. 1963). Only when a sentence exceeds the statutory maximum can it be challenged as cruel and unusual. See Dawson, 400 F.2d at 200. It follows logically that a sentence based in part upon acquitted conduct can only be challenged as cruel and unusual if that sentence exceeds the statutory maximum. But when a sentence exceeds the statutory maximum, the use of acquitted conduct as factors for that increase must be submitted to a jury for determination, Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), which is not presently at issue. Accordingly, a sentence is not cruel and unusual when a it falls within the statutory range and is found using acquitted conduct.

II. THE SIXTH AMENDMENT IS NOT VIOLATED WHEN THE SENTENCING JUDGE CONSIDERS THE CONDUCT OF A JURY ACQUITTED OFFENSE, AND APPLIES A GREATER PENALTY THAN THE JURY CONVICTION'S GUIDELINE RANGE CALCULATION.

A. Introduction.

The D.C. Circuit Court was correct in upholding the district court's use of jury-acquitted conduct in sentencing the Petitioners beyond the U.S. Sentencing Guidelines Manual range. Article III of the United States Constitution guarantees "[t]he trial of all crimes, except in cases of impeachment, shall be by jury." U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment further protects an individual's right to a trial by an impartial jury of the defendant's peers. U.S. Const. amend. VI. Sixth Amendment protections, in a small part, follow a convicted defendant into the sentencing stage in that a penalty cannot exceed the statutory maximum imposed by the jury convicted offense. Apprendi v. United States, 530 U.S. 466, 490 (2000). This sentencing maximum is from the United States Code in federal cases, and not the advisory Guidelines range as calculated by the district court judge. Booker, 543 U.S. at 243-44; See United States v. White, 551 F.3d 381, 384-85 (6th Cir. 2008), cert. denied, 556 U.S. 1215 (2009). Today, district courts

rely upon the Guidelines' Sentencing Table, a matrix of possible monthly sentences, using both the prior criminal history and criminal offense level to sentence an offender. See U.S. Sentencing Guidelines Manual, ch. 5, pt. A (2014) (Sentencing Table).

A sentencing court may factor in any relevant facts at sentencing, including "information concerning the background, character, and conduct of a person convicted of an offense." 18 U.S.C. § 3661. The Federal Sentencing Guidelines also call for all relevant conduct to be considered when calculating a term of imprisonment, even if the term departs from the Guidelines range. U.S. Sentencing Guidelines Manual §§ 1B1.3, 1B1.4 (2010). The information considered includes any conduct underlying a jury-acquitted charge, so long as the relevant conduct is found by a preponderance of the evidence. Watts, 519 U.S. at 156.

In this case, the sentencing judge correctly considered Petitioner's conduct underlying the jury acquitted conspiracy charge, and was sound in applying a penalty beyond the Guidelines range. Each Petitioner was convicted by a jury of distribution of crack cocaine, but acquitted of conspiracy to distribute the same. From Watts, § 3661, and the Guidelines considerations, this conspiracy acquittal placed no curtailment on the sentencing judge finding, by a preponderance of the evidence, Petitioners did indeed participate in the conspiracy conduct. The relevant conduct was exactly the type meant for sentencing calculations for each Petitioner. The district court here sentenced under the statutory maximum while going beyond the Guidelines calculation for the distribution conviction alone. Thereby, the district court was well within the Sixth Amendment protections when factoring in judge-found facts at sentencing.

B. The sentencing of Petitioners was within the statutory maximum from the jury conviction and thereby in accord with the Sixth Amendment protections.

The sentencing court was on firm Sixth Amendment ground when it sentenced the Petitioners above the United States Code minimum and below the maximum. The Sixth

Amendment only requires that the sentencing court remain within the statutory limits of the jury conviction(s) when imposing a penalty. Watts, 519 U.S. at 156-57, Apprendi, 530 U.S. at 490; see also United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009). The United States Sentencing Guidelines and the applicable monthly sentence calculations are only advisory under both per curium opinions of Booker. 543 U.S. 220 (2005). Thereby, the Sixth Amendment limits on sentencing stem from the United States Code, not the Guidelines ranges. Id. at 243-44. Finally, the broad discretion of a district court allows a judge "to select a specific sentence within a defined range, [and] the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. at 233.

The Circuits are in unison on finding no Sixth Amendment violation when the sentencing court remains in the statutory limits of the jury-convicted offense. See supra; United States v. Mercado, 474 F.3d 654, 656-58 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008) (citing the nearly unanimous circuit following of Booker allowing sentencing based on acquitted conduct, omitting the Sixth Circuit); White, 551 F.3d at 384-86 (holding the same). The D.C. Circuit below correctly followed the precedent from this Court and the full gambit of sister circuits holding that the Guidelines ranges do not statutorily limit sentences. Jones 744 F.3d at 1369.

The same Sixth Amendment argument in a sentencing context has made its way around each federal appellate circuit, including the D.C. Circuit previously. A sentencing court is free to use acquitted conduct in ramping up a sentence, "without offending the defendant's Sixth Amendment right to a trial by jury." United States v. Dorcely, 454 F.3d 366, 371 (D.C. Cir. 2006), cert. denied, 549 U.S. 1055 (2006). In Dorcely, the defendant was convicted on one count of making false statements to the FBI and acquitted on a pair of conspiracy charges. Id. at 370. Using the Guidelines' relevant conduct provision, the court found that the defendant had

participated in the acquitted conspiracy by a preponderance of the evidence. Id. The sentencing court sentenced the defendant to twenty-four months, as opposed to the Guidelines range for the convicted offense of zero to six months. Id. The D.C. Circuit upheld the sentence, holding nothing in Booker prevented the sentencing court from considering the relevant, albeit acquitted, conduct of the defendant found by a preponderance of the evidence. Dorcely, 454 F.3d at 371 Further, the twenty-four month sentence was well below the conviction's statutory maximum of five years, and free of Sixth Amendment taint. Id. at 371-72.

Dorcely, as noted above, does not stand alone in finding the statutory limit arises from the United States Code, and not the Guidelines range. In United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005), cert. denied, 546 U.S. 940 (2005), a jury returned a special verdict of guilty, finding the defendant had possessed five kilograms or more of cocaine powder. Id. at 1300. However, the district court judge found that the defendant had possessed 12.24 kilograms of cocaine base, or crack, and applied a much higher Guidelines range calculation. Id. From only the jury's special verdict, the United States Code authorized a sentence up to and including life imprisonment. Id. at 1303. The lower court sentenced the defendant to life imprisonment. Id. at 1300. The Eleventh Circuit held that even by applying Booker retroactively, the sentence was within the United States Code maximum and thereby valid. Duncan, 400 F.3d at 1303.

In the case before this Court, the facts clearly show each Petitioner was within the statutory window of their conviction, per the United States Code. As a result, each Petitioner was sentenced in accord with the Sixth Amendment jurisprudence above. All three Petitioners were convicted by the jury of distributing small quantities of crack cocaine and acquitted of conspiracy to distribute the same, similar to the defendant's in Dorcely and Duncan. Factoring in relevant criminal records, Petitioner Jones's statutory maximum was thirty years imprisonment.

Petitioner Thurston's statutory maximum was twenty years imprisonment. And Petitioner Ball's statutory maximum was forty years with a minimum of five years.

Each Petitioner was then sentenced well below the statutory maximum, as called for in Watts, and held in persuasive authority like Dorcely and Duncan. Petitioner Jones received a sentence of only 180 months. Petitioner Thurston received a sentence of 194 months, and Petitioner Ball received a sentence of 225 months imprisonment. While each term of imprisonment went beyond the Guidelines range for only the distribution conviction, the district court, per Booker, was never bound by the Guidelines range. The sentences in Dorceley and Duncan are similar, and allowed the district court to consider the acquitted conduct at sentencing. Here, the statutory maximum was a far cry from the imprisonment terms of each Petitioner.

Petitioners may point to the holding in Blakely, which held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. 542 U.S. at 303. In Blakely, the defendant was sentenced over three years beyond the Washington State statutory maximum for second degree kidnapping involving domestic violence and a firearm. Id. at 300. The sentencing judge found the defendant had acted with "deliberate cruelty," which called for an exceptional sentence and upward departure. Id. The facts supporting such an upward departure came only from judge-found facts, and not those submitted to a jury. Id. In reversing, this Court held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Id. at 303 (emphasis original).

The Petitioners point to empty ground when relying on Blakely. First, per Booker, it is absolutely clear the statutory maximum is the United States Code and not the advisory Sentencing Guidelines. Similarly, in Blakely, the Washington State statutes were the maximum

imprisonment limit, not the state sentencing guidelines. Second, unlike the sentencing judge in Blakely, the district court judge in the instant case did not go beyond any jury finding or defendant admission. The statutory maximum came from the jury conviction for distribution of crack cocaine by each Petitioner, and no exceptional sentence or "deliberate cruelty" finding was necessary when including the Congress Park conspiracy conduct. This follows the clear line set in Booker, making the United States Code the statutory maximum in play and any judge-found facts very much in play for individual sentencing calculations.

The sentencing court was sound in imposing, on each individual Petitioner, a term of imprisonment that went well beyond the Guidelines range for the distribution charge. While the United States Code maximum sentence varied by Petitioner, the Sixth Amendment argument is still defunct for each Petitioner. By remaining under the statutory maximum of the jury-convicted offense, the sentencing court was proper in factoring in the acquitted conduct when determining the sentence. This stands regardless of any Guidelines calculation deviation.

C. The sentencing of the Petitioners beyond the Guidelines range was reasonable when factoring in relevant judge found conduct, established by a preponderance of the evidence.

1. A sentencing court is open to consider all relevant information when making a sentencing determination.

The sentencing court was free to use any relevant information for calculating the sentence of the Petitioners. Here, this included the underlying conduct of the acquitted conspiracy charge. The United States Code, the Sentencing Guidelines, and Watts all allowed the district court below to include such relevant information in its sentencing calculation. Thereby, each Petitioners' sentence was tailored to the facts and within the Sixth Amendment requirements.

There is no limitation to the information a judge can use in sentencing, whether it is of the defendant's background, character, or conduct. 18 U.S.C. § 3661. The Sentencing Guidelines

Manual, like the United States Code, allows a district court to factor in judge found relevant conduct when making a sentencing calculation. U.S. Sentencing Guidelines Manual §§ 1B1.3, 1B1.4 (2010); See also U.S. Sentencing Guidelines Manual § 1B1.2(b) (2010) ("[a]fter determining the appropriate offense guideline section … determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)."). A district court calculating a sentence "may consider conduct of which a defendant has been acquitted." Watts, 519 U.S. at 157; U.S. Sentencing Guidelines Manual § 1B1.3 cmt. background (2010) ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."). Relevant conduct further applies for a sentence when acquitted conduct was part of a "common scheme," or any like conspiracy. U.S. Sentencing Guidelines Manual § 1B1.3(a)(2) (2010). Finally, the sentencing court is afforded wide discretion in tailoring a sentence while considering the advisory Guidelines range as just one factor before the court. 18 U.S.C. § 3553(a).

The language of 18 U.S.C. § 3661 – allowing a sentencing court to factor in the background, character, and conduct of the underlying offender – is not diminished by the ruling in Booker or the now advisory nature of the Sentencing Guidelines. United States v. Faust, 456 F.3d 1342, 1348 (2006), cert. denied, 549 U.S. 1046 (2006). In United States v. Faust, the defendant was convicted of only one of four federal drug offenses, and acquitted by the jury of the three remaining counts. Id. at 1345. First, that court found the imposed 210 month sentence was within the statutory maximum from a single jury conviction. Id. at 1347 n.4. Second, "[w]e also note 18 USC § 3661, on which Watts relied, remains intact post-Booker." Faust, 456 F.3d at 1348. The Eleventh Circuit held that courts may still factor in relevant facts of a defendant's background, character, and conduct "even if those facts relate to acquitted conduct." Id.

This Court has also allowed for relevant conduct underlying a convicted offense to be considered in sentencing, as opined in the Guidelines Manual § 1B1.3. Lower appellate courts have followed suit, and factored in relevant acquitted conduct at sentencing, per the Guidelines Manual and the over-arching United States Code provisions. Waltower, 643 F.3d at 578. The well-established practice of factoring in acquitted conduct was not lost on the D.C. Circuit in the opinion below. Jones, 744 F.3d at 1369; See also Settles, 530 F.3d at 923 (citing multiple cases of binding precedent, including Watts, holding the same).

In the present case, the district court found that each Petitioner had engaged in a common scheme, or conspiracy, to distribute crack in Congress Park. This finding was a common practice allowed under § 3661 and § 1B1.3. The conspiracy conduct, considered by § 3661, applied to the background and conduct of each Petitioner in relation to the distribution conviction. Specifically, the "common scheme" was particularly found by the sentencing judge, and falls under the Guidelines direction for sentencing enhancements, per § 1B1.3(a)(2). Finally, from the holding in Watts and other persuasive cases like Settles and Faust, the fact the conduct considered by the sentencing court related to an acquitted offense is of no consequence. In short, the trial court was on firm ground when sentencing all three Petitioners using the judge-found conspiracy conduct.

2. A sentencing court is proper when using acquitted conduct, found to a preponderance of the evidence, by a sentencing judge.

The Sentencing Court here was well within the Sixth Amendment limitations when it found the acquitted conspiracy to distribute conduct by a preponderance of the evidence. Given, the jury found each Petitioner not guilty of conspiracy to distribute crack cocaine in Congress Park. However, using a lesser preponderance of the evidence standard, the sentencing court did not run afoul to the Sixth Amendment by finding the underlying conspiracy conduct did occur.

As seen above, this Court requires that a jury must find any fact used that will take a penalty beyond the statutory maximum, not a judge. Apprendi, 530 U.S. at 490. However, in considering the conduct submitted at sentencing, there is a "significance of the different standards of proof that govern at trial and sentencing." Watts, 519 U.S. at 155. Within the statutory limits, a judge can adjust and increase the sentence on facts found by a preponderance of the evidence. Id. at 156-57. This is also the Guidelines Manual standard of proof for judge-found facts deemed relevant for sentencing. U.S. Sentencing Guidelines Manual § 6A1.3 (2004).

In Watts, this Court clearly held that judge-found facts may adjust sentences when found by a preponderance of the evidence. 519 U.S. at 156. Watts involved a pair of Ninth Circuit decisions holding district courts could not consider acquitted conduct of defendants at sentencing. Id. at 149. In reversing, this Court reiterated its holding that judge found facts in sentencing must only be found to a preponderance. Id. at 155. "We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'" Id., quoting One Assortment of 89 Firearms, 465 U.S. at 361. Thus, no fact underlying an acquitted charge has been rejected or removed from a sentencing finding later. Watts, 519 U.S. at 155.

In our case, like the holding in Watts, the sentencing court correctly followed precedent and utilized a lower standard of proof. The jury convicted the Petitioners of distribution of crack cocaine, thereby finding the necessary elements beyond a reasonable doubt. The jury found, at the very least there was a reasonable doubt to the conduct underlying the conspiracy charge. Like in Watts, the reasoning behind the acquittal on the conspiracy charge is unknown. But the acquittal amounts to only "not guilty," and in no way proves any innocence relating to the conspiracy charges. Thereby, the sentencing court found the Petitioners had indeed built a

conspiracy to distribute in Congress Park, based on a preponderance of the evidence standard. This middle ground in the standards of proof is completely acceptable under Watts, the lower circuits, and § 6A1.3 of the Guidelines for factoring in relevant conduct at a defendant's sentencing. After all, each Petitioner was found guilty of the distribution offense, and the conspiracy finding only related to the distribution-conviction sentencing.

The D.C. Circuit below was correct in upholding the sentencing of Petitioners below. While the jury acquitted the Petitioners of conspiracy to distribute crack cocaine in Congress Park, the sentencing judge found enough evidence to satisfy the lower preponderance standard. Thereby, the sentencing court was free to factor in the conspiracy conduct when sentencing for the distribution charge. This in no way runs afoul to the jury conviction, Petitioners' Sixth Amendment right, or any U.S. Sentencing Guidelines rule.

D. Petitioners' argument to overturn the sentencing judge's determination based o n Justice Scalia's concurrence in *Rita* is without merit.

Petitioner's argument in the D.C. Circuit below, using Justice Scalia's concurrence in Rita v. United States, 551 U.S. 338, 368-386 (2007), fails to show sufficient reasoning to divert from the stare decisis holdings of this Court. While the Guidelines ranges remain relevant, "courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." Gall, 552 U.S. at 41. A sentence that departs from the Guidelines range also does not require a proportional reasoning on par with the Guidelines recommendation. Id.

Sentences should begin with a Guidelines calculation, move to 18 U.S.C. § 3553(a) factors, and include an adequate explanation by the sentencing court. Id. at 49-50; see also 18 U.S.C. § 3553(a) (including factors such as "the nature and circumstances of the offense and the history and characteristics of the defendant," the Sentencing Guidelines, and "the need to avoid

unwarranted sentence disparities."). In the end, a sentencing court is to consider each individual offender with the mitigating and magnifying facts of the case. Gall, 552 U.S. at 52.

In Rita, Justice Scalia argues a Sixth Amendment violation when a sentence relying on judge-found facts. Rita, 551 U.S. at 375 (Scalia, J., concurring). Justice Scalia argues that in a lawful sentence, facts must be found by a jury not a judge Id. at 373. Otherwise, the sentence may be found to be "substantively unreasonable," per Gall. Rita, 551 U.S. at 372. "But it *is* possible to say (indeed, it *must* be said) that *some* judge-found fact or combination of facts … suffices to establish a Sixth Amendment violation." Rita, 551 U.S. at 378 (Scalia. J., concurring).

In the present case, the concurrence penned by Justice Scalia in Rita should not result in finding the sentences of Petitioner's "substantively unreasonable." The opinion below was inherently correct in finding the argument of Justice Scalia in Rita as "not the law." Jones, 744 F.3d at 1369. The Sixth Amendment allows for judge-found facts to vary both Guidelines range and the actual sentence within the statutory maximum. Id.; Watts, 519 U.S. at 156-57. By factoring in the Guidelines range as a first step, and then moving to additional judge-found facts, the sentencing court was sound in its calculation of Petitioner's sentences from § 3553(a). Jones, 744 F.3d at 1365-66. The inclusion of a judge-found conspiracy finding was therefore not "substantively unreasonable." Id. at 1369.

CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court affirm the decision of the United States Circuit Court of Appeals for the D.C. Circuit in this case.

Respectfully Submitted,

Team # 19

APPENDIX

UNITED STATES CONSTITUTION

Article III, Section 2, Clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

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.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.