No. 13-10026

In the Supreme Court of the United States

JOSEPH JONES,
DESMOND THURSTON, & ANTUWAN BALL,
Petitioners,

v.

THE UNITED STATES OF AMERICA ,
Respondent,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE UNITED STATES

BRIEF FOR RESPONDENT

Team Number: 20

Questions Presented

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

2. Whether there is a violation of 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?

PARTIES

The parties in this case are petitioners, Joseph Jones, Desmond Thurston and Antuwan Ball. Defendants were convicted by the United States District Court of the District of Columbia of selling crack cocaine. They are in front of this Court today arguing the constitutionality of the sentences imposed. Respondent in this case is the United States of America, contending the lower court properly considered acquitted conduct in the petitioners sentencing and there are no constitutional rights being violated.

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides, "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 offense 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."

The Sixth Amendment provides, "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."

STATEMENT OF THE CASE

For more than thirteen years, the so-called "Congress Park Crew" controlled and oversaw the crack cocaine market in Southeast Washington, D.C.'s Congress Park neighborhood. Dkt. 258, 268, 1042, 7501-02, 12180-84[1]. The gang operated an "open air crack market" in Congress Park. *Id.* In addition to the widespread distribution and sale of narcotics, the gang was tied to numerous murders and robberies in and around Washington. *United States v. Wilson*, 720 F. Supp. 2d 51, 55-58 (D.D.C. 2010); Dkt. 173. After an extensive investigation that involved an FBI task force and dozens of cooperators, eighteen defendants were indicted. *United States v. Ball*, 962 F. Supp. 2d 11, 13 (D.D.C. 2013). An F.B.I task force conducted and supervised "controlled buys" in Congress Park over the course of their investigation. Dkt. 328-330, 371, 365-76. More than twenty of these "controlled buys" implicated petitioners. *Id.*

Charges ranged from mid-level drug distribution offenses to violent crimes, including murder. *Wilson*, 720 F. Supp. at 55-57. After lengthy proceedings that were partially bifurcated and a trial that involved 106 prosecution witnesses, the jury returned verdicts of guilt against all three petitioners on November 28, 2007. Dkt. 1191. Each of the petitioners was convicted of offenses involving the distribution of crack cocaine. *Id.* All three were acquitted of the conspiracy charges.[2] *Id.* Petitioner Antwuan Ball faced a statutory maximum of forty years for his conviction. 18 U.S.C. §841(b)(1)(B)(iii); (C). Petitioner Joseph Jones faced a maximum of thirty years. *Id.* Petitioner Desmond Thurston faced a maximum of twenty years. *Id.* Judge Richard W. Roberts, who presided over the trial and sentencing below, has served as a District

[1] "Dkt." will refer to the docket for the case below in the United States Court of Appeals for the District of Columbia Circuit, 744 F.3d 1362

[2] "Ball, Thurston, and Jones were tried together with others and convicted of multiple crack sales, but acquitted of conspiracy. Each defendant's sentencing guidelines range, though, was calculated using as relevant conduct evidence of the 1.5 kilograms of crack cocaine involved in the conspiracy. Ball was convicted under 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii) of one count of distribution of 11.6 grams of crack cocaine. His guidelines range was 292 to 365 months imprisonment. He was sentenced to 225 months in prison and 60 months of supervised release. Thurston was convicted under 21 U.S.C. § 841(a)(1) and (b)(1)(C) of two counts of unlawful distribution of a total of approximately 1.7 grams of crack cocaine. His guidelines range was 262 to 327 months imprisonment. He was sentenced to 194 months in prison and 36 months of supervised release on each count to be served concurrently. Jones was convicted under 21 U.S.C. § 841(a)(1) and (b)(1)(C) of two counts of unlawful distribution of a total of approximately 1.8 grams of crack cocaine. His guidelines range was 324 to 405 months imprisonment. He was sentenced to 180 months in prison and 72 months of supervised release on each count to be served concurrently." *Ball*, 962 F. Supp. 2d at 13.

Court judge in the District of Columbia for more than sixteen years and is the Chief Judge of the District. United States District Court for the District of Columbia, Judges[3].

Evidence adduced at trial indicates that the three petitioners involved themselves in the Congress Park Crew's conspiratorial drug distribution by engaging in concerted activities for the purposes of crack cocaine distribution. *United States v. Jones*, 744 F. 3d 1362, 1365-66 (D.C. Cir. 2014). Extensive proof of cooperation and coordinated behavior led the United States and Judge Roberts to conclude that all three petitioners were part of a joint conspiracy to distribute narcotics in Congress park. *Id.* Methods of crack distribution the petitioners and their coconspirators engaged in included sharing crack sales by way of "fronting" (whereby veteran dealers would loan quantities of drugs to less experienced dealers on consignment), a scheme called "doors" (whereby dealers would coordinate to determine whose turn it was to make a drug sale), uniting for retaliatory violence against competing drug gangs, identifying themselves via "Congress Park" headbands, threatening witnesses (including two fourteen year-old girls who witnessed a murder), and sharing in market profits. Dkt. 288-89, 5335-37, 6527-28, 9733, 10133, 12210. Multiple convicted conspirators testified that Jones, Ball, and Thurston were co-conspirators. *Id.* Petitioner Ball was said to be a "leader" of the gang's activities, who himself "ran Congress Park." Dkt. 11662-63. An apparent roster of Congress Park gang members in evidence listed all three petitioners' names. Dkt. 1228.

Pre-sentencing submissions to Judge Roberts indicated further that petitioners and others were part of a years-long "chain conspiracy" to distribute crack in Congress Park. Dkt. 1246. By a preponderance of the evidence, Judge Roberts considered the above and his firsthand assessments of the evidence he observed at trial and at the sentencing phase to find that such a conspiracy existed. *Ball*, 962 F.Supp at 13. He applied this finding in elevating petitioners' terms

[3] http://www.dcd.uscourts.gov/dcd/roberts

of imprisonment under the United States Sentencing Guidelines. *Id.* All three petitioners were sentenced to terms well below the statutory maxima for their crimes of conviction: 225 months for Ball, 194 months for Thurston, and 180 months for Jones.[4] *Jones*, 744 F.3d at 1366. Judge Roberts decreased petitioners punishment based on the possibility of disparities in punishments for crack and powder cocaine. *Id*. at 1365-66. Furthermore, Judge Roberts cut time off of petitioners Ball and Thurston's sentences because of the possibility they were prejudiced by a delay in their sentencing proceedings. *Id*. Petitioners Jones, Ball, and Thurston appealed their punishments to the United States Court of Appeals for the District of Columbia Circuit. *See Jones*, 644 F. 3d 1362. Finding the sentences below were constitutional, reasonable, and in accord with settled law, the District of Columbia Circuit affirmed Judge Roberts' sentences. *Id.* These three incarcerated men now petition this Court and challenge Judge Roberts' view of the evidence, which included credibility determinations of witnesses who appeared before him.

STANDARD OF REVIEW

Appellate courts review sentences both inside and outside the Guidelines range under a deferential abuse-of-discretion standard. *Gall*, 552 US 38, 51 (2007). "The reviewing court may not apply a heightened standard of review or a presumption of unreasonableness to sentences outside the Guidelines range." *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013). That an appellate court might reasonably have imposed a different sentence on a defendant is insufficient grounds to justify a reversal of a District Court's sentence. *Gall*, 552 U.S. at 47. Appeals courts have a "limited role" in reviewing sentences. *Settles*, 530 F.3d 920, 923 (D.C. Cir 2008). This Court reviews Constitutional questions *de novo*. *Wright v. West*, 505 U.S. 277, 296 (1992).

[4] Respectively: Eighteen years, nine months (Ball); Sixteen years, four months (Thurston); Fifteen years (Jones)

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia Circuit properly held that the sentencing judge imposed reasonable sentences that were consistent with the Sixth Amendment. "[F]acts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of a crime that must be proved to a jury of one's peers beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Further, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge" when the conduct "has been proved by a preponderance of the evidence." *United States v. Watts*, 519 US 148, 156 (1997) (per curiam). Calculation of a proper sentence other the United States Sentencing Guidelines is also consistent with the Sixth Amendment when a judge considers acquitted conduct in her calculation. *Id.* Further, the sentences below are lawful because Judge Roberts committed no significant procedural error and because the sentences were not substantively unreasonable. *See Gall v. United States*, 552 US 38, 51 (2007). The United States respectfully requests that this Court affirm the decision of the United States Court of Appeals for the District of Columbia.

ARGUMENT

I. THE STATUTORY MAXIMUM IS THE CONSTITUTIONAL CEILING FOR A CRIMINAL SENTENCE.

The statutory maximum is the upper limit for a criminal defendant's punishment upon conviction to a particular crime. *Alleyne v. United States*, 133 S.Ct. 2151, 2162 (2013); *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam). This self-evident rule of law is the target of petitioners' challenge. A jury's role is to determine facts "that increase the statutory maximum punishment." *United States v. Norman*, 465 Fed. Appx. 110, 121 (3d Cir. 2012); *See also United States v. Booker*, 543 U.S. 220, 244 (2005). Upon conviction, a sentencing judge has broad discretion to consider a wide range of information about offense and offender in imposing a lawful sentence. *See* 18 U.S.C. § 3661. This information may include conduct related to charges not proven to the jury beyond a reasonable doubt. *Watts*, 519 US at 156. Because Judge Roberts sentenced all three petitioners to serve terms within, and in fact well below, the respective U.S. Code maxima, petitioners' sentences are constitutional. That he considered acquitted conduct in rendering their sentences does not change the Constitutional analysis.

The Sixth Amendment guarantees that one who is accused of a crime "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." U.S. Const. amend. VI. "An essential Sixth Amendment inquiry is whether a fact is an element of a crime." *Alleyne*, 133 S.Ct. at 2162. This Court has defined "element" as any fact, other than that of a prior conviction, which increases a defendant's maximum potential punishment. *So. Union Co. v. United States*, 132 S. Ct. 2344, 2348 (2013). Because Judge Roberts did not himself find any elements of petitioners' respective crimes of conviction, the sentences Judge Roberts imposed comport with the Sixth Amendment.

A. *Apprendi* and Its Progeny Have Not Disrupted The Rule That The Statutory Maximum Is The Constitutional Ceiling for a Criminal Sentence.

This Court's recent Sixth Amendment jurisprudence, even in restricting judicial invasions into functions constitutionally reserved for the jury, has not wavered from the proposition that a sentencing judge's discretion is capped at a particular crime's statutory maximum. *See, e.g. Peugh v. United States*, 133 S.Ct. 2072, 2079 (2013); *Alleyne*, 133 S.Ct. at 2162. Petitioners contend that *Apprendi v. New Jersey* and its progeny have limited judicial discretion to render statutory maxima essentially meaningless. The examination of this Court's Sixth Amendment jurisprudence that follows demonstrates the U.S. Code limits remain the sentencing cap for a federal crime, and that sentencing judges may consider conduct related to acquitted offenses. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Petitioners point to a supposed trend in this Court's jurisprudence and scattered dissenting opinions to argue that sentencing courts may not exercise discretion up to the statutory maximum for a particular crime. *See United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014). Judge Roberts' sentences below the statutory maxima are distinguishable from post-*Apprendi* cases when this Court overturned sentences on Sixth Amendment grounds.

In *Apprendi*, a defendant who pleaded guilty to a weapons charge objected to a sentencing enhancement based on the judge's finding that his offense was a hate crime. 530 U.S. at 469. This Court overturned the enhancement, holding: "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 proved beyond a reasonable doubt." *Id.* at 466. Justice Stevens emphasized that "nothing in this history [of Sixth Amendment law]" suggests that it is impermissible for judges to exercise discretion "in imposing a judgment *within the*

range prescribed by statute". *Id.* at 481. (emphasis in original). The Court noted that judicial leeway to consider sentencing factors to impose punishment within the statutory limits remained unchanged. *Id.*

The decision in *United States v. Booker* rendered the Federal Sentencing Guidelines non-mandatory. *See generally* 543 U.S. 220 (2005). The *Booker* opinion has two parts: Justice Stevens' Constitutional determination and the remedial portion authored by Justice Breyer. *Booker*'s Constitutional determination essentially applied the *Apprendi* rule to the federal Sentencing Guidelines.[5] *Booker*, 543 U.S. at 244. In light of Justice Stevens' constitutional holding, Justice Breyer's portion of *Booker* invalidated the two provisions of the Sentencing Reform Act of 1984 that made the Federal Sentencing Guidelines mandatory. *Id.* at 245. Continuing to impose the section of the Sentencing Reform Act that made the Guidelines mandatory, the Court reasoned, would be inconsistent with the Sixth Amendment's right to a jury trial as formulated in *Apprendi* . *Id.* at 302. The portion of the Sentencing Guidelines that made them mandatory, 18 USC 3553(b)(1), was thus "severed as excised" from the Sentencing Reform Act, leaving a scheme whereby the Guidelines are "effectively advisory." *Booker*, 543 US at 246.

Pursuant to *Cunningham v. California*, this Court discussed "sentence-elevating fact finding." *See generally Cunningham v. California*, 549 U.S. 270 (2007). There, a state court judge applying California's determinate sentencing law weighed aggravating and mitigating factors under a preponderance of the evidence standard before sentencing the defendant to the highest of the prescribed sentences. *Id.*, at 275. This Court invalidated California's mechanical determinate sentencing law as violative of the Sixth Amendment because it tasked judges with

[5] "[O]ther 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 proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 466

discerning sentence-elevating conduct that exposed defendants to sentences above what the penal statute itself authorized. *Id.* at 274. Importantly, the state sentencing scheme at issue in *Cunningham* was binding on the judiciary. *Id* at 279. The statutory sentencing procedures amounted to "a clear fact finding directive to which there [was] no exception." *Id.*

The *Cunningham* Court's characterization of the Sixth Amendment is consistent with Judge Roberts' sentences in petitioners' case. *Cunningham* noted that there is a Sixth Amendment violation when "the jury's verdict alone does not authorize the sentence," meaning "the judge must find an additional fact to impose the longer term." *Id*. at 289. The jury verdict authorized the statutory maximum for the crimes committed by petitioners: forty years for petitioner Ball, thirty years for Jones, and twenty years for Thurston. *See* 18 U.S.C. § 841(b)(1)(B)(iii),(C). Judge Roberts need not, and legally could not, have engaged in any fact finding to increase petitioners' sentences above their statutorily-designated maximum terms. Though Justice Ginsburgh's well-reasoned opinion in *Cunningham* contains forceful condemnations of judicial overreach into areas Constitutionally designated to the jury, such language is inapplicable here. Neither *Cunningham* nor any case that has followed from this Court has disrupted the rule that the Sixth Amendment cap for a criminal sentence is the statutory maximum.

This Court's characterization of Sixth Amendment application in sentencing as outlined in *Rita v. United States* is illuminating in the case at bar. 551 U.S. 38 (2007). Per *Rita*, a within-Guidelines sentence is consistent with the Sixth Amendment and is entitled to a presumption of reasonableness on appeal "even if it increases the likelihood that the judge, not the jury, will find sentencing facts." *Rita*, 551 US at 352 (internal quotation marks omitted). In setting standards by

which appellate courts are to review criminal sentences, the *Rita* court acknowledges the importance of judge-found facts in determining just criminal punishment. *See id.*

Contrary to petitioners' contention, judicial fact-finding at sentencing can lawfully increase a defendant's punishment. *See Oregon v. Ice*, 555 U.S. 160 (2009). In *Ice*, this Court permitted a sentencing judge to find facts that could double a defendant's term of imprisonment. *Id*. at 164. At issue in *Ice* was whether, under Oregon law, the Sixth Amendment permitted a judge to find facts that would determine whether certain offenses occurred in discrete transactions. *Id.* This inquiry would control whether a defendant would serve concurrent or consecutive sentences for multiple convictions to the same offense. *Id.* This Court authorized judicial fact finding of this variety. *Id.* This Court in *Ice* expressly repudiated the argument that defendants retain "a Sixth Amendment right to have the jury, not the sentencing judge, find the facts that permitted the imposition of consecutive sentencing." *Id.* at 166. The jury in *Ice* rendered its verdict, and the judge had discretion to find facts that determined the appropriate sentence authorized by that verdict. *Id. Ice* is further illustration that petitioners are mistaken when they contend that this Court reserves sentence-elevating fact finding within the statutory limits to the sole discretion of a jury.

A fact that forms the sentencing floor, or the minimum punishment for a crime, is an essential element of a crime that must be proved to a jury beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2157. *Alleyne* held that judicial fact-finding must not itself increase either the mandatory minimum or the statutory maximum for a crime of conviction. *Id*. at 2156. But, as appellate courts have observed, "*Alleyne* did not curtail a sentencing court's ability to find facts relevant in selecting a sentenced *within* the prescribed statutory range." *United States v. Smith*, 751 F.3d 107, 118 (3d Cir. 2014) (emphasis in original).

Petitioners here were not sentenced to the top, or near the top, of the statutory maximum for their crimes of conviction. *See Jones*, 744 F.3d at 1366. Statutory limits serve the essential purpose of "allow[ing] those who violated the law to know, *ex ante*, the contours of the penalty that the legislature affixed to the crime." *Alleyne*, 133 S.Ct. at 2160. Petitioners' claim does not remotely parallel the hypothetical this Court proffered in *Blakely* as a possible absurdity that might result from a sentencing judge completely disregarding a jury verdict. Justice Scalia hypothesized in *Blakely* that a rule allowing sentencing based in part on acquitted conduct could mean "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it- or of making an illegal lane change while fleeing the death scene." *Blakely*, 542 U.S. at 306. This extreme hypothetical ignores the rule that sentencing courts are always bound by the statutory maximum for any crime of conviction. A traffic offense carries only the punishment affixed by statute for that infraction. Being guilty of an "illegal lane change" could not subject one to the statutory range of punishments set for a homicide.

B. Each Federal Court Of Appeals Has Considered And Rejected The Sixth Amendment Argument Petitioners Advance.

Petitioners, as have numerous others whose criminal punishments were based on judge-found conduct, challenge their sentences on Sixth Amendment grounds. Each federal Court of Appeals has upheld the rule permitting sentencing judges to consider acquitted conduct and sentence defendants up to the statutory maximum for a particular offense. *See United States v. Gobbi*, 471 F.3d 302 (1st Cir. 2006); *United States v, Vaughn*, 430 F.3d 518 (2d Cir. 2005); *Smith*, 751 F.3d 107 (3d Cir. 2014); *United States v. Ashworth*, 139 Fed. Appx. 525 (4th Cir. 2005) (per curiam), cert. denied, 546 U.S. 1045 (2005); *United States v. Hernandez*, 633 F.3d 370 (5th Cir. 2011); *United States v. White*, 551 F.3d 381 (6th Cir. 2008); *United States v. Price*,

418 F.3d 771 (7th Cir. 2005); *United States v. High Elk*, 442 F.3d 622 (8th Cir. 2008); *United States v. Mercado*, 474 F.3d 654 (9th Cir. 2009) (permitting sentencing based on acquitted conduct that was seven times higher than the government's Pre-Sentence Report recommendation); *United States v. Cassius*, 2015 U.S. App. LEXIS 1200, 2015 WL 327824 (10th Cir. January 27, 2015); *United States v. Faust*, 465 F.3d 1342 (11 Cir. 2006); *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008).

As the District of Columbia Circuit has noted, "a sentencing judge may consider uncharged or even acquitted conduct in calculating an 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 for the crime of conviction." *Settles*, 530 F3d at 923. This "long-standing sentencing practice [. . .] poses no Fifth Amendment due process problem." *Id*. Petitioners point to dissenting opinions from this Court to argue that the judicial fact-finding employed to sentence them is, in their view, unfair. But, as the District of Columbia Circuit noted in upholding petitioners' sentences, their position contravenes settled law. *Jones*, 744 F.3d at 1369. In sum, petitioners' conception of the Sixth Amendment "has been uniformly and unequivocally rejected by the federal circuit courts." *Norman*, 465 Fed. Appx. at 120.

C. Upholding The Statutory Maximum As The Ceiling For Sentencing Discretion Will Not Encourage Abusive Or Overzealous Prosecutions

Considering jury-acquitted conduct in the course of sentencing is consistent with Congress's intent to cast a wide net for what would be permissible considerations at sentencing.[6] *See* 18 U.S.C. § 366. Overturning *Watts* and contravening each federal Court of Appeals' Sixth Amendment jurisprudence will needlessly yield an onerous flood of post-sentencing challenges and further encumber federal dockets.

[6] "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. § 366.

The current practice of permitting judicial discretion in sentencing up to the statutory maximum does not incentivize heavy-handed charging by United States Attorneys. No matter the number of acquitted charges, the sentencing judge may not increase a defendant's sentence above the statutory maximum for the crime or crimes of conviction. *See Alleyne*, 133 S. Ct. at 2160. Upholding *Watts* and the determinations of the Circuits will not risk criminal defendants to any heightened exposure to punishment. Nor would a decision on a prosecutor's part to not charge a particular crime forecloses the prosecutor from putting on evidence related to that uncharged conduct at the sentencing phase of a criminal proceeding. Upholding the decision below will not expand the scope of information a sentencing judge may consider or embolden prosecutors to bring meritless charges in hopes of attaining lengthier criminal sentences.

"An acquittal is not a finding of any fact." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). That a jury acquits a fellow citizen of an offense "serves not to clear the defendant of guilt." *Watts*, 519 U.S. at 155. Accordingly, it is not legally correct to say that sentencing a defendant based on acquitted conduct is necessarily sentencing a defendant for a crime he "did not commit." *See White*, 551 F.3d at 385. As the Sixth Circuit points out, this distinction between standards of proof is one that even laypersons intuit. *See id.* at 385. The Sixth Circuit notes that it has become a "familiar" principle to non-lawyers that a criminal jury under a reasonable doubt standard famously acquitted O.J. Simpson yet faced civil liability for the same conduct under a preponderance of the evidence standard. *Id.*

This Court has cautioned that any "preclusive effect of an acquittal" not be overstated. *See Watts*, 519 US at 155. "An acquittal is not a finding of fact," but instead "it merely proves the existence of a reasonable doubt as to [a defendant's] guilt." *One Assortment of 89 Firearms*, 465 at 361. A jury cannot be said to have "necessarily rejected" any particular facts upon

acquitting a defendant, nor does an acquittal prove a defendant's innocence. *See Watts*, 519 US at 155. Accordingly, it is incorrect for petitioners to state that the jury convened below found them totally blameless of engaging in a conspiracy. That the United States fell short of proving part of its case beyond a reasonable doubt is far from a definite finding of petitioners' innocence.

As this Court noted in *Booker*, "the ball now lies in Congress's court" to construct a new federal sentencing regime if it sees fit. 543 US at 265. The legislature or the Sentencing Commission "could certainly conclude as a policy matter that sentencing courts may not rely on acquitted conduct." *Settles*, 530 F.3d at 924. But those bodies have not precluded the consideration of acquitted conduct in sentencing. Broad judicial discretion and scope of inquiry remain the law governing sentencing proceedings. Similarly, the legislature may adjust the statutory minima and maxima for offenses. If petitioners contend their punishments do not fit their crime because the statute permits sentences that are too high, their grievance is with the legislature.

Law enforcement, the defense bar, myriad advocacy groups, and even many prosecutors have criticized possible disparities between sentences for crimes involving crack cocaine and powder cocaine. *See e.g.* Memorandum to All Federal Prosecutors; U.S. Dep't of Justice, Office of the Deputy Attorney General, 1 May 2009. In the event disparities exist, Congress has the power to remedy any inequalities between punishments for these substances. Moreover, the multitude of social, economic, geographic, and other factors that are said to contribute to purported disparities are outside of the scope of appellate review of Judge Roberts' sentencing determinations in the case at bar. In fact, Judge Roberts did consider the possibility of such perceived injustices in punishments for crack cocaine when he sentenced all three petitioners to terms substantially below the Guidelines ranges he calculated. *See Jones*, 744 F.3d at 1365-66.

The United States urges this Court to uphold its own precedent that the statutory maximum is the Constitutional ceiling for criminal sentencing.

II. CALCULATING GUIDELINES AND IMPOSING A HIGHER SENTENCE THAN RECOMMENDED BASED UPON A FINDING THAT THE DEFENDANT HAD ENGAGED IN ACQUITTED CONDUCT DOES NOT VIOLATE THE SIXTH AMENDMENT.

The lower court did not err in determining that the petitioners' sentences did not violate their Sixth Amendment right to trial by jury because they were partially based on conduct that the jury acquitted them on. The Sixth Amendment offers all defendant's a "right to a speedy and public trial by an impartial jury. . . ." U.S. Const. amend. VI.

The *Booker* decision stated the guidelines advisory and the sentencing courts were not strictly bound to them. *See Booker*, 543 U.S. at 244. "[A] sentencing court may base a sentence on acquitted conduct 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); *see United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008). Every circuit that has considered the question, of whether the Sixth Amendment is violated when basing a sentence on acquitted conduct, has determined that there is no violation of the Sixth Amendment when basing a sentence on acquitted conduct. *Dorcely*, 454 F.3d at 371-72 (enumerating cases from every circuit who has considered the instant question).

A sentencing court's decision will be upheld if the imposed sentence was reasonable. "It is well established that sentences that fall within the Guidelines range are entitled to a presumption of reasonableness . . . it is 'hard to imagine' how we could find [Petitioners'] below-Guidelines sentences to be unreasonably high." *United States v. Jones*, 744 F.3d 1362, 1368 (App. D.C. 2014) (citing *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) ("It is hard to conceive of below-range sentences that would be unreasonably high.")

The district court's findings of fact will be upheld unless they are "clearly erroneous." *United States v. Bridges*, 175 F.3d 1062, 1065 (D.C. Cir. 1999). "'Clear error' review is particularly appropriate when the issue involves the application of a clearly-established, well-understood legal standard or principle to a detailed fact pattern cases because 'the fact-bound nature of the decision limits the value of appellate court precedent.'" *United States v. Williams*, 340 F.3d 1231, 1238-39 (11th Cir. 2003)(citing *Buford v. United States*, 532 U.S. 59, 65-6 (2001).

A. The Respondents properly found that the Petitioners' Sixth Amendment rights are not violated by allowing a sentence to be based on conduct of which a jury has acquitted because the sentencing court is not bound by the jury's determination since the jury's finding of guilt simply sets the statutory maximum not the advisory maximum.

Considering acquitted conduct does not violate the Sixth Amendment right to jury. "The court in sentencing, is . . . not bound by the jury's determination . . . but can look to the totality of the circumstances of the crime." *United States v. Agostini*, 365 F. Supp. 530, 534 (S.D.N.Y. 2005). "For Sixth Amendment purposes, the relevant upper sentencing limit established by the jury's finding of guilt is that of the statutory maximum, not the advisory guidelines maximum corresponding to the base level offense." *Settles*, 530 F.3d at 923.

Pursuant to *Booker*, "consideration of acquitted conduct only violates the Sixth Amendment if the judge imposes a sentence that exceeds what the jury verdict authorizes. *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006) (quoting *Booker*, 543 U.S. at 244) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

In the instant case, the jury found the petitioners guilty of distributing crack cocaine. Because of the amount of cocaine each defendant was found guilty on, the statutory maximum sentences for Jones, Thurston, and Ball respectively is thirty years, twenty years, and forty years. In addition, the condition of Ball's offense required a statutory minimum of five years. Respectively, Jones, Thurston, Ball were sentenced to fifteen years, sixteen years and nearly nineteen years. All imposed sentences fell below the statutory maximum, and additionally Ball's imposed sentence fell above his statutory minimum that the jury's determination of guilt has set.

The Petitioners contend, "the upper limit of the judges sentencing discretion is the top of the sentencing guideline range for the convicted offense and any increase above that range based on facts not found by the jury is unconstitutional." *United States v. Ball*, 962 F. Supp. 2d 11, 16 (D.D.C. 2013). However, this argument fails because it is not the upper limit of the sentencing guideline range for the convicted offense, "the upper limit of the sentencing court's discretion is the statutory maximum and that binding precedent allows the use of acquitted conduct to increase the defendant's sentences up to that level." *United States v. Ball*, 962 F. Supp. 2d 11, 20 (D.D.C. 2013). Pursuant to the *Booker* decision, the sentencing court must calculate and consider the applicable guidelines range but is not bound by it because the guidelines are strictly advisory. *See generally Booker*, 543 U.S. at 244; *see also United States v. Dorcely*, 454 F.3d 366, 375-76 (D.C. Cir. 2006).

This Court should uphold the lower court's decision that there was no Sixth Amendment violation by considering conduct, of which a jury had acquitted the petitioners, in the determination of the sentence imposed because the consideration of acquitted conduct in an imposed sentencing did not infringe upon the jury's determination and thus did not encroach on the petitioners' Sixth Amendment right to a trial by jury. The jury sets the statutory range, and

the sentencing court must find a guidelines range and impose a sentence that falls within the guidelines and statutory range. An imposed sentence within the statutory range is given a presumption of reasonableness, thus because each of the petitioners' imposed sentences fell within said range, they were therefore were valid under the Sixth Amendment.

B. Judges have the authority to find facts and consider evidence and testimony that was not published to a jury, therefore the sentencing court may use their discretion based on additional knowledge to prove whether an element of an offense was proved by a preponderance of the evidence does not impose on the petitioners' right to a trial by jury.

"Judicial fact-finding does not implicate the Sixth Amendment, even if it yield[s] above that based on plea or verdict alone." *Bras*, 483 F.3d at 107. The sentencing court has very broad discretion when determining a sentence to be imposed. "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." *See* 18 U.S.C. § 3661; U.S.S.G. § 1B1.4; *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006). "We have held that section 1B1.3 'is certainly broad enough to include acts underlying offenses of which the defendant has been acquitted.'" *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (citing *United States v. Boney*, 298 U.S. App. D.C. 149, 977 F.2d 624, 635 (D.C. Cir. 1992)).

An offense level may be increased as a result of acquitted conduct, but by no more than ten levels. U.S.S.G. § 2A2.2(b)(3); *United States v. Concepcion*, 983 F.2d 396 (2d Cir. 1992).Not only may the sentencing court consider acquitted conduct in calculating the appropriate Guidelines range but it may also consider that conduct in determining the sentence within the range. *United States v. Dorcely*, 454 F.3d 366, 375-76 (D.C. Cir. 2006).

1. The sentencing court properly considered information and testimony that the jury did not hear because it was suppressed as hearsay and adequately determined a proper sentence based on the need for imprisonment.

This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by jury and to increase the sentence in consequence." *Rita,* 551 U.S. at 352. "Judicial control of the juror's knowledge of the case pursuant to the laws of evidence is fundamental to the prevention of bias and prejudice." *Farese v. United State*s, 428 F.2d 178, 179-80 (5th Cir. 1970). "Enhancing a sentence within the statutory range based on facts found by the judge, as opposed to the jury, does not violate the Sixth Amendment," *See Rita*, 551 U.S. at 352. The judge imposes a sentence based on many facts, such as a need to protect the community, the need for punitive actions, and deterrence. *Id.*

The sentencing judge has the authority to enhance a sentence based on factors to determine the need for imprisonment based off information, which a jury is not privy too. A jury could not possibly determine an appropriate sentence because they were not aware of the information, which influenced a need for an enhanced sentence. The jury may only consider what they have knowledge of throughout the course of trial when determining a verdict of guilt. Such information is not offered to the jury at trial in order to give the defendant a fair trial by an impartial jury. *See* U.S. Const. amend. VI; *see also Jones v. Kemp*, 706 F.Supp 1534 (N.D. Ga. 1989). Therefore, the sentencing court properly considered all evidence, including hearsay testimony, which was not admitted at trial so to implement an appropriate sentence based on the conduct found by the court, which was proven by a preponderance of the evidence.

2. *The lower court properly found that judicial fact finding does not violate the Sixth Amendment when the elements of an offense are proven by a preponderance of the evidence, and based on a sentencing judge's position as trial, he is uniquely qualified to impose an enhance sentence.*

Sentencing courts are given broad discretion when calculating an advisory guideline range and imposing a sentence, and the courts' determinations are given a presumption of reasonableness when the imposed sentence is within the statutory range. This Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range. *Booker*, 543 U.S. at 233. "[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 157. "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." *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006).

A major consideration when reviewing the sentence by a sentencing court is "whether a ruling was dependent on a wide range of facts that are more readily available to the district court then the court of appeals, due to the district court's first hand experience trying the case." *United States v. Williams*, 340 F.3d 1231, 1238-39 (11th Cir. 2003) (citing *Buford* 532 U.S. at 65-6. Because of the judge's unique perspective, the reviewing court gives significant deference to the sentencing court's decision. *See id*.The Court considers the substantive reasonableness of the sentences in light of the totality of the circumstances and will uphold the sentence when it is determined the district court did not abuse its broad discretion. *See United States v. Gall,* 552 U.S. 38, 51 (2007); *United States v. Gardellini*, 545 F.3d 1089, 1093 (D.C. Cir. 2008).

The elements to find a conspiracy are: a common goal, interdependence among the participants, and overlapping membership. *United States v. Graham*, 83 F.3d 1466, 1471 (D.C. Cir. 1996). Here, the lower court properly concluded that the common goal was to sell crack at Congress Park, and they were found guilty by a jury on that fact. The interdependence was found

in the form of shared sales, proceeds, and the "protection of the turf against encroachment by outsiders." And finally, the overlap in membership happened across time and among different cliques. All these elements were found to be established by witnesses who were deemed credible and who were also a part of the conspiracy.

Petitioners ask this Court to acknowledge that the Fifth and Sixth Amendment limit judicial fact finding under the Federal Sentencing Guidelines, and that the petitioners' Sixth Amendment rights were violated because of the trial judges' broad discretion to fact-find and their reliance on hearsay. However, the sentencing court's reliance on hearsay poses no procedural problems, as there has been "clear precedent" established that "permits hearsay to be used in sentencing decisions." *United States v. Jones*, 744 F.3d 1362, 1368 (D.C. Cir. 2014) (citing *United States v. Bras* 483 F3d 103, 108 (D.C. Cir. 2007). The conduct alluded to in the testimony was proven by a preponderance of the evidence, and thus a reasonable factor to consider when imposing a sentence. Furthermore, there exists a "standard rule" that there is no violation of the Sixth Amendment when a sentence is enhanced, "within the statutory range, based on facts that were found by a judge, as opposed to a jury." In the instant case, the petitioners do not present any reason for this Court to reconsider this rule. *See United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014); *see also Rita*, 551 U.S. at 352.

This Court should uphold the lower court's determination that there is no Sixth Amendment violation when a sentencing judge finds facts based on evidence not admitted at trial when such evidence proves elements of an offense by a preponderance of the evidence because the jury may not hear all information in order to give a defendant a fair trial, and the sentencing judge has great discretion when determining a sentence because their authority is trusted and

they can better assess the sentence needed than a higher court due to their unique position as an impartial authority at trial.

The arguments made by the Petitioners are weak at best. As the lower court accurately stated: "[n]o Supreme Court majority has ever recognized the validity of such challenges." The petitioners contend that they were denied the right to an impartial jury when the sentencing judge enhanced their sentences based on a conduct they were acquitted for, because the court found facts inconsistent with the jury's determination.

The jury's conviction sets the statutory maximum, and as long as the sentencing judge imposes a sentence below the statutory maximum, the sentence is presumptively reasonable. The court can deviate from the guidelines and impose a sentence greater than the one advised based on facts and information known to the sentencing judge even if not published to the jury as long as they state the reasons for the imposed sentence. In the instant case, Judge Roberts found facts which proved elements of an offense by a preponderance of the evidence and therefore properly imposed a sentence based on that information. Judge Roberts imposed a sentence below the statutory maximum based on his findings, which were consistent with elements of conspiracy, and thus his sentence was proper and did not violate the petitioners' Sixth Amendment right, therefore this Court should uphold the lower court's decision.

CONCLUSION

We ask this Court uphold the District of Columbia Circuit decision and affirm the petitioners' sentence.