

No. 13-10026

SUPREME COURT OF THE UNITED STATES

**Joseph Jones, Desmond Thurston,
and Antuwan Ball**
Petitioner- Appellants,

v.

United States,
Respondent- Appellee.

Appeal from the United States Court of Appeals
for the D.C. Circuit
CASE NUMBER

BRIEF FOR RESPONDENT

TEAM 22

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF ISSUES	4
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS	5
STANDARD OF REVIEW	7
SUMMARY OF THE ARGUMENT.....	7
ARGUMENT.....	9
I. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA BECAUSE THE USED OF ACQUITTED CONDUCT IN SENTENCING DOES NOT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION	9
A. Since acquitted conduct becomes relevant conduct to convicted crimes at sentencing, the use of acquitted conduct at sentencing does not violate the Fifth Amendment to the Constitution’s protection against double jeopardy as well as its guarantee of due process.	10
1. When defendants are convicted of a crime and acquitted of other charges at the same trial, the judge may consider the acquitted charges as relevant conduct of the convicted crime in sentencing and not violate the 5 th Amendment’s protection against double jeopardy.	10
2. The Fifth Amendment’s due process guarantee is not violated when a judge uses acquitted conduct in sentencing so long as the judge finds that the defendant committed those crimes by a preponderance of the evidence.....	12
II. IT DOES NOT VIOLATE THE SIXTH AMENDMENT FOR A FEDERAL DISTRICT COURT TO BASE SENTENCING CALCULATIONS ON ACQUITTED CONDUCT BECAUSE THE U.S. SENTENCING GUIDELINES ARE DISCRETIONARY AND JUDGES MAY FIND FACTS RELEVANT TO SENTENCING.....	15
A. The U.S. Sentencing Guidelines are discretionary, and therefore the district court judge permissibly used acquitted conduct to calculate the relevant guidelines.	17
B. Sentencing based on acquitted conduct does not violate the Sixth Amendment....	20
C. Only substantively unreasonable sentences by a district court will be overturned by an appeals court.	22
III. MANY CIRCUITS HAVE CONSIDERED THE CONSTITUTIONALITY OF USING ACQUITTED CONDUCT IN DETERMINING SENTENCING AND ALL BUT ONE HAVE FOUND THIS PRACTICE TO BE UNCONSTITUTIONAL. ADDITIONALLY, GIVEN THAT FACT, THERE IS A STRONG PUBLIC POLICY INTEREST IN ALLOWING DISTRICT COURT JUDGES TO HAVE THE DISCRETION TO CONTINUE THIS CONSTITUTIONAL PRACTICE.	25
CONCLUSION	26

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	16, 18, 19
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).	16, 17, 19
<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	7, 15
<i>In re Winship</i> , 397 U.S. 358 (1970).....	21
<i>Jones v. United States</i> , 522 U.S. 227 (1999).....	18
<i>McMillian v. Pennsylvania</i> , 477 U.S. 79 (1986).	passim
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	passim
<i>United States v. Watts</i> , 519 U.S. 148 (1997).....	passim
<i>Williams v. New York</i> , 337 U.S. 241 (1949).....	26
<i>Witte v. United States</i> , 515 U.S. 389 (1995).....	12, 26

United States Appeals Court Cases

<i>United States v. Brown</i> , 516 F.3d 1047 (D.C. Cir. 2008).....	13
<i>United States v. Donelson</i> , 695 F.2d 583 (D.C. Cir. 1982).	13
<i>United States v. Gardellini</i> , 545 F.3d 1089 (D.C. Cir. 2008).....	23
<i>United States v. Jones</i> , 744 F. 3d 1362 (D.C. Cir. 2014)	passim
<i>United States v. Mercado</i> , 474 F.3d 654 (9th Cir.2007).	22
<i>United States v. Waltower</i> , 643 F.3d 572 (7 th Cir. 2011)	11
<i>United States v. White</i> , 551 F.3d 381(6th Cir.2008).....	22

United States District Court Cases

<i>United States v. Ball</i> , 962 F. Supp. 2d 11 (U.S. Dist. 2013).....	6, 8, 15, 24, 25
--	------------------

Statutes

21 U.S.C. § 841(b)(1)(B)(iii), (C).	6
USCS § 2119	26
USSG § 6A1.3	13

Constitutional Provisions

U.S. Const. amend. X.	10, 13
U.S. Const. amend. XI.....	23

STATEMENT OF ISSUES

- 1) Under the United States Constitution, does it violate a defendant's rights for a sentencing court bases its sentence upon conduct of which the jury has acquitted him where the judge has found that conduct occurred by a preponderance of the evidence?

- 2) Under the Sixth Amendment to the United States Constitution, does it violate a defendant's rights 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?

STATEMENT OF THE CASE

Petitioners Joseph Jones, Desmond Thurston, and Antwuan Ball were convicted after a jury trial of distributing small quantities of crack cocaine. The jury acquitted all three of conspiracy charges. The district court found at sentencing that all three had engaged in the conspiracy and based the calculations of the applicable U.S. Sentencing Guidelines ranges on that acquitted conduct. Petitioners appealed their sentences to the United States Court of Appeals for the D.C. Circuit on the grounds that it violated their constitutional rights to base sentences on acquitted conduct. The D.C. Circuit affirmed the sentences as constitutional. The Supreme Court granted certiorari on October 14, 2014.

STATEMENT OF THE FACTS

The “Congress Park Crew” was a loose-knit gang that dealt crack cocaine in Washington, D.C. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2013). Eighteen of the members of this group, including appellants, were indicted by a grand jury in 2005 for narcotics and racketeering charges. *Id.* The grand jury found that for nearly thirteen years, the group conspired to run a crack cocaine market in Congress Park. *Id.* Eleven of the coconspirators accepted guilty pleas, one was convicted at a separate trial, and appellants Thurston, Ball, and Jones preceded to trial in 2007. *Id.*

At the trial, appellants faced charges of crack distribution and participation in a conspiracy to distribute crack cocaine. *Id.* The government’s evidence at trial included recordings of the appellants engaging in the crack cocaine sales as well as testimony from cooperating witnesses that were members of the alleged conspiracy and customers. *Id.* When the jury returned their verdict, the appellants were convicted of the distribution charges and

acquitted of the conspiracy charges. *Id.* However, based on their criminal records, Jones's conviction warranted a maximum sentence of thirty years in prison and Thurston's carried a twenty year maximum in prison. *Id.* Ball faced a minimum of five years and maximum of forty years due to the large amount of crack cocaine involved. *Id. citing* 21 U.S.C. § 841(b)(1)(B)(iii), (C).

When Jones faced sentencing, the district court found by a preponderance of the evidence that his crimes were conducted as part of a common conspiracy to distribute of over 500 grams of crack cocaine. *Id.* Given this finding, the district court determined that the United States Sentencing Guidelines recommended a sentence of 324 to 405 months of imprisonment. *Id.* at 1365-66. The district rendered a sentence of only 180 months. *Id.*

At Thurston's and Ball's sentencing at a different time, the district court determined by a preponderance of the evidence that Thurston's and Ball's crimes were also part of a conspiracy to distribute crack cocaine. Based on that finding and Thurston's conviction, the district court determined Thurston's Guidelines range to be 262 to 327 months imprisonment and Ball's to be 292 to 365 months. *Id.* the district ultimately imposed a sentence of 194 months for Thurston and 225 months for Ball. *Id.*

The defendant's appeal to the Supreme Court of the United States comes after their sentences were affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Id.*, and before that, the United States District Court for the District of Columbia, *United States v. Ball*, 962 F. Supp. 2d 11 (D.C. Cir. 2013).

STANDARD OF REVIEW

The standard of review on appeal of sentencing decisions is abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Appellate courts review sentencing decisions for reasonableness, and will only overturn a sentence that is so substantively unreasonable as to exceed the statutory maximum. *United States v. Booker*, 543 U.S. 220, 261 (2005). Appellate courts may apply a presumption of reasonableness to sentences that fall within the properly calculated United States Sentencing Guidelines range. *United States v. Rita*, 551 U.S. 338, 349 (2007).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Appeals Court for the District of Columbia upholding the sentences of defendants Thurston, Jones, and Ball. The use of acquitted conduct to determine the sentencing range of a defendant does not violate a defendant's constitutional rights. First, this practice does not violate the Fifth Amendment rights of defendants. As long as the court finds that the defendant committed the crimes by a preponderance of the evidence, a sentence rendered using acquitted conduct does not violate the prohibition on double jeopardy or the due process guarantee of the Fifth Amendment. *United States v. Watts*, 519 U.S. 148, 156-57 (1997). Secondly, the use of acquitted conduct to determine a defendant's sentence does not violate the Sixth Amendment to the Constitution. If the sentence imposed by the court is not so substantively unreasonable that it exceeds the statutory maximum, there is no violation of the Sixth Amendment to the Constitution. *United States v. Booker*, 543 U.S. 220, 233 (2005). Neither does it violate the Sixth Amendment for a district court judge to calculate the U.S. Sentencing Guidelines range

based on that acquitted conduct because the Guidelines are discretionary, not mandatory. *Id.* Finally, many circuits have considered this constitutional question and there is no circuit split as to whether using acquitted conduct in sentencing is constitutional and therefore no reason to take this important tool of discretion away from the district courts. *United States v. Ball*, 962 F. Supp. 2d 11, 14-15 (U.S. Dist. 2013).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA BECAUSE THE USED OF ACQUITTED CONDUCT IN SENTENCING DOES NOT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION

This court should affirm the decision of the United States Court of Appeals for the District of Columbia in *United States v. Jones*, 744 F. 3d 1362 (D.C. Cir. 2014) because that court properly found that the sentencing of the defendants based on conduct of which they had been acquitted by a jury does not violate the Constitution.

A defendant does not have his Fifth Amendment or his Sixth Amendment constitutional rights violated when a court sentences him based on conduct of which the jury had acquitted him. So long as the court finds that the defendant committed the crimes by a preponderance of the evidence, a sentence rendered using acquitted conduct does not violate the prohibition on double jeopardy or the due process guarantee of the Fifth Amendment. *United States v. Watts*, 519 U.S. 148, 156-57 (1997). Since the facts being used at sentencing are relevant to the crime of which the defendants were convicted, no jeopardy has attached to those facts despite the acquittal. *Watts* makes clear that any relevant conduct can be considered at sentencing without violating double jeopardy. *Id.* at 156-57. The due process protection within the Fifth Amendment is also not violated through the use of this sentencing practice because acquitted charges do not equate to a complete rejection of the facts related to that charge. When the judge is still able to find those facts to be true by a preponderance of the evidence, a defendant's due process rights are still being protected with that standard of proof. *Id.* at 155. For these reasons, no constitutional violation occurs when a district judge uses acquitted conduct to calculate a sentence.

A. Since acquitted conduct becomes relevant conduct to convicted crimes at sentencing, the use of acquitted conduct at sentencing does not violate the Fifth Amendment to the Constitution's protection against double jeopardy as well as its guarantee of due process.

When a sentencing judge considers acquitted conduct as relevant conduct to a convicted crime for purposes of sentencing, the defendant's constitutional right against double jeopardy and his constitutional guarantee to due process are not violated. Thus, when the defendants in this appeal had their sentences based in part on charges of conspiracy of which they were acquitted, their Fifth Amendment rights were not violated. First, their protection against double jeopardy was not violated because the acquitted conduct is not the basis of the sentence but rather relevant conduct to the convicted crime, which is the basis of the sentence. Defendants do not have their protection against double jeopardy violated when the sentence for a crime of which they are convicted is based on that convicted crime and its relevant conduct. *Watts*, 519 U.S. at 156-57. Secondly, the Fifth Amendment's guarantee of due process is similarly not violated when facts stemming from acquitted conduct are found by a sentencing judge by a preponderance of the evidence. *Id.* at 155. Since an acquittal by a jury is not a rejection of those facts as not true and discretion has been given to sentencing judges to use those facts so long as they are found by a preponderance of the evidence. *Id.*

1. When defendants are convicted of a crime and acquitted of other charges at the same trial, the judge may consider the acquitted charges as relevant conduct of the convicted crime in sentencing and not violate the 5th Amendment's protection against double jeopardy.

The protection against double jeopardy in the Fifth Amendment to the Constitution is not violated when a district court judge at sentencing considers acquitted conduct. The Fifth Amendment provides, in part, that no person shall be "subject for the same offence to be

twice put in jeopardy of life or limb.” U.S. Const. amend. X. When a defendant is convicted of at least one crime, the other acquitted crimes are not the basis for the sentence but they instead become relevant conduct of the convicted crime. *United States v. Waltower*, 643 F.3d 572, 574 (7th Cir. 2011) *citing* *Watts*, 519 U.S. at 156-57. When a defendant is being punished for the crime he did commit and of which he was convicted, the sentencing guidelines allow judges to consider relevant conduct to the convicted crime without it being considered. *Watts*, 519 U.S. at 156-57. Therefore, the defendant’s right against double jeopardy is not violated because he is being punished for a crime of which he was convicted using permissible relevant conduct to determine the sentence. *Id.*

Acquitted conduct can be considered relevant conduct when it is related to charge for which a defendant is convicted. *Id.* at 153-54. In *Watts*, a jury of possessing cocaine with intent to distribute convicted the defendant but the jury acquitted him of using firearms in relation to this drug offense. *Id.* at 149-50. However, despite the acquittal on that charge, the District Court determined that the defendant possessed the firearms in connection with his drug offense. *Id.* Thus, *Watts* concludes that if the judge determines that conduct was so closely tied to the charge of which the jury convicted the defendant, it is relevant to the sentencing and is permissibly considered by that judge.

It is long-held precedent by this Court that sentence enhancements based on relevant conduct, but that are not elements of any convicted crime do not violate the Constitution. *McMillian v. Pennsylvania*, 477 U.S. 79, 93 (1986). Defendants commonly argue that double jeopardy is violated when the court considers acquitted conduct as relevant conduct for purposes of sentencing. Yet, this Court has held that when a sentence is based on acquitted conduct, the defendant is not being subjected to punishment for the crimes of which he was

acquitted. *Watts*, 519 U.S. at 153-54. In fact, the defendant is being “punished only for the fact the present offense was carried out in a manner that warrants increased punishment.” *Witte v. United States*, 515 U.S. 389, 403 (1995). In total, when the defendant’s acquitted conduct still relates to the offense of which he was convicted, the acquitted conduct essentially becomes information that can be properly considered for sentence enhancements.

The case presently on appeal to this Court provides a clear example of acquitted charges being properly considered as relevant conduct at the time of sentencing. The defendants in this case were charged with several counts of conspiracy and narcotics distribution. *Jones*, 744 F.3d at 1365. The jury returned convictions on the distribution charges and acquittals on the conspiracy charges. *Id.* At sentencing, the district court considered the witness testimony from trial that gave rise to the conspiracy charges and found that the distribution charges, of which they *were* convicted, were so closely connected to a common scheme that a conspiracy was present. *Id.* The defendants were being punished for the distribution charges that were carried out in a manner that involved a conspiracy and this consideration by a sentencing judge is properly allowed under cases like *Witte* without violating the double jeopardy protection from the Fifth Amendment. *Witte*, 515 U.S. at 403.

2. The Fifth Amendment’s due process guarantee is not violated when a judge uses acquitted conduct in sentencing so long as the judge finds that the defendant committed those crimes by a preponderance of the evidence.

When a district court uses acquitted conduct in calculating a sentence, the sentencing judge must find that the acquitted conduct was proven by a preponderance of the evidence. *Settles*, 530 F.3d at 923. So long as the conduct is proved to the court by the preponderance of the evidence standard, there is no violation of the of the Fifth Amendment’s guarantee of

due process. *See Id.* and *Watts*, 519 U.S. at 156-57; *United States v. Brown*, 516 F.3d 1047 (D.C. Cir. 2008). Therefore, when the sentence is based on acquitted conduct, there is no violation of the due process guarantee of the Fifth Amendment when the district court finds that the acquitted conduct was proven by a preponderance of the evidence.

The Fifth Amendment to the United States Constitution provides that no person will “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. X. In the matter of sentencing, this Court has held that the due process rights of a defendant are not violated when a sentencing judge takes into account facts that were introduced at trial even if they were related to other charges. *Watts*, 519 U.S. at 152. Further, it has been held that there is no due process violation when the sentencing judge using facts at trial stemming from acquitted charges. *Id.* (citing *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982)). Many defendants challenge the constitutionality of this practice saying that the promulgation of the federal sentencing guidelines changes the reasoning in *Donelson*. However, *Watts* made it clear that the guidelines did not alter the constitutionality of that judicial discretion. 519 U.S. at 153. *Watts* commented on this question saying “The Guidelines state that it is ‘appropriate’ that facts relevant to sentencing [are] being proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process.” *Id.* at 156 (citing USSG § 6A1.3 and *McMillian*, 477 U.S. at 91-92.)

Facts related to an acquitted charge but that were still heard by the jury are constitutionally allowed to be used at sentencing. When a jury returns a verdict of not guilty on a charge, they have not rejected any facts surrounding that charge and it is not a violation of the due process clause for the judge to use those facts in sentencing when he or she finds

they were proven by a preponderance of the evidence. *Watts*, 519 U.S. at 155. In *Watts*, the defendant had facts and testimony presented against him for the firearm charge of which the jury acquitted him. *Id.* at 157. Yet, because the defendant was convicted of other charges at the same trial, the district court was allowed to consider those facts and testimony because the acquittal does not preclude the district court from finding “by a preponderance of the evidence that the defendant did, in fact, use or carry such a weapon, much less that he simply possessed the weapon in connection with a drug offense.” *Id.* Thus, when the facts of the acquitted conduct can still be proved to a court by a preponderance of the evidence, it is permissible to use those facts at sentencing.

The preponderance of the evidence standard for using acquitted conduct at sentencing satisfies due process because the acquitted conduct is not an element of the offense of which the defendants are being acquitted. Every element of an offense must be proved beyond a reasonable doubt for a jury to convict a defendant guilty of that offense. See *Meachum v. Fano*, 427 U.S. 215, 224 (1976). However, this Court held in *McMillian* that facts relevant only to sentencing must be proven only by a preponderance of the evidence standard. 477 U.S. at 92. This Court has clearly stated that this separation of the standards of proof in conviction and sentencing is not a violation of the Due Process Clause of the Fifth Amendment. *Watts*, 519 U.S. at 148. Once a jury has found a defendant guilty of an offense beyond a reasonable doubt, the sentence for that crime can be enhanced using facts that are not found beyond a reasonable doubt, but by a preponderance of the evidence. *Id.*

Applying the standards set forth in *Watts* and *McMillian*, to the case on appeal, it is clear the district court committed no Fifth Amendment due process violation. Defendants Ball, Thurston, and Jones were all convicted of multiple crack-cocaine sales. *United States v.*

Ball, 962 F. Supp 2d 11, 13. Any criminal conviction necessarily implies that every element of that crime was found beyond a reasonable doubt by the jury. *Meachum*, 427 U.S. at 224. Thus, the first part of the *Watts* test, conviction beyond a reasonable doubt, was satisfied. *Watts*. 519 U.S. at 148. The next step of the test is the sentencing. There, the district court found by a preponderance of the evidence that Jones's and Ball's crimes of possession were part of a common scheme to distribute crack-cocaine and a conspiracy necessarily existed. 744 F. 3d at 1365-66. The sentence was calculated according to the sentencing guidelines for both of the crimes. *Id.* Thus, the second part of *Watts* was satisfied since the sentencing judge used a preponderance of the evidence standard for all relevant conduct considerations. 519 U.S. at 148.

II. IT DOES NOT VIOLATE THE SIXTH AMENDMENT FOR A FEDERAL DISTRICT COURT TO BASE SENTENCING CALCULATIONS ON ACQUITTED CONDUCT BECAUSE THE U.S. SENTENCING GUIDELINES ARE DISCRETIONARY AND JUDGES MAY FIND FACTS RELEVANT TO SENTENCING.

This Court should affirm the D.C. Circuit Court of Appeals because it does not violate the Sixth Amendment for a judge to calculate the United States Sentencing Guidelines based on acquitted conduct. Nor does it violate the Sixth Amendment for a judge to impose a much higher sentence than the Guidelines would otherwise recommend based on that acquitted conduct. This Court should review the district court's sentencing decisions for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Sentences that fall within the Guidelines are presumptively reasonable on appeal. *United States v. Rita*, 551 U.S. 338, 346 (2007).

The second issue before this Court is 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 than the Guidelines would otherwise recommend, based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him. This Court held that the U.S. Sentencing Guidelines are discretionary and excised the part of 18 U.S.C. §3553 that required district courts base sentences on the Guidelines. *United States v. Booker*, 543 U.S. 220 (2005). As such, sentencing judges must determine the statutory maximum and minimum based on the offense of which the defendant was convicted or to which the defendant pleaded guilty. *Id.* Sentencing judges have “broad discretion in imposing a sentence within a statutory range.” *Id.* at 233.

A judge may find factors relevant to sentencing by a preponderance of the evidence without violating the Sixth Amendment. *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). In *McMillan*, the Court held that there was the Sixth Amendment right to a jury trial did not guarantee the right jury sentencing, even where that sentence depends on certain findings of fact. *Id.* However, in *Apprendi v. New Jersey*, 530 U.S. 466, 473 (2000), the Court clarified that any fact that increases the statutory maximum penalty for a crime must be found by a jury, not a by a judge. This meant that while the judge could impose a penalty anywhere within the range that the jury’s verdict permitted, the judge could not find facts that would increase the possible sentence beyond what the facts would allow. Mandatory sentencing regimes in which the judge rather than the jury finds facts that aggravate the sentence beyond what the jury verdict alone would permit violate the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 309 (2004). In *Blakely*, the Court struck down a Washington statute that only permitted a sentence at the top of the range when a judge had found certain facts not found by the jury or admitted by the defendant. *Id.* This case further extended the

holding in *Apprendi* to cover statutes that have maximum sentences that only judge-found facts permit. Under the Sixth Amendment, the relevant statutory maximum is that which is permitted by the jury verdict or by the facts admitted by the defendant in a plea agreement. *See Blakely*, 542 U.S. at 303.

In the present case, this Court should affirm the D.C. Circuit's decision to uphold Petitioners' sentences because they do not violate the Sixth Amendment. The judge found by a preponderance of the evidence that Petitioners had engaged in the conspiracy of which the jury had acquitted them, and used that finding to determine the relative Guideline range. However, this finding did not increase the relevant statutory maximum, it merely increased the discretionary Guidelines range. The district court judge imposed a sentence that was below the relevant statutory maximum that Petitioners might have received. The jury found facts sufficient to authorize the sentence that the district court judge imposed. While the jury verdict alone would have provided for a lower Guideline range, the U.S. Sentencing Guidelines are not a mandatory sentencing regime that binds judges to certain minimum and maximum sentences. It is not a violation of the Sixth Amendment for a judge to base the calculation of the Guidelines on acquitted conduct.

Therefore, because Petitioners sentences do not violate the Sixth Amendment right to a trial by jury, this Court should uphold the sentences imposed by the district court.

A. The U.S. Sentencing Guidelines are discretionary, and therefore the district court judge permissibly used acquitted conduct to calculate the relevant guidelines.

Petitioners' sentences do not violate the Sixth Amendment because the acquitted conduct was used only to increase the discretionary U.S. Sentencing Guideline range, not the

statutory maximum penalty for the crime. The United States Sentencing Guidelines are not mandatory ranges within which a district court judge must sentence a defendant. *Booker*, 543 U.S. at 245. This Court held that 18 U.S.C. §3553(b) violated the Sixth Amendment because it required district court judges to sentence within the applicable guidelines unless a departure from the Guidelines was justified. *Id.* at 259. Judges still must consider the Guidelines as a generally applicable sentencing range for the specific crime alongside the sentencing factors set out in 18 U.S.C. §3553(a). *Id.* However, the calculation of the Guidelines no longer determines the sentence the judge must apply absent a reason for departure. *Id.*

The Sixth Amendment requires that any fact that will increase the possible penalty for a crime beyond the statutory maximum must be treated as an element of the crime. *Apprendi*, 530 U.S. at 476; *See also Jones v. United States*, 522 U.S. 227, 243 (1999). The relevant maximum for Sixth Amendment purposes is the statutory maximum based on the jury verdict alone. *Blakely*, 542 U.S. at 303.

In *Booker*, the district court judge calculated a higher Guideline range based on findings made by a preponderance of the evidence. 543 U.S. at 227. The Court held that the provision that made the United States Sentencing Guidelines mandatory violated the Sixth Amendment because it allowed judges impose sentences longer than the statutory maximum permitted by the jury verdict alone. *Id.* at 235. This, the Court reasoned, violated the *Apprendi* and *Blakely* line of cases. *Id.* The Court acknowledged that judges are free to exercise discretion within the relevant statutory range, and therefore held that the Guidelines would be advisory to allow district court judges to find facts relevant to sentencing that might

increase the guideline range, but would not change the maximum punishment permitted by statute. *Id.* at 233.

In *Apprendi*, the Court held that any fact that increased the statutory maximum punishment for a crime must be proven to a jury beyond a reasonable doubt. 530 U.S. at 476. In that case, the petitioner had been charged with unlawful possession of a firearm and an antipersonnel bomb, and as part of plea agreement the prosecutor asked the court to impose a hate crime sentence enhancer. *Id.* at 469. The Court held that the imposition of this enhanced sentence violated the Sixth Amendment because the sentence enhancer constituted an element of the crime and must therefore be proved to a jury beyond a reasonable doubt. *Id.* at 476.

Several years later in *Blakely*, the Court considered the issue of what constitutes a relevant statutory maximum. For Sixth Amendment purposes, the Court held that the relevant statutory maximum is the maximum sentence that can be imposed on the jury verdict alone. *Blakely*, 542 U.S. at 303. In that case, the petitioner pled guilty to second-degree kidnapping. *Id.* at 299. The relevant Washington statute provided that the judge could sentence beyond the statutory maximum if any of a number of factors were found at sentencing. *Id.* At sentencing, the judge found that the petitioner had acted with deliberate cruelty and imposed a sentence beyond the standard maximum the statute suggested. *Id.* at 300. The Court held that this violated the Sixth Amendment because the judge had based the sentence on facts that were neither found by a jury nor admitted by the petitioner. *Id.* at 305.

Turning to the case at hand, the district court based the calculation of the appropriate guideline range on conduct that the jury had not found beyond a reasonable doubt. However, based on the jury's verdict alone, petitioner Jones could have received a sentence of up to

thirty years, petitioner Thurston could have received a sentence of up to twenty years, and petitioner Ball up to forty years. *Jones*, 744 F.3d at 1365. While the Guidelines range the judge calculated for Jones did exceed the maximum punishment authorized by statute, the Guidelines ranges calculated for Thurston and Ball did not exceed the maximum punishments authorized by statute. *Id.* at 1366.

However, the sentence the judge did impose was below the statutory maximum in each case. *Id.* Even if the judge had calculated a Sentencing Guideline Range that exceeded the statutory maximum, the U.S. Sentencing Guidelines are advisory, not mandatory. The judge would not have been authorized to impose a sentence that exceeded the statutory maximum simply because the relevant Guidelines range exceeded it. The judge did impose a sentence on all three petitioners that varied below each of the Guideline ranges that he calculated. It is clear that the judge properly considered the Guidelines as the Court intended in *Booker*. However, the judge did not impose sentences on the petitioners that violate the Sixth Amendment because the acquitted conduct was used only to increase the U.S. Sentencing Guidelines range, which the judge considered and applied sentences that varied below each Guidelines range. The acquitted conspiratorial conduct was not used to increase the statutory maximum penalty for petitioners. Therefore, Petitioners' sentences do not violate the Sixth Amendment.

B. Sentencing based on acquitted conduct does not violate the Sixth Amendment.

Petitioners' sentences do not violate the Sixth Amendment because courts may permissibly base sentencing decisions on acquitted conduct. It does not violate the Sixth Amendment for judges to base sentencing on acquitted conduct when the judge makes a

finding that the conduct occurred by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum. *See United States v. Watts*, 519 U.S. 148, 156 (1997). The Sixth Amendment guarantees the right to a trial by jury and that proof of guilt beyond a reasonable doubt is needed for a conviction. U.S. Const. amend. VI (right to trial by jury) and *In re Winship*, 397 U.S. 358, 363-64 (1970) (proof beyond reasonable doubt). A judge may find facts relevant to sentencing by a preponderance of the evidence without violating due process. *McMillan*, 477 U.S. at 91. This Court has acknowledged that in some circumstances where facts relevant to sentencing may aggravate the sentence considerably, a finding of clear and convincing evidence may be required, but has never specifically articulated what facts might rise to this level. *Watts*, 519 U.S. at 156.

Factors relevant to sentencing could be found by a preponderance of the evidence without violating due process. *McMillan*, 477 U.S. at 91. The sentencing provision at issue was a finding that the petitioner had been visibly possessing a firearm. *Id.* at 83. The Court held that because this finding merely raised the minimum sentence applicable to the crime and not the maximum, it did not need to be proved to a jury beyond a reasonable doubt. *Id.* at 89. Rather, state legislatures may permissibly prescribe burdens of proof at sentencing, and a finding made by a preponderance of the evidence did not violate due process. *Id.* at 92.

Judges may base sentences on acquitted conduct without violating the Sixth Amendment as long as that conduct is found to have occurred by a preponderance of the evidence and that sentence does not exceed the statutory maximum. *Watts*, 519 U.S. at 156. In *Watts*, both respondents were sentenced based on conduct of which the jury had acquitted them. *Id.* at 150-51. The Court held that an acquittal does not mean that the jury rejects the facts underlying the charge, but merely that the government has failed to prove that charge to

a jury beyond a reasonable doubt. *Id.* at 155. As such, in a future proceeding with a lower standard of proof, like sentencing, those facts may be reconsidered. *Id.* at 156. Therefore, the Court held that judges could consider acquitted conduct at sentencing if they could find that conduct had occurred by a preponderance of the evidence. *Id.*

Subsequent to this Court's ruling in *Booker*, every circuit has held that sentencing based on acquitted conduct does not violate the Sixth Amendment. *See Jones*, 744 F.3d at 1369; *United States v. White*, 551 F.3d 381, 383-4 (6th Cir.2008); *United States v. Mercado*, 474 F.3d 654, 656 (9th Cir.2007). These circuits have all concluded that the holding in *Booker* does not alter the validity of *Watts*. *See White*, 551 F.3d at 383.

This Court should uphold the D.C. Circuit's ruling based on circuit agreement on the validity of the holding in *Watts*. Here, the fact that a jury acquitted petitioners of the conspiracy charges does not mean that the jury rejects the facts underlying those charges. It means only that the government failed to carry its burden of proof on those charges. Therefore, a judge at sentencing can permissibly find by a preponderance of the evidence that the acquitted conduct occurred and use it to determine the appropriate sentence. The district court judge in this case found by a preponderance of the evidence that the Petitioners had engaged in the conspiracy, even though the jury had acquitted them of that charge. This finding did not increase the statutory maximum sentence the judge could impose. Therefore, the finding does not violate the Sixth Amendment and this Court should affirm

C. Only substantively unreasonable sentences by a district court will be overturned by an appeals court.

Under the post-*Booker* regime, a sentencing judge's decision will only be overturned if it exceeds the statutory maximum and is thus substantively unreasonable. *Booker*, 543 U.S.

at 233. In calculating the maximum, the statutory maximum sentence is to be established by the jury's finding of guilt. *Settles*, 530 F.3d at 923. However, that maximum can be calculated using relevant conduct that gave rise to or were integral to the conviction. *Rita*, 551 U.S. at 352. In *Rita*, this Court held that a statutory maximum could be calculated using relevant conduct and as long as the sentence falls beneath the maximum, it is not a violation of the Sixth Amendment, even post-*Booker*. *Id.*

Even if the sentence does not violate the right to jury-found facts from the Sixth Amendment, defendants often argue that sentences can violate the Sixth Amendment if they are substantively unreasonable. This Court held that a reviewing appellate court should not reverse a district court's sentencing only because they find that another district court "might reasonably have concluded that a different sentence was appropriate." *Gall*, 552 at 51. As precedent from this Court and the circuit courts sets forth, a sentence will not be seen as a violation of the Sixth Amendment due to substantive unreasonableness so long as it falls beneath the statutory maximum. *Rita*, 551 U.S. at 369. Further The D.C. Court of Appeals has recently stated that "it will be an unusual case where an appeals court overturns a sentence as substantively unreasonable – as the post-*Rita*, post-*Gall* case law in the courts of appeals shows." *United States v. Gardellini*, 545 F.3d 1089, 1096 (D.C. Cir. 2008). Precedent illustrates the fact that district courts are given great discretion in determining sentences and those sentences will rarely be overturned as substantively unreasonable and in violation of the Sixth Amendment.

Despite the deference given to sentencing judges at the district court level by the appellate courts, defendants may have valid Sixth Amendment challenges when sentences are based on judge-found facts, including acquitted conduct. Defendants in these cases often cite

Justice Scalia's concurrence in *Rita* in which he says that the *Rita* majority "does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict." *Rita*, 551 U.S. at 375. (J. Scalia, concurring). Yet, the *Rita* majority as well as many circuit courts make clear that Justice Scalia's concurrence shall only give rise to a valid Sixth Amendment claim if the acquitted conduct is used to exceed the statutory maximum. *Id.* at 352. If the sentence does not exceed the statutory maximum, the right to challenge the sentence on Sixth Amendment grounds as suggested by Scalia's *Rita* concurrence, will not be fruitful for defendants.

The defendants in the case presently on appeal did not have their Sixth Amendment rights violated when the sentencing judge considered acquitted conduct because the sentences rendered were lower than the statutory maximum and were not substantively unreasonable. Defendant Ball's guideline range was 292 to 365 months imprisonment and he was sentenced to 225 months in prison and 60 months of supervised release. *Ball*, 962 F. Supp. 2d at 13. Defendant Thurston's guideline range was calculated at 262 to 327 months in prison and he was sentenced to 194 months in prison and 36 months of supervised release. *Id.* Finally, defendant Jones's guideline range was 324 to 405 months imprisonment and he was sentenced to 180 months imprisonment and 72 months of supervised release. *Id.*

Each of the defendant's ultimate sentences was below the statutory maximum and below the guidelines range. The defendants here contend that the district court deviated from the "norm" for their convictions. *Id.* at 18. Yet, even if the district court did not sentence according to a supposed norm for these crimes, *Rita* clearly states that an appellate court should apply a presumption of reasonableness to a district court sentence so long as it reflects a proper application of the Sentencing Guidelines. 551 U.S. at 347. Additionally, there is

certainly no constitutional challenge due to a departure from the supposed “norm” when the sentence is facially reasonable under *Rita. Id.* at 352. The district court here applied a sentence that was significantly below both the statutory maximum and the guidelines range and thus, there is no precedent that would allow an appellate court to find these sentences substantively unreasonable. Only sentences that are found to be substantively unreasonable are violations of the Sixth Amendment. *Booker*, 543 U.S. at 233 Therefore, there is no Sixth Amendment violation here and the Court should not vacate the sentences of the defendants in this appeal on those grounds.

III. MANY CIRCUITS HAVE CONSIDERED THE CONSTITUTIONALITY OF USING ACQUITTED CONDUCT IN DETERMINING SENTENCING AND ALL BUT ONE HAVE FOUND THIS PRACTICE TO BE UNCONSTITUTIONAL. ADDITIONALLY, GIVEN THAT FACT, THERE IS A STRONG PUBLIC POLICY INTEREST IN ALLOWING DISTRICT COURT JUDGES TO HAVE THE DISCRETION TO CONTINUE THIS CONSTITUTIONAL PRACTICE.

There is no circuit court that has found a sentence based in part on acquitted conduct to be unconstitutional. Eleven of the thirteen United States circuit courts of appeals have considered the constitutionality of using acquitted conduct to calculate a guideline-based sentence post-*Booker*, and all eleven of them have this practice to be constitutional. *Ball*, 962 F. Supp. 2d at 17. As this brief has laid out, there are several important standards to which a sentencing judge must adhere in order to use acquitted conduct at sentencing. The court must find that the conduct was relevant to the crime of which the defendant was convicted. *Watts*, 515 U.S. 156-57. Next, they must determine that the government established the relevant conduct by a preponderance of the evidence. *Id.* at 149. Finally, the court must render a sentence that does not exceed the statutory maximum for the convicted crime and its relevant conduct so it is not substantively unreasonable. *Booker*, 543 U.S. at 223. This is a strict

procedure and each step ensures that neither the double jeopardy protection of the Fifth Amendment is violated nor that the due process guarantee is infringed, nor the Sixth Amendment's right to a jury trial is dishonored. Since there is no circuit split on this issue and the implementation of the practice is constitutional, there is no reason for the Court to reverse this long-standing practice.

To strike down the practice of using acquitted conduct at sentencing would endanger the important discretion we give to our district court judges to administer justice and to determine the proper treatment of each defendant. Sentence enhancements are a common and important aspect of our criminal justice system. For example, sentence enhancements are codified in federal and state statutes for many crimes. *See e.g.* USCS § 2119, Motor Vehicles (sentence enhanced when serious injury or death results from a motor vehicle theft). Another example is sentencing judges are allowed to take into account a probation report of the defendant prior to sentencing so that he or she may consider a convicted person's past life, habits, conduct, and propensities in order to render a proper sentence for that individual defendant. *Williams v. New York*, 337 U.S. 241, 245 (1949). Facts such as probation reports and uncharged conduct are a tool of district court judges to render proper and individual sentences. Acquitted conduct serves the same purpose and the Constitution clearly allows access to all of those tools by the courts. *McMillian*, 477 U.S. at 93. Today is not the day to take this important tool away from our district courts.

CONCLUSION

It does not violate a defendant's constitutional rights for a judge to base sentencing on acquitted conduct. A judge's finding by a preponderance of the evidence that the acquitted

conduct occurred does not violate the Fifth Amendment because it does not violate either the prohibition on double jeopardy or the due process guarantee. It does not violate the Sixth Amendment for judge to calculate the applicable U.S. Sentencing Guidelines range based on acquitted conduct and impose a higher sentence based on that conduct because it does not increase the potential statutory maximum punishment for the crime. Since there is no constitutional issue with basing sentencing on acquitted conduct, there is no compelling reason to curtail the broad discretion afforded to district court judges at sentencing. For these reasons, this Court should affirm the decision of the D.C. Circuit Court of Appeals and find that Petitioners' sentences are constitutional.

Respectfully submitted,

Team 22