No. 13-10026

In the Supreme Court of the United States

October Term 2014

JOSEPH JONES, DESMOND THURSTON, AND ANTUWAN BALL, *PETITIONERS*

V.

UNITED STATES OF AMERICA, *RESPONDENT*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

Team #3
17th Annual Herbert Wechsler National Criminal Moot Court Competition

QUESTIONS PRESENTED

1. Whether a constitutional violation arises when a sentencing court bases a defendant's sentence upon conduct of which the jury had acquitted him.

2. Whether a federal district court violates the Sixth Amendment when it calculates the applicable United States Sentencing Guideline range to impose a higher sentence than the Guidelines would otherwise recommend based upon its finding that a defendant had engaged in conduct of which the jury acquitted him.

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The opinion of the court of appeals is reported at 744 F.3d 1362. The memorandum and order of the district court is reported at 692 F. Supp. 2d 11.

STATEMENT OF THE CASE

A. Procedural History

This case arises from the United States Court of Appeals for the District of Columbia Circuit. *See United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014). The sentencing judge based, in part, the defendant's sentences on acquitted conduct. *See United States v. Ball*, 962 F. Supp. 2d 11, 21 (D.D.C. 2013). The court of appeals followed this Court's precedent and affirmed the district court's decision, which considered acquitted conduct during sentencing. *See Jones*, 744 F.3d at 1370.

B. Factual History

In 2005, a grand jury charged the defendants, Jones, Thurston, Ball ("petitioners"), with various counts, including narcotics and racketing offenses. *Id.* at 1365. In 2007, the defendant's proceeded with their trial concerning charges related to crack distribution and conspiracy to distribute crack. *Id.* The jury returned a verdict convicting the defendant's with distribution of crack, but acquitted them of conspiracy. *Id.* Jones' conviction carried a maximum sentence of 30 years. *Id.* Thurston's conviction carried a maximum sentence of 20 years. *Id.* Ball's conviction carried a maximum sentence of 40 years, given that he possessed a larger quantity of crack. *Id.*

At sentencing, the sentencing judge determined by a preponderance of the evidence that the petitioners also engaged in conspiracy, resulting in a sentence varying between fifteen to nineteen years. *Id.* Regarding the petitioner's involvement in conspiracy, the sentencing judge

relied on testimony, which established that the petitioners had a common goal to sell crack for a profit. *Id.* at 1367-68. Therefore, the sentencing court found by a preponderance of the evidence that the "crimes were part of a common scheme to distribute crack." *Id.* at 1365. The United States Sentencing Guidelines ("Guidelines") recommended a sentence from 324 to 405 months imprisonment for Jones. *Id.* at 1366. However, the sentencing court imposed a sentence of only 180 months, varying below the Guidelines given the overall severity of the punishments for drug offenses and "considerations related to Jones' background." *Id.* Thurston's and Ball's delayed their sentences due to post-trial motions. *Id.* The sentencing court found that their crimes were part of conspiracy to distribute crack "and that they could foresee that their coconspirators would distribute at least one-and-a-half kilograms of crack." *Id.* The sentencing court calculated Thruston's and Ball's Guidelines range from 262 to 327 months and 292 to 365 months, respectively. *Id.* Like Jones' sentence, the sentencing court reduced Thurston's and Ball's sentence to 194 and 225 months, respectively. *Id.* The sentencing court reduced Thurston's and Ball's sentence "on grounds similar to those given at Jones' sentencing," but the court also reduced their sentence to "remedy any prejudice from the delays in their sentence." *Id.*[1]

The district court held that "the upper limit of a 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." *Ball*, 962 F. Supp. 2d at 19. The defendants allege that their sentences were procedurally and substantively unreasonable and unconstitutionally predicated upon acquitted conduct. *Id.* at 1365. The defendants appealed the district court's sentence. *Id.* at 1366.

[1] Notwithstanding the acquitted conduct, the Guideline ranges for the petitioners would have been between 27 and 71 months.

The court of appeals noted that a sentencing judge may rely on acquitted conduct during sentencing without violating the defendant's Sixth Amendment right to a jury trial. *Jones*, 44 F.3d at 1369. In any event, the court of appeals lawfully held that the sentencing judge imposed a sentence within the statutory range even though he relied on acquitted conduct. *Id.* at 1367. Subsequently, the petitioners petitioned for writ of certiorari in which this Court granted.

SUMMARY OF THE ARGUMENT

The United States Constitution guarantees the right to a jury trial. Every fact that increases a maximum sentence must be presented to a jury. However, there are circumstances in which a sentencing judge may consider acquitted conduct. The sentence imposed must not exceed the maximum statutory sentence, and, at sentencing, the government must prove the acquitted conduct by a preponderance of the evidence.

The petitioners contend that the sentencing judge's consideration of their conspiracy to distribute crack violated their Sixth Amendment right to a jury trial. Nevertheless, the court of appeals justly affirmed the petitioner's sentence.

First, the Sixth Amendment allows a sentencing court to make factual determinates that were not considered by a jury. The statutory maximum sentence is proscribed by the jury's guilty verdict, resulting from the statute of conviction, and not the maximum advisory sentence listed in the Guidelines.

A defendant's Sixth Amendment right to a jury applies in circumstances in which a factual finding will increase a sentence beyond the statutory maximum sentence. The sentence must not exceed the statutory maximum enumerated in the United States Code. A defendant's Sixth Amendment violation arises when the sentence exceeds the statutory maximum outlined in

the statute of conviction. Only then is a trial court bound to present to the jury factual inquiries that will enhance a sentence beyond the maximum sentence.

Supreme Court precedent dictates that judges have authority to exercise discretion to impose a sentence within a statutory range and consider relevant sentencing factors. Sentencing judges still have discretion to impose a just sentence given that the Guidelines are advisory rather than mandatory.

Here, the petitioner's sentences did not exceed the statutory maximum. The court of appeals correctly concluded that the sentencing judge did not abuse its discretion by rendering a sentence not exceeding the statutory maximum.

Second, a defendant's constitutional rights are not violated when a sentencing court relies on acquitted conduct. The government shall prove such conduct by a preponderance of the evidence. In *United States v. Watts*, the Supreme Court held that a sentencing judge may consider uncharged or acquitted conduct so long as the government proves such conduct by a preponderance of the evidence.

Considering acquitted conduct during sentencing does not violate a defendant's Sixth Amendment right. Acquitted conduct is relevant, if not essential, in order to impose an appropriate sentence. Sentencing judges may take into account acquitted conduct, conduct that is not formally charged, or conduct that is not an element of an offense. Furthermore, sentencing judges are not restricted to information only admissible at trial.

The correct standard of proof during sentencing is preponderance of the evidence and not beyond a reasonable doubt. Thus, a lower evidentiary standard at sentencing permits sentencing judges to consider acquitted conduct. In a criminal case, an acquittal does not prevent the

government from relitigating an issue when it is presented in a subsequent hearing with a lower burden of proof.

Watts, which allows sentencing courts to consider acquitted conduct, remains good law. Every circuit court of appeals is in agreement that sentencing judges may consider acquitted conduct so long as the government proves such conduct by a preponderance of the evidence. Post *Apprendi* and *Booker*, every circuit court has upheld *Watt's* validity. Moreover, this Court has denied certiorari in cases that uphold *Watts*, therefore, permitting the usage of acquitted conduct in criminal sentencings.

Here, the sentencing judge evaluated the testimony that established that the petitioner's had a common goal to sell crack for a profit. The testimony proved by a preponderance of the evidence that petitioners engaged in a conspiracy.

Sentencing judges are allowed to consider acquitted conduct during sentencing so long as the acquitted conduct does not impose a sentence that exceeds the statutory maximum sentence and the government proves the acquitted conduct by a preponderance of the evidence. Therefore, the court of appeals was correct in applying this Court's precedent and affirming the petitioner's sentences.

ARGUMENT

I. IRRESPECTIVE OF THE GUIDELINE RANGE, SENTENCING JUDGES MAY BASE A SENTENCE ON ACQUITTED CONDUCT SO LONG AS THE SENTENCE IMPOSED DOES NOT EXCEED THE STATUTORY MAXIMUM SENTENCE ENUMERATED IN THE UNITED STATES CODE

A sentencing court violates a defendant's Sixth Amendment right to a jury trial if the sentence would otherwise be unreasonable in the absence of judicially found facts. *See Rita v. United States*, 551 U.S. 338, 352 (2007) ("[The Supreme Court's] Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a

jury and to increase the sentence in consequence.") (emphasis added). The statutory maximum sentence is proscribed by the jury's findings of guilt, the statute of conviction, and not the maximum advisory Guidelines corresponding to the base offense level. *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008). Therefore, the court of appeals is correct in properly increasing the petitioner's sentence given that the only facts a jury must determine are those that increase the statutory maximum sentence. *See United States v. Hernandez*, 633 F.3d. 370, 373-74 (5th Cir. 2011); *United States v. Treadwell*, 593 F.3d 990, 1017 (9th Cir. 2010); *United States v. Ashqur*, 582, F.3d 819, 814-25 (7th Cir. 2009); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008); *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008); *United States v. Redcorn*, 528 D.3d 727, 745-46 (10th Cir. 2008) (noting that facts a jury must determine are those that increase a sentence beyond the statutory maximum).

A. The maximum penalty is the maximum sentence enumerated in the convicting statute

The legislature established the "statutory maximum" sentence, which, in the federal sentence arena, is enumerated in the United States Code. *See United States v. Grier*, 475 F.3d 556, 565 (3d Cir. 2007) (en banc) *cert denied*, 128 S. Ct. 106 (2007) ("Post-*Booker*, the punishments chosen by Congress in the United States Code determine the statutory maximum for a crime."). For purposes of the Sixth Amendment, the relevant maximum sentence is the statutory maximum punishment and not the maximum advisory sentence in the Guidelines. *See United States v. Booker*, 543 U.S. 220, 223 (2005) (holding that the Guidelines are advisory rather than mandatory). Here, the petitioner's maximum statutory sentences ranged from 20 to 40 years, and the sentences the sentencing court imposed did not exceed 20 years of imprisonment. *See Jones*, 744 F.3d at 1365.

B. A defendant's Sixth Amendment right to a jury trial pertains to circumstances in which a factual finding will increase a sentence beyond the statutory maximum sentence

This Court's precedent confirms that the Sixth Amendment right to a jury trial is applicable when the jury must consider facts that would increase a sentence beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Booker*, the Supreme Court held that the mandatory Guidelines violate the Sixth Amendment and the Guidelines are advisory. 543 U.S. at 245. Post-*Booker*, circuit courts have unanimously held that the relevant statutory maximum that judges may impose is the maximum penalty authorized by the United States Code. *See United States v. Sexton*, 512 F.3d 326, 330 (6th Cir. 2008) *cert. denied*, 129 S.Ct. 304 (2008) (finding that the maximum sentence is measured by the statute of conviction, rather than the Guidelines range); *Settles*, 530 F.3d at 923 (explaining that the statutory maximum is established by a jury's findings of guilt); *see generally United States v. Jimenez*, 498 F.3d (1st Cir. 2007); *United States v. Smith*, 413 F.3d 778 (8th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005); *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

The court of appeals holding is not contrary to Supreme Court law outlined in *Apprendi* given that any conduct, including acquitted conduct, may be accounted for in sentencing so long as it would not increase a sentence beyond the statutory maximum. 530 U.S. at 490. Only facts that impose a sentence beyond the statutory maximum must be presented before a jury and proven beyond a reasonable doubt. *See id.* Here, the judge sentenced Jones to 15 years when the statutory maximum sentence was 30 years. *Jones*, 744 F.3d 1365-66. The judge sentenced Thurston to about 16 years when the statutory maximum sentence was 20 years. *Id.* Finally, the judge sentenced Ball to about 18 years when the statutory maximum was 40 years. *Id.* Although the Guidelines may have recommended a lower sentence, absent acquitted acts, nothing prohibits

a sentencing judge from rendering a sentence so long as the sentence does not exceeding the statutory maximum and is reasonable in light of the circumstances. *See Apprendi*, 530 U.S. at 490. Here, the court of appeals correctly concluded that the sentencing court did not rely on facts that would impose a sentence beyond the statutory maximum. *See Jones*, 744 F.3d 1366-67.

C. Judges have authority to exercise discretion and impose a sentence within a statutory range not to exceed the statutory maximum sentence

This Court has "never doubted the authority of a judge to exercise broad discretion to impose a sentence within a statutory range." *Booker*, 543 U.S. at 223. This Court held that the Guidelines are advisory and no longer mandatory, allowing judges to "exercise broad discretion in imposing a sentence within a statutory range." *Id.* at 223, 243-44. Further, congress did not place a limitation on information "a court of the United States may receive and consider for purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. The statutory text allows judges to consider prior acquitted conduct among other facts in sentencing. *See id.* Acquitted conduct does not necessarily prove innocence, therefore, a sentencing judge is justified in considering acquitted conduct during sentencing. *See id.*

Further, this Court has continuously reaffirmed the notion of judicial discretion during sentencing. *See Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013) (explaining that, within statutory limits, "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"); *Dillon v. United States*, 560 U.S. 817, 828-29 (2010) (noting that exercising discretion within a statutory range does not contravene the Sixth Amendment, even if the sentence is based on judge-made facts); *Apprendi*, 530 U.S. at 481 (stating that nothing in this Court's history "suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute"). Lastly, the Sixth Amendment does not forbid judges

considering factual matters, not considered by a jury, to impose a sentence. *See Rita*, 551 U.S. at 352. Thus, the court of appeals was correct in affirming the sentencing judge's decision to consider acquitted conduct and render a sentence within the statutory range because the sentences were not unreasonable. *See Rita*, 551 U.S. at 352; *Jones*, 744 F.3d at 1369-70.

II. A SENTENCING COURT'S RELIANCE ON ACQUITTED CONDUCT DOES NOT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHTS SO LONG AS THE GOVERNMENT PROVES THE ACQUITTED CONDUCT BY A PREPONDERANCE OF THE EVIDENCE

This Court, along with the United States Constitution, does not prohibit a sentencing court from relying on acquitted conduct during sentencing. *See United States v. Watts*, 519 U.S. 148, 156-57 (1997) (*per curiam*) (finding that a sentencing judge may consider uncharged or acquitted conduct so long as the government proves such conduct by a preponderance of the evidence) (emphasis added). When conduct satisfies the preponderance of the evidence standard and the sentence does not exceed the statutory maximum for the crime, there are no Sixth Amendment concerns. *Id.* Here, the court of appeals did not err in affirming the district court's sentence that relied on acquitted conduct. *See Jones*, 744 F.3d at 1370. As such, this Court should affirm the court of appeals decisions given that the sentencing court found by a preponderance by the evidence that the petitioners engaged in a conspiracy to distribute crack. *See Watts*, 519 U.S. at 157-57; *Jones*, 744 F.3d at 1370.

A. A sentencing court's reliance on acquitted conduct does not violate a defendant's Sixth Amendment right to a jury trial

Precedent does not preclude a sentencing judge from considering acquitted conduct during sentencing so long as the government proves acquitted acts by a preponderance of the

evidence. *See Watts*, 519 U.S. 148, 157.[2] The *Watts* Court allows sentencing judges to consider acquitted conduct mentioning that it is "[h]ighly relevant – if not essential – to [the judge's] selection of an appropriate sentence" because sentencing judge's can inquire about the defendant's life and characteristics. *Id.* at 151-52 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Nichols v. United States*, 511 U.S. 738, 747 (1994) (noting that sentencing courts have constitutionally considered a defendant's past criminal behavior that did not result in a conviction.) There is no limitation concerning information inquiring "the background, character, and conduct of a person convicted of an offense…for the purpose[s] of imposing an appropriate sentence." 18 U.S.C. 3661.

Furthermore, conduct that is not formally charged or is not an element of the offense listed in the conviction may enter into the determination of the applicable guideline range. U.S.S.G. § 1B1.3 cmt. backg'd. With respect to certain offenses, the Guidelines, in section 1B1.3(a)(2), requires sentencing courts to consider all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. *Watts*, 519 U.S. at 149. "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, a court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law." *Watts*, 519 U.S. at 149. Thus, this Court in *Watts* explicitly stated that a sentencing court is permitted to consider past conduct that may reflect upon the defendant's character, and more importantly, this information may be considered without limitation. *See id.*

[2] While *Watts* dealt with a Fifth Amendment double jeopardy challenge, nonetheless, the *Watts* Court concluded that an acquittal does not preclude a judge from considering such conduct; and federal courts have applied this analysis in Sixth Amendment challenges. *See White*, 551 F.3d at 391-92.

Moreover, sentencing judges are not restricted to information that is admissible at trial. *See* 18 U.S.C. § 3661; *see also* 18 U.S.C. § 3553(a) (providing that sentencing courts should consider "the history and characteristics of the defendant" and "the need for the sentence imposed ... to protect the public from further crimes of the defendant"). The court in *United States v. Vigil* held that this Court and the court of appeals for the Tenth Circuit allows judges to consider the totality of defendant's actions, even those acts which were charged and not proven beyond a reasonable doubt, if the Government proved by a preponderance of the evidence that such acts occurred. 476 F. Supp. 2d 1231, 1239 (D.N.M. 2007). The court in *Vigil* relied on the United States Code, section 3553(a) as a guideline, which requires sentencing judges to consider factors, such as looking to the acquitted conduct. *Id.* In addition, this section calls upon judges to look at the nature and circumstance of the offense, the fact that the defendant was acquitted of all but one of the charges, and whether the defendant has a criminal history allowing for a variance from the Guidelines sentencing range. *Id.*

In resolving disputed facts, during sentencing, the Guidelines provide adequate measures that ensure due process. *See* U.S.S.G. § 6A1.3. "When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an opportunity to present information to the court regarding that factor." *Id.* Therefore, sentencing courts are free to consider relevant information disregarding its admissibility under the rules of evidence pertinent at trial. *See id.* A judge can rely on relevant information so long the "information has sufficient indicia of reliability to support its probable accuracy." *Id.*

Here, the lower courts were not bound to consider only evidence admissible at trial; therefore, sentencing judges may consider evidence regarding a defendant's history and background. *See Watts*, 519 U.S. at 149. Thus, the sentencing judge noted that the petitioners

engaged in a common scheme to distribute crack, which parallels to the underlying conviction to possess crack. *See Jones*, 744 F.3d at 1367. Thus, the acquitted conduct were part of the same course of conduct or common scheme as the offense of conviction. *See Watts*, 519 U.S. at 149; Jones, 744 F.3d at 1367.

B. The appropriate evidentiary standard at sentencing is preponderance of the evidence

Established Supreme Court precedent stands for the proposition that acquitted conduct is admissible during sentencing. A lower evidentiary standard at sentencing permits sentencing judges to rely on acquitted conduct. *Watts*, 519 U.S. at 154. Sentencing courts have considered a varied amount of information without the procedural protections accorded in a criminal trial, including criminal conduct that may be the subject of a subsequent prosecution. *Witte v. United States*, 515 U.S. 389, 399-401 (1995).

Moreover, the *Watts* Court explained that the different standards of proof governing trials and sentencings. Acquittals may indicate that the jury cannot convict because the defendant was not guilty beyond a reasonable doubt. *See Watts*, 519 U.S. at 154 (requiring proof of relevant facts during sentencing by a preponderance of the evidence and that this evidentiary standard satisfies due process). Further, an acquittal may be an acknowledgement that the government failed to prove one of the elements beyond a reasonable doubt. *Id.* at 155. In a criminal case, an acquittal does not prevent the government from relitigating an issue when it is presented in a subsequent hearing governed by a lower burden of proof. *Dowling v. United States*, 493 U.S. 342, 349 (1990). As the court in *United States v. Grubb* held, a sentencing court may consider uncharged or acquitted behavior so long as that behavior was found to be true by a preponderance of the evidence. 585 F.3d 793, 795 (4th Cir. 2009) *cert. denied* 130 S.Ct. 1923 (2010). It does not violate the Sixth Amendment for the sentencing judge, not the jury, to

determine the existence of those facts because, as far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence in the absence of special facts. *See Id.*

Here, the lower courts agreed that the petitioners were part of a conspiracy to distribute crack by a preponderance of the evidence. *Jones*, 744 F.3d at 1367. The sentencing judge evaluated the testimony that established that the petitioners had a common goal to sell crack for a profit. *Id.* at 1367-68. The testimony proved by a preponderance of the evidence that petitioners engaged in a conspiracy. *Id.* In sum, the court of appeals rightfully considered relevant information within the appropriate standard of proof, a preponderance of the evidence, during sentencing and affirmed a just sentence. *See Watts*, 519 U.S. at 154; *Jones*, 744 F.3d at 1367.

C. *Watts* remains good law

Circuit courts, presented with the issue of whether acquitted conduct is admissible in sentencing hold that sentencing judges may consider acquitted conduct so long as the government proves the acquitted conduct by a preponderance by the evidence. *See United States v. Marquez*, 699 F.3d 556, 562-63 (1st Cir. 2012) (noting that there is a lower standard of proof during sentencing allowing sentencing judges to consider acquitted conduct); *Settles*, 530 F.3d at 923 (upholding acquitted conduct for sentencing purposes pursuant to a lower evidentiary standard); *United States v. Horne*, 474 F.3d 1004, 1006-07 (7th Cir. 2007) (supporting the usage of acquitted conduct for a sentence enhancement); *United States v. Mercado* , 474 F.3d 654, 657 (9th Cir. 2007) (supporting the admissibility of acquitted conduct in sentencings).

Notwithstanding *Apprendi* and *Booker*, every circuit court has upheld *Watt's* validity. *See United States v. Mustafa*, 695 F.3d 860, 862 (8th Cir. 2012) ("[D]ue process never requires applying more than a preponderance of the evidence standard for finding sentencing facts."); *United States v. Waltower*, 643 F.3d 572, 575 (7th Cir. 2011) (noting that the Supreme Court did

not overturn *Watts* in light of *Apprendi*); *Grubbs*, 585 F.3d at 799 ("*Booker* did not change the sentencing court's ability to consider uncharged or even acquitted conduct during sentencing."); *Settles*, 530 F.3d at 923 (citing *Watts* as authority Post-*Booker*); *Mercado*, 474 F.3d at 656 ("While the *Watts* holding might have become problematic under a mandatory guideline system, the Court went on to declare that even before the Guidelines federal judges could look to the 'real conduct' of a defendant."); *White*, 551 F.3d at 383 (recognizing "*Watts* continued vitality post-*Booker*"); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) (noting that post-*Booker* law has not changed the use of acquitted conduct so long that it is proven by a preponderance of the evidence); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006) (noting that *Watts* survives *Booker*, and sentencing judges may still consider facts by a preponderance of the evidence, such as facts contradicting jury findings); *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005) ("[W]e do not read *Booker* to undermine the continued validity of the ruling in *Watts*,"); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005) ("Nothing in *Booker* changes [our] analysis. 18 U.S.C. § 3661, which underlay the decision in *Watts*, remains in full force."); *Duncan*, 400 F.3d at 1304-05 ("[N]othing in *Booker* erodes our binding precedent.").

Given the weight of authority, the court of appeals did not abuse its discretion in considering acquitted conduct during the petitioner's sentencing. The court of appeals correctly applied *Watts*, which permits a sentencing judge to consider acquitted conduct in subsequent proceedings, such as sentencing. *See Watts*, 519 U.S. 148, 157. Although petitioners argue that the usage of acquitted conduct during sentencing violates their constitutional rights, precedent dictates that *Watts* remains good law, allowing a sentencing court to consider acquitted conduct to redner a just sentence. Nevertheless, the petitioners still received a constitutionally guaranteed

trial by a jury and a sentence within the approved statutory range. *See Jones*, 744 F.3d at 1365. If the government did not prove by a preponderance of the evidence the conspiracy, then the law does not permit the judge to consider such evidence. *See Watts*, 519 U.S. at 154. However, the acquitted conduct was admissible at sentencing and testimony proved conspiracy to distribute crack by a preponderance of the evidence, which permitted the sentencing judge to increase the petitioner's sentence.

CONCLUSION

For the aforementioned reasons, this Court should affirm the court of appeal's decision that upheld the district court's sentence. Sentencing judges are allowed to take into account acquitted conduct during sentencing so long as the acquitted conduct does not impose a sentence that exceeds the statutory maximum sentence and the government proves the acquitted acts by a preponderance of the evidence.

Respectfully Submitted,

Team 3

March 2, 2015