

No. 13-10026

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Jones, Desmond Thurston,  
and Antwuan Ball,  
Petitioners

v.

UNITED STATES,  
Respondent.

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ON APPEAL FROM THE  
UNITED STATES  
COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR RESPONDENT  
Team 5  
March 9, 2015  
*Counsel for the Respondent*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	6
I. A DEFENDANT’S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED WHEN A DISTRICT COURT JUDGE IMPOSES A SENTENCE BASED ON CONDUCT OF WHICH THE DEFENDANT HAS BEEN ACQUITTED.....	6
A. A Defendant’s Fifth Amendment Right to Due Process is not Violated When Both the Statute and the United States Sentencing Guidelines Support the Consideration of Acquitted Conduct When Determining Sentencing, Provided it is Proven by a Preponderance of the Evidence.....	7
B. There is No Violation of the Sixth Amendment Right to a Trial by Jury when a Sentencing Court Bases a Sentence on Acquitted Conduct of the Defendant.....	10
II. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS PROCEDURALLY REASONABLE AND WAS NOT AN ABUSE OF THE SENTENCING JUDGE’S DISCRETION BECAUSE A SUFFICIENT BASIS IN FACT EXISTED TO SHOW THAT THE DEFENDANTS WERE INVOLVED IN THE CHARGED CONSPIRACY.....	12
A. No Procedural Error was Committed when the Sentencing Judge Calculated and Implemented the Defendants’ Sentences Because the Findings Relied Upon by the Sentencing Court were Not Clearly Erroneous.....	13
B. The District Court did Not Abuse its Discretion in Imposing Sentence Because the Defendants’ Participation in the Conspiracy was Established by the Evidence....	17
CONCLUSION.....	21

## **TABLE OF AUTHORITIES**

### **STATUTES**

18 U.S.C. § 924(a)(2).....	9, 11, 14
18 U.S.C. § 994(1).....	8
U.S.C. § 1001(a).....	18
18 U.S.C. § 3661.....	4, 7, 8, 17
18 U.S.C. § 3553(a).....	5, 13, 14
21 U.S.C. § 841(b)(1)(C).....	<i>passim</i>
U.S.S.G. § 1B1.3(a)(1)(B).....	<i>passim</i>
U.S.S.G. § 1B1.4.....	8, 17
U.S.S.G. § 6A1.3.....	4, 7

### **CASES**

<u>Gall v. United States</u> , 552 U.S. 38 (2007).....	17
<u>McMillan v. Pennsylvania</u> , 477 U.S. 79 (1986).....	6, 8
<u>Nichols v. United States</u> , 511 U.S. 738 (1994).....	6
<u>Rita v. United States</u> , 551 U.S. 338 (2007).....	11
<u>United States v. Ashworth</u> , 139 F.App'x, 525 (4th Cir. 2005).....	9, 10
<u>United States v. Ayala-Vazquez</u> , 751 F.3d 1 (1st Cir. 2014).....	17
<u>United States v. Booker</u> , 543 U.S. 220 (2005).....	<i>passim</i>
<u>United States v. Boney</u> , 977 F.2d 624 (D.C. Cir. 1992).....	7, 18
<u>United States v. Bras</u> , 483 F.3d 103 (D.C. Cir. 2007).....	11
<u>United States v. Brockenbrough</u> , 575 F.3d 726 (D.C. Cir. 2009).....	13
<u>United States v. Cage</u> , 451 F.3d 585 (10th Cir. 2006).....	17

<u>United States v. Carty</u> , 520 F.3d 984 (9th Cir. 2008).....	17
<u>United States v. Culver</u> , 598 F.3d 740 (11th Cir. 2010).....	17
<u>United States v. Duncan</u> , 400 F.3d 1297 (11th Cir. 2005).....	11
<u>United States v. Dorcelly</u> , 454 F.3d 366 (D.C. Cir. 2006).....	11, 18, 19
<u>United States v. Edwards</u> , 427 F.Supp.2d 17 (D.C. 2006).....	11
<u>United States v. Fitch</u> 659 F.3d 788 (9th Cir. 2011).....	11, 13, 17
<u>United States v. Gonzalez</u> , 765 F.3d 732 (7th Cir. 2014) .....	13
<u>United States v. Gordon</u> , 510 F.3d 811 (8th Cir. 2007).....	14
<u>United States v. Hall</u> , 473 F.3d 1295 (10th Cir. 2007).....	17
<u>United States v. Hargrove</u> , 701 F.3d 156 (4th Cir. 2012).....	12
<u>United States v. Jones</u> , 744 F.3d 1362 (D.C. Cir. 2014).....	<i>passim</i>
<u>United States v. Kane</u> , 639 F.3d 1121 (8th Cir. 2011).....	16
<u>United States v. Menendez</u> , 600 F.3d 263 (2d Cir. 2010).....	17
<u>United States v. Mercado</u> , 474 F.3d 654 (9th Cir. 2007).....	8, 12
<u>United States v. One Assortment of 89 Firearms</u> , 465 U.S. 354 (1984).....	7
<u>United States v. Pulley</u> , 601 F.3d 660 (7th Cir. 2010).....	13
<u>United States v. Settles</u> 530 F.3d 920 (D.C. Cir. 2008).....	<i>passim</i>
<u>United States v. Spangle</u> , 626 F.3d 488 (9th Cir. 2010).....	13
<u>United States v. Watts</u> , 519 U.S. 148 (1997) .....	<i>passim</i>
<u>United States v. Worex</u> , 420 F.App’x 546 (6th Cir. 2011).....	19, 20

## **QUESTIONS PRESENTED**

- I. Did the United States Court of Appeals for the District of Columbia Circuit properly find that none of the defendants' constitutional rights were violated when the District Court based its sentence upon conduct of which the jury had acquitted him?
- II. Did the United States Court of Appeals for the District of Columbia Circuit properly uphold that the Sixth Amendment is not violated when a District Court calculates the applicable U.S. Sentencing Guidelines range and imposes a higher sentence than the Guidelines would otherwise recommend, based upon its findings that a defendant had engaged in conduct of which the jury had acquitted him?

## **STATEMENT OF THE CASE**

In 2005, a grand jury charged the defendants, Joseph Jones, Desmond Thurston, and Antwuan Ball, and fifteen named coconspirator with narcotics and racketeering offenses. United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). In February of 2007 the defendants proceeded to trial and on November 28, 2007, the jury returned a verdict acquitting the defendants of the alleged conspiracy, but convicting them of distribution of crack cocaine. Id. Jones was sentenced in May of 2008, but Thurston and Ball's sentences were postponed pending the resolution of a post-trial motion. Id. at 429. That motion was filed in May of 2008, but not resolved until July 2010. Thurston was sentenced in October of 2010 and Ball was sentenced in March of 2011. Id. The defendants appealed their sentences and this appeal ensued. In March of 2014, the United States Court of Appeals for the District of Columbia Circuit heard the case and affirmed the sentences imposed by the District Court. On October 14, 2014, the Supreme Court of the United States denied Certiorari; however, this Court on January 15, 2015, reversed this denial, and granted the Appellants' Petition for Writ of Certiorari. R. at 2.

## **STATEMENT OF FACTS**

In the present case, three defendants, Joseph Jones, Desmond Thurston, and Antwuan Ball, were charged with distribution of narcotics as well as with conspiracy to distribute for their roles as coconspirators in the Congress Park Crew, "a loose-knit gang that ran a market for crack cocaine in the Congress Park neighborhood of Southeast Washington, D.C., for nearly thirteen years." Jones, 744 F.3d at 1365. At trial the government introduced, "recordings of appellants engaging in sales of crack and testimony from several cooperating witnesses, including members of the alleged conspiracy and individuals who had purchased crack from appellants."

Id. Nevertheless, the jury acquitted the defendants of the conspiracy charges, convicting each of them only for distributing crack cocaine. Id.

At sentencing, based on this evidence, the sentencing judge found that ample evidence in the record exists to establish “all three attributes of a single conspiracy: a common goal of selling crack for profit in Congress Park; interdependence in the forms of shared sales proceeds and the protection of turf against encroachment by outsiders; and overlap in membership both across time and among the different cliques.” Id. at 1367-68. Despite the jury’s acquittal on the charged conspiracy, the sentencing judge found by a preponderance of the evidence that the defendants had engaged in the charged conspiracy and used the ‘relevant conduct’ sentencing enhancement provided for in U.S.S.G. §1B1.3 as a basis to raise the defendants’ Guideline sentence ranges. Id. at 1368. Accordingly, the judge adjusted the defendants’ Guideline ranges from an initial twenty-seven to seventy-one month term of imprisonment to a term of 324 to 405 months for Jones, a term of 262 to 327 for Thurston, and a term of 292 to 365 for Ball. Id. at 1365.

The sentencing judge foresaw sales of over 500 grams of crack by Jones’s co-conspirators and foresaw sales of at least one-and-a-half kilograms of crack by Thurston and Ball’s co-conspirators. Id. at 1365-66. Thus, “[b]ased on appellants’ criminal records, Jones’s conviction carried a maximum sentence of thirty years’ imprisonment and Thurston’s a maximum of twenty years. Because of the larger quantity of crack involved, Ball’s conviction carried a minimum of five years and maximum of forty years.” Id. at 1365; see also 21 U.S.C. § 841(b)(1)(B)(iii), (C) (2010).

However, the judge then, taking into account “concerns about the overall severity of punishments for crack offenses,” sentenced the defendants to a term of imprisonment far below the statutory maximum of twenty years, and in fact imposed even lower sentences than the advisory

Guidelines recommended. Id. The judge imposed a sentence of 180 months for Jones, 194 months for Thurston, and 225 months for Ball. Id. at 1365; see also 21 U.S.C. § 841(b)(1)(C).

### **SUMMARY OF THE ARGUMENT**

A sentencing Court does not violate a defendant's Fifth Amendment due process rights when it uses acquitted conduct in determining the defendant's sentence. Section 6A1.3 of the United States Sentencing Guidelines states. "It is appropriate that facts relevant to sentencing be proved by a preponderance of the evidence. In the present case, the Court found that although the defendant was acquitted of a drug related conspiracy charge, the conduct was proven by a preponderance of the evidence standard. A jury has only decided that there still exists a reasonable doubt. Thus, the acquitted conduct was properly considered in determining the defendant's sentence.

A sentence which was based on considered acquitted conduct does not violate a defendant's Sixth Amendment right to a jury trial. Section 3661 of Title 18 of the U.S.C. states, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Here, the judge in the sentencing Court determined the defendant's sentence based not only on the convicted crimes, but the manner in which the crime was committed. This finding by the sentencing judge does not punish the defendant for crimes he did not commit, and thus, does not violate the defendant's right to a jury trial under the Sixth Amendment.

There is no limitation on a judge's ability to consider a defendant's background, criminal history, or conduct, so long as the sentence that is imposed is procedurally and substantively reasonable. A sentence is procedurally reasonable when it has been properly calculated, meaning



that the judge has properly calculated the advisory Guidelines range, considered the §3553(a) factor, relied on established facts, treated the advisory Guidelines as mandatory, and properly explained the chosen sentence and the Court's deviation from the advisory Guidelines range.

In the present case, the sentence imposed took into account the advisory Guidelines, was aimed to achieve the goals provided in 18 U.S.C. § 3553(a) (2010), was reasonably based on facts in the record, and was properly calculated and explained; thus, the sentences imposed upon Jones, Thurston, and Ball were procedurally reasonable. A sentence is substantively reasonable when the District Court has not abused its discretion. A Court has not abused its discretion when its sentence, by the totality of the circumstances, the sentence has been based on reasonably proven facts and achieves the sentencing goals of punishment, deterrence, public protection, and rehabilitation. Because the totality of the circumstances show by more than a preponderance of the evidence that the defendant's conduct met all the elements of conspiracy, the sentence imposed here was substantively reasonable. For the reasons outlined above and presented below, we respectfully request that this Court affirm the decision of the Court of Appeals for the District of Columbia Circuit and uphold the District Court's sentence as constitutional.

## ARGUMENT

### **I. A DEFENDANT'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED WHEN A DISTRICT COURT JUDGE IMPOSES A SENTENCE BASED ON CONDUCT OF WHICH THE DEFENDANT HAS BEEN ACQUITTED.**

The defendant's constitutional rights were not violated when the United States Court of Appeals, District of Columbia Circuit affirmed the District Court's sentencing of the defendants considering the conspiracy charge in which the defendants were acquitted of by the jury. A sentencing Court may consider a defendant's past criminal behavior, even if no conviction resulted from that behavior, without violating due process. Nichols v. United States, 511 U.S. 738, 747 (1994). When a sentence is based partly on acquitted conduct, the defendant is not being punished for a crime that was not committed. Instead the defendant is being punished for the manner in which the convicted crime was committed. United States v. Watts, 519 U.S. 148 (1997). Moreover, provided the sentencing Court finds that the acquitted conduct occurred by a preponderance of the evidence, a defendant may be sentenced based on this finding without violating the defendant's right to due process. McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986). Further, a defendant's Sixth Amendment right to a jury trial is not violated when the acquitted conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime. United States v. Settles, 530 F.3d 920, 923-94 (D.C. Cir. 2008). For this Court to limit a judge's discretion in considering highly relevant criteria in sentencing would be contrary to public policy and go against statute and the United States Sentencing Guidelines. Justice is best served when a judge is able to look into the "real conduct" of a defendant when determining the defendant's sentence. Watts, 519 U.S. at 148.

A. **A Defendant's Fifth Amendment Right to Due Process is not Violated When Both the Statute and the United States Sentencing Guidelines Support the Consideration of Acquitted Conduct When Determining Sentencing, Provided it is Proven by a Preponderance of the Evidence.**

It is well established that a defendant's Fifth Amendment due process is not violated when a sentencing Court considers acquitted conduct in determining the sentence. 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 found by the judge. Watts, 519 U.S. at 156 (holding that the defendant although acquitted of possessing a firearm in relation to his convicted charge of a drug offense could be sentenced considering the acquitted conduct). Moreover, an "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984). It has been established in United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992), that "[a] not guilty verdict establishes only that the government has not proved each element of the offense beyond a reasonable doubt. It does not rule out the possibility that, more likely than not, the defendant engaged in the conduct." Boney, 977 F.2d at 644.

Both the statute and the sentencing guidelines support the Court in considering a defendant's acquitted conduct in determining a sentence. Section 3661 of title 18 of the United States Code, in pertinent part states, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Further, the Guidelines state that it is appropriate that facts relevant to sentencing be proved by a preponderance of the evidence. See U.S.S.G. § 6A1.3 (comment)(2004). Additionally, this Court has held that application of the preponderance standard at sentencing general-

ly satisfies due process. McMillan, 477 U.S. at 91-92. Congress expected this system to continue, which is why it specifically inserted it into the Sentencing Act the provision. United States v. Mercado, 474 F.3d 654, 657 (9th Cir. 2007). When the provisions were excised which made the sentencing guidelines mandatory, this provision was included. Therefore, the constitutional propriety of a sentencing Court's consideration of conduct which underlay an acquitted charge existed before creation of the Guidelines and continues to exist today, despite the possibility that it would not exist if the Guidelines were mandatory, which they are not. Id.

Although Congress instructed the Sentencing Commission, in § 994(1) of Title 18 of the United States Code that the Guidelines provide incremental punishment for a defendant who is convicted of multiple offenses and therefore meaning for the Guidelines to increase the sentence based on offenses of which a defendant has been acquitted, the statute is far from limiting a sentencing Court's power to consider uncharged or acquitted conduct. Watts, 519 U.S. at 153. If the Court were to only use conduct in which the defendant was found guilty of beyond a reasonable doubt because the broadly inclusive language of § 3661 is only incorporated in § 1B1.4 of the Guidelines, it would be completely ignoring the language of § 1B1.3 which directs sentencing Courts to consider all other related conduct, whether or not it resulted in a conviction. Id.

The “Supreme Court has ‘never doubted the authority of a judge to exercise broad discretion in imposing a sentence within statutory range,’” Settles, 530 F.3d at 922 (D.C. Cir. 2008) (quoting United States v. Booker, 543 U.S. 220 (2005)). The United States Court of Appeals for the District of Columbia Circuit in Settles, held that the sentencing judge’s consideration of acquitted conduct was not a violation of the Sixth Amendment because “the conduct in question was proved by a preponderance of the evidence and because the defendant’s sentence did not exceed the statutory maximum of 10 years.” Settles, 530 F.3d at 922. In Settles, the defendant

was convicted of unlawful possession of a firearm and ammunition by a convicted felon; but the defendant was also acquitted “of possession with intent to distribute cocaine and of using or carrying a firearm during a drug-trafficking offense.” Id. According to the majority § 924, subsection (a)(2) of Title 18 of the United States Code, “[t]he statutory maximum for the defendant’s felon-in-possession conviction was 10 years,” and the defendant’s “Guidelines range for the felon-in-possession conviction was 37 to 46 months of imprisonment.” Id. Despite these Guideline ranges, the District Court sentenced the defendant to 57 months of imprisonment. Id. In upholding the sentence, the Court found that “the Constitution does not prohibit a sentencing Court from relying on acquitted conduct,” and ruled that this was not a sentence that varied from the Guideline range. Id. at 924

In the instant case, just like in Settles, the Court convicted the defendant of crime, however considered the acquitted crime of conspiracy to sell drugs in the sentence. “The jury convicted Settles of one count of unlawful possession of a firearm and ammunition by a convicted felon, but it acquitted him of possession with intent to distribute cocaine and of using or carrying a firearm during a drug-trafficking offense. Id. at 920. In sentencing, the District Court found by a preponderance of the evidence the defendants were also involved in a conspiracy and determined the sentence based on this finding. In accordance with precedent, the Court was correct in accounting for the acquitted conduct. Furthermore, the defendants were acquitted of conduct which relates to the convicted crime. Section 1B1.3(a)(1)(B) directs sentencing Courts to consider all other related conduct, whether or not it resulted in a conviction. Watts, 519 U.S. at 153. In sentencing a defendant, the Court should determine by preponderance of the evidence whether the defendant participated in conduct he was acquitted for. In United States v. Ashworth, 139 F.App’x, 525 (4th Cir. 2005), the Court considered whether the defendant conspired to manufac-

ture and distribute methamphetamine and in determining so, calculated the sentence accordingly. Id. at 527. Thus, the sentencing Court in the instant case was correct and in accordance with statute in its sentencing of the defendants.

**B. There is No Violation of the Sixth Amendment Right to a Trial by Jury when a Sentencing Court Bases a Sentence on Acquitted Conduct of the Defendant.**

When sentencing, the Court is not in violation of the defendant's Sixth Amendment right to a jury trial when it considers acquitted conduct along with the crimes in which the defendant is convicted of. In Booker, 543 U.S. 220, a landmark case severing the United States Sentencing Guideline's provisions which made the act mandatory, the Court stated, "the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. at 233. Binding precedent establishes that the practice of considering acquitted conduct does not violate the Sixth Amendment when the conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime. Settles, 530 F.3d at 923-94. The Court in Settles determined that the defendant's "[g]uidelines range for the felon-in-possession conviction was 37 to 46 months of imprisonment." Id. at 922. In the present case, the sentencing judge determined that the Guidelines sentence fell between 324 and 405 months. Jones, 744 F.3d at 1365. Lastly in Settles, the District Court sentenced the defendant to 57 months of imprisonment, a term of imprisonment that was below the statutory maximum of 10 years, even though it was not within the base Guideline range. Settles, 530 F.3d at 922.

In the current case, the sentencing judge sentenced the defendants to lower sentences than those recommended, 180 months. Jones, 744 F.3d at 1365. Just like Settles, because the Court here did not sentence the defendant beyond the statutory maximum of twenty years imprisonment, such a sentence cannot be held to violate the Sixth Amendment's right to a jury trial. Judicial fact-finding does "not implicate the Sixth Amendment even if it yields a sentence above that

based on a plea or verdict alone. United States v. Bras, 483 F.3d 103, 107 (D.C. Cir. 2007). See also United States v. Dorcely, 454 F.3d 366, 370-71 (D.C. Cir. 2006) (stating where the Court stated that a “sentencing Court may base a sentence on acquitted conduct without offending the defendant’s Sixth Amendment right to trial by jury).

When a defendant is sentenced based in part on acquitted conduct, the defendant is not suffering punishment for a criminal charge for which he or she was acquitted, instead, the defendant has an increased sentence because of the manner in which he or she committed the crime of conviction. Watts, 519 U.S. at 153. In Watts, the Court held “a sentencing Court could . . . consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant’s subsequent prosecution of the cocaine offense.” Watts, 519 U.S. at 153. Further, “[t]he ‘maximum [sentence] authorized’ by a jury verdict is not the top of the now-advisory Guidelines range for the convicted offense, but rather the statutory maximum for the offense under the United States Code-which is often much higher than the Guidelines range.” United States v. Edwards, 427 F.Supp.2d 17, 21 (D.C. 2006), affd 198 Fed.Appx. 4 (D.C. Cir. 2006), cert. denied, 549 U.S. 1283 (2007) (quoting United States v. Duncan, 400 F.3d 1297, 1303 (11th Cir. 2005)); see also Rita v. United States, 551 U.S. 338 (2007). For any sentence that is below the statutory maximum, “the defendant has no right to a jury determination of the facts that the judge deems relevant.”). United States v. Fitch, 659 F.3d 788, 796 (9th Cir. 2011) (quoting Booker, 543 U.S. at 233)(internal quotation marks omitted).

In the interest of serving justice, a sentencing Court will consider conduct the defendant participated in which relates to the convicted crime during sentencing. According to § 924, subsection (a)(2) of Title 18 of the United States Code, “[t]he statutory maximum for the defend-

ant's felon-in-possession conviction was 10 years", and the defendant's "Guidelines range for the felon-in-possession conviction was 37 to 46 months of imprisonment." Settles, 530 F.3d at 922. A similar statute, § 841, subsection (b)(1)(C) of Title 21 of the United States Code, provides the relevant statutory maximum penalties for the crack cocaine distribution charges of which Jones has been convicted; Jones violated 21 U.S.C. § 841(a)(1) and thus faced a twenty year statutory maximum sentence. 21 U.S.C. § 841(b)(1)(C). In United States v. Mercado, 474 F.3d 654 (9th Cir. 2007), where the defendants were convicted of racketeering and conspiracy, on appeal the Court held that the sentencing Court did not violate the Sixth Amendment right to jury trial by considering acquitted conduct. See generally, Mercado, 474 F.3d 654. This case closely resembles the case at bar in that the defendant's sentences were based on conspiracy and related charges. The Court took into consideration this acquitted conduct when sentencing the defendants similar to the defendants in the instant case who were convicted of distribution of crack cocaine, but acquitted conspiracy charges. Jones, 744 F.3d at 1365. Thus, the United States Court of Appeals was correct in affirming the District Court's sentence, and this Court should uphold the decision.

**II. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS PROCEDURALLY REASONABLE AND WAS NOT AN ABUSE OF THE SENTENCING JUDGE'S DISCRETION BECAUSE A SUFFICIENT BASIS IN FACT EXISTED TO SHOW THAT THE DEFENDANTS WERE INVOLVED IN THE CHARGED CONSPIRACY**

A sentence may only be overturned if it is determined on appeal that the sentence is procedurally or substantively unreasonable. Specifically, "[p]rocedural reasonableness evaluates the method used to determine a defendant's sentence . . . [s]ubstantive reasonableness examines the totality of the circumstances to see whether the sentencing Court abused its discretion in concluding that the sentence the Court chose satisfied the standards set forth in § 3553(a)" of punishment, deterrence, public protection, or rehabilitation. United States v. Hargrove, 701 F.3d 156,



160-61 (4th Cir. 2012); see also 18 U.S.C. § 3553(a). For an Appellate Court to overrule a sentence imposed by a District Court, it must be “left with the definite and firm conviction that a mistake has been committed.” Jones, 744 F.3d at 1366-67 (citing United States v. Brockenborough, 575 F.3d 726, 738 (D.C. Cir. 2009)). In the current case, no procedural error exists because the District Court properly calculated the Guidelines and Guideline enhancements based on reasonable evidence and thus did not commit clear error. Furthermore, because all the facts considered by the sentencing judge were proven by at least a preponderance of the evidence, the District Court has not abused its discretion. Finally, the sentence imposed on the defendants by the District Court was factually supportable; thus, the decision of the United States Court of Appeals for the District of Columbia Circuit upholding the sentences of the defendants Joseph Jones, Desmond Thurston, and Antwuan Ball must be affirmed.

**A. No Procedural Error was Committed when the Sentencing Judge Calculated and Implemented the Defendants’ Sentences Because the Findings Relied Upon by the Sentencing Court were Not Clearly Erroneous**

A District Court judge’s reliance on reasonably proven factual findings can never be procedurally unreasonable. In evaluating the procedural reasonableness of a sentence imposed by a District Court, an Appellate Court must review a sentencing judge’s factual findings for clear error. Settles, 530 F.3d at 923. Because it is such a high standard, reversal for clear error is limited to situations where the Court’s factual findings are “illogical, implausible, or without support in the record.” Fitch, 659 F.3d at 797 (citing United States v. Spangle, 626 F.3d 488, 497 (9th Cir. 2010)). The Courts “defer to a District Court’s determination of witness credibility, which can virtually never be clear error.” United States v. Gonzalez, 765 F.3d 732, 736 (7th Cir. 2014). Furthermore, “[t]he District Court may consider as relevant conduct all drugs that the government shows by a preponderance of the evidence were a part of the same course of conduct

or common scheme as the conspiracy, even where the defendant was acquitted of such conduct.” United States v. Gordon, 510 F.3d 811, 817-18 (8th Cir. 2007).

The Courts have repeatedly affirmed the procedural reasonableness of sentences imposed, so long as the sentence was sentencing judge’s reliance on certain facts so long as those facts were not erroneous. The United States Court of Appeals for the District of Columbia Circuit in Settles, 530 F.3d at 922 affirming that the sentencing judge did not rely on clearly erroneous facts when it imposed sentence, held that facts are not clearly erroneous when proven by a preponderance of the evidence. Settles, 530 F.3d at 922 (relying on Booker, 543 U.S. at 233). In Settles, the defendant was convicted of unlawful possession of a firearm and ammunition by a convicted felon. Settles, 530 F.3d at 922. The defendant was also acquitted “of possession with intent to distribute cocaine and of using or carrying a firearm during a drug-trafficking offense.” Id. According to 18 U.S.C. § 924(a)(2), “[t]he statutory maximum for the defendant’s felon-in-possession conviction was ten years,” Id., and the defendant’s “Guidelines range for the felon-in-possession conviction was 37 to 46 months of imprisonment.” Id. However, based on a presentence report which “recommended an enhancement for conduct of which jury had acquitted Settles,” the Court adjusted the defendant’s Guideline range to between fifty-seven and seventy-one months of imprisonment. Id.

There, the judge, after hearing arguments from the parties, found by a preponderance of the evidence that the defendant “had possessed the gun in connection with possessing with intent to distribute cocaine.” Id. On that basis, the District Court sentenced the defendant to fifty-seven months of imprisonment. Id. In affirming the procedural reasonableness of the District Court’s sentence, the Court in Settles acknowledged that the sentencing Court did not, “incorrectly calculate the advisory Guidelines range, fail to consider the § 3553(a) factors, rely on clearly erroneous

ous facts, treat the advisory Guidelines as mandatory, or fail to explain the chosen sentence and any deviation from the advisory Guidelines range.” Id. at 923.

The circumstances in Settles closely resemble those found in the present case. Because all the factors that the Court evaluated in Settles are determining procedural reasonableness and are satisfied here, this Court should affirm that the District Court did not commit clear error when it imposed sentence on the defendants. In the present case, just like Settles, the sentencing judge found by a preponderance of the evidence that the defendants had engaged in the conspiracy of which they were acquitted and used the ‘relevant conduct’ sentencing enhancement provided for in U.S.S.G. § 1B1.3 as a basis to raise the defendants’ Guidelines ranges from an initial twenty-seven to seventy-one month term of imprisonment to a term of 324 to 405 months for Jones, a term of 262 to 327 for Thurston, and a term of 292 to 365 for Ball. Jones, 744 F.3d at 1365.

Moreover, the District Court in the present case, similarly to Settles, sentenced the defendants to a term of imprisonment far below the statutory maximum of twenty years, and in fact imposed even lower sentences than the advisory Guidelines recommended, 180 months for Jones, 194 months for Thurston, and 225 months for Ball. Jones, 744 F.3d at 1365; see also 21 U.S.C. § 841(b)(1)(C). The sentencing judge in the present case clearly balanced the need for punishment, public protection, and deterrence, with the need for rehabilitation in downwardly departing from the adjusted Guidelines range due to “concerns about the overall severity of punishment for crack offenses.” Jones, 744 F.3d at 1365. As in Settles, here the Court found sufficient evidence in the record to support its determination. First, the Court pointed out “a common goal of selling crack for profit in Congress Park.” Id. at 1367. Secondly, “interdependence in the forms of shared sales proceeds and the protection of turf against encroachment by outsiders.” Id. Lastly, “[an] overlap in membership both across time and among the different cliques.” Id. at

1368. Thus, it was procedurally reasonable for the sentencing judge to balance the goals of deterrence, public protection, punishment, and rehabilitation. The sentence was calculated correctly when the judge properly explained and based the sentence on sufficiently reliable and corroborated evidence.

Although there are cases in which the Court has held the sentencing judge had made clearly erroneous findings of fact, such cases bear sharp distinctions from the present case. In United States v. Kane, 639 F.3d 1121, 1131 (8th Cir. 2011), the sentencing Court was unusually lenient on the defendant because it erroneously determined that the defendant would not “pose a danger to the public or . . . be a recidivist.” Id. In Kane, “[t]he facts show [the defendant] repeated her crime over and over again . . . on more than 200 occasions,” Id. at 1131-32, and had “not shown she would not commit this type of crime again in the name of money.” Id. at 1131 (internal quotations omitted). These facts, sufficient to show certainty, firmness, or definiteness that a mistake has been made, present a sharp contrast from a case at hand, wherein the sentencing Court’s decision was based upon reasonably proven facts: the defendants were recorded distributing crack cocaine within the territory controlled by the Congress Park Crew and the government introduced “testimony from several cooperating witnesses, including members of the alleged conspiracy.” Jones, 744 F.3d at 1365. The Court in Kane held that “the District Court procedurally erred by basing Kane’s sentence on that unsupported determination,” Kane, 639 F.3d at 1132. However, in the present case the sentencing judge has a sufficient basis in fact to justify the District Court’s reliance on the defendants’ participation in the conspiracy of which he was acquitted. Its decision must be affirmed as procedurally reasonable.

This Court cannot find the certainty, firmness, or definitiveness necessary to justify a conclusion that a clear error was made because there is sufficient proof in the record on which

the judge based his determination that “the defendant voluntarily participated to promote a criminal objective;” thus, the District Court’s sentence should be affirmed as procedurally reasonable. United States v. Ayala-Vazquez, 751 F.3d 1, 15 (1st Cir. 2014).

**B. The District Court did Not Abuse its Discretion in Imposing Sentence Because the Defendants’ Participation in the Conspiracy was Established by the Evidence**

A sentence imposed by a District Court judge is a valid exercise of his discretion when that sentence is reasonable. For a sentence to be considered substantively reasonable, it “must be ‘reasoned,’ or calculated utilizing a legitimate method.” United States v. Hall, 473 F.3d 1295, 1313 (10th Cir. 2007) (citing United States v. Cage, 451 F.3d 585, 591 (10th Cir. 2006)). A sentence can only be reversed as substantive unreasonable if the District Court abused its discretion. United States v. Menendez, 600 F.3d 263, 266 (2d Cir. 2010). No abuse of discretion exists when “under the totality of the circumstances, the sentence achieves the sentencing goals [of punishment, deterrence, public protection, and rehabilitation].” United States v. Culver, 598 F.3d 740, 753 (11th Cir. 2010); see also Gall v. United States, 552 U.S. 38, 51 (2007)); 18 U.S.C. § 3553(a)(2). Moreover, there is no limit to a sentencing judge’s ability to consider a defendant’s background, character, and conduct. See U.S.S.G. § 1B1.4; see also 18 U.S.C. § 3661 (2010). A sentencing judge is even permitted to consider facts unconsidered by the jury at sentencing and may even raise a defendant’s sentence based on conduct of which the jury has acquitted him. Fitch, 659 F.3d at 795 (9th Cir. 2011). Furthermore, a sentencing judge may in its discretion consider “in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred . . . [in connection with] the offense of conviction.” See U.S.S.G. § 1B1.3(a)(1)(B).

The Courts have found sentences that exceed the Guidelines range four times over to be substantively reasonable. Upholding the reasonableness of a District Court’s sentence on the ba-

sis of acquitted conduct, the Court in United States v. Dorcely, affirmed the constitutionality of the two year sentence of a defendant on the basis of charges of which he was acquitted. 454 F.3d 366 (D.C. Cir. 2006). In Dorcely, the defendant was charged of “making false statements to Federal Bureau of Investigations . . . and of conspiracy to commit money laundering and conspiracy to defraud the government.” Id. at 369. After a trial, “the jury convicted [the defendant] of making false statements to the FBI and acquitted him of both conspiracy charges.” Id. at 370. The sentencing judge, nonetheless, “took into account [the defendant’s] role in the conspiracies, finding by a preponderance of the evidence that he was involved in them notwithstanding his acquittal on those offenses.” Id. at 369. Initially the judge calculated the Guideline sentence for the conviction to range from a term of imprisonment of 0 to 6 months. Id. However, based on the findings that the defendant participated in the conspiracy, the District Court used the relevant conduct section of the Sentencing Guidelines, U.S.S.G. § 1B1.3(a)(1)(B), to adjust the Guideline sentence to range between 24 and 30 months. Id. at 370. The District Court then sentenced the defendant to a term of imprisonment of 24 months. Id. The defendant’s sentence was less than the statutory maximum of five years. See 18 U.S.C. § 1001(a). The Court in Dorcely found that “section 1B1.3 [of the United States Sentencing Guidelines] ‘is certainly broad enough to include acts underlying offenses of which the defendant has been acquitted,’” and upheld the sentence as substantively reasonable. Id. at 375 (quoting United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992)); see generally U.S.S.G. § 1B1.3.

The situation in Dorcely bears a striking resemblance to the situation in the present case. Thus, this Court should uphold the sentence in the present case and find that the District Court did not abuse its discretion. In the present case, just like in Dorcely, the sentencing judge utilized the relevant conduct provision of the United States Sentencing Guidelines to adjust the defend-

ant's Guideline sentence range from twenty-seven and seventy-one month term of imprisonment to a Guideline range between 324 to 405 months for Jones, a term of 262 to 327 months for Thurston, and a term of 292 to 365 for Ball. This was based on the Court's factual findings that the three defendants were participants in the charged conspiracies of which they were acquitted. Jones, 744 F.3d at 1365, 1368-69. Furthermore, while in Dorcely the District Court imposed the lowest sentence within the Guidelines, in the current case the sentencing Court imposed terms of imprisonment even lower sentences than those recommended and lower than the statutory maximum of twenty years, 180 months for Jones, 194 months for Thurston, and 225 months for Ball. Jones, 744 F.3d at 1365; see also 21 U.S.C. § 841(b)(1)(C).

In the present case, just like in Dorcely, sufficient evidence exists through the totality of the circumstances to show that the defendants were engaged in a drug conspiracy. In the present case, the evidence of the defendants' roles in the drug conspiracy was established through "recordings of appellants engaging in sales of crack and testimony from several cooperating witnesses, including members of the alleged conspiracy and individuals who had purchased crack from appellants," which showed the defendants were part of an organization which shared profits, turf, and a common goal of selling narcotics in Congress Park. Jones, 744 F.3d at 1365. Because sufficient facts in the record existed to justify the sentence imposed by the District Court in the present case, this Court should uphold the sentence as substantively reasonable.

The case at hand is a sharp distinction from those cases in which the appellate Courts have determined that a sentencing Court abused its discretion, such as United States v. Worex, wherein a 24 month upward departure from the Guidelines was vacated due to its lack of a factual basis. United States v. Worex, 420 F.App'x. 546, 550-51 (6th Cir. 2011). In Worex, the District Court imposed a term of imprisonment twice that of what the Guidelines recommended on

uncharged conduct not submitted to the jury, specifically, the defendant's involvement in two shootings; however, the sentencing judge also noted that, "the Court stated that 'if there were sufficient evidence . . . to conclude even by a preponderance of the evidence that [the defendant] aided and abetted . . . or encouraged these offenses in some way, [it] would impose the statutory maximum sentence.'" Id. at 550. These admissions by the sentencing judge, essentially conceding that the relied-upon facts were not proven by a preponderance of the evidence, were an insufficient basis of fact on which to base the upward departure that the defendant received.

Conversely, in the case at hand, the defendants' participation in the conspiracy charged of which they were acquitted was proven by a preponderance of the evidence. First by showing "a common goal of selling crack for profit in Congress Park." Jones, 744 F.3d at 1367. Secondly by showing interdependence in the forms of shared sales proceeds and the protection of turf against encroachment by outsiders." Id. Lastly by showing an "overlap in membership both across time and among the different cliques." Id. at 1368. In Worex, the "evidence regarding the uncharged conduct, albeit incriminatory, was insufficient to establish the defendant's involvement by a preponderance of the evidence." Worex, 420 F.App'x. at 550. However, because the facts relied upon by the sentencing judge in the current case were reasonably established by facts in the record, the substantially different circumstances present in the current case warrant a conclusion that the sentencing judge, by a totality of the circumstances, has not abuse its discretion.

The District Court in Jones based its sentence off of cooperator testimony and "highly-corroborated accounts of appellants' conspiratorial conduct," Jones, 744 F.3d at 1367, which was evident in the record and had been proven by more than a preponderance of the evidence; thus, because the totality of the circumstances show that the facts relied upon by the sentencing judge were reasonable, the judge did not abuse his discretion and thus, the sentence must be affirmed.



## **CONCLUSION**

For the foregoing reasons this Court must affirm the decision of the United States Court of Appeals for the District of Columbia Circuit upholding the District Court's sentences of one-hundred-and-eighty-months for Jones, one-hundred-and-ninety-four months for Thurston, and two-hundred-and-twenty-five months for Ball.