No. 13-10026

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH JONES, DESMOND THURSTON, AND ANTWUAN BALL, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioners' Sixth Amendment rights by sentencing them in part on the basis of conduct underlying counts on which they had been acquitted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 744 F.3d 1362.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2014. Petitioner Ball's petition for rehearing was denied on June 3, 2014. The petition for a writ of certiorari was filed on May 6, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner Ball was convicted of distributing five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B)(iii) (2000), and petitioners Jones and Thurston were convicted on two counts of distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C). Petitioner Ball was sentenced to 225 months of imprisonment, to be followed by five years of supervised release; petitioner Jones was sentenced to 180 months of imprisonment, to be followed by six years of supervised release; and petitioner Thurston was sentenced to 194 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a-4a; Gov't C.A. Br. 4-5; 3/22/11 J. 1-3; 1:05-CR-00100-RWR-16 Min. Entry (May 1, 2008); 1:05-CR-00100-RWR-13 Min. Entry (Oct. 29, 2010). The court of appeals affirmed. Pet. App. 1a-13a.

1. From 1992 through March 2005, petitioners were members of a loosely-knit gang that sold crack cocaine in an "open-air" market in the Congress Park neighborhood of Washington, D.C. Pet. App. 2a-3a; Gov't C.A. Br. 6, 9. Petitioners also engaged in crimes of violence against rival gangs. Gov't C.A. Br. 15-17. Petitioner Ball was one of the gang's leaders. Id. at 21-22. During the investigation of the organization's drug

trafficking, the Federal Bureau of Investigation Safe Streets Gang Task Force conducted more than 20 controlled purchases of crack from petitioners and their co-defendants. Id. at 6-7.

2. Petitioners and three others were charged in a superseding indictment with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841 (2000) and 846, and conspiracy to participate in a Racketeer Influenced and Corrupt Organization, in violation of 18 U.S.C. 1962(d). As relevant here, petitioner Ball was also charged with two counts of distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B)(iii) (2000), and 841(b)(1)(C); two counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2000 & Supp. V 2005); unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1); and two counts of first-degree murder, in violation of the District of Columbia Code. Petitioner Thurston was additionally charged with four counts of distributing crack cocaine; three counts of attempted murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); three counts of use of a firearm during and in relation to a crime of violence; and three counts of assault with intent to kill, in violation of the District of Columbia

Code. Petitioner Jones was additionally charged with two counts of distributing crack cocaine; attempted murder in aid of racketeering; and assault with intent to kill while armed, in violation of the District of Columbia Code. 1:05-CR-00100-RWR Docket entry No. 544 (Nov. 16, 2006) (Superseding Indictment). A jury convicted petitioner Ball on one count of distributing five grams or more of crack cocaine and petitioners Thurston and Jones on two counts of distributing crack cocaine. The jury acquitted petitioners on the remaining counts. Gov't C.A. Br. 4. Based on the quantity of drugs in the counts of conviction and their respective criminal histories, petitioner Ball faced a mandatory minimum sentence of five years of imprisonment and a maximum sentence of 40 years; petitioner Jones faced a maximum sentence of 30 years; and petitioner Thurston faced a maximum sentence of 20 years. Pet. App. 3a; Gov't C.A. Br. 5 n.4.

At sentencing, the district court found by a preponderance of the evidence that petitioner Jones's crimes of conviction were part of a common scheme to distribute crack in Congress Park, that he had distributed "roughly 400 grams" of crack, and that he could have foreseen a total amount of sales exceeding 500 grams by his co-conspirators. Gov't C.A. Br. 34; see Pet. App. 3a; Gov't C.A. Br. 32-35. It also concluded that Jones was subject to a two-level enhancement for gun possession and qualified as a career offender because of his two prior felony

convictions. Gov't C.A. Br. 35. Under the career-offender guideline, Jones's advisory Guidelines range was 324 to 405 months of imprisonment. Taking into account the sentencing factors in 18 U.S.C. 3553(a) and certain mitigating considerations, the court imposed a below-Guidelines sentence of 180 months of imprisonment. Pet. App. 3a-4a; Gov't C.A. Br. 35-36.

The district court found by clear and convincing evidence that petitioner Ball was responsible for more than 1.5 kilograms of crack, and it enhanced his Guidelines range for his gun possession and leadership role. With a total offense level of 40 and a criminal history category of I, Ball's Guidelines range was 292 to 365 months of imprisonment. The court imposed a below-Guidelines sentence of 225 months of imprisonment. Pet. App. 4a; Gov't C.A. Br. 41-46.

The district court also found by clear and convincing evidence that petitioner Thurston was responsible for more than 1.5 kilograms of crack. With a criminal history category of IV, his advisory Guidelines range was 262 to 327 months of imprisonment. The court imposed a below-Guidelines sentence of 194 months of imprisonment. Pet. App. 4a; Gov't C.A. Br. 37-41.

3. The court of appeals affirmed. Pet. App. 1a-13a. It held that the district court did not commit procedural error in calculating petitioners' advisory Guidelines ranges and that

their sentences were substantively reasonable. Id. at 5a-9a. The court of appeals rejected petitioners' claim that their respective sentences violated the Sixth Amendment because they were based, in part, on the petitioners' involvement in a conspiracy for which they had been acquitted. The court explained that binding precedent established that a court does not violate the Sixth Amendment when it considers acquitted conduct that is proven by a preponderance of the evidence. Id. at 9a-10a. The court also rejected petitioners' as-applied Sixth Amendment argument that their sentences would not have been reasonable had the district court not made additional findings of fact. Id. at 10a-11a. The court emphasized that "[n]o Supreme Court majority has ever recognized the validity of such challenges, and among the courts of appeals the consensus is clearer still." Id. at 11a.

ARGUMENT

Petitioners contend (Pet. 8-16) that the district court violated their Sixth Amendment rights by sentencing them in part based on conduct underlying counts on which they were acquitted. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. Petitioners first raise (Pet. 8-16) an as-applied Sixth Amendment challenge to their sentences, arguing that the district court's use of acquitted conduct to calculate their advisory Guidelines ranges violated their constitutional rights because their sentences would not have been reasonable absent the court's independent factual findings. They rely (Pet. 10-11) on Justice Scalia's statement in Rita v. United States, 551 U.S. 338 (2007), that the Court's opinion did "not rule out as-applied Sixth Amendment challenges" to sentences that "would have been unreasonable in the absence of any judge-found facts." Id. at 373, 375 (Scalia, J., concurring in part and concurring in the judgment) (emphasis omitted). Petitioners contend (Pet. 15) that their rights were violated because their sentences "were driven quite openly by judge-made findings" that yielded "dramatically higher base offense levels and sentences than [they] otherwise legally could have received." This Court has denied numerous petitions for a writ of certiorari raising similar as-applied Sixth Amendment challenges,[1] and there is no reason for a different result in this case.

[1] See, e.g., Garcia v. United States, 132 S. Ct. 1093 (2012); Culberson v. United States, 131 S. Ct. 1674 (2011); Taylor v. United States, 131 S. Ct. 993 (2011); Gibson v. United States, 559 U.S. 906 (2010); Magluta v. United States, 556 U.S. 1207 (2009); Marlowe v. United States, 555 U.S. 963 (2008); Bradford v. United States, 552 U.S. 1232 (2008); Alexander v. United States, 552 U.S. 1188 (2008).

Contrary to petitioners' claim, this Court's decisions in United States v. Booker, 543 U.S. 220 (2005), and subsequent cases establish that, under the advisory Guidelines regime currently in place, judicial fact-finding does not violate the Sixth Amendment when it results in the imposition of a sentence at or below the statutory maximum for the offense of conviction. As the Court explained in Booker:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

Id. at 233 (citations omitted). This Court has consistently reaffirmed that understanding of judicial discretion. See, e.g., 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"); Rita, 551 U.S. at 352 (stating that the 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"); Cunningham v. California, 549 U.S. 270, 285 (2007) (stating that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory).

Moreover, as petitioner concedes (Pet. 11-13), the courts of appeals have uniformly concluded that "as-applied" Sixth Amendment challenges are foreclosed by this Court's precedent.[2]

b. Even if as-applied challenges were theoretically available, no such claim could succeed on the facts of this case. Cf. Rita, 551 U.S. at 373-374 (Scalia, J., concurring in part and concurring in the judgment) (disavowing any claim of an as-applied Sixth Amendment violation where the petitioner could not demonstrate that his sentence would have been unreasonable absent a judge-found fact). Petitioner Jones could not establish that, without the district court's finding, his 180-month sentence would be unreasonable, given his status as a career offender and his resulting advisory Guidelines range of 324 to 405 months of imprisonment. See pp. 4-5, supra. Petitioner Ball also could not establish that his sentence was unreasonable, in light of the seriousness of his crime of

[2] See United States v. Smith, 741 F.3d 1211, 1227 & n.5 (11th Cir. 2013), petition for cert. pending, No. 13-10424 (filed June 2, 2014); United States v. Norman, 465 Fed. Appx. 110, 120-121 (3d Cir. 2012)); United States v. Hernandez, 633 F.3d 370, 373-374 (5th Cir.), cert. denied, 131 S. Ct. 3006 (2011); United States v. McCormick, 401 Fed. Appx. 29, 33-34 (6th Cir. 2010); United States v. Treadwell, 593 F.3d 990, 1017-1018 (9th Cir.), cert. denied, 131 S. Ct. 280, 131 S. Ct. 281, and 131 S. Ct. 488 (2010); United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009); United States v. Redcorn, 528 F.3d 727, 745-746 (10th Cir. 2008).

conviction, the quantity of drugs that he personally distributed, and his long history of drug dealing. See p. 5, supra. Similarly, petitioner Thurston could not meet the unreasonableness standard, in light of his long criminal history and numerous arrests for drug offenses and violent crimes. See p. 5, supra. This case presents a particularly weak case for a claim that petitioners' sentences were substantively unreasonable because the district court varied downwards from the applicable Guidelines range and imposed below-range sentences.

2. To the extent that petitioners challenge the sentencing court's reliance on acquitted conduct, that claim also does not warrant review. In United States v. Watts, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The Court noted that "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" id. at 152 (citation omitted), and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," ibid. Although Watts specifically addressed a

challenge to consideration of acquitted conduct based on double jeopardy principles, rather than the Sixth Amendment, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See id. at 157. That principle predated the Sentencing Guidelines, see id. at 152, and it fully applies to the advisory Guidelines regime put in place by Booker, see 543 U.S. at 226-227.

Petitioners' argument (Pet. 15) that the sentencing court "sidestepped" the jury's verdict cannot be squared with this Court's recognition that judicial fact-finding "may lead judges to select sentences that are more severe than the ones they would have selected without those facts," but that "the Sixth Amendment does not govern that element of sentencing." Alleyne, 133 S. Ct. at 2161 n.2. Similarly, petitioners' contention (Pet. 15) that they were sentenced for "an entirely differing crime with differing elements" "misses the distinction between elements of an offense and facts relevant to sentencing." United States v. Vaughn, 430 F.3d 518, 526 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); see 18 U.S.C. 3661 ("No 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.").

Since Booker, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct for sentencing,[3] and this Court has repeatedly denied petitions for a writ of certiorari raising that issue.[4] No different result is warranted here.

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[3] See, e.g., United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); Vaughn, 430 F.3d at 525-527 (2d Cir.); United States v. Jimenez, 513 F.3d 62, 88 (3d Cir.), cert. denied, 553 U.S. 1034 (2008); United States v. Ashworth, 247 Fed. Appx. 409, 409-411 (4th Cir. 2007) (per curiam), cert. denied, 552 U.S. 1297 (2008); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); United States v. Hurn, 496 F.3d 784, 788-789 (7th Cir. 2007), cert. denied, 552 U.S. 1295 (2008); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Duncan, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005); United States v. Dorcely, 454 F.3d 366, 371-373 (D.C. Cir.), cert. denied, 549 U.S. 1055 (2006).

[4] See, e.g., Kokenis v. United States, 132 S. Ct. 2713 (2012); Magluta v. United States, 556 U.S. 1207 (2009); Morris v. United States, 553 U.S. 1065 (2008); Edwards v. United States, 549 U.S. 1283 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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