No. 05-6596

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROGER CLAYTON WHITE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

RESPONSE OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Appellant Roger Clayton White contends that a sentencing court is not permitted to consider conduct underlying charges on which the defendant was acquitted. That claim is foreclosed by the Supreme Court's decision in United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam), holding 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." Following the Court's decision in United States v. Booker, 543 U.S. 220 (2005), every court of appeals to consider the question has correctly held that Booker does not bar consideration of acquitted conduct at sentencing. Accordingly, the petition for rehearing en banc should be denied.

STATEMENT

1. On April 17, 2002, appellant White, armed with a 9mm rifle, acted as the getaway driver while White's brother and his brother's girlfriend robbed the Security Bank and Trust Company in Maysville, Kentucky at gunpoint. United States v. White, 134 Fed. Appx. 880, 882 (6th Cir. 2005) (unpublished). After a jury trial, White was convicted of armed bank robbery and possession of a firearm with an obliterated serial number. The jury acquitted White of conspiring to commit armed bank robbery, conspiring to use and carry firearms during and in relation to a crime of violence, and two counts of using and carrying firearms during and in

relation to a crime of violence. (R.81, Verdict; Apx. 29.)

The presentence report's Guidelines calculation included a seven-level enhancement under Section 2B3.1(b)(2) because a firearm was discharged during the offense. (R.95, PSR ¶¶ 57-67; Apx. 195-196.) White's Guidelines sentencing range was 235 to 293 months. (PSR ¶ 95; Apx. 201.) The district court sentenced White to 264 months of imprisonment. (R.97, 5/23/03 Judgment; Apx. 31.) This Court affirmed White's convictions, but remanded for resentencing under Booker. 134 Fed. Appx. at 884-885.

2. On remand, the district court found by a preponderance of the evidence that White's brother fired a gun during the bank robbery and that shots were fired from the getaway car toward pursuing police officers. (Resent. Tr. 19-24; Apx. 110-115.) The court enhanced White's sentence because a firearm was discharged during the offense, explaining that although White "was acquitted of the conduct relating to the discharge of the firearm in the vault and then during the chase, * * * he aided and abetted that conduct, and it was reasonably foreseeable to him that * * * in furtherance of the jointly undertaken criminal activity * * * guns would be not only brandished but discharged." (Resent. Tr. 16-17; Apx. 107-108). After considering the factors in 18 U.S.C. 3553(a), the court again sentenced White to 264 months, finding that White and his co-defendants "placed in jeopardy the lives of several innocent persons" and that "[a]nything less" than the 22-year sentence "would not promote respect for the law" and would

"minimize the trauma and pain and suffering by the victims." (Resent. Tr. 44-47; Apx. 135-138; R.166, Amended Judgment; Apx. 87.)

3. This Court affirmed White's sentence based on circuit precedent holding that sentencing courts may consider acquitted conduct, but recommended that White file a petition for rehearing en banc on the issue. United States v. White, 2007 WL 2890974, at *1 (6th Cir. Oct. 5, 2007).

ARGUMENT

In United States v. Watts, the Supreme Court reaffirmed the "longstanding principle" that sentencing courts have broad discretion to consider all relevant information, including "facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." 519 U.S. at 152-154 (internal quotation omitted). This Court and other courts of appeals have uniformly concluded that nothing in the Supreme Court's subsequent decisions undermines the holding in Watts, and White provides no reason for the Court to revisit the issue.

1. This Court's conclusion in United States v. Mendez, 498 F.3d 423, 427 (6th Cir. 2007), that "a post-Booker sentencing court may consider even 'acquitted conduct' if it finds facts supporting that conduct by a preponderance of the evidence" is consistent with the holdings of every other court of appeals that has considered the issue. See, e.g., United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518,

525-527 (2d Cir. 2005); United States v. Farias, 469 F.3d 393, 399 (5th Cir. 2006); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 657-658 (9th Cir. 2007); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir. 2005); United States v. Duncan, 400 F.3d 1297, 1304-1305 (11th Cir. 2005); United States v. Dorcely, 454 F.3d 366, 371-373 (D.C. Cir. 2006).

2. Contrary to White's contention (Pet. 5-8), Booker does not cast doubt on the holding in Watts. See 543 U.S. at 240, 241 (opinion of Stevens, J., for the Court) (stating that the issue decided in Booker "simply was not presented" in Watts and that "[n]one of [the Court's] prior cases is inconsistent" with Booker); id. at 250-252 (opinion of Breyer, J., for the Court) (relying on Watts for proposition that "a sentencing judge could rely * * * upon a fact that a jury had found unproved (beyond a reasonable doubt)," and explaining that the Booker Court's rejection of the dissenters' remedial proposal was based in part on the conclusion that preventing judges from finding facts relevant to sentencing would "undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways").

Moreover, Booker itself suggests that sentencing courts may continue to consider relevant acquitted conduct. See 543 U.S. at 233 ("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"). As the Court recognized in Watts, such consideration is not unfair to a defendant because "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one for which the defendant was convicted." 519 U.S. at 155 (quoting Witte v. United States, 515 U.S. 389, 401 (1995)). The rationale of Watts - that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be used at sentencing without satisfying that standard, see 519 U.S. at 155-156 - remains valid after Booker. See United States v. Brika, 487 F.3d 450, 459 (6th Cir.) (finding "no logical contradiction between Watts and Booker"), cert. denied, 2007 WL 2414928 (Oct. 1, 2007).

The Supreme Court recently reaffirmed that its "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." Rita v. United States, 127 S. Ct. 2456, 2465-2466 (2007). White's contention (Pet. 10-13) that consideration of acquitted conduct in determining the Guidelines range increases the sentence above the "statutory maximum" authorized by the jury's findings ignores the remedial holding of Booker. The Court held in Booker that the mandatory federal Sentencing Guidelines implicated the rule that any fact, other than a prior conviction, necessary to support a sentence

exceeding the "maximum authorized" by a guilty plea or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. 543 U.S. at 244. By making the Guidelines advisory rather than mandatory, however, id. at 245, Booker remedied the constitutional problem presented by the Guidelines. Now the maximum sentence authorized by a defendant's guilty plea or the jury's verdict is the statutory maximum - i.e., the maximum set forth in the U.S. Code - for the offense, not the top of the Guidelines range, as White suggests. See United States v. Duckro, 466 F.3d 438, 443-444 (6th Cir. 2006). Thus, under Booker, as long as the sentencing judge imposes a sentence within the statutory range, basing the sentence on judge-found facts is constitutionally permissible.

This Court's application of a presumption of reasonableness to within-Guidelines sentences on appeal does not affect the Sixth Amendment analysis, as White contends (Pet. 12). Rita makes clear that district courts may not presume that a Guidelines sentence is reasonable, but instead must determine the appropriate sentence based on the circumstances of each case. 127 S. Ct. at 2465. As the Supreme Court explained in rejecting a similar argument in Rita, the "appellate presumption that a Guidelines sentence is reasonable does not require the sentencing judge to impose that sentence," and the fact that the presumption may "encourage sentencing judges to impose Guidelines sentences" or "increase[] the likelihood that the judge, not the jury, will find sentencing

facts" does not "change the constitutional calculus." Id. at 2466-2467.

3. White's attempt (Pet. 13-15) to recast his argument as a due process claim fares no better. The Supreme Court has made clear that it is consistent with due process for a sentencing court to select a sentence within the applicable statutory range based on facts found by that court by a preponderance of the evidence. See Watts, 519 U.S. at 156 ("application of the preponderance standard at sentencing generally satisfies due process") (citing McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986)); see also Edwards v. United States, 523 U.S. 511, 513-514 (1998) (concluding that a sentencing judge was authorized to determine that the offense involved crack cocaine even if the jury had found the defendants guilty of a conspiracy involving only powder cocaine); Witte, 515 U.S. at 400-401 (noting that Supreme Court's cases "authoriz[e] the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial").

Booker did not disturb that settled rule. Under the advisory Guidelines system adopted in Booker, as long as the sentencing judge imposes a sentence within the statutory range, sentencing based on facts found by the judge by a preponderance of the evidence is constitutionally permissible. See Booker, 543 U.S. at 233; see also id. at 239-241 (concluding, after reviewing Edwards, Watts, and Witte, that "[n]one of our prior cases is inconsistent

with today's decision").[1/]

In any event, regardless of any argument about the continued validity of the rule in Watts, the Supreme Court has made clear that lower courts must leave to that Court "the prerogative of overruling its own decisions," even if a decision "appears to rest on reasons rejected in some other line of decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997); see United States v. Koch, 383 F.3d 436, 439 (6th Cir. 2004) (en banc), vacated on other grounds, 544 U.S. 995 (2005).

4. White also contends (Pet. 8-10) for the first time that the Court should reject the Guidelines' use of acquitted conduct as "categorically unreasonable." Even if the Court considers that claim, but see Costo v. United States, 922 F.2d 302, 302-303 (6th Cir. 1990) (argument not raised in appellate brief or at oral argument generally may not be raised for the first time in petition for rehearing), White's contention lacks merit. White argues (Pet. 9-10) that the Guidelines' relevant conduct provisions are contrary to Congress's intent in adopting the Sentencing Reform Act, but the Supreme Court reached the opposite conclusion in Booker. See 543 U.S. at 251 (noting that "[j]udges have long looked to real conduct

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[1] White relies (Pet. 14) on district court decisions holding that due process requires sentencing courts to employ the beyond-a-reasonable-doubt standard in making factual findings relating to acquitted conduct. Those decisions, however, are contrary to binding precedent in the circuits in which the district courts sit. See United States v. Gobbi, supra; United States v. High Elk, supra.

when sentencing" and that "Congress expected this system to continue" and "specifically inserted into the Act" the provision in 18 U.S.C. 3661 authorizing sentencing courts to consider all information about defendant's "background, character, and conduct"); id. at 252 ("engraft[ing]" jury-trial requirement onto sentencing system would "weaken the tie between a sentence and an offender's real conduct" and "would thereby undermine" principal purpose of statute).[2/] Moreover, as explained above, White's suggestion that a sentencing court's consideration of acquitted conduct punishes the defendant for offenses other than the offense of conviction has been rejected by the Supreme Court. See Watts, 519 U.S. at 154 ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction") (citing Witte, 515 U.S. at 402-403).

In any event, White's contention that the Guidelines' treatment of acquitted conduct is unreasonable overlooks the well-settled rule that the jury's failure to find a fact beyond a reasonable doubt does not preclude subsequent proof of that fact by a preponderance of the evidence. See Dowling v. United States, 493

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[2] White's reliance (Pet. 10) on contrary language in a House Judiciary Committee report is misplaced in light of the widespread recognition that the Act did not reflect a compromise between the House and Senate approaches to the legislation, "but clear and complete victory for the Senate approach." Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 236 (1993).

U.S. 342, 349-350 (1990). Furthermore, a rule prohibiting district courts from considering acquitted conduct would have the anomalous effect of permitting courts to rely on conduct that the jury never considered, but barring them from finding conduct the jury considered but failed to find beyond a reasonable doubt.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT copies of the foregoing Response of the United States to Appellant's Petition for Rehearing En Banc were served this 8th day of November, 2007, by Federal Express overnight delivery service upon the following counsel for defendant-appellant:

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