

APPENDIX

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UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4733

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY JABBARI RHODES, a/k/a Viking, a/k/a JJ,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:14-cr-00607-JFA-13)

Submitted: September 23, 2019

Decided: October 8, 2019

Before WILKINSON and FLOYD, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Joshua Snow Kendrick, KENDRICK & LEONARD, P.C., Greenville, South Carolina, for Appellant. Sherri A. Lydon, United States Attorney, Kathleen Michelle Stoughton, Assistant United States Attorney, John David Rowell, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Jerry Jabbari Rhodes of conspiracy to possess with intent to distribute and distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846 (2012). Rhodes was originally sentenced as a career offender, but in his first direct appeal, we held that Rhodes' prior South Carolina conviction for distribution of a controlled substance in proximity of a school did not qualify as a "controlled substance offense" under the Sentencing Guidelines and that Rhodes therefore was not a career offender. We accordingly vacated this portion of the district court's judgment and remanded for resentencing. *United States v. Rhodes*, 736 F. App'x 375, 378-80 (4th Cir. 2018) (No. 17-4162) (argued but unpublished). Rhodes now appeals the 205-month sentence imposed by the court at resentencing.

At trial, the jury found Rhodes responsible for a measurable quantity of cocaine and cocaine base, but, at resentencing, the district court held Rhodes responsible for more significant quantities of cocaine and cocaine base. On appeal, Rhodes contends that the district court erred in considering conduct acquitted by the jury as relevant conduct for sentencing purposes and that his sentence is therefore unreasonable.¹ We affirm.

In determining whether a district court properly applied the Sentencing Guidelines, we review a district court's factual findings for clear error and its legal conclusions de

¹ Rhodes also has filed a motion to file a pro se supplemental brief. Because Rhodes is represented by counsel and this appeal is not filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), we deny the motion. See *United States v. Penniegraft*, 641 F.3d 566, 569 n.1 (4th Cir. 2011).

novo. *United States v. Oceanic Illsabe Ltd.*, 889 F.3d 178, 194 (4th Cir. 2018). “We ‘review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.’” *United States v. Blue*, 877 F.3d 513, 517 (4th Cir. 2017) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). This review entails appellate consideration of both the procedural and substantive reasonableness of the sentence. *Gall*, 552 U.S. at 51.

The Supreme Court has 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.” *United States v. Watts*, 519 U.S. 148, 157 (1997). Although Rhodes contends that *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), overruled *Watts*, *Nelson* does not cite *Watts* nor does it call into question *Watts*’ holding, as *Watts* recognized that “application of the preponderance standard at sentencing generally satisfies due process.” *Watts*, 519 U.S. at 156. Furthermore, we recently stated:

It has long been established that sentencing courts may consider acquitted conduct in establishing drug amounts for the purpose of sentencing. Of course, the court must find the drug amounts established by a preponderance of the evidence. Thus, even if a court knows that a jury had a *reasonable doubt* about drug quantities, that doubt would not preclude the court’s finding of those quantities by a *preponderance of the evidence*, a lower standard.

United States v. Davis, 918 F.3d 397, 405 (4th Cir. 2019) (citation and internal quotation marks omitted). Thus, to the extent Rhodes contends that his sentence is unreasonable simply because the district court relied on acquitted conduct proven by a preponderance of the evidence rather than beyond a reasonable doubt, such argument is squarely foreclosed

by the Supreme Court's and this court's precedent.² Rhodes' double jeopardy argument fails for the same reasons. *See Monge v. California*, 524 U.S. 721, 728 (1998); *Watts*, 519 U.S. at 154-55; *United States v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991). Nor did the district court believe, as Rhodes argues, that it was required to sentence on acquitted conduct. Furthermore, the district court considered the 18 U.S.C. § 3553(a) (2012) factors and imposed a sentence below the Sentencing Guidelines range. Thus, we conclude that Rhodes' sentence is reasonable.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

² Rhodes contends that the Supreme Court's recent decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019), has overruled reasoning that historically allowed sentencing on acquitted conduct. *Haymond*, however, is inapposite. The imposition of Rhodes' 205-month sentence did not involve a judge increasing the penalty to which Rhodes was subject because Rhodes' sentence was within the statutory maximum of 30 years. *See* 21 U.S.C. §§ 841(b)(1)(C), 846; *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

FILED: October 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4733
(3:14-cr-00607-JFA-13)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERRY JABBARI RHODES, a/k/a Viking, a/k/a JJ

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

United States District Court

District of South Carolina

UNITED STATES OF AMERICA

vs.

JERRY JABBARI RHODES**Date of Original Judgment:** 3/14/17
(or Date of Last Amended Judgment)**AMENDED JUDGMENT IN A CRIMINAL CASE**

Case Number: 3:14-607 (013 JFA)

USM Number: 96007-171

Joshua S. Kendrick, Esq. (Appointed)

Defendant's Attorney

Reason for Amendment:

Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

Reduction of Sentence for Changed Circumstances (Fed.R. Crim. P. 35(b))

Correction of Sentence by Sentencing Court (Fed.R.Crim.P.35(a))

Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)

Modification of Supervision Conditions (18 U.S.C. §3563(c) or 3583(e))

Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. §3582(c)(1))

Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. §3582(c)(2))

Direct Motion to District Court Pursuant to 28 U.S.C. §2255 or 18 U.S.C. §3559(c)(7)

Modification of Restitution Order (18 U.S.C. §3664)

THE DEFENDANT:

pleaded guilty to Count(s) on.

pleaded nolo contendere to Count(s) on which was accepted by the court.

was found guilty on Count(s) 1 of the Second Superseding Indictment on 9/28/16 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 USC 846	Please see 2 nd superseding indictment	6/22/15	1
21 USC 841(a)(1); (b)(1)(C)			

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s).

Count(s) original indictment and superseding indictment are dismissed on the motion of the United States.

Forfeiture provision is hereby dismissed on motion of the United States Attorney.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

October 4, 2018

Date of Imposition of Judgment

Signature of Judge

Joseph F. Anderson, Jr., United States District Judge
Name and Title of Judge

October 4, 2018

Date

DEFENDANT: JERRY JABBARI RHODES
CASE NUMBER: 3:14-607

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of Two Hundred Five (205) months.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JERRY JABBARI RHODES
CASE NUMBER: 3:14-607

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Six (6) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. §20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program of domestic violence. *(check if applicable)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions listed below:

1. The defendant shall participate in a random drug testing program as administered by the U.S. Probation Office. If able, the defendant shall contribute to the costs of such program in an amount determined reasonable by the Court at the time of the defendant's enrollment for testing.
2. Unless able to secure stable and verifiable employment, the defendant shall participate in a Vocational Training or Work Force Development Program as approved by the U.S. Probation Office.

DEFENDANT: JERRY JABBARI RHODES

CASE NUMBER: 3:14-607

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JERRY JABBARI RHODES
 CASE NUMBER: 3:14-607

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	<u>\$ 100.00</u>	<u>\$</u>	<u>\$</u>

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case*(AO245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	<u>\$</u> _____	<u>\$</u> _____	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- The interest requirement is waived for the fine restitution.
- The interest requirement for the fine restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JERRY JABBARI RHODES
CASE NUMBER: 3:14-607

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 100.00 special assessment due immediately, balance due
 not later than _____, or
 in accordance with C, D, or E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.