NUMBER: _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEARIEUS DUHEART,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Dearieus Duheart went to trial on three charges: (1) possession with intent to distribute marijuana; (2) possession of a firearm in furtherance of a drug trafficking crime; and (3) possession of a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year. While the jury found Duheart guilty only of possession with intent to distribute marijuana, the district court imposed a two-level dangerous weapon enhancement which resulted in a longer sentence than otherwise applicable under the Guidelines.

The Fifth Circuit held the issue is foreclosed by *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997). Since *Watts*, though, four current sitting justices of this court have questioned whether using acquitted conduct to enhance a defendant's sentence "disregards the Sixth Amendment." *Jones v. United States*, 574 U.S. 948, 135 S.Ct. 8, 190 L.Ed.2d 278 (J. Scalia, with J. Thomas and J. Ginsburg dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926 (U.S.D.C. 2015)(then Judge Kavanaugh); *United States v. Sabillion-Umana*, 772 F.3d 1328 (10th Cir. 2014) (then Judge Gorsuch).

Thus, the question before this court is:

Whether the Fifth and Sixth Amendments prohibit the use of acquitted conduct to enhance a defendant's sentence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

United States of America, through the Solicitor General of the United States.

Dearieus Duheart, an individual and the defendant.

CORPORATE DISCLOSURE

The **United States of America** is a body politic and the federal government. The Solicitor General of the United States is the representative of the United States in matters before this Court.

LIST OF RELATED CASES

United States v. Duheart, No. 3:17-cr-00026 (U.S.D.C. Md. La. 2018)

United States v. Duheart, 794 Fed.Appx. 440 (5th Cir. 2020).

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OPINION BELOW

In a summary opinion, the United States Court of Appeals for the Fifth Circuit held Duheart's claim regarding the use of acquitted conduct to enhance his sentence is foreclosed under circuit precedent, *United States v. Jackson*, 596 F.3d 236, n. 4 (5th Cir. 2010, 562 U.S. 950, 131 S.Ct. 90, 178 L.Ed.2d 247 (2010), citing *United States v. Farias*, 469 F.3d 393 (5th Cir. 2006), *cert. denied*, 549 U.S. 1272, 127 S.Ct. 1502, 167 L.Ed.2d 241 (2007), and undermined by *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

BASIS FOR SUPREME COURT JURISDICTION

Duheart seeks review of the appellate court decision by writ of certiorari. This Court has jurisdiction under 28 U.S.C. §1254(a) to review the decision. This application is timely filed under 28 U.S.C. §2101(d), as outlined in United States Supreme Court Rule 13.1. A pauper application is also attached.

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In the summer of 2017, a United States grand jury for the Middle District of Louisiana indicted Duheart for: (1) knowingly and intentionally possessing with the intent to distribute marijuana, in violation of 21 U.S.C. §841(a)(1); (2) knowingly possessing a firearm, a Taurus .45 caliber semiautomatic pistol, in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §924(c)(1)(A); and (3) knowingly possessing a firearm, a Taurus .45 caliber semiautomatic pistol, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony, in violation of 18 U.S.C. §922(g)(1).

The matter proceeded to trial. The evidence showed that in mid-December 2016, Baton Rouge City Police received an anonymous complaint alleging suspicious activity at 4535 McClelland Street in Baton Rouge, Louisiana. Days after the complaint, Cpl. Frederick Thornton led a group of officers to the location to conduct a knock-and-talk. He found several vehicles parked in the front yard of the property and observed that the home's windows were tinted.

Cpl. Thornton smelled raw marijuana while approaching the house. He knocked, announced his presence, and was allowed to enter the home by Derrick Keelen, who leased the premises. Cpl. Thornton observed Keelen had a bulge in his trouser pocket, which turned out to be a large sum of money rubber-banded together. Cpl. Thornton also found an open area in the home with only a table and stool. Atop the table were small bags of marijuana. Duheart and Keelen's brother were seated at a table in a second open area of the home. Atop that table were narcotics and a firearm.

A search warrant was obtained. In the search, officers found various amounts of narcotics, digital scales, cellular phones, and a firearm in the home; heroin and cash were found in a vehicle.

Keelen ultimately pleaded guilty to possession with intent to traffic marijuana and trafficking with a firearm. Duheart opted for trial. The jury found Duheart guilty of possession of knowingly and intentionally possessing with the intent to distribute marijuana, but *acquitted* him of the two firearm charges.

The probation department calculated a base offense level of 12, with a criminal history category of VI. The court adjusted down the probation office's calculated base offense to six, but then added a two-level upward adjustment for the firearm charges. On a base offense level of eight with a VI criminal history category, the court calculated a guideline range of 18 to 24 months. Based upon that calculation, the court imposed a 24-month sentence to run concurrent to any state sentence but consecutive to any sentence Duheart could receive for revocation of supervision in another district court or in state court. Duheart appealed; the verdict and sentence were affirmed.

ARGUMENT

The Fifth and Sixth Amendments bar the use of acquitted conduct for sentence enhancement.

Use of acquitted conduct denies a defendant due process under the Fifth Amendment. Consideration of acquitted conduct undermines the [due process] "notice requirement that is at the heart of any criminal proceeding." *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008)(Bright, J., concurring), *cert. denied*, 555 U.S. 1037, 129 S.Ct. 609, 172 L.Ed.2d 466 (2008).

Meanwhile, using acquitted conduct to enhance a sentence is anathema to the Sixth Amendment. At the least ... increas[ing] a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal. *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). Because an acquittal is accorded special weight, *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), allowing judges to materially increase the length of imprisonment based on facts *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury's constitutional role. *United States v. Bell*, supra at 930 (Millet, J., dissenting). "[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved." *United States v. Pimental*, 367 F.Supp.2d 143, 152 (D.Mass.2005).

1. The lower federal courts have improperly expanded *Watts* to affirm the use of acquitted conduct for sentence enhancement.

Use of acquitted conduct for sentence enhancement has been routinely applied by federal district courts at least since *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), wherein this Court held the Double Jeopardy Clause of the Fifth Amendment did not prohibit use of relevant, but uncharged, conduct to impose a higher sentence. In *Witte*, the sentencing court used the quantity of cocaine involved in an earlier, but uncharged, importation scheme into account when determining sentence for a subsequent possession offense.

The court further held because *Witte* was neither prosecuted for, nor convicted of, the cocaine offenses during a first criminal proceeding, he was not subject to punishment twice for the same offense. 515 U.S. at 396. The sentencing guidelines, the court held, did not upset the constitutional analysis: "A defendant has not been "punished" any more for double jeopardy when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account." 515 U.S. at 401.

Two years later, the court revisited the use of relevant conduct and acquitted conduct in *Watts*, supra. Like Duheart, Watts was convicted of a drug offense but acquitted of using or carrying a firearm during or in relation to the drug offense. That acquittal, however, did "not preclude a finding by a preponderance of the evidence that the defendant did, in fact, use or carry such a weapon, much less that he simply *possessed* the weapon in connection with a drug offense." *Id.* In a per curiam decision

with two written dissents, the Court concluded a sentencing court could consider acquitted conduct in crafting a sentence as long as the sentencing court determines the facts are proven by a preponderance of the evidence:

> Indeed, 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.' The Guidelines did not alter this aspect of the sentencing court's discretion. 'Very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment. 519 U.S. at 152 (internal citations omitted).

Justice Kennedy dissented, writing that the majority ignored the precise issue "for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted." Justice Kennedy believed that the majority "hesitat[ed] in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not shrugging it off." 519 U.S. at 170. Justice Kennedy was poignant: "At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal...." *Id.*

Watts, then, resulted in two rules: (1) courts could use relevant conduct if the government proved that conduct by a preponderance of the evidence, and (2) relevant conduct included "acquitted conduct."

Three years later, though, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court limited *Watts*, requiring proof beyond a

reasonable doubt for conduct that would increase the sentence beyond the statutory maximum of the crime for which the defendant either pleaded guilty to or was convicted of by a jury. Specifically, the Court held that "[o]ther than the fact of a prior conviction, any act that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

The Court further eroded and declared unconstitutional as a violation of the Sixth Amendment the expansive United States Sentencing Guidelines. *Booker*, supra. A majority of the Court concluded the Sixth Amendment barred any judicial factfinding under the Guidelines that would increase a defendant's sentencing range beyond what the Guidelines would mandate based solely on facts admitted to in a plea agreement. Post-*Booker*, the Guidelines are now only advisory. *Booker*'s holding "requires a sentencing court to consider Guidelines range, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246.

The *Booker* decision is generally believed to have eliminated the Sixth Amendment implications that require a jury rather than a judge determine facts essential to sentencing. *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). The justices acknowledged the *Booker* court "unanimously agreed that judicial factfinding under a purely advisory guidelines system would ... comport with the Sixth Amendment. *Id.*, 127 S.Ct. at 874 (Alito, J., dissenting). While the Guidelines advisory remedy seemed to satisfy Sixth Amendment concerns, it alleviated

constitutional concerns regarding the burden of proof under the mandatory system. *United States v. Farias-Guijarro*, 2008 WL 5993209 (D.N. Mex. 2008).

Whether the sentencing court could count acquitted conduct remained uncertain.

But, in light of this Court's finding the Guidelines no longer mandatory, several federal judges concluded that sentencing based upon conduct for which the defendant is acquitted is unconstitutional.

In *Pimental*, supra, District Judge Nancy Gertner discussed at length the sentencing scheme following *Booker*. According to Judge Gertner, *Booker* undermined the continued validity of *Watts*, explaining it "makes absolutely no sense to conclude that the Sixth Amendment is violated whenever acts essential to sentencing have been determined by a judge rather than a jury [by a preponderance of the evidence rather than reasonable doubt] and also conclude that the fruits of the jury's efforts [acquittal] can be ignored with impunity by the judge in sentencing." *Pimental*, 367 F.Supp.2d at 150. She wrote:

> In effect, juries rule on "legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punishment to follow. *Pimental*, supra at 150.

In short, to consider acquitted conduct trivializes "legal guilt" or "legal innocence." When a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize, but facts of which the jury expressly rejected. *Pimental*, supra at 152. Thus, the expectation of no additional criminal punishment to follow from a jury acquittal is "a matter of simple justice." *Id.* at 150,

quoting *Apprendi*, 530 U.S. at 476. *Accord. United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008)(Merritt, J., dissenting), *cert. denied*, 556 U.S. 1215, 129 S.Ct. 2017, 173 L.Ed.2d 1147 (2009)(It is a mistake to rely upon *Watts* to support use of acquitted conduct since *Booker* limited *Watts* reach to the Fifth Amendment question of double jeopardy. Further, use of acquitted conduct "to punish is wrong as a matter of statutory and constitutional interpretation and violates both our common law heritage and common sense"); *United States v. Casper*, 536 F.3d 409, 418 (5th Cir. 2008)(Dennis, J., concurring), *cert. granted, vacated on other grounds*, 556 U.S. 1218, 129 S.Ct. 2156, 173 L.Ed.2d 1153("I am greatly troubled that a district court can use conduct acquitted by a jury for a sentence enhancement that significantly increases a sentence beyond that the defendant would have obtained had he been convicted by the jury for the same conduct").

See also, Canania, supra at 776 (Bright, J., concurring)("A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence"); *United States v. Mercado*, 474 F.3d 654, 664 (9th Cir. 2007) (Fletcher, J., dissenting), *cert. denied*, 552 U.S. 1297, 128 S.Ct. 1736, 170 L.Ed.2d 542 (2008)("By allowing judges to consider conduct rejected by the jury, the court allows the jury's role to be circumvented by the prosecutor and usurped by the judge – two of the primary entities against whom the jury is supposed to protect the defendant"); *United States v. Faust*, 456 F.3d 1342, 1352 (D.C. 2008)(Barkett, J.,

concurring)("When a sentencing judge finds facts that could, in themselves, constitute entirely freestanding offenses under the applicable law – that is when an enhancement factor could have been named in the indictment as a complete criminal charge – the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt").

2. The *Jones* dissent is the guidepost for eliminating the use of acquitted conduct for sentence enhancement.

An upswing in the debate whether a sentencing court could consider acquitted conduct in sentencing took hold after *Jones,* supra, a 2014 certiorari denial. In *Jones*, a jury convicted petitioners of distributing very small amounts of crack cocaine and acquitted them of conspiring to distribute drugs. Because the sentencing judge found they *had* engaged in the charged conspiracy – and relying largely on that finding – the defendants claimed sentences many times longer than those recommended by the Guidelines were imposed.

In a three-justice dissent, Justice Scalia, joined by Justice Thomas and Justice Ginsberg, found it time for this Court to unavoidably say that any fact necessary to expose the defendant to a longer than Guideline sentence "must be either admitted by the defendant or found by a jury. It *may not* be found by a judge." *Jones* at 8. Otherwise, the sentence could be reversed as substantively unreasonable. To the point of this application, Justice Scalia wrote:

> The present petition presents the nonhypothetical case the Court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing court thought them guilty of, but a jury *acquitted* them of that offense.

> Petitioners were convicted of distributing drugs, but acquitted of conspiring to distribute drugs. The sentencing judge found that petitioners had engaged in the conspiracy of which the jury acquitted them. (Emphasis provided). *Jones* at 9.

Jones sets the groundwork for this Court to now hold that the use of acquitted conduct violates a defendant's Fifth Amendment Due Process right and Sixth Amendment right to face punishment only for conduct found guilty of beyond a reasonable doubt by a jury. Otherwise, defendants continue to face imprisonment based upon an improper interpretation of *Watts* – which strictly addressed acquitted conduct in the context of double jeopardy.

And while federal appellate courts continue to cite *Watts* to affirm sentences based upon acquitted conduct, federal judges – including the two newest Justices to this Court – continue to find constitutional fault with the continued use. *See Sabillon-Umana*, supra, where just two months after *Jones*, now Justice, then Judge Gorsuch, as writing judge, found the District Judge's use of factual findings to either decrease or increase a defendant's sentence, within the statutorily authorized range, based on facts the judge finds without the aid of a jury or the defendant's consent rests on questionable foundation – "far from certain whether the Constitution allows at least the second half of that equation."

Justice Gorsuch observed that using acquitted conduct places a defendant in jeopardy of losing two constitutional rights: notice and jury trial. With regard to the Fifth Amendment, this Court has held that "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the

factfinder of his guilt." *In re Winship*, 397 U.s. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). And allowing the use of acquitted conduct takes away the defendant's Sixth Amendment rights by "permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed." *United States v. Lasley*, 832 F.3d 910 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 823, 196 L.Ed.2d 608 (2017)(Bright, J., dissenting). In short, by permitting the district court to ignore express findings by the jury under the assertion the fact is a mere "sentencing factor" not only gives the government a proverbial "second bite at the apple" on counts it failed to prove to the jury, but also "entirely trivialize[s] [the jury's] principal fact-finding function." *Lasley*, 832 F.3d at 921-922 (Bright, J., dissenting), citing his concurrence in *Canania*, 532 F.3d at 776.

Justice Kavanaugh, when sitting on the United States Court of Appeals, District of Columbia Circuit, was one of the leading critics on the use of acquitted conduct to enhance an offense. *See Bell*, supra (Kavanaugh, concurring in denial of rehearing en banc)(sharing Judge Millet's "overarching concern about the use of acquitted conduct at sentencing: "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial," also citing to his opinions in *United States v. Settles*, 530 F.3d 920, 923-924 (U.S.D.C. 2008), *cert. denied*, 555 U.S. 1140, 129 S.Ct. 999, 173 L.Ed.2d 298 (2009); *United States v. Henry*, 472 F.3d 910, 918-922 (U.S. D.C. Cir. 2007), 552 U.S. 888, 128 S.Ct. 247, 169 L.Ed.2d 147 (2007).

See also the more recent United *States v. Martinez*, 769 Fed.Appx. 12, 16 (2nd

Cir. 2019)(Pooler, J., concurring), *cert. denied*, — S.Ct. —, 2020 WL 827176 (2020)(... "I believe that the district court's practice of using acquitted conduct to enhance a defendant's sentence – here to life imprisonment – is fundamentally unfair. I agree with Justice Scalia that such a practice 'disregard[s] the Sixth Amendment,' and with then-Judge Gorsuch that '[i]t is far from certain whether the Constitution allows a district court in this way to increase a defendant's sentence ... based on facts the judge finds without the aid of a jury or the defendant's consent")(Internal citations omitted). In *Martinez*, the defendant was acquitted of murder but still sentenced to life imprisonment because the trial court believed he was "directly responsible" for the victim's death. *Id.*, 769 Fed.Appx. at 17.

Although no federal appellate court has held that the use of acquitted conduct is unconstitutional, it is time for this Court to share the discomfort of the late Justice Scalia who insisted on an "end to the unbroken string of cases disregarding the Sixth Amendment." *Jones*, supra. Otherwise, the misunderstood perception that *Watts* permits the unfettered use of "acquitted conduct" will continue to result in defendants, like *Jones* and like Duheart, facing additional incarceration time for conduct to which they not only did not admit by pleading guilty, but for which a jury acquitted them. Congress could not have intended such bizarre results when it adopted the Guidelines. Otherwise, Congress must have intended for the jury trial acquittal to have no meaning in the federal system. *See United States v. Scheiblich*, 346 F.Supp.3d 1076 (S.D. Ohio 2018), *reversed and remanded*, 788 Fed.App. 305 (6th Cir. 2019)(Most

lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction)(internal citations omitted).

And while there is no requirement mandating a court consider acquitted conduct, a close review of the jurisprudence shows its application commonplace and appellate court affirmation routine.

This case is a clear example. The jury found Duheart not guilty of the possession of a firearm. The jury's decision is well-founded upon the lack of evidence presented by the government. The jury, the bulwark of the American justice system, obviously performed its charge in deliberating on the charge, it asked the court three times for instruction about possession of a firearm. The mere presence of a firearm in the home does not mean Duheart either constructively or actually possessed it, regardless of the standard the court must apply in considering the acquitted conduct.

The evidence established that the firearm was sitting upon a table, not in the actual or constructive possession of Duheart. *United States v. Ferg*, 504 F.2d 914, 916-917 (5th Cir. 1974)(In order to establish constructive possession, the government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which the contraband is concealed); *United States v. Martin*, 483 F/2d 974 (5th Cir. 1973)(To establish constructive possession there must be proof of dominion and control). The jury acquitted Duheart of the firearm possession charges. The district court nevertheless believed Duheart possessed the firearms and

used that belief to impose a two-level sentence increase. And the appellate court made short work with his argument, noting the issue is foreclosed by its precedents.

CONCLUSION

As the court of last refuge, this Court should grant this writ of certiorari to do what Justice Scalia suggested. The use of acquitted conduct "has gone on long enough." *Jones*, supra. It is time that the Court complete what at least four Justices have said needs to be done. Continuing to allow judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose is a dubious infringement of the rights to due process and to a jury trial that should be stopped. *Bell*, 808 F.3d at 928 (Kavanaugh, J., dissenting).

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I provided a copy of this Writ of Certiorari by electronic mail to:

Solicitor General of the United States
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s/s Mark D. Plaisance
MARK D. PLAISANCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 21, 2020
Lyle W. Cayce
Clerk

No. 18-31009
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DEARIEUS DUHEART,

Defendant - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:17-CR-26-1

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

PER CURIAM:[*]

Dearieus Duheart challenges: his jury conviction of possession, with intent to distribute, marihuana, in violation of 21 U.S.C. § 841(a)(1); and his within-Sentencing Guidelines sentence of, *inter alia*, 24 months' imprisonment.

For his challenge to his conviction, Duheart contends the evidence is insufficient to prove he knowingly possessed the marihuana. In support of this

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

assertion, he points to evidence he presented at trial, which he contends showed: he had arrived at an alleged drug house only 10 minutes before police arrived; and the marihuana belonged to his co-defendant, Derrick Keelen, whose assistance Duheart had sought to secure a position at a local factory.

At the close of the Government's case, Duheart moved for a judgment of acquittal, on which the court deferred ruling. He did not, however, renew his motion at the close of all the evidence, and the court never ruled on the original motion. The parties do not address whether, given Duheart's failure to renew and the court's not ruling on the motion, our review of this claim is *de novo* or for plain error. *See United States v. Delgado*, 672 F.3d 320, 328–31 (5th Cir. 2012) (en banc) (holding plain-error review applies where defendant entirely failed to move for judgment of acquittal in district court). "Despite the government's failure to assert plain-error review, it is well-established that our court, not the parties, determines the appropriate standard of review." *E.g.*, *United States v. Kalu*, 936 F.3d 678, 680 (5th Cir. 2019) (alteration, citation, and internal quotation marks omitted). "Nevertheless, we need not determine the standard of review because, assuming *arguendo* [Duheart's sufficiency claim] [was] sufficiently preserved, [it] still fail[s]". *Id.* (citation omitted).

Because the court deferred ruling on the motion, our review is limited to the evidence adduced during the Government's case-in-chief, which did not include the earlier-described evidence relied upon on appeal by Duheart. *United States v. Carbins*, 882 F.3d 557, 562 n.2 (5th Cir. 2018) (citing Fed. R. Crim. P. 29(b); *United States v. Brown*, 459 F.3d 509, 523 (2006)). We review this evidence, "whether circumstantial or direct, in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury's verdict". *United States v. Rodriguez*, 831 F.3d 663, 666 (5th Cir. 2016) (citation omitted). "We determine only whether a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and are mindful that the jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses." *Id.* (alteration, citation, and internal quotation marks omitted).

To obtain a conviction under 21 U.S.C. § 841(a)(1), "the government must prove [defendant's] knowing possession of a controlled substance with the intent to distribute it" beyond a reasonable doubt. *United States v. Cardenas*, 748 F.2d 1015, 1019 (5th Cir. 1984) (citations omitted). Possession may be actual or constructive. *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012) (citation omitted). In joint-occupancy-of-residence cases, as in this instance, constructive possession is satisfied "only when there is some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the illegal item". *Id.* (emphasis, citation, and internal quotation marks omitted).

The evidence presented in the Government's case-in-chief was, *inter alia*: an officer detected a strong odor of raw marihuana from outside a house; its windows were covered, and the house had minimal furniture, which the officer testified is consistent with a "trap house" used to package narcotics; upon obtaining consent to enter the house, the officer saw a table on which were a firearm and large quantities of marihuana in open, vacuum-sealed bags, which the officer testified are used to transport marihuana before distribution; and Duheart was seated at the table, within arm's reach of the marihuana, which was in plain view. A reasonable jury could conclude, therefore, that Duheart knew of the existence of the marihuana and had access to it. *See id.* at 419–21 (citations omitted).

For his sentencing challenge, Duheart contends the court violated the Sixth Amendment by relying on acquitted conduct in imposing a two-level

dangerous-weapon enhancement, pursuant to Guideline § 2D1.1(b)(1). (The jury had acquitted Duheart of possessing a firearm in furtherance of a drug-trafficking crime and of being a felon in possession of a firearm.) Because he did not raise this issue in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Duheart must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct such reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.*

As Duheart concedes, his claim is foreclosed by *United States v. Watts*, 519 U.S. 148, 157 (1997) (citation omitted); he contends, however, that *Watts* was undermined by *United States v. Booker*, 543 U.S. 220 (2005). This claim is also foreclosed. *United States v. Jackson*, 596 F.3d 236, 243 n.4 (5th Cir. 2010) (citing *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006)).

AFFIRMED.