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WHITE-COLLAR CRIME

Congress Poised To End Use of Acquitted Conduct at Sentencing

Among the many ways the U.S. Sentencing Guidelines have distorted the federal criminal justice system is through heavy reliance on factual determinations typically made by judges at sentencing rather than by juries at trial. Two senators recently announced the introduction of the "Prohibiting Punishment of Acquitted Conduct Act of 2021," which would bar courts from increasing a defendant's sentence based on acquitted conduct. Robert J. Anello and Richard F. Albert provide background and discuss the legislation in this edition of their White-Collar Crime column.

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Among the many ways the U.S. Sentencing Guidelines have distorted the federal criminal justice system is through heavy reliance on factual determinations typically made by judges at sentencing rather than by juries at trial. Perhaps the most troubling example of judicial factfinding predominating over the role of the jury is the court's authority to increase a sentence based on acquitted conduct. Even as a series of U.S. Supreme Court decisions in the first decade of this century struck down the mandatory Guidelines based on Sixth Amendment protections of the jury's role, the court nevertheless declined opportunities to address this controversial practice. Now, however, as political winds have begun to shift and pressures for criminal justice reform have grown, the legislative branch is thankfully stepping up. On March 4, 2021, Sens. Dick Durbin and Charles Grassley announced the introduction of the "Prohibiting Punishment of Acquitted Conduct Act of 2021," which would bar courts from increasing a defendant's sentence based on acquitted conduct.

The Role of Judicial Factfinding at Sentencing, as Shaped by SCOTUS. Federal sentencing practice has long given judges the authority to consider facts beyond those found by the jury. Prior to the introduction of the Guidelines, the court had discretion to sentence defendants anywhere within typically broad maximums established in the statute of conviction. As the Second Circuit addressed in *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), in general, if the sentencing court sought to base its decision on additional facts not found by the jury, and the defendant contested those facts, the court was required to hold an evidentiary hearing to determine them by a preponderance of evidence.

With the advent of the mandatory Sentencing Guidelines in the late-1980s, judicial factfinding in connection with sentencing took on greater importance. For many offenses, the calculation of the Guidelines range was dominated by factual determinations such as the amount of loss and number of victims in a fraud or theft case, the volume of affected commerce in an antitrust case, the tax loss in a tax case, and the weight of narcotics in a drug case. Over the years the Sentencing Commission, often urged on by Congress, added a plethora of fact-based "offense level enhancements" to a wide variety of offense Guidelines, such that determining the extent of these enhancements often would have an enormous impact on the mandatory sentencing range. Typically, however, the jury verdict would establish only that the charged crime had occurred, and these additional facts that expressly drove the Guidelines sentencing range were left to the court. Within two decades, however, a series of Supreme Court decisions focusing new attention on the role of the jury upended this system.

The first change came from the Supreme Court's decision in *Apprendi*

v. New Jersey, 530 U.S. 466 (2000), in which the court considered whether a New Jersey state court's finding at sentencing that the defendant's crime was motivated by racial animus—permitting a sentence above the 10-year maximum for the offense charged—ran afoul of the defendant's Sixth Amendment right. The court held that the enhancement was unconstitutional because any fact that would increase the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In so holding, the court relied upon the "surpassing importance" of the jury trial as a "bulwark" of personal liberty, preserved by the Sixth Amendment.

Apprendi was followed by *Blakely v. Washington*, 542 U.S. 296 (2004). In that case, the court considered a sentence based on a judicial finding the defendant had acted with "deliberate cruelty," which, under Washington's sentencing scheme, permitted enhancement of the sentence beyond the standard statutory maximum. Writing for the majority, and citing the longstanding common-law requirement that "the truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," Justice Scalia concluded that this mode of enhancement similarly violated the Sixth Amendment jury right.

The third in this line of sentencing decisions emphasizing the primacy of the jury was *United States v. Booker*, 543 U.S. 220 (2005), in which the court squarely addressed whether the mandatory Guidelines, by forcing the sentencing court to impose a certain sentence, potentially on the basis of its factfinding at sentencing, violated the Constitution. As presaged by *Apprendi* and *Blakely*, the court concluded that the mandatory guidelines impermissibly infringed the jury's power; instead, the Guidelines would be merely "advisory," and sentences within the statutory range would be reviewed for "reasonableness."

Given the Supreme Court's interpretation of the Sixth Amendment in *Apprendi*, *Blakely* and *Booker*, some expected that the Supreme Court might further cabin judicial factfinding in sentencing. Yet the trend flagged in the court's next major sentencing decision, *Rita v. United States*, 551 U.S. 338 (2007). There the court reviewed the Fourth Circuit's presumption that within-Guidelines sentences were "reasonable." The defendant argued that a presumption of reasonableness would encourage judicial factfinding, to the detriment of the jury's role and thus in violation of the Sixth Amendment. Retreating somewhat from its earlier characterization of the jury's primacy and the constitutional concerns involved in judicial factfinding at sentencing, the court characterized a Sixth Amendment violation as occurring only when "the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find." On that basis, the majority concluded that a nonbinding presumption of reasonableness for within-Guidelines sentences was permissible.

The conclusion in *Rita*—that as long as a sentence is not expressly barred absent judicial factfinding, it is permissible under the Sixth Amendment—still invites the question whether a sentence that would not be "reasonable" without a judicially found fact passes constitutional muster. Some have termed this the "as-applied" Sixth Amendment question. Indeed, in *Rita*, Justice Antonin Scalia, with Justice Clarence Thomas joining him, wrote separately to emphasize that in his view, a sentence violated the constitution if it would be unreasonable but for facts found by a judge. That view, however, has not yet garnered the support of a majority of the justices.

'United States v. Watts' and the Problem of Acquitted Conduct. The problem that Justice Scalia addressed in *Rita* is all the more salient where a jury specifically has concluded that insufficient evidence existed to convict the defendant of the conduct at issue. Indeed, many likely would assume that where a jury has acquitted a defendant of particular conduct, the defendant will not face punishment for it. Yet in *United States v. Watts*, 519 U.S. 148 (1997), a per curiam decision, the Supreme Court concluded that reliance on acquitted conduct was acceptable at sentencing. In so holding, the court reasoned primarily from the different burdens of proof: A fact not found beyond a reasonable doubt nevertheless may be found by a preponderance of the evidence. Predating the court's decision in *Apprendi*, the *Watts* opinion does not substantively address broader Sixth Amendment concerns.

While data regarding how often courts rely on acquitted conduct in sentencing are not readily available, circumstantial evidence suggests that it is not an exceptionally rare occurrence. According to a research database, since the Supreme Court's 1997 decision in *Watts*, court opinions have cited its holding that

courts may rely on acquitted conduct at sentencing more than 760 times.

Watts is in tension with the constitutionally-protected primacy of the jury in our justice system, as expressed in *Apprendi*, *Blakely* and *Booker*. More strongly stated: Allowing a sentence to be enhanced based on acquitted conduct deprecates the role of the jury, converting the jury trial from a sacrosanct bulwark against tyranny to a minor proceeding before the main event—sentencing.

Despite this tension, the Supreme Court has declined opportunities to review further the use of acquitted conduct at sentencing. In 2013, in *Jones v. United States*, 574 U.S. 948 (2014), in particular, the petitioners sought Supreme Court review of exceptionally high sentences imposed on the basis of a judicial finding that they had been part of a drug distribution conspiracy of which the jury had acquitted them. Noting the "strong case that, but for the judge's finding of fact, their sentences would have been substantively unreasonable and therefore illegal," Justices Scalia, Thomas, and Ginsburg strongly dissented from the denial of certiorari. Since that denial, however, the court has come no closer to taking up the question. Notably, however, prior to their elevation to the court, both Justices Neil Gorsuch and Brett Kavanaugh expressed concerns about relying on acquitted conduct at sentencing. See *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) and *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

New Prospects for Legislative Relief. Without action by the Supreme Court, the torch has passed to Congress. The "Prohibiting Punishment of Acquitted Conduct Act of 2021," introduced by Sens. Durbin and Grassley, the ranking members of both parties on the Senate Judiciary Committee, along with others, would help restore the jury's primacy. The bill does so primarily through a narrowly tailored amendment to §3661—the statute that codifies the general rule that judges may consider all relevant facts at sentencing—by adding that a court shall not consider acquitted conduct "except for purposes of mitigating a sentence." The bill is still under consideration by the Judiciary Committee, although its sponsorship suggests that it is likely to clear this initial hurdle.

The bill has the potential to serve as one of many reforms needed to reduce the disincentives for defendants to go to trial: the "trial penalty" resulting in the declining number of jury trials that has received growing attention for its deleterious impact on all aspects of the criminal justice system. First, by removing acquitted conduct from consideration at sentencing, the bill lowers the risk that defendants will go to trial and achieve partial victory, only to find the sentence unaffected. Second, the bill may encourage defendants to proceed to trial even where the evidence is difficult to overcome on some charges but considerably weaker on others, in the hope they might beat allegations that could otherwise increase their sentence.

If passed, the bill might also tend to curb prosecutors' temptations to overcharge defendants. The bill creates a disincentive to charge additional conduct that is less than well supported by the evidence, because any acquitted charges would preclude consideration of such conduct at sentencing.

Looking Ahead. The bill's bipartisan sponsorship by senior senators—especially given Democrats' control of the House—would appear to give it more hope than many to become law. One factor that may have an impact on its chances is whether it becomes part of a package of further criminal justice reform bills: For example, on March 26, 2021, Sens. Durbin and Grassley also proposed new legislation to make retroactive certain sentencing-related provisions of 2018's First Step Act.

If passed in its current form, the bill's text would appear to leave some questions for the courts to determine. Among them is whether "acquitted conduct" encompasses only elements of offenses on which the jury has acquitted, or would reach to other facts presented to the jury but not essential to the counts of conviction. Regardless of the answer to this question and others, the new law would bring an end to a practice that has long troubled practitioners and scholars, and would be a welcome step toward preserving the jury's sacred role in our criminal justice system.

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