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REPORT ON LEGISLATION BY THE FEDERAL COURTS COMMITTEE

S.2566

Sen. Durbin

AN ACT to amend section 3661 of title 18, United States Code, to prohibit the consideration of acquitted conduct at sentencing.

Prohibiting Punishment of Acquitted Conduct Act of 2019

THIS BILL IS APPROVED WITH MODIFICATIONS

I. INTRODUCTION

The Prohibiting Punishment of Acquitted Conduct Act of 2019, which was introduced with bipartisan support in the Senate, is intended to remedy the “important, frequently recurring, and troubling contradiction in sentencing law” involving the use of acquitted conduct in federal court to enhance a convicted defendant’s sentence.¹ The New York City Bar Association (“the City Bar”) supports the legislation, which is currently before the Senate Judiciary Committee, to amend 18 U.S.C. § 3661 to preclude the federal courts from considering, except for purposes of mitigating a sentence, acquitted conduct at sentencing. The City Bar, however, believes that Congress should go further in amending the statute by including other similarly troubling contradictions such as consideration of uncharged conduct in federal sentencing law.

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The City Bar includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar’s Federal Courts Committee is charged with the responsibility for studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

II. THE CITY BAR SUPPORTS THE PROHIBITING PUNISHMENT OF ACQUITTED CONDUCT BILL

a. Use of Information for Sentencing (18 U.S.C. § 3661)

The Supreme Court has “observed that ‘both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in sources and types of evidence used to assist him in

¹ *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing *en banc*).

determining the kind and extent of punishment to be imposed within limits fixed by law.”² In 1984, Congress codified that “long-standing principle that sentencing courts have broad discretion to consider various kinds of information” at 18 U.S.C. § 3661.³

As codified, Section 3661 provides that:

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.

The Supreme Court has relied upon Section 3661 to allow consideration of various sources and types of evidence, including acquitted conduct, to sentence a defendant.⁴ The *Watts* Court, in particular, reasoned that consideration of acquitted conduct is permissible because “acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.”⁵ And, as the Second Circuit explained, “[u]nder *Watts*, the distinction between unrelated and related conduct is irrelevant.”⁶ Thus, despite challenges under the Fifth (due process clause) and Sixth (jury trial clause) Amendments, every single circuit has continued to consider acquitted conduct when sentencing within the statutory range authorized by the jury verdict.⁷

While this practice of relying on acquitted and uncharged conduct at sentencing existed before the enactment of the United States Sentencing Guidelines,⁸ the practice took on a more weighty significance under the Sentencing Guidelines. This is because during the era of mandatory Guidelines sentencing, acquitted and uncharged conduct were not merely to be “considered” by district court judges, but rather became part of the calculation of the Guidelines range. This practice has continued even after the Guidelines became advisory, rather than mandatory, under *Booker v. United States*, 543 U.S. 220 (2005).⁹ While the Guidelines are now advisory, accurate calculation of the advisory Guidelines range remains the first step in sentencing, and judges have continued to give great weight to the Guidelines range at sentencing.

² *Pepper v. United States*, 562 U.S. 476, 488 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)).

³ *Pepper*, 562 U.S. at 488-89.

⁴ See *United States v. Watts*, 519 U.S. 148, 151-52 (1997) (*per curiam*).

⁵ 519 U.S. at 155 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

⁶ *United States v. Gotti*, 767 Fed. App’x 173, 175 (2d Cir. 2019), *petition for cert. filed*, __U.S.L.W. __ (U.S. July 22, 2019) (No. 19-107).

⁷ See *United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014) (citing cases).

⁸ See *United States v. Fatico*, 603 F.2d 1053, 1057-58 (2d Cir. 1979) (discussing the need for a sentencing hearing at which the burden of proof is lower than the standard of proof beyond a reasonable doubt that is used at sentencing).

⁹ See U.S.S.G. § 1B1.3 (defining relevant conduct to include all conduct); *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005) (holding that even after *Booker*, “a district court may sentence a defendant taking into account acquitted conduct”).

b. Judicial Concerns Regarding Consideration of Acquitted Conduct in Sentencing Are Undiminished

While commentators have almost uniformly decried the use of acquitted conduct in federal sentencing,¹⁰ appellate courts have been bound by precedents to the contrary.¹¹ Nonetheless, there has been a continuing groundswell of concerns expressed by judges, including the late Justice Scalia and then-circuit judges Kavanaugh and Gorsuch.¹²

c. The Use of Acquitted Conduct at Sentencing Continues

The Supreme Court, however, has “repeatedly and recently denied petitions for writs of certiorari challenging the reliance on acquitted conduct at sentencing.”¹³ Given the Supreme Court’s latest denial of certiorari, the use of acquitted conduct at sentencing will continue undiminished in federal courts.

d. Legislative Fix for 18 U.S.C. § 3661 Is Appropriate

The bipartisan bill (S.2566), introduced by Senators Durbin (D-Ill.) and Grassley (R-IA) in September 2019, to amend 18 U.S.C. § 3661 to preclude considering, except for purposes of mitigating a sentence, acquitted conduct at federal sentencing would resolve the concerns regarding consideration of acquitted conduct expressed by courts and commentators. The City Bar endorses the legislation, and urges Congress to do more.

Since 1949, courts have been allowed to consider uncharged conduct in determining the sentence a convicted defendant should receive within the statutory range authorized by law.¹⁴ But there is no meaningful or practical distinction between courts’ consideration of uncharged conduct and acquitted conduct. Indeed, consideration of uncharged conduct at federal sentencing raises

¹⁰ See Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 27 (2016),

¹¹ See, e.g., *United States v. Bagcho*, 923 F.3d 1131, 1141 (D.C. Cir. 2019) (Millett, J., concurring) (“circuit precedent forecloses this panel from righting this grave constitutional wrong”).

¹² See *Jones v. United States*, 574 U.S. ---, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) (calling for a review of consideration of acquitted conduct at sentencing); *United States v. Bell*, 808 F.3d at 927-28 (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that using acquitted 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”); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning whether use of acquitted conduct passes constitutional muster). See also *United States v. Martinez*, 769 Fed. App’x 12, 16 (2d Cir. 2019) (Pooler, J., concurring) (explaining that “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” and “deeply troubling”); *United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring) (“wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of ‘not guilty’ for practical purposes may not mean a thing”).

¹³ Brief for the United States in Opposition to Petition for Writ of Certiorari at 14, *Asaro v. United States*, No. 19-107 (cert. denied Feb 24, 2020) (citing 12 denials since 2016, excluding *Asaro*’s denial).

¹⁴ *United States v. Galloway*, 976 F.2d 414, 419 (8th Cir. 1992) (citing *Williams v. New York*, 337 U.S. at 246).

the same constitutional concerns as acquitted conduct.¹⁵ Thus, we urge that Section 3661 should be further amended to include any uncharged conduct that was never brought to any court—let alone, any jury—for adjudication. If the government wishes to see a defendant sentenced for particular conduct, it should be required to charge the conduct in an indictment or information and obtain a conviction by plea or trial.

III. CONCLUSION

The City Bar supports the legislation to amend 18 U.S.C. § 3661 to preclude the federal courts from considering, except for purposes of mitigating a sentence, acquitted conduct at sentencing. The City Bar, however, believes that Congress should address other similarly troubling contradictions in federal sentencing law such as consideration of uncharged conduct for enhancement of a convicted defendant’s sentence, and urges continued bipartisan efforts to make additional changes to Section 3661 to continue to make federal sentencing more fair and just.

Federal Courts Committee
Harry Sandick, Chair

April 2020

¹⁵ See *United States v. Bell*, 808 F.3d at 927-28 (treating acquitted and uncharged conduct as same for constitutional purposes).