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PROHIBITING PUNISHMENT OF ACQUITTED CONDUCT ACT OF 2021

MARCH 28, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1621]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1621) to amend section 3661 of title 18, United States Code, to prohibit the consideration of acquitted conduct at sentencing, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 1621, the "Prohibiting Punishment of Acquitted Conduct Act of 2021," would prohibit judges from increasing sentences based on conduct for which a jury found a defendant not guilty.

Background and Need for the Legislation

The U.S. Supreme Court has held that "the Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.'"[1] The Court further held that "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime . . . and 'must be found by a jury, not a judge.'"[2] Despite this guidance, under 18 U.S.C. § 3661, Congress has barred any limitation on the conduct that sentencing courts may consider for the purpose of imposing punishment. And the "Relevant Conduct" provision of the United States Sentencing Guidelines[3] allows federal courts to enhance a defendant's sentence by considering a range of factors, including the conduct underlying charges of which the defendant was acquitted.[4] Consequently, federal judges are permitted to sentence defendants based on charges for which a jury found them not guilty, and the evidentiary standards at sentencing are lower compared to the guilt-innocence phase. The lower federal courts have "almost uniformly approved of the use of acquitted or uncharged conduct at sentencing, so long as a judge finds by a preponderance of the evidence that the conduct occurred."[5]

Some judges and legal commentators have disagreed with the practice, largely on constitutional grounds.[6] Criticism of the practice has reached the high court. While the Supreme Court held that the consideration of acquitted conduct by a preponderance standard at sentencing did not violate the double jeopardy clause in *United States* v. *Watts*, the Court has never addressed whether the Sixth Amendment right to trial by jury prohibits the practice.[7] In *Jones* v. *United States*,[8] Supreme Court justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg strongly dissented from the denial of certiorari in a case seeking review of exceptionally high sentences that were imposed because a judge found the defendants were part of a drug distribution conspiracy despite the jury's acquittal on that count. Justice Scalia, writing for the dissent, stated that appellate courts have taken the Court's silence on the issue as a suggestion that these sentences are permitted so long as they are in the statutory range.[9] Justice Scalia wrote, "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."[10] Prior to their elevation to the Supreme Court, Justices Neil

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[1] *Jones* v. *United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari and quoting *Alleyne* v. *United States*, 570 U.S. 99, 104 (2013)).

[2] *Jones* v. *United States*, 574 U.S. at 948 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 483, n.10, 490 (2000) and *Cunningham* v. *California*, 549 U.S. 270, 281 (2007)).

[3] U.S.S.G. § 1B1.3

[4] Michael A. Foster, *Judicial Fact-Finding and Criminal Sentencing: Current Practice and Potential Change*, CONG. RSCH. SERV. (Aug. 24, 2018) at 1, https://sgp.fas.org/crs/misc/LSB10191.pdf.

[5] *Id.*

[6] *Id.*

[7] 519 U.S. 148 (1997).

[8] 574 U.S. at 948.

[9] *Id.* Justice Scalia stated that the Supreme Court "left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness."

[10] *Id.* (emphasis in original).

Gorsuch and Brett Kavanaugh expressed concerns about the reliance on acquitted conduct at sentencing.[11]

The "Prohibiting Punishment of Acquitted Conduct Act of 2021" would prohibit judges from increasing sentences based on conduct for which a jury found a defendant not guilty by amending 18 U.S.C. § 3661 to preclude courts from considering, except for purposes of mitigating a sentence, acquitted conduct at sentencing, and defining "acquitted conduct" to include acts for which a person was criminally charged and adjudicated not guilty or not responsible in a federal, state, or juvenile courts, or acts underlying a criminal charge or juvenile information dismissed upon a motion for acquittal.

Hearings

The Committee did not hold any hearings related to H.R. 1621.

Committee Consideration

On November 17, 2021, the Committee met in open session and ordered the bill, H.R. 1621 favorably reported without an amendment, by a voice vote, a quorum being present.

Committee Votes

No roll call votes occurred during the Committee's consideration of H.R. 1621.

Committee Oversight Findings

In compliance with clause 3(c)(1) of House Rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House Rule X, are incorporated in the descriptive portions of this report.

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House Rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House Rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House Rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of the Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House Rule XIII, no provision of H.R. 1621 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

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[11] *See United States* v. *Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J.); *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1331 (2014) (Gorsuch, J.).

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House Rule XIII, H.R. 1621 would end the practice of judges increasing sentences based on conduct for which a defendant has been acquitted by a jury.

Advisory on Earmarks

In accordance with clause 9 of House Rule XXI, H.R. 1621 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill, the "Prohibiting Punishment of Acquitted Conduct Act of 2021."

Sec. 2. Acquitted Conduct at Sentencing. Section 2 amends 18 U.S.C. § 3661 to bar judges from considering at sentencing, except for purposes of mitigating a sentence, conduct for which a defendant was acquitted (found not guilty). The amendment applies only to judgments entered on or after the date of enactment.

This section also defines the term "acquitted conduct" as an act for which a person was criminally charged and found not guilty after trial or adjudicated not responsible in a Federal, State, Tribal, or Juvenile court; any favorable disposition to the person in any prior charge, regardless of whether the disposition was pretrial, at trial, or post trial; or acts underlying a criminal charge or juvenile information dismissed upon a motion for acquittal.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

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PART II—CRIMINAL PROCEDURE

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CHAPTER 232—MISCELLANEOUS SENTENCING PROVISIONS

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§ 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an of-

fense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence*, except that a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct under this section*.

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§ 3673. Definitions for sentencing provisions

[As] *(a) As* used in chapters 227 and 229—

(1) the term "found guilty" includes acceptance by a court of a plea of guilty or nolo contendere;

(2) the term "commission of an offense" includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

(3) the term "law enforcement officer" means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense.

(b) As used in this chapter, the term "acquitted conduct" means—

(1) an act—

(A) for which a person was criminally charged and with regard to which—

(i) that person was adjudicated not guilty after trial in a Federal, State, or Tribal court; or

(ii) any favorable disposition to the person in any prior charge was made, regardless of whether the disposition was pretrial, at trial, or post trial; or

(B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication hearing; or

(2) any act underlying a criminal charge or juvenile information dismissed—

(A) in a Federal court upon a motion for acquittal under rule 29 of the Federal Rules of Criminal Procedure; or

(B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.

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