

NOTES

THE USE OF SENTENCING FINDINGS AS A COLLATERAL ESTOPPEL WEAPON IN SUBSEQUENT CIVIL LITIGATION

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INTRODUCTION

Should plaintiffs or defendants be permitted to use judicial findings made in the limited setting of a federal criminal sentencing hearing as a weapon in subsequent civil litigation? In the contemporary U.S. justice system, a majority of prosecutions do not actually proceed to trial, but are resolved by a guilty plea.¹ There are numerous reasons that criminal prosecutions result in guilty pleas rather than a trial.² The rarity of criminal trials often leaves sentencing as the most important stage of the criminal process.³ In the federal system, before pronouncing the sentence a judge must make factual findings. These findings may relate to uncharged conduct that could later become the

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1 See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001).

2 Some of the incentives that a defendant might have to plead guilty include a defendant's willingness to plead guilty to a lesser crime than that originally charged, or a defendant's hope to receive a more lenient sentence than he would receive if he contested the charge. See, e.g., *United States v. Montes*, 976 F.2d 235, 241 (5th Cir. 1992) (demonstrating the incentives a defendant has to plead guilty when two accomplices to the same crime received different sentences based on whether the accomplice pled guilty). A prosecutor may be motivated to offer a guilty plea by the prospect of eliminating the risk of a not guilty verdict, and the possibility of increasing the total number of cases that can be prosecuted.

3 See Bibas, *supra* note 1, at 1150–52.

source of civil litigation. In many cases, because of the lack of a trial, most of the underlying facts surrounding the criminal offense are not fleshed out until the sentencing process. But in the limited context of a sentencing hearing many procedural rules that constrain litigants in civil or criminal trials are unavailable.

The federal system has a general policy favoring preclusion of issues that have been decided in previous litigation. It is well established that a criminal conviction by a jury verdict or a guilty plea has preclusive effect in subsequent civil litigation as to the issues which are identical to the matters necessarily decided by the judgment in the criminal case.⁴ On the other hand, whether a federal judge's criminal sentencing findings also have preclusive effect is not a settled issue. Some federal courts in civil suits have used the doctrine of collateral estoppel to prevent the relitigation of factual issues that were previously decided in the limited context of a sentencing hearing where the civil suit was based on the same set of underlying facts as the earlier criminal prosecution.⁵ This usually occurs when there is a civil suit for damages based on the same underlying set of facts as a previous criminal conviction. The most common scenario is when a civil suit is brought by a government agency based on the same underlying transaction as a previous criminal conviction. The SEC has argued that collateral estoppel should presumptively apply to sentencing findings on the same basis as it does in other contexts.⁶ One commentator has even claimed that there is no reason to treat sentencing findings differently than any other type of judgments. He argues that "[i]f a defendant can be sent to prison . . . on the basis of a sentencing finding, that finding should, as a general rule, also have preclusive effect in a civil suit."⁷ This commentator claims that "[i]f sentencing findings are an adequate basis for keeping people in prison, surely they must be an adequate basis for taking away people's money."⁸

Part I of this Note examines the current federal sentencing process. Part II explains the current state of the law regarding the preclu-

4 See, e.g., *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).

5 See *Allen v. Los Angeles*, 92 F.3d 842 (9th Cir. 1996), *overruled on other grounds sub nom.*, *Acri v. Varian Assoc.*, 114 F.3d 999 (9th Cir. 1997) (en banc); *United States v. U.S. Currency in the Amount of \$119,984.00*, 129 F. Supp. 2d 476, 478 (E.D.N.Y. 2001), *vacated*, 304 F.3d 165 (2d Cir. 2002); *SEC v. Monarch Funding Corp.*, 983 F. Supp. 442, 444 (S.D.N.Y. 1997), *rev'd*, 192 F.3d 295 (2d Cir. 1999); *M. Prusman, Ltd. v. Ariel Maritime Group, Inc.*, 781 F. Supp. 248, 250 (S.D.N.Y. 1991); *Wilcoxson v. United States*, No. 97-14519, 2002 WL 127047, at *3 (Bankr. S.D. Ala. Jan. 2, 2002).

6 See *Monarch Funding*, 192 F.3d at 306.

7 Wystan M. Ackerman, Note, *Precluding Defendants from Relitigating Sentencing Findings in Subsequent Civil Suits*, 101 COLUM. L. REV. 128, 154 (2001).

8 *Id.*

sive effect given to a judge's sentencing findings. Part III advocates that federal courts adopt a bright line rule that bars per se criminal sentencing findings from having preclusive effect in subsequent civil litigation. This argument is based on the Sixth⁹ and Seventh Amendments,¹⁰ as well as the problems of procedural and substantive fairness presented by this practice.

I. THE FEDERAL SENTENCING PROCESS

In 1984, Congress adopted the Sentencing Reform Act,¹¹ which established the Sentencing Commission and authorized the creation of the Federal Sentencing Guidelines.¹² The purpose of this legislation was to reduce judicial discretion in fixing criminal sentences and to increase uniformity across the federal system.¹³ At the time the Guidelines were adopted there was a widespread belief among policymakers that significant disparities existed among sentences for the same underlying acts both between different judges and between different regions, and that the enactment of a guidelines system was the best way to increase uniformity.¹⁴ The Sentencing Act created the United States Sentencing Commission (the "Commission") and instructed the Commission to develop sentencing guidelines which would allow for sentences to be fair, uniform and certain across the country. Congress hoped that this would eliminate any large disparities in sentence length among defendants who had similar previous criminal histories and had committed similar offenses.¹⁵

The Commission created a sentencing table to calculate the recommended sentencing range based on the defendant's conduct and the defendant's criminal history.¹⁶ Under the Guidelines, the crime for which the defendant was convicted sets the "base" offense level.¹⁷

9 The Sixth Amendment states, "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 . . ." U.S. CONST. amend. VI.

10 The Seventh Amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.* amend. VII.

11 Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

12 Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence and Reform*, 75 U. CHI L. REV. 715, 715 (2008).

13 *Id.*

14 *Id.*

15 *Id.* at 718.

16 *Id.* at 718-19.

17 *Id.*

Other factual circumstances surrounding the crime, such as whether the defendant violated securities laws while committing the offenses,¹⁸ whether the defendant had a leadership role,¹⁹ the amount of the loss,²⁰ or whether the defendant accepted responsibility for the crime,²¹ add or subtract levels to the offense.²² The defendant's criminal offense history is calculated based on the prior offenses committed by the offender, with greater weight given to more serious offenses and patterns of criminal behavior.²³ The offense level and the defendant's criminal history are then combined to create a sentencing range of a certain number of months.²⁴

With the help of a probation officer who prepares a presentence report, the district court makes factual findings that determine the offense level.²⁵ The district court judge has full discretion in determining how to accumulate and use evidence in making these factual findings.²⁶ Under the Guidelines prior to the decision in *United States v. Booker*,²⁷ a sentencing judge's adjustment to the base offense level based on the judge's factual findings could only be reversed if the findings were "clearly erroneous."²⁸ This left little to appeal, because under the pre-*Booker* Guidelines, if the defendant's offense level and criminal history were properly calculated, the sentence pronounced by the district court could not be reversed on appeal.²⁹

One exception under the Guidelines as originally enacted allowed sentencing judges to deviate from the Guidelines if they identified "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the Guidelines]."³⁰ In order to justify a departure, the sentencing judge was required either to make a statement in open court or to write an opinion.³¹ Appellate

18 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(5)(A) (2008).

19 *Id.* § 3B1.1(a).

20 *Id.* § 2B3.1(b)(7).

21 *Id.* § 3E1.1(a).

22 *Id.* §§ 1B1.1(b)–(c) (instructing courts to set the "level" of the offense on the basis of factors in the guidelines).

23 *See id.* §§ 4A1–B1.

24 *See id.* § 5A.

25 *See Schanzenbach & Tiller, supra* note 12, at 719–20.

26 *See infra* text accompanying notes 180–83.

27 543 U.S. 220 (2005).

28 18 U.S.C. § 3742(e) (2006).

29 *See id.* § 3742(a)–(b).

30 *Id.* § 3553(b)(1) (2006).

31 *Id.* § 3553(c).

courts were permitted de novo review of a district court's departure from the Guidelines.³²

Despite the fact that the Guidelines are no longer mandatory because of the Supreme Court's decision in *Booker*,³³ the sentencing process still works in largely the same manner. The probation officer compiles a presentence report, the judge makes factual findings (often based in large part on the presentencing report), and the judge then determines the sentencing range based on those findings and finally pronounces a sentence.³⁴

II. CURRENT STATE OF THE LAW

After the adoption of the Sentencing Guidelines in 1984, federal courts were presented with opportunities to apply collateral estoppel to a judge's sentencing findings. Most of the early federal courts did not find application of collateral estoppel to sentencing findings to be problematic from either a prudential or constitutional perspective. The first federal appellate court to actually undertake an in-depth treatment of this issue was the Second Circuit in 1999 in *SEC v. Monarch Funding Corp.*³⁵ The *Monarch Funding* court reversed a district court decision granting summary judgment based on the preclusive effect of earlier sentencing findings. But instead of adopting a per se ban that would prevent sentencing findings from ever having preclusive effect, the *Monarch Funding* court left the door open for sentencing findings to have preclusive effect under some circumstances. Other courts in multiple circuits have subsequently adopted the rule of *Monarch Funding*.

A. Early Cases

Before the *SEC v. Monarch Funding* decision in 1999, several courts discussed the use of sentencing findings to preclude issues in subsequent litigation. Although the holdings of these cases did not hinge on whether or not sentencing findings would be given preclusive effect, several of these courts implied that they did not find the preclusive use of sentencing findings to be problematic. The most notable early case discussing preclusion based on sentencing findings

32 *Id.* § 3742(e).

33 *See infra* text accompanying notes 121–28.

34 *See infra* text accompanying notes 123–28. Since the *Booker* decision, sentencing judges have generally imposed sentences within the Guideline range. Deborah Young, *The Freedom to Sentence: District Courts After Booker*, 37 McGEORGE L. REV. 649, 685–86 (2006).

35 192 F.3d 295 (2d Cir. 1999).

was *Allen v. Los Angeles*.³⁶ In this case, Los Angeles claimed that pursuant to state law it did not have to pay for the defense of officers in a civil action because the officers had acted with “actual malice” towards a victim during a beating incident.³⁷ Los Angeles claimed, and the district court agreed, that the jury verdict precluded the officers from arguing that they had acted without “actual malice” as defined by California law.³⁸ On appeal, the Ninth Circuit affirmed the district court’s judgment holding that “both the criminal verdict and the sentencing opinion are a basis for collateral estoppel on the issue of whether [the officers] acted with ‘actual malice’ under the [California] statute.”³⁹ Although the *Allen* court did not use sentencing findings as the sole basis for preclusion,⁴⁰ it did not find the preclusive use of sentencing findings to be problematic as either a prudential or constitutional matter. Instead the court implied that it might have used the sentencing findings as an independent basis for collateral estoppel.⁴¹

Other courts have dealt with the preclusive effect of sentencing findings in contexts different from that of a plaintiff or defendant seeking to use the findings in subsequent civil litigation. The Seventh Circuit in *Levesque v. Brennan*⁴² noted in dicta that where a sentencing judge “clearly” made “factual findings to resolve” disputed facts, a collateral estoppel argument based on those findings would “have merit” in subsequent litigation before the Parole Commission.⁴³ Also, a fed-

36 *Allen v. Los Angeles*, 92 F.3d 842 (9th Cir. 1996), *overruled on other grounds sub nom. Acri v. Varian Assoc.*, 114 F.3d 999 (9th Cir. 1997) (en banc). The underlying event of *Allen* was the controversial Rodney King beating by Los Angeles police officers. *Id.* at 845. The officers were individually convicted of “intentional use of unreasonable force by one making an arrest under color of law” and “depriving King of the Constitutional right to be kept free from harm while in official custody,” in violation of federal law. *Id.* After the conviction of the officers, King filed a § 1983 civil suit against the police officers. *Id.*

37 *Id.*

38 *Id.* The court determined that in order to satisfy the standard for “actual malice” under California Government Code section 996.4, the government only needed to prove the officers acted with “deliberate wrongful intent.” *Id.* at 848 (quoting A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY app. 781 (1980)).

39 *Id.* at 850 (quoting CAL. GOV’T CODE § 996.4 (West 1995)).

40 *See id.* (“In this instance, the district court’s sentencing opinion adds additional support to the criminal jury findings.”).

41 *See id.* *But see* Maciel v. Comm’r, 489 F.3d 1018, 1025–26 (9th Cir. 2007) (asserting that the court in *Allen* merely offered the sentencing findings as added support for the judgment based on the criminal conviction).

42 864 F.2d 515 (7th Cir. 1988).

43 *Id.* at 518 (holding that where a sentencing judge had not made explicit factual findings, the Parole Commission was not required to follow the sentencing judge’s computation of victim loss).

eral district court in West Virginia held that a defendant could use a judge's sentencing findings in order to dismiss a later indictment based on an issue arising in the earlier sentencing hearing.⁴⁴ On a similar issue, a district court in Virginia held that a finding by a judge that is necessary to a refusal to make an upward departure at a sentencing hearing has a preclusive effect on a later indictment based on the same set of facts.⁴⁵

The first time a district court within the Second Circuit precluded reconsideration of an issue in civil litigation based on previous judicial sentencing findings in a published case⁴⁶ was in *M. Prusman, Ltd. v. Ariel Maritime Group, Inc.*⁴⁷ Forgoing extensive analysis, the *Prusman* court held that a sentencing court's determination after a guilty plea that the defendants "controlled" a corporation had a collateral estoppel effect in a subsequent civil suit.⁴⁸ Specifically, the *Prusman* court held that sentencing findings satisfied all the requirements for collateral estoppel: (1) final judgment, (2) identity of parties, (3) identity of issues that were necessarily decided in the prior proceeding, and (4) a "full and fair opportunity to litigate the pertinent issues."⁴⁹

B. SEC v. Monarch Funding

As mentioned previously, the court that most thoroughly analyzed the issue of the preclusive effect of sentencing findings in subsequent civil litigation was the Second Circuit in *SEC v. Monarch Funding Corp.* The SEC initially filed suit in the Southern District of New York in 1985 alleging that Richard O. Bertoli, an employee of the securities

44 *United States v. Plaster*, 16 F. Supp. 2d 667, 671–72 (W.D. Va. 1998) (holding that where a sentencing judge accepted the defendant's version of a transaction, the defendant could not be later prosecuted for false swearing based on the testimony that had been previously accepted by sentencing judge).

45 *United States v. Biheiri*, 341 F. Supp. 2d 593, 604 (E.D. Va. 2004) (holding that because judge's factual finding was "necessary and material" to the rejection of the government's request for an upward departure, a subsequent indictment containing allegations contrary to that previous factual finding must be dismissed).

46 Brief of Amici Curiae New York Counsel of Defense Lawyers et al. at 8, *SEC v. Monarch Funding Corp.*, 192 F.3d 295 (2d. Cir. 1999) (No. 98-6120), 1998 WL 34093874 [hereinafter Defense Lawyers Brief].

47 781 F. Supp. 250 (S.D.N.Y. 1991).

48 *Id.* at 252. In *Prusman*, the criminal defendant, Merritt, had pled guilty to conspiracy to commit fraud involving submission of false bills of lading. *Id.* at 250. The sentencing judge found that Merritt had control of the corporation through which the false bills of lading had been submitted. *Id.*

49 *Id.* at 252 ("[The sentencing judge's] finding that the Merritts controlled Broadview for their own unlawful purposes binds Merritt here under the *Gelb* test." (citing *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986))).

brokerage firm Monarch Funding, in connection with the issuance of two securities had violated numerous provisions of federal securities laws.⁵⁰ The SEC sought a permanent injunction and disgorgement of the defendant's ill-gotten gains as relief.⁵¹ The civil case was suspended pending the outcome of a related federal criminal matter being prosecuted in the District of New Jersey.⁵² The indictment of the criminal case charged Bertoli with two racketeering counts under RICO, and several obstruction of justice counts.⁵³ This activity was the same underlying conduct as in the SEC civil suit.⁵⁴ Following a three-month trial, Bertoli was convicted of one count of obstruction of justice and one count of conspiracy to obstruct justice.⁵⁵ On the other hand, Bertoli was acquitted of the RICO charges, which included as predicate acts the securities violations alleged by the SEC in the civil suit.⁵⁶ In pronouncing Bertoli's sentence for obstruction of justice, the district court judge found that Bertoli had committed the securities fraud alleged by the indictment, even though the jury had acquitted him of this offense.⁵⁷

After the conclusion of the criminal action, the SEC moved for summary judgment in the civil suit on the grounds that the sentencing findings in the criminal action precluded Bertoli from disputing liability for securities violations.⁵⁸

50 SEC v. Monarch Funding Corp., 983 F. Supp. 442, 444 (S.D.N.Y. 1997), *rev'd*, 192 F.3d 295 (2d Cir. 1999). Specifically, the SEC accused Bertoli of orchestrating artificial increases in the prices of several stocks by publishing misleadingly favorable research reports of the stocks at a profit while leaving other investors to take losses. *Monarch Funding*, 192 F.3d at 299–300. In other words, Bertoli was operating a classic “pump-and-dump” scheme.

51 *Monarch Funding*, 192 F.3d at 298. The SEC alleged violations of section 10(b) of the Securities Act of 1934, Rule 10b-5, and sections 5(a), 5(c), and 17(a) of the Securities Act of 1933. *Id.*

52 *Id.* at 299.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *See* United States v. Bertoli, 854 F. Supp. 975, 1128–30 (D.N.J. 1994). The specific Guideline applicable to obstruction of justice, Section 2X3.1, applied in Bertoli's case by the sentencing judge at Bertoli's initial sentencing provided that the offense level was to be calculated on the basis for the criminal conduct underlying the investigation obstructed by the defendant. *See id.* at 1144–46 (citing U.S. SENTENCING GUIDELINES MANUAL § 2X3.1 (1993)). In Bertoli's resentencing, the sentencing judge explicitly adopted the factual findings made in the previous sentencing opinion and made further findings specifically applicable to the Guideline applied in the resentencing. United States v. Bertoli, (D.N.J. Mar. 22, 1995).

58 *Monarch Funding*, 192 F.3d at 303.

The district court agreed with the SEC and granted summary judgment on liability against Bertoli for the § 10(b), Rule 10b-5 and § 17(a) securities violations in the civil case.⁵⁹ In its opinion, the district court acknowledged the problems fraught in giving sentencing findings preclusive effect,⁶⁰ but nonetheless held that each of the four requirements of collateral estoppel were met by the New Jersey district court's sentencing findings.⁶¹ Most importantly, the district court held that despite the absence of particular procedural devices in a sentencing hearing that are available in a civil trial, Bertoli had been given a "full and fair" opportunity to litigate the relevant facts during the sentencing phase of the trial because the sentencing judge had allowed Bertoli to call witnesses and dispute both the presentence report and the final Guidelines calculation.⁶² The district court also found that there was an identity of issues,⁶³ that the issues were "actually litigated and decided" in the sentencing proceeding,⁶⁴ and that the sentencing judge's findings of fact were "necessary to the imposition" of the sentence.⁶⁵

The Second Circuit in *Monarch Funding* reversed the district court and declined to apply collateral estoppel to the sentencing findings made in Bertoli's criminal case. The *Monarch Funding* court began its analysis of the collateral estoppel issue with an extensive discussion of the competing policy goals of fairness, efficiency, and uniformity, all of which the doctrine of collateral estoppel promotes.⁶⁶ The *Monarch Funding* court construed the four traditional prerequisites of collateral

59 *Monarch Funding*, 983 F. Supp. at 458–59.

60 The district court indicated that the application of collateral estoppel to sentencing findings could be problematic because of the limited "procedural protections" available in a sentencing hearing as compared to a "plenary civil action." *Id.* at 447. Despite these misgivings, the district court concluded that the lack of certain procedural protections in a sentencing hearing was not fatal to such an attempt at preclusion if the court undertook a "searching examination" of the sentencing proceedings and determined that the defendant had a "full and fair opportunity to litigate the relevant issues." *Id.* at 448.

61 *Id.* at 458.

62 *Id.* at 449–50. During the two-year period between Bertoli's conviction and his ultimate sentencing, the parties made multiple submissions contesting various sentencing issues and participated in at least two hearings. *Id.*

63 *Id.* at 453 & n.15.

64 *Id.* at 449.

65 *Id.* at 450–57. The district court in great detail explained how under the Guidelines the sentencing judge could not have imposed the final sentence imposed on Bertoli without making the disputed factual findings. *Id.*

66 *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 303–05 (2d Cir. 1999). Encompassed within the goal of "efficiency" is judicial economy, avoidance of repetitive litigation, and ensuring an end to a dispute. *Id.* at 303. For an extensive discussion of

estoppel⁶⁷ as a means of “strik[ing] an appropriate balance between [these] competing concerns” and sought to strike the same balance on the issue of the preclusive effect of sentencing findings.⁶⁸ The two fairness concerns identified by the court in the use of sentencing findings to preclude subsequent litigation were: (1) the existence of procedural devices in the civil action that are unavailable to litigants in a sentencing proceeding;⁶⁹ and (2) the fact that a party may not have an incentive to litigate a factual issue as fiercely in the context of a sentencing hearing as in a plenary civil trial.⁷⁰ Regarding efficiency, the court then found that any efficiency benefits were limited because giving sentencing findings preclusive effect could complicate the sentencing process⁷¹ and would not necessarily make the civil action simpler because of the close judicial scrutiny of sentencing findings required in the civil action.⁷²

After weighing the competing policy concerns the court rejected a *per se* ban and instead adopted a presumption against the applica-

these policy concerns, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–31 (1979).

67 The requirements for issue preclusion or collateral estoppel in the federal system are: (1) the issues in both proceedings must be identical; (2) the issue in the prior proceeding must have been actually litigated and actually decided; (3) there must have been a full and fair opportunity for litigation in the prior proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. See *Anderson v. Genuine Parts Co.*, 128 F.3d 1267, 1273 (8th Cir. 1997); *Aircraft Braking Sys. Corp. v. Local 856, UAW*, 97 F.3d 155, 161 (6th Cir. 1996); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995); *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1059 n.4 (11th Cir. 1987); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Garza v. Henderson*, 779 F.2d 390, 393 (7th Cir. 1985); *Bulloch v. Pearson*, 768 F.2d 1191, 1192 (10th Cir. 1985); *White v. World Fin. of Meridian, Inc.*, 653 F.2d 147, 151–52 (5th Cir. 1981); 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4416, at 390–93 (2d ed. 2002).

68 *Monarch Funding*, 192 F.3d at 304.

69 The court specifically focused on the lack of opportunities for a criminal defendant to take discovery, the absence of a right for a criminal defendant to present witnesses or receive a “full-blown evidentiary hearing,” and the fact that evidence barred by the Federal Rules of Evidence can be considered by a sentencing judge. *Id.* at 305–06.

70 A criminal defendant may (and often does) choose not to dispute a factual issue based on hope of a downward departure or other recommendation by the prosecutor. *Id.* at 305.

71 The court suggested that allowing sentencing findings to have a preclusive effect in subsequent civil litigation could lead the parties at sentencing to heavily litigate matters which although only “tangential[ly]” related to the criminal proceeding would have great importance if given preclusive effect in subsequent civil litigation. *Id.*

72 *Id.* at 306.

tion of collateral estoppel to sentencing findings. Although the court found arguments for a per se ban on the use of sentencing findings to be “attractive,” the court ultimately rejected these arguments.⁷³ To reach this conclusion, the court leaned heavily on the Supreme Court’s decision in *Parklane Hosiery Co. v. Shore*.⁷⁴ The *Monarch Funding* court reasoned that because the Supreme Court had considered these same concerns of fairness and efficiency in *Parklane* and had rejected a per se ban on nonparty offensive collateral estoppel in favor of a flexible rule, presuming that district courts would fairly apply offensive collateral estoppel, a similar policy should be adopted concerning the preclusive effect of criminal sentencing findings.⁷⁵ But, unlike *Parklane’s* treatment of offensive collateral estoppel as an ordinary preclusion issue with no special presumptions,⁷⁶ the *Monarch Funding* court stated that because of the special concerns involved, a presumption against extending collateral estoppel to sentencing findings was appropriate. Based on this reasoning, this court held that collateral estoppel should only be extended where the proponent could prove that it would be “clearly fair and efficient to do so.”⁷⁷

Applying this analytical framework to the Bertoli sentencing findings, the court held that the SEC had failed to show that preclusion was fair, and that the record demonstrated that application of collateral estoppel in this case was not efficient.⁷⁸ The court purported to apply a heightened standard because of the nature of the sentencing proceedings, but ultimately conducted a standard preclusion analysis using the four requirements of collateral estoppel.⁷⁹ Using the standard preclusion analysis the court determined that the sentencing judge’s factual findings were not actually *necessary* to the final sentence pronounced.⁸⁰ As an alternative ground for the judgment, the court also held that efficiency concerns were not implicated to a sufficient degree to justify the application of estoppel to the issue of the defendant’s liability for securities violations.⁸¹

73 *Id.* at 305.

74 439 U.S. 322 (1979) (holding that despite possible fairness concerns, offensive use of collateral estoppel by a nonparty in the previous litigation was permitted in some circumstances).

75 *Monarch Funding*, 192 F.3d at 306.

76 *Parklane Hosiery*, 439 U.S. at 331.

77 *Monarch Funding*, 192 F.3d at 306.

78 *Id.* at 306–07.

79 *Id.* at 307–08.

80 *Id.* at 306–07.

81 *Id.* at 309–10.

Although the *Monarch Funding* court's analysis prevented application of collateral estoppel to sentencing findings in the Bertoli civil case, and suggested that it would not be appropriate in most cases, this opinion has several important flaws. First, the opinion claimed that its analytical framework treats sentencing findings differently than other potential bases for preclusion. However, the court's actual analysis of Bertoli's case treated sentencing findings as essentially a standard preclusion issue, subject to the same considerations.⁸² This provided district courts with little guidance as to how sentencing findings should be treated differently from other judgments.⁸³ This deficiency was revealed in later cases where courts and litigants were unclear how to apply the presumption articulated in *Monarch Funding*.⁸⁴ Second, the *Monarch Funding* opinion completely failed to consider how the unique nature of sentencing findings, as compared to other contexts where a judge makes factual findings, could implicate the Seventh Amendment right to a jury trial in later cases.⁸⁵

C. *Monarch Funding's Progeny in the Second Circuit*

The majority of district court cases following the *Monarch Funding* analysis have declined to give sentencing findings preclusive effect. However, the scant reasoning of the courts in the cases where they declined to preclude based on sentencing findings, as well as the fact that some district court judges actually have given preclusive effect to sentencing proceedings, illustrates that there are problems with the *Monarch Funding* approach.

In *United States v. Lamanna*,⁸⁶ one of the first post-*Monarch* cases where a court considered the issue, the Western District of New York declined to apply collateral estoppel to federal sentencing findings. But the court indicated that it would have been willing to do so if

82 See *id.*

83 See *infra* Part II.C. for instances where district courts struggled with application of the *Monarch Funding* analysis.

84 See, e.g., SEC v. Zafar, No. 06-CV-1578, 2009 WL 129492, at *5-6 (E.D.N.Y. Jan. 20, 2009) (claiming that the litigant seeking to ascribe preclusive effect needed to make an affirmative demonstration of why it was clearly efficient to do so in that case); see also *United States v. U.S. Currency in the Amount of \$119,984.00*, 129 F. Supp. 2d 471 (E.D.N.Y. 2001), *rev'd*, 304 F.3d 165, 174 (2d Cir. 2002) (failing to properly apply the *Monarch Funding* analytical framework).

85 *Monarch Funding*, 192 F.3d at 304 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 332, 336 (1979)). It is well established that the Seventh Amendment does not apply to cases that would have been tried in equity at the time of the Amendment's ratification. See *infra* notes 151-53 and accompanying text.

86 114 F. Supp. 2d 193 (W.D.N.Y. 2000).

presented with a slightly different set of facts.⁸⁷ This court applied the *Monarch Funding* standard and, without extensive explanation, determined that application of collateral estoppel was not appropriate because of the particular facts of the case.⁸⁸ Implicit in this decision was that if the statutory framework had been slightly different,⁸⁹ or if the government had presented different proof,⁹⁰ collateral estoppel would have been appropriate. *Lamana* illustrates the important point that the *Monarch Funding* approach will not prevent sentencing findings from having collateral effect in all cases. Had the statutory scheme been slightly different, or if the sentencing findings had been precisely on point, the court may have found it appropriate to apply collateral estoppel to prevent a defendant from disputing facts which he never admitted in a guilty plea and which no jury ever determined.

The result of another case, the forfeiture proceeding of *United States v. U.S. Currency in the Amount of \$119,984.00*,⁹¹ gave further indication that the *Monarch Funding* analysis may be difficult for district courts to apply. In this case, applying *Monarch Funding's* analytical framework, the district court held that the sentencing judge's factual finding that the defendant had acquired the funds legally precluded the government from arguing otherwise in the civil trial.⁹² The

87 *Id.* at 197. In *Lamana*, the defendant had previously pled guilty to a single-count felony information of making a false statement in order to obtain federal employee compensation in violation of 28 U.S.C. § 1920 based on a false statement he made on a single form (the "June 1996 form"). *Id.* at 194. The sentencing judge in the criminal action determined the total amount of loss to the government to be \$404,073 and ordered the defendant to pay restitution in the amount of \$119,432.54 based on fifteen monthly disability checks cashed by the defendant in the fifteen months prior to submitting the false statement. *Id.* In the subsequent civil action, the federal government sought to recover civil damages and penalties pursuant to the False Claims Act, 31 U.S.C. § 3730. The government argued that collateral estoppel prevented the defendant from denying liability for the submission of the June 1996 form (the facts underlying the guilty plea), as well as for cashing the 15 disability checks (the facts underlying the sentence of restitution). *Lamana*, 114 F. Supp. 2d at 197.

88 *Lamana*, 114 F. Supp. 2d at 197.

89 *See id.* (indicating that if the burden of proof for the False Claims Act had been met by the sentencing findings then it would have been appropriate to apply collateral estoppel).

90 *See id.* (explaining that the government had not provided sufficient information to apply collateral estoppel).

91 129 F. Supp. 2d 471 (E.D.N.Y. 2001), *rev'd*, 304 F.3d 165 (2d Cir. 2002).

92 *Amount of \$119,984.00*, 129 F. Supp. 2d at 476–78. The court found that the requirements for collateral estoppel were met and that it was "clearly fair and efficient" because the government had waited until two years after the sentencing proceeding to pursue the forfeiture action. *Id.* at 478.

judge then granted summary judgment to the defendant on this basis.⁹³

Like *Monarch Funding*, the Second Circuit reversed this decision. The court held that the government did not have a “full and fair opportunity to litigate” the disputed issue, and also stated that the necessary threshold showing of efficiency had not been made.⁹⁴ Although the court did not indicate that the analysis in this case differed from *Monarch Funding*’s analysis, the factors that this court relied on in determining that estoppel was inappropriate in this particular case are factors that exist in all scenarios involving sentencing hearings and subsequent civil litigation. Although the case was not decided on efficiency grounds,⁹⁵ in terms of the efficiency prong of the *Monarch Funding* analysis, the court found that that application of collateral estoppel would have borne minimal efficiency gains in this case because the government surely would have litigated the issue more fiercely if it had “anticipated the application of collateral estoppel based upon sentencing findings.”⁹⁶ This rationale is somewhat peculiar in that this type of speculation could be made in every case.⁹⁷ Similarly, regarding fairness, the court relied on the existence of a number of procedural mechanisms that were different in the criminal proceeding than in the civil litigation, mechanisms that are unavailable in *any* sentencing hearing.⁹⁸

Unlike *Monarch Funding*, the court in *Amount of \$119,984.00* made a strong demonstration on grounds particular to sentencing proceedings why application of collateral estoppel was not appropriate in that case. However, these were facts that are common to any sentencing hearing. As a result, the court did not adopt a per se ban, but instead decided the case on grounds that exist universally. The court gave little guidance as to how a district court would be able to

93 *Id.* at 481.

94 *United States v. U.S. Currency in the Amount of \$119,984.00*, 304 F.3d 165, 173–79 (2d Cir. 2002).

95 *Id.* at 174 (“Nevertheless, the prospect of even a minor efficiency benefit from the application of estoppel in this case makes it difficult for us to conclude definitively that ‘the doctrine will not promote efficiency’ in the forfeiture proceedings, and therefore we will not ‘deny preclusion for that reason alone.’” (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 310 (2d Cir. 1999))).

96 *Amount of \$119,984.00*, 304 F.3d at 174.

97 This is especially true considering that the judge in this case actually broached the issue of collateral estoppel in the sentencing hearing itself. *Id.* at 169–70 (quoting the sentencing hearing transcript).

98 *Id.* at 176–77 (holding that the government lacked a full and fair opportunity to litigate because they lacked “procedural mechanisms” available in a civil trial, such as the ability to compel the testimony of the defendant).

distinguish between cases where preclusion on the basis of sentencing findings would be appropriate and when it would not be appropriate.

In another interesting twist, one district court prior to the *Monarch Funding* decision initially granted summary judgment apparently on the grounds of collateral estoppel related to sentencing findings.⁹⁹ But, after the *Monarch Funding* opinion, the district court reconsidered the issue and determined that it had not granted summary judgment on collateral estoppel grounds, but rather because of all of the evidence in front of the court, including the facts found in the defendant's sentencing in the criminal case.¹⁰⁰

Another district court required the party seeking to apply collateral estoppel to make an affirmative demonstration that in addition to being fair, the application of collateral estoppel would "foster judicial economy."¹⁰¹ In light of the type of speculation engaged in by the court in *Amount of \$119,984.00*,¹⁰² it is difficult to imagine how a litigant could ever make such a showing.¹⁰³

The cases following *Monarch Funding* demonstrate that in the Second Circuit, it is unlikely, but not impossible, that a litigant will be able to use sentencing findings to preclude relitigation of an issue decided at sentencing. However, the particular contexts under which allowing sentencing findings to have preclusive effect would be appropriate, or even some of the factors that would be important in determining that the preclusive use of sentencing findings was appropriate, are unknown.

D. Post-Monarch Funding Cases in Other Circuits

Three other circuits have essentially adopted the same rule as *Monarch Funding*: sentencing findings are presumed improper for collateral estoppel purposes, but their use is not per se banned. In addition, district courts in other circuits have also applied the same framework. In a tax case, the Ninth Circuit held that the Commissioner of Internal Revenue could relitigate the amount of tax owed by

99 United States v. Letscher, 83 F. Supp. 2d 367, 372-74 (S.D.N.Y. 1999).

100 *Id.* at 382-83.

101 SEC v. Zafar, No. 06-CV-1578, 2009 WL 129492, at *6 (E.D.N.Y. Jan. 20, 2009).

102 See *supra* notes 94-97 and accompanying text.

103 Although the *Zafar* court seems to impose a nearly impossible standard to overcome, based on *U.S. Currency in the Amount of \$119,984.00*, it should be noted that the SEC in the *Zafar* case utterly failed to meet the burden of demonstrating efficiency as it did not acknowledge the difference in treatment between sentencing findings and a guilty plea or jury verdict. See Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendant Faisal Zafar at 9-11, SEC v. Zafar, No. 06-CV-1578 (E.D.N.Y. Jan. 20, 2009), 2008 WL 5362336.

the defendant despite a judge's sentencing findings on the issue in a previous criminal action.¹⁰⁴ In this case, the court adopted the same position as the Second Circuit concerning a per se ban, noting in dicta that if "fairness and efficiency considerations support preclusion" then "sentencing finding[s] *may* be entitled to collateral estoppel effect in subsequent civil litigation."¹⁰⁵

In a similar tax case, *Kosinski v. Commissioner*,¹⁰⁶ the Sixth Circuit did not ascribe preclusive effect to a sentencing court's findings of fact.¹⁰⁷ After outlining in great detail the problems in that case, many of which are common in all cases presenting this issue, the court indicated that it doubted that a determination reached in a criminal-sentencing proceeding "could *ever* satisfy" the requirements of issue preclusion.¹⁰⁸ Although the *Kosinski* court explicitly did not decide the question of whether ascribing preclusive effect to collateral estoppel was per se banned, this is the strongest statement yet made by any court that has considered the issue.

District courts in Illinois and Kansas have also declined to give sentencing findings preclusive effect, citing the reasoning of the Second Circuit in earlier cases.¹⁰⁹ In the lone divergent case, a bankruptcy court¹¹⁰ held that collateral estoppel applied to sentencing findings and barred relitigation of issues decided adversely to a debtor in a previous criminal trial.¹¹¹

104 *Maciel v. Comm'r*, 489 F.3d 1018, 1023–26 (9th Cir. 2006) (finding that the procedural differences between civil litigation and the sentencing hearings as well as the lack of incentive by the government made preclusion inappropriate in the case).

105 *Id.* at 1025.

106 541 F.3d 671 (6th Cir. 2008).

107 *Id.* at 679.

108 *Id.*

109 *United States v. Real Property Located at 7401-03 S. Racine Avenue*, No. 04 CV 5885, 2009 WL 806120, at *2–3 (N.D. Ill. Mar. 25, 2009) (citing *SEC v. Monarch Funding Corp.* 192 F.3d 295, 305 (2d Cir. 1999)); *Phillips v. Martin*, 535 F. Supp. 2d 1210, 1217–19 (D. Kan. 2008) (citing *United States v. U.S. Currency in the Amount of \$119,984.00*, 304 F.3d 165, 174 (2d Cir. 2002)).

110 In a bankruptcy court, the protections of an Article III tribunal do not apply uniformly. This raises a multitude of issues that this Note will not address.

111 *Wilcoxson v. United States*, No. 97-14519, 2002 WL 127047, at *4 (Bankr. S.D. Ala. Jan. 2, 2002) (holding that "the doctrine of collateral estoppel also applies to the above-listed sentencing findings" because the four requirements of collateral estoppel were met). It should be noted that in this case, despite the court's explicit application of preclusive effect to the sentencing hearings, the opinion did not fully explain whether the court could have reached the same result by relying solely on the facts necessary to the criminal conviction instead of the sentencing findings.

III. A PER SE BAN ON THE USE OF SENTENCING FINDINGS TO PRECLUDE SUBSEQUENT LITIGATION

Although cases in which lower courts have ascribed preclusive effect to sentencing proceedings are few and far between, courts should adopt a per se ban in order to prevent this from occurring in any future cases. There are three independent rationales for the courts to adopt a per se ban on extending preclusive effect to a federal district court's sentencing findings. Each of these rationales for a per se ban has some limitation, and as a result each rationale is important. First, in light of the Supreme Court's recent jurisprudence concerning the Sixth Amendment, the traditional requirement for collateral estoppel that a decision on the issue be necessary to the final judgment cannot be met by a judge's sentencing findings. Second, the Seventh Amendment may prevent ascribing preclusive effects to sentencing findings in some cases, and at the very least indicates that it may be improper. Finally, the important policy concerns of fundamental fairness implicated by an attempt by a government agency or a private party to preclude litigation of an issue based on a judge's sentencing findings militate against giving district courts discretion to apply collateral estoppel to sentencing findings.

A. *Sixth Amendment Jurisprudence Applied to the Application of Preclusive Effect to Sentencing Findings*

The Supreme Court's recent decisions concerning the Sixth Amendment right to a jury trial prevent courts from ascribing preclusive effect to a judge's sentencing findings under current federal preclusion law. The Federal Sentencing Guidelines have come under intense constitutional scrutiny since their enactment.¹¹² The Sentencing Guidelines as initially adopted by Congress were understood to be binding on federal judges, and judges were required to follow express procedures in order to impose a sentence outside the Guidelines.¹¹³ The first indication that mandatory Guidelines were unconstitutional was given as dicta in *Jones v. United States*,¹¹⁴ where the Court stated

112 See *Mistretta v. United States*, 488 U.S. 361, 378–79 (holding that the sentencing structure set up by the Sentencing Reform Act of 1984 was a valid delegation of Congress's powers).

113 See *supra* Part II.

114 526 U.S. 227 (1999). In *Jones*, the Court construed the provisions of the federal car-jacking statute such that it did not run afoul of the Sixth Amendment. *Id.* at 239–41, 52. The Court in *Jones* held that the provision of the statute which allowed for a greater sentence if the carjacking resulted in death or serious bodily injury was not a sentence enhancement provision allowing for a greater sentence based on judi-

that allowing judicial fact-finding to increase the maximum sentence of a criminal defendant raised serious constitutional concerns and was incompatible with the Founders' desire for the Sixth Amendment to ensure the right to a jury.¹¹⁵

The Court expanded on this idea in *Apprendi v. New Jersey*.¹¹⁶ In *Apprendi*, a state court prosecution, the Court set out the rule that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹¹⁷ The basis for this rule is that the "truth of every [criminal] accusation" must be proved to a jury and a defendant cannot be exposed to a greater punishment than that allowed by the facts proven beyond a reasonable doubt to a jury.¹¹⁸ The *Apprendi* rule essentially meant that the transfer of power from a jury to a judge to determine the existence of a fact that could raise a defendant's maximum potential punishment was a violation of the Sixth Amendment.¹¹⁹ The *Apprendi* Court made no distinction between labeling a provision a "sentence enhancement" rather than a separate criminal act.¹²⁰ Like *Jones*, *Apprendi* raised further doubts about the constitutionality of the Federal Sentencing Guidelines under the Sixth Amendment.

This line of cases culminated in *United States v. Booker*.¹²¹ In *Booker*, the Court applied the rule of *Apprendi* to the Federal Sentencing Guidelines. Booker, the criminal defendant, had been found guilty by a jury of a crime that prescribed a minimum sentence of ten years in prison and a maximum sentence of life imprisonment.¹²² As permitted by the Sentencing Guidelines, the district court judge in

cial fact-finding. *Id.* at 236. Instead, the Court held that this provision created a crime distinct from that of simple carjacking. *Id.* Death or serious bodily injury was an element of this distinct crime and thus required a jury finding of that element. *Id.* at 245–47.

115 *Id.* at 244–45 (explaining that the Founders recognized the need to "guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which . . . may in time, imperceptibly undermine this best preservative of LIBERTY" (quoting *A [New Hampshire] Farmer*, No. 3, June 6, 1788, reprinted in *THE COMPLETE BILL OF RIGHTS* 476, 77 (Neil H. Cogan ed., 1997))).

116 530 U.S. 465 (2000).

117 *Id.* at 490.

118 *Id.* at 477 (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* *349–50).

119 *Id.* at 483–84.

120 *Id.* at 494–95, 494 n.19.

121 543 U.S. 220 (2005).

122 *Id.* at 227 (Stephens, J., opinion of the Court). The defendant was convicted of possession with intent to distribute at least fifty grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1). *Id.*

Booker had imposed a sentence within the Guideline range as determined by his own factual findings.¹²³ However, this sentence was above the Guideline range as determined by the facts found by the jury.¹²⁴ The Court declared that such a sentence was in violation of the Sixth Amendment. The Court's first holding was that because the Guidelines as written were mandatory, the imposition of a sentence above the Guideline range determined by the factual findings of a jury was a violation of the Sixth Amendment requirement that a jury decide all factual questions which could raise a maximum sentence.¹²⁵ The Court's second holding determined that the best remedy for this constitutional violation was to sever the provision of the Sentencing Reform Act that made the Sentencing Guidelines mandatory.¹²⁶ The severance of this provision meant that the Guidelines were now merely advisory, rather than binding on federal sentencing judges.¹²⁷ As a result, under the post-*Booker* sentencing scheme, a sentencing judge is permitted to impose a reasonable sentence within the statutory minimum and maximum and is to use the Federal Sentencing Guidelines as merely a guide in determining which sentence to impose.¹²⁸

One of the fundamental requirements in order for the decision of a court on an issue to have preclusive effect is that a decision on the issue must have been necessary in order to support the judgment

123 *Id.* at 227. Based upon the defendant's criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the district court to select a sentence of between 210 and 262 months in prison. *Id.*

124 *Id.* The judge conducted a post-trial sentencing proceeding and determined by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack cocaine and that the defendant was guilty of obstructing justice. *Id.* These findings mandated that the judge select a sentence between 360 months and life in prison. *Id.*

125 *Id.* at 233–35, 237.

126 *Booker*, 543 U.S. at 245 (Breyer, J., opinion of the Court).

127 *Id.* The Court based this remedy on what they perceived to be the legislative intent of the system enacted by Congress. *Id.* at 246. The Court believed that Congress wanted to link the defendant's actual conduct to the system imposed as well as preserve uniformity throughout the federal system, and that this remedy best preserved this intent. *Id.* at 250–56.

128 It should be noted that judge's sentences are subjected to appellate review for "reasonableness" according to the statutory criteria of 18 U.S.C. § 3553(a) under the post-*Booker* system. *Id.* at 264. Although the Guidelines are now merely advisory, in many ways the system still acts in much the same manner because judges often hew closely to Guideline sentences. For a discussion of the effects of *Booker* on the sentencing scheme and the influence of the Guidelines post-*Booker*, see Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1484–94 (2008).

entered in the first action.¹²⁹ The primary justification for this rule is that the court deciding the first case may not have taken sufficient care in determining an issue that did not affect the result.¹³⁰ Another way of phrasing this requirement is that a judgment must “turn on” a decision of the issue on which preclusion is sought.¹³¹ *Booker*’s constitutionally mandated prohibition on the use of judicial factual findings to alter the range in which a defendant can be sentenced means that a judge’s factual sentencing findings should never be given preclusive effect in subsequent civil litigation.

In most contexts it is difficult to determine whether a factual finding was necessary to support the judgment.¹³² Post-*Booker*, because the sentencing decision is discretionary, it is constitutionally required that the judge’s factual findings are never “necessary” to support the final judgment.¹³³ In other words, the judge could have found either *X* or *Y*, and still have imposed sentence *Z*. In fact, under the now advisory Guidelines, the judge could have found *any* fact and still imposed sentence *Z*, subject to the reasonableness requirement. This simple analysis seems to indicate that there is no question that the factual findings imposed by the judge will never be *necessary* to the final sentence imposed.

However, the post-*Booker* Guidelines system is not that simple. Post-*Booker*, at sentencing a district court is still statutorily required to compute the applicable guideline range.¹³⁴ In doing so, a judge may have to make factual findings.¹³⁵ Furthermore, because the sentence that is imposed is reviewed on appeal for “reasonableness” in light of

129 See cases cited *infra* note 141.

130 18 WRIGHT ET AL., *supra* note 67, § 4421. The lack of appellate review in some contexts or the lack of incentive to seek appellate review of an unnecessary decision of an issue has also been cited by some courts as a justification for the “necessary to the judgment” requirement for issue preclusion. See, e.g., *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168–73 (5th Cir. 1981) (holding that use of offensive collateral estoppel with respect to an issue which had been an unappealed alternative ground in the prior litigation was inappropriate).

131 *Kosinski v. Comm’r*, 541 F.3d 671, 676 (6th Cir. 2008).

132 See 18 WRIGHT ET AL., *supra* note 67, § 4421, at 539.

133 *Booker*, 543 U.S. at 244 (2005) (Stephens, J., opinion of the Court) (“Any fact (other than a prior conviction) which is *necessary* to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” (emphasis added)).

134 18 U.S.C. § 3552(a) (2006); FED. R. CRIM. P. 32; see also *Rita v. United States*, 551 U.S. 338, 350–51 (2007) (explaining the process that federal judges must follow before imposing a sentence).

135 See *Rita*, 551 U.S. at 350.

the Guideline computation,¹³⁶ the judge's findings of fact must be correct.

Thus, in a roundabout way, the accuracy of a judge's particular set of factual findings is necessary to the final judgment. Although it does not matter what the sentencing findings are, these findings must be accurate. So, if a judge made sentencing findings *X*, the judgment rested on the fact that *X* is true. If *X* was false, then the sentence would be reversed. Thus, the ultimate question presented on this issue is: where a court is permitted to exercise discretionary and independent judgment, but that judgment must be based on a true set of underlying factual findings, are the factual findings necessary to the judgment?

The answer to this question is not simple. Nonetheless, because of the fundamental holding of *Booker*, sentencing findings should not be given preclusive effect in subsequent litigation. First, these findings do not meet the "necessary" requirement for collateral estoppel in the terms that the "necessary" requirement has been construed by the courts in previous cases.¹³⁷ Previously, the Supreme Court held that necessary meant that "the verdict could not have been rendered without deciding that matter."¹³⁸ This means, not only rendering *any* correct decision on the matter (as required by the post-*Booker* sentencing process), but rendering that *exact* decision on the matter. This principle elucidates the difference between the pre-*Booker* and post-*Booker* sentencing schemes. In the pre-*Booker* sentencing scheme, a judge could not impose a sentence without making the *exact* factual findings that were made. Thus, the factual findings were necessary to the judgment, in the sense required by collateral estoppel. However, in the post-*Booker* regime, the sentence does not rest on the *exact* set of facts found by the judge. Instead, the judgment rests on whether *a* correct set of facts was determined by the judge.¹³⁹ The imposition of a sentence under the post-*Booker* regime is at its heart a discretionary judgment. Such discretionary judgments are the opposite of the type of judgments contemplated by collateral estoppel. The theory of collateral estoppel is that relitigation of an issue is improper and inefficient because that *exact* decision must have been reached in the previous case in order to reach the final result.¹⁴⁰ But, where a deci-

136 *Id.* at 347–51.

137 Post-*Booker*, most judges still make factual findings to support the imposition of a sentence. See Young, *supra* note 34, at 685–86.

138 Haring v. Prosise, 462 U.S. 306, 315 (1983) (quoting Petrus v. Robbins, 83 S.E.2d 408, 412 (Va. 1954)).

139 See *Rita*, 551 U.S. at 352–56.

140 See cases cited *supra* note 67.

sion is discretionary, an underlying assumption—even an assumption that must be true in order for the *process* to be upheld as valid—is not necessary to the final judgment.

Second, the judge's factual findings and computation of a sentence under the Guidelines are not a substantive component of the final judgment, but are a procedural component. Although a mistake in calculation of the guidelines by the sentencing judge is reversible error, this error does not pertain to the substance of the decision. The substantive component of appellate review is the "reasonableness" of the decision based on the computed Guideline range, not the computation of the Guidelines themselves.¹⁴¹ The computed Guideline range must be a procedural step rather than a substantive component, because the final Guideline range that is produced is not directly incorporated into the final sentence. The finding of any particular fact is not essential to the judgment. If any particular finding were necessary, the promise of *Booker* would not be fulfilled.¹⁴² Despite the procedures and the appellate review required by the Court in subsequent cases, one cannot accept the fundamental holding of *Booker*—a judge's factual findings cannot raise a defendant's sentence—without arriving at the conclusion that a particular finding by a judge is not required for the imposition of a sentence.¹⁴³

Third, *Booker* implicates the policy behind prohibiting the use of issue preclusion where a judgment is based on a number of different grounds. The rationale of the "necessary" requirement is that where a decision can be based on a number of different grounds there is doubt that any single one of those grounds is correct. The imposition of a sentence is such a judgment under the Guidelines as they exist today. A judge can use an infinite number of possible findings in order to arrive at a final sentence because the final sentence is entirely discretionary.

Fourth, because the current sentencing system is in conflict, the best policy is to rely on the clear constitutional rule of *Booker*. On the one hand, the rule of *Booker* dictates that a sentencing judge's factual findings cannot be constitutionally necessary to the imposition of a sentence. On the other hand *Gall v. United States*¹⁴⁴ and *Rita v. United*

141 See *Rita*, 551 U.S. at 365 (Stevens, J., concurring) ("[P]urely procedural review . . . is inconsistent with our remedial opinion in *Booker*, which plainly contemplated that reasonableness review would contain a substantive component."); *United States v. Booker*, 543 U.S. 220, 260–64 (2005).

142 See *Rita*, 551 U.S. at 369–70 (Scalia, J., concurring in part and concurring in the judgment).

143 See *Kosinski v. Comm'r*, 541 F.3d 671, 676 (6th Cir. 2008).

144 128 S. Ct. 586 (2007).

*States*¹⁴⁵ dictate that in order for a sentence to be upheld on review, it must be a reasonable sentence where the judge has initially made a correct calculation of the Guidelines, both in terms of the factual findings made, and the application of the Guidelines to those findings. Because the rule of *Booker* is a clear constitutional rule, the plain meaning of this rule—that sentencing findings are never “necessary” to a the final judgment imposed—should be followed.

This reading of *Booker* and its progeny has also been accepted by the only circuit court to previously consider *Booker*’s implications on the use of sentencing findings to preclude subsequent civil litigation. This court, the Sixth Circuit in *Kosinski*, stated that a defendant’s sentence “could not constitutionally” turn on the judge’s sentencing findings.¹⁴⁶ On this basis, the court determined that sentencing findings could not meet the necessary requirement for collateral estoppel.¹⁴⁷

B. *The Seventh Amendment*

The Seventh Amendment preserves the right to a jury trial that existed prior to the ratification of the Constitution.¹⁴⁸ In essence, the Seventh Amendment is a general injunction against the curtailment of civil juries in federal court, but it is not an instructional manual for allocating decisional responsibility or regulating procedure.¹⁴⁹ By its terms the Seventh Amendment only applies to “[s]uits at common law.”¹⁵⁰ This means that suits that were tried in courts of equity or maritime courts at the time of the ratification of the Seventh Amendment may be tried without a jury.¹⁵¹

The Court has addressed in recent years whether or not the right to a jury trial applies to a number of different causes of action.¹⁵²

145 551 U.S. 338 (2007).

146 *Kosinski v. Comm’r*, 541 F.3d 671, 676 (6th Cir. 2008).

147 *Id.*

148 8 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 38.10[1][a][ii] (3d ed. 2009).

149 *Id.* (indicating that the Seventh Amendment was intended not to “preserve mere matters of form and procedure, but substance of right”).

150 U.S. CONST. amend. VII. The Seventh Amendment also guarantees a right to jury trial for a newly created cause of action that involves rights and remedies traditionally enforced in an action at common law. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989); *Tull v. United States*, 481 U.S. 412, 417–18 (1987); *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

151 *See Chauffeurs, Teamsters, & Helpers Local 391 v. Terry*, 494 U.S. 558, 564 (1990).

152 *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (holding that Seventh Amendment required a jury trial on damages question based on the Copyright Act); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384

Because the Seventh Amendment does not extend to all actions where a litigant may seek to use a judge's sentencing findings as a collateral estoppel weapon, the Seventh Amendment rationale for a per se ban on applying preclusive effect to sentencing findings is limited to those actions in which there has been traditionally accorded the right to a jury trial. Where a litigant attempts to preclude based on a judge's sentencing findings in an action where there is no constitutional right to a jury trial, the Seventh Amendment presents no barrier to a court giving preclusive effect to a previous judge's sentencing findings.¹⁵³ But if the action is one where the Seventh Amendment right to a jury trial does apply, an attempt to preclude based on a judge's sentencing findings presents constitutional problems under the Seventh Amendment.

Although the Seventh Amendment has generally been understood to reserve factual questions for a jury,¹⁵⁴ where a judge is competent under the Constitution to render a judgment based on facts determined by the judge, such a judgment has preclusive effect in a subsequent case, even if a Seventh Amendment right to a jury trial normally attaches to the cause of action in the second case.¹⁵⁵ As a result, there is a two-part test for determining whether the Seventh Amendment permits giving preclusive effect to a prior factual determination of an issue by a judge: *first*, whether the judge's factual determinations were necessary to a judgment that is valid for Seventh Amendment purposes; and *second*, whether a Seventh Amendment right to a jury trial attaches to the instant case. Because the answer to the second part of this test will vary depending on the type of action

(1996) (holding that Seventh Amendment did not apply to the issue of the construction of the claims in a patent); *Tull*, 481 U.S. at 426–27 (holding that Seventh Amendment did not apply to penalties which Congress had the right to fix statutorily).

153 See, e.g., *SEC v. Monarch Funding Corp.*, 983 F. Supp. 442, 447 n.7 (S.D.N.Y. 1997) (noting that the Seventh Amendment right to a trial by jury does not attach to an SEC enforcement proceeding (citing *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 96–97 (2d Cir. 1978), *vacated on other grounds*, 192 F.3d 295 (2d Cir. 1999))).

154 It was implicitly understood by the ratifiers of the Constitution that questions of fact were “peculiarly the jury’s province.” Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1133 (2003). This is supported by the Judiciary Act of 1789, which was written by many of the Framers. *Id.*

155 *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333–35 (1979) (finding that issues decided in earlier equitable action could not be relitigated in subsequent action for damages, where a jury trial would normally have been required by the Constitution).

brought in the instant case,¹⁵⁶ this Note will focus on whether or not a judge's sentencing findings can pass the first part of the test.

In determining whether previous factual findings of a judge can be given preclusive effect in a later action where the Seventh Amendment right to a jury trial attaches, the Court has relied on whether the first action would have been tried in equity or law in 1791.¹⁵⁷ If the action was such that it would have been tried at equity, then the Court has found no constitutional problem.¹⁵⁸ Where an action or a portion of an action does not fall neatly into either the suits at law or suits at equity box, the Court has used several different approaches to decide whether the right to a jury trial applied. Early cases focused on the fact-law distinction.¹⁵⁹ In more recent years, however, the Court has moved away from the fact-law distinction and has relied on historical antecedents, common law analogies, or functional considerations.¹⁶⁰ Particularly in recent years, the Court has focused on the nature of the remedy sought.¹⁶¹

Sentencing findings are criminal proceedings and do not fall into either the category of suits at common law or suits at equity. But because it is permissible to give preclusive effect to issues decided in a criminal judgment in a subsequent civil case, the possibility that sentencing findings can have preclusive effect in subsequent civil litigation cannot be dismissed outright. Because the question that is usually determinative of whether a judgment is adequate for Seventh Amendment purposes—whether it was tried at law or equity—cannot be applied to criminal sentencing finding; a new question must be formulated. Instead of asking whether the first cause of action was

156 See cases cited *supra* notes 150, 152.

157 See *Parklane Hosiery*, 439 U.S. at 333; *Katchen v. Landy*, 382 U.S. 323, 336–38 (1966); *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160, 160 (1963) (per curiam); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476–80 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508–10 (1959); *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113–17 (1821).

158 *Parklane Hosiery*, 439 U.S. at 333.

159 See *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 537 (1958); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497–98 (1931); see also *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (“The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.”); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897) (holding that in order to preserve the substance of the Seventh Amendment right, it was “require[d] that questions of fact in common law actions shall be settled by a jury”).

160 *Kirgis*, *supra* note 154, 1128–29 (describing this shift in jurisprudence and the importance of cases like *Tull*, *Markman*, and *Feltner*).

161 See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 198 (2000).

analogous to a case tried in law or equity, the questions which should be asked are (1) whether a judge's sentencing findings substantially similar to a judgment in equity such that they can be given preclusive effect in a subsequent case where the Seventh Amendment would require a jury trial; and (2) if a judge's sentencing findings are not substantially similar to a judgment in equity, whether allowing a judge's sentencing findings to have preclusive effect in subsequent litigation does sufficient damage to the substance of the right to a jury trial to constitute a violation of the Seventh Amendment.

The answer to the first of these queries is found in the history of criminal sentencing. Despite what previous courts have held, there is in fact a significant distinction that can be made between a judgment in equity and a judge's sentencing findings based on the history of criminal sentencing. Because the Seventh Amendment preserves the civil jury system in existence at the time of the ratification of the Amendment, the differing historical pedigree between a judgment in equity and a judge's sentencing findings is too significant to give a sentencing judge's findings preclusive effect.

The *Apprendi* Court explored in great detail the American history of criminal sentencing. First, the Court noted that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”¹⁶² Instead, the substantive criminal law was “sanction-specific” and “prescribed a particular sentence for each offense.”¹⁶³ This meant that the sentencing judge exercised no discretion to lower or raise the range within which a criminal defendant could be sentenced.¹⁶⁴ This is not to say that judges in the common law era did not base sentences on mitigating or aggravating circumstances, but only that such aggravating or mitigating circumstances could not change the range within which the judge could sentence the defendant.¹⁶⁵ Thus, sentencing findings as they exist today did not exist at the time of the Founding. Courts of equity, in contrast,

162 *Apprendi v. New Jersey*, 530 U.S. 466, 478–79 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *365); *see also id.* at 502–10 (Thomas, J., concurring) (citing cases from the Founding era to the Civil War to establish that “a fact that is by law the basis for imposing or increasing punishment is an element”).

163 *Id.* at 478–79 (majority opinion) (explaining that the system was such that a defendant would be able to predict the punishment for the crime based on the face of the indictment).

164 *Id.* at 479.

165 *Id.* at 519 (Thomas, J., concurring) (citing JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 85, at 53–54 (2d ed. 1872)).

had a long and rich tradition prior to the ratification of the Seventh Amendment, and in fact judgments in equity had long been given preclusive effect in subsequent suits at law.¹⁶⁶ Furthermore, at the time of the Founding the substance of the functions performed by a court in giving a criminal sentence and when sitting in equity differ significantly. A court in equity decided the totality of the judgment.¹⁶⁷ In contrast, a sentencing court only acted with discretion and was bound by the jury verdict.¹⁶⁸ These differences are of enough significance that a sentencing judge's factual findings should not be treated in the same manner for Seventh Amendment purposes as judgment in equity by a court determining whether to give preclusive effect to those sentencing findings.

The question of whether an action does sufficient damage to the substance of the right to a jury trial to constitute a violation of the Seventh Amendment informs the scope of the right to a jury trial.¹⁶⁹ The answer to this question also militates against allowing a subsequent civil court to give preclusive effect to a judge's sentencing findings. Allowing a court to give preclusive effect to a judge's sentencing findings sufficiently damages the substance of the right to a jury trial preserved in the Seventh Amendment that it at the very least raises grave constitutional concerns. Throughout the Court's Seventh Amendment jurisprudence, the Court has been concerned with maintaining the "substance" of the right to a jury trial.¹⁷⁰ A series of cases decided in the first half of the twentieth century indicated that it was not necessary to preserve every detail of the jury trial that existed at the time of the adoption of the Amendment in order to maintain the substance of the Amendment.¹⁷¹ Rather, the Amendment was "designed to preserve the basic institution of the jury trial in only its most fundamental elements."¹⁷² In subsequent cases, the Court found the abridgement of the fundamental role of the jury in cases where the jury's role as a factfinder was usurped by the judge.¹⁷³ An

166 See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) (citing a number of early cases accepting that a litigant was not entitled to have a jury determine a fact previously adjudicated by a chancellor in equity).

167 *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 505 (1959).

168 See *Apprendi*, 530 U.S. at 478–82.

169 See *id.* at 483 (explaining that while trial practice need not remain stagnant, it "must at least adhere to the basic principles undergirding" the requirement of a jury trial).

170 See *id.* at 484.

171 *Moses*, *supra* note 161, at 200–01.

172 *Galloway v. United States*, 319 U.S. 372, 392 (1943).

173 *Moses*, *supra* note 161, at 202–03.

important recent case, *Feltner v. Columbia Pictures Television, Inc.*,¹⁷⁴ also explained that the substance of the Seventh Amendment reserved the factual question of the amount of damages to the jury.¹⁷⁵ In the context of ascribing preclusive effect to a judge's sentencing findings, not only would the jury in some cases be prevented from determining the amount of damages, but they would also be prevented from determining liability. Thus, the effect of a court giving preclusive effect to a judge's sentencing findings constitutes an abridgement of the substance of the Seventh Amendment where the issue in the subsequent litigation is one to which the right to a jury trial applies.

Even if one is not persuaded that the Seventh Amendment, where applicable, bars the use of collateral estoppel based on sentencing findings, at the very least it can be conceded that this practice raises serious constitutional concerns. The approach taken by the Court in *Byrd v. Blue Ridge Electric Cooperative, Inc.*¹⁷⁶ is instructive of how constitutional concerns should be handled in the Seventh Amendment context. Although the *Byrd* Court did not go so far as to make its holding regarding the jury trial a purely constitutional holding, the Court held that the "influence—if not the command—of the Seventh Amendment, assigns the decision of disputed questions of fact to the jury."¹⁷⁷ Similarly, in the context of ascribing preclusive effect to sentencing findings in subsequent civil litigation where the right to a jury trial attaches, "the influence—if not the command—of the Seventh Amendment" indicates this practice is inappropriate.

C. Prudential and Policy Reasons for a Per Se Ban

Beyond the difficulty of meeting the traditional requirements of collateral estoppel and the Seventh Amendment concerns, there are also strong prudential and policy reasons for a per se ban. Because collateral estoppel in the federal system is a common law doctrine, it is possible for the courts to decide that permitting a judge's sentencing findings to have preclusive effect is simply inappropriate. Although, many of the prudential and policy rationales behind a per se ban were outlined by the *Monarch Funding* court,¹⁷⁸ the court erred in deciding that these rationales did not militate in favor of a per se ban.

The Court in *Parklane* cautioned against allowing collateral estoppel to apply where the defendant had little incentive to litigate the

174 523 U.S. 340 (1998).

175 *Id.* at 352.

176 356 U.S. 525 (1958).

177 *Id.* at 537.

178 *See* SEC v. Monarch Funding Corp., 192 F.3d 295, 304–06 (2d Cir. 1999).

first action vigorously, where procedural opportunities would be unavailable in the first action that could cause a different result, and where the potential efficiency gains were minimal.¹⁷⁹ Each of these three policy reasons is strongly implicated when a litigant attempts to ascribe preclusive effect to sentencing findings.

The procedural devices available to a defendant in a sentencing proceeding vary significantly from those available to a litigant in a full-blown civil trial. A defendant is only afforded the opportunity to comment on the matters relating to the appropriate sentence and to compel the court on each disputed issue to “rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.”¹⁸⁰ This means that any presentation of evidence in order to resolve disputed factual issues is left solely to the discretion of the district court.¹⁸¹ The defendant has no affirmative right to present evidence on disputed factual issues. Also, the rules of evidence do not apply in a sentencing hearing, so the prosecution is able to admit hearsay evidence and other evidence forbidden by the Federal Rules of Evidence in a criminal or civil trial.¹⁸² Furthermore, even where a district court decides to hear evidence a defendant has no right to conduct prehearing discovery or to compel the presence of prosecutorial witnesses.¹⁸³ Finally, a defendant in a sentencing hearing may be reluctant to testify for a number of reasons.¹⁸⁴

Although many of these concerns may seem defendant-centric, there are actually important procedural opportunities that are available to the government in a civil trial that are unavailable in a criminal trial. In comparison to the “full array of civil discovery procedures against the defendant” available to the government in civil litigation, the government in a criminal trial is only permitted to seek “discovery of documents and tangible objects from the defendant” if the defendant seeks reciprocal discovery from the government.¹⁸⁵ Furthermore, even then the government is restricted to the evidence that

179 *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–31 (1979).

180 FED. R. CRIM. P. 32(i)(3)(B).

181 See Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1843–48 (2003).

182 See Elias C. Selinger, *An Unredeemed Promise: How Courts Can Prevent Offensive Collateral Estoppel from Undercutting the Policy Goals of Amended Rule of Evidence 408*, 102 Nw. U. L. REV. 1953, 1985 (2008).

183 Michaels, *supra* note 181, at 1815–19.

184 *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 305 (2d Cir. 1999).

185 *United States v. U.S. Currency in the Amount of \$119,984.00*, 304 F.3d 165, 177 (2d Cir. 2002).

“the defendant intends to introduce as evidence in chief at the trial.”¹⁸⁶ In addition, the government faces constitutional restrictions. All of these various procedural differences between a criminal and civil trial add up to precisely the type of procedural differences between two proceedings that *Parklane* stated would make application of collateral estoppel inappropriate.

A defendant in a criminal sentencing also has far different motives than a defendant in a civil action. Often the sentencing proceeding is a cooperative process between the prosecution and the criminal defendant, rather than an adversarial proceeding. In order to receive a recommendation from the prosecutor for a reduction in the Guidelines range for “acceptance of responsibility,” oftentimes the criminal defendant will choose not to contest an issue of fact contained in the presentence report or argued by the prosecution. There is also the potential that the criminal defendant will choose not to challenge a factual issue because the defendant believes either that the issue is irrelevant to the calculation of the Guideline offense level, or that the procedural limitations of the sentencing hearing may prevent the defendant from being able to contest the claim adequately.¹⁸⁷ Because the defendant in a criminal sentencing proceeding will almost invariably have a vastly different incentive to litigate an issue than the same defendant in a subsequent civil action, collateral estoppel should not be applied to sentencing findings.

The *Monarch Funding* court recognized this policy rationale for a per se ban and believed that the best choice was to leave the district court discretion to decide when the application of collateral estoppel would be inappropriate for this reason. This approach is problematic because in many cases it will be next to impossible for the defendant to prove that he did not have a full opportunity to litigate an issue or even why a defendant chose not to vigorously litigate an issue at sentencing. This approach ignores the possibility that a defendant may make decisions at sentencing based on reasons that will not be apparent in later civil litigation.

There are other considerations of efficiency. First, one of the primary purposes of collateral estoppel is to increase judicial economy. This rationale behind collateral estoppel is not promoted by a regime where preclusive use of sentencing findings is permitted but highly discouraged. Under this type of regime the issue of collateral estoppel can still be heavily litigated in cases where it is inappropriate. This

186 *Id.* (quoting FED. R. CRIM. P. 16(b)(1)(A)).

187 Defense Lawyers Brief, *supra* note 46, at 19.

means that any efficiency gains from a case where it was found to be appropriate will be mitigated.

Second, litigants need predictable rules. Based on the inability of courts to produce factors distinguishing situations where use of collateral estoppel would be appropriate from those where it would be inappropriate,¹⁸⁸ any preclusive use of sentencing findings by federal courts will likely be unpredictable.¹⁸⁹ Every circuit court that has decided this issue has expressed concern that ascribing preclusive effect to sentencing findings would lead to transforming sentencing hearings into “mini-trials” thus undercutting any efficiency gains in the subsequent civil litigation. However, under the current regime, because it is still possible for sentencing findings to be ascribed preclusive effect, litigants still have great incentive to over-litigate the sentencing hearing in order to prevent adverse findings from being used against them. The best way to prevent this problem is to completely bar the preclusive use of sentencing findings.

Finally, the *Monarch Funding* court decided that a per se rule was inappropriate because of the precedent set by *Parklane Hosiery*. In *Parklane Hosiery*, the court decided to give district courts the discretion to determine when offensive use of collateral estoppel was appropriate because there were factors present in some such cases—whether the plaintiff could not be joined in the prior action, whether the defendant had full incentive to litigate, and whether there were inconsistent judgments—that made the use of collateral estoppel appropriate, while in other cases it would not be appropriate.¹⁹⁰ On the other hand, the *Monarch Funding* court did not explain with any level of specificity the factors that would distinguish sentencing proceedings where it was fair to ascribe preclusive effect from those sentencing hearings where it was not.¹⁹¹ Furthermore, subsequent cases that were decided using this same analytical framework were decided on grounds that were common to *all* sentencing hearings.¹⁹² This means that district courts will not be able to apply a discretionary rule with any consistency and militates in favor of a per se ban.

188 See *supra* Part III.C.

189 See Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 N.Y.U. ANN. SURV. AM. L. 435, 436, 441 (claiming that collateral estoppel use of nontraditional litigation has been very unpredictable).

190 See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327–33 (1979).

191 See *supra* text accompanying note 85.

192 See *United States v. U.S. Currency in the Amount of \$119,984.00*, 304 F.3d 165, 174, 179 (2d Cir. 2002); *SEC v. Zafar*, No. 06-CV-1578, 2009 WL 129492, at *6 (E.D.N.Y. Jan. 20, 2009).

When considered in their totality, the policies behind collateral estoppel that are implicated caution against allowing sentencing findings to have collateral estoppel effect in subsequent litigation.

CONCLUSION

In the contemporary federal criminal justice system, the sentencing hearing is often the most important event in the criminal process. This proceeding is where most of the facts about the actual events underlying the transaction are contested. The issue of the preclusive effect that should be ascribed to criminal sentencing findings in subsequent federal civil litigation is not a simple issue. Because this issue involves the intersection of civil law and criminal law, the preclusion precedents in these areas of law are not directly on point. Nonetheless, the Supreme Court jurisprudence relating to the Sixth Amendment indicates that the factual findings made at these sentencing hearings are not necessary to the final sentence that is imposed in the way that “necessary” has been traditionally construed in the collateral estoppel context. Furthermore, if the Seventh Amendment, in cases where it applies, does not dictate the decision on this issue, it at least represents a policy choice against allowing a judge’s sentencing findings to have preclusive effect and in favor of preserving questions of fact for the civil jury. Finally, the policy considerations surrounding this issue militate against ascribing preclusive effect to a judge’s sentencing findings. Although courts applying the discretionary rule of *Monarch Funding* have been reluctant to ascribe preclusive effect to sentencing findings because of the foregoing reasons a per se ban is appropriate.