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26 Champion 35

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TEXT:

[*35] **Between Crime and Punishment: Where Might the Supreme Court Draw the Constitutional Line?**

Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.

Justice Souter n1

n1 *Jones v. United States, 526 U.S. 227, 232 (1999)* (Souter, J.).

The difficulty I have is that nowhere have we defined what the distinction is between an element of the offense and [a sentencing] enhancement factor.

Justice Thomas n2

n2 Justice Thomas, Transcript of Oral Argument at 44, Apprendi v. New Jersey (No. 99-478).

The question of which factors are which is normally a matter for Congress.

Justice Breyer n3

n3 *United States v. Almendarez-Torres, 523 U.S. 224, 228 (1998)* (Breyer, J.).

[A] legislature should not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties.

Justice Stevens n4

n4 *McMillan v. Pennsylvania, 477 U.S. 79, 96 (1987)* (Stevens, J., dissenting).

The above dialogue exemplifies the historical and rising uneasiness among the United States Supreme Court Justices regarding the imprecise constitutional line between crime (in terms of offense elements) and punishment (in terms of sentencing factors). On June 26, 2000, the Court made its first foray into resolving the ambiguity when it issued an opinion imposing constitutional limits on sentencing factors. n5 In *Apprendi v. New Jersey*, n6 the Court held 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." n7 In other words, if "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," then due process requires that the sentencing factor be treated as an element of the offense, and consequently, proven to the fact-finder beyond a reasonable doubt. n8

n5 The term 'sentencing factor' . . . appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense. *Apprendi v. New Jersey, 120 S. Ct. 2348, 2365 n.19 (2000).*

n6 *120 S. Ct. 2348 (2000).*

n7 *Id. at 2362-63.*

n8 *Id. at 2365* (emphasis added).

Since *Apprendi*, state and federal courts have been overwhelmed with cases testing the scope of this constitutional rule distinguishing crime from punishment. Post-*Apprendi* decisions indicate that the predominant understanding of *Apprendi's* holding is that it merely imposes a limit on the effect sentencing factors may have on the ultimate sentence such that courts may enhance a sentence up to, but not over, the statutory maximum penalty for the offense of conviction. n9 This focus on the literal, or "formalistic" n10 holding of *Apprendi*, however, misses the essence of *Apprendi* and ignores the history of the Court's sentencing jurisprudence. Indeed, if the amount of case law *Apprendi* has generated is any indication, n11 the implications of *Apprendi's* holding are more far-reaching. And the Court itself appears to be signaling as much given that it summarily has vacated a defendant's sentence and remanded for reconsideration in light of its decision in *Apprendi* on over 50 occasions, n12 including in cases not involving statutory maximums. n13

n9 *Compare United States v. Hernandez, 228 F.3d 1017 (9th Cir. 2000)* (holding that because sentencing enhancement did not exceed ten-year statutory maximum sentence for conspiracy, the rule in *Apprendi* was not violated), *with United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)* (holding that because sentencing enhancement exceeded five-year statutory maximum for drug trafficking where no amount was specified in the indictment, rule in *Apprendi* was violated) *overruled in part by United States v. Buckland, F.3d 2002 WL 63718* (9th Cir. 2002, (en banc). For a summary of selected post-*Apprendi* decisions, see Carmen D. Hernandez, Apprendi v. New Jersey--Lower Court Decisions (Nov. 2000) (unpublished manuscript), *at* http://www.dcfpd.org/fdtg/apprendi/apprendi.htm.

n10 As Justice O'Connor noted in her dissenting opinion in *Apprendi*, "given the pure formalism of the above reading[] of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching." *Apprendi, 120 S. Ct. at 2391.*

n11 In the nearly two years since the *Apprendi* decision, well over two thousand state and federal cases have discussed the *Apprendi* decision.

n12 The Federal Public Defender for the District of Columbia's Web site provides an excellent resource tracking those cases that were summarily disposed by the Court and remanded for resentencing in light of *Apprendi*. *See* FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF COLUMBIA, APPRENDI WATCH, *at* http://www.dcfpd.org/fdtg/apprendi/apprendi_watch.htm.

n13 *See, e.g., United States v. Valensia, 222 F.3d 1173 (9th Cir. 2000), vacated, 121 S. Ct. 1222 (2001)* (Mem.).

In light of the above, there undoubtedly is something more to *Apprendi* than what may be called the formalistic "statutory maximum rule," which may be stated as follows: If, and only if, a sentencing factor increases a sentence beyond the statutory maximum penalty for the offense of conviction, then that sentencing factor becomes an element of the offense. This article argues that, in light of the issues presented in two cases to which the Supreme Court recently granted *certiorari*, n14 the "statutory maximum rule" likely will prove not to be the rule of *Apprendi*, but rather only an indicator of when the real (but implicit) rule of *Apprendi* is violated. Indeed, the Court finally appears to be prepared to define explicitly the line over which it is unconstitutional for legislatures and courts to "dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties," n15 and this line ultimately may have little to do with statutory maxima, and everything to do with the effect the factor has on the ultimate sentence.

n14 *United States v. Cotton, 261 F.3d 397 (4th Cir. 2001), cert. granted, 122 S. Ct. 803* (Jan. 4, 2002) (whether fact omitted from indictment that enhances statutory maximum sentence requires court of appeals automatically to vacate enhanced sentence); *Harris v. United States, 243 F.3d 806 (4th Cir. 2001), cert. granted in part, 122 S. Ct. 663* (Dec. 10, 2001) ("Given that a finding of 'brandishing', as used in *18 U.S.C. § 924*(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?"). The Court has granted *certiorari* to a state capital sentencing case, which also includes an *Apprendi* issue. *See Ring v. Arizona, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S. Ct. 865* (Jan. 11, 2002) (whether Arizona's capital sentencing scheme, which allows courts rather than juries to determine whether death is warranted, violates *Apprendi*). The issues presented in this case, however, are not germane to the arguments and discussions made in this article.

n15 *McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986)* (Stevens, J., dissenting).

This article first reviews, briefly, Supreme Court jurisprudence regarding sentencing factors. It then discusses recent post-*Apprendi* circuit court cases, as well as the two cases recently granted *certiorari* that involve *Apprendi* issues. The article concludes that the Court will likely take the opportunity this Term to articulate explicitly the constitutional [*36] rule lurking in the background of *Apprendi*. In all likelihood, the rule will provide that factors that moderately increase a sentence can continue to be determined by judges under a preponderance-of-the-evidence standard. However, factors that have an "extremely disproportionate effect on the sentence relative to the offense of conviction" n16 will have to be determined under a clear and convincing standard by courts. n17 And finally, when it turns out that the factor, rather than the offense, is what the legislature has targeted for "severe criminal penalties," n18 then it must be considered an element of the offense. With respect to this last prong, factors that not only affect the statutory maximum penalty, but also those that implicate mandatory minimum penalties, will be considered elements.

n16 *United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001).*

n17 *See id.*

n18 *McMillan, 477 U.S. at 96* (Stevens, J., dissenting).

A Brief History of Sentencing Factors

McMillan v. Pennsylvania:

The Birth of Sentencing Factors

In 1986, the Supreme Court enunciated a distinction between "sentencing factors" and criminal elements. In *McMillan v. Pennsylvania*, the Supreme Court upheld the constitutionality of a Pennsylvania statute providing for a

mandatory minimum five-year sentence "if the sentencing judge--upon considering the evidence introduced at the trial and any additional evidence offered by . . . the [government] at the sentencing hearing--finds, by a preponderance of the evidence, that the defendant 'visibly possessed a firearm' during the commission of the offense." n19

n19 *Id. at 81* (emphasis added).

Although acknowledging that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," n20 the Court specifically rejected the claim that "whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." n21 Instead, the Court held that states have broad discretion in defining the elements of crimes and in defining the sentencing factors that may enhance the punishment for those crimes. n22 Moreover, the states, as well as the federal government, may delegate their authority to define sentencing factors to sentencing commissions. n23

n20 *Id. at 84* (quoting *In re Winship, 397 U.S. 358, 364 (1970))* (internal quotations omitted).

n21 *Id.* (quoting *Patterson v. New York, 432 U.S. 197, 214 (1977)).*

n22 *Id.* at 85.

n23 *See Mistretta, 488 U.S. 361, 389* (holding that the Constitution does not "prohibit[] Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties" including the promulgation of sentencing guidelines).

The main check on states' discretion in defining the elements of crimes and sentencing factors is the Due Process Clause of the Fifth and Fourteenth Amendments. According to *McMillan*, states may not define the elements of a crime, or its attendant sentencing factors in such a manner that would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." n24 Quite famously, then-Associate Justice Rehnquist, writing for the majority, stated that the relevant criminal statute may not be "tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense." n25

n24 *McMillan, 477 U.S. at 85* (citations and internal quotations omitted).

n25 *Id. at 88; see also Tot v. United States, 319 U.S. 463 (1943)* (invalidating criminal statute that created presumption that convicted felon who possessed a weapon obtained it in interstate commerce).

Jones v. United States: *Reining in Sentencing Enhancements*

More recently, the Court in *Jones v. United States*, n26 emphasized that "much turns on the determination that a fact is an element of an offense rather than a sentencing consideration." n27 Indeed, determining whether a fact is a criminal element or a sentencing factor is of paramount importance to procedural due process. The elements of a crime must be charged in the indictment and proven to a jury beyond a reasonable doubt; sentencing factors, however, need only be determined by a judge by the preponderance of the evidence standard. n28 Still, the Court recognized that "the question of which factors are which is normally a matter for Congress." n29

n26 *526 U.S. 227 (1999).*

n27 *Jones v. United States, 526 U.S. 227, 232 (1999).*

n28 *See id.*

n29 *United States v. Almendarez-Torres, 523 U.S. 224, 228 (1998)* (emphasis added).

In *Jones*, the Court found that a federal carjacking statute that specifically provided a sentencing enhancement for serious bodily injury was an unconstitutional penalty enhancement. n30 As in *McMillan*, the Court reiterated the due process limitations, as well as the notice and jury trial limitations, on what a state can define as a crime. n31 Likewise, the Court held that these same constitutional limitations apply to what a state can define as a *sentencing factor*. According to the Court in *Jones, "McMillan* is notable . . . for acknowledging the question of due process requirements for fact-finding that raises a sentencing range." n32

n30 *See Jones, 526 U.S. at 236* (noting that "Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime").

n31 *See id. at 242.*

n32 *Id.*

In short, the Court recognized the very real danger that would arise from legislatures' being afforded too much discretion in denominating certain factors as criminal elements, and others as sentencing factors. Indeed, it is an important and legitimate "question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." n33

n33 *Id. at 243-44.*

Apprendi v. New Jersey:
Distinguishing Crime from Punishment
Close on the heels of *Jones*, the Supreme Court decided *Apprendi v. New Jersey*. n34 Charles Apprendi pleaded guilty in a New Jersey state court to felony firearm possession. n35 In New Jersey, felony firearm possession carried a ten-year statutory maximum term of imprisonment. n36 Pursuant to the New Jersey hate crime statute, however, a finding that there was racial bias involved in the felony firearm possession, increased the maximum penalty from 10 years to 20 years. n37 The prosecutor moved the court to enhance Apprendi's sentence pursuant to the hate crime statute. n38 At the sentencing hearing, the judge found, by a preponderance of the evidence, that Apprendi's offense--felony firearm possession--was conducted with racial bias. n39 Pursuant to the hate crime sentencing enhancement, the court sentenced Apprendi to a 12-year-term of imprisonment. n40

n34 *120 S. Ct. 2348 (2000).*

n35 *Id. at 2352.*

n36 The New Jersey statute in question classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. *See N.J. Stat. Ann. § 2C:39-4(a)* (West 1995). Such an offense is punishable by imprisonment for "between five years and 10 years." § 2C:43-6(a)(2).

n37 *N.J. Stat. Ann. § 2C:44-3(e)* (West Supp. 2000). A separate statute, described by that State's Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' *N.J. Stat. Ann. § 2C:44-3(e)* (West Supp. 2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.' § 2C:43-7(a)(3). *Apprendi, 120 S. Ct. at 2351.*

n38 *See id. at 2352.*

n39 *Id.*

n40 *See id.*

Apprendi appealed his sentence arguing that the hate crime statute violated his constitutional right to due process of law, and that the hate crime enhancement in fact was an element of a separate offense--an offense that should have been included in the indictment and proved beyond reasonable doubt. n41 Both the New Jersey appellate court n42 and the New Jersey Supreme Court affirmed Apprendi's sentencing enhancement and ultimate sentence. n43 The New Jersey Supreme Court held that "'the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor.'" n44 In the view of the New Jersey Supreme Court, both the enhancement and the hate crime statute were constitutionally valid.

n41 *See id.*

n42 *See State v. Apprendi, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997).*

n43 *See State v. Apprendi, 731 A.2d 485 (N.J. 1999).*

n44 *Apprendi, 120 S. Ct. at 2353* (quoting *State v. Apprendi, 731 A.2d at 494-495).*

The United State Supreme Court granted *certiorari* to Apprendi on November 29, 1999, n45 heard oral arguments on March 28, 2000, and subsequently issued its opinion on June 26, 2000. n46 The Court reversed the New Jersey Supreme Court and remanded for resentencing. n47 The U.S. Supreme Court held 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." n48

n45 *See State v. Apprendi, 731 A.2d 485 (N.J. 1999).*

n46 *See Apprendi, 120 S. Ct. at 2348.*

n47 *Id. at 2367.*

n48 *Id. at 2362-63.* In *Almendarez-Torres v. United States, 523 U.S. 224 (1998),* the Court held that a prior criminal conviction may be treated as a sentencing factor and may constitutionally increase the statutory maximum penalty beyond the statutory maximum penalty for the offense of conviction. *See id.* In *Apprendi,* however, although declining to overrule *Almendarez-Torres,* the Court did note that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi, 120 S. Ct. at 2362.*

In essence, if a sentencing factor increases the penalty beyond the statutory [*37] maximum for the conviction, then, following *McMillan,* the sentencing factor has become a "tail" that "wags the dog of the substantive offense," *i.e.* the sentencing factor has become the "functional equivalent" of a criminal element. n49

n49 *Apprendi, 120 S. Ct. at 2365 n.19.*

Likewise, following Jones, the *Apprendi* decision also means that when a sentencing factor increases the statutory maximum punishment, the defendant's Fifth and Fourteenth Amendment rights to due process, and Sixth Amendment right to a jury trial, are violated. n50 Thus, *Apprendi* clarified the holding in *McMillan* and expanded the holding in *Jones* by enunciating a new "constitutional rule" n51 --a constitutional rule that set the outer bounds given to a sentencing factor in determining a defendant's ultimate punishment.

n50 *See id. at 2355.*

n51 *See id. at 2363.*

The Court in *Apprendi* noted "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." n52 Especially in light of this novelty, legislative schemes such as the Federal Sentencing Guidelines must "remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" n53 As such, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." n54

n52 *Id. at 2359.*

n53 *Id.*

n54 *Id. at 2359 n.10* (emphasis original). In his concurrence, Justice Thomas reiterated this point regarding the distinction between elements of a crime and sentencing factors, but with a slightly different flavor: "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element." *Apprendi, 120 S. Ct. at 2379* (Thomas, J., concurring).

Presumably, Justice Thomas' definition of what constitutes an element is far more encompassing than the majority's insofar as Justice Thomas' definition does not incorporate reference to "a punishment greater than that otherwise legally prescribed," i.e., the statutory maximum punishment. Indeed, on its face, Justice Thomas' definition of an element would subsume all sentencing factors for they are a "basis for. . . increasing punishment" and for "increasing the prosecution's entitlement". *Id.*

Evolution of (Some) Sentencing Factors Into Elements

Does Apprendi *Apply to Mandatory Minimums?*

As noted above, courts routinely have interpreted *Apprendi* to embody nothing more than the formalistic statutory maximum rule such that a sentencing factor does not conflict with constitutional due process as long as the factor does not affect the statutory maximum penalty. Yet, as Justice Breyer, writing for the majority, acknowledged in *Almendarez-Torres v. United States*, n55 "the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue." n56 Elaborating on this point, Justice Breyer later noted in his dissent in *Apprendi* that "as a practical matter, a legislated mandatory 'minimum' is far more important to an actual defendant. . . [and all] the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply *a fortiori* to any matter that would increase a statutory minimum." n57 Indeed, as a practical matter, the issue of mandatory minimums is most relevant to federal drug-trafficking n58 and firearms offenders. n59 For example depending on the quantity and type of drugs involved, a drug offender can fall into one of three statutory penalty ranges: (1) 0 to 20 years, n60 (2) 5 to forty years, n61 or (3) 10 years to life imprisonment. n62 (Of course, the Federal Sentencing Guidelines ultimately determine the sentence within those ranges. n63)

n55 *523 U.S. 224 (1998)*.

n56 *Id. at 245.*

n57 *Apprendi v. New Jersey, 120 S. Ct. 2348, 2401* (Breyer, J., dissenting); *accord id. at 2379-80* (Thomas, J., concurring).

n58 Of 59,846 federal cases in fiscal year 2000, 23,542 (39%) were sentenced under the drug offense guidelines. *See* UNITED STATES SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 44. Of these drug offenders, at least 13,544 (58%) received a mandatory minimum sentence. *See id.*

n59 Of 59,846 federal cases in fiscal year 2000, at least 3524 (6%) were sentenced for firearms violations. *See* UNITED STATES SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 3. According to unpublished Commission data, of the 3524 firearms offenders, 1464 (42%) of them were sentenced under *18 U.S.C. § 924*(c), which subjected them automatically to a mandatory minimum term of imprisonment. Thus, nearly half of all firearms offenders and over half of all drug offenders are sentenced to a mandatory minimum terms of imprisonment. All told, 15,008 offenders (25%) were sentenced to some mandatory minimum term of imprisonment in fiscal year 2000.

n60 *See 21 U.S.C. § 841*(b)(1)(C).

n61 *See 21 U.S.C. § 841*(b)(1)(B).

n62 *See 21 U.S.C. § 841*(b)(1)(A).

n63 *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES, Ch.2, Pt.D.

Prior to *Apprendi*, drug amount was not required to be included in an indictment as it was considered a sentencing factor. As such, it was left up to the sentencing judge to determine by a preponderance of evidence. After *Apprendi*, however, every United States Circuit Court of Appeals to consider the issue has decided that drug amount must be alleged in the indictment and proved to a jury beyond a reasonable doubt, but only if the drug amount changes the statutory maximum penalty. Consequently, nearly every circuit has held that *Apprendi* does not apply to mandatory minimums.

In *United States v. Flowal*, n64 however, the Sixth Circuit held that because "the trial judge made a factual finding [on drug amount] that determined the appropriate length of the criminal sentence, . . . a jury should have determined the weight of the drugs beyond a reasonable doubt." n65 The Sixth Circuit noted that "the ultimate effect of the trial judge's finding in this case is the same as the effect of the judge's finding in *Apprendi*." n66

n64 *234 F.3d 932 (6th Cir. 2000); United States v. Ramirez, 242 F.3d 348, 351 (6th Cir. 2001)* ("Aggravating factors, other than a prior conviction, that increase the penalty from a non-mandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved.").

n65 *Id.* at 936.

n66 *Id.* at 936.

Consequently, as the "judge's determination effectively limited the range of applicable penalties" n67 and deprived the defendant of the opportunity to receive a lesser sentence, "the constitutional underpinnings of the defendant's right to trial" required that drug amount be treated as an element. n68

n67 *Id.* at 936 n.2.

n68 *Id.* at 937.

More recently, in *United States v. Guevara*, n69 the Second Circuit held that "by virtue of *Apprendi*, a statutory mandatory minimum sentence . . . cannot mandate a prison sentence that exceeds the highest sentence to which the defendant would otherwise have been exposed (*i.e.*, the top of the Federal Guidelines range . . .) if the applicability of [the mandatory minimum] depends on a finding of drug quantity not made by the jury." n70 The Second Circuit reasoned that "because the Guideline range is law that binds the sentencing court, . . . the maximum sentence justifiable under the Guidelines . . . is the prescribed maximum sentence to which a defendant may be exposed and sentenced." n71 Consequently, "if drug quantity is used to trigger a mandatory minimum sentence that exceeds the top of the Federal Guideline range that the district court would otherwise have calculated . . . that quantity must be charged in the indictment and submitted to the jury." n72

n69 *227 F.3d 111 (2d Cir. 2001).*

n70 *Id. at 118.*

n71 *Id. at 119.*

n72 *Id.*

Interestingly, the Second Circuit noted that in finding that *Apprendi* applies to mandatory minimum determinations, it had aligned itself "on one side of a circuit split," n73 for in *United States v. Harris*, n74 the Fourth Circuit considered and arrived at the opposite conclusion on that precise issue, but in the context of mandatory minimums applicable to firearms offenses. Similar to the graduated penalty schedule for drug-trafficking offenses, *18 U.S.C. § 924* provides that if an offender possesses a firearm "during and in relation to any crime of violence or drug trafficking crime," the offender shall receive a term of imprisonment of not less than five years, n75 but not less than seven years "if the firearm is brandished," n76 and not less than ten years "if the firearm is discharged." n77 Unlike the drug trafficking penalty scheme, however, those factors in *18 U.S.C. § 924* that trigger the various mandatory *minima*, do not affect the statutory maximum penalty. n78

n73 *Id.*

n74 *243 F.3d 806 (4th Cir. 2001).*

n75 *18 U.S.C. § 924*(c)(1)(A)(i).

n76 *18 U.S.C. § 924*(c)(1)(A)(ii).

n77 *18 U.S.C. § 924*(c)(1)(A)(iii).

n78 *Harris v. United States, 243 F.3d 806, 808 (4th Cir. 2001)* (noting that *18 U.S.C. § 924*(c) "provides for no statutory maximum sentence"), *cert. granted in part, 122 S. Ct. 663* (Dec. 10, 2001).

At issue in *Harris* was whether *Apprendi* applied to determining the existence of a particular sentencing factor--the brandishing of a firearm during the commission of a drug trafficking offense. Relying on *McMillan v. Pennsylvania*, n79 the Fourth Circuit ruled that *Apprendi* did not apply because the brandishing determination did not expose the defendant "to greater additional punishment," alter "the maximum penalty for the crime committed," or create "a separate offense calling for a separate penalty." n80

n79 *477 U.S. 79 (1986).*

n80 *Harris, 243 F.3d at 808* (quoting *McMillan, 477 U.S. at 87-88).*

Somewhat ironically, the Fourth Circuit also quoted *McMillan's* most famous phrase: "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." n81

n81 *Id.*

In utilizing the rationale in *McMillan* [*38] to hold that *Apprendi* did not apply to the "brandishing" determination, the Fourth Circuit took pains to note that *Apprendi* expressly did not overrule *McMillan*. And therefore, to hold that brandishing was an element rather than a sentencing factor would be "to do what the Supreme Court has explicitly refused to do." n82

n82 *Id.* at 809.

As if daring the Supreme Court to review the particular issue in *Harris*, the Fourth Circuit stated that "while the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or 'range' of punishment, rather than only the maximum punishment, that is not our role." n83

n83 *Id.*

The Court accepted the Fourth Circuit's implicit challenge on December 10, 2001, when it granted *certiorari* to Harris on the precise issue of whether "a finding of 'brandishing,' as used in *18 U.S.C. § 924*(c)(1)(A), [which] results in an increased mandatory minimum sentence, must . . . be alleged in the indictment and proved beyond a reasonable doubt." n84 Should the Court reverse the Fourth Circuit in *Harris* and hold that *Apprendi* applies to factors that trigger mandatory minimum sentences in *18 U.S.C. § 924*(c) cases, it naturally would follow that *Apprendi* also applies to factors that trigger mandatory minimum sentences in *21 U.S.C. § 841*(b) cases.

n84 *Harris v. United States, 122 S.Ct. 633 (2001)* (granting *certiorari* in part).

Prior opinions by the Supreme Court Justices indicate strongly that the Court will overrule *Harris* and, perhaps, even *McMillan*. Writing for the majority in *Apprendi*, Justice Stevens stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." n85 In speaking to this particular point the year before in *Jones*, Justice Stevens stated that "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence." n86

n85 *Apprendi, 120 S. Ct. 2362-63.* (quoting *Jones, 526 U.S. 252-53)* (emphasis added).

n86 *526 U.S. at 253* (Stevens, J., concurring).

Likewise, Justice Thomas stated in *Apprendi* that "if a fact is by law the basis for imposing or increasing the punishment--for establishing or increasing the prosecution's entitlement--it is an element." n87 Consequently, this "commonlaw rule would cover the *McMillan* situation of a mandatory minimum sentence." n88

n87 *120 S. Ct. at 2379* (Thomas, J., concurring).

n88 *Id.*

Any residual doubt that *Apprendi* applies to mandatory minimums will be resolved this Term with the likelihood that the *Apprendi* "watershed" merely set the stage for the *Harris* continental divide.

In the Face of Overwhelming Evidence, Does Apprendi Matter?

The United States Circuit Courts of Appeal have consistently ruled that drug quantity is an element of the offense in light of *Apprendi*. However, in the face of overwhelming evidence, does *Apprendi* require a court of appeals to automatically vacate an enhanced sentenced when the drug quantity was omitted from the indictment? In other words, although failure to charge drug quantity in an indictment may constitute "plain error," does it also "seriously affect the fairness, integrity or public reputation of judicial proceedings" such that a sentence based on the unindicted drug quantity must be vacated? n89 In *United States v. Cotton*, n90 the Fourth Circuit answered in the affirmative.

n89 *United States v. Olano, 507 U.S. 725, 731-36 (1993)* (setting forth four-part plain error review standard); *FED. R. CRIM. P. 52(b)*.

n90 *261 F.3d 397 (4th Cir. 2001)*.

In reaching this conclusion, the Fourth Circuit relied on the Fifth Amendment's requirement "that a court cannot permit a defendant to be tried on charges that are not made in the indictment." n91 As a result, "when an indictment fails to set forth an essential element of a crime, the court has no jurisdiction to try a defendant under that count of the indictment." n92 "And, of course, a district court cannot impose a sentence for a crime over which it does not even have jurisdiction to try a defendant." n93 As drug amount is an element of drug trafficking, the Fourth Circuit held that it lacked jurisdiction to sentence the defendant based on uncharged and unconvicted drug amounts, which affected the statutory maximum penalty. Therefore, the Fourth Circuit exercised its discretion to notice the plain error. n94

n91 *Id. at 404* (quoting *Stirone v. United States, 361 U.S. 212, 217 (1960)* (emphasis added by Fourth Circuit)).

n92 *Id.* (internal quotations and brackets omitted) (quoting *United States v. Hooker, 841 F.2d 1225, 1232-33 (4th Cir. 1988))*.

n93 *Id.*

n94 *See id.* at 406.

Because there is a conflict among the circuits with respect to noticing plain error in cases involving unindicted drug amounts, n95 the Court granted *certiorari* in *Cotton* on January 4, 2002. n96 As the Government stated in its petition for *certiorari*, "the circuit conflict about the application of plain-error or harmlesserror review to the omission of drug quantity from indictments charging drug-trafficking offenses is indicative of a broader conflict about whether the omission of an offense element from an indictment invariably requires reversal." n97

n95 *Compare United States v. Terry, 240 F.3d 65, 74-75* (1st Cir.) (declining to notice error where drug amount was omitted from indictment), *cert. denied, 121 S. Ct. 1965 (2001); United States v. Patterson, 241 F.3d 912, 914* (7th Cir.) (per curiam), *cert. denied, 122 S. Ct. 124 (2001); United States v. Swatzie, 228 F.3d 1278, 1281-84 (11th Cir. 2000), cert. denied, 121 S. Ct. 2600 (2001), with United States v. Gonzalez, 259 F.3d 355 (5th Cir. 2001)* (requiring automatic reversal where drug amount omitted from indictment), *rehearing en banc granted, 262 F.3d 455 (2001); United States v. Maynie, 257 F.3d 908 (8th Cir. 2001)* (same).

n96 *United States v. Cotton, 261 F.3d 397 (4th Cir. 2001), cert. granted, 122 S. Ct. 803* (Jan. 4, 2002).

n97 *Brief for Petitioner at 20, United States v. Cotton, 261 F.3d 397 (4th Cir. 2001)* (No. 01-687).

In essence, as the Government indicated in its petition, *Cotton* does not so much concern the applicability of *Apprendi* as it concerns "whether indictment errors automatically require reversal." n98 According to the

Government, indictment errors do not require automatic reversal in the face of overwhelming evidence of the disputed element--in this case, drug amount. n99 In response to this argument, the Fourth Circuit stated that "while the government may well be correct as a factual matter [that the evidence was overwhelming], the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment." n100

n98 *See id.* at 22.

n99 *See id.* at 11; *Cotton, 261 F.3d at 407* ("The government argues that we should decline to recognize the error in this case because the evidence adduced at trial overwhelmingly establishes the threshold drug quantities for an aggravated drug trafficking offense.").

n100 *Cotton, 261 F.3d at 407* (emphasis added).

Although the Court has ruled that a jury "instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," n101 the Court never has ruled that a defective indictment does not require automatic reversal.

n101 *Neder v. United States, 527 U.S. 1, 9 (1999); Johnson v. United States, 520 U.S. 461, 468 (1997).*

Indeed, "the Supreme Court has never retreated from its dictate that the Constitution makes a grand jury indictment 'indispensable' to the power to try a defendant for a serious crime. Rather, the Court has consistently and repeatedly reiterated the fundamental nature of the constitutional right to be tried only on charges presented to a grand jury." n102 A defect in the indictment thus is fatal to the jurisdiction of the court regardless of the quantum of evidence. In fact, "'the lack of grand jury indictment . . . gives rise to a right not to be tried.'" n103 The likelihood, therefore, is nil that the Court will retreat from the constitutional requirement that all elements of an offense be included in the indictment. For, even as the Court itself noted in *Apprendi*, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." n104

n102 *United States v. Promise, 255 F.3d 150, 188 (4th Cir. 2001)* (en banc) (Motz, J., concurring in part, dissenting in part, and dissenting in the judgment) (quoting *Ex Parte Bain, 121 U.S. 1, 13 (1887)).*

n103 *Promise, 255 F.3d at 190, 191* (quoting *Midland Asphalt Corp. v. United States, 489 U.S. 794, 802 (1989)* (emphasis added by court)).

n104 *Id.* at 2359 n.10 (emphasis added).

Thus, *Apprendi* does matter in the face of overwhelming evidence because, as it turns out, "overwhelming evidence" does not matter in cases of defective indictments.

What are Apprendi's *Implications for the Sentencing Realm Between* Minima *and* Maxima?

The Court will likely hold in *Harris* that the constitutional rule enunciated in *Apprendi* applies to factors that trigger mandatory minimum sentences. And, in the event that the Court affirms *Cotton*--a near certainty, to be sure--it follows that factors not alleged in an indictment that either trigger a mandatory minimum penalty, or affect a statutory maximum [*39] penalty, will require courts of appeal automatically to notice plain error, vacate the sentence, and remand for resentencing. But what about within the much larger sentencing realm between mandatory *minima* (where applicable) and statutory *maxima*? Do the principles articulated in *Apprendi* apply?

On its face, it appears that sentencing factors that neither alter the statutory maximum penalty, nor trigger the mandatory minimum penalty, n105 are not subject to *Apprendi's* constitutional rule. Consequently, legislatures theoretically could avoid *Apprendi* issues altogether by removing mandatory minimum penalties from their criminal codes and increasing the statutory maximum penalties for all offenses to life imprisonment.

n105 At least, as currently is the case, in the Second and Sixth Circuits.

For example, a criminal code simply could identify just one crime--general wrong-doing--and then proceed to enunciate dozens of sentencing factors for that crime. These sentencing factors would range from mere jay-walking, which would only require the payment of a small fine, to homicide, which presumably would require a life term of

imprisonment. Under such a sentencing scheme, jaywalkers as well as murderers potentially could receive a sentence of life imprisonment depending on the court's findings at sentencing. n106

n106 *See Monge v. California, 524 U.S. 721, 738 (1998)* (Scalia, J., dissenting) (describing as "sinister" a sentencing regime that "is full of 'sentencing' enhancement that look exactly like separate crimes, and that expose the defendant to additional maximum punishment").

The essential problem this example illustrates is that sentencing factors drive the sentence, rather than the nature of the offense. In other words, under such a regime, the conduct associated with the enhancement is what is penalized, rather than the conduct associated with the elements of the crime. n107 Harkening back to *McMillan*, such a criminal code impermissibly would allow the sentencing factor "to be a tail which wags the dog of the substantive offense." n108

n107 Indeed, the following excerpt from oral argument in *Apprendi* between Justice Thomas and Lisa S. Gochman, Deputy Attorney General for New Jersey, for the Respondent, illustrates an example of legislative over-reaching, but also notes the remaining problem of identifying the constitutional line separating crime from punishment.

QUESTION: What if a legislature had a statute that authorized a crime called wrongdoing, just prove anything wrong, and then it had a--and the jury has to find the wrong, but then the judge is directed to impose a whole range of sentences, depending on what the wrong is, and he has to do it just by a preponderance of the evidence. I suppose that would be perfectly okay.

MS. GOCHMAN: No. That would probably go way too far. That would be too extreme. It's very vague. It's very overbroad. It wouldn't give notice to criminal defendants of exactly what their conduct was, what the requisite mens rea was.

QUESTION: Well, they could perhaps have a checklist of 95 different things that would qualify as wrongdoing. Any one of those is found, then you turn over the matter to the judge, and from there on it's up to the judge on the basis of the preponderance of the evidence, and no jury required.

MS. GOCHMAN: Well, we're not suggesting at all that we can take away from the prosecutor's burden to prove mens rea beyond a reasonable doubt, or any of the traditional elements of traditional offenses. That's not at all what we're arguing here, so that that hypothetical would, of course--

QUESTION: Well, what is the constitutional line, in your view, about what can be an element, and what can be a sentencing factor? *What's the line?*

Transcript of Oral Argument at 29-30, Apprendi v. New Jersey (No. 99-478) (emphasis added).

n108 *McMillan, 477 U.S. at 88.*

In such situations, defendants certainly would not be afforded adequate notice of precisely what "crime" they were alleged to have committed inasmuch as such factors would not have been contained in the indictment. But as the Court "made clear beyond peradventure" in *Apprendi*, "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" n109 After all, the criminal law "'is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability' assessed." n110

n109 *Apprendi, 120 S. Ct. at 2359* (quoting *Almendarez-Torres, 523 U.S. at 251* (Scalia, J., dissenting)).

n110 *Apprendi, 120 S. Ct. at 2360* (quoting *Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975)).*

Consistent with this concern is the fact that although courts generally are to defer to the legislature when determining whether a factor is an element of the offense or a sentencing factor, legislatures do not have unfettered discretion in drafting criminal legislation. n111 As *Apprendi* itself illustrated, regardless of the legislative designation or intent regarding a particular factor, the Constitution nevertheless may demand that the factor be considered an element of an offense in order that due process protections are not subsumed by statutory construction. "The degree of criminal culpability the legislature chooses to associate with particular, factually

distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." n112

n111 *See McMillan, 477 U.S. at 86* (noting that "there are constitutional limits to the State's power" to circumvent the reasonable-doubt requirement that otherwise "applies to facts not formally identified as elements of the offense charged").

n112 *Apprendi, 120 S. Ct. at 2365.*

Of course, the Constitution does not demand that every factor be considered an element in order to ensure due process. After *McMillan*, due process demanded that *bona fide* sentencing factors need only be determined by a mere preponderance of the evidence. "In the run-of-the-mill sentencing cases, these principles [of less procedural protection] are amply justified." n113

n113 *United States v. Kikumura, 918 F.2d 1084, 1100 (3d Cir. 1990).*

There is, however, an intermediate tradition which holds that for some sentencing factors, due process requires a heightened standard of proof. Over a decade ago, the Third Circuit cautioned that "because less procedural protection is so clearly appropriate in the majority of sentencing cases, we sometimes tend to regard it as appropriate in all sentencing cases." n114

n114 *Id.*

In *United States v. Kikumura*, the defendant, an illegal alien and member of the Japanese Red Army--an international terrorist organization, was convicted by bench trial of, *inter alia*, multiple counts of unlawful possession and transportation of explosives with intent to destroy property and harm individuals, as well as violations of passport and visa laws. n115 The presentence report computed the defendant's sentence under the Federal Sentencing Guidelines to be an offense level of 18 (27-33 months imprisonment). n116 The district court, however, departed upward from the Guideline range due to the defendant's motive "to execute a terrorist mission in this country" in order to indiscriminately "kill and seriously injure scores of people." n117 The defendant was sentenced to a term of 30 years' imprisonment, n118 which represented the equivalent of a 22-level enhancement based upon that particular factor.

n115 *See United States v. Kikumura, 706 F. Supp. 331, 334 (D.N.J. 1989).*

n116 *See id. at 334.*

n117 *Id. at 335.*

n118 *See id. at 336.*

On appeal, the Third Circuit vacated the district court's upward departure and remanded for resentencing. n119 The court stated that the departure was "perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.'" n120 Consequently, relying on *McMillan*, the Third Circuit held "that in such situations, the factfinding underlying that departure must be established at least by clear and convincing evidence." n121 According to the Third Circuit, although "*McMillan* held that a preponderance standard was generally constitutional," it still "suggested that a different question would be presented if the magnitude of a contemplated departure is sufficiently great." n122

n119 *See United States v. Kikumura, 918 F.3d 1084 (3d Cir. 1990).*

n120 *Id. at 1100-1101* (quoting *McMillan, 477 U.S. at 88).*

n121 *Id.* at 1101.

n122 *Id.*.

The Third Circuit, however, did not establish a "sliding-scale" as to the "appropriate level of procedural protection" applicable to increasingly significant sentencing enhancements. n123 Nonetheless, it noted that "a mere

preponderance is sufficient to justify a two-level increase," four-level, six-level, "or probably even a ten-level increase." n124

n123 *Id.*

n124 *Id.*

Following the Third Circuit's lead, a recent line of cases illustrates the Ninth Circuit's position "that the application of the correct burden of proof at a criminal sentencing hearing is critically important." n125 Beginning in 1999 with *United States v. Hopper*, n126 the Ninth Circuit held unequivocally for the first time that a "district court erred in failing to apply the clear and convincing standard" to evidence that supported a seven-level upward adjustment to the defendant's guidelines sentence given the "extremely disproportionate impact" of the adjustment on the sentence. n127

n125 *United States v. Jordan, 256 F.3d 922, 930 (9th Cir. 2001).*

n126 *177 F.3d 824 (9th Cir. 1999).*

n127 *Id. at 833.*

The next year, the Ninth Circuit clarified Hopper's "extremely disproportionate impact" test in *United States v. Valensia*. n128 There, the Ninth Circuit set forth the following six factors for courts to consider when assessing whether a sentencing factor, or combination of factors, should be determined by clear and convincing evidence:

> (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime [*40] alleged in the indictment; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based on the extent of a conspiracy; (5) whether the increase in the number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence. n129

In *Valensia*, however, the Ninth Circuit ruled that, in light of the above enumerated factors, an enhancement of only four-levels n130 "did not present an exceptional case that requires clear and convincing evidence." n131 Interestingly, the Court summarily vacated *Valensia*, and remanded the case for reconsideration in light of *Apprendi*. n132

n128 *222 F.3d 1173, 1182 (9th Cir. 2000), cert. granted, judgment vacated, and remanded by 121 S. Ct. 1222 (2001).*

n129 *Jordan, 256 F.3d at 928* (internal quotations and brackets omitted) (quoting *Valensia, 222 F.3d at 1182).*

n130 Although the enhancement only was four levels, it had the effect of increasing the defendant's sentence by nearly eight years. *See Valensia, 222 F.3d at 1181.* This perhaps could be why the Court summarily vacated the *Valensia* sentence and remanded for reconsideration in light of *Apprendi*.

n131 *Valensia, 222 F.3d at 1182-83* (internal quotations omitted).

n132 *See Valensia v. United States, 121 S. Ct. 1222 (2001)* (Mem.).

Finally, last year, the Ninth Circuit in *United States v. Jordan* n133 applied the *Valensia* factors to a nine-level enhancement, and found that such an enhancement constituted "an exceptional case that required clear and convincing evidence." n134 The Ninth Circuit noted that "it is now settled that when a sentencing factor has an extremely disproportionate impact on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence." n135

n133 *256 F.3d 922 (9th Cir. 2001).*

n134 *Id. at 929* (internal quotations omitted).

n135 *Jordan, 256 F.3d at 930* (emphasis added).

Thus, where the Fourth Circuit in *Cotton* applied the plain error standard of review to defective indictments and found such error to affect the fairness of the judicial proceeding, so too the Ninth Circuit in *Jordan* found plain error that likewise affected the fairness of the judicial proceeding where a district court failed to apply a clear and convincing evidentiary standard to a nine-level enhancement. n136 In both instances, due process was of central concern. Together, these cases hold that as the impact of a sentencing factor becomes disproportionate in the extreme, due process requires that the burden of proof increase to clear and convincing evidence; n137 and when the impact becomes even greater still such that the statutory penalty range is changed (maximum or minimum), due process requires both that (1) the burden of proof increase from clear and convincing to beyond a reasonable doubt, and (2) that the factor *qua* element be alleged in the indictment and submitted to the finder of fact. Again, "the relevant inquiry is, one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" n138 Depending on the effect of the factor, the process due is determined.

n136 *Jordan, 256 F.3d at 933 See also, United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999)*(finding error in seven-level enhancement not established by clear and convincing evidence).

n137 This may require, for example, that certain adjustments under the Federal Sentencing Guidelines will require proof by clear and convincing evidence. *See, e.g.*, Justin A. Thornton & Mark H. Allenbaugh, Apprendicitis*: A Troubling Diagnosis for the Sentencing of Hackers, Thieves, Fraudsters, and Tax* Cheats, *9 GEO. MASON L. REV. 419, 444-49 (2000)* (arguing that loss may require higher standard of proof as it is a sentencing factor that "wags the dog of the substantive offense"); U.S.S.G. § 3A1.4 (providing an increase of 12 offense levels, a floor of 32, and imposition of Criminal History Category VI for offenses involving or intending to promote federal crimes of terrorism). In an as-of-now unique case, the Sixth Circuit recently discussed the applicability of the terrorism adjustment at USSG § 3*A1.4. In United States v. Graham, 275 F.3d 490 (6th Cir. 2001),* the Sixth Circuit held *inter alia* that the clear and convincing evidentiary standard was not required for purposes of determining the applicability of U.S.S.G. § 3A1.4. *See id. at 517 n.19* (disagreeing with the Third Circuit's opinion in *Kikumura*). Judge Avern Cohn, however, in his dissenting opinion, argued in favor of a *Kikumura* analysis and suggested that U.S.S.G. § 1B1.2, comment. (n.4) might require a higher standard of proof than mere preponderance. *See id. at 541.*

n138 *Apprendi, 120 S. Ct. 2365.*

A Constitutional Continental Divide

For the past sixteen years, the Court has "never attempted to define precisely the constitutional limits" between crime and punishment, "*i.e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases." n139 Those days are at an end. The impact of *Apprendi, Harris*, and *Cotton*, as well as the re-emergence of *Kikumura* in light of *Apprendi*, will be felt not only by legislatures in terms of how they draft new criminal statutes, but also by sentencing commissions with respect to how they draft sentencing guidelines and the weight they assign to particular sentencing factors. Not only is the constitutional line between crime and punishment becoming clearer, but so too the line within punishment itself. In light of the above review and analysis of recent case law, it is likely that the "watershed" change that began with *Apprendi* will transform into a constitutional continental divide during the course of this Supreme Court Term and into the next.

n139 *McMillan, 477 U.S. 79, 86 (1986)* (emphasis added).

As the divide develops, legislatures, when drafting criminal codes, will have to remain acutely aware of the effect that certain factors have on sentences. Regardless of what a legislative body labels a particular factor--offense or penalty--and regardless of whom they assign the fact-finding role--jury or judge--should that factor surpass a statutory maximum, or trigger a mandatory minimum, then due process requires that it be determined by a jury beyond a reasonable doubt.

Similarly, sentencing commissions and courts will have to carefully consider the effect of *bona fide* sentencing factors on the sentence. As the effect of factors on sentences becomes so disproportional as to be extreme, due process will require courts to increase the burden of persuasion for those factors. And finally, for those *bona fide* sentencing factors that are not extremely disproportional--for example, those that may enhance a sentence by less than five offense levels--the preponderance of the evidence burden of persuasion likely will continue to suffice.

In this era of increased determinate sentencing schemes, the importance of having a clear constitutional rule distinguishing crime from punishment cannot be overstated. Such a rule will guide not just courts, but more importantly, legislatures and sentencing commissions when ascertaining the weight to give to certain factors at sentencing. In all events, the sentencing landscape is again about to change dramatically, and not for the last time.

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