APPREHENDING AND APPRECIATING *APPRENDI*

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The last days of June are traditionally the time the Supreme Court chooses to decide the most difficult and important cases of the term. This year was no exception. As the nation waited to find out whether *Miranda* would be reaffirmed (it would be), the Boy Scouts would be required to allow gay men to be scoutmasters (they would not), and whether Nebraska could criminalize so-called "partial birth abortions" (no), the Court decided a little-noticed case about whether a New Jersey court could impose an enhanced "hate crimes" sentence on a white man who fired several shots into the home of his African-American neighbors. Although *Apprendi v. New Jersey*, 530 U.S.__, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), may not have seemed significant to much of the press at the time, it is arguably one of the most important and far-reaching criminal cases decided by the Court in years.

Apprendi holds that almost any fact that determines the statutory maximum penalty for an offense must be charged in the indictment, submitted to the jury (if the case goes to trial), and proved beyond a reasonable doubt. Prior to *Apprendi*, federal circuit courts of appeals consistently held that only "elements" of an offense must be charged in the indictment and proven beyond a reasonable doubt. (*See United States v. Jackson*, 207 F.3d 910, 920–21 (7th Cir. 2000); *United States v. Thomas*, 204 F.3d 381, 384 (2d Cir. 2000); *United States v. Hester*, 199 F.3d 1287, 1291 (11th Cir. 2000); *United States v. Williams*, 194 F.3d 100, 107 (D.C. Cir. 1999); *United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993); *United States v. Underwood*, 982 F.2d 426, 429–30 (10th Cir. 1992); *United States v. Moreno*, 899 F.2d 465, 472–73 (6th Cir. 1990); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Gibbs*, 813 F.2d 596, 599–600 (3d Cir. 1987); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Normandeau*, 800 F.2d 953, 956 (9th Cir. 1986).) Under these prior cases, facts other than "elements" that affect the extent of the defendant's exposure to punishment were often decided by the sentencing judge by the preponderance of the evidence. All that has changed.

After *Apprendi*, it no longer makes any difference whether facts are construed as "elements" or as "penalty factors." If a fact increases the maximum potential sentence, it must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. The one possible exception to this rule applies when the fact that increases the statutory maximum is a defendant's prior conviction. Just two years ago, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court ruled that when a defendant's prior conviction triggers higher maximums, that fact need not be treated as an element. Although *Apprendi* did not overrule *Almendarez-Torres*, the continued viability of that case is now very much in doubt. Not only did the majority note that *Almendarez-Torres* may have been incorrectly decided, 120 S. Ct. at 2362, but Justice Thomas, who was part of the five-justice majority in *Almendarez-Torres*, noted in his concurring opinion in *Apprendi* that he now believes he erred in supporting that decision. (120 S. Ct. 2379.)

Because *Apprendi* was decided by the Supreme Court on review of a state case on constitutional grounds, it affects all state as well as federal cases that involve criminal statutes in which the potential statutory maximum sentence is determined by the presence or absence of certain facts. In the federal criminal system, *Apprendi* will have its greatest impact in drug cases. The primary federal criminal drug statute has a multifaceted "penalty" section, 21 U.S.C. § 841(b), in which the statutory maximum penalty to which a particular defendant is subject depends on the type and quantity of drug involved in the offense, as well as other factors, such as whether a defendant has prior drug convictions, or whether death or serious bodily injury occurred as a result of the offense.

How *Apprendi* affects sentences in drug cases

Apprendi is rather easily applied in drug cases. (*See United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000) (noting government's concession of applicability).) Section 841(b) of title 21, U.S. Code, creates a complex sentencing structure in which maximum sentences in controlled substances cases depend on a variety of factors, including drug type and quantity. Until now, these factors have been decided by judges, not juries. Under *Apprendi*, before a drug type/quantity-based maximum sentence is applicable in a particular case, the jury must find the required factors beyond a reasonable doubt. (*See, e.g., United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000) (affirming sentence where jury found drug quantity beyond a reasonable doubt).)

Applying *Apprendi*, a defendant charged in a one-count indictment with distributing (or conspiring to distribute) five kilograms or more of powder cocaine faces a 10-year minimum and a life-maximum sentence, if the jury finds beyond a reasonable doubt that the defendant distributed at least this quantity. (21 U.S.C. § 841(b)(1)(A).) If the jury in such a case makes no finding with respect to quantity, then the maximum sentence would be 20 years, regardless of what the judge might decide at the time of sentencing. (*See* 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum for cases in which

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no particular quantity of Schedule I or II controlled substance is involved.) For counts involving marijuana, the statutory maximum would be five years' imprisonment, if no threshold quantity is proved to the jury beyond a reasonable doubt. (21 U.S.C. § 841(b)(1)(D).)

Several courts of appeals have already applied these principles to vacate sentences that exceed statutory maximums, as redefined under *Apprendi*. (See *United States v. Angle*, 230 F.3d 113 (4th Cir. 2000) (in cocaine conspiracy, sentence in excess of 20 years reversed where quantity not alleged in indictment or submitted to jury); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000) (in methamphetamine conspiracy, maximum sentence 30 years due to prior conviction—not life); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (five-year maximum applied in marijuana case); *cf. United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) (affirming 20-year sentence in methamphetamine case; sentence does not exceed statutory maximum authorized by jury verdict).)

Under *Apprendi*, the guideline offense level continues to be calculated at the time of sentencing as it was before *Apprendi*. If, for example, the court found by the preponderance of the evidence, more than 150 kilograms of cocaine relevant conduct (level 38) and that the defendant possessed a gun (a two-level enhancement), the total offense level would be 40. Although this offense level normally produces a range of 292 to 365 months for defendants with a criminal history category I, because this entire range exceeds the *Apprendi*-modified statutory maximum of 240 months (in a one-count case where quantity was not charged in the indictment or the jury was not told it had to find at least the threshold quantity to raise the case to the level covered by section 841(b)(1)(B)), U.S.S.G. § 5G1.1(a) provides that the guideline sentence shall be the statutory maximum—that is, 240 months or 20 years. (*See United States v. Angle*, 230 F.3d 113, 123 (4th Cir. 2000) (discussing this principle); *United States v. Doggett*, 230 F.3d 160, 166 n.3 (5th Cir. 2000) (same), *United States v. Rogers*, 228 F.3d 1318, 1328–30 (11th Cir. 2000) (same).)

The *Apprendi* decision affects the statutory maximum applicable for each separate count. If a defendant were convicted on two powder cocaine counts (where no particular quantity was charged or proved beyond a reasonable doubt to a jury), the total applicable statutory maximum would rise to 40 years, because two 20-year sentences could be imposed to run consecutively. (18 U.S.C. § 3584.) In fact, the guidelines require consecutive terms whenever necessary to impose sentence within the guideline range. (U.S.S.G. § 5G1.1(d).) (*See United States v. Page*, 2000 WL 1682523, at *7–*8 (6th Cir. Nov. 9, 2000) (refusing to find plain error for this reason).) Therefore, if this defendant were convicted on two counts, the guideline range would be the full 292 to 365 months; the guidelines are structured to set a range for the case, not for any particular count. If the court in that case were to select a 292-month sentence, it would have to impose a 240-month term on one count, and a consecutive 52-month term on the other count.

> With a charge of distributing more than one drug, which statutory maximum applies?

In drug conspiracy cases, because the objective of the conspiracy determines the maximum penalties, 21 U.S.C. § 846, *Apprendi* would appear to require the government to prove that a particular defendant agreed and specifically intended to accomplish a substantive drug offense involving at least a threshold quantity of a particular substance in order to obtain any penalty higher than that set forth in 21 U.S.C. § 841(b)(1)(C) (or (b)(1)(D) in a marijuana case). When a defendant has been charged with distributing more than one type of drug, there can be a question as to which statutory maximum applies, which the *Apprendi* decision may also affect. (*But see Edwards v. United States*, 523 U.S. 511 (1998) (affirming guideline relevant conduct provision requiring sentencing court to determine drug type and quantity relevant for sentencing in case involving general verdict in multiple drug conspiracy, at least where each drug charged subjected defendant to the same statutory maximum).) For example, if a defendant charged with conspiring to distribute cocaine as well as marijuana is found guilty by a general verdict, it would not be clear whether the jury had found beyond a reasonable doubt that the defendant had conspired to distribute cocaine, marijuana, or both drugs. This is an important question, because the maximum sentence for an offense involving cocaine where no threshold quantity is found beyond a reasonable doubt is 20 years, 21 U.S.C. § 841(b)(1)(C), while the maximum sentence in a marijuana case where no threshold quantity is found is five years. (*Id.* § 841(b)(1)(D).)

How *Apprendi* affects guilty-plea cases

Apprendi's requirement that the facts that determine the statutory maximum must be pleaded in the indictment is equally applicable to guilty plea cases. Moreover, a defendant who pleads guilty can only be found by the judge to *be* guilty if the plea is knowing and intelligent. (*Boykin v. Alabama*, 395 U.S. 238 (1969).) A defendant who pleads guilty without knowing the government's burden of proof concerning drug type or quantity, where those facts establish the statutory maximum, has not made a knowing and intelligent plea, as required both by Federal Rule 11 and by the Constitution. When a defendant does not wish to challenge the voluntariness of a guilty plea, *Apprendi* would affect the maximum sentence, just as it does in cases tried to a jury. (*See, e.g., United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000) (in guilty plea case, death from drug use must be proved to judge beyond a reasonable doubt before higher statutory maximum applies).)

How *Apprendi* affects mandatory minimums

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court held that facts that require the imposition of a mandatory minimum sentence but do not affect the statutory maximum do not have to be treated like elements, and, instead, may be determined by a judge by the preponderance of the evidence at sentencing. Although *Apprendi* did not overrule *McMillan*, the continued vitality of *McMillan* is now in question.

At least three, and likely five, Supreme Court justices believe that when certain factors are used to establish a mandatory minimum sentence, then those factors, too, must be submitted to the jury and found beyond a reasonable doubt. (*Apprendi*, 120 S. Ct. at 2379–80 (Thomas, J., concurring); *Jones v. United States*, 526 U.S. 227, 253 (1999) (Stevens, J., concurring); *id.* (Scalia, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 257 (1998) (Scalia, J., dissenting).) Although *McMillan* remains a binding precedent for now, its vitality is questionable, and the decision may well be the subject of a grant of certiorari in the near future. Indeed, as with *Almendarez-Torres*, the prior conviction case, the majority opinion in *Apprendi* specifically mentioned the possibility of reconsideration of the *McMillan* holding. (*See Apprendi*, 120 S. Ct. at 2361 n.13; *Jones v. United States*, 526 U.S. at 253 (Stevens, J., concurring).)

Even if *McMillan* is not overruled, however, in federal drug cases *Apprendi* may well have the effect of limiting mandatory minimums as well as maximums. In the federal drug law, statutory maximums and mandatory minimums go hand in hand. When a jury fails to find that the government has proven a threshold quantity of cocaine beyond a reasonable doubt, section 841(b)(1)(C), not section 841(b)(1)(A) or (B), applies. Since section 841(b)(1)(C) provides for no mandatory minimum term of imprisonment, and lower mandatory minimum terms of supervised release, the question is whether one subsection of section 841(b)(1) may apply to limit the statutory maximum and another subsection to establish a mandatory minimum sentence. Two courts have already answered this question in the affirmative. (*See United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (approving 20-year mandatory minimum sentence where 30-year statutory maximum applied); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933–34 (8th Cir. 2000) (same).) Unfortunately, neither of these cases addresses the severability issue raised by this question; i.e., whether application of the statute in this way would be consistent with the intent of Congress, which tied together statutory maximums and mandatory minimums. (*See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (discussing principles of statutory severability).)

How *Apprendi* affects drug cases on direct appeal

If a defendant received a sentence that exceeded the statutory maximum under *Apprendi*, he or she can raise that issue on direct appeal, even if it was not raised at sentencing. Courts of appeals may review issues not raised in the lower courts for "plain error." (FED. R. CRIM. P. 52(b).) Under this rule, an error is "plain" if it is "plain" under the law as it exists at the time of the appeal—even if it would not have been "plain" under the law as it existed at sentencing. Before an appeals court will notice an issue under "plain error," the error must also affect the defendant's "substantial rights," and "seriously affect the fairness, integrity, or public reputation of judicial proceedings." (*Johnson v. United States*, 520 U.S. 462, 466–67 (1997) (internal quotations omitted).)

Although all courts have concluded that *Apprendi* error is "plain" in the sense of being obvious under current law, courts have disagreed on the application of the other elements of "plain error" in this context. In *Nordby*, the Ninth Circuit discussed two ways in which a defendant's "substantial rights" could be affected. Under one approach, a defendant's "substantial rights" are affected whenever the sentence is higher than that supported by a jury's verdict. Under another approach, the failure to instruct the jury on drug quantity would be examined for "harmless error" as provided by *Neder v. United States*, 527 U.S. 1 (1999). The *Nordby* court refused to decide which approach is correct, because in that case, the defendant met both standards since he hotly contested the quantity of marijuana at trial. (225 F.3d at 1060–61.)

Nordby also held that *Apprendi* error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." (*Id.*) The court provided two reasons for this conclusion. First, it noted that "the rights to jury trial and a determination of guilt beyond a reasonable doubt are the bedrock of our constitutional system of justice." (*Id.*) It also reasoned that "fairness is undermined when a court's error 'impose[s] a longer sentence that might have been imposed had the court not plainly erred.'" (*Id.*) (Bracketed insertions original, internal cites omitted.)

In contrast, in *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000), the indictment cited 21 U.S.C. § 841(b)(1)(B) but did not allege any particular drug quantity. The Eleventh Circuit ruled that the defendant's "substantial rights" had not been affected, because the threshold quantities of cocaine and cocaine base were never seriously contested. Finally, the court held that failure to correct the *Apprendi* error did not impair the fairness or integrity of the proceeding, because the evidence of the threshold quantities was "overwhelming." (228 F.2d at 1284.) (*See also United States v. Scheele*, 2000 WL 1638944, at *4 n.2 (9th Cir. Nov. 2, 2000) (*Apprendi* error in methamphetamine case harmless where sentence less than 20 years); *United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000) (same).)

Nondrug crimes affected by *Apprendi*

Although drug cases are the most common federal cases affected by *Apprendi*, they are not the only ones. Gun cases charged under 18 U.S.C. § 924 in its current form are not affected by *Apprendi*, because the different offenses charged by this section and section 922 all have the same statutory maximum (life imprisonment), even though they have different mandatory minimums. (*See Castillo v. United States*, 530 U.S.__, 120 S. Ct. 2090 (2000) (construing these pre-November 13, 1998, version of these statutes); *United States v. Carlson*, 217 F.3d 986 (8th Cir. 2000) (factors listed in § 924(c)(1)(A) that increase mandatory minimum sentence are sentencing factors that need not be charged in the indictment).) The following is a nonexhaustive list of federal criminal statutes affected:

Alien smuggling cases. 8 U.S.C. § 1324 provides a five-year maximum sentence for alien smuggling, unless the smuggling was done "for the purpose of commercial advantage or private financial gain," in which case the maximum is 10 years.

Mail and wire fraud. 18 U.S.C. §§ 1341 and 1343 provide a five-year maximum for each count of mail or wire fraud, respectively, unless "the violation affects a financial institution," in which case the maximum is 30 years. Under section 2326, an "additional" sentence of up to 10 years is provided if the fraud is committed "in connection with the conduct of telemarketing." Both enhancement provisions are subject to *Apprendi* protection.

Health care fraud. 18 U.S.C. § 1347 sets a maximum punishment of 10 years, but a 20-year maximum if "serious bodily injury" results, and up to life imprisonment if there is a resulting death.

Interstate domestic violence. 18 U.S.C. § 2261(b) provides for a range of potential maximum penalties ranging from five years to life, depending on the level of harm suffered by the victim.

Bail violator enhancement. 18 U.S.C. § 3147 provides for an additional consecutive sentence of up to 10 years' imprisonment where a defendant commits an offense while released on bail.

Federal three-strikes cases. 18 U.S.C. § 3559(c) provides for a mandatory life sentence upon a third conviction for a serious violent felony or serious drug offense. Section 3559(c)(3)(A) provides that a defendant may attempt to avoid the enhanced penalties, but must show that his prior conviction does not qualify as a serious violent felony by clear and convincing evidence. Since the three-strikes statute increases the statutory maximum based on prior convictions, it is not controlled by *Apprendi* in the strictest sense. For example, in *United States v. Gatewood*, 230 F.3d 186 (6th Cir. 2000) (en banc), the Sixth Circuit held that the statute's placing the burden on the defendant to demonstrate that his prior convictions did not qualify, rather than placing it on the government to demonstrate beyond a reasonable doubt that they do, did not run contrary to *Apprendi*. Nevertheless, four judges dissented, concluding that after *Apprendi*, the Supreme Court's ruling in *Almendarez-Torres v. United States* must be read very narrowly, and that under the federal three-strikes law, prior convictions must be alleged in the indictment and proved by the prosecution beyond a reasonable doubt. The dissenters would have also held that placing the burden of proof on the defendant violated the Due Process Clause.

Raising *Apprendi* in a defendant's first section 2255 motion

New rules of constitutional law (such as the doctrine announced in *Apprendi*) cannot usually be raised in a section 2255 motion. (*See Teague v. Lane*, 489 U.S. 288 (1989).) There are, however, several exceptions to this rule. The *Teague* bar does not apply when the new rule is a "watershed rul[e] of criminal procedure" that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and "without which the likelihood of an accurate conviction is seriously diminished." (*Sawyer v. Smith*, 497 U.S. 227, 242–44 (1990).)

The Ninth Circuit recently addressed this issue in *Jones v. Smith*, 2000 WL 1664426 (9th Cir. Nov. 7, 2000). That habeas corpus appeal involved a California attempted murder conviction in which the defendant was sentenced to life with the possibility of parole. Under California law, attempted murder is punishable by life imprisonment with the possibility of parole where the attempted murder is "premeditated." Otherwise, the maximum would be no more than nine years. (2000 WL 1664426, at *6 n.3.) Since the indictment did not allege "premeditation," the defendant alleged that his sentence exceeded the statutory maximum under the principles established by *Apprendi*—even though in that case, the jury found the premeditation element beyond a reasonable doubt. The court of appeals did not address the *Apprendi* issue, however, because it found that under the facts of the case, none of the exceptions to *Teague* applied, barring retroactive application of *Apprendi* on collateral attack.

The "watershed rule" exception applies where: (1) failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue . . . implicates the fundamental fairness of the trial." (*Jones v. Smith*, 2000 WL 1664426, at *9.) The facts in *Jones* did not meet either of these criteria, according to the Ninth Circuit. Although a defendant has a right to receive notice of the elements of the offenses of which he has been charged, that error was harmless in *Jones*, because everyone, including the defendant, was under the impression that he *was* charged with "premeditated" attempted murder. The court held that when a defendant has actual notice of the charges against him and the possible maximum, omission of key words in the indictment neither increases the possibility that an innocent person will be convicted, nor does it hinder the

fundamental fairness of the trial. Had the defendant in *Jones* not had actual notice that he was being tried on the "premeditation" element, or had that element not been proved beyond a reasonable doubt, the result of that case may have been different. (*See, e.g., United States v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000) (Doty, J.) (finding "watershed rule" applicable, and permitting *Apprendi* issue to be raised on § 2255 motions).)

Section 2255 (as amended by the Antiterrorism and Effective Death Penalty Act of 1986—AEDPA) provides for a one-year statute of limitations that runs from the latest of several dates, one of which is "the date on which the judgment of conviction becomes final," and another of which is "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Whether defendants have a year from the announcement of *Apprendi* to file section 2255 motions raising the right initially recognized by that case depends on whether that right has been "made retroactively applicable to cases on collateral review." Under the reasoning of *Jones*, the answer to that question in a particular case may depend on the facts of that case. In some cases, such as *Jones*, *Apprendi* may not have the impact required of a "watershed" rule of criminal procedure. In others, *Apprendi* may have such an impact.

Raising *Apprendi* in a defendant's second section 2255 motion

Section 2255, as amended by the AEDPA provides that a defendant may not file a second section 2255 without permission from the court of appeals. The court of appeals may give permission if the section 2255 motion contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The courts of appeals that have considered this question to date have ruled that the new rule of constitutional law announced in *Apprendi* does not meet section 2255's "made retroactive" criterion, and thus may not justify a second or successive section 2255 motion. (*See In re Tatum*, 2000 WL 1707765 (5th Cir. Nov. 15, 2000); *Rodgers v. United States*, 229 F.3d 704 (8th Cir. 2000); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000); *Hernandez v. United States*, 226 F.3d 839 (7th Cir. 2000); *In re Joshua*, 224 F.3d 1281 (11th Cir. 2000); *United States v. Sustache-Rivera*, 221 F.3d 8, 10–11 (1st Cir. 2000).) These courts have taken the position that unless and until the Supreme Court explicitly rules that the constitutional rule it established in *Apprendi* is retroactively applicable on collateral review, they will not permit a second or successive section 2255 motion raising that issue to be filed.

This interpretation of section 2255's gatekeeping provision has not been universally accepted. In *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) (Becker, Ch. J.), the Third Circuit held that the statute's "made retroactive" language does not restrict second or successive section 2254 habeas petitions (or, presumably, section 2255 motions that are subject to an identical gatekeeping provision) to new rules of constitutional law that the Supreme Court has explicitly made retroactive. The court of appeals reasoned that there is more than one way in which a new rule could be "made retroactive" by the Supreme Court. (204 F.3d at 59–60.) As an example, the court of appeals cited the retroactivity rules established by the Supreme Court in *Teague*. (*Id.*) *West* involved the retroactivity of the new rule of constitutional law established by *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (holding that jury instructions that equate reasonable doubt with substantial doubt and grave uncertainty suggest a lower standard of proof than that required by the Fourteenth Amendment). Under the Third Circuit's approach, whether *Apprendi* issues may be raised in second or successive motions depends on whether the holding of *Apprendi* is retroactively applicable on collateral review under the principles established in *Teague*.

> The dissent warns that the constitutionality of the guidelines is at risk.

Applying *Apprendi* to the U.S. Sentencing Guidelines

The holding of *Apprendi* does not itself affect the application of the Sentencing Guidelines—except when a statutory maximum affects the otherwise applicable guideline range. (The most dramatic example of this is the Career Offender guideline, section 4B1.1, in which the offense level is determined by the statutory maximum. Another may be U.S.S.G. § 2J1.7, adding three levels for bail violators, which comes into play only if 18 U.S.C. § 3147 "applies." *See* p. 1 of this transcript. Presumably the published version will have yet another page.) Nevertheless, the dissenting opinion of Justice O'Connor (joined by the Chief Justice and Justices Kennedy and Breyer) warns that the majority's opinion opens the constitutionality of the guidelines to challenge once more. Equally important, Justice Thomas's concurring opinion (not joined in this respect by Justice Scalia) suggests that *Apprendi* might apply to the Guidelines, because they " 'have the force and effect of laws.' " (120 S. Ct. at 2380 n.11) (quoting from Justice Scalia's dissent in *Mistretta v. United States*, 488 U.S. 361, 413 (1989)).)

Because Congress has required courts by statute to impose sentences within correctly calculated guideline ranges, unless there are grounds for upward departure, the upper end of

each of those ranges is, in effect, a statutory maximum:

> The court *shall impose* a sentence of the kind and within the range [provided by the Sentencing Guidelines] unless the court finds that there exists an aggravating . . . 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.

(18 U.S.C. § 3553(b) (emphasis added); accord, 18 U.S.C. § 3551(a).)

Under *Apprendi*, any fact that increases this statutory maximum must be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt. Because facts that justify upward departures also justify a higher statutory maximum, they, too, would have to be alleged in the indictment and proved beyond a reasonable doubt at trial under this reasoning. If the guideline range itself establishes a "statutory maximum," then any fact that causes that range to be higher must also be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt. To date, no lower court has taken seriously the concern of four or five members of the Supreme Court that, as a result of the constitutional rule created by *Apprendi*, the Sentencing Guidelines as currently implemented can no longer pass constitutional muster. (*See United States v. Nealy*, 2000 WL 1670932, at *2 n.3 (11th Cir. Nov. 7, 2000) (summarily rejecting application of *Apprendi* to the Sentencing Guidelines); *United States v. Doggett*, 230 F.3d at 165 (same); *Talbott v. Indiana*, 226 F.3d at 869 (same); *United States v. Cepero*, 224 F.3d 256, 267 n.5 (3d Cir. 2000) (en banc) (same).)

Applying of *Apprendi* to financial penalties

Apprendi holds that with the exception 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." (120 S. Ct. at 2362–63.) Because fines, restitution, and forfeitures are among the "penalt[ies]" imposed in criminal cases, "any fact" that increases those penalties must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, as well. Indeed, many of the nineteenth century cases from which the constitutional holding of *Apprendi* is derived, themselves only involved differences in fines and other financial penalties, according to Justice Thomas's extensive review in his concurring opinion. Although financial penalties are open to attack under *Apprendi*, the avenues of that attack may be more limited than those available to challenge terms of imprisonment or other limitations on liberty. For example, most courts hold that section 2255 motions are not available to challenge only portions of sentences that do not result in confinement. (*See, e.g., Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997) (relief on restitution issue not available under § 2255 where no issues relating to defendant's custody raised).)

Maximum financial penalties are often subject to increase based on proof of certain nonelement facts. Here are some examples:

Alternative fine based on gain or loss: 18 U.S.C. § 3571(b) and (c) lists the maximum fines that can be imposed on individuals and organizations in various types of cases. When a person derives financial gain or a victim suffers financial loss of more than half the otherwise applicable statutory maximum fine, the maximum fine may be higher—up to twice the gain or twice the loss. (Section 3571(d).) Where the loss or gain is more than half the otherwise applicable maximum fine, that fact must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, before the court may impose the higher penalty.

Restitution: 18 U.S.C. §§ 3663 and 3663A provide for sentences that include orders to pay restitution. When a victim has suffered bodily injury, restitution can also include the cost of medical care, physical rehabilitation, and lost income. In drug cases, restitution can be ordered based on the "amount of public harm caused by the offense." (Section 3663(c)(2)(A).) Before these penalties may be imposed, the fact and amount of loss must now be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

Criminal forfeitures: In money laundering and certain financial crime cases, 18 U.S.C. § 982 provides for criminal forfeiture of property "involved" in or "traceable to" the offense. In drug cases, 21 U.S.C. § 853 provides for criminal forfeiture of property "constituting, or derived from, any proceeds," or property "used, or intended to be used" to commit the offense. (*See also* 18 U.S.C. § 1963(a)–(c) (RICO forfeiture).) Under *Apprendi*, it is now arguable (despite prior law specific to forfeitures *see Libretti v. United States*, 516 U.S. 29 (1995)) that these facts must also be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

Money laundering cases: 18 U.S.C. § 1956 provides for a fine of not more than $500,000 "or twice the value of the property involved in the [money laundering] transaction, whichever is greater." Before a defendant can be fined more than $500,000, the indictment must charge and the jury find beyond a reasonable doubt more than $250,000 involved in the money laundering.

Bribery: 18 U.S.C. § 201(b)(2) provides for a fine equal to three times the bribe.

Misuse of public funds: 18 U.S.C. § 653 provides for a fine equal to the amount embezzled.

Extortionate extensions of credit: 18 U.S.C. § 893 provides for fines equal to twice the value of the money or property advanced.

Many questions arising under the Supreme Court's *Apprendi* decision are not yet clearly resolved. No doubt there are other questions we have not even considered yet. What is clear already, however, is that the decision requires that judges and counsel, both on the defense and prosecution sides, rethink many procedural issues that they had thought were settled. The bullet fired by Charles *Apprendi* at his neighbors' door may not be "the shot heard 'round the world," but its ramifications are certainly being felt in courthouses throughout this country. ■