

Memorandum

For: LUCIEN CAMPBELL
From: HENRY BEMPORAD
Date: AUGUST 13, 2000
Subj: APPRENDI AND OUR CLOSED CASES

On August 9, I attended a meeting in D. C. on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). The meeting, convened by the Federal Defender Training Group, was very productive—I got lots of great material and good ideas—but perhaps the best thing it did for me was to provide guidance on what to do about our former clients who might have habeas claims to raise. As this memo shows, the issue is exceedingly complex.

TRIAGE

As we both know, the number of former clients whose cases might be affected by *Apprendi* is potentially astronomical, and amount of work necessary to identify and advise these clients is daunting in the extreme. In light of these practical realities, I think all we can do right now is triage. I've come to some tentative conclusions about how to prioritize our closed cases, and I wanted to pass them along—because, if I'm right, we will have to move quickly on some of our cases to protect our former clients' claims.

A REFRESHER ON HABEAS LAW

To think about which cases to prioritize, I had to gain some familiarity with federal habeas law—particularly four of the obstacles that the courts and Congress have erected to thwart defendants seeking to make habeas claims. The four obstacles are closely interrelated, and how they play out in any given case is exceedingly complex. As regards *Apprendi* claims, the obstacles could work to the disadvantage of many of our former clients unless we move quickly. For other clients, however, the peril may lie in moving too soon.

The first obstacle to consider is the 1-year time limit in § 2255 itself. This limit states that a defendant has one year from the date his conviction became final to file his habeas petition. For the purposes of our *Apprendi*-affected clients, there are two important exceptions to this rule, one statutory and one judge-made.¹ The statutory exception provides that defendants have one year to file after a “new right” has been recognized, if that right is made retroactive. *See* 28 U.S.C. § 2255(3). The judge-made exception provides that the 1-year limit may be suspended under equitable tolling rules. Equitable tolling can preserve a claim when the claimant has been actively misled, or has in some other way been prevented from asserting his rights. *See, e.g., United States v. Patterson*, 211 F.3d 927, 930–31 (5th Cir. 2000).

The second obstacle to consider is the bar on retroactive application of new rules to habeas claims. *See Teague v. Lane*, 489 U.S. 288 (1989). *Teague* holds that, with two important exceptions, new rules of constitutional law will not be retroactively applied to convictions that were final before the rules were announced. The two exceptions are (1) for rules that remove certain conduct from the state’s power to punish; and (2) for “watershed rules” that are “implicit in our concept of ordered liberty.” *Id.* at 311 (citations omitted). The Court has read this second exception to mean that the new rule must both increase the accuracy of the criminal trial, and alter our understanding of the bedrock procedures essential to fundamental fairness. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). The *Teague* rule seems to parallel the § 2255(3) time-limit exception in important ways, but they are different; *Teague*, for example, applies only to new constitutional rules, while the § 2255(3) time-limit exception seems to apply to any new right, constitutional or otherwise.

The third obstacle to consider is the procedural default rule. This rule states that a habeas petitioner cannot succeed on a constitutional claim that he did not raise in his original case, unless he can show “cause” and “prejudice” to do so, or can show “actual innocence.” *See, e.g., Bousley v. United States*, 523 U.S. 614, 622 (1998). One way to show cause is to demonstrate that the constitutional claim was not reasonably available at the time of the original case;

¹There are actually three exceptions to the time limit set out in the statute, but only one will regularly have application in *Apprendi* cases.

another may be to show that raising the claim would have been futile (because no court would have agreed with it); a third way is to show that the failure to raise the claim was due to ineffective assistance of counsel.

The fourth obstacle is § 2255's prohibition on "second or successive" habeas petitions. If a client files for § 2255 relief and his motion is denied, he cannot file another motion unless a court of appeals certifies that the motion fits within very narrow exceptions. For the purposes of thinking about *Apprendi*, the important exception is the one that allows a successive petition when a new constitutional rule has been announced that has been made retroactive by the Supreme Court, and that was previously unavailable. This rule seems to parallel the § 2255(3) exception and the *Teague* rule, but, again, there are differences. For example, while many circuits have been willing to find new rules retroactive under *Teague* without waiting for the Supreme Court, most have held that, for a new rule to fit within exception to the successive petition ban, the Supreme Court must expressly make the rule retroactive. *See, e.g., Sustache-Rivera v. United States*, No. 99-2128, 2000 WL 1015879 (1st Cir. July 25, 2000) (denying *Apprendi* claim in second habeas petition).

With these four obstacles in mind (more or less), it's time to turn to the holding in *Apprendi*.

APPRENDI'S HOLDING

Part of *Apprendi's* holding is clear; other parts are less so. We need to distinguish between the clear and less-clear parts to decide if our former clients can rely on *Apprendi* for relief now, or will likely have to wait for a future clarification or extension of the Court's decision.

The clear part of *Apprendi's* holding is that any fact that increases the statutory maximum penalty (other than a prior conviction) is an element that must be proven to the jury beyond a reasonable doubt. 120 S. Ct. at 2362-63. The less clear parts have to do with what's left out of the clear part of the holding: (1) prior conviction facts, and (2) facts that raise a mandatory minimum.

With regard to prior conviction facts, the earlier case of *Almendarez-Torres v. United States* stated that they need not be treated as elements that must be

alleged in the indictment, even if they do increase the maximum. 523 U.S. 224 (1998). With regards to facts that raise only the minimum sentence, *McMillan v. Pennsylvania* held that they need not be treated as elements. 477 U.S. 79 (1986). *Apprendi* suggests that both *Almendarez-Torres* and *McMillan* have been limited. It suggests that *Almendarez-Torres* has been limited to situations in which the defendant pleaded guilty and admitted (or did not contest) the enhancement fact, and raised only an indictment claim rather than a jury right or burden of proof claim. *Apprendi*, 120 S. Ct. at 2362.² With regard to *McMillan*, the Court limits its application to cases that did not involve imposition of a sentence above the maximum for the offense that the jury found. 120 S. Ct. at 2360–61 & n.13.³ The *Apprendi* Court hints that both *Almendarez-Torres* and *McMillan* may be reconsidered in the future, but it declines to do so now.

TIERING OUR OLD CASES

If one can keep in mind both the express and implied parts of the holding of *Apprendi*, and the four obstacles of habeas law (this is tough for me), I think one can divide our closed cases into tiers for purposes of triage. The main division is between cases that became final in the last year, and those that are older; within that division, I think the cases should be ranked by whether they fit within the clear part of *Apprendi*'s holding, or will instead require a clarification or extension of *Apprendi* to secure relief for the client.

²*Apprendi* did not raise an indictment claim, as the Fifth Amendment Presentment Clause has not been applied through the Fourteenth Amendment to state proceedings. See *Apprendi*, 120 S. Ct. at 2355 n.3.

³The Court also hints that *McMillan* might not control when the enhancement “convert[s] what otherwise was a maximum . . . sentence . . . into a minimum sentence.” 120 S. Ct. at 2354 (discussing facts of *Apprendi*'s sentence to show why error not harmless); *but see United States v. Aguayo-Delgado*, No. 99-4098, 2000 WL 988128 (8th Cir. July 18, 2000) (possible *Apprendi* error not reversible when minimum enhanced sentence imposed was maximum under unenhanced range).

Cases That Became Final in the Last Year

Tier one: cases that come within the clear holding of Apprendi.

This tier would include cases in which the enhancement fact is not a prior conviction, and the defendant received a sentence in excess of the maximum sentence for the offense the jury found (e.g., marijuana defendants who went to trial and received more than 5 years; cocaine defendants who went to trial and received more than 20; it could also apply to supervised release terms or fines in excess of the maximum).

In these cases, our clients are in the best position to make an *Apprendi*-based habeas claim. They can file a § 2255 without worrying about fitting within an exception to the 1-year time limit. They also have the option of arguing that *Apprendi* is not a “new” rule (because *Apprendi* simply recognizes what has always been the law), and thus try to avoid the *Teague* requirement that *Apprendi* be retroactive. If they argue that *Apprendi* is not a new rule, they may face a procedural default claim if there were no objections at their trial; but they may be able to overcome this by arguing that their attorneys were ineffective (a possible claim, in light of the Supreme Court’s presaging of *Apprendi* in *Jones v. United States*, 526 U.S. 227 (1999)).

For triage purposes, it does not matter whether they can win on the *Teague* issue or procedural default; as long as these claims are possible, we should identify these cases before the 1-year time limit passes, and the arguments are no longer available to our clients (i. e., after one year, if you try to avoid *Teague* by claiming that *Apprendi* is not a new rule, then you are out of time under the 1-year limitations period).

Tier two: cases that come within the less-clear holdings of Apprendi.

These cases would include those in which a client could rely on the factual distinctions *Apprendi* drew around former cases like *Almendarez-Torres* and *McMillan* to make a claim for relief (for example, a § 1326 or other recidivism-enhanced case that went to trial (and thus can raise the jury and burden of proof

issues that *Almendarez-Torres* did not)).⁴ Defendants in these cases would seem to have a claim almost as strong as those in Tier 1, and they too could benefit from avoiding both *Teague* and having to plead an exception to the 1-year time limits. There is a danger, however, that if the client files for habeas relief now, a court will find that his case doesn't come within *Apprendi*. If so he will face the "second or successive" ban if the Supreme Court ever clarifies *Apprendi*'s scope in a way that would apply to his case.

Tier three: cases that come within logical extensions of Apprendi.

These cases would include those where a defendant's prevailing would require some extension of *Apprendi*. In some cases, the extension would be a small one (for example, a defendant who pleaded guilty to a drug charge but claims that, because quantity is an element under *Apprendi*, his indictment was insufficient to support the 20-plus-year sentence he received); in others, the extension is more problematic (for example, a § 1326 defendant who, like *Almendarez-Torres*, pleaded guilty and did not contest his prior conviction, or a drug defendant whose mandatory minimum sentence comes within the otherwise applicable maximum sentence). While these defendants still might benefit from avoiding *Teague* (and while they might even have better cause for their procedural default), they run a greater risk of losing on their first petition and having to try to prevail on a successive one later.

Cases That Became Final More than a Year Ago

In all these cases, the defendants will face the 1-year time limit under § 2255. To get around it they will likely have to argue that *Apprendi* recognized a new right, and file for relief within 1 year of *Apprendi* (i.e., by June 25, 2001). Presenting the tolling argument, however, will make it highly likely that they will face a *Teague* bar, and if so they will have to argue that *Apprendi*, as a "watershed" case, is retroactive under *Teague*.

Tier four: cases that come within the clear holding of Apprendi.

⁴The *McMillan* distinction may apply only to a mandatory minimum case where the sentence exceeded the maximum for the proved crime; all of these cases would already fall in Tier 1. *But see* note 3, *supra*.

Because these cases fit squarely under *Apprendi*, the time clock is running for them. Other habeas obstacles may still be avoidable, however. For example, in some cases it might be possible (barely) to argue both that *Apprendi* is “new” for the purposes of tolling the § 2255 time limit, but that it is not “constitutional” so that *Teague* is inapplicable (for example, the defendant could argue that *Apprendi* applies to § 841 as a rule of statutory construction, and that under *Apprendi* he had a statutory right to have the quantity of marijuana proven beyond a reasonable doubt to the jury). Otherwise, the defendant will have to argue that *Apprendi* is a “watershed” constitutional rule to avoid both *Teague* and the 1-year time limit. The defendant may have to argue this anyway, to avoid procedural default (e. g., because it is a “watershed” rule, he can argue that *Apprendi* was not reasonably available to him when his case was originally pending).

Tier five: cases that come within the less-clear holdings of Apprendi.

In these cases, a defendant will have to deduce a rule of general application from *Apprendi*'s discussion of precedent like *Almendarez-Torres* and *McMillan*. Once he deduces the rule, he will have a hard time arguing that it is not a constitutional one subject to *Teague*. He will also have a harder time arguing that the rule he deduces fits within the “watershed” exception. These difficulties make it more likely that his petition will be denied, and thus more likely that he will be in the successive-petition category if the Supreme Court ever clarifies *Apprendi* in his favor. On the other hand, a defendant in this situation may not yet be facing a time clock; he may be able to argue that their 1-year time limit does not run until *Apprendi* is further clarified.

Tier six: cases that come within a logical extension of Apprendi.

Because these cases would require some extension of *Apprendi*, they are the least likely to fit currently within the “new right” exception to the 1-year time limit, and the most likely to be *Teague* barred. Filing in these cases now is even less likely to benefit the client, and even more likely to place the client in the “successive petition” category if *Apprendi* is later extended. And these clients

can most plausibly argue that the 1-year time limit does not run until the Supreme Court extends *Apprendi*.⁵

AFTER OUR CASES ARE TIERED: WHAT NEXT?

Even after we identify the various tiers of closed cases, it is exceedingly difficult to decide how to proceed. This is because the likelihood of success in each case turns on myriad facts that have little or nothing to do with *Apprendi* or habeas law—for example, the number of unaffected convictions and sentences the client has; his criminal history and role in the offense, and whether he cooperated against others; the vehemence of opposition expected from the particular prosecutor; and the sympathy (or lack thereof) of the judge that will hear the case. These sort of factors would seem to require consideration on a case-by-case basis, and one-on-one consultation between attorney and client.

It was suggested in D.C. that, for clients with final convictions less than one year old, we write the appropriate judge, indicating that we believe the client may have an *Apprendi*-based issue, and asking the court to appoint us for the purpose of consulting with the client and filing the appropriate papers. We could send a copy of the letter to the client. The letter would both notify the client and (maybe) provide him with an equitable tolling argument if his 1-year limit ran. We could then attempt to contact the client and discuss the risks and benefits of filing a habeas claim, and the other possible issues he might want to raise (he will need to raise all his issues in the first petition, to avoid the “successive petition” category later). I’m not sure if we want to send out a letter for all three tiers of “within a year” cases. But whatever letters we do send, we would want to act as soon as possible, to toll as much as possible of the defendant’s filing time.

⁵Within this category, however, I think it is important to distinguish among the kinds of extensions of *Apprendi* that would be necessary to prevail. For example a drug defendant with a 20-plus-year sentence may want to file now even if he pleaded guilty, as it seems very likely that the courts will view the federal right to indictment as requiring the Government to plead all the elements that *Apprendi* requires it to prove. By contrast, defendants who pleaded guilty to a § 1326 charge will likely need another Supreme Court decision before they can secure habeas relief.

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For cases older than a year, I think we might be able to distinguish between cases within the clear holding of *Apprendi* and those that might need clarification or extension of *Apprendi* to secure relief. For those clearly within *Apprendi*, the habeas filing time will expire June 25, 2001; for the others, the defendants will have some argument that their time has not yet begun to run (this argument is stronger or weaker depending on how close their case is to *Apprendi*). In cases not clearly under *Apprendi* the client will ultimately have to weigh the possible benefits of filing by June 25, 2001, against the possible danger of getting poured out and later being stuck in the “successive” box.

A TENTATIVE CONCLUSION

The above analysis includes a tremendous amount of guesswork; any prediction how *Apprendi* and its progeny will interact with federal habeas law is speculative at best. Unfortunately, we can't expect our questions to be resolved very soon; we will have to act to protect our clients' best interests in an uncertain world. For some clients, that means acting right now.