

***An Apprendi Primer:
On the Virtues of a Doubting Thomas***

Steven G. Kalar
Assistant Federal Public Defender
N.D. California

Jon M. Sands
Assistant Federal Public Defender
District of Arizona

Introduction

Apprendi v. New Jersey – to the surprise of many but not to Justice Thomas – announced a “watershed change in constitutional law.”¹ The ripples of this recent Supreme Court decision are now being felt throughout the federal circuits, and will soon flood all jurisdictions. Ultimately, litigation over *Apprendi* may well top the high-tide mark formerly set by *Bailey v. United States*.²

At its core, *Apprendi* concerns what facts constitute a sentencing enhancement and what facts constitute an offense element. The myriad issues raised by *Apprendi* cry out for a detailed, academic, historical analysis of the case, its reasoning, and its jurisprudential lineage. This is not that analysis. Readers of *The Champion* can instead look forward to an upcoming article on *Apprendi*, *Jones*, and enhancement factors by one of the nation’s leading authorities on the issue, Assistant Federal Public Defender Timothy Crooks. This primer is only one of the first of many detailed articles sure to come on this interesting, and controversial, new case.

The present article instead poses ten basic questions and attempts to provide some answers or guidance. As such, it serves as a primer on *Apprendi*, its significance, and the opportunities the case creates.³ While it is impossible to review every case that has already been spun out of the flurry of post-

Apprendi litigation, we will touch upon some of the notable decisions that suggest how trial and appellate courts will ultimately deal with the decision. It is a critical time. The impact of *Apprendi* will be determined in large part by the efforts of defense counsel. Our litigation will shape *Apprendi*'s legacy and structure its constitutional contours. Finally, the article extols the virtues of the "doubting Thomas;" Supreme Court swing vote Justice Thomas who had the courage to openly question his previous vote in *Almendarez-Torres*.⁴

1. What is *Apprendi*?

What is a sentencing enhancement and what is an element for the jury? The Supreme Court has been grappling with this question over the past several terms, with decisions in *Jones v. United States*, 119 S. Ct. 1215 (1999) and *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998) serving as tremors in the legal landscape. The earthquake to the established principles came on June 26, 2000 when a fractured Court decided *Apprendi*. It is important to know what *Apprendi* considered, and what it left for another day.

A. Case Analysis: Just the Facts

Charles Apprendi fired several shots into the home of an African American family that had recently moved into his previously all white neighborhood in New Jersey. He faced numerous charges, including allegations of other shootings, possessing illegal firearms and bombs. As a result of a plea agreement, he plead guilty to counts of second degree possession of a firearm for an unlawful purpose and one count of third degree unlawful possession of an antipersonnel bomb. The second degree counts carried a penalty of five to ten years; the third degree count carried a penalty of three to five years. As part of the

agreement, the state sought to enhance the sentence under New Jersey's "hate crime" provision. Apprendi reserved the right to challenge this enhancement. The effect of the enhancement would be to increase the sentence range on a second degree count to ten to twenty years (doubling the exposure). The requirement for the enhancement was a finding by the trial court by a preponderance of the evidence that a defendant committed the crime with a motive to intimidate a victim because of racial bias.⁵

The indictment had no reference to the hate crime enhancement nor did it allege any such facts. The state nonetheless presented evidence of bias, which the defendant contested. The trial court found that the acts were motivated by racial bias, and sentenced the defendant to twelve years on one second degree count and concurrent shorter terms on the other counts. Without the hate crime enhancement, the court could only sentence the defendant to a maximum of ten years on the second degree counts. Apprendi appealed. A divided New Jersey Supreme Court affirmed the sentence. The Supreme Court then took certiorari.⁶

B. The Majority Opinion: Even Stevens

The Court reversed in a five to four opinion. Justice Stevens delivered the majority opinion, which was joined by Justices Scalia, Souter, Thomas and Ginsberg. Concurring opinions were filed by Justices Thomas and Justice Scalia. Dissenting opinions were written by Justices O'Connor and Breyer. Each of the opinions carry important repercussions, which the Court recognized will vibrate through federal and state guideline sentencing and in the capital context .

The Court held the state hate enhancement unconstitutional on two grounds. First, the enhancement allowed a judge, and not a jury, to decide the issue of motivation. Second, this finding was

by a preponderance and not by beyond a reasonable doubt. The Court undertook a historical overview of the important role a jury plays as a guardian against governmental tyranny and oppression. It also stressed the importance of the highest possible finding in a criminal case where liberty, to say nothing of one's very life, is at stake.⁷ These rights, protected by the constitutional guarantees of due process and the right to a jury, "indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"⁸

The Court then dealt with the distinction between elements of the offense and sentencing factors. It recognized that this is a relatively recent distinction, and that historically courts had scant discretion in sentencing except to determine a sentence within a specified range acting under its discretion. The role of the courts regarding sentencing changed with the introduction of sentencing factors. Nonetheless, the Court here reemphasized that due process and jury protections did not only go to guilt or innocence, but also involve the length of sentence.⁹ In so ruling, the Court stated:

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. With that exception, we endorse the statement of the rule set forth in the concurring opinions of [*Jones*]: "[I]t 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."¹⁰

To reach this holding, the Court had to distinguished its earlier holdings in *McMillan v. Pennsylvania*¹¹ and *Almendarez-Torres*. The Court narrowed *McMillan*, which dealt with a mandatory

sentence for use of a firearm in a state guideline sentencing scheme. *McMillan*, explained the Court, allowed a sentencing court to find those facts by a preponderance that impose or increase a mandatory minimum so long as that sentence falls within the statutory maximum sentence for the offense. The Court conceded that “it was arguable that *Almendarez-Torres* was incorrectly decided.”¹² The Court hesitated in flatly overturning it, as it could be limited as “a narrow exception” due to the nature of recidivism as a factor considered by judges in sentencing, and the circumstances of that case, where the defendant did not challenge the prior convictions but acknowledged them.¹³ It is questionable, as will be discussed below, whether these remain viable distinctions.¹⁴

C. Concurrences

1. The Constitutional Right to a Jury Means What It Says.

Justice Scalia’s concurrence reiterates his prior positions in this area, that enhancements are elements that must go to the jury. His concurrence emphasizes the constitutional role of the jury and the key role it plays as a bulwark against the might of the state. Justice Scalia has no patience with Justice Breyer’s dissenting view that judges, rather than juries, are better situated to parse, weigh and evaluate the sentencing factors.¹⁵

2. The Virtues of a Doubting Thomas.

Justice Thomas plays a pivotal role in the Court’s enhancement jurisprudence. In a concurring opinion Justice Thomas admits that he was wrong in *Almendarez-Torres*, where he was the deciding fifth vote for the majority.¹⁶ He has reconsidered his vote, and now believes that all elements which impose or increase punishment must go to the jury. This would include the very prior convictions, or recidivism, that

was the enhancing factor in *Almendarez-Torres*.¹⁷ Justice Thomas, to support this conclusion, undertook a long and exhaustive historical analysis of jury elements and sentencing enhancements over the past centuries. After exhaustively reviewing the development of sentencing enhancements, Justice Thomas now doubts the wisdom of past Court precedent allowing a judge, rather than a jury, to decide enhancements increasing punishment.

Justice Thomas explained his reasons for a broader reading of the Constitutional rights recognized by the majority:

- a. First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment.
- b. Second, and related, one of the chief errors of *Almendarez-Torres* - an error to succumbed - was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reason I have given, it should be clear that this approach just defines away the real issue. **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. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.**

- c. Third, I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence. . . .[H]is expected punishment **has increased as a result of the narrowed range** and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish, i.e. minimum mandatory triggers are elements of the offense.¹⁸

As for the implication for capital punishment, Justice Thomas stated:

Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona*. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.¹⁹

Justice Thomas' switch here and in *Jones* makes a solid block of five votes inclined to construe any aggravating facts as an element to go to the jury. The implication of this new majority is to

call into question every sentencing enhancement.

D. The Dissents

1. What Hath Thomas Wrought, or, Why Is Death Different?

Justice O'Connor in her dissent decries what she sees is the muddled analysis of the majority and the faulty history of Justice Thomas's concurrence. Justice O'Connor would uphold the sentencing enhancements because the core elements for conviction were found by the jury. Once the state has proved guilt of the underlying offense beyond a reasonable doubt, constructional requirements have been met. Towards this end, Justice O'Connor discusses *Walton* and the capital jurisprudence, where the Court has upheld judge sentencing to death once a jury has found guilt of first degree murder beyond a reasonable doubt. The weighing and balancing of aggravating and mitigating factors that lead to a death sentence is questionable, to her and the dissenters, in light of the majority's opinion. Justice O'Connor also takes to task the efforts of the majority to distinguish past precedent. Using *McMillan* as a guide, Justice O'Connor observes that all a state has to do now is to increase the maximum ranges, and make enhancements a mandatory minimum or sentencing floor if the facts are found by the court. Moreover, if the majority's opinion is taken to its logical conclusion, the legislature could remove all sentencing discretion if an offense is proved. How, asks the dissent, can the distinctions now be drawn between jury elements and sentencing factors.²⁰

2. The Guideline Sky Is Falling.

Justice Breyer in his dissent cannot find in the Constitution the requirement that all facts must go to the jury. He bemoans the results of the Court's rulings, which call into question all sentencing

systems where a judge must determine facts, and wonders whether the courts can withstand the deluge and deal with the uncertainty this decision will unleash. To Justice Breyer’s mind courts are better able to handle the weighing and balancing of sentencing factors than juries and should so be trusted – a position mocked by Justice Scalia. For Justice Breyer, the Constitution is not offended if, after a conviction on a case or general offense, a judge and not as jury finds that a sentence’s maximum must be increased due to a specific sentencing fact.²¹

2. How is *Apprendi* Different from *Almendarez-Torres* and *Jones v. United States*?

A. Distinguishing *Apprendi* from *Alemendarez-Torres* and [Nathaniel] *Jones*.

Modern sentencing factor or enhancement history begins in 1986 with *McMillan v. Pennsylvania*.²² In *McMillan*, the Court, in an opinion authored by Justice Rehnquist, held that facts which increase a statutory minimum – such as possession of a firearm – can be determined by the judge as sentencing enhancements. The statutory maximum was not exceeded; the floor was instead raised. In so holding the Court looked to *Patterson v. New York* for support that not all facts that increased the severity of punishment had to be proved beyond a reasonable doubt.²³ *McMillan* was the precedential foundation for guideline sentencing with aggravating factors.

Over ten years later, *McMillan* still seemed to hold sway when the Court decided *Almendarez-Torres*. *Almendarez-Torres* dealt with the issue of illegal re-entry under 8 U.S.C. § 1326(a) and whether the indictment must allege a defendant’s prior “aggravated felony” conviction in order for an enhanced sentence under 8 U.S.C. § 1326(b)(2).²⁴ The Court, in a five to four decision, held that § 1326(b)(2) merely created a “sentencing factor” and need not be pled in the indictment. In reaching this

decision, the Court, in an opinion authored by Justice Breyer, pointed to several factors:

1. The relevant statutory subject matter was recidivism which was a traditional factor that is considered in sentencing²⁵;
2. The language linking the simple offense and the enhancement indicated an interdependency and linkage between the two and that neither was standard low offenses²⁶;
3. The inclusion of the word “penalties” in the title of the statute;²⁷
4. The Court would not deem Congress to have created a type of unfairness for the defendant that would result from requiring his prior convictions to be prove before the jury²⁸.

The Court in *Almendarez-Torres* also rejected a number of other arguments in favor of construing § 1326(b)(2) as a separate offense. The Court would not find a separate offense to be created by the magnitude of an increased maxim authorized sentenced that resulted from the enhancement. Indeed, the Court found that the enhancement, from two years to fifteen years, was similar to other enhancements that lower courts had validated. The Court also did not find that subsequent amendments to § 1326 changed the nature of the enhancement. Lastly, the Court did not believe that the statute was amenable to “constitutional doubt and any other reading besides an enhancement.”²⁹

The dissents in *Almendarez-Torres* looked askance at the test. It saw the test as just a means of stripping a jury of the traditional role of finding those facts that increased the defendant’s maximum statutory penalty. Why, they asked, have this test when the common-law practice was to give the jury

those elements that significantly increase punishment?³⁰ It was a question that would be posed again in the next term and answered in their favor.

The *McMillan* edifice was undermined the very next term. In *Jones v. United States*, the Court considered the car jacking statute found at 18 U.S.C. § 2119³¹. The issue was whether a statute that had enhanced penalties for “serious bodily injury” and “death resulting” were sentencing enhancements or separate offenses with additional elements. The Court held that they were separate elements, with the four dissenters joined by Justice Thomas, who had been in the majority in *Almendarez-Torres*. The Court focused on the following factors:

1. The statute’s “look” indicated an adding of elements to a principle offense in the first paragraph. This “look” had steeply higher penalties that were linked to the specific additional elements.³²
2. The statute itself, while it did have increasing penalties with additional elements, had to be read together. The elements could not, by themselves, stand alone.³³
3. The Court found that traditionally Congress and state legislatures have treated elements such as “serious bodily injury” as defining elements of a greater offense, such as aggravated robbery.³⁴
4. The Court then adopted the possibility of a different reading, invoking the doctrine of constitutional doubt, which it had rejected in *Almendarez-Torres*.³⁵

Jones led to numerous challenges to sentencing enhancement statutes.³⁶ All of these challenges were unsuccessful. Courts chose not to extend *Jones* beyond its specific car jacking statute to, for example, the drug statutes, because the Supreme Court seemed to limit its inquiry to that one statute.

As the Court stated, *Jones* “does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decision over the past quarter century.”³⁷

What a difference a Supreme Court term makes. Before deciding *Apprendi* this term, the Court considered *Castillo v. United States*³⁸. *Castillo* proved to be an interesting segue from *Jones*.

In *Castillo*, the Court considered whether a “machine gun” in a 18 U.S.C. § 924(c)(1) prosecution was an offense element for the jury. The Court, 9-0, found that it was. Such a fact was integral to the offense of illegal use, and so had to be proved beyond a reasonable doubt. An unanimous Court held it was not simply a matter of law, a mere technicality.

Apprendi took the next step. The Court went beyond a statute-by-statute exegesis and interpretation and laid down a general rule. As such, *Apprendi*’s approach differs significantly from close-factored analysis of *Alemendarez-Torres* and *Jones*. In *Apprendi*, the Court does not adopt the close-textural reading of the statute as it had in *Alemendarez-Torres* and in *Jones*. There are no list of factors, no comparisons to other statutes, and no attempt to try to parse what Congress intended in the entitled enhancement or what it had traditionally done. Rather, *Apprendi* charts a bright line. As Justice Stevens unequivocally states: “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.”³⁹ What this can be taken to mean is that any element which has the effect of raising a maximum sentence, aside from prior conviction, can no longer be considered a sentencing enhancement. Rather, it is an element that must be proved beyond a reasonable doubt to a jury.

This chart illustrates the line-up in the relevant cases. The shifting of a doubting Justice

Thomas usually determines the outcome:

2000 <i>Apprendi</i> 5-4		2000 <i>Castillo</i> 9-0	
<u>Majority</u>	<u>Dissents</u>	<u>Majority</u>	
Stevens (a)	O'Connor (d)	Breyer (a)	Kennedy
Scalia (c)	Rehnquist	Rehnquist	Souter
Souter	Kennedy	Stevens	Thomas
Ginsberg	Breyer (d)	O'Connor	Ginsberg
Thomas (c)		Scalia	
1999 <i>Jones</i> 5-4		1998 <i>Almendarez-Torres</i> 5-4	
<u>Majority</u>	<u>Dissents</u>	<u>Majority</u>	<u>Dissents</u>
Souter (a)	Kennedy (d)	Breyer (a)	Scalia (d)
Stephens	Rehnquist	Rehnquist	Stevens
Scalia	O'Connor	O'Connor	Souter
Thomas	Breyer	Kennedy	Ginsberg
Ginsberg		Thomas	

(a) authored opinion (b) authored concurrence (c) authored dissent

3. Do enhancement facts need to be proved at trial *and* alleged in the indictment?

Apprendi clearly stands for the proposition that – at least in some cases – facts that increase a defendant’s punishment must be proved beyond a reasonable doubt at trial. Must those same facts also be alleged in an indictment or complaint?

At first blush this seems a simple question; it is a matter of hornbook law that elements of an offense must be alleged in an indictment and notice provided to the defendant.⁴⁰ Justices Thomas and Scalia echoed this principle in their *Apprendi* concurrence: “In order for an accusation of a crime (whether

by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt).⁴¹

On a closer reading of *Apprendi*, however, the issue becomes a bit more thorny. As discussed in Question Two above, the majority in *Apprendi* was forced to deal with the Court's previous decision in *Almendarez-Torres*. Two options readily presented themselves. First, the Court could overrule its two-year old decision in *Almendarez-Torres*. If it didn't do so in *Apprendi*, the Court came tantalizingly close. With the enthusiasm of a recent convert Justice Thomas strongly suggested that *Almendarez-Torres* has been overruled by *Apprendi*, or is at least destined for the jurisprudential dust bin.⁴² The majority in *Apprendi* also questioned the older opinion, observing that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested."⁴³

The second course available to the Court was to limit *Almendarez-Torres* to "its unique facts."⁴⁴ The majority in *Apprendi* observed that *Almendarez-Torres* involved a guilty plea to a grand jury indictment. "The specific question" in the case therefore "concerned the sufficiency of the indictment." Because the defendant in *Almendarez-Torres* had pleaded guilty to an indictment and had, at the plea, admitted earlier convictions for three aggravated felonies "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court."⁴⁵ As the Court explained, "there is a vast difference between accepting the validity of a prior judgment of conviction

entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.”⁴⁶

Assuming *arguendo* that *Apprendi* did not overrule *Almendarez-Torres*, the two opinions must be reconciled. One way to do so may be as follows: both decisions require that all elements of an offense be alleged in the indictment. *Almendarez-Torres* did not view the fact of a prior conviction as an element of the offense – after *Apprendi*, it may be. The absence of an element from an indictment, however, does not rise to the level of constitutional error when the defendant pleads guilty and *admits the missing fact at his or her plea*.⁴⁷ This may particularly be true when the missing factual element comes bundled with due process protections of its own, as is the case with prior convictions.⁴⁸

These factual distinctions have real repercussions for how an *Apprendi* argument is cast, depending on the procedural posture of the challenge. If at all possible a trial seems the best route to preserve *Apprendi* issues for appeal. In the Northern District of California, for example, after *Apprendi* Assistant Federal Public Defenders have refused to plea to illegal reentry charges and instead insist on stipulated-fact bench “trials.” The sole disputed fact in these trials is the prior aggravated felony, to which there is no stipulation and which the government has (briefly) refused to prove. At the close of the government’s “case” the defense moves for a Judgment of Acquittal as to 8 U.S.C. § 1326(b), a crime that carries a twenty-year maximum if the defendant has a prior aggravated felony. If the defense ultimately prevails on appeal and an aggravated felony *is* an element of an illegal reentry conviction under 8 U.S.C. § 1326(b), the argument will not have been waived by a plea. Instead – as in *Apprendi* – the challenge has

been framed as a sufficiency of evidence issue, with the higher standard of proof and greater due process protections that come with such an attack.⁴⁹ At stake? Potentially a four to six year savings for alien defendants who have only been convicted of 8 U.S.C. § 1326(a), which carries a two year maximum sentence.

After enduring several of these challenges, and after the Department of Justice issued a confidential *Apprendi* memorandum in July of 2000, the Northern District of California United States Attorney's Office switched its policy and will now allege the prior aggravated felony in § 1326 indictments.⁵⁰

If the United States Attorney is less accommodating in your district and stipulated fact "trials" are not an option, another possibility is a pre-plea, pre-trial challenge to the sufficiency of the indictment *and no admission of the enhancement fact* at the change of plea. One argument in this procedural posture is that as a matter of statutory construction *Almendarez-Torres* did not require proof of a prior conviction, but after *Apprendi* Due Process protections require that this enhancement fact be treated as an "implied necessary element" that must be included in the indictment.⁵¹ If the challenge is timely raised and the enhancement fact of a prior conviction is ultimately deemed to be an essential element of the substantive offense, the indictment suffers a fatal flaw that is not subject to harmless error analysis but must instead be dismissed.⁵²

If a plea is unavoidable or if the *Apprendi* issue is first being raised on direct appeal, there is little choice but to challenge the lack of notice from an indictment that omits an enhancement fact.⁵³ In this situation it may be possible to distinguish *Almendarez-Torres* because the defendant has (hopefully)

not admitted the missing enhancement fact at the change of plea.

4. **What statutes should be flagged for *Apprendi* challenges?**

The statutes most obviously vulnerable to an *Apprendi* challenge are those that prohibit offense conduct and specify a maximum sentence for that conduct, then (typically in the same section), provide for a greater maximum sentence if an additional fact or facts exist. The best example of this is Section 841 of Title 21, which prohibits the manufacture and distribution of controlled substances. As is discussed more thoroughly in Question Five below, in a post-*Apprendi* memorandum order the Supreme Court has strongly suggested that the *amount* of drugs is an enhancement element under 21 U.S.C. § 841 and must accordingly be pleaded in an indictment and proved at trial.⁵⁴

Apprendi is a decision with repercussions far beyond the New Jersey hate crime statute and federal drug laws. The dissent in *Apprendi* worried that “in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court’s and Justice Thomas’ rules in terms of sentencing schemes invalidated by today’s decision will likely be severe.”⁵⁵ Creativity by the defense bar will help to realize the dissent’s concerns.

One example of a vulnerable statute is the federal money laundering law, 18 U.S.C. § 1956. It 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.”⁵⁶ If the government seeks a fine of over \$500,000 at sentencing, after *Apprendi* it must allege in the indictment that property worth over \$250,000 was involved in the laundering and prove that amount beyond a reasonable doubt at trial.

For those involved in indigent defense, fines in excess of half-a-million dollars may not be

of great concern. Alien smuggling, however, is a common charge – especially in the border districts. Section 1324 of Title 8 provides for a maximum sentence of five years for many types of alien smuggling.⁵⁷ If, however, the smuggling was done “for the purpose of commercial advantage or private financial gain,” the maximum sentence climbs to ten years.⁵⁸ After *Apprendi*, Fifth and Sixth Amendment protections require that this fact – the purpose that motivated the smuggling – must be alleged in the indictment and proved beyond a reasonable doubt at trial.⁵⁹

A survey of the federal criminal and immigration codes⁶⁰ reveals three broad categories of statutes affected by *Apprendi*.

- The first category includes statutes that increase a maximum custodial sentence based upon the existence of a substantive fact. The amount of drugs involved,⁶¹ the motives for alien smuggling,⁶² the impact of criminal activity on a financial institution,⁶³ or whether serious bodily injury results or a dangerous weapon was used⁶⁴ – each of these enhancement factors must be pleaded and proved as substantive elements of their respective offenses.
- The second category includes statutes with fine amounts tied to the amount of loss. As mentioned above, the money laundering statute is one such example. Other examples include the federal bribery statute,⁶⁵ misuse of public funds,⁶⁶ and the financing of extortionate extensions of credit.⁶⁷
- The final, and most controversial, category encompasses statutes that provide for greater maximum sentences based on a defendant’s prior convictions. Section 841 of Title 21 includes prior convictions along with drug amounts as enhancement factors.⁶⁸ Misdemeanors illegal reentry charges are transformed to felonies upon a finding of a prior conviction,⁶⁹ illegal reentry cases see a ten-fold increase in sentencing exposure,⁷⁰ and fraud maximum sentences double.⁷¹

As is discussed more fully below, guns and priors are intimately linked in the federal criminal code and previous convictions can be the single most important factor in many gun conviction sentencing

ranges.⁷² The “prior conviction” enhancement factor, unfortunately, is the area of greatest uncertainty after *Apprendi*. Did *Apprendi* overrule *Almendarez-Torres*’ tolerance of prior convictions as sentencing factors? Did *Apprendi* limit the *Almendarez-Torres* decision to cases involving a challenge to the indictment where the prior conviction is admitted at the change of plea? These questions will be the focal point of litigation until the Supreme Court revisits the *Almendarez-Torres* decision.

5. How does *Apprendi* impact current drug cases?

The Supreme Court wasted little time after delivering the *Apprendi* decision before applying it to statutes outside of the immigration code. In a memorandum order issued three days after the *Apprendi* opinion, the Court reversed a Tenth Circuit decision that had treated the *amount* of drugs as a sentencing factor rather than an enhancement element. The order remanded the case for reconsideration in light of *Apprendi*.⁷³

After *Apprendi*, (and, perhaps more importantly, after the *Jones* memorandum order), federal appellate courts have not hesitated to apply the case to drug statutes. As of early August, 2000, post-*Apprendi* federal appellate courts were unanimous that the Supreme Court decision required proof of *drug amounts* at trial, and beyond a reasonable doubt, under the enhancement factors found at 21 U.S.C. § 841(b).⁷⁴

If the decisions of the Eighth Circuit are any indication, however, defendants after *Apprendi* will still have to struggle to avoid winning the (drug) battles yet losing the (drug) wars. In *United States v. Sheppard*, for example, the Eighth Circuit conceded that – in least in some drug cases – Fifth and Sixth Amendment protections identified in *Apprendi* would require that a finding of drug amounts be submitted

to the jury and found beyond a reasonable doubt.⁷⁵ The Court in *Sheppard* found, however, that any error before the district court was harmless because a drug amount had been alleged in the indictment and a special verdict form regarding amounts submitted to the jury.⁷⁶ The Eighth Circuit concluded that *Apprendi* did not require proof that a defendant *knew* the amount or type of drugs involved in a conspiracy. Moreover, in *Sheppard* the Court of Appeals dropped a worrisome footnote, observing that the mandatory minimum of 240 months in prison that the defendant received was within the twenty year maximum for a methamphetamine offense under § 841(b).⁷⁷

Another danger is drug sentences that fall within stacked concurrent statutory maximums. In *United States v. Henderson*, for example, a West Virginia district court undertook a particularly thoughtful and in-depth analysis of *Apprendi*, the decision's lineage, and the equitable concerns that support a requirement of proof at trial for enhancement facts.⁷⁸ While the court concluded that the *amount* of drugs is an element of a § 841 offense, it nonetheless imposed a thirty-five year term of imprisonment for a drug conspiracy (in excess of the twenty-year basic statutory maximum found in § 841). It arrived at the thirty-five year range under the federal sentencing guidelines by running the twenty year maximum sentences for three counts *consecutively*.⁷⁹ Federal defenders have already reported that various Assistant United States Attorneys have adopted this strategy, and are seeking higher maximum sentences by stacking drug counts.

After *Apprendi*, the issue of consecutive versus concurrent sentences will obviously become much more important. For example, beating one count in a federal drug conspiracy case was formerly a pyrrhic victory, because relevant conduct drug amounts on other counts would inevitably elevate the guideline range. A “not guilty” verdict on a drug count after *Apprendi*, however, will have two results:

it could lower the overall drug amount range for guideline calculations, and it will deprive the government of another twenty-year statutory maximum sentence to stack towards a higher guideline range.

A. Mandatory Minimum Sentences and *Apprendi*

The Eighth Circuit was more direct, and even less encouraging, in *United States v. Aguayo-Delgado* – delivered the same day as the *Sheppard* opinion.⁸⁰ In *Aguayo-Delgado*, there was no pretense that the jury was ever given jury instructions regarding drug amounts. The district court made a finding of drug amounts at sentencing based on the presentence report, and the defendant contested that amount. When presented with these facts, the Eighth Circuit conceded that much of its prior caselaw was no longer valid after *Apprendi*: drug amounts were now elements of the offense.⁸¹

The Eighth Circuit nonetheless affirmed the conviction and the sentence of 240 months, the mandatory minimum in the case. Employing an analysis that promises to bedevil future *Apprendi* challenges, the Court in *Aguayo-Delgado* distinguished mandatory minimum sentences from those statutes that raise the maximum possible sentence:

The rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury’s verdict. If the non-jury factual determination only narrows the sentencing judge’s discretion within the range already authorized by the offense of conviction, such as with the mandatory minimums applied to *Aguayo-Delgado*, then the governing constitutional standard is provided by *McMillan*.⁸²

This pair of Eighth Circuit cases illustrate what promises to be a central issue in future *Apprendi* litigation; whether enhancement facts that increase mandatory minimum sentences but that do not increase a statutory maximum sentence must be alleged and proved.

The *Apprendi* decision itself is carefully vague on the issue of mandatory minimum sentences. The majority discusses mandatory minimum sentences in the context of the Court's prior decision in *McMillan v. Pennsylvania*, an opinion that had tolerated proof of enhancement facts by a preponderance of evidence for a state statute that resulted in a mandatory minimum sentence.⁸³ The Court limited *McMillan* to cases that do not produce a sentence "more severe than the statutory maximum for the offense established by the jury's verdict," but "reserve[d] for another day" whether the narrower holding of *McMillan* would survive.⁸⁴ Justices Thomas and Scalia were less circumspect in their concurrence; Justice Thomas thought "it clear that the common-law rule [requiring proof of the enhancement fact] would cover the *McMillan* situation of a mandatory minimum sentence."⁸⁵

The final word on *Apprendi* and mandatory minimum sentences must, in all likelihood, await a decision from the shifting majorities on the Supreme Court. In the interim, one of the most important post-*Apprendi* fights will be to extend the reasoning of the opinion to the many criminal statutes providing for mandatory minimum sentences.⁸⁶

B. *Apprendi* and the Disclosure of Drug Prosecution Informants

An important ancillary consequence of treating drug amounts as elements of a drug offense is the pre-trial disclosure of informants. The concept of "sentencing entrapment," where an informant or agent induces a defendant into dealing in amounts beyond their typical experience or predisposition, is now fairly well-accepted in federal courts.⁸⁷ If, however, the *amount* of drugs is now a substantive element of the offense entrapment by an informant becomes a *trial*, rather than sentencing, defense. Disclosure of the informant – a percipient witness to the entrapment – should accordingly be compelled before the

government's case-in-chief at trial.⁸⁸

6. How does *Apprendi* impact current gun cases?

Whether ultimately characterized as “sentencing factors” or “substantive elements,” it is indisputable that facts that increase custodial sentences are peppered throughout the federal gun statutes. The Armed Career Criminal Act,⁸⁹ ubiquitous § 924(c) charges,⁹⁰ and even the simple act of illegally “transferring” a firearm⁹¹ all provide for greater sentences that can be triggered by enhancement facts *in addition* to the underlying offense conduct.

Three weeks before the *Apprendi* decision, the Supreme Court signaled that it would be looking at enhancement facts in gun statutes with a fresh – and skeptical – eye. In *Castillo v. United States*, the Court undertook a statutory interpretation of 18 U.S.C. § 924(c).⁹² This statute prohibits the use or carrying of a firearm in relation to a crime of violence, and provides for a dramatic increase in the penalty provision if the firearm is a “machinegun.” The Court concluded that Congress had intended the use or carrying of a “machinegun” to be separate crime that must be alleged and proved before the jury. Apart from “the doctrine of constitutional doubt” arising from the treatment of enhancement facts as sentencing factors, the Court concluded that relevant words used in the statute created a separate substantive crime.⁹³

The *Castillo* decision provides interesting reasoning that should prove useful in future gun challenges. The Court identified a potential conflict that could arise between a judge and jury if “the machinegun matter [was left] to the sentencing judge.” The jury could find that one gun was “used” in the offense, while the sentencing judge may find a different firearm is a machinegun.⁹⁴ The Court in *Castillo*

also concluded that the length and severity of an added mandatory minimum sentence weighed *in favor* of treating the offense-related words, “use of a machinegun,” as referring to an element.⁹⁵

Despite this promising start, attempts to characterize enhancement facts as substantive elements in gun statutes are likely to encounter the same “mandatory minimum” distinction advanced by the appellate courts in the drug context. The Eighth Circuit, for example, has held in a post-*Apprendi* decision that 18 U.S.C. § 924(c) does not include a separate element of “brandishing” that must be alleged in the indictment and proved at trial to warrant a seven-year mandatory minimum sentence.⁹⁶ In *United States v. Carlson*, the Eighth Circuit based its analysis in part on the fact that § 924(c) does not raise the statute’s maximum possible sentence, but rather provides for a mandatory minimum punishment.⁹⁷ Although the Court in *Carlson* did discuss the Supreme Court’s decision in *Castillo*, it avoided *Castillo*’s treatment of mandatory minimum sentences.

Gun statutes well-illustrate both the opportunities and dangers presented by the *Apprendi* decision. The Armed Career Criminal Act (“ACCA”) is one example. Like the hate crime statute in *Apprendi*, the ACCA increases the maximum statutory sentence for the base offense upon a finding of enhancement facts.⁹⁸ Those enhancement facts are three prior convictions for violent felonies or serious drug offenses. Before *Apprendi*, the Circuits were unanimous that these enhancement facts are sentencing factors that need not be proved at trial.⁹⁹

After *Apprendi*, Fifth and Sixth Amendment protections may require that the government prove these enhancement facts at trial. This may, however, be the last type of “protection” that an ACCA defendant would want – proof of three violent or serious drug convictions entered as evidence before the

jury in the government's case in chief. While stipulations may somewhat mitigate the prejudicial effect of such proof,¹⁰⁰ bifurcation of the "prior convictions" element from the other elements of the gun possession offense may not be possible.¹⁰¹

Another practical concern is that a pleading and proof requirement for prior convictions in ACCA cases may wake sleeping giants. Many Armed Career Criminal defendants have snuck by harried prosecutors and probation officers unnoticed and have received straight felon-in-possession sentences. These cases will not benefit from the unwanted attention that the pleading and proof requirements will generate in the pre-indictment setting.

7. How does *Apprendi* impact on *Almendarez-Torres*, or, is *Apprendi*'s holding alien to reentries?

The validity of *Almendarez-Torres*' holding is questionable. The Court, in *Apprendi*, admitted that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . ."¹⁰² The *Apprendi* Court sought to limit *Almendarez-Torres* to its "unique facts." In *Almendarez-Torres*, the defendant did not contest his prior convictions, but rather admitted all three at a plea. The implication was that the decision would be different if the prior convictions were contested or challenged. The distinction is one without a real difference when it comes to the on two constitutional principles of due process and trial by jury. As such, it is hard to see how *Almendarez-Torres* can be reconciled with *Apprendi* unless the Court does make a "recidivist exception."¹⁰³ The Court, in such an approach, would stress the traditional role that recidivism plays in sentencing, and the fact that a prior conviction can be considered as having had a due

process imprimatur.¹⁰⁴ If the Court carved out this exception, it would recognize that not all facts were created equal. Prior convictions, because of what they are and because of the precedential weight of *Almendarez-Torres*, would be for the sentencing court to determine enhancement. Recidivism, as a matter of proof for the jury, would be read out of the Constitution.

It is equally possible that the four dissenters in *Almendarez-Torres* can now count on Justice Thomas for a reconsideration. Justice Thomas, who had been in the five-justice majority in *Almendarez-Torres*, wrote a concurring opinion in *Apprendi* which he plainly stated that he had erred in that decision. A clearer invitation for reconsideration could not be made. Counsel must be aware of the possibility that *Almendarez-Torres* will be revisited or overruled. As such, in illegal re-entry cases under 8 U.S.C. § 1326 where prior convictions are not alleged but are used as enhancements under 8 U.S.C. § 1326(b)(2), counsel should challenge the indictment. If successful, the defense would then face only a two year statutory maximum under § 1326(a). This challenge can be made pretrial, in a motion for judgment of acquittal, or preferably, both.

In the plea context, a challenge to the enhancement is also viable. There is the risk, however, that if the defense concedes the fact of a prior conviction the *Apprendi* challenge will have been waived. As this issue work its way through the courts, counsel might be able to use the uncertainty to his or her advantage in negotiating a better plea offer. After all, proving prior convictions is not difficult and prior convictions are extremely prejudicial at trial. For immigration cases, therefore, *Apprendi* may be most valuable as bargaining leverage.

8. How does *Apprendi* impact old cases – on appeal and habeas?

There are no shortage of questions left unanswered by *Apprendi*, but one of the foremost policy questions is the impact of the decision for cases on appeal and for habeas petitions. Federal Defender Offices across the country have already been inundated with calls from former clients and from Criminal Justice Act panel attorneys, seeking advice on the application of the decision to the appellate phase of a case.

In the face of a potential tidal wave of new litigation on old cases, it may be useful to engage in some triage and categorize the cases most likely to be affected by *Apprendi*.

A. Cases Currently on Appeal

A significant category of appellate cases will involve those defendants who sustained a conviction before *Apprendi*, but whose appeal was not final before the decision was issued. Unless those defendants had the benefit of an extraordinarily prescient attorney,¹⁰⁵ an *Apprendi* challenge was probably not made to the indictment or at trial.

The most obvious challenges on appeal lie to sentences that exceed a statutory maximum due to enhancement facts not proven at trial. The trick, of course, is to identify these statutes. Title 21 Section 841 comes to mind, but close examination of the statute reveals that convictions for most prohibited drugs result in *no less* than a twenty-year maximum sentence – regardless of drug amounts, prior convictions, use of guns, or injury during the transactions.¹⁰⁶ The Supreme Court’s memorandum order in *Jones* is of little help, for the sentences in the Tenth Circuit opinion that was reversed *exceeded* the base twenty year maximum.¹⁰⁷

Moreover, there may be a (regrettable) trend towards stacking drug counts, producing

ample maximum sentence ranges within which to impose a guideline sentence.

For drug counts, therefore, the most likely candidates for appellate attack are sentences in non-marijuana drug cases in excess of twenty years – and preferably, cases that did not involve more than one count of conviction.

Marijuana cases may also be a fruitful area for appellate challenges. Unlike other controlled substances, possession of marijuana for sale has a relatively low five year statutory cap absent proof of higher amounts.¹⁰⁸ Marijuana sentences in excess of five years – and particularly, in cases arising from only one count of conviction – may be vulnerable.

The rare case that involves fines or supervised release terms in excess of a base statutory amount also fall within this first, promising, level of potential appellate review.

A second (and less sure) level of appellate challenges focus on mandatory minimum sentences. Other federal circuits will hopefully reject the Eighth Circuit's approach towards mandatory minimums after *Apprendi*, and a circuit split may encourage the new *Apprendi* majority to revisit the Court's decision in *McMillan*.

Further down the triage list are cases that involve proof of prior convictions. Illegal reentry (§ 1326(b)) cases, ACCA and Career Offender sentences, and drug sentences enhanced by prior convictions are among the candidates in this area. There are two main hurdles for these types of appeals. First, the status of *Almendarez-Torres* – and whether recidivism is an enhancement element or sentencing factor – is still undecided. A second problem is for those defendants who pleaded guilty pursuant to written plea agreements and admitted the prior conviction in the agreement or in the plea colloquy.¹⁰⁹

B. Habeas Cases

Is *Apprendi* retroactive? That simple question will inspire countless law review articles, be the focus of discussion at habeas conferences, and promises to generate considerable litigation until decided by the Supreme Court. This overview article cannot begin to address the complexities of the potential retroactive application of the *Apprendi* decision. We can, however, highlight some issues that are most likely to arise in the habeas context.

On the substantive front, capital habeas litigants are likely to focus on the structure of state death penalty statutes and argue that the codes fail to present aggravating factors as elements. This argument has, unfortunately, already been rejected by a district court in New York, which held that “aggravating factors are sentencing considerations, and not an element of a separate crime that distinguishes capital murder in aid of racketeering from non-capital murder in aid of racketeering.”¹¹⁰

Procedurally, a central issue in habeas litigation will be the vehicle in which an *Apprendi* challenge can be raised. A useful – though disappointing – analysis of this procedural maze and *Apprendi* has been provided by the First Circuit in *Sustache-Rivera v. United States*. In *Sustache-Rivera*, the Court of Appeals conceded that the *Apprendi* majority now arguably views the *statutory* analysis in *[Nathaniel] Jones* as “constitutionally compelled.” The First Circuit nonetheless concluded that the *Apprendi* rule was “not retroactive to cases on collateral review.”¹¹¹ The Court accordingly held that the car jacking defendant’s claim was barred on a second or successive habeas petition.

9. Does *Apprendi* overrule the Sentencing Guidelines?

Dissenting in *Apprendi*, Justice O’Connor warned:

The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond and otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt . . . the principle thus would apply not only to schemes like New Jersey's under which a factual determination exposes the defendant to a sentence beyond a prescribed statutory maximum, but also to all determinant-sentencing schemes in which the length of a defendant's sentence within the statutory range turns a specific factual determinations (e.g. the Federal Sentencing Guidelines). Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the sentencing guidelines.¹¹²

Clearly Justice O'Connor believes that *Apprendi* is the death knell of the Federal Sentencing Guidelines, and indeed of all guideline systems. It could well be that after *Apprendi* all facts must be alleged to the jury. However, the dissent's reports of the guidelines' death of the guidelines may be greatly exaggerated.

The analysis in *Apprendi* reveals that an increase in the maximum penalty by an element must be proved beyond a reasonable doubt. Guideline systems can work within maximum statutory ranges. Failure to allege a specific drug amount, for example, need not necessarily be fatal to the indictment, and probably will not require dismissal of the criminal action. Instead, such an omission in the indictment merely limits punishment to the lowest statutory range provided. The guideline system of assessing relevant conduct, the type of drug, the role in the offense – all factors used to arrive at an achieve an offense level -- can, and does, produce an offense level below the statutory maximum.

As discussed in Question Five above, the problem arises when the guideline range *does*

exceed the statutory maximum for a count charged with the enhancement facts. That is, generally, counts that are groupable under U.S.S.G. § 3D are generally to be served concurrently. Guideline section 5G1.2, however, provides that “[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts should run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.” What that means is that in multiple-count indictments, where a defendant can face charges of conspiracy, possession with intent to distribute, and other charges, a court can stack the maximums to achieve the guideline level.

This was the situation in *United States v. Henderson*, which, as previously discussed, involved a district court sentencing in the Southern District of West Virginia. At trial, the defendant was convicted of multiple-count drugs. At sentencing, which was post-*Apprendi*, the district court held that *Apprendi* requires that the “quantity” of drugs in federal drug offenses be charged in the indictment, given to the jury, and found beyond a reasonable doubt. Because that was not done at trial, the district court held that it could not increase the statutory penalties as provided in 21 U.S.C. 1 841(b)(1)(C). The court, however, could still use relevant conduct in federal guideline sentencing. Moreover, the court was able to impose the total guideline sentence of 316 months imprisonment by stacking the multiple counts involved without exceeding the 20 year maximum available. The court therefore reached the same result through the guidelines as it would have achieved through a sentencing enhancement.¹¹³

One also must be careful for what one wishes. *Apprendi*, as the dissenters make clear, could well lead legislators to get rid of all discretion. As Justice O’Connor pointed out in her dissent:

“Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.”¹¹⁴ If *Apprendi* is limited to increases of the maximum sentence, the legislature could raise many maximums to life. Such statutory maximums would have the effect of raising the ceiling so high that all sentences would fit comfortably below.

Interestingly, even before *Apprendi* district and appellate have been moving to require even greater standards of proof in guideline determinations that would significantly enhance sentences. Thus, if a court would find that a certain cross-reference applied which would, for example, raise the offense level by greater than seven levels, the proof required for that fact is clear and convincing evidence, (as opposed to a preponderance). This is a recognition by the courts that sentencing determinations can be the tail that wags the dog of the substantive offense, and a greater standard level of proof should be required when relevant conduct would dramatically increase a sentence.¹¹⁵ This requirement of an increased standard of proof needs to be re-evaluated in light of *Apprendi*.

In a recent case the Ninth Circuit seems to recognize that the factors that require a higher standard of proof in un-charged conduct might need to be re-evaluated after *Apprendi*. In *United States v. Eliodoro-Valencia*,¹¹⁶ the Ninth Circuit considered a challenge to a preponderance finding for an enhanced sentence. One factor in the Court’s analysis was whether the un-charged conduct alters the maximum penalty available for the crime committed – if so, this would support a “clear and convincing” standard. Under *Apprendi*, however, “other than the fact of a prior conviction, any factor that increases

the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, proved beyond a reasonable doubt.” This new rule should apply when the government uses un-charged conduct to enhance the sentence. This comes into play, for example, if a defendant charged with felon in possession of a firearm encounters a cross-reference to an uncharged underlying offense, which increases the maximum to which he is exposed.

Apprendi's requirement of jury elements can be a two-edged sword. The government may begin to file indictments that include actual drug quantities or allegations of prior convictions. The government may also become much more aggressive in getting before the jury, or requiring at a plea, evidence that may have been overlooked or ignored by the AUSA before *Apprendi*. The need for up-front proof could well have downside repercussions in actual sentencings.

What does the future hold? If courts already recognized the inappropriateness of a preponderance standard in uncharged conduct, and the Supreme Court in *Apprendi* stresses the importance of proof beyond a reasonable doubt for increases in statutory maximums, an argument can be made for a higher standard in uncharged conduct. This call for higher evidentiary sentencing is an issue that will also be litigated in the coming months and years.

10. What is the Future of *Apprendi*?

Naysayers – including the Department of Justice – are likely to downplay the significance of the *Apprendi* decision. After all, there has generally been a trend towards requiring proof of jurisdictional elements,¹¹⁷ most drug cases will involve statutory maximums that far exceed a defendant's guideline range,¹¹⁸ and proof of prior convictions at trial will do little to advance a defendant's case.

The naysayers are wrong. *Apprendi* and its Supreme Court predecessors will be the focal point of criminal defense litigation for the next several years. The key controversies will include:

- The proof requirement for enhancement facts in cases involving mandatory minimum sentences (and revisiting the validity of the Supreme Court's decision in *McMillan*);
- The impact of *Apprendi* on the federal sentencing guidelines, and specifically the interplay between findings of drug amounts at trial and relevant conduct for sentencing;
- The status of recidivism as a substantive element or sentencing factor, and the status of the (questioned) *Almendarez-Torres* decision;
- The collateral repercussions of *Apprendi*, including expanding the scope of discovery requests, compelling the disclosure of informants, and the interplay between *Apprendi* elements and Federal Rule of Evidence 403 constraints;
- The availability of *Apprendi* to habeas petitioners.

To advance these new issues, defense counsel in the post-*Apprendi* era will have to rethink even the most basic aspects of a case. Pre-trial motions include challenges to the sufficiency of the indictment, broadened discovery demands in light of new essential elements of the offense, and attacks on long-accepted jury instructions.

Written plea agreements that detail a factual basis are now suspect, and may forever waive interesting *Apprendi* issues. Defendants will need to be carefully prepared for plea colloquies, to avoid inadvertently admitting enhancement facts not alleged or proved.¹¹⁹

Trial tactics will include Federal Rule of Criminal Procedure 29 motions for judgment of

acquittal in cases where (potential) enhancement facts are not proved, requests for lesser-included instructions, and a renewed focus on sentencing entrapment as an affirmative defense. At sentencing, plan to dispute relevant conduct that has not withstood a jury's scrutiny. Appeals and habeas petitions will demand immediate triage, to winnow out the high-return cases and ensure that *Jones* and *Apprendi* issues are not inadvertently waived for later appellate review.

Apprendi turned a constitutional corner as large – or larger – than *Mistretta* and *Koon*. Early, aggressive, and creative litigation will help to protect and expand the Due Process protections recognized by the Supreme Court in this “watershed” decision.

Conclusion

For the past many years, and over many terms, we have read the Supreme Court opinions with nothing but dread. Lately this has been changing. *Apprendi* is especially surprising, both for its respect for the role of the jury and its deference to the standard of reasonable doubt when applied to enhancement facts that increase sentences. Who would have thought that *this* Supreme Court would draw such a bright line when it came to sentencing enhancement? Who would have imagined that a coalition of such disparate Justices as Stevens, Scalia, Souter, Thomas and Ginsberg would join to call into question many, if not most, of the sentencing factors that go to raising punishment?

In this Primer, we have tried to flag a few of the salient issues that *Apprendi* raises. The next years will see these questions answered, and assuredly new ones raised. It is still too early in the *Apprendi* aftermath to see how all the issues will shake out. Precedents as old as *McMillan* and as recent as *Almendarez-Torres* must be reexamined in *Apprendi*'s light. The Court, with its five *Apprendi* votes,

could recast the jurisprudence of sentencing, returning even more power to the jury in finding sentencing elements. The Court also could take a step back, interpreting its cases to focus solely on the raising of a statutory maximum by an enhancement, and leaving undisturbed the fact-finding that goes into a sentence falling “under the max.” The Court, recognizing the implications may, Prufrock-like, whisper “Do I Dare” and let its moment pass.¹²⁰

It is also difficult to predict the legislative response to *Apprendi*. Congress and legislatures have shown a willingness to trump their own enacted sentencing systems with mandatory minimums, thereby distorting the workings of guideline calculations and findings. Congress could render this all moot with non-discretionary sentences for certain crimes.

Apprendi’s impact on capital cases, especially in judge-sentencing cases, will be the highest-stakes litigation. It is upon this issue that the Court’s new coalition of five may fracture.

Federal and state guidelines will be reexamined afresh. We may encounter a rethinking of the entire guidelines system, or *Apprendi* could be a tempest in a teapot as courts, legislators and prosecutors combine to restrict its applicability.

We, as defense counsel, will have much to say in how *Apprendi* plays out. For the first time in years, if not decades, we have a recovered or recently-unearthed constitutional rights that can be used to shape criminal justice. The right of the jury to find all the elements of the offense beyond reasonable doubt is a right that benefits all. It is also a right that carries risks – exposing the jury those very factors that can taint and prejudice, such as prior convictions. What is true is that *Apprendi* represents a challenge and an opportunity. The next several years will be most interesting as we work to shape *Apprendi*’s legacy.

With creativity, and the help of a doubting Thomas, we can give credence to the dissent's view of *Apprendi* as a “watershed” constitutional decision.

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1. *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2380 (2000) O'Connor, J., *dissenting*).
 2. *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed.2d 472 (1995).
 3. Federal Defenders have quickly responded to the *Apprendi* decision and have generously shared their views and research on the case among the national offices. This article relies heavily on the research and memoranda of Federal Public Defender Quin Denvir (E.D. Ca), Asst. Federal Public Defender Tim Crooks (N.D. Tex); Asst. Federal Public Defender Dan Broderick (E.D. Ca), David Beneman, Esq. (Portland, Me) and Federal Defender Training Attorney Carmen Hernandez (Washington, D.C.).
 4. *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998); *cf John 20: 24-29* (apostle who demanded proof).
 5. *Apprendi*, 120 S. Ct. at 2351-53.
 6. *Id.* at 2353-54.
 7. *Id.* at 2353-58.
 8. *Id.* at 2356 (quoting *United States v. Gaudin*, 515 US 506, 510 (1995)).
 9. *Id.* at 2360-62.
 10. *Id.* at 2362-63 (citations omitted).
 11. 477 U.S. 7-9 (1986) (Rehnquist J., authored the opinion, joined by Justice O'Connor; Justice Stevens dissented).
 12. *Apprendi*, 120 S. Ct. at 2360.
 13. *Id.*

14. *Id.* at 2361-62.
15. *Id.* at 2367-68 (Scalia, J., concurring).
16. *Id.* at 2379.
17. *Id.* at 2379.
18. *Id.* at 2368-69 (Thomas, J., concurring) (citations omitted) (emphasis added).
19. *Id.* at 2380 (citations omitted).
20. *Id.* at 2387-88 (O'Connor, J. dissenting).
21. *Id.* at 2396-2402 (Breyer, J., dissenting).
22. 477 U.S. 79 (1986).
23. 432 U.S. 197 (1977). *Patterson* involved a New York statute that placed the burden on the defendant in murder prosecutions to prove emotional disturbance as an affirmative mitigating defenses. Emotional disturbance if proved would reduce murder to manslaughter. The Court held this passed constitutional muster. It was not burden shifting, as the state carried the burden of proving the greater offense with its requisite mental state.
24. 118 S. Ct. 1219 (1998).
25. *Id.* at 1229.
26. *Id.* at 1224-25.
27. *Id.* at 1226.
28. *Id.* at 1226-27.
29. *Id.* at 1228.
30. *Id.* at 1241 (Scalia, J., dissenting).
31. 119 S. Ct. 1215 (1999).
32. *Id.* at 1228.
33. *Id.*

34. *Id.* at 1220.

35. *Id.* at 1221.

36. In the specific context of 21 U.S.C. 841 challenges, see *United States v. Thomas*, 204 F.3d 381 (2nd Cir. 2000); *United States v. Rios-Quintero*, 204 F.3d 214 (5th Cir. 2000); *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000); *United States v. Hector*, 199 F.3d 1287 (11th Cir. 2000); *United States v. Williams*, 194 F.3d 100 (D.C. Cir. 1999).

37. 526 U.S. at 252 n.11.

38. 120 S. Ct 2090 (2000).

39. *Apprendi*, 120 S. Ct. at 2362.

40. *See, e.g., id.* at 2355 (“We [in *Jones*] noted that ‘under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt.’”) (quoting *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed. 2d 311 (1999)).

41. *Apprendi*, 120 S. Ct. at 2368 (Scalia, Thomas, J.J. dissenting).

42. *See id.* at 2378 (“The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough”); (“Second, and related, one of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence.”) (Thomas, Scalia, J.J. concurring).

43. *See id.* at 2362 (footnote omitted). Footnote fifteen, omitted from this quote, is remarkable for its open criticism of the *Almendarez-Torres* opinion. In this footnote the *Apprendi* majority adopts, wholesale, the reasoning of Justice Scalia’s dissent in *Almendarez-Torres*. *Id.* at 2362 n. 15. The majority in this footnote also offers historical support for the pleading requirement at issue in *Almendarez-Torres*. *Id.*

44. *See id.* at 2362 (“Given [*Almendarez-Torres*]’ unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.”)

45. *See id.* at 2361-62.

46. *See id.* at 2366.

47. See, e.g., *United States v. Reyes-Platero*, No. 99-50234, 2000 WL 943556, at *2 (9th Cir. July 11, 2000) (“In addressing this issue, we are guided by ample case law concerning the effect of a guilty plea upon earlier constitutional defects. An unconditional guilty plea constitutes a waiver of the right to appeal all non-jurisdictional antecedent rulings and cures all antecedent constitutional defects.”)(internal quotations and citation omitted); see also *United States v. Skinner*, 25 F.3d 1314, 1317 (6th Cir. 1994) (“Although it is well settled that a guilty plea does not waive the right of an accused to challenge the constitutionality of a statute under which he is convicted, a defendant may not challenge the statute where the facts admitted by the guilty plea render the statute’s alleged unconstitutionality moot as to the defendant.”) The waiver identified by the Sixth Circuit may provide one way to distinguish the *Almendarez-Torres* opinion from *Apprendi*. Under the rationale of *Skinner*, the defendant in *Almendarez-Torres* had no standing to challenge the use of the prior convictions as sentencing factors because his admission of the factors at the change of plea rendered his constitutional challenge moot. That procedural posture is factually distinct from, for example, a stipulated facts § 1326 trial where there is no proof of the prior conviction and the defendant accordingly challenges the sufficiency of the evidence.

48. *Apprendi*, 120 S. Ct. at 2361-62 (“Because *Almendarez-Torres* had admitted the three earlier convictions for aggravated felonies – *all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own* – no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.”) (emphasis added).

49. Compare *Reyes-Platero*, 2000 WL 943556, at *2 (“An unconditional guilty plea constitutes a waiver of the right to appeal all non-jurisdictional antecedent rulings and cures all antecedent constitutional defects.”), with *United States v. James*, 987 F.2d 648, 651 (9th Cir. 1993) (reversing bank robbery conviction for insufficient evidence when the government neglected to prove fact of FDIC insurance at trial, and noting that “the defense has no obligation to remind the government of its obligation to remind the government of its obligation to prove each element of a crime. It is axiomatic that the government has the ultimate burden of proof.”)

50. There is an argument that by alleging the prior conviction in the indictment, the United States Attorney has now admitted that this enhancement fact is a substantive element of the offense. See, e.g., *United States v. GAF Corporation*, 928 F.2d 1253, 1260 (2nd Cir. 1991) (holding that a bill of particulars inconsistent with an evolving theory of guilt was an admission that could be offered against the government.)

Another interesting issue will be the impact of this policy when a case proceeds to trial, and the government faces a Federal Rule of Evidence 403 challenge. In § 1326 trials where the defendant often does not testify, the fact of a prior aggravated felony has no probative value and an obvious prejudicial impact. If the defense does not prevail on the *Apprendi* issue, then admission of the prior conviction at trial should render the conviction susceptible on appeal. See, e.g., *United States v.*

Jimenez, 214 F.3d 1095, 1099 (9th Cir. 2000) (reversing conviction for new trial when trial court referred to a previous conviction for a “felony involving a firearm.”)

51. *See, e.g., United States v. Jackson*, 72 F.3d 1370, 130 (9th Cir. 1995) (“[I]mplied, necessary elements, not present in the statutory language, must be included in an indictment.”)

52. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (“We hold that, if properly challenged prior to trial, an indictment’s complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.”); *see also United States v. Prentiss*, 206 F.3d 960, 976 (“These cases demonstrate that the failure to allege an essential element of a crime is a fatal error. While indictments first challenged after trial are reviewed under a more liberal standard . . . that standard nevertheless requires that the necessary facts appear in any form or by fair construction can be found within the terms of the indictment.”) (internal quotations and citations omitted).

53. *See, e.g., Prentiss*, 206 F.3d at 975 (“However, even if challenged after the verdict, the failure of the indictment to allege all the essential elements of an offense is a jurisdictional defect requiring dismissal.”) (internal quotations and citations omitted).

54. *See Jones v. United States*, No. 99-8176, 2000 WL 217939 (U.S. June 29, 2000) (mem.) *reversing and remanding for further consideration in light of Apprendi v. New Jersey, United States v. Jones*, 194 F.3d 1178 (10th Cir. 1999).

55. *Apprendi*, 120 S. Ct. at 2391 (O’Connor, J., dissenting).

56. 18 U.S.C. § 1956(a)(1)(B)(ii).

57. *See* 8 U.S.C. § 1324(a)(1)(B)(ii) (providing for five year statutory maximum sentence).

58. *See* 8 U.S.C. § 1324(a)(1)(B)(I) (providing for a ten year statutory maximum sentence if offense was undertaken for commercial advantage or private financial gain).

59. *But see United States v. Barajas-Montiel*, 185 F.3d 947, 952-53 (9th Cir. 1999) (recognizing *mens rea* requirement for conviction under 8 U.S.C. § 1324(a)(2)(B)). The Ninth Circuit’s decision in *Barajas-Montiel* illustrates that statutory analysis may have already incorporated enhancement facts that would otherwise be subject to an *Apprendi* constitutional attack.

60. E.D. Cal. AFPD Dan Broderick has compiled a valuable list of statutes potentially affected by the *Apprendi* decision. These examples were taken from his summary.

61. *See* 21 U.S.C. § 841(b)(1)(A) (providing in controlled substance statute for greater maximum sentences up to life depending on drug amounts involved and whether death or serious bodily injury

resulted).

62. See 8 U.S.C. § 1324(a)(1)(B)(ii) (providing in alien smuggling statute for greater maximum sentence of ten years if smuggling was for commercial advantage or gain).

63. See 18 U.S.C. § 1341 (providing in mail fraud statute for thirty year maximum sentence if “the violation affects a financial institution,” and a ten year maximum sentence without this enhancement element).

64. See 18 U.S.C. § 2261(b)(3) (providing in interstate domestic violence statute for ten year maximum sentence if “serious bodily injury to the victim results or of the offender uses a dangerous weapon during the offense”), compare with 18 U.S.C. § 2261(b)(4) (providing for a five year maximum sentence in absence of aggravating fact).

65. See 18 U.S.C. § 201(b)(2) (providing in bribery statute for a fine of not more than three times the monetary equivalent of the thing of value).

66. See 18 U.S.C. § 653 (providing in statute prohibiting the misuse of public funds by a disbursing officer for a fine “not more than the amount embezzled.”)

67. See 18 U.S.C. § 893 (providing in statute prohibiting extortionate extensions of credit for a fine of twice the value of the money or property so advanced).

68. See, e.g., 21 U.S.C. § 841(b)(1)(A) (providing in controlled substance statute for a sentence of twenty years to life given sufficient drug amounts and the existence of a prior felony drug offense); but see 21 U.S.C. § 851 (establishing procedure to provide notice of prior convictions by means of an information filed with the court). The argument after *Apprendi* is that the procedure detailed in § 851 is constitutionally deficient.

69. See 8 U.S.C. § 1325 (providing in illegal entry statute for felony conviction if alien defendant had prior illegal entry conviction).

70. Compare 8 U.S.C. § 1326(a)(two year maximum sentence) with 8 U.S.C. § 1326(b)(2) (twenty year maximum sentence).

71. See, e.g., 18 U.S.C. § 1029(c)(1)(B) (providing in state prohibiting fraud with access devices for twenty year maximum sentence after prior conviction for same offense, and ten year maximum sentence without).

72. See, e.g., 18 U.S.C. § 924(c)(1)(C) (providing for twenty-five year additional consecutive sentence if gun is used during a crime of violence and defendant has had a previous conviction under the subsection).

73. See *Jones v. United States*, 120 S. Ct. 2739 (June 29, 2000) (mem.) *overruling United States v. Jones*, 194 F.3d 1178 (10th Cir. 1999). The *Jones* memorandum order should not be confused with an important pre-*Apprendi* decision on sentencing factors versus sentencing elements, [*Nathaniel*] *Jones v. United States*, 119 S. Ct. 1215 (1999). The [*Nathaniel*] *Jones* opinion held that to avoid serious constitutional questions, the federal car jacking statute should be interpreted as “establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.” *Id.* at 1228.

74. See, e.g., *United States v. Sheppard*, No. 00-1218, 2000 WL 988127, at *1 (8th Cir. July 18, 2000) (“Based upon the Supreme Court’s recent decision in *Apprendi v. New Jersey* . . . we conclude that drug quantity must often be treated as an element under § 841 but that any error was harmless in this case because the indictment charged Sheppard with conspiring to distribute more than 500 grams, and the jury made a special finding of that quantity.”) (internal quotation omitted); see also *United States v. Aguayo-Delgado*, No. 99-4098, 2000 WL 988128, *5 (8th Cir. July 18, 2000) (overruling Circuit precedent that drug quantity was a sentencing factor that could be found using a preponderance of the evidence standard); see *United States v. Henderson*, No. Crim..A 2:29-00214-0, 2000 WL 1006054 (S.D.W.Va. July 19, 2000) (“This court concludes that a recent Supreme Court opinion, *Apprendi v. New Jersey* . . . mandates that in cases in which the government seeks increased penalties, the amount of drugs involved in a violation of section 841 is an element of the offense that must be charged in an indictment, submitted to the jury, and proven beyond a reasonable doubt.”); but see *United States v. Kelly*, No. CR 00-0652-R, CR 00-0653-R, 2000 WL 1013972 (S.D. Cal. July 14, 2000) (“After exhaustive deliberation, the Court holds that, while recent Supreme Court decisions have exhibited a trend towards classifying facts that bear on the sentence as elements, that trend has not progressed as far as Defendant urges. Rather, under the current state of the law, § 841(b) properly sets forth sentencing factors to be determined by the trial judge.”)

75. See *Sheppard*, No. 00-1218, 2000 WL 988127, at *2.

76. *Id.* at 2000 WL 988127, *2

77. *Id.* at 2000 WL 988127, *4 n3.

78. See *United States v. Henderson*, No. Crim. A 2:99-00214-0, 2000 WL 1006054 (S.D. W.Va. July 19, 2000) (mem. ord.) Judge Goodwin’s opinion is a good starting place for a clear overview of the issues involved in *Apprendi* and the “elements” line of Supreme Court authority. See, e.g., *id.* at 2000 WL 1006054, *11 (“Casting aside the artificial formalism and looking at the real effect of a drug amount finding, 21 U.S.C. § 841 sets forth separate offenses, rather than one offense with separate penalties.”)

79. See *Henderson*, 2000 WL 1006054, at *13-*14 (discussing U.S.S.G. § 5G1.2(d), that provides “[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.”)

80. *United States v. Aguayo-Delgado*, No. 99-4098, 2000 WL 988128 (8th Cir. July 18, 2000).

81. *Aguayo-Delgado*, 2000 WL 988128, at *2-*3.

82. *Aguayo-Delgado*, 2000 WL 988128, at *7.

83. *Apprendi*, 120 S. Ct. at 2360 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 106 (1986)).

84. *Apprendi*, 120 S. Ct. at 2361 n.13.

85. *Id.* at 2378 (Thomas, Scalia J.J. concurring).

86. The issue of mandatory minimum sentences after *Apprendi* is less clear-cut than suggested by the Eighth Circuit in its pair of post-*Apprendi* decisions. In addition to the language in the *Apprendi* decision itself discussed above, the Supreme Court has also suggested this term that “the length and severity of an added mandatory sentence . . . weighs in favor of treating such offense-related words as referring to an element.” *Castillo v. United States*, 120 S. Ct. 2090, 2096 (2000).

87. See, e.g., U.S.S.G. § 2D1.1 comment. n. 15 (discussing under-pricing of drugs by government agents to encourage high volume of sales as a basis for a downward departure); see also, *United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998) (discussing predisposition to engage in *degree* of illegal activity).

88. See, e.g., *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1505-08 (9th Cir. 1997) (concluding that the district court erred by denying a motion to reveal the identity of a confidential informant when it failed to hold “an *in camera* hearing to determine whether the informant's testimony would be relevant and helpful to the defendants on the question of sentencing entrapment.”).

89. 18 U.S.C. § 924(e)(1) (providing for fifteen year mandatory minimum sentence for defendant who violates § 922(g) with three prior convictions for violent felony or serious drug offenses).

90. See, e.g., 18 U.S.C. § 924(c)(1)(B) (providing for a thirty-year maximum sentence if firearm possessed is a machinegun or destructive device).

91. 18 U.S.C. § 924(h) (providing for a ten year sentence if firearm is transferred with the knowledge that such firearm will be use to commit a crime of violence or drug trafficking crime).

92. *Castillo v. United States*, 120 S. Ct. 2090 (2000).

93. *Id.* at 2092.

94. *Id.* at 2095 (citing *Bailey v. United States*, 516 U.S. at 143).

95. *Id.* at 2096.

96. *See United States v. Carlson*, No. 00-1073, 2000 WL 924593 (8th Cir. July 10, 2000).

97. *Id.*, 2000 WL 924593 at *2 (First, while the Court did state that any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment . . . brandishing does not increase the maximum possible penalty for a § 924(c)(1)(A) violation but only increases the mandatory minimum penalty – a distinction with a difference because the Court has held that a statute which provides for increased mandatory minimum penalties based on the presence of certain facts defines one crime with sentencing enhancements rather than multiple distinct offenses.”)

98. *Compare* 18 U.S.C. § 924(e)(1) (providing for a fifteen-year mandatory minimum sentence for a violation of § 922(g) for defendants with three previous convictions for violent felonies or serious drug offenses), *with* 18 U.S.C. § 924(a)(2) (providing for a ten year maximum sentence for a violation of § 924(g)). *See also Custis v. United States*, 511 U.S. 485, 487 (1994) (“The . . . ACCA raised the penalty for felon in possession of a firearm from a maximum of ten years in prison to a mandatory minimum sentence of 15 years and a maximum of life in prison without parole.”)

99. *See United States v. Brewer*, 853 F.2d 1319, 1322 (6th Cir. 1988); *United States v. Rumney*, 867 F.2d 714 (1st Cir. 1989), *United States v. Lowe*, 860 F.2d 1370 (7th Cir. 1988); *United States v. Pivolos*, 844 F.2d 415, 420 (7th Cir. 1988); *United States v. Rush*, 840 F.2d 571, 577-78 (8th Cir. 1988) (*en banc*); *United States v. Blannon*, 836 F.2d 843, 844-45 (4th Cir. 1988); *United States v. West*, 826 F.2d 909, 911-12 (9th Cir. 1987); *United States v. Jackson*, 824 F.2d 21, 25-26 (D.C. Cir. 1988); *United States v. Hawkins*, 811 F.2d 210, 220 (3rd Cir. 1987); *United States v. Gregg*, 803 F.2d 568, 570 (10th Cir. 1987).

Northern District of California Chief AFPD Geoffrey Hansen and his colleagues have compiled a useful survey of authority on ACCA and Career Offender law. The above list of authority was taken from their ACCA outline.

100. *See Old Chief v. United States*, 519 U.S. 172, 191-92 (1997) (permitting, in light of Fed. R. Evid. 403 concerns, stipulation as to prior felony conviction in felon-in-possession prosecution).

101. *See United States v. Nguyen*, 88 F.3d 812, 818 (9th Cir. 1996) (“We have held that a district court cannot bifurcate a trial to separately consider whether a defendant was a felon and whether he possessed a gun because, “proof of the felony conviction is essential to proof of the offense.”) (citation

omitted).

102. *Apprendi*, 120 S. Ct. at 2362.

103. *Id.* at 2362, 2366.

104. This was the approach the Court adopted in *Custis*, where it precluded challenges in federal court to prior state convictions except for structural attacks, such as lack of counsel.

105. In some pre-*Apprendi* cases, however, the “elements” challenge was framed (and preserved) as an appeal under the [*Nathaniel*] *Jones* decision. See, e.g., *Sheppard*, No. 00-1218, 2000 WL 988127.

106. See 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (providing for twenty year maximum sentences).

107. See *United States v. Jones*, 194 F.3d 1178, 1881 (10th Cir. 1999), *overruled by Jones v. United States*, 120 S. Ct. 2739 (2000) (mem.)

108. See 21 U.S.C. § 841(b)(1)(D) (providing for statutory maximum sentence of five years if under 50 kilograms of marijuana are involved).

109. In the Northern District of California, for example, written plea agreements include a factual basis that details the amount of drugs involved in the transaction or – in the case of illegal reentry convictions – concedes that the defendant had previously been convicted of an aggravated felony. Northern District defenders have refused, however, to enter into written plea agreements in 8 U.S.C. § 1326(b) cases and instead “plead to the sheet.”

As discussed in Question Three above, an appeal after a plea of guilty may be forced to focus on the adequacy of the notice provided in the indictment.

110. *United States v. Kee*, No. 98-CR 778 (DLC), 2000 WL 863119, *11 (S.D. N.Y. June 27, 2000).

111. *Sustache-Rivera v. United States*, No. 99-2128, 2000 WL 1015879 (1st Cir. July 25, 2000).

112. *Apprendi*, 120 S. Ct. at 2391.

113. *United States v. Henderson*, No. 2:99-00214-01 (S.D. W. VA. July, 2000).

114. *Apprendi*, 120 S. Ct. at 2394 (O’Connor, J., dissenting).

115. See, e.g., *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. dismissed, *United States v. Reed*, 120 S. Ct. 1578 (2000) (court erred in failing to apply clear and convincing standard in

weighing evidence that supported a seven level enhancement); *United States v. Mezar de Jesus*, 2000 WL 772188 (9th Cir. June 16, 2000) (uncharged kidnaping cross-reference requires clear and convincing standard); *see also United States v. Townley*, 929 F.2d 365 (8th Cir. 1991) (clear and convincing standard might be appropriate for dramatic enhancements); *United States v. Shonubi*, 103 F.3d 1085 (2nd Cir. 1997) (requiring a more “rigorous” standard).

116. ___F.3d___, 2000 W.L. 1051865 (9th Cir. Aug. 1, 2000).

117. *See United States v. Prentiss*, 206 F.3d 960, 970 (10th Cir. 2000) (collecting cases involving statutes that require proof of an essential jurisdictional element).

118. *See* 21 U.S.C. § 841(b)(1)(A), (B), (C) (providing for a minimum of a twenty year statutory maximum sentence in the absence of greater drug amounts, prior convictions, or injury).

119. One potential danger at entry of a plea of guilt is the reduction for acceptance of responsibility and drug amounts. In an “open” plea, (a plea without a plea agreement), the defendant has traditionally not admitted the amount of drugs involved in the offense – saving that issue for sentencing. Instead, defendants have admitted that “detectible amounts of controlled substances” were involved, a showing that used to be sufficient pre-*Apprendi*.

If, however, drug amounts are elements at the change of plea, then to deny or not admit that element – the amount of drugs – may result in a loss of the guideline reduction for acceptance of responsibility. Moreover, courts may then find an insufficient factual basis for the plea and proceed onwards to trial.

To anticipate and avoid this conundrum, it may be prudent to file a Bill of Particulars and force the government to articulate its view of the elements and identify the facts it intends to prove at trial. Until the dust has settled around *Apprendi* litigation, this tactic has the advantage of shifting the uncertainty over elements onto the government.

120. *See generally* Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); T.S. Eliot, *The Love Song of J. Alfred Prufrock*, (1917).