

Apprendi v. New Jersey: It's Element-al

by Timothy Crooks

On June 26, 2000, the United States Supreme Court handed down its 5-4 decision in *Apprendi v. New Jersey*,¹ a decision which the principal dissent characterized as "a watershed change in constitutional law."² In *Apprendi*, the Court held that "[o]ther 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."³ This holding promises to have profound ramifications for federal criminal defense practice. Some of these ramifications will be explored in this article.

Facts and Holding of Apprendi

In *Apprendi*, the defendant pleaded guilty to, among other charges, two counts of possession of a weapon for an unlawful purpose.⁴ The charges arose out of Apprendi's shooting at the home of a black family living in a white neighborhood, and there was evidence that Apprendi had targeted the defendants because of their race.⁵ Although the possession of a weapon for an unlawful purpose normally carried between five and ten years imprisonment, the prosecutor successfully sought to enhance the maximum

¹ ___ U.S. ___, 120 S.Ct. 2348 (2000).

² *Id.* at 2380 (O'Connor, J., dissenting).

³ *Id.* at 2362-63. Had *Apprendi* been a federal prosecution, the Fifth Amendment right to grand jury indictment would have been implicated as well. However, the Supreme Court long ago held that there is no federal constitutional right to indictment by grand jury in state prosecutions, *see Hurtado v. California*, 110 U.S. 516, 538 (1884), and it has never revisited that decision.

⁴ *See State v. Apprendi*, 159 N.J. 7, 10, 731 A.2d 485, 487 (1999).

⁵ *See id.*, 159 N.J. at 10, 731 A.2d at 486.

sentence to twenty years (with ten years of parole ineligibility) pursuant to N.J. Stat. Ann. § 2C:44-3(e), which allows enhanced sentencing in any case in which “the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.”⁶

In a 5-2 decision, the New Jersey Supreme Court held that New Jersey’s “biased purpose” law was not an element requiring a jury to find such a purpose beyond a reasonable doubt, but rather was merely a sentencing enhancement which could be found by a judge by a preponderance of the evidence.⁷

Justice Stein, joined by Justice Handler, dissented:

In my view, the critical determination required by the statute, that a defendant’s mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof. Moreover, the significantly increased sentencing range triggered by that statute also persuades me that the finding of a purpose to intimidate must be treated as a material element of a defendant’s crimes. Accordingly, I conclude that N.J.S.A. 2C:44-3(e) is unconstitutional because it permits the finding of a purpose to intimidate based on race to be made by a judge under a preponderance-of-the-evidence standard.⁸

On November 29, 1999, the United States Supreme Court granted certiorari,⁹ and on June 26, 2000, the Court, by a 5-4 vote, reversed the judgment of the New Jersey Supreme Court. The opinion for the Court was written by Justice Stevens. After surveying historical practice,¹⁰ and the Court’s prior

⁶ *See id.*, 159 N.J. at 11, 731 A.2d at 487.

⁷ *See id.*, 159 N.J. at 23-27, 731 A.2d at 494-96.

⁸ *See id.*, 159 N.J. at 30, 731 A.2d at 498 (Stein, J., dissenting); *see also id.*, 159 N.J. at 29-54, 731 A.2d at 497-513.

⁹ *Cert. granted*, ____ U.S. ____, 120 S.Ct. 525 (Nov. 29, 1999).

¹⁰ *See Apprendi*, 120 S.Ct. at 2355-59.

case law,¹¹ the Court held that "[o]ther than the fact of a prior conviction^[12], any fact that increases the penalty for a crime beyond the prescribed statutory maximum^[13] must be submitted to a jury, and proved

¹¹ See *id.* at 2359-62.

¹² The Court's exception of prior convictions from the general rule announced in *Apprendi* stems from the Court's decision two years ago in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez-Torres*, the Court considered whether the prior "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326 (the statute proscribing illegal reentry after deportation) constituted mere "sentencing enhancements" of a single illegal reentry offense, or rather whether they described separate offenses with the prior "felony" or "aggravated felony" as an additional offense element. In a 5-4 decision, the Court held that the former reading was the correct one, because neither principles of statutory construction nor constitutional doctrine required the latter reading. See *id.* at 228-47. In making its constitutional ruling, however, the Court relied heavily on traditionality of treating prior convictions as sentencing enhancements. See *id.* at 243-44 & 246-47.

Thus, in deciding *Apprendi*, the Court was forced to adjudicate against the backdrop of its decision in *Almendarez-Torres*. The Court in *Apprendi* suggested 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," but then concluded that "Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset." *Apprendi*, 120 S.Ct. at 2362 (footnote omitted).

Significantly, however, Justice Thomas, the critical fifth vote in *Almendarez-Torres*, appears to have repudiated the position he took in that case. See *Apprendi*, 120 S.Ct. at 2367-80 (Thomas, J., concurring) (expressing view that *Almendarez-Torres* was wrongly decided). Thus, combining Justice Thomas's vote with those of the four dissenters in *Almendarez-Torres*, see *Almendarez-Torres*, 523 U.S. at 248-71 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting), it now appears that five Members of the Court are of the view that *Almendarez-Torres* was incorrectly decided.

Since the Court in *Apprendi* expressly declined to overrule *Almendarez-Torres*, and since the Court has cautioned that courts of appeals "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), lower courts will no doubt consider themselves bound by *Almendarez-Torres* until such time as the Court expressly overrules that decision. Certainly, however, Justice Thomas's change of heart about *Almendarez-Torres* provides a good-faith basis for renewing challenges to recidivism-based sentencing enhancements.

¹³ The Court's careful use of the term "statutory maximum" excludes facts used to increase sentences within the statutory range under determinate sentencing systems like the Federal Sentencing Guidelines, as to which the Court commented:

beyond a reasonable doubt."¹⁴

Ramifications of *Apprendi* for Federal Practice: Trial and Direct Review

Even with the *Almendarez-Torres* "recidivism exception" still in place,¹⁵ the ramifications of *Apprendi* for federal practice are profound. The federal criminal code is chock-full of statutes where the statutory maximum penalty is increased upon proof of a particular fact.¹⁶ And none of these statutes is more on people's minds than 21 U.S.C. § 841, the principal federal statute proscribing drug trafficking. Accordingly, this article will discuss the ramifications of *Apprendi*, and possible litigation strategies, in the context of § 841, although the strategies are generally applicable to any statutory sentence-increasing factor.

The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.

Apprendi, 120 S.Ct. at 2366 n.21, citing *Edwards v. United States*, 523 U.S. 511, 515 (1998). In his concurring opinion, Justice Thomas likewise pretermitted the question, although he dangled the possibility that, because the Guidelines "have the force and effect of laws," they might be subject to treatment like that required for facts raising the statutory maximum sentence. *Apprendi*, 120 S.Ct. at 2380 n.11 (Thomas, J., concurring), quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). The *Apprendi* dissenters, however, direly predicted that the principle announced in *Apprendi* could not logically be limited so as to exclude the Guidelines. *See Apprendi*, 120 S.Ct. at 2391 & 2393-95 (O'Connor, J., dissenting).

¹⁴ *Apprendi*, 120 S.Ct. at 2362-63.

¹⁵ *See* footnote 12, *supra*.

¹⁶ *See, e.g.*, 18 U.S.C. § 844(i) (federal arson statute; statutory minimum and maximum sentences increase upon proof of personal injury resulting or death resulting); 18 U.S.C. § 1341 (federal mail fraud statute; statutory maximum sentence increases from 5 to 30 years "[i]f the violation affects a financial institution"); 18 U.S.C. § 1343 (federal wire fraud statute; same as mail fraud); 21 U.S.C. § 841 (federal drug trafficking statute; statutory minimum and maximum penalties increase upon proof of aggravating drug quantities).

The statutory penalties in § 841 are principally determined by the quantity of the particular controlled substance under consideration.¹⁷ For most of the common controlled substances (except marijuana), there are the following three tiers of penalties: 10 years imprisonment to life for drug amounts at or over the highest threshold amount;¹⁸ 5-40 years imprisonment for drug amounts under the highest threshold amount, but at or over the next highest threshold amount;¹⁹ and 0-20 years imprisonment for amounts falling under the latter threshold amount.²⁰ After *Apprendi*, it is clear that these aggravating drug quantities must be considered essential elements to be charged in the indictment and proved to, and found by, a jury beyond a reasonable doubt. However, taking advantage of *Apprendi* will require different defensive strategies in different situations.

Where an indictment fails to charge an aggravating drug quantity, the principal strategy in both trial and guilty plea cases will be to wait until sentencing and then object to the imposition of any sentence in excess of the simplest version of the offense. Where the client's guilt is well-established, a quick guilty plea to the unadorned indictment may be in order so as to nail down the client's claim to the lowest statutory penalty range, before the prosecutor reconsiders and decides to re-indict including an aggravating drug quantity in the new indictment. Jeopardy will attach at the acceptance of the plea,²¹ and double jeopardy

¹⁷ See 21 U.S.C. § 841(b).

¹⁸ See 21 U.S.C. § 841(b)(1)(A).

¹⁹ See 21 U.S.C. § 841(b)(1)(B).

²⁰ See 21 U.S.C. § 841(b)(1)(C).

²¹ See, e.g., *Fransaw v. Lynaugh*, 810 F.2d 518, 523 & n.9 (5th Cir. 1987) (collecting cases); *United States ex rel. Stevens v. Circuit Ct. of Milwaukee Cty., Wisconsin, Branch VIII*, 675 F.2d 946, 948 (7th Cir. 1982). But see *Bally v. Kemna*, 65 F.3d 104, 108-09 (8th Cir. 1995) (questioning rule and holding that accepted plea on lesser included DWI charge did not create double jeopardy bar to prosecution for vehicular assault and involuntary manslaughter); *United States v.*

will preclude the prosecutor from seeking another indictment for the greater offenses, of which the plea offense is a lesser included offense. For the same reason, if the client does wish to go to trial, you should avoid tipping your hand on this issue at least until jeopardy has attached.²²

Another related problem which may arise at trial is that the prosecutor may belatedly realize the problem; and then will urge the trial court to instruct the jury to find the sentence-increasing facts beyond a reasonable doubt. Such a tactic should be vigorously protested as an impermissible constructive amendment of the indictment.²³

Where the indictment **does** charge an aggravating drug quantity, the choices are more difficult. First, the plea-or-trial decision will have to take into account the government's ability to prove the charged drug quantity. Second, if the case does go to trial, counsel and client must make the difficult strategic

Combs, 634 F.2d 1295, 1298 (10th Cir. 1980) (holding that plea to lesser included offense did not bar trial on greater offense where defendant had not been sentenced, and judgment had not been entered, on the lesser included offense; “[u]ntil entry of judgment and sentencing on the guilty plea, defendant had not been formally convicted”). *See also Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (double jeopardy did not bar prosecution on remaining counts of an indictment after a trial court, over the state’s objection, accepted a defendant’s pleas to lesser included offenses); *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. 1987) (jeopardy did not attach when district court accepted guilty plea to the lesser included offense and then, without objection by defendant, vacated plea without having imposed sentence and entered judgment); *United States v. Sanchez*, 609 F.2d 761, 762-63 (5th Cir. 1980) (jeopardy did not attach upon conditional acceptance of guilty plea/plea agreement, pending preparation and review of presentence report to determine whether plea agreement was acceptable to the court).

²² In a jury trial, jeopardy attaches when the jury is sworn. *See Crist v. Bretz*, 437 U.S. 28, 38 (1978). In a bench trial, jeopardy attaches when the judge begins to hear evidence. *See Serfass v. United States*, 420 U.S. 377, 388 (1975).

²³ *See, e.g., United States v. Fletcher*, 121 F.3d 187, 191-92 (5th Cir. 1997). *See generally Stirone v. United States*, 361 U.S. 212, 215 (1960) (“after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself”); *see also id.* at 217 (“a court cannot permit a defendant to be tried on charges that are not made in the indictment against him”).

decision whether to request a lesser-included-offense instruction (or whether to oppose the government's request for such an instruction).

At trial, the government should be put to its proof on the issue of drug quantity. Government agents' speculations about drug quantity can and should be vigorously cross-examined. Furthermore, to the extent that such drug quantity estimates depend upon the agents' vaunted "expertise," counsel may wish to consider moving for a pretrial hearing on the admissibility of such "expert" testimony under *Daubert v. Merrell Dow Pharmaceuticals*²⁴ and *Kumho Tire v. Carmichael*.²⁵ Last, but not least, where the government has made its case on the drug trafficking but not on the aggravating drug amount, counsel should move for a judgment of acquittal on the aggravated drug offenses and ask that the case be submitted to the jury only on the non aggravated drug offense.

For cases pending on direct review -- including both direct appeal and petition for writ of certiorari from the direct appeal -- *Apprendi* is fully retroactive.²⁶ Failure to object below will subject the *Apprendi* claim to plain error review.²⁷ *Apprendi* error will probably satisfy the first two prongs of the *Olano* plain error test -- that there be (1) "error" (deviation from a legal rule)²⁸ which is (2) "plain," meaning clear or obvious²⁹ -- since "where the law at the time of trial was settled and clearly contrary to the law at the time

²⁴ 509 U.S. 579 (1993).

²⁵ 526 U.S. 137 (1999).

²⁶ See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

²⁷ See *FED. R. CRIM. P.* 52(b); see also *United States v. Olano*, 507 U.S. 725, 732-35 (1993).

²⁸ See *Olano*, 507 U.S. at 732-33.

²⁹ See *id.* at 734.

of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration.¹⁶⁰ In order to get relief under the plain error doctrine, however, a defendant must also meet the third and fourth prongs of the *Olano* plain error test, *i.e.*, (3) the defendant must show that his substantial rights were affected, which usually (though perhaps not always) will require the defendant to show prejudice³¹; and (4) the court of appeals must be convinced that it should exercise its discretion to correct the plain forfeited error because "the error seriously affects the fairness, integrity or public reputation of judicial proceedings."¹⁶²

Raising *Apprendi* claims for the first time on collateral review is much more problematic. That subject will be addressed in a future article.

Conclusion

Apprendi represents one of the most exciting opportunities for criminal defense practitioners in many years. Countless present and past defendants stand to benefit from this holding. Hopefully your clients (and ex-clients) will be among them!

³⁰ *Johnson v. United States*, 520 U.S. 461, 468 (1997).

³¹ *See Olano*, 507 U.S. at 734-35.

³² *Id.* at 736 (internal quotation marks, brackets, and citation omitted); *see also id.* at 735-37.