COMPRENDEZ *APPRENDI*?

John Kenneth Zwerling*

How can you get a twelve year sentence on a charge that carries a statutory maximum of ten years? Prior to the Supreme Court's 5-4 decision in June 2000, *Apprendi v. New Jersey*[1], one's sentence could be "enhanced" beyond a statutory maximum for numerous reasons. For example, sentence enhancements could be applied if a firearm was used in the commission of a crime or, as in *Apprendi*, the crime was determined to be hate-motivated. These enhancement factors only needed to be proved by a preponderance of the evidence to a sentencing judge. However, the Supreme Court invalidated these enhancements, holding that the Constitution requires that "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."[2]

The facts of the case are as follows. The defendant fired a gun into the home of a neighbor. He pled guilty to three counts, the most serious being the possession of a firearm for an unlawful purpose. Under the normal New Jersey law, the potential sentencing range is five to ten years. The sentencing judge, however, at a contested hearing, found by a preponderance of the evidence that the crime was motivated by "racial bias" and applied the New Jersey statute that increased the sentence for racially motivated crimes, sentencing the defendant to twelve years of imprisonment. The sentence was upheld by a divided New Jersey Supreme Court. The United States Supreme Court overturned the sentence.

I. SENTENCING ENHANCEMENT V. ELEMENTS OF THE OFFENSE

The Constitution requires that "elements of the offense" are to be decided by juries beyond a reasonable doubt, but "sentencing enhancements" are to be determined by a judge by the preponderance of the evidence. The Court's decision in *Apprendi*, however, is a stark departure from its previous jurisprudence on this issue. The Supreme Court in *Apprendi* specifically did not overrule *McMillan v. Pennsylvania*[3], which held that facts which increase a statutory minimum

* Attorney, Zwerling & Kemler, P.C., Alexandria, Virginia.

[1] 120 S.Ct. 2348 (2000).

[2] *Id*. at

[3] 477 U.S. 79 (1986). Interestingly, this case was authored by Chief Justice Rehnquist, a dissenter in *Apprendi*, and joined by Justice O'Connor, another *Apprendi* dissenter. Also

penalty, such as defendant's possession of a firearm, are sentencing enhancements to be determined by a judge. *McMillan*, in turn, rested on *Patterson v. New York*[4], which rejected the claim that whenever a state links the "severity of punishment" to the "presence or absence of an identified fact," the state must then prove that fact beyond a reasonable doubt.

In *Almendarez-Torres v. United States*[5], the Supreme Court held in a 5-4 decision that an indictment did not have to charge that the defendant's initial deportation was after a conviction for the commission of an "aggravated felony" in order for the "enhancement" from a two to a twenty-year maximum to apply. "In sum, we believe that Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense."[6] The majority opinion in *Almendarez-Torres* was authored by Justice Breyer and joined by the Chief Justice and Justices O'Connor, Kennedy, and Thomas. Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented.

In a 1999 car-jacking case, *United States v. (Nathaniel) Jones*[7], the Court started to change course, holding that 18 U.S.C. § 2119's three different potential maximum sentences, (a base maximum of fifteen years, a twenty-five year maximum if serious bodily injury was inflicted, and a life maximum if a death results) set forth three separate offenses with different elements. The Court based its decision on the Due Process Clause; because the government had charged the basic fifteen-year maximum language, fifteen years was the maximum available sentence. The majority opinion was authored by Justice Souter and joined by Justices Stevens, Scalia, Thomas, and Ginsburg. The dissent was filed by the same four Justices that would comprise the *Apprendi* dissent—Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer. Justice Thomas changed his vote and thereby changed the outcome. *Jones* was followed by *Castillo v. United States*[8], unanimously holding that the word "machine gun" in 18 U.S.C. § 924(c)(1) states an element of a separate, aggravated crime. Whether a machine gun was used in the commission of the crime goes to the jury as an element, it is not for the judge. The stage was thus set for *Apprendi*.

The *Apprendi* decision was 5-4 with some bitter dissents. Justice Stevens wrote the opinion for the Court, joined by Justices Scalia, Souter,

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notable is that Justice Stevens, the author of *Apprendi*, dissented from the Court's opinion in McMillan.

[4] 432 U.S. 197 (1977).

[5] 523 U.S. 224 (1998).

[6] *Id*. at

[7] 526 U.S. 227 (1999).

[8] 530 U.S. ____ (2000).

Thomas, and Ginsburg. Justices Scalia and Thomas added concurring opinions. Justice O'Connor authored the major, and most ardent, dissent and was joined by the Chief Justice and Justices Kennedy and Breyer; Justice Breyer also added a separate dissent. The vote counting in *Apprendi* is significant because one must remember that Justices Scalia, Stevens, Souter, and Ginsburg dissented from the Court's holding in *Almendarez-Torres*. Justice Thomas's changed vote from *Almandarez-Torres* carried the *Apprendi* majority.

II. A MEA CULPA BY CLARENCE THOMAS

In the words of Justice Thomas: "I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a *broader rule* than the Court adopts."[9]

Implicitly in his opinion, Justice Thomas seems to be saying the following as well. "The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough (i.e. that they should be overruled), but a few points merit special mention.

"First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment.

"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 the offender's sentence. For the reasons 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. 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.

"Third, I think it clear that the common law rule would cover the *McMillan* situation of a mandatory minimum sentence. His 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."

The Court is now 5-4 in favor of getting rid of "sentencing enhancements"[10] as judicially decided. Justice Thomas, the swing vote,

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[9] *Apprendi*, 120 S.Ct. at ____ (Thomas, J., concurring)(emphasis and parenthetical added).

says mandatory minimums, recidivism, and any other fact that boosts a sentence is an element. He concludes, "Today's decision, far from being a sharp break with the past, marks nothing more than a return to the status quo ante – the status quo that reflected the original meaning of the Fifth and Sixth Amendments." Justice O'Connor *strongly disagrees* with that assessment, arguing that:

> [o]ur Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually dispositive."

III. WHERE DO WE GO FROM HERE?

Apprendi can be read in one of three ways: the narrow holding, the broad holding, and the middle approach.

A. The Narrow Holding

The narrow reading would be to take *Apprendi* at face value. The maximum sentence for any given offense would be the lowest "basic offense" maximum set forth in the indictment. Anything, with the exception of prior convictions, which might increase that potential maximum sentence, would have to be both pled and proven as an element of the offense.[11] In a federal district court case, *United States v. Henderson*[12], the court held that Apprendi's holding, in conjunction with the Court's earlier decision in Jones, leads to the inescapable conclusion that the drug amount in a section 841[13] offense is a fact that increases the penalty for a crime beyond the prescribed statutory maximum.[14] The court went on to hold that though grouped counts are generally to be served concurrently, it would apply U.S.S.G. 5G.2(d) and run the sentences consecutively to the extent needed to obtain the Guideline sentence. The

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[10] By "sentencing enhancement," I mean to limit the definition to those enhancements at issue in *Apprendi*—enhancements that increase a sentence beyond the statutorily defined maximum.

[11] *See* United States v. Aguayo-Delgado, No. 99-4098, 2000 WL 988128 (8th Cir. July 18, 2000) (applying the narrow view of Apprendi to the facts of that case).

[12] 2000 U.S. Dist. LEXIS 10369 (D. W.Va. 2000) (holding that 20 years was the maximum sentence allowed on any cocaine distribution conviction if the amount of the cocaine was not charged in the indictment).

[13] Referring to 18 U.S.C. § 841, the primary federal criminal drug law.

[14] *Henderson*, 2000 U.S. Dist. Lexis at *

final sentence was, therefore, not changed because of the multiple counts of conviction.

B. The Middle Holding

The middle reading would do two things: expand the category of what must be pled and proven to include facts that increase the minimum mandatory sentences because that increases the lowest sentence that a court has the power to impose[15], and include prior convictions[16].

C. The Broad Approach

The broad reading of *Apprendi* is that any sentence modifier becomes an element of the offense. From this vantage point, all of the Guideline adjustments could be viewed as elements that the grand jury must allege and the petit jury must decide beyond a reasonable doubt.

Thus far, the only court that has applied this analysis is Judge Nickerson in the Eastern District of New York. On February 1, 2001, he issued a decision in *United States v. Glen Norris*[17]. Though he recognized that several circuit courts have specifically refused to apply *Apprendi* to the determination of base offense, he found that *Apprendi* must be applied.

> It is true that various Circuit Courts have said that Apprendi does not apply where non-jury factual findings increased the range of punishment provided the sentence imposed does not exceed the maximum that Congress fixed by statute for the crime. See, e.g., United States v. Scheele, 231 F.3d 492, 497 n.2 (9th Cir. 2000); United States v. Meschak, 225 F.3d 556, 576 (5th Cir. 2000); United States v. Williams, 235 F.3d 858 (3d Cir. 2000); United States v. Nealy, 232 F.3d 825, 829 n.3 (11th Cir. 2000); United States v. Doggett, 230 F.3d 160, 165 (5th Cir. 2000); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000). In this court's opinion these decisions take an improperly

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[15] *See* United States v. Sheppard, No. 00-1218, 2000 WL 988127 (8th Cir. July 18, 2000) (holding that drug indictment alleged both the type and quantity of drugs even though jury was not instructed that quantity was an element and was only given a special interrogatory as to quantity, eventually finding that the defendant was responsible for more than 500 grams of methamphetamine). The defendant in that case was sentence within the range allowed by 18 U.S.C. § 841(b)(1)(C).

[16] Remember Justice Thomas's dissent and "changed vote" from *Almendarez-Torres* advocating that prior convictions should become elements of the offense as well.

[17] 2001 U.S. Dist. LEXIS 872.

> narrow view of the functions that Congress has entrusted to the Sentencing Commission. The Commission's function is not to guide or give advice to a Federal Court; it is to promulgate provisions, that is, laws that, unless they are unconstitutional, the federal courts are bound by law to follow on pain of being reversed. 18 U.S.C. § 3742.[18]

IV. WHAT WERE YOU SMOKING, MY FRENDI?

The application of *Apprendi* to drug cases is creating quite a stir in the stir. The Eleventh Circuit, for example, recently granted a motion to file a supplemental brief in *United States v. Ratcliff*[19] in order to consider an *Apprendi* issue that was neither raised at trial nor in the initial appeal briefs. And that is barely scratching the surface; every week, the United States Supreme Court remands more cases, involving drug crimes as well as many others, back to the various circuit courts for reconsideration in light of *Apprendi*.

The primary drug statute, 21 U.S.C. § 841(b)(1) has four subsections:

> **Subsection A**: sets a *ten-year minimum mandatory sentence with a maximum of life*, unless there is a death or serious bodily injury, or a prior felony drug conviction, in which case the minimum mandatory becomes twenty years with a maximum of life.
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> **Subsection B**: sets a *five-year minimum mandatory sentence with a maximum of forty years*, unless there is a death or serious bodily injury, in which case the minimum sentence becomes twenty years and the maximum is life, or if there is a prior felony drug conviction the minimum becomes ten years and maximum becomes life.
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> **Subsection C**: sets the *maximum sentence at twenty years*, unless death or serious bodily injury results, in which case there is a twenty year minimum mandatory sentence and a maximum sentence of life; and if there is a prior drug felony conviction, then the maximum sentence is thirty years.

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[18] *Id.* at *

[19] U.S.C.A. No. 99-4190.

> **Subsection D**: *in cannabis cases, the maximum is five years*. 21 U.S.C. § 841(b)(4) sets a maximum sentence of twelve months for distribution of a "small amount of marijuana for no remuneration" not withstanding paragraph (1)(D).

After *Apprendi*, an indictment charging a violation of section 841, for any schedule 1 or 2 drug[20] (other than marijuana) that does not set forth any greater specificity, potentially carries a maximum sentence under subsection (b)(1)(C) of twenty years with no minimum mandatory. In the case of marijuana, the maximum sentence would be five years or possibly twelve months. Prior to *Apprendi*, the circuit courts consistently held that the sentencing schemes set out in section 841 were "sentencing enhancements" and not elements of the offense. Following its decision in *Apprendi*, however, the Supreme Court has vacated and remanded numerous cases to the circuit courts for "further consideration in light of *Apprendi*."[21]

The indictment in *(Carless) Jones* specifically alleged section 841(b)(1)(C). At sentencing the court found that Jones actually possessed 165.5 grams of cocaine base and he should be sentenced under section 841(b)(1)(A), which provides for a maximum penalty of life imprisonment. The court then sentenced Jones to two concurrent terms of thirty years each. On appeal, Jones argued that the maximum applicable sentence was the twenty-year maximum allowed under (b)(1)(C). The Supreme Court vacated this judgment and remanded it for reconsideration, and in doing so, the Supreme Court has foreshadowed that the *Apprendi* case will make a large difference in drug prosecutions. As the Eighth Circuit has recently held:

> [I]f the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to the jury beyond a reasonable doubt. To allow otherwise would be "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."[22]

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[20] **Controlled substances are placed in various schedules based upon their perceived danger and medicinal acceptance. See Title 21 § 812**

[21] (Carless) Jones v. United States, 120 S.Ct. 2739 (2000).

[22] United States v. Aguayo-Delgado, No. 99-4098, 2000 WL 988128 (8th Cir. July 18, 2000) (quoting *Apprendi*).

V. CASES ON DIRECT APPEAL IN WHICH THE *APPRENDI* ISSUE WAS NOT RAISED IN THE TRIAL COURT

A. Plain Error Test: Is the Plain Error Analysis Different in Sentencing Cases?

The government as they did in *Ratcliff and other cases* will concede that Apprendi applies to drug cases, but that the circuit courts must use a "plain error" analysis. The government will further agree that the failure to prove to the jury what the type and weight of the drug is beyond a reasonable doubt was error and that the error was plain. They will seek to deny the defendant relief by claiming that he has not satisfied the third and fourth prongs of the plain error test, which are the unfairness and prejudice prongs. That is, that the amount and type of drugs were agreed to at trial or cannot be seriously questioned. Therefore, they will argue that remanding the case to the lower court would either be of no help to the defendant or it would not be unfair to the defendant and that the court should exercise its discretion by declining to remand the case..

The manner of applying the unfairness and prejudice prongs of the plain error test appears to be applied differently in the context of the sentencing cases. This distinction between sentencing challenges and challenges to the underlying conviction was noted in *United States v. Von Meschack*[23]. There, the Fifth Circuit observed that "in sentencing cases we have generally determined prejudice by considering whether the alleged error resulted in an increased sentence for the defendant."[24] In that case, because the defendant received a longer concurrent sentence for his conspiracy conviction than the sentence he sought to have vacated under *Apprendi*, he could not demonstrate either prejudice or that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[25] The defendant in *Von Meschack* could not show that he would serve a lesser sentence even if the court were inclined to vacate his sentence and, therefore, there was no unfairness in the sentencing procedure.

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[23] 2000 U.S. App. LEXIS 21955 (5th Cir. 2000).
[24] *Id.* at *19.
[25] *Id.* (quoting United States v. Franks, 46 F.3d 402, 404 (5th Cir. 1995) (quoting United States v. Olano, 507 U.S. 725, 736 (1993))).

The Ninth Circuit recently decided *United States v. Nordby*[26]. There the defendant was charged with a conspiracy to possess with intent to distribute and to manufacture marijuana. The indictment in *Nordby* alleged that the defendant manufactured and possessed with the intent to distribute 2,308 marijuana plants from August 1993 to the end of September 1993. The question of the amount of marijuana was not submitted to the jury. At his sentencing. although the defendant admitted that he had grown over 2,000 marijuana plants in an earlier conspiracy, he denied growing the amount of marijuana the government had charged in the indictment. The defendant further admitted that he had conspired with two individuals in 1992 to grow marijuana, but that their relationship had ended by 1993. He also admitted to conspiring with another individual in 1993, but claimed that conspiracy ended in June 1993. As for the marijuana found growing on his property and charged in the indictment, the defendant claimed that "unknown 'guerilla growers'" had planted and tended the marijuana while he had been either out of the country or in another state.[27] Finding, by a preponderance of the evidence, that the defendant was responsible for at least 1,000 marijuana plants, the court sentenced the defendant to the ten-year minimum sentence.

In looking at whether the trial court's failure to submit the question of drug quantity to the jury affected the defendant's "substantial rights," the Ninth Circuit considered two possible approaches.[28] The more simple approach simply looks at the fact that the jury convicted the defendant of violating section 841(a)(1), which specifies no quantity of drugs. Since the court's sentence imposed five years more than the sentence authorized by the verdict, the defendant's substantial rights were affected.[29]

The "more stringent approach treat[s] drug quantity as the equivalent of an element of the offense on which the jury was not instructed."[30] Under this approach, a harmless error analysis would apply. Relying on *Neder v. United States*[31], the court explained that "[i]f, . . ., 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding,' the error could not be harmless."[32] Similar to appellant's defense at trial, the defendant in *Nordby*, while not contesting that over 2,000 marijuana plants were found on his property, asserted that he was not responsible and he was not involved in a conspiracy to

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[26] 2000 U.S. App. LEXIS 22776 (9th Cir. 2000)
[27] *Id.* at *4.
[28] *Id.* at *15-16.
[29] *Id.* at *16 (citing United States v. Anderson, 201 F.3d 1145, 1152 (9th Cir. 2000) ("a longer sentence undoubtedly affects substantial rights)).
[30] *Id.*
[31] 527 U.S. at 19.
[32] *Nordby*, 2000 U.S. App. LEXIS 22776, at *16

manufacture marijuana at the time charged in the indictment.[33] Finding that the defendant met the fourth prong of the plain error test, the Ninth Circuit stated that the "rights to jury trial and a determination of guilt beyond a reasonable doubt are the bedrock of our constitutional system of justice. Moreover, fairness is undermined when a court's error 'impose[s] a longer sentence than might have been imposed had the court not plainly erred.'"[34] The panel that decided *Rogers* in the Eleventh Circuit cited *Nordby* approvingly for the proposition that Apprendi raised a constitutional principle, that is, a defendant cannot be "sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge rather than the jury trial."[35]

The government will likely argue as they did in *Ratcliff* that the "[a]ppellant cannot meet the fourth prong of the plain error test if he received a fair sentencing proceeding under the prevailing practice at the time."[36] This is not the test under *Apprendi* or the plain error cases. The jury must be called upon to decide the weight and type of the drug before a defendant can be subjected to a higher maximum penalty.

B. Must Be Charged in the Indictment

If the indictment fails to set forth an element of the offense, plain error is no longer a consideration. The question in drug cases is whether the type and weight of the drugs is an element of the offense or only its functional equivalent. A recent case in the Second Circuit, *United States v. Hoang Van Tran*[37], goes through this analysis:

> [T]o comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. . .
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> An indictment also "limits the defendant's jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

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[33] *Id.* at *17-18.
[34] *Id.* (quoting United States v. Castillo-Casiano, 198 F.3d 787, 792 (9th Cir. 1999)).
[35] Rogers v. _____, _____ , at *29-30 (11th Cir. ____) **(need a better cite)**
[36] (Gov't Br. at 9). Ratcliff
[37] 234 F.3d 798 (2d Cir.)

[P]lain error review is inappropriate where the defect in the indictment is jurisdictional. Where an element fails to allege each material element of the offense, it fails to charge that offense. "A 'failure of the indictment to charge an offense may be treated as a jurisdictional' defect, . . . and an appellate court must notice such a flaw even if the issue was raised neither by the district court nor on appeal."

The notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established. In *Ex Parte Bain*, the Supreme Court first stated its "opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged." For this proposition, "the *Bain* case . . . has never been disapproved . . . ." Consequently, it has long been a settled rule of law in the United States Courts that the Declaration of Article 5 of the Amendments to the Constitution that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is jurisdictional and no court of the United States has authority to try a prisoner without indictment ot presentment in such cases . . .

The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him . . . . The indictment limits the defendant's jeopardy to offenses charged by the grand jury. In sum, unless the right to be charged by an indictment containing all of the material elements of an offense is voluntarily, intelligently, and knowingly waived by the defendant, the indictment as returned limits the scope of the district court's jurisdiction to the offense charged in the indictment. If the district court acts beyond its jurisdiction by trying, accepting a guilty plea from, convicting, or sentencing a defendant for an offense not charged in the indictment, this Court must notice such error and act accordingly to correct it, regardless of whether the defendant has raised the issue.

VI. 28 USC § 2255, HAVE THE FLOODGATES OPENED?

A. First Circuit Says No

In a §2255 petition, the First Circuit concedes that, after Apprendi, Jones may be a case of constitutional stature that merits a second habeas petition. This would be an important development, because Jones had previously been considered a case involving statutory interpretation, which would be barred by AEDPA from successive habeas attack. Because, however, the Supreme Court has not made Jones retroactive to cases on collateral review, the petitioner in *Sustache-Rivera v. United States*[38] could not bring a second or successive petition.

The Supreme Court's *Apprendi* decision involved a direct appeal from a state conviction and the Court held that the Constitution requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. The Court said that its constitutional holding was foreshadowed by *Jones*, which construed a federal statute.[39] Significantly for our purposes, the Court also said, referring to the *Jones* decision:

> We there 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. The Fourteenth Amendment commands the same answer in this case involving a state statute.[40]

As is evident from Justice O'Connor's dissent, the meaning and scope of the *Jones*/*Apprendi* rule is still unclear. Because the *Apprendi* majority referred to the *Jones* rule as an example of its new constitutional rule, my firm does the same.

Jurists of reason could find that the *Jones* claim is, post-*Apprendi*, based on a new rule of constitutional law. However, it is clear that the Supreme Court has not made the rule retroactive to cases on collateral

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[38] No. 99-2128, 2000 WL 1015879 (1st Cir. July 25, 2000).
[39] *Apprendi*, 120 S.Ct. at ____.
[40] *Id.* at _____.

review. As the Fourth Circuit has noted, "[A] new rule of constitutional law has been 'made retroactive to cases on collateral review by the Supreme Court' within the meaning of § 2255 [the habeas provision] only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding."[41] The Supreme Court may yet hold that the *Jones*/*Apprendi* rule is to be retroactively applied to cases on collateral review. (This likely depends upon whether the Court considers the *Jones*/*Apprendi* rule procedural or substantive). Until that time, however, any second or successive petition seeking retroactive application of *Jones* must be considered premature.

B. The Seventh Circuit Says No As Well

On September 7, 2000, the Seventh Circuit held that Apprendi did not yet have retroactive application to cases no longer on direct appeal. The court noted that retroactive application must be declared by the Supreme Court itself.[42] The court then pleaded with prisoners to "hold their horses" and stop wasting everyone's time unless and until the Supreme Court held so.[43]

C. A Different Take in Minnesota

In *United States v. Murphy*[44], Judge Doty agreed that a new rule of constitutional law, such as the doctrine announced in *Apprendi*, cannot usually be raised in a section 2255 motion, there are exceptions and one of them applies to *Apprendi* issues.[45] The court argued that the *Teague* bar does not apply when the new rule is a "watershed rule of criminal procedure" which "alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[46]

[Conclusion]

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[41] In re Vial, 115 F.3d 1192, 1197 (4th Cir. 1997) (quoting 28 U.S.C. § 2255).
[42] Bennett v. United States, 119 F.3d 470 (7th Cir. 1997).
[43] Talbott v. Indiana, No. 00-3080 (7th Cir. 2000).
[44] 2000 WL 1140782 (D.Minn August 7, 2000) (Doty, J.).
[45] *See* Teague v. Lane, 480 U.S. 288 (1989).
[46] *Murphy*