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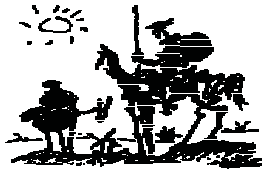

Newsletter for CJA Panel Attorneys
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The Apprendi Special

Summary of Arguments in Drug Cases

CARLOS A. WILLIAMS
EXECUTIVE DIRECTOR

The rampart has been breached! To the consternation and fear of some, the Supreme Court in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) announced a "watershed change in constitutional law. . . ."[1] which may reduce some of the longest sentences imposed as a result of the war on drugs and may render unconstitutional 21 U.S.C. 841, the drug statute under which many defendants have been convicted. This fissure in constitutional law was announced in the shadow of Dickerson v. United States, 120 S.Ct. 2326 (2000)[2] and without any of Dickerson's media fanfare. Apprendi's significance and potential impact escaped many criminal practitioners, save those who unsuccessfully waged the "elements vs. enhancement" challenges and those familiar with the litigation in Almendares-Torres v. United States , 118 S.Ct. 1219 (1998) and later Jones v. United States,119 S.Ct. 1215 (1999). Apprendi 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." That holding applies to a host of federal statutes wherein a judge is authorized to increase the statutory maximum penalty upon finding a particular fact using a preponderance of the evidence standard. The opinion effectively imposes upon defense counsel a duty to raise new

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K. LYN HILLMAN CAMPBELL
ASSISTANT FEDERAL DEFENDER

Who has an Apprendi claim?

If a person was convicted under any statute where the maximum statutory punishment increased based upon certain facts not proven to the jury (i.e., convicted under 21 U.S.C. §841 and maximum increased from 20 years to life based upon quantity at sentencing), then the person has a claim under Apprendi that the statute used to convict them is unconstitutional. If a person's sentence exceeds the least statutory maximum available under the statute (i.e., convicted under 21 U.S.C. §841 and convicted to 241 months where 240 months is the least statutory maximum available), the person has an argument for a new sentencing. The latter argument applies to those who pleaded guilty as well as to those who went

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arguments on behalf of current and former clients. This article will attempt to summarize some of the Apprendi arguments and responses.

I

Apprendi challenges will necessarily vary depending on the circumstances and statute(s) involved in a particular case. The broadest challenge made to date is that Apprendi renders the drug statutes underlying most convictions under § 841, unconstitutional on its face. This argument rests on the unanimous findings of all courts considering the issue that the provisions of section 841(b) are sentencing factors.[3] It is argued that the statute is unconstitutional because, under 841(b), "a jury [does not] determine those facts that determine the maximum sentence the law allows." Id. at *17 (Scalia, J., concurring).

Following Jones v. United States, 526 U.S. 227 (1999) defendants began to challenge the validity of the Appellate Courts' unanimous position that the 841(b) sections were sentencing factors because of language the Court included in a footnote: "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." Jones, 526 U.S. at 243 n.6. However, every challenge failed, as courts unanimously maintained their holdings that the 841(b) sections were sentencing factors and further declined to reconsider their holdings that the statutes were nonetheless constitutional.[4] In United States v. Hester, 199F.3d 1287 (11th Cir. 2000), the Court rejected the defendant's Jones claim. The Hester panel reasoned:

> ...If the [Supreme] Court meant to announce a rule that any factor which increases the maximum penalty counts is an element, then it would render irrelevant the detailed analysis of the statute and its legislative history discussed in the first part of the opinion. In other words, if any factor that increases the maximum penalty amounts to an element of the crime, the Court need not bother with determining whether or not Congress considered it an element. It seems that the Court proceeded with its analysis only because it first found Congress' intent ambiguous. See id. at 1222. In addition, a broad rule would have sweeping implications for factors that Congress has traditionally considered sentencing considerations not elements of the crime. (emphasis added).

Hester, at 1292.

The Eleventh Circuit's concerns could not have been more prescient. As we now know, the Supreme Court meant to announce a broad rule which renders unconstitutional "factors Congress traditionally considered sentencing considerations not elements of the crime." Of significance, Hester's rejection of the rule foreshadowed in Jones and announced in Apprendi has been overruled. United States v. Rogers, ___F.3d ____ 2000 WL 1451907 (11th Cir. September 29, 2000). That case did not involve a claim that § 841 was unconstitutional on its face.

Consistent with the argument that § 841 is facially unconstitutional, defendants next argue that the statute cannot be upheld under the doctrine of severability. A two-part inquiry governs the determination of whether unconstitutional provisions are severable. The first question is "whether the Act which remains after the unconstitutional provisions are excised is 'fully operative'... [or] whether the unconstitutional provisions are 'functionally independent' from the remainder of the Act." Board of Natural Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993). "Second, if the Act, absent the unconstitutional provisions, is fully operative as law, [the Court] then inquire[s] whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions." Id.

The second prong of the inquiry is likely satisfied, as Congress clearly desired to proscribe the conduct prohibited by section 841. The first prong of the severability inquiry, however, cannot be satisfied because section 841(a) is not "fully operative" or "functionally independent" from section 841(b). Without section 841(b), section 841(a) does not set forth any penalties whatsoever. In essence, without section 841(b), section 841(a) constitutes crimes without a punishment. Indeed, without section 841(b), it would not even be clear whether section 841(a) was a felony or misdemeanor. The statute would be inoperative and therefore unconstitutional.

If a statute is facially invalid, it amounts to a jurisdictional defect. see Exparte Yarbrough, 110 U.S. 651, 654 (1884)("If the law which describes the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoner must be discharged."); United States v. Frandsen, 212 F.3d 1231 (11th Cir. 2000) (If defendant's facial challenge to a regulation under which he or she was convicted is success-

ful, the remedy is the striking down of the regulation and the reversal of the conviction.) In addition, "[a] litigant's failure to clear a jurisdictional hurdle can never be harmless or waived by a court." See Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n. 3,108 S.Ct. 2405, 2409 n.3 (1988).

The facial challenge to the constitutionality of § 841is a powerful argument which takes Apprendi and the litigation preceding it to their logical conclusion. Many doubt that the courts will take this step because it would invalidate a staggering number of convictions. Perhaps, but that result should not determine either the court's decision or defense counsel's decision to make the claim.

II

Defendants raising Apprendi claims next make the alternative argument that the criminal process as applied to their individual cases deprives them of rights secured under the Fifth and Sixth Amendment to the United States Constitution by the use of drug type and quantity to increase the statutory maximum penalty where the jury made no specific finding as to the type and quantity of drug involved in the offense. They allege that their conviction and/or sentence was invalid under Apprendi where the government failed to (1) charge the drug type and/or quantity in the indictment, (2) failed to prove drug quantity and/or type to the jury beyond a reasonable doubt and (3) failed to allege and/or prove beyond a reasonable doubt the requisite mens rea for that element of the offense.

Of necessity, the arguments change with the factual circumstances presented. In many instances the indictment includes the type and quantity of drugs at issue and it may include the appropriate mens rea for that element. However, consistent with the pre Apprendi state of the law, the courts instructed juries that the government need not prove the actual amounts alleged in the indictment, that the government need only prove that a measurable amount was part of the alleged criminal acts alleged. See United States v. Murphy, 109 F. Supp. 2d 1059, (D. Minn. Aug. 7, 2000) (Where jury instruction effectively foreclosed any meaningful jury deliberation on the issue of drug quantity, harsher sentence under 841(b)(1)(A) vacated as unlawful per Apprendi).

The "as applied" Apprendi challenge is inconsistent with the earlier argument that 841(b) is unconstitutional on its face. In this second argument the defendant maintains that his Fifth and Sixth Amendments were violated by the use of drug type and quantity to increase his statutory maximum penalty where the government failed to charge the element and/or the jury made no specific finding as to the type and quantity of drug involved in the offense. He argues that he should have been sentenced under 21 U.S.C. §841(b)(1)(C), the "catch all" penalty provision for drug crimes that with one exception, contains no reference to a specific drug type or quantity. In the Eleventh Circuit, United States v. Rogers, supra, p.2, the defendant raised an "as applied" challenge to his sentence and the Court explicitly applied Apprendi's constitutional principles to § 841. Rogers held that where a judge decides the quantity of drugs "[t]he statutory maximum must be determined by assessing the statute without regard to quantity. This means that §§ 841(b)(1)(A) and 841 (b)(1)(B) may not be utilized for sentencing without a finding of drug quantity by the jury." The defendant must be sentenced under a provision that does not contain a quantity amount, for example, §§ 841(b)(1)(C) or 841(b)(1)(D). Rogers at 9.

Defendants making this claim will more than likely face the argument that the error was harmless. See Neder v. U.S., 119 S.Ct. 527 (1999)(Erroneous jury instruction that omits an element of the offense is subject to harmless error analysis); United States v. Swatzie, ___ F.3d ___ 2000 WL 1421337 (11th Cir Sept 27, 2000) (No plain error relief from life sentence due to omission of kind and quantity of drugs where defendant failed to put the amount of cocaine at issue.) Aside from ensuring that quantity is challenged, practitioners can distinguish Neder because the prejudice inherent in an Apprendi claim is the fact that defendants are punished for a greater offense, not the offense made the basis of the jury verdict.

III

Finally, defendants are advancing an argument that application of mandatory minimum sentences under §841 is also unconstitutional pursuant to Apprendi . The argument is made despite the Court's statement in Apprendi that its ruling did not affect the continuing validity of McMillan v. Pennsylvania, 106 S.Ct. 2411 (1986). The argument works because it distinguishes the statute in McMillan, while noting similarities between §841 and the New Jersey statute at issue in Apprendi.

It is argued that the Pennsylvania statutory scheme reviewed in McMillan is distinguishable from § 841 for several critical reasons. First, the sentencing provision reviewed in McMillan was independent of the underlying criminal offenses it modified and created no separate or aggravated offense. See McMillan, 477 U.S. at 87-88 . In contrast, if drug quantity, type and other facts relevant to sentencing are elements of § 841, then §

841(b) establishes overlapping hierarchies of aggravated offenses. However, a sentencing court has no authority to pick and choose among sentencing provisions for different offenses or to apply sentencing provisions for a greater offense in sentencing a defendant to a lesser included offense. Instead, the court is bound by the sentencing range that applies to the specific offense found by the jury.

In addition, separate subsections of § 841 establish different classes of offenses. Therefore, § 841 is more comparable to the New Jersey statutory scheme reviewed in Apprendi than the Pennsylvania provisions reviewed in McMillan. In Apprendi, the Court explained with respect to the New Jersey provisions:

> [T]he effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first degree offense, under the State's own criminal code.

120 S. Ct. at 2365. Similarly, § 841(b)(1)(A) establishes a class A felony and § 841(b)(1)(C) establishes a class C felony. See 18 U.S.C. § 3559 (classifying criminal offenses by maximum term of imprisonment). These classifications affect various sentencing decisions pursuant to federal statute and the Sentencing Guidelines, see, e.g., 18 U.S.C. §§ 3583(b) & (e)(3) (respectively setting term of supervised release and maximum term of imprisonment permitted upon revocation of supervised release based on classification of offense); U.S.S.G. §§ 5B1.1 & 5D1.2 (respectively setting Guideline sentences of probation and supervised release based on classification of offense), as well as offense severity ratings by the Bureau of Prisons, which affect a defendant's placement, treatment and access to programs while in prison. Therefore, determination of the specific offense under § 841(b) and the resulting felony classification has direct consequences to punishment in addition to the heightened stigma associated with an aggravated crime.

The Pennsylvania sentencing provision reviewed in McMillan is also distinguishable from § 841 because it had no effect on the maximum statutory sentence established by the underlying criminal offense, whereas facts relating to type and quantity of drugs increase the applicable maximum sentence under § 841. In addition, the statute at issue in McMillan did not increase both the lower and higher range of the sentence, unlike facts establishing drug type and quantity under § 841, which increase the applicable maximum and minimum sentences simultaneously, in lock-step fashion. As the Court explained in Apprendi and McMillan, the Pennsylvania provision at issue in McMillan "'neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty . . . .'" 120 S. Ct. at 2361 (citing 477 U.S. at 87). Section 841(b), in contrast, does both.

Only the sentencing provisions of § 841(b)(1)(C) can be applied where a jury is instructed to consider only whether a defendant possessed with intent to distribute a detectable quantity of cocaine base. This is consistent with Rogers supra. Pursuant to Apprendi and notwithstanding McMillan, a sentencing court may not apply a mandatory minimum sentence based on drug quantity under § 841 unless the quantity authorizing that mandatory minimum sentence was determined by a jury beyond a reasonable doubt.

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1. Apprendi at 2380 (O'Connor, J., dissenting)

2. In Dickerson, The Supreme Court, Chief Justice Rehnquist, held that Miranda's warning-based approach to determining admissibility of statements made by an accused during custodial interrogation was constitutionally based and could not be overruled by legislative act.

3. See, e.g.,United States v. Williams, 876 F.2d 1521, 1524-25 (11th Cir. 1989); United States v. Lindia, 82 F.3d 1154, 1160-61 (1st Cir. 1996); United States v. Campuzano, 905 F.2d 677, 679 (2d Cir. 1990); United States v. Parker, 30 F.2d 542, 554 (4th Cir. 1994); United States v. Morgan, 835 F.2d 79, 81 (5th Cir. 1987); United States v. Levy, 904 F.2d 1026, 1033-34 (6th Cir. 1990); United States v. Whitley, 905 F.2d 163, 165 (7th Cir. 1990); United States v. Wood, 834 F.2d 1382, 1388 (8th Cir. 1987); see, e.g., United States v. Sotelo-Rivera, 931 F.2d 1317, 1319 (9th Cir. 1991); United States v. Silvers, 84 F.3d 1317, 1320-21 (10th Cir. 1996); United States v. Lam Kwong-Wah, 966 F.2d 682, 685-86 (D.C. Cir. 1992).

4. See, e.g., United States v. Grimaldo, 214 F.3d 967 (8th Cir. June 2, 2000); United States v. Jackson, 207 F.3d 910 (7th Cir. 2000); United States v. Thomas, 204 F.3d 381, 383 (2d Cir. 2000); United States v. Rios-Quintero, 204 F.3d 381 (5th Cir. 2000); United States v. Swiney, 203 F.3d 397 (6th Cir. 2000); United States v. Hester, 199 F.3d 1287, 1291-92 (11th Cir. 2000); United States v. Williams, 194 F.3d 100, 106-07 (D.C. Cir. 1999).

to trial. As to the former argument, its reach is unclear.

When should Apprendi claims be filed?

Congress' revisions of 28 U.S.C. §2255 complicate the procedural ramifications of Apprendi. As such, when a person should file an Apprendi claim depends upon the procedural posture of the person's case.

If the person has not yet been sentenced, an Apprendi claim should be filed prior to sentencing, if it hasn't been filed earlier in a motion for new trial.

If the person has been sentenced, and has already filed a notice of appeal or is currently before a circuit court on appeal or within the 90 days for filing certiorari (i.e., the original criminal judgment is not final), Apprendi claims should be filed immediately. If the person waits, they will lose the benefit of Griffith v. Kentucky, which indicates that new rules of criminal law are applied retroactively to those cases on direct appeal. Direct appeal includes petitioning for certiorari.

If the person currently has a §2255 pending, the person should try to amend the original §2255 to include the Apprendi argument. The importance of attempting to amend is detailed below.

If the person's direct appeal is over, or the person never filed a direct appeal, the important question to ask is how long has the person's conviction been final? If within the one-year statute of limitations under 28 U.S.C. §2255, the person should file the Apprendi claim, along with any other §2255 arguments, by the date the conviction has been final for one year. While the circuits are split on which date to use (date of conviction, date of issuance of appellate decision, date of mandate of appellate decision, date time for filing certiorari runs, or date certiorari is denied), the safest course is one year from the date of conviction or, if an appeal was taken, the date the appeal was denied by the circuit court (not the date the mandate issued).

If the person's one year to file a §2255 has run, what then? Since Apprendi establishes . . A watershed change in constitutional law . . . ." Id.at *31 (O'Connor, J., dissenting) it should be applied retroactively to an initial §2255 petition under the second Teague v. Lane, 489 U.S. 288, 305-310 (1989) exception. See United States v. Murphy, ___ F. Supp. 2d ___, 2000 WL 11440782 (D. Minn. Aug. 7, 2000). Second or successive §2255 petitions have been rejected by two circuit courts. Why? Congress limited second or successive petitions to those where the Supreme Court made a new rule of constitutional law retroactive to collateral proceedings. In other words, the Supreme Court has to say that Apprendi may be raised in a §2255 before a court may grant a second or successive petition on Apprendi grounds. However, again, to be safe, all Apprendi claims under §2255 should be filed within one year of the Apprendi decision. However, since Apprendi has not been out for a year, and the Supreme Court may address this issue next term, the safest course would be to wait and see if the Supreme Court does make Apprendi retroactive before the one year from the Apprendi decision runs. If a §2255 is filed and denied, the petitioner could later argue, if the Supreme Court made Apprendi retroactive, that the previous Apprendi petition was premature, and might find another exception to the second or successive doctrine.

If the Supreme Court does not speak within the year, the other option is to file the Apprendi claim under 28 U.S.C. §2241. Courts have allowed petitioners to use §2241 if the petitioner can show that the remedy under §2255 is inadequate. However, prior to filing a §2241, the best advice is to wait and see whether the Supreme Court rules on retroactivity next term.

Summary of 11TH Circuit Cases Dealing

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ASSISTANT FEDERAL DEFENDER

As of early October, cases dealing with Apprendi v. New Jersey issued from the 11th Circuit on four occasions. Each case presented a different situation for the application of the new constitutional rule, and one case indicated an application of the Apprendi rationale to the career offender guideline calculations (where the guidelines mandate that the base offense level increase, according to the statutory maximum of the offense charged, where a defendant has two previous drug convictions or crimes of violence).

The first Apprendi case from the 11th Circuit, In re Joshua, No. 00-14328, 2000 U. S. App. Lexis 22202 (11th Cir. Aug. 30, 2000), inquired whether Apprendi claims could be raised in a second or successive motion under 28 U. S. C. § 2255. The court answered the issue in the negative, based in large part on the requirement in 28 U.S.C. § 2255 that new rules of constitutional law be made retroactive by the Supreme Court in order to form the basis of a second or successive §2255 motion. The case cites with approval the First Circuit case of Sustache-Rivera v. United States, No. 99-2128 (1st Cir. July 25, 2000), which suggests, in dicta, that an Apprendi claim could be raised in a motion under

§2241, and that any claim dismissed at this point might be revived later should the Supreme Court apply Apprendi retroactively based upon its prematurity at the time of filing.

The next case to issue from Atlanta was United States v. Walker, No. 99-12242, 2000 WL 1392758 (11th Cir. Sept. 26, 2000). Walker mentions Apprendi in passing. The defendant's statutory maximum was life imprisonment based upon two prior convictions. Further, the court held any Apprendi benefit waived. The court stated in footnote one, "As Walker pled guilty in this case and accepted the contents of the PSI, he lost any right to appeal on the basis of this argument."

By far, the case most likely to be quoted by the Government came from Atlanta styled United States v. Swatzie, No. 00-10729 (11th Cir. Sept. 27, 2000). Swatzie went to trial, and was convicted of possessing with intent to distribute crack cocaine and powder cocaine. Because the defendant presented no evidence, the court characterized the trial evidence as "uncontradicted." Further, Swatzie did not object (in large part because of the state of the law at the time of trial) to the jury instructions, nor did he request a special verdict on drug quantity or type.

Swatzie, a former snitch, confessed to continued drug activity during the period of his cooperation. He allowed officers to search his home where they found 21.1 grams of crack cocaine and 135.9 grams of powder cocaine. He admitted cooking crack from powder cocaine and exonerated his wife in his activities. He further offered to cooperate.

After his trial, when the PSI issued, Swatzie objected to the type and amount of cocaine listed in the PSI. Finding that Swatzie was a career offender, the district court determined that Swatzie's statutory maximum sentence was life imprisonment. As a result of the career offender guideline, Swatzie's guideline range became 360-life. The court sentenced Swatzie to life in prison.

Rejecting his Apprendi claims, and reviewing only for plain error, the court found that the Government proved beyond a reasonable doubt the necessary elements of drug type and quantity through uncontradicted evidence, and, as such, no harm occurred to Swazie's substantial rights. The court noted that Swatzie did not deny his confession nor seek to discredit those who testified against him.

United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000). Reversing circuit precedent in light of *Apprendi*, the Eleventh Circuit held that drug quantity is an element of a prosecution under 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B), the mandatory minimum sections, which must be charged in the indictment and proved to a jury beyond a reasonable doubt. Where the indictment failed to allege the quantity of cocaine base involved in a charge of possession with intent to distribute, and that quantity was not submitted to the jury for a finding beyond reasonable doubt, the sentence could not exceed the twenty-year maximum prescribed in § 841(b)(1)(C) for convictions involving an undetermined amount of cocaine base.

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