

APPRENDI v. NEW JERSEY — LOWER COURT DECISIONS

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INTRODUCTION

This outline summarizes selected decisions of the appellate and district courts interpreting *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). It is organized by the type of offense, followed by post-conviction cases and non-drug sentencing guidelines cases. Within each section, cases are listed by circuit. Where there is more than one case from a circuit, they appear in reverse chronological order. District court cases are listed within each circuit following appellate decisions.

8 U.S.C. § 1326 — ILLEGAL REENTRY AFTER DEPORTATION

Ninth Circuit

United States v. Turrubiarres-Gonzales, No. CR 00-58-GF-DWM, ___ F. Supp. 2d ___, 2000 WL 1346698 (D. Mont. Sept. 14, 2000). In considering the defendant's motion to dismiss the indictment in this § 1326 case (or in the alternative, to strike the penalty enhancement), the court considered the argument that it "should take the path that the Supreme Court deliberately chose not to take in *Apprendi* and find that the § 1326(b)(2) enhancements violate the Fourteenth Amendment's due process guarantees. [The defendant] states that stare decisis in this area should not be controlling because the members of the Supreme Court have cast enough doubt on the holding in *Almendarez-Torres* to allow this court to rule contrary to *Almendarez-Torres*." The court, however, rejected this argument.

18 U.S.C. § 924(c) — USING GUN IN CONNECTION WITH CERTAIN OFFENSES

First Circuit

United States v. Mojica-Baez, No. 98-2349, ___ F.3d ___, 2000 WL 1211013 (1st Cir. Aug 30, 2000). In a case that creates a conflict with the Third, Fourth, Ninth, and Tenth Circuits in pre-*Apprendi* cases, the First Circuit held that harmless error analysis applies to the failure to allege an element in the indictment—in this case that the firearm used during the robbery of an armored car depot was a semiautomatic assault weapon. At the time of the offense, § 924(c)(1) specified a mandatory five-year

sentence for the use of a firearm, but if a semiautomatic weapon was used, the mandatory sentence increased to ten years. This element also was not submitted to the jury for a finding beyond a reasonable doubt. In upholding the enhanced sentence, the First Circuit reasoned that the defendants were not prejudiced by the error because the jury, based on trial evidence, would have found beyond a reasonable doubt that the defendants used a semiautomatic assault weapon (the element) and because the defendants were not alleging that they lacked fair notice of the aggravated nature of the firearm. The court rejected the proposition that a failure to allege an element in the indictment is a structural error not subject to harmless error review. Similarly, relying on *Neder v. United States*, 527 U.S. 1, 15 (1999), the court of appeals found that failure to submit an element to the jury is subject to harmless error review. Significantly, in a footnote, the court also explained that it was not deciding “whether the proper remedy would be remanding for reindictment or for resentencing” because defendants had “overreach[ed]” in their “choice of remedy,” as the indictment fairly charged the “basic” use of a firearm offense under § 924(c)(1) and there was no question that the government proved the elements of that offense beyond a reasonable doubt so that the “only possible relief for the defendants would be a remand for reindictment or resentencing.” *Mojica-Baez*, slip op. at *18, n.9 (internal citations omitted).

Eighth Circuit

United States v. Carlson, 217 F.3d 986 (8th Cir. 2000). In a case involving a guilty plea to a § 924(c)(1) charge (as amended after *Bailey*), the Eighth Circuit found that whether a defendant “brandished” a firearm so as to trigger the seven-year mandatory minimum consecutive term—rather than the five-year mandatory consecutive term for the offense in its simplest form—is a factor to be determined by the district court at sentencing and not an element which must be charged in the indictment. The Court found that because the factor increased the mandatory minimum but not the statutory maximum, *Apprendi* did not require a different result.

Tenth Circuit

United States v. David Owens, Jr., CR-00-24-L (W.D. Okla. July 26, 2000) (AFPD Tony Lacy). At a sentencing on July 26, the district court imposed a five-year sentence of imprisonment rather than the aggravated seven-year penalty for “brandishing” a firearm under § 924(c)(1). The U.S. Attorney’s office and the probation officer acquiesced to the defendant’s objection that “brandishing” was an element of the offense such that the seven-year mandatory minimum for “brandishing” a firearm could not be imposed absent the guarantees required by *Apprendi*. The case, which had been tried to a jury in April, involved an attempted carjacking (18 U.S.C. § 2119), using and carrying a firearm during and in relation to the commission of a crime of violence (18 U.S.C. § 924(c)(1)), and being a felon-in-possession (18 U.S.C. § 922(g)(1)).

Eleventh Circuit

United States v. Pounds, No. 99-15058, ___ F.3d ___, 2000 WL 1568152 (11th Cir. Oct. 20, 2000). In a prosecution under 18 U.S.C. § 924(c)(1)(A), the court of appeals held that whether a firearm was discharged, § 924(c)(1)(A)(iii), is a factor to be determined by the district court at sentencing

rather than an element of the offense because that factor only increases the mandatory minimum penalty to ten years; it does not alter the statutory maximum penalty, which is life for all violations of § 924(c).

18 U.S.C. § 924(e) — ARMED CAREER CRIMINAL ACT

Third Circuit

United States v. Mack, 229 F.3d 226 (3d Cir. 2000). A defendant convicted of being a felon-in-possession of a firearm (18 U.S.C. §922(g)) may have his sentence enhanced to a maximum sentence of life pursuant to 18 U.S.C. § 924(e) from the basic ten-year maximum penalty upon a finding by a preponderance of the evidence by the district court that he was previously convicted of three specified felonies without violating the rule in *Apprendi*, which expressly excludes prior convictions from its application. In a concurrence, Chief Judge Becker addresses the possibility that guideline enhancements that increase the maximum guideline sentence without increasing the statutory maximum sentence may run afoul of the rule in *Apprendi*.

United States v. Powell, 109 F. Supp. 2d 381 (E.D. Pa. 2000). The district court ruled that the recidivist provisions in the Armed Career Criminal Act, 18 U.S.C. § 924(e), are sentencing enhancements even where they serve to enhance the maximum sentence from ten years to life and to require imposition of a mandatory minimum fifteen-year sentence whenever a person who is convicted of a violation of 18 U.S.C. § 922(g) has three specified prior felony convictions. Because they are not elements, the enhanced sentences may be imposed without alleging the three predicate convictions in the indictment. The district court addressed all the obvious arguments on this issue, including (1) that *Apprendi* does not require a different result as it expressly excluded prior convictions from its holding; (2) that *Apprendi* did not expressly or impliedly reverse *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the constitution does not require that recidivism facts be charged in the indictment before the maximum penalty may be enhanced; (3) that Justice Thomas's confession that he erred when he voted with the majority in *Almendarez-Torres* does not undermine the binding nature of that decision; and (4) that *Almendarez-Torres* should be limited to illegal reentry cases.

18 U.S.C. § 1341 — MAIL FRAUD

Ninth Circuit

United States v. Pavelcik, No. 99-50316, 2000 WL 1141096 (9th Cir. Aug. 11, 2000) (unpublished). The Ninth Circuit vacated a five-year statutory sentence enhancement imposed after a guilty plea to mail fraud through telemarketing upon concession by the government that the five-year enhancement for committing the offense through telemarketing, as set out in 18 U.S.C. § 2326, is a separate element of a crime subject to indictment and proof beyond reasonable doubt.

18 U.S.C. § 1963 — RICO

United States v. Corrado, 227 F.3d 543 (6th Cir. 2000). *Apprendi* does not require that a jury determine the extent of a criminal forfeiture flowing from convictions for conspiracy under RICO where the jury had determined that defendants were guilty of the RICO charges beyond a reasonable doubt based on specific charges and defendants were put on notice under the indictment that criminal forfeitures under 18 U.S.C. § 1963 would be pursued upon conviction of the criminal charges.

18 U.S.C. § 3559(c) — “THREE STRIKES”**Sixth Circuit**

United States v. Gatewood, No. 98-5138, ___ F.3d ___, 2000 WL 1483177 (6th Cir. Oct. 10, 2000) (en banc). The Sixth Circuit ruled that the prior felony convictions on which the government sought to rely in seeking a mandatory life sentence were not elements of the offense but mere sentencing factors, which did not have to be set forth in the indictment. Although noting that the different concurrences in *Apprendi* cast doubt on the correctness of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the Constitution does not require Congress to treat prior convictions that enhance sentences as elements of the offense, the court nevertheless rejected the argument because “*Almendarez-Torres* remains the law.”

Ninth Circuit

United States v. Williams, No. 99-10475, 2000 WL 1175695 (9th Cir. Aug. 18, 2000) (unpublished). The court held that *Apprendi* does not require the government to prove the fact of prior convictions by a standard higher than preponderance before it can seek to impose life imprisonment pursuant to 18 U.S.C. § 3559(c).

21 U.S.C. §§ 841, 846, 848 — DRUGS**Supreme Court**

In the following cases, all involving drug offenses, the Supreme Court has granted the writ of certiorari, vacated the judgment and remanded the case for further consideration in light of *Apprendi*. They are listed by circuit, and in reverse chronological order within each circuit.

Blue v. United States and *Gibson v. United States*, 121 S. Ct. 31 (Oct. 2, 2000) (case below: 187 F.3d 631 (4th Cir. July 27, 1999) (unpublished, No. 96-4369)).

Clinton v. United States, 121 S. Ct. 296 (Oct. 10, 2000) (case below: *United States v. Reliford*, 210 F.3d 285 (5th Cir. 2000)).

Burton v. United States, 121 S. Ct. 32 (Oct. 2, 2000) (case below: *United States v. Crawford*, 211 F.3d 125 (5th Cir. Mar. 8, 2000) (unpublished, No. 98-20294)).

Hughes v. United States, No. 00-192, ___ S. Ct. ____, 2000 WL 1201887 (Nov. 6, 2000) (case below: 213 F.3d 323 (7th Cir. 2000)).

Whitt v. United States, No. 00-183, ___ S. Ct. ____, 2000 WL 1201687 (Nov. 6, 2000) (case below: 211 F.3d 1022 (7th Cir. 2000)).

Jackson v. United States, No. 99-10055, ___ S. Ct. ____, 2000 WL 840430 (Oct. 30, 2000) (case below: 207 F.3d 910 (7th Cir. 2000)).

Smith v. United States, No. 00-5198, ___ S. Ct. ____, 2000 WL 1056566 (Oct. 16, 2000) (case below: 215 F.3d 1331 (7th Cir. Jun 5, 2000) (unpublished, No. 99-4253)).

(*Carless*) *Jones v. United States*, 120 S. Ct. 2739 (June 29, 2000) (case below: 194 F.3d 1178 (10th Cir. 1999)).

Curry v. United States, No. 99-10265, ___ S. Ct. ____, 2000 WL 876642 (Oct. 30, 2000) (case below: 211 F.3d 129 (11th Cir. Mar. 10, 2000) (unpublished, No. 98-9621)).

Hester v. United States, No. 99-10024, ___ S. Ct. ____, 2000 WL 797322 (Oct. 16, 2000) (case below: 199 F.3d 1287 (11th Cir. 2000)).

Brown v. United States, No. 99-9107, ___ S. Ct. ____, 2000 WL 463113 (Oct. 10, 2000) (case below: 207 F.3d 662 (11th Cir. Jan. 10, 2000) (unpublished, No. 99-2272)).

Wims v. United States, 121 S. Ct. 32 (Oct. 2, 2000) (case below: 207 F.3d 661 (11th Cir. Jan 4, 2000) (unpublished, No. 98-3684)).

Fourth Circuit

United States v. Angle, No. 96-4662, ___ F.3d ____, 2000 WL 1515159 (4th Cir. Oct. 12, 2000). In a cocaine conspiracy case where the indictment did not allege quantity and the quantity determination was made by the district court at sentencing, the Fourth Circuit held that a sentence may not exceed the twenty-year statutory term of imprisonment for the standard offense set out in 21 U.S.C. § 841(b)(1)(C); however, for sentences below the twenty-year statutory maximum “drug amount is still a proper aggravating or mitigating factor to be considered by the judge in determining a sentence at or below” that maximum.

United States v. Henderson, 105 F. Supp. 2d 523 (S.D. W. Va. 2000). At sentencing after conviction by a jury resulting from a trial held before *Apprendi* was decided, the district court ruled that *Apprendi* requires that “quantity” in federal drug offenses must be charged in the indictment, submitted to

the jury, and found beyond a reasonable doubt. Consequently, the district court found that it was prohibited from imposing statutory minimum sentences and could sentence the defendant only under the unenhanced twenty-year maximum penalty provided in § 841(b)(1)(C). The court, however, rejected the defendant's argument that *Apprendi* also prohibits it from making relevant conduct findings. The case involved one count of conspiracy to distribute methamphetamine and marijuana; one count of aiding and abetting money laundering; one count of aiding and abetting attempted possession of methamphetamine with intent to distribute; and one § 924(c) count. Because multiple counts were involved, the district court was able to impose the total guideline sentence of 360 months imprisonment for the drug and money laundering counts by imposing consecutive sentences on the separate counts without exceeding the twenty-year maximum available for unaggravated drug offenses under § 841(b)(1)(C); a five-year consecutive term of imprisonment on the § 924(c) count was also imposed.

Fifth Circuit

United States v. Keith, No. 99-50692, ___ F.3d ___, 2000 WL 1532802 (5th Cir. Oct. 17, 2000) (per curiam). On rehearing by the panel, the Fifth Circuit found no *Apprendi* error where the twenty-year statutory mandatory minimum recidivist sentence imposed under 21 U.S.C. § 841(b)(1)(A) did not exceed the thirty-year recidivist statutory maximum set out in 21 U.S.C. § 841(b)(1)(C).

United States v. Doggett, No. 99-50380, ___ F.3d ___, 2000 WL 1481160 (5th Cir. Oct. 6, 2000). The Fifth Circuit held that *Apprendi* overrules circuit precedent that treated drug quantity as a sentence enhancement rather than as an element. Hence, in order to impose a sentence beyond the statutory maximum of twenty years for the basic offense, the quantity must be alleged in the indictment and submitted to the jury for a finding beyond a reasonable doubt. However, for recidivist offenders, the maximum penalty of the basic offense is thirty years even if the prior is not alleged in the indictment, because *Apprendi* limits its holding to facts other than prior convictions. Further, *Apprendi* does not "invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines."

United States v. Meshack, 225 F.3d 556 (5th Cir. 2000). In a case in which the government conceded that *Apprendi* mandated correction of the sentences because the quantity of drugs was neither alleged in the indictment nor submitted to the jury for a finding beyond a reasonable doubt, the Fifth Circuit, after conducting plain error review, upheld those sentences that did not exceed the twenty-year maximum penalty for the "basic" offense described in 21 U.S.C. § 841(b)(1)(C). In addition, the court upheld the relevant conduct findings under the Sentencing Guidelines, relying on the narrow holding of *Apprendi* (only if the maximum increases) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), although the court acknowledged that the Supreme Court noted that it might reconsider *McMillan* in the future. The Fifth Circuit explained that a sentence pursuant to the Guidelines does not violate *Apprendi* although based on "non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury," quoting *United States v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir. 2000). With respect to another defendant whose life sentences exceeded the *Apprendi*-allowable maximum, the court vacated and remanded to the district court in the first instance to decide whether to resentence at the lowest statutory drug amount or to allow a retrial of the count. The court also remanded to correct the terms of supervised release.

United States v. Ramirez, No. 99-50768 (5th Cir. July 14, 2000) (unpublished). In a heroin case tried to a jury where the indictment did not allege a quantity, the Fifth Circuit remanded the case to determine, in light of *Apprendi*, whether the district court relied on the quantity of drugs in imposing two concurrent five-year terms of supervised release, which terms are authorized under § 841(b)(1)(B) only when offenses involve more than 100 grams of heroin. This was the only relief sought, as the two concurrent 110-month sentences of imprisonment did not exceed the twenty-year maximum authorized under the default provisions of § 841(b)(1)(C).

Sixth Circuit

United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000). Finding *Apprendi* error because the statutory maximum was increased based on a fact that had not been alleged in the indictment nor proved beyond a reasonable doubt, the Sixth Circuit vacated a twenty-four year sentence in a case where the female defendant had pleaded guilty to a heroin charge. The sentencing court found on a preponderance of evidence at sentencing that the defendant's husband died from the use of heroin, which fact triggered a twenty-year mandatory minimum with a maximum sentence of life; without this sentencing enhancement, the statutory maximum was twenty years and the defendant's guideline range was 24-30 months.

United States v. Garcia, No. 92-20103, ___ F. Supp. 2d ___, 2000 WL 1597757 (E.D. Mich. Oct. 26, 2000). The court in this case dismissed the fourth superseding indictment, filed in August 2000, more than eight years after the offense allegedly occurred and more than two years after the second superseding indictment had been filed, on which the defendant had been arraigned. The government acknowledged that it filed the fourth superseding indictment, which alleged both drug quantity and the defendant's prior convictions, in order to comply with *Apprendi*. The court found that this indictment did not relate back to the second. The court rejected the government's argument that "the Fourth Superseding Indictment does not broaden the charges in this case because the defendant's life sentence for the (now reversed) conviction under [the] First Superseding Indictment, which is essentially the same as the charges contained in the Second Superseding Indictment, was based on judicial findings under the preponderance-of-evidence standard. The Fourth Superseding Indictment merely transfers the responsibility for those findings to the jury, and enhances the standard of proof in the defendant's favor." The court observed that "[a]lthough the government's argument has a practical appeal, the Court cannot accept it because it is contrary to fundamental constitutional principles. In *Apprendi*, the Supreme Court held that a defendant has a constitutional right to have his trial jury determine beyond a reasonable doubt all the facts which establish or increase the maximum penalty to which the defendant is exposed. Furthermore, under the Fifth Amendment, a federal defendant has a right to prosecution by grand jury indictment. In *Stirone v. United States*, 361 U.S. 212 (1960), the Supreme Court reaffirmed the rule that 'after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.'" (Citations omitted.) The court concluded that because the fourth superseding indictment did not relate back to the second, it violated the five-year statute of limitations for drug offenses. However, the court based its decision only upon the quantity of drugs charged. It expressly declined to address whether *Apprendi* affects drug quantity determinations under the Guidelines, or whether *Apprendi* applies to prior convictions.

Seventh Circuit

United States v. Cavender, 228 F.3d 792 (7th Cir. 2000). Without deciding whether circuit precedent holding that drug quantities in Title 21 prosecutions are sentencing enhancements rather than elements should be reconsidered, the Seventh Circuit found that any error was harmless where the indictment charged that defendants had handled “multiple kilograms of mixtures containing cocaine base” and that evidence was “put before the jury.” Although the court’s holding addresses the *Apprendi* claim of one of the defendants who pleaded guilty, it does not discuss the standard of proof applied by the district court.

United States v. Smith, 223 F.3d 554 (7th Cir. 2000). The Seventh Circuit held that *Apprendi* does not require it to define the mandatory life provisions for certain classes of offenders convicted of engaging in a continuing criminal enterprise (CCE) as separate offenses rather than as sentencing enhancements. The basic CCE offense requires a twenty-year minimum sentence with a maximum penalty of life imprisonment, but if a defendant is a leader or organizer of an enterprise and the enterprise either involved a specified quantity of drugs or specified amount of gross receipts, a life sentence is mandatory. 21 U.S.C. § 848(b). The defendants argued that the particular findings that trigger the mandatory life sentence are elements of a distinct offense that must be charged and proved beyond a reasonable doubt. In a very good and concise analysis of the issue, the court ultimately decided that the rationale of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which has not been overruled by the Supreme Court, controlled the question before it and rejected the defendants’ argument.

United States v. Scott, No. 99-30043, ___ F. Supp. 2d ___, 2000 WL 1568701 (C.D. Ill. Sept. 27, 2000). This case involved a conspiracy alleging both marijuana and cocaine. In responding to sentencing objections, the court found that its failure to instruct the jury on the need to find drug quantities was plain, but that under *Neder v. United States*, 527 U.S. 1 (1999), the error was harmless. The court found that the jury could not have concluded that there was no cocaine involved in the offense in light of the evidence presented at trial, because every witness testified that the conspiracy involved both marijuana and cocaine. The court found that the thirty-year maximum of § 841(b)(1)(C) applied (the defendant had a prior conviction), that the guideline range was 262-327 months, and that there was no *Apprendi* violation because the range was within the maximum.

Eighth Circuit

United States v. Nicholson, No. 99-2206EA, ___ F.3d ___, 2000 WL 1634731 (8th Cir. Nov. 1, 2000). In a case where the defendant was charged with conspiracy to distribute and with possession with intent to distribute, there was evidence before the jury concerning the defendant’s involvement in both marijuana and cocaine transactions, and the jury was instructed that it could find that Mr. Jenkins violated § 841(a) even if it found “that the controlled substance distributed was not cocaine base, but another controlled substance, either cocaine, marijuana, or PCP,” the statutory maximums for the offenses could be based only upon marijuana, not upon cocaine or crack. The court found that “We cannot rule out the possibility that the jury followed this instruction and convicted Mr. Jenkins on a finding of marijuana distribution even though his indictment alleged cocaine base.” Consequently, the court

reversed Jenkins' sentence and remanded with instructions that the statutory maximum on each count be limited to five years.

United States v. Chavez, No. 00-1404, ___ F.3d ___, 2000 WL 1556050 (8th Cir. Oct. 20, 2000). The Eighth Circuit rejected the argument that drug quantities used to determine the guideline sentence must be found by a jury beyond a reasonable doubt. The court held that it is sufficient under the constitutional rule enunciated in *Apprendi* if the jury verdict—here, by way of a verdict form—establishes a quantity of methamphetamine sufficient to trigger the application of § 841(b)(1)(A), with its maximum statutory penalty of life.

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000). In a case tried to a jury that involved a conspiracy to distribute methamphetamine, the Eighth Circuit held that *Apprendi* did not require reversal even though the indictment failed to allege the quantity, the question was not submitted to the jury, and the quantity was determined by the district court on a preponderance standard at sentencing. The Eighth Circuit reasoned that under the jury verdict, the defendant's maximum penalty was up to thirty years imprisonment (assuming a prior felony conviction) without reference to any drug quantity under 21 U.S.C. § 841(b)(1)(C). As the quantity determination did not result in a sentence in excess of the maximum penalty for which the defendant was liable under the jury verdict, the case was controlled by *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), not overruled by *Apprendi*, which permits the non-jury factual findings to limit the discretion of the district court to require imposition of the twenty-year mandatory minimum term of imprisonment and the ten-year term of supervised release applicable under § 841(b)(1)(B).

United States v. Sheppard, 219 F.3d 766 (8th Cir. 2000). Applying a different analysis but reaching the same result, the Eighth Circuit upheld the conviction and sentence, ruling that any error in failing to treat "drug type and quantity as an element of the crime was harmless error." In this case, the indictment alleged both the type and quantity of drugs—a conspiracy involving more than 500 grams of methamphetamine—but the district court refused to instruct the jury that drug quantity was an element of the offense; instead the jury was given a special interrogatory on which it found that "more than 500 grams of methamphetamine were involved in [the defendant's] offense." Because the district court's sentencing finding was consistent with the special interrogatory and the quantity was alleged in the indictment, the Eighth Circuit reasoned that the defendant received all of the Fifth and Sixth Amendment protections required by *Apprendi*. In a footnote, the court also noted that the twenty-year mandatory minimum sentence imposed was within the § 841(b)(1)(C) default maximum, but notably in this case, decided on the same day as *Aguayo-Delgado*, *supra*, there is no mention of *McMillan*. Finally, the court rejected the defendant's argument that, to convict him, the government had to prove that he actually knew the exact nature of the substance with which he was dealing; it is only necessary for the government to prove that defendant knew that it was a controlled substance.

Ninth Circuit

United States v. Garcia-Guizar, 227 F.3d 1125 (9th Cir. 2000). Where the actual sentence imposed on the defendant charged in a multi-count methamphetamine distribution case was less than the twenty-year statutory maximum penalty to which the defendant was subject under the facts as found by the

jury, the defendant's substantial rights were not affected so as to require the sentence to be vacated, even where the judge plainly erred by making a quantity finding using a preponderance standard at sentencing and where the indictment failed to allege quantity as an element. The Ninth Circuit also assumed for purposes of the decision that *Apprendi* prohibits any increase of a mandatory minimum penalty in such circumstances, but again found that the defendant was not prejudiced as his guideline sentence, not implicated by the *Apprendi* rule, exceeded the increased mandatory minimum.

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). On a direct appeal in a multi-count marijuana case, where the indictment specified the number of marijuana plants but the jury was instructed that it only need find a "measurable or detectable amount," the court of appeals vacated the ten-year mandatory minimum sentence and remanded for resentencing "subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt, consistently with *Apprendi*," namely the five-year maximum applicable under 21 U.S.C. § 841(b)(1)(D). Because the *Apprendi* issue was not raised below by the defendant, the court of appeals reviewed the entirety of the record, including the contrary evidence presented by the defendant, to determine if the error was harmless under the rationale of *Neder v. United States*, 527 U.S. 1 (1999). Notably, in assessing the error, the court of appeals does not address whether multiple counts permit the stacking of five-year terms so as to make the error harmless if multiple counts are present. In concurring specially, Judge Reinhardt also explained that the more stringent *Neder* analysis is not applicable in *Apprendi*-error drug cases for two alternative reasons: (1) in drug cases, unlike in *Neder*, the defendant has been sentenced for an aggravated offense of which the jury did not convict him, or (2) by its own terms, *Neder* is limited in scope and does not apply.

Tenth Circuit

United States v. Wilson, No. 99-6233, 2000 WL 1199101 (10th Cir. Aug. 23, 2000) (unpublished). The Tenth Circuit vacated a life sentence that was imposed as a result of the improper aggregation of drug quantities involved in the offense of conviction with other relevant conduct not involved in the offense of conviction, an issue that was raised pro se by the defendant in a supplemental brief in which he argued that he was subject to a maximum penalty of forty years based on his plea to distributing ten grams of crack cocaine. In footnote 1, the court admonished that there may be an *Apprendi* claim that "might implicate further sentencing limitations" because the record suggested that no drug quantity was included in the indictment. Presumably, if no drug amount was alleged in the distribution count, the defendant's sentence could not exceed twenty years.

Eleventh Circuit

United States v. Gerrow, No. 99-12061, ___ F.3d ___, 2000 WL 1675594 (11th Cir. Nov. 8, 2000). Where the defendants were sentenced to 151 months and to 235 months respectively, the Eleventh Circuit found no error because these terms were within the unenhanced maximum of twenty years provided by § 841(b)(1)(C). Each defendant was also sentenced to five years of supervised release, where § 841(b)(1)(C) calls only for a minimum of three. The Eleventh Circuit has not decided whether this provision is limited by the cap in 18 U.S.C. § 3583(b)(2). Because the defendants did not raise any objection below, the Eleventh Circuit reviewed only for plain error. It found none, both because it has not

ruled on the issue previously and because the other circuits are split, with the majority position going against the defendants.

United States v. Nealy, No. 99-15211, ___ F.3d ____, 2000 WL 1670932 (11th Cir. Nov. 7, 2000). The defendant received thirty-two years of imprisonment on a count of possession of 14.8 grams of cocaine base. He requested a jury instruction on quantity at trial, which was denied, and raised the issue again at sentencing. The Eleventh Circuit found *Apprendi* error, but also found it to be harmless, because the quantity of drug was not contested at trial and a police officer testified that the defendant had admitted that the drugs were his. On appeal, in a supplemental brief, the defendant also challenged the lack of allegation of drug quantity in the indictment, an issue he had not raised below. The Eleventh Circuit refused to consider this issue because it had not been raised in the opening brief, even though it was based on *Apprendi*.

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. Although the government had filed a recidivist enhancement information as provided in 21 U.S.C. § 851, the defendant's sentence on remand was not subject to the thirty-year maximum available for recidivists under § 841(b)(1)(C), as the government had waived the issue when it failed to object or to appeal once the district court failed to impose the recidivist enhancement at the original sentencing. On remand, the offense level under the career offender guideline applicable to the defendant was the one corresponding to the twenty-year unenhanced maximum penalty.

United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000). Because the court concluded both that the evidence of the quantity and type of drug involved in the offense was overwhelming and that the defendant had not even hinted that he lacked fair notice sufficient to permit him to defend against the charges, the Eleventh Circuit found no plain *Apprendi* error in a case where after a jury trial, the district court imposed a sentence based on its findings of drug type and quantity made using a preponderance-of-evidence standard, the indictment failed to specify any quantity and specified both cocaine hydrochloride and cocaine base, and the jury had not been required to make a quantity determination.

United States v. Walker, 228 F.3d 1276 (11th Cir. 2000). The primary issue raised in this case involved a non-*Apprendi* challenge to the imposition of a life sentence in a cocaine base conspiracy on the basis of the defendant's prior conviction on two predicate drug offenses. In a footnote, however, the Eleventh Circuit rejected any *Apprendi* challenge on the basis that the case was distinguishable from *Apprendi* as the defendant lost his right to appeal the *Apprendi* issue when he pleaded guilty and accepted the drug quantity alleged in the PSR; no reference is made to whether a specified quantity was alleged in the indictment. Significantly, the court of appeals appeared to read *Apprendi* as applying only to jury trials, disregarding the fact that *Apprendi* itself involved a guilty plea.

28 U.S.C. §§ 2254, 2255 — HABEAS / POST-CONVICTION**First Circuit**

United States v. Sustache-Rivera, 221 F.3d 8 (1st Cir. 2000). In this habeas petition, the First Circuit conceded that, after *Apprendi*, *Jones v. United States*, 119 S. Ct. 1215 (1999), may be a case of constitutional stature that merits a second habeas petition. This would be an important development, because *Jones* previously had been considered a case involving statutory interpretation—which would be barred by AEDPA from successive habeas attack. However, because the Supreme Court has not made *Jones* retroactive to cases on collateral review, the petitioner in *Sustache-Rivera* could not bring a second or successive petition.

Norton v. United States, No. Civ. A. 00-12198-WGY, ___ F. Supp. 2d ____, 2000 WL 1612294 (D. Mass. Oct. 26, 2000). The court dismissed a defendant's second motion under 28 U.S.C. § 2255 challenging his sentence under the Armed Career Criminal Act because the court found it had no subject matter jurisdiction under the AEDPA. The court also rejected the defendant's claim of § 2241 relief, both because the motion was filed in the wrong court and because the motion challenged the validity of the sentence, not its execution. In a second case considered in the same opinion, the court rejected the defendant's claim of relief under the All Writs Act, 28 U.S.C. § 1651. Finally, the court declined to appoint an attorney for either defendant on the basis both of lack of jurisdiction over the claims and the lack of merit to the claims (*Apprendi* does not apply to prior convictions).

Second Circuit

Parise v. United States, No. 3:95CR00135 PCD, ___ F. Supp. 2d ____, 2000 WL 1611999 (D. Conn. Oct. 25, 2000). The court granted relief to a defendant who brought a § 2255 motion challenging his sentence under § 841. He was convicted both of possession with intent to distribute, and of conspiracy. The indictment had alleged more than 500 grams of cocaine for each count, i.e., a violation of § 841(b)(1)(B), but the sentencing court found more than five kilos were involved, i.e., a violation of § 841(b)(1)(A). However, the defendant had a prior conviction, so the statutory minimum went from ten years to twenty years, which he received. In granting the § 2255 motion, the court wrote: "While the 240 months sits within the permitted range for the crime for which Parise was convicted, the justification for enhancing the sentence above the range authorized by the Sentencing Guidelines was a statute under which he was not indicted. The Guidelines range already factored in his criminal history and the Court's finding of 5 kilograms. Thus, by relying on § 841(b)(1)(A) as authority for enhancing the sentence from 188-235 months to 240 months, the Court necessarily made a finding of fact that subjected Parise to a greater sentence than that authorized by the jury's verdict. This case is distinguishable from *Apprendi* in that *Apprendi* focused on criminal penalties that were beyond the statutory maximum. Here, Parise's sentence did not exceed that set by § 841(b)(1)(B). However, the principles upon which *Apprendi* relied are equally applicable in the instant case where the criminal penalty involved exceeded that provided by the Sentencing Guidelines. Sections 841(b)(1)(A) and (B) are no doubt 'separate offense[s] calling for . . . separate penalt[ies].' [Citation omitted.] By applying the prior conviction provision of § 841(b)(1)(A), Parise was exposed to a greater punishment than he would have received under § 841(b)(1)(B), as the

former triggered a mandatory minimum that required raising the sentence he otherwise would have received under § 841(b)(1)(B) and the Sentencing Guidelines. The maximum sentence statutorily authorized in *Parise's* case, given the Guidelines, was 235 months. Using a statute under which he was not convicted as authority for enhancing his statute was not proper.” Notably, the court implicitly assumed that *Apprendi* is retroactive.

Robinson v. United States, No. 00 Civ. 7493 LAK, ___ F. Supp. 2d ___, 2000 WL 1585686 (S.D.N.Y. Oct. 25, 2000). On a first § 2255 motion that claimed relief from an § 841 conviction on the grounds that “(1) the charge to the jury erroneously failed to require a jury finding as to the quantity of drugs, (2) movant was deprived of the effective assistance of trial counsel in that trial counsel failed to object to the charge on the ground that it failed to require a jury finding as to the quantity of drugs, and (3) the indictment deprived movant of due process in that it failed to charge as an element of the charged offenses a prior . . . felony conviction later used as a basis for enhancing his sentence pursuant to 21 U.S.C. § 851,” the court ordered appointment of an attorney because “of the possibly meritorious nature of at least the first of movant’s assertions.”

Third Circuit

Williams v. United States, No. Civ. A 99-2756, ___ F. Supp. 2d ___, 2000 WL 1342541 (E.D. Pa. Sept. 18, 2000). In a § 2255 motion presenting both *Apprendi* and non-*Apprendi* claims, the court rejected the non-*Apprendi* claims as time-barred, but acknowledged that the limitation period for the *Apprendi* claim “arguably runs from the date of the Supreme Court decision.” The court, however, rejected the movant’s *Apprendi* claim on its merits (prior convictions excluded from the decision’s holding).

Doe v. United States, 112 F. Supp. 2d 398 (D.N.J. 2000). The district court permitted an amendment, filed beyond the one-year statute of limitations, of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, implicitly finding that the petitioner’s *Apprendi* claim was timely because it asserted a right “newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” The petition, which claimed that allowing district court to determine the drug quantity based on preponderance violates due process and the right to trial by jury, was denied on the merits, however. The district court held that the 151-month term of imprisonment imposed did not exceed the statutory maximum (life) for the offense for which petitioner was charged and to which he pleaded guilty—conspiring to distribute more than five kilograms of cocaine.

Seventh Circuit

Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000). The Seventh Circuit denied an application to file a second or successive petition to vacate, set aside or correct sentence filed by a defendant who was serving an enhanced sentence under the Armed Career Criminal Act (“ACCA”) based on three prior felony convictions. The defendant alleged that under the rule of *Apprendi*, one of his prior convictions could not have resulted in a felony sentence, so it should be reclassified as a misdemeanor and thus would no longer be a predicate prior for ACCA purposes. The Seventh Circuit held that until the Supreme Court declares

that *Apprendi* is to be applied retroactively or applies *Apprendi* retroactively, it will not grant leave to file second or successive petitions under 28 U.S.C. §§ 2254 or 2255.

Hernandez v. United States, 226 F.3d 839 (7th Cir. 2000). A successive petition to vacate a sentence that rests on a new rule of constitutional that has not yet been certified by the Supreme Court to be retroactive should be dismissed without prejudice. In this case, which involved a conviction for conspiracy to kidnap and for kidnapping, the court dismissed the petition with prejudice because the petitioner was challenging sentencing enhancements that, although they increased his guideline sentence, still resulted in a sentence within the prescribed statutory maximum penalty.

Eighth Circuit

Rodgers v. United States, No. 00-2916, ___ F.3d ___, 2000 WL 1515167 (8th Cir. Oct. 13, 2000). Where a defendant seeks leave to file a second or successive petition to set aside, vacate or correct a sentence pursuant to 28 U.S.C. § 2255, the court of appeals lacks power to grant leave, as the statutory language plainly authorizes only the Supreme Court to certify whether a new rule of constitutional law is retroactive. For initial § 2255 claims, however, no such limitation applies and the Eighth Circuit has previously accepted review of *Apprendi* claims raised in a § 2255 petition for the first time (the court did not, however, cite any example).

United States v. Murphy, 109 F. Supp. 2d 1059 (D. Minn. 2000). On a motion to vacate, set aside or correct a sentence filed pursuant to 28 U.S.C. § 2255, the district court found that *Apprendi* is to be applied retroactively because it establishes a “watershed rule of criminal procedure,” making it applicable under the second *Teague* exception. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989). The court vacated the 300-month sentence imposed under § 841(b)(1)(A) after a jury trial in which the jury was instructed that the government was not required to prove the precise amount of the cocaine base alleged in the indictment and imposed the twenty-year maximum penalty permissible under § 841(b)(1)(C), which does not include a quantity determination.

Ninth Circuit

Jones v. Smith, No. 99-56405, ___ F.3d ___, 2000 WL 1664426 (9th Cir. Nov. 7, 2000). In an appeal from the denial of a § 2254 petition arising out of a state attempted-murder conviction, the Ninth Circuit held that *Apprendi* does not apply retroactively under *Teague* to a claim of constructive amendment of the charging document.

Eleventh Circuit

In re Joshua, 224 F.3d 1281 (11th Cir. 2000). Agreeing with the First Circuit in *Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000), the Eleventh Circuit holds that for purposes of second or successive petitions to vacate, set aside or correct a sentence, the Supreme Court must make the new rule of constitutional law retroactive to cases on collateral review before such petitions may be entertained by the lower federal courts. “It is not enough that the new rule is or will be applied retroactively by the

Eleventh Circuit or that it satisfies the criteria for retroactive application set forth by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989).” Petitioner’s application for leave to file a second petition was denied.

SENTENCING GUIDELINES

Sixth Circuit

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000). In a case involving a RICO conspiracy, the Sixth Circuit found that the government need not prove underlying acts of racketeering beyond a reasonable doubt in order to use the underlying conduct as relevant conduct in calculating the defendant’s sentence. It was permissible to determine the base offense level based on a finding by a preponderance of evidence that one of the objects of the conspiracy was a plot to commit murder, because the defendant’s sentence did not exceed the twenty-year statutory maximum for a RICO conspiracy under 18 U.S.C. § 1963, without regard to the murder conspiracy. As a result, *Apprendi* did not require that the plot to commit murder be submitted to the jury under the reasonable doubt standard.

United States v. Elliott, No. 99-5994, 2000 WL 1175600 (6th Cir. Aug. 9, 2000) (unpublished). The Sixth Circuit rejected the argument that guideline enhancements based on uncharged conduct require proof beyond a reasonable doubt. The case involved a guilty plea to a charge of being a felon-in-possession of a firearm, 18 U.S.C. § 922(g)(1). At sentencing, the district court imposed a three-level enhancement pursuant to U.S.S.G. § 3A1.2(b), applicable where a victim of the offense is an official victim, after finding by a preponderance of the evidence that the defendant had knowingly assaulted a law enforcement officer in a manner creating a substantial risk of serious bodily injury.

Ninth Circuit

United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000). The imposition of a two-level sentencing guidelines enhancement in a prosecution for transporting an illegal alien based upon a finding by the district court that the offense involved an intentional or reckless risk of injury to another did not violate *Apprendi* where the enhancement did not increase the term of imprisonment beyond the prescribed statutory maximum.

United States v. Valensia, 222 F. 3d 1173 (9th Cir. 2000). The Ninth Circuit held that due process is satisfied where the district court applied a preponderance-of-evidence standard in making findings on guidelines enhancements based on uncharged conduct. The court rejected the defendant’s request that it impose a clear and convincing standard where the totality of enhancements for the defendant’s role as manager of a drug enterprise (two levels) and for possession of firearm (two levels) resulted in a sentence of 262 months, increased from a range of 168-210 months. In determining when due process requires a standard greater than preponderance, the court, relying on *Apprendi*, applied a five-factor analysis, one of which is whether the enhanced sentence falls within the maximum sentence for the offense alleged in the indictment.