

Guideline Sentencing Update

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Offense Conduct

Drug Quantity

Eleventh Circuit holds *Apprendi* requires reversal of drug quantity finding by court and also affects calculation under career offender guideline. Defendant was found guilty by a jury of possession of crack cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1). The sentencing court determined that defendant possessed forty-one grams of crack, an amount that allows a maximum term of forty years under §841(b)(1)(B), and sentenced defendant to 360 months after calculating a guideline range of 360 months to life. (Note: The court mistakenly referenced §841(b)(1)(A) in sentencing, but that does not affect the ultimate result on appeal.) The defendant challenged the government's motion under §851 to enhance his sentence for three prior felony drug convictions, which would have increased the statutory maximum to life under §841(b)(1)(B) and to forty years under §841(b)(1)(C), but the district court never ruled on that issue.

The appellate court remanded, finding that *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), overruled its prior precedent regarding "what may be determined by a sentencing judge by a preponderance of the evidence and what must be charged in an indictment and decided by a jury beyond a reasonable doubt. . . . Applying *Apprendi*'s constitutional principle to section 841 cases, it is clear that the principle is violated if a defendant is 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 trial jury. The statutory maximum must be determined by assessing the statute without regard to quantity. This means that sections 841(b)(1)(A) and 841(b)(1)(B) may not be utilized for sentencing without a finding of drug quantity by the jury. If a provision of section 841(b) that does not contain a quantity amount applies, for example, section 841(b)(1)(C), then a convicted defendant may still be sentenced under that provision. In short, we hold today that drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*."

Therefore, the defendant here "may only be sentenced under section 841(b)(1)(C), which provides punishment for conviction of an undetermined amount of crack cocaine" and limits the sentence to "not more than 20 years" or, if defendant has a prior felony drug conviction, "not more than 30 years." Although the government initially

filed notice under §851, defendant "was not sentenced under the section 851 enhancement by the district court and because there was no objection or appeal on that issue, we treat the Government as having abandoned its request for a section 851 enhancement." Thus, the allowable maximum is twenty years.

These findings will also affect defendant's guideline range. Although not used for §851 purposes, his prior offenses were used to classify him as a career offender, and his offense level was determined by the table in USSG §4B1.1. The applicable offense level for his offense of conviction was 30, which the district court initially raised under §4B1.1 to 37 because it had determined defendant's "offense statutory maximum" was life. However, under §841(b)(1)(C) without a prior felony drug conviction, defendant's offense statutory maximum is twenty years and §4B1.1 sets his offense level at 32. Given his criminal history and other adjustments, defendant's sentencing range would thus be 210–262 months, or 210–240 months in light of the statutory maximum and USSG §5G1.1. The appellate court remanded for resentencing. *U.S. v. Rogers*, 228 F.3d 1318, 1326–30 (11th Cir. 2000).

Fifth Circuit holds *Apprendi* requires jury determination of drug quantity that raises statutory maximum; court later holds *Apprendi* does not apply to mandatory minimum that does not exceed applicable statutory maximum. Defendants were convicted after trial of methamphetamine offenses, 21 U.S.C. §§841(a) and 846. "As had been the practice in this circuit, no specified amount of drugs were charged in the indictment or submitted to the jury." The sentencing court determined quantity by a preponderance of the evidence and sentenced one defendant to 235 months, the other to two concurrent life sentences. Under §841(b), the maximum sentence for a defendant with no prior felony drug convictions is twenty years when no drug amount is specified, thirty years with a prior conviction.

"This case presents the question recently left unanswered in *U.S. v. Meshack*, 225 F.3d 556 . . . (5th Cir. 2000) [11 *GSU*#1], whether drug quantities under §841(b) are sentencing factors or elements of the offense. We conclude that there is no reasonable construction of §841 that would allow us to avoid the broad constitutional rule of *Apprendi*. Notwithstanding prior precedent of this circuit and the Supreme Court that Congress did not intend drug quantity to be an element of the crime under 21 U.S.C. §§841 and 846, we are constrained by *Apprendi* to find in the opposite."

“The relevant inquiry is now whether a factual determination is involved, and whether that determination increases the sentence beyond the maximum statutory penalty. . . . Section 841 clearly calls for a factual determination regarding the quantity of the controlled substance, and that factual determination significantly increases the maximum penalty from 20 years under § 841(b)(1)(C) to life imprisonment under § 841(b)(1)(A). Therefore, we hold that if the government seeks enhanced penalties based on the amount of drugs under 21 U.S.C. § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt.”

The court found that *Apprendi* does not affect the 235-month sentence given to one defendant because it is within the lowest applicable statutory maximum term of twenty years. It rejected that defendant’s argument that “*Apprendi* prohibits the trial court from determining the amount of drugs for relevant conduct purposes under the Sentencing Guidelines. . . . The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court’s factual finding for the purposes of determining the applicable Sentencing Guidelines.” However, defendant’s five-year term of supervised release must be reduced to the three years authorized under § 841(b)(1)(C) and 18 U.S.C. § 3583(b)(2).

As for the other defendant’s life sentences, which were based partly on his prior felony drug convictions, “the sentencing court did not err by using Beman’s prior convictions to enhance his sentence, even though the prior convictions were not submitted to the jury. *See Apprendi*, . . . 120 S. Ct. at 2362–63. . . . Nevertheless, even considering the proper enhancement, the maximum penalty for Beman under § 841(b)(1)(C) is 30 years on each count. Because the district court sentenced Beman to two concurrent life sentences, we remand Beman’s case for resentencing consistent with this opinion.”

U.S. v. Doggett, 230 F.3d 160, 164–66 (5th Cir. 2000).

In a case decided after *Doggett*, defendant was convicted of a crack cocaine count under § 841(a); he also had a previous conviction for a felony drug offense. There was no quantity finding by the jury, and the sentencing court imposed a mandatory twenty-year sentence under § 841(b)(1)(A) based on its finding that the offense involved more than fifty grams of cocaine base. Defendant “argues that because subsection (C) of § 841(b)(1) applies in the absence of an allegation and jury finding of drug quantity, the district court could not impose the statutory minimum sentence of twenty years under § 841(b)(1)(A) based on a non-jury determination of drug quantity. We disagree. Although *Doggett* involved a Sentencing Guidelines enhancement, its reasoning and its holding apply with equal force to a statutory minimum sentence.”

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court held that a sentencing judge could impose a mandatory minimum sentence, based on a preponderance of the evidence finding, that was within the applicable statutory maximum. “In *Apprendi*, the Court emphasized that *McMillan* remains good law. . . . Our examination of *Apprendi* in light of *McMillan* and *Doggett* leads inexorably to the conclusion that, as Keith’s sentence did not exceed the maximum sentence of thirty years under § 841(b)(1)(C), the offense established by the jury’s verdict [and defendant’s prior conviction], it does not run afoul of *Apprendi*’s constitutional limitations.”

U.S. v. Keith, No. 99-50692 (5th Cir. Oct. 17, 2000) (per curiam). *See also U.S. v. Pounds*, No. 99-15058 (11th Cir. Oct. 20, 2000) (per curiam) (affirmed: *Apprendi* is inapplicable to § 924(c)(1)(A)(iii), which mandates minimum term of ten years when a firearm is discharged during a crime of violence, “because every conviction under § 924(c)(1)(A) carries with it a statutory maximum sentence of life imprisonment, regardless of what subsection the defendant is sentenced under”).

Fourth Circuit agrees *Apprendi* requires jury finding of quantity to raise statutory maximum, but holds sentencing court determines guideline range within the applicable statutory maximum. Defendants were found guilty by a jury of conspiracy to distribute cocaine, 21 U.S.C. § 846. With no drug quantity charged or submitted to the jury, the sentencing court determined the amount and sentenced one defendant to 210 months, the other to 292. However, under *Apprendi*, without a quantity finding by the jury “a violation of § 846 authorizes sentences for the defendants under § 841(b)(1)(C) to terms of not more than twenty years.”

“Pursuant to *Apprendi*, in order for imprisonment penalties under § 841(b)(1)(A) or (B) to apply to the defendants, . . . the drug quantity must be treated as an element [of the offense]: charged in the indictment, submitted to a jury, and proven to beyond a reasonable doubt. Where no drug quantity is charged in the indictment or found by a jury, but a jury has found a violation of § 841(a), the standard statutory term of imprisonment is not more than twenty years. *See* § 841(b)(1)(C). In these cases, where the quantity is not charged, the drug amount is still a proper aggravating or mitigating factor to be considered by the judge in determining a sentence at or below the statutory maximum sentence. . . . Thus, the judge still may determine the amount of drugs by a preponderance of the evidence for the purposes of calculating the offense level and relevant conduct under the U.S. Sentencing Guidelines.” *See also* USSG § 5G1.1(a).

Therefore, for the defendant sentenced to 210 months, “consideration by the district court judge of the quantity of drugs in determining the appropriate sentence at or below the statutory maximum was proper under

Apprendi.” That sentence was remanded, however, for more specific quantity findings.

For the defendant sentenced to 292 months, “it is clear that the district court did not sentence in accordance with the applicable statutory penalty of § 841(b)(1)(C), . . . which authorizes a term of imprisonment not more than twenty years.” Although the court’s action was proper under the circuit’s prior rule “that drug quantity is a sentencing factor that may be proven by a preponderance of the evidence,” that rule “must be abandoned to the extent that the rule is inconsistent with *Apprendi*,” and defendant should be resentenced accordingly.

U.S. v. Angle, 230 F.3d 113, 121–24 (4th Cir. 2000).

Sixth Circuit affirms, on review for plain error, sentences on multiple counts that exceed the statutory maximum allowable under *Apprendi* for each individual count. Defendants were convicted by a jury of conspiracy to distribute and to possess with the intent to distribute cocaine base. Three of the four defendants were also convicted on substantive distribution counts. The district court determined drug quantity at sentencing and sentenced one defendant to 292 months, the other three to 360 months each. Defendants challenged their sentences in light of *Apprendi*.

The Sixth Circuit previously found *Apprendi* applied to the determination of whether death resulted from the distribution of drugs because it would raise the statutory maximum. See *U.S. v. Rebmann*, 226 F.3d 521 (6th Cir. 2000) [11 *GSU*#1]. The court now found “the principles set forth in *Apprendi* applicable to [these] cases.” Because there was no mention of quantity in the indictment and the jury made no findings regarding quantity, the statutory maximum for each count was limited to twenty years under § 841(b)(1)(C).

“Defendants, however, failed to object to the district judge making the determination of drug quantities. Where there has been no objection, review is for plain error.” Although the court found that failure to follow *Apprendi* met the requirements for plain error and requires resentencing one defendant, “the government contends that the sentencing errors . . . with respect to [three defendants] were not prejudicial and, therefore, should not be noticed on plain error review. These defendants were convicted [of two or more charges], each of which carries a statutory maximum of twenty years pursuant to 21 U.S.C. § 841(b)(1)(C). Thus, the total statutory maximum is dramatically increased depending on the number of counts of which each defendant was convicted. The government argues that there would be no change in defendants’ sentences if remanded for resentencing. Rather than running the sentences concurrently, the Sentencing Guidelines would require that the sentence imposed on one or more of the substantive counts run consecutive to the sentence on the conspiracy count,

to the extent necessary to produce a combined sentence equal to the total punishment. See U.S.S.G. § 5G1.2(d).”

The court first noted that *Apprendi* “appears to foreclose this argument” because it ruled that, even if the same sentence could have been given by using consecutive sentences, it was “legally significant” that the count in question in that case could double the possible statutory maximum. “However, the decision in *Apprendi* was not limited by the standard of review for plain error. . . . In the case of defendants Linton, Hill, and Powers, we find that they were not prejudiced and that the fairness of the proceedings was not affected by the error since, absent the error, their sentences would have been the same as those which were imposed. We therefore decline to exercise our discretion as to these three defendants because they can show no meaningful benefit they would receive from vacating their sentences and remanding for resentencing.”

U.S. v. Page, No. 99-5361 (6th Cir. Nov. 9, 2000) (Katz, Dist. J.).

Seventh Circuit rejects habeas petition based on *Apprendi* and summarizes limits of that case. A prisoner filed a request for a second or successive collateral attack on his federal sentence based on *Apprendi*. In this case, that request could only be granted if *Apprendi* established “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. §§ 2244(b)(2)(A), 2255. “We held [previously] that retroactive application must be declared by the Supreme Court itself. . . . *Apprendi* does not state that it applies retroactively to other cases on collateral review. No other decision of the Supreme Court applies *Apprendi* retroactively to cases on collateral review. So, . . . no application based on *Apprendi* can be authorized under § 2244(b)(2)(A) or § 2255.”

The appellate court went on to note that “[p]risoners seem to think that *Apprendi* reopens every sentencing issue decided by a federal court in the last generation. It does not. All *Apprendi* holds is that most circumstances increasing a statutory maximum sentence must be treated as elements of the offense—and, if the defendant has demanded a jury trial, this means that they must be established beyond a reasonable doubt to the jury’s satisfaction. *Apprendi* does not affect application of the relevant-conduct rules under the Sentencing Guidelines to sentences that fall within a statutory cap.”

“When a drug dealer is sentenced to less than 20 years’ imprisonment—the limit under 21 U.S.C. § 841(b)(1)(C) for even small-scale dealing in Schedule I and II controlled substances—again *Apprendi* is irrelevant To put this otherwise, *Apprendi* does not affect the holding of *Edwards v. United States*, 523 U.S. 511 . . . (1998), that the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum.

And, more to the point of Talbott's application, *Apprendi* does not affect the holding of *Custis v. United States*, 511 U.S. 485 . . . (1994), that the validity of prior convictions is not open to reexamination at sentencing for a new offense, unless the defendant lacked counsel when convicted of the prior offenses."

Talbott v. Indiana, 226 F.3d 866, 868–70 (7th Cir. 2000). *Accord* *Rodgers v. U.S.*, 229 F.3d 704, 706 (8th Cir. 2000) (per curiam) (defendant cannot file second or successive motion under §2255 to vacate sentence based on *Apprendi*

"because the Supreme Court has not made *Apprendi* retroactive to cases on collateral review, as required by the plain language of § 2255. . . . Nowhere in the *Apprendi* decision itself, or in any subsequent decision, does the Supreme Court discuss *Apprendi's* retroactivity. Therefore, *Apprendi* is not available to a prisoner filing a second or successive petition under § 2255."); *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000) (same); *Sustache-Rivera v. U.S.*, 221 F.3d 8, 15 (1st Cir. 2000) (same).

See *Outline* at II.A.3.a and c

Guideline Amendments

Some of the Nov. 1, 2000, amendments to the Sentencing Guidelines will affect sections of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 2000). Those sections are listed below, with a brief summary of the relevant amendments.

I.A.3 at p. 7 and **IX.A.1** at p. 414: New policy statement § 5K2.21 specifically authorizes departures for dismissed or uncharged conduct that was not otherwise accounted for. The Background Commentary to § 1B1.4 was also amended to reflect this policy. A majority of the circuits had already reached this conclusion.

VI.C.1.c at p. 329: New policy statement § 5K2.20 provides a definition of "aberrant behavior" and outlines the circumstances under which a departure may or may not be appropriate. This resolves a split among the circuits with new guidance that may affect the value of circuit precedent.

VI.C.2 at p. 340: New policy statement § 5K2.19 prohibits departure at resentencing for rehabilitation efforts undertaken after imprisonment, even when exceptional, and resolves a split among the circuits. Most circuits to decide the issue had held that exceptional post-sentencing rehabilitation could warrant departure.

Note to readers: The new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 2000), has been mailed to all recipients of *GSU*. If you have not received your copy by now, or would like to request additional copies, please contact the FJC's Information Services Office by fax at 202-502-4077.

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