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Apres Apprendi

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Après Apprendi

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After *Apprendi v. New Jersey*,¹ any fact, other than a prior conviction, that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. This due process rule is properly labeled “watershed,”² as it is bound to change the course of criminal litigation significantly, both in the near future and well into the coming decades. In a forthcoming article,³ we attempt to answer at length some of the profound questions raised by the *Apprendi* case including constitutional oversight of legislative authority to define what is a “crime,” questions that will ripen over the years as legislatures look for ways around the rule and litigants test these legislative reactions. In this shorter essay, we focus on a more immediate problem facing those laboring in the trenches of the criminal justice system: the correction of flawed judgments after *Apprendi*.⁴

Apprendi threatens thousands of completed criminal prosecutions under dozens of existing federal and

state statutes. Appendices A and B collect many of these provisions. Some are what we would call “add-on” statutes resembling the hate crime law at issue in *Apprendi*. Such “add-on” statutes impose a higher maximum for any offense (or for a large subset of crimes) following proof at sentencing of a specified aggravating fact. Statutes that add prison time to what would otherwise be a statutory maximum if a firearm was used, or if there was injury to a victim, or if the crime was committed while on pretrial release, are additional examples of “add-on” statutes that are subject to the *Apprendi* rule. Also at risk are convictions and sentences under what we would call “nested” statutes. “Nested” statutes are those that include provisions that define a core offense, but peg higher sentence ceilings to the presence of aggravating facts as determined by the sentencing judge. The carjacking provision examined by the Court in *Jones v. United States*⁵ and the firearms offense interpreted in *United States v. Castillo*⁶ are examples of such “nested” statutes, as are theft statutes that set the sentence maximum using the sentencing judge’s determination of the value of the item stolen, and drug statutes that boost maximum sentences for increasing quantities of drugs.

Whether relief is available to those sentenced under these statutes depends in part upon whether the *Apprendi* claim was raised on direct appeal or in a petition for collateral relief; whether the failure to treat a sentencing fact as an element was raised as a challenge to the indictment, to jury instructions at trial, to the validity of a guilty plea, or even as a claim of ineffective assistance; and whether the claim was properly preserved by the defense. These different contexts are considered separately, for federal and state defendants, in the analysis that follows.

I. Federal Defendants

A huge proportion of federal prisoners today are serving sentences for violating 21 U.S.C. § 841, prohibiting the distribution of controlled substances.⁷ Their judgments are now open to challenge under *Apprendi* because courts have for years assumed that although § 841(b) ties maximum sentences to the amount of drugs involved, drug amount is a sentencing factor that need not be charged in the indictment or proven to a jury beyond a reasonable doubt.⁸ The Supreme Court has already remanded a case involving this provision to the Court of Appeals for the Tenth Circuit for reconsideration in light of *Apprendi*,⁹ and the number of lower court decisions evaluating the post-*Apprendi* claims of



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federal drug defendants increases weekly.¹⁰ For prosecutors defending these sentences, we predict much litigation and resentencing, but relatively few released defendants. Much, perhaps too much, will turn on the pleading practices of various United States Attorneys offices.

A. Raising *Apprendi* on Direct Appeal

Defendants who challenge their sentence under *Apprendi* on direct appeal will encounter two major road block: harmless error and plain error.

1. Properly Preserved Claims—Harmless Error

(a) *Failure to Instruct Trial Jury or Prove Beyond Reasonable Doubt.* Consider first the defendant convicted by a jury of violating § 841, who alleges only the denial of a jury determination of drug amount. Assume further that this defendant raised his *Apprendi* claim in time by demanding, albeit unsuccessfully, that drug quantity be proven to the jury beyond a reasonable doubt. Conveniently, just before it announced its decision in *Jones*, the Court held in *Neder v. United States* that omitting an element of an offense from trial jury instructions can be harmless error.¹¹ *Neder* involved the failure of the trial court to instruct the jury on the element of “materiality” in a tax fraud charge. Five justices decided that the evidence of this element was “overwhelming” and “uncontested,” and therefore the omission of this element in the charge to the jury was harmless beyond a reasonable doubt.¹² Justice Stevens concurred, but concluded that the error was harmless because the jury’s verdict “necessarily included a finding” that the element existed.¹³ Based on the assumption that none of the five justices in the *Neder* majority will shift their votes in the future and join Justice Stevens’ more confined standard,¹⁴ it is inevitable that some defendants denied due process under *Apprendi* will find their route to relief blocked by the harmless error doctrine embraced in *Neder*. Our federal drug offender, for example, is out of luck if the record shows that “overwhelming” proof of drug type and amount was introduced at trial, and was not contested at the time.¹⁵

(b) *Misunderstanding of Elements of Crime at Plea Proceeding.* The decision in *Apprendi* also provides ammunition for defendants who have been convicted following a guilty plea. Like the defendant in *Bousley v. United States*,¹⁶ who attacked his plea-based conviction after the Supreme Court in *Bailey v. United States*¹⁷ unexpectedly decided that Bailey’s firearm offense required proof of active employment of the firearm, a defendant convicted of violating § 841 may be able to claim after *Apprendi* that at the time he pleaded guilty, “neither he, nor his counsel, nor the court correctly understood the

essential elements of the crime with which he was charged.”¹⁸ The defendant must show he was actually misled by the court as to the elements of his offense, but if he does, and his claim is timely, the plea is invalid, requiring relief even if the prosecutor is able to show that properly informed, the defendant would have pleaded guilty anyway.¹⁹

(c) *Failure to Include Element in Indictment.* The defendant sentenced under § 841(b) whose indictment fails to allege drug amount or type is in an even better position to obtain relief. Unlike the trial context where the omission of an element from jury instructions may be harmless, the omission of an element from a federal indictment is considered a constitutional violation not subject to a finding of harmless error.²⁰ If *Apprendi* means that maximum-boosting facts must be included as elements in the indictment as well as proven to a jury, prosecutors will be unable to use harmless error to fend off an attack upon a judgment under § 841(b) if the indictment fails to allege the requisite drug amount. The Court in *Apprendi* did not decide whether the Grand Jury Clause of the Fifth Amendment requires maximum-enhancing facts to be included as elements in the indictment. Justice Stevens, noting that the issue had not been raised, carefully declined to discuss whether the grand jury indictment as well as the trial jury instructions must include maximum enhancing facts as elements.²¹ However, given the Court’s earlier dicta in *Jones* that it does,²² and the historical link between the *Apprendi* rule and pleading practices,²³ the Court’s affirmative answer to its open question seems to be a foregone conclusion. Consequently, under prevailing doctrine, *Apprendi* error affecting the indictment will warrant relief, even if the government later proved the omitted element at trial, even if the defendant admitted the omitted element at a plea proceeding,²⁴ and, it seems, even if the defendant expressly waived his right to challenge his conviction or sentence.²⁵

2. Untimely Claim on Appeal – Plain Error

(a) *Failure to Submit Element to Jury or Prove Beyond Reasonable Doubt.* Consider now the federal drug offender whose indictment is sufficient, who objects on appeal to the lack of jury finding on the element of drug amount, but who did not raise this objection at trial. Under FRCrP 52, an appellant who fails to raise his claim on time can only obtain relief if he can demonstrate that his judgment was infected with “plain error.” This barrier to relief was extended recently by the Court in *Johnson v. United States* to the omission of an element from jury instructions at trial.²⁶ Instead, defendants aggrieved under *Apprendi* who are late in raising their claim will receive no relief unless they can demon-

strate a “miscarriage of justice” – no easy task, judging from early returns.²⁷

(b) *Failure to Allege Element in Indictment.* Again, relief for the defendant who protests a missing element from the indictment will be more accessible than for the defendant who objects to a different type of error, even when that objection is untimely. For just as the failure to allege an essential element is never considered harmless when a defendant raises the issue properly before trial, a defendant’s belated claim after conviction that his indictment failed to allege an essential element is also exempt from the usual plain error rules.²⁸

We anticipate that before long, the pressure to extend more rigorous harmless error and plain error review to missing-allegation cases will intensify. Since *Neder*, one finds in lower-court opinions repeated expressions of frustration with the rule of automatic reversal for missing elements.²⁹ Indeed, there is a real possibility that *Apprendi* will prompt both the Court and Congress to reconsider their respective automatic reversal rules for missing elements in a federal indictment, especially in light of several decisions undermining the grand jury’s screening function.³⁰ For brevity’s sake, we do not pursue these issues here, except to note that since its decision to apply harmless error analysis to constitutional error in *Chapman v. California*,³¹ the Court has yet to revisit directly the application of harmless error or plain error review to the failure to allege an essential element in a federal indictment; nor has the Court considered the question in light of its recent decisions in *Neder* or *Johnson* extending harmless and plain error review to the omission of an element from trial jury instructions.

B. *Apprendi*-related Claims and 28 U.S.C. § 2255

Federal defendants who have completed their direct appeals must seek relief for *Apprendi* error through 28 U.S.C. § 2255. Many federal convictions and sentences that fall under *Apprendi*’s shadow will be sheltered by the rules limiting collateral relief.

1. Retroactivity and *Teague*

(a) *Apprendi as New Rule.* One formidable barrier to relief for *Apprendi* error under § 2255 is *Teague v. Lane*,³² which bars retroactive application of “new rules” of procedure unless the rule meets one of two narrow exceptions. That *Apprendi* is a “new” rule under *Teague*, not “dictated” by prior precedent, is amply illustrated by the debate between the justices about its consistency with prior decisions. We believe the majority in *Apprendi* is correct, and that the decision is quite consistent with prior precedent,³³ but one would be hard pressed to maintain that “no other interpretation was reasonable.”³⁴

As for the *Teague* exceptions, the *Apprendi* rule does not qualify as a rule that protects certain conduct from punishment altogether.³⁵ Nor, in our view, does it qualify for the second exception as a watershed ruling central to an accurate determination of guilt that “alter[s] our understanding of the bedrock procedural elements essential to the fairness of the proceeding.”³⁶ However this is a closer question. On the one hand the rule is fundamental in that it affects potentially any criminal statute, involves the basic mechanisms of adjudication (burden of proof and the jury), and affects the accuracy of individual judgments. On the other hand, the rule of *Apprendi* lacks the “primacy and centrality of the rule adopted in *Gideon*,”³⁷ for unlike deprivations of counsel, it does not protect the blameless from punishment, but instead protects the unquestionably blameworthy from unauthorized amounts of punishment. The decision does no more to “alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding” than other rules rejected under the exception, including the ruling in *Batson v. Kentucky*. Indeed, the Court has yet to find any ruling that qualifies for this exception, and it seems unlikely to us that the *Apprendi* rule will be the first.³⁸

(b) *The Bousley Loophole.* The Court in *Bousely v. United States*³⁹ held that where an applicant for relief under § 2255 seeks retroactive application of a new interpretation of substantive criminal law, rather than a new rule of procedure, he need not worry about retroactivity and *Teague*. Just as the petitioner in *Bousley* was not barred by *Teague* from taking advantage of a new interpretation of the weapons offense of which he was convicted, defendants convicted of aggravated carjacking after *Jones* or of the possession of particular weapons after *Castillo* may seek retroactive application of the Court’s recent interpretations of these federal offenses.⁴⁰ Conceivably, by pointing to the first decision from his neighborhood court of appeals finding as a matter of statutory interpretation that the sentence-enhancing fact in any given federal criminal statute is an element, an applicant previously sentenced under that statute who seeks relief under § 2255 may, like *Bousley*, cast his claim as one that seeks to apply a new interpretation of substantive criminal law rather than one seeking retroactive application of the procedural rule announced in *Apprendi*.

2. Successive Motions under § 2255

Applicants who raise their *Apprendi* claims in a second or successive § 2255 motion will encounter a dead end. Relief for such claims is available only if the court of appeals will certify that the claim is based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.”⁴¹ But no court of appeals can make such a

certification unless and until the United States Supreme Court decides that *Apprendi* should be applied retroactively, a decision we believe is unlikely to materialize.⁴²

But the review of claims in second or successive § 2255 motions is restricted to claims based upon new rules of constitutional law; there is no provision for the review of claims based on new interpretations of federal statutes. Consequently, a defendant whose second or successive petition raises *Jones* or *Castillo*, both of which were decided on statutory, not constitutional, grounds,⁴³ must give up on § 2255. He may resort instead to bringing a petition under 28 U.S.C. § 2241 and argue that the remedy under § 2255 is inadequate or ineffective, as have other defendants who ran into the same problem when they belatedly sought § 2255 relief claiming they were not guilty of “use” of a firearm after the Court attributed a new meaning to that offense in *Bailey*.⁴⁴

3. Procedurally Defaulted Claims Under § 2255

Even if not blocked by retroactivity rules, or rules limiting claims raised in second or successive motions, § 2255 applicants who did not raise their claims early enough must demonstrate cause for and prejudice from their failure to protest on time, or, alternatively, their actual innocence.⁴⁵ Here again, courts will turn to *Bousley* for guidance, where the Court rejected the defendant’s argument that the novelty of the claim endorsed by the Court in its *Bailey* decision provided “cause” for his default. The Court concluded, with very little explanation, that the legal basis for Bousley’s claim was reasonably available at the time (noting “the Federal Reporters were replete with cases involving” similar claims), so that novelty as cause was unavailable.⁴⁶ Nor did the Court accept the defendant’s argument that raising the claim earlier would have been futile: “futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.”⁴⁷ Similar conclusions concerning “cause” can be expected in the context of *Apprendi* challenges to convictions and sentences under § 841.⁴⁸

That leaves our offender with the defaulted claim only the alternative of showing actual innocence. For a violator of § 841, this means showing that the more serious drug amount or type that should have been proven beyond a reasonable doubt to a jury probably did not exist.⁴⁹ Further, if the conviction is the result of a plea bargain, as Bousley’s was, the defendant must show in addition, that he is innocent of any more serious charge which had been dismissed as part of his plea bargain. For many federal prisoners, either showing will raise insurmountable burdens.⁵⁰

C. Claims of Ineffective Assistance

Rather than raise an *Apprendi*-related claim directly, a defendant may allege that his attorney should have

done so at trial or on direct appeal. Making out the required showing of “prejudice” will be the most common obstacle here,⁵¹ just as harmless error and actual innocence standards will derail many of the claims of *Apprendi* error described above. Moreover, a defendant convicted of violating § 841 will not have an easy time establishing that his attorney’s conduct in failing to anticipate *Apprendi* “fell below an objective standard of reasonableness.”⁵² Before *Apprendi*, not a single Circuit had agreed to characterize drug amount as an element under § 841 rather than a sentencing factor, even after the Court’s decision in *Jones*.⁵³

D. Remedy for *Apprendi* Error: Resentencing under the Guidelines

Should an offender succeed in navigating these rules and winning relief, that relief will probably be resentencing. Yet such resentencing may sometimes result in the very same term of incarceration.

Typically, the defendant will be resentenced on a lesser offense, each element of which was alleged and proven in accordance with the Constitution. Retrial on the more aggravated offense will be impractical in many cases, and, in any event, may be barred by double jeopardy.⁵⁴ Under § 841, because the sentence ceilings for the least quantity of drugs are already quite high, even a successful *Apprendi* challenge may not reduce time behind bars.⁵⁵

The case of *United States v. Aguayo-Delgado*⁵⁶ will illustrate. The defendant, prior to *Apprendi*, was convicted of conspiracy to distribute methamphetamine in violation of § 846. At sentencing the judge determined that the defendant had distributed over 3 but less than 15 kilograms of methamphetamine, which mandated a base offense level of 36 under the Sentencing Guidelines. The combination of his base offense level and criminal history category yielded a sentencing range of 235–293 months.⁵⁷ The judge imposed a sentence of 240 months. Following *Apprendi*, the defendant appealed his conviction and sentence, and demonstrated that his indictment failed to include an allegation of the *amount* of methamphetamine. The Circuit court refused to remand, because the trial judge on resentencing would use the exact same Guidelines calculations, and reach the same result. It was true that after *Apprendi* the judge cannot sentence above the statutory maximum for the highest offense alleged in the indictment and found by the jury, which for Aguayo-Delgado was up to 30 years under 21 § 841(b)(1) (C) for delivery of *any* amount of methamphetamine (rather than life imprisonment, the sentence maximum provided by § 841(b)(1)(A) for 50 grams or more of methamphetamine). However, 240 month sentence originally imposed did not exceed that 30 year cap. Aguayo-Delgado might argue that a different calculation under the Guidelines should apply on resentenc-

ing, one using offense level 12 (the lowest for any amount of methamphetamine), which would produce a recommended range of 10–16 months.⁵⁸ But nothing in *Apprendi* precludes the government from using a fact that is not proven beyond a reasonable doubt to set a sentence *within the statutory maximum*.⁵⁹

Sometimes, however, a significant sentence reduction will be warranted.⁶⁰ For example, in the unlikely event that drug *type* as well as amount is missing from an indictment, then the court upon resentencing an offender convicted under § 841 must assume that the offense of conviction involved the minimal amount of that controlled substance punished least severely — marijuana. Thus, the statutory maximum would drop to one year under § 841 (b)(4), the only offense validly pled and proven.⁶¹ In the more likely event that drug type was charged in the indictment but drug quantity not submitted to the jury, a steep sentence may be saved by proof of a prior conviction at the new sentencing hearing. 21 U.S.C. § 841(b)(C) authorizes raising the statutory maximum sentence for any amount of schedule I or II substances from 20 to 30 years if the defendant has a prior felony drug conviction. And, under *Almendarez-Torres*, 523 U.S. 224 (1998), sentences may be enhanced by a judge beyond the statutory maximum based upon the fact of prior convictions, without charging those convictions in the indictment or submitting them to a jury for a finding beyond a reasonable doubt.⁶²

II. State Prisoners

A. Direct Appeal

State offenders who raise *Apprendi* as a basis for attacking their sentences and convictions face similar hurdles, for most of them will encounter rules for harmless and plain error on direct appeal that are very like those in the federal system.⁶³ However, some states offer more generous review for an aggrieved prisoner, having rejected *Neder* and/or *Johnson*,⁶⁴ while other states extend even less relief for delinquent claims than is provided by federal law. In particular, the Grand Jury Clause does not bind the states, and the failure to allege an essential element in the charge is not a fatal error in many states.⁶⁵ Nevertheless, some states consider the failure to allege an essential element in the charge a “jurisdictional error” that, like the failure to plead an essential element in a federal indictment, can be raised at any time.⁶⁶

B. Collateral Relief for State Prisoners

State post-conviction relief may be available for *Apprendi* error.⁶⁷ Significantly, however, the 1996 amendments to the federal habeas statute effectively block federal habeas corpus relief for state prisoners who seek relief from the rejection by state courts of *Apprendi*-like arguments made prior to the date *Apprendi* was handed down.⁶⁸ These prisoners will not be able to show that a state court’s failure to treat a maximum-enhancer as an element was “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,”⁶⁹ because *Apprendi* was a case of first impression for the Court.⁷⁰ Nor would a state prisoner be able to argue that a state court’s failure to anticipate *Apprendi* was an “unreasonable application” of prior precedent, even after *Jones*, given that four dissenting justices in *Apprendi* thought prior precedent compelled a different rule.⁷¹ Following the announcement of the *Apprendi* decision, however, state court decisions that fail to heed *Apprendi* in resolving what must be treated as an element will be subject to collateral review in federal court.

C. Remedy

As in the federal system, state prisoners who do succeed in mounting a challenge based on *Apprendi* will probably obtain resentencing rather than dismissal and retrial.⁷² As the sentence ceilings provided by the states for drug offenses tend not to be as high as those for federal drug offenses, resentencing may in some cases produce a sentence much lower than the original sentence.⁷³

Conclusion

A considerable quantity of criminal justice resources will be spent sorting out the proper punishment for state and federal prisoners who were convicted by the time the Court announced its decision in *Apprendi*. Eventually, however, the number of pre-*Apprendi* convictions will dwindle to a trickle and this correction process will have run its course. The more lasting impact of the decision, we believe, will be its effect on legislative efforts to draft crimes and punishments in its wake, and its implications for constitutional limits on the shape of substantive criminal law.

Appendix A. Selected Federal Statutes Subject to *Apprendi* Challenge

Statute	Maximum enhancing feature(s)	Challenged in:
18 U.S.C. § 13 (drunk driving on military base or federal lands)	Increasing maximum sentence by one year where minor in vehicle.	
18 U.S.C. § 34 (penalty when death results)	Increasing maximum sentence to death penalty based upon crime resulting in death.	
18 U.S.C. § 43(b) (aggravated offense, animal enterprise terrorism)	Increasing maximum sentence from 1 year to life imprisonment based upon finding of bodily injury or death.	
18 U.S.C. § 111(a)(2) (assaulting federal officer)	Increasing maximum sentence from 1 to 3 years based upon seriousness of assault.	<i>United States v. Nuñez</i> , 180 F.3d 227 (5th Cir. 1999).
18 U.S.C. § 111(b) (use of a weapon in assault of federal officer)	Increasing maximum sentence from 3 to 10 years based upon use of a deadly weapon or infliction of bodily injury.	<i>United States v. Chestaro</i> , 197 F.3d 600 (2nd Cir. 1999).
18 U.S.C. § 201(b)(2) (bribery)	Increasing fine to three times the monetary equivalent of the thing of value.	
18 U.S.C. § 216 (penalty and injunctions)	Increasing maximum sentence from 1 to 5 years if violation of 18 U.S.C. §§ 203–205 or §§ 207–209 (bribery and gratuity) occurs willfully.	
18 U.S.C. § 247 (damage to religious property)	Increasing maximum sentence from 1 year to death penalty based upon finding of bodily injury or death.	Oral argument in <i>United States v. Jones</i> , 1998 WL 713483 (1999).
18 U.S.C. § 248 (b) (penalties for violation of freedom of access to clinic entrances act)	Increasing maximum sentence from 3 to 10 years or life imprisonment based upon serious bodily injury or death.	
18 U.S.C. § 521 (criminal street gang statute)	Increasing maximum sentence by additional 10 years if federal felony offense was committed while participating in or to promote a criminal street gang.	<i>United States v. Matthews</i> , 178 F.3d 295 (5th Cir.), cert. denied, 120 S.Ct. 359 (1999).
18 U.S.C. § 653 (misuse of public funds)	Increasing fine to amount embezzled.	
18 U.S.C. § 659 (interstate or foreign shipments by carrier)	Decreasing maximum sentence from 10 to 1 year based upon value of goods stolen not exceeding \$10,000.	<i>United States v. Galvez</i> , 2000 WL 1140343 (S.D. Fla. 2000).
18 U.S.C. § 661 (theft within special maritime jurisdiction)	Increasing maximum sentence from 1 to 5 years based upon value of property.	
18 U.S.C. § 893 (extortionate extensions of credit)	Increasing fine to twice the value of the money or property so advanced.	
18 U.S.C. § 924(c) (1988 ed. Supp. V) (use of firearm in relation to crime of violence or drug trafficking)	Increasing maximum sentence by additional 5 to 30 years based upon type and use of firearm.	<i>Castillo v. United States</i> , 530 U.S.—(2000) (Congress intended the statutory references to particular firearm types to define separate crimes).
18 U.S.C. § 924(c)(1) (A) (Sup. IV 1998) (enhanced penalties for use of weapon in relation to crime of violence or drug trafficking)	Increasing maximum sentence by an additional 5 to 10 years based upon brandishing or discharging weapon.	<i>United States v. Carlson</i> , 2000 WL 924593 (8th Cir 2000).

Appendix A (continued). Selected Federal Statutes Subject to Apprendi Challenge

Statute	Maximum enhancing feature(s)	Challenged in:
18 U.S.C. § 924(e)(1) (Armed Career Criminal Act of 1984)	Providing a mandatory minimum of 15 years and no specified maximum sentence for violating 922(g) after three previous convictions.	<i>United States v. Mack</i> , 2000 WL 1456245 (3rd Cir.).
18 U.S.C. § 924(j) (causing death of a person in the course of a violation of subsection c)	Increasing maximum sentence by additional 5 years to death sentence based upon a murder.	<i>United States v. Peña-Gonzalez</i> , 62 F.Supp. 2d 366 (D. Puerto Rico 1999).
18 U.S.C. § 982 (criminal forfeitures)	Authorizing property forfeiture in addition to maximum penalty for violation of money laundering or bank secrecy act based on offense involving property or generating proceeds.	
18 U.S.C. § 1030(c) (penalty for fraud in connection with computers)	Increasing maximum sentence from 1 to 5 years based upon value of information.	
18 U.S.C. § 1033 (crimes by or affecting persons engaged in the business of insurance)	Increasing maximum sentence from 10 to 15 years based upon jeopardizing the soundness of an insurer.	
18 U.S.C. § 1091(b) (punishment for genocide)	Increasing maximum sentence from 20 years to death penalty based upon resulting death.	
18 U.S.C. § 1201 (death during kidnapping)	Increasing maximum sentence from life imprisonment to death penalty based upon death of victim.	<i>United States v. Brown</i> , 1999 WL 1068273 (D. Me. 1999).
18 U.S.C. § 1324(a)(1)(B)(ii) (alien smuggling)	Increasing maximum sentence to ten years if smuggling was for commercial advantage or gain.	
18 U.S.C. §§ 1341 and 1343 (mail and wire fraud)	Increasing maximum sentence from 5 to 30 years based upon violation affecting a financial institution.	
18 U.S.C. § 1363 (buildings or property within special maritime jurisdiction)	Increasing maximum sentence from 5 to 20 years based upon the building being a dwelling or a life being placed in jeopardy.	<i>United States v. Terence Earl Davis</i> , 202 F.3d 212 (4th Cir. 2000)
18 U.S.C. § 1503(b) (punishment for influencing juror)	Increasing maximum penalty from 10 years to death penalty based upon killing.	
18 U.S.C. § 1791(b) (federal inmates possessing prohibited object)	Increasing maximum sentence from 6 months to 20 years based upon nature of prohibited object.	<i>United States v. Allen</i> , 190 F.3d 1208 (11th Cir. 1999).
18 U.S.C. § 1959 (violent crime in aid of racketeering activities)	Increasing maximum penalty from 3 years to death penalty based upon use of weapon, injury to victim, death of victim.	<i>United States v. Kee</i> , 2000 WL 863119 (S.D.N.Y. 2000).
18 U.S.C. 1963(a)(3) (criminal RICO forfeiture)	Mandating forfeiture of proceeds derived from or proceeds of racketeering activity.	<i>United States v. Corrado</i> , 2000 WL 1396742 (6th Cir. 2000).
18 U.S.C. §§ 2261(A) (interstate stalking), 2261 (interstate domestic violence)	Increasing maximum sentence from 5 years to life based on injury to victim.	<i>United States v. Brown</i> , 1999 WL 1068273 (D. Me. 1999).
18 U.S.C. § 2262(b) (penalties for interstate violation of protective order)	Increase sentence from 5 to 10 years if serious bodily injury to the victims result, 20 years if permanent disfigurement results, or life imprisonment if the victim dies.	
18 U.S.C. § 2326 (enhanced penalties for fraud)	Increasing maximum fraud sentence by additional 5 years based upon telemarketing, and additional 10 years based upon 1141096 victimizing at least 10 persons over age 55.	<i>United States v. Pavelcik</i> , 2000 WL (9th Cir.2000) (unpublished).

Appendix A (continued). Selected Federal Statutes Subject to Apprendi Challenge

Statute	Maximum enhancing feature(s)	Challenged in:
18 U.S.C. § 2332(b)(c) (penalties for acts of terrorism transcending national boundaries)	Increasing maximum sentence from 10 to 25 years based on damage to property, 30 years based on serious bodily injury, 35 years for maiming, life imprisonment for kidnapping, and the death sentence for killing.	
18 U.S.C. § 2701(b) (punishment for violation of video piracy protection act)	Increasing sentence from 6 months to 1 year based upon purpose of commercial advantage.	
18 U.S.C. § 3147 (penalty for offense committed while on release)	Increasing maximum sentence by additional 1 to 10 years for commission of an offense while on release.	<i>United States v. Davis</i> , 114 F.3d 400 (2nd Cir. 1997).
18 U.S.C. § 3559(c)(3)(A) (federal three-strikes law)	Increasing maximum sentence for a serious violent felony to mandatory life imprisonment based upon recidivism, with exceptions for certain kinds of robberies.	<i>United States v. Kaluna</i> , 192 F.3d 1188 (9th Cir. 1999).
21 U.S.C. § 841(b)(1)(A), (B) and (C) (manufacture or possession of a controlled substance with intent to distribute)	Increasing maximum sentence from 20 years to life based upon quantity of Schedule I or II substance or resulting injury or death.	<i>Jones v. United States</i> , 194 F.2d 1178 (10th Cir. 1999), cert. granted, vacated and remanded, No. 99-8176 (6/29/00); <i>United States v. Rebmann</i> , 2000 WL 1209271 (6th Cir. 2000).
21 U.S.C. § 841(b)(1)(D) (manufacture or possession of a controlled substance with intent to distribute)	Increasing maximum sentence from 1 to 5 years based upon quantity of marijuana.	<i>United States v. Kelly</i> , 2000 WL 103972 (S.D. Cal. 2000).
21 U.S.C. § 841(b)(7) (penalties for distribution)	Increasing maximum sentence from 1 to 20 years based upon commission of crime of violence during drug offense.	
21 U.S.C. § 843(d) (penalties for prohibited acts C)	Increasing maximum sentence from 4 to 10 years based upon intent to manufacture methamphetamine.	
21 U.S.C. § 844(a) (penalties for simple possession)	Increasing maximum sentence from 1 to 20 years based upon the substance containing cocaine base, from 1 year to 3 years based upon possession of flunitrazepam.	
21 U.S.C. § 846 (attempt and conspiracy to distribute controlled substances)	Authorizing same enhancements as under 21 U.S.C. § 841(b).	<i>United States v. Porter</i> , 1999WL 1116812 (10th Cir.1999); <i>United States v. Aguayo-Delgado</i> , 2000 WL 988128 (8th Cir. 2000).
21 U.S.C. § 848(e) (death penalty for violation of continuing criminal enterprise)	Increasing maximum sentence from life imprisonment to death penalty based upon an intentional killing.	
21 U.S.C. § 853 (criminal forfeitures)	Authorizing property forfeiture in addition to maximum sentence based on property being used in or derived from a drug offense.	
21 U.S.C. § 859 (distribution to persons under age 21)	Authorizing twice the maximum sentence for violation of § 841(b), based upon distribution to a person under 21 years of age.	
21 U.S.C. § 860 (distribution near schools)	Authorizing twice the maximum sentence available for violation of § 841(b) based upon distributing within 1,000 ft. of a school.	
31 U.S.C. §§ 5322(b), 5324 (criminal penalties for violation of bank secrecy act)	Increasing maximum sentence from 5 to 10 years based upon violating the bank secrecy act while violating another law or as part of a pattern of illegal activity.	

Appendix B. Selected State Criminal Statutes Subject to *Apprendi* Challenge

“Nested” Statutes Which Allow Judge to Raise the Penalty within a Certain Type of Crime.

Statute	Maximum enhancing feature	Interpreted in:
1. Theft Statutes		
Ga. Stat. § 16–8–12 (Georgia) (1933)	Increasing offense from misdemeanor to 10 year felony if theft exceeded \$500; to 15 year sentence if defendant is fiduciary or public employee.	<i>State v. Forthe</i> , 514 S.E.2d 890 (Ga.Ct.App. 1999); <i>Hight v. State</i> , 472 S.E.2d 113 (Ga.Ct.App. 1996).
27 MD Code § 342 (Maryland) (1977)	Increasing offense from misdemeanor to 15 year felony if theft exceeded \$300.	<i>State v. Stackowitz</i> , 511 A.2d 1105 (Maryland 1986); <i>Proctor v. State</i> , 435 A.2d 484 (Maryland 1981).
2. Controlled Substance Statutes		
Ga. Stat. § 16–13–31 (Georgia) (1989)	Increasing sentence from 10 to 25 years based upon quantity.	<i>Cleveland v. State</i> , 463 S.E.2d 36 (Ga. App. 1995).
N.M. Stat. Ann. § 30–31.22 (New Mexico) (1980)	Increasing sentence from 18 months to 3 years if more than 100 lbs. of marijuana.	
N.D. Stat. § 19–03.1–23.1 (North Dakota) (1989)	Raises penalty to next highest class of felony.	<i>State v. Allesi</i> , 216 N.W.2d 805 (N.D. 1974).
18 Pa. Consol. Stats. § 780–113(f)(1.1) (Pennsylvania) (1978)	Increasing maximum sentence from 5 to 10 years.	<i>Commonwealth v. Myers</i> , 722 A.2d 649 (1998).

Statutes Which Allow Judge to Raise the Penalty for All Crimes.

1. “While on Release” Statutes		
DC Code § 23–1328 (D.C.) (1970)	Additional 1–5 years if felony, 90–180 days if misdemeanor.	<i>Speight v. United States</i> , 569 A.2d 124 (D.C.App. 1989) (<i>en banc</i>).
ARS § 13–604.02A (Arizona) (1993)	Court may increase statutory maximum by up to 25% if it finds two “substantial aggravating factors.”	<i>State v. Hurley</i> , 154 Ariz. 124(1987); <i>State v. Powers</i> , 154 Ariz. 291 (1987).
CTS § 53a–40b (Connecticut) (1990)	Adds 10 years to offense if felony, adds 1 year if misdemeanor.	
NHSA § 597:14–b (New Hampshire) (1988)	Adds up to 7 years to sentence if felony offense, 1 year if misdemeanor.	<i>State v. Ringuette</i> , 697 A.2d 507 (1997).
RIGL § 12–13–1.2 (Rhode Island) (1985)	Additional 2–10 years if felony, 90–365 days if misdemeanor.	
2. Firearms Statutes		
Cal. Penal Code §§ 12022 <i>et. al.</i>	Additional 1–10 years for felony if weapon used.	
Ind. Code § 35–42–1–3 (Indiana) (1987)	Raises voluntary manslaughter to higher class of felony.	
KRS § 218A.992 (Kentucky) (1994)	Controlled substance offenses raised to higher class of felony.	<i>Adams v. Commonwealth</i> , 931 S.W.2d 465 (Ky.Ct.App.1996).
17–A M.R.S.A. § 401 (Maine) (1977)	Burglary offenses raised to higher class of felony.	<i>State v. DeWalt</i> , 684 P.2d 1291 (Maine 1996).
NJSA § 2C:39–4.1 (New Jersey) (1998)	Controlled substance offenses raised.	

Notes

- ¹ 120 S. Ct. 2348 (2000).
- ² 120 S. Ct. at 2394 (2000) (O'Connor, J., dissenting).
- ³ Nancy J. King and Susan R. Klein, *Essential Elements*, 54 VAN-
DERBILT LAW REV. ____ (forthcoming 2001).
- ⁴ Since Professor Klein was quoted in the Washington Post,
July 23, 2000, as opining that *Apprendi* was "going to be a
disaster," she and Professor King have been inundated with
hundreds of calls from members of the press, Assistant
United States Attorneys, District Attorneys, criminal defense
attorneys, judges, and criminal defendants regarding
whether previously imposed sentences under statutes chal-
lengeable under *Apprendi* are now subject to attack.
- ⁵ 526 U.S. 227 (1999).
- ⁶ 530 U.S. ____ (2000).
- ⁷ Overall, 58.9% of the total federal prison population in 1998
were incarcerated for drug-related offenses. USDOJ, Source-
book of Criminal Justice Statistics, 1998. The average sen-
tence for a federal drug offender in 1990 was 84 months.
U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 138 & nn. 186-188
(February 1995). Altogether, some 400,000 federal, state,
and local inmates—almost a quarter of the overall inmate
population—are serving time or awaiting trial for drug
offenses. Justice on Trial 23, Leadership Conference on Civil
Rights and Education Fund, 2000, <http://www.civilrights.org/policyandlegislation/plissues/criminaljustice/>; Allen J.
Beck, *Bureau of Justice Statistics Bulletin* 1, USDOJ, Office of
Justice Programs (April 2000) <http://www.ojp.usdoj.gov/bjs/>
(discussing inmate population).
- ⁸ Following *Jones* but prior to *Apprendi*, lower courts continued
to deny relief to defendants claiming that drug amount in a
§ 841 prosecution was an element not a sentencing factor.
See, e.g., *United States v. Twitty*, 2000 U.S. App. LEXIS 12225
(4th Cir. May 23, 2000) (collecting cases).
- ⁹ See *Carless Jones v. United States*, No. 99-8176, 6/29/00,
certiorari granted, judgment vacated, and case remanded in
light of *Apprendi v. New Jersey*. The Tenth Circuit had held
that the Court's earlier *Jones* opinion did not require that 21
U.S.C. § 841(b)(1)(A), which provides for a maximum penalty
of life imprisonment based upon a finding of 50 grams or
more of cocaine base, be considered an element of an
offense rather than a sentencing enhancer. 194 F.3d 1178,
1183-1186 (10th Cir. 1999). *But see United States v. Kelly*,
105 F. Supp. 2d 1107 (S.D. Cal. 2000) (indictment need not
allege 9 kilograms of marijuana as element of 21 U.S.C. §
841(a)(1) offense, as drug amount does not "increase" the
statutory maximum sentence, but "determines" it).
- ¹⁰ Well over 100 lower court cases have discussed *Apprendi* in
the few months since the decision was handed down.
- ¹¹ See *Neder v. United States*, 527 U.S. 1, 12-15 (1999).
- ¹² 527 U.S. at 18 ("where an omitted element is supported by
uncontroverted evidence, this approach reaches an appropri-
ate balance between 'society's interest in punishing the guilty
[and] the method by which decisions of guilt are made'").
- ¹³ See *Neder*, 527 U.S. at 27 (Stevens, J., concurring). Justice
Scalia, joined by Justices Souter and Ginsburg, dissented,
arguing that the Court's decision meant that the remedy for
the constitutional violation is a repetition of the same viola-
tion by a different judge. 527 U.S. at 30-40.
- ¹⁴ There is reason to believe this shift might occur. The five-ju-
stice majority in *Apprendi* defending the importance of jury
review of each and every element consisted of the three dis-
senter in *Neder* plus Justices Thomas and Stevens. When
the harmless nature of *Apprendi* error eventually reaches the
Court, Justice Thomas may renounce his decision in *Neder*
and conclude either that such error is never harmless, or that

Justice Steven's position is more consistent with *Apprendi*.
(Recall that in *Apprendi* he renounced his vote in *Almendarez-
Torres*).

- ¹⁵ Harmlessness under *Neder* requires at the least proof before
a trial jury; even uncontested and irrefutable evidence of the
missing element will not suffice if the jury never hears it.
For recent cases applying *Neder* to jury instructions omitting
elements, compare, e.g., *United States v. Sheppard*, 219 F.3d
766 (8th Cir. 2000) (failure to instruct jury that drug quantity
is an element of 21 U.S.C. § 841 was harmless because the
indictment charged the defendant with conspiracy to distrib-
ute more than 500 grams of methamphetamine, and the jury
made a special finding of that quantity); *People v. Marshall*,
99 Cal. Rptr. 2d 441 (Cal. App. 2 Dist. 2000) (failure to
instruct the jury that the firearm must have proximately
caused the death and the decedent, before imposing addi-
tional 25-year sentencing enhancement, was harmless
beyond a reasonable doubt as defendant repeatedly shot
decedent who was supine upon the ground); *United States v. Joubert*,
2000 WL 1155012 (9th Cir. 2000) (unpublished) (where defendant raised issue of *Apprendi* error for first time
at oral argument on direct appeal, court found error harm-
less as the sentence he received for quantity of crack cocaine
was below the statutory maximum sentence for distribution
of powder cocaine); *Sustache-Rivera v. United States*, 221 F.3d
8 (1st Cir. 2000) (failure to submit issue of serious bodily
injury during carjacking, pursuant to 18 U.S.C. § 2119(2),
was harmless error, as jury heard uncontroverted evidence
that the defendant shot his victim, and that his victim ulti-
mately lost a limb); *United States v. Davis*, 202 F.3d 212, 217
(4th Cir. 2000) (holding that failure to instruct jury on the
aggravating facts of "destructive conduct directed at a
dwelling" and "placing lives in danger," was harmless when
those facts were "uncontested and supported by overwhelm-
ing evidence"); *People v. Geisendorfer*, 991 P.2d 308, 312
(Colo. Ct. App. 1999) (finding that failure to instruct jury that
fear of serious bodily harm experienced by the victims must
be "imminent" was harmless when no reasonable jury could
have determined that the victims' fear was of anything other
than imminent serious bodily harm); *with United States v. Brown*,
202 F.3d 691, 703 (4th Cir. 2000) (failure to instruct
jury regarding separate element under *Richardson* not harm-
less when defendant "genuinely contested" evidence); *Keat-
ing v. Hood*, 191 F.3d 1053, 1065 (9th Cir. 1999)
(instructions omitting the element of *mens rea*, and thus
allowing defendant to be convicted of securities fraud as
either a direct perpetrator or an aider and abettor, not harm-
less); *People v. Peoples*, No. 98CA2486, 2000 Colo. App.
LEXIS 838, at *4 (Colo. App. 2000) (omitting from jury
instructions element that dwelling was that of "another" in a
trespass case was not harmless when defendant contested
missing element "vigorously" at trial and presented conflict-
ing witness testimony).
- ¹⁶ 523 U.S. 614 (1998).
- ¹⁷ 516 U.S. 137 (1995).
- ¹⁸ 523 U.S. at 618-19.
- ¹⁹ *Id.* *But see United States v. Rebmann*, 226 F.3d 521 (6th Cir.
2000) (where defendant pleaded guilty to heroin distribution
understanding that if the court found that death resulted
from the distribution she could be sentenced to a life term
rather than the statutory maximum of 20 years, court
vacated 292 month sentence based upon a judicial finding
by a preponderance of the evidence and remanded for court
determination of this element beyond a reasonable doubt).
- ²⁰ See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974); *Rus-
sell v. United States*, 369 U.S. 749 (1962). See also LaFave,
Israel & King, 4 CRIMINAL PROCEDURE at § 19.2(d) and (e)

and § 19.3(a) (West, 2d ed. 1999). We do not believe that this analysis would change had the prosecutor filed a bill of particulars. *But see United States v. Braugh*, 204 F.3d 177 (5th Cir. 2000) (indictment that omits essential element of offense sufficient under Fifth Amendment's Grand Jury Clause because it alleged facts from which grand jury could have inferred missing element, relying on *Neder*), *petition for cert. filed 6/20/00*, *Brauch v. United States*, 99–2049.

²¹ *Apprendi*, 120 S. Ct. at 2355–56 n.3.

²² 526 U.S. at 243, n. 6 (“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”) (emphasis added).

²³ In addition to the extensive historical review in the concurring opinion of Justice Thomas in *Apprendi*, we review this historical background at length in our forthcoming article. See King & Klein, *supra* note 3.

²⁴ That a defendant admitted the existence of a missing element as part of a guilty plea, or that a trial jury concluded the fact existed after a fair trial is “irrelevant.” *United States v. Du Bo*, 186 F.3d 1177, 1180 n.3 (9th Cir. 1999) (vacating conviction when *mens rea* omitted from indictment). See, e.g., *United States v. Keith*, 605 F.2d 462 (9th Cir. 1979) (relief despite proof at trial); *United States v. Cabrera Teran*, 168 F.3d 141 (5th Cir. 1999) (relief despite plea); *United States v. Prentiss*, 206 F.3d 960, 977 (10th Cir. 2000) (vacating conviction of charge of arson when indictment failed to allege elements of Indian status of defendant and victim, despite guilty verdict by jury, defense stipulation to missing elements, and failure of defendant to contest existence of elements, noting that “applying harmless error analysis to the total omission of an essential element would allow the prosecution to circumvent the grand jury proceeding” and collecting similar cases); *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) (finding that failure to allege element of “interstate commerce” in indictment was “fatal” and thus vacating conviction, following guilty plea). Lower courts have already applied the automatic reversal rule for insufficient indictments in several carjacking cases post-*Jones*. See, e.g., *United States v. Rudisill*, No. 99–4588, 2000 U.S. App. LEXIS 10380, at **3–4 (4th Cir. May 15, 2000) (vacating guilty plea because indictment failed to allege element of “serious bodily injury,” noting that it is “error for the district court to sentence a defendant where an indictment fails to allege an essential element of the offense and the district court fails to include the element when advising the defendant of the elements of the crime with which he is charged”); *United States v. Arnett*, 1999 U.S. App. LEXIS 27415 (6th Cir. 1999) (concluding that because “the serious bodily injury element of § 2119(2) was not included in the indictment and was not presented to the jury . . . we must vacate Arnett’s sentence for carjacking under § 2119(2) and remand . . . for resentencing under § 2119 (1)”); *United States v. Matthews*, 178 F.3d 295 (5th Cir. 1999) (same); *United States v. Davis*, 184 F.3d 366 (4th Cir. 1999) (same).

²⁵ The waiver of appellate rights as part of a plea or sentence agreement is increasingly popular in the federal system, and has proved to be a powerful weapon for prosecutors. See Nancy J. King, *Priceless Process*, 47 UCLA L. Rev. 1 (1999) (discussing appeal waivers). But several courts have held that even an express waiver does not prohibit a defendant from appealing a sentence imposed in excess of the statutory maximum for the crime of conviction, and *Apprendi* error, by definition, involves precisely this situation. At least

one court has allowed defendants to raise *Jones* error on appeal, despite an express waiver of the right to appeal. See *United States v. Rudisill*, 2000 U.S. App. LEXIS 10380 (4th Cir. May 15 2000) (finding that defendant’s waiver of appeal did not prevent him from challenging his carjacking sentence under *Jones* on appeal). See also *Latorre v. United States*, 193 F.2d 1035 (8th Cir. 1999) (questioning validity of collateral attack waivers in dicta).

²⁶ 520 U.S. 461, 470 (1997).

²⁷ See *United States v. Perez-Montanez*, 202 F.3d 434 (1st Cir. 2000) (*Jones* error raised for the first time on appeal, noting that because the indictment specifically referred to the statutory section of the carjacking statute specifying the enhanced sentence if death results, the defendant’s claim was limited to objecting to the failure to instruct the jury on those elements at trial, which, after review under plain error standards, produced neither prejudice nor miscarriage of justice, citing *Johnson*); *United States v. Wiggings*, 1999 U.S. App. LEXIS 30695 (4th Cir. 1999) (finding failure to charge trial jury about the sentence maximum enhancing fact (a shotgun) was not plain error, citing *Johnson* and noting that evidence defendant used a short-barrelled shotgun was “overwhelming” and “essentially uncontroverted”); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (*Castillo* error raised for first time on appeal, review under plain error standard failed to establish that omitted element “affected substantial rights” as there was overwhelming evidence that defendants used a semiautomatic assault weapon, and failed to establish any miscarriage of justice); *United States v. Smith*, 2000 WL 1144602 (4th Cir. 2000) (unpublished) (finding no plain error because the defendant received sentences that did not exceed the statutory maximums set out in 21 U.S.C. § 841(b)(1)(C)); *United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000) (no plain error under *Johnson* in failing to submit amount of drugs to jury because sentence of 168 months well within the 20 year prescribed statutory maximum, and resentencing under Guidelines would result in same sentence); *United States v. Moore*, 2000 WL 1339497 (4th Cir. 2000) (same); *United States v. Wright*, 2000 WL 1283053 (4th Cir. 2000) (same). *But see United States v. Von Meshack*, 200 WL 1218437 (5th Cir. 2000) (two life sentences for conspiracy to possess crack cocaine with intent to distribute and possession of crack cocaine vacated for plain error where unenhanced maximum sentence would have been 30 years); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (where indictment alleged 2308 marijuana plants, this amount was hotly contested at trial and sentencing, and the jury was instructed to find only “detectable amount,” imposition of enhanced 10-year sentence rather than otherwise applicable five year sentence was “plain error” that affected “substantial rights” and seriously affected the fairness of the judicial proceeding); *United States v. Lewis*, 2000 WL 1390065 (4th Cir. 2000) (unpublished) (where indictment alleged conspiracy to distribute marijuana and cocaine, and general jury verdict did not specify which of the controlled substances was the object of the conspiracy, plain error affected substantial rights of the defendant and the fairness of the judicial proceeding, as defendant received 121 month sentence based upon cocaine when the statutory maximum for marijuana was five years).

²⁸ See, e.g., *United States v. Prentiss*, 206 F.3d 960, 966 (10th Cir. 2000) (vacating conviction where indictment failed to include an element of the crime charged, as such omission is a “fundamental jurisdictional defect that is not subject to harmless error analysis”); *United States v. Henderson*, 105 F. Supp.2d 523 (S.D. W.Va. 2000) (failure to allege specific drug amount in indictment limits punishment to the lowest

statutory range provided by the statute, thus trial judge was limited to maximum 240-month sentence as provided in 21 U.S.C. § 841(b)(1)(C), rather than the maximum of life imprisonment provided by 21 U.S.C. § 841(b)(1)(A); 4 LaFave, Israel & King, *supra* note 20, at § 19.3(e) (discussing FRCrP 12(b)(2) and citing authority finding that omission of an element is always “plain error” to be noticed by the court *sua sponte*).

²⁹ See, e.g., *United States v. Prentiss*, 206 F.3d 960, 978–79 (10th Cir. 2000) (Baldock, C.J., dissenting) (“a defendant’s right to have a jury find each element of the charged offense beyond a reasonable doubt is no less important than a defendant’s right to have each element of the same offense presented to the grand jury . . . illogically, denial of the former right is subject to harmless error analysis, but denial of the latter right is not”). Some courts have already extended plain error review to missing-allegation cases. See *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (denying relief for error of omitting type of weapon in indictment where error was harmless and not structural, citing *Johnson* and *Neder*); *United States v. Woodruff*, 1999 WL 776213 (9th Cir. 1999) (unpublished) (denying relief for error in omitting element from indictment when claim not raised until oral argument on appeal, noting no “miscarriage of justice” citing *Johnson*, *cert. denied*, 120 S.Ct. 2202 (2000); *United States v. Rios-Quintero*, 204 F.3d 214 (5th Cir. 2000) (rejecting claim that drug amount is an element under § 841, and stating that even if it was, it would not support a finding of plain error: noting that the indictment was “filed with a Notice of Enhancement that listed the relevant drug quantity,” the defendant “stipulated that the offense involved more than one kilogram of heroin and that evidence was submitted to the jury,” suggesting that it might decide differently if the indictment did not list quantity and the defendant contested the amount at trial); *United States v. Rebmann*, 226 F.3d 521, n.1 (6th Cir. 2000) (finding that indictment is “probably technically deficient” because it did not include enhancement for fact of resulting death, but refusing to address the issue because it was not raised by the parties); *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000) (no plain error relief where government failed to allege quantity of cocaine in indictment, despite increase in statutory maximum sentence from 30 years to life imprisonment, because the government gave defendant notice of the enhancement a week after the indictment was filed).

³⁰ See *United States v. Williams*, 504 U.S. 36 (1992) (exculpatory evidence need not be presented to the grand jury); *United States v. Mechanik*, 475 U.S. 66 (1986) (challenge to indictment based upon prosecutor misconduct was rendered moot by defendant’s subsequent conviction at a fairly conducted trial); *Costello v. United States*, 350 U.S. 359 (1956) (insufficient or even non-existent proof before the grand jury is considered “cured” by a subsequent conviction by proof beyond a reasonable doubt).

Another, albeit more remote, possibility is that the Court will decide that the essential elements requirement is not mandated by the Grand Jury Clause of the Fifth Amendment. See 4 LaFave, Israel & King, *supra* note 20, at § 19.2(f) (arguing that even the most plausible functional defense of the essential elements requirement – that it is needed to insure grand jury screening – is questionable).

³¹ 386 U.S. 18 (1967).

³² 489 U.S. 288 (1989). See also *Bousley v. United States*, 523 U.S. 614 (1998) (considering the application of *Teague* in proceeding under § 2255).

³³ See also King & Klein, *supra* note 5 (discussing *Apprendi* and prior precedent).

³⁴ See *Lambrich v. Singletary*, 521 U.S. 151 (1997).

³⁵ See *Graham v. Collins*, 506 U.S. 461, 477 (1993).

³⁶ *Sawyer v. Smith*, 497 U.S. 227 (1990).

³⁷ See *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

³⁸ See 5 LaFave, Israel & King, *supra* note 20, at § 28.6 (d) and (e) (discussing *Teague* exceptions). But see *United States v. Murphy*, 109 F. Supp.2d 1059 (D. Minn. 2000) (holding that *Apprendi* error falls under second *Teague* exception and therefore is to be applied retroactively under § 2255).

³⁹ 523 U.S. 614 (1998) (*Bailey* claim under § 2255 not barred under *Teague*, because *Teague* bars only application of new rules of procedure, not interpretations of substantive law)

⁴⁰ Cf. *United States v. Lanier*, 205 F.3d at 963 (*Teague* not applicable to claim of missing element under *Richardson v. United States*, 526 U.S. 813 (1999), a case interpreting the federal Continuing Criminal Enterprise offense to designate each “violation” of the “series” as a separate element, an interpretation adopted in part to avoid problems with constitutionality under *Schad v. Arizona*, 501 U.S. 624 (1991)); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (same).

⁴¹ 28 U.S.C. § 2255. Certification is also available if the claim is based upon newly discovered evidence, but *Apprendi* claims are typically apparent on the face of the record. See *In re Joshua*, 224 F.3d 1281 (11th Cir. 2000) (holding that even if *Apprendi* is a new rule of constitutional law, it was not made retroactive to cases on collateral review by the Supreme Court), *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000) (refusing to consider successive collateral attack on a sentence until the Supreme Court declares *Apprendi* retroactive under 28 U.S.C. §§ 2244(b)(2)(A), 2255 para.8(2)). But see *West v. Vaughn*, 204 F.3d 53, 59–63 (3d Cir. 2000) (holding that decision of the Supreme Court is “retroactive to cases on collateral review” if its logic implies retroactivity under the approach of *Teague*).

⁴² See discussion at notes 32–38, *supra*.

⁴³ See *Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000).

⁴⁴ *Id.* (collecting such cases).

⁴⁵ See *Bousley v. United States*, 523 U.S. 614, 621–23 (1998) (Section 2255 relief from a plea-based conviction to the use of a firearm preceding Court’s *Bailey* decision that use of a firearm requires active employment of the firearm requires a showing of cause and prejudice or innocence because defendant’s *Bailey* claim was untimely, finding no cause for failure to raise objection to failure to charge element).

⁴⁶ 523 U.S. at 522–23, distinguishing *Reed v. Ross*, 468 U.S. 1 (1984).

⁴⁷ 523 U.S. at 623. See also *Sustache-Rivera v. United States*, *supra* note 43.

⁴⁸ See *United States v. Apker*, 174 F.3d 934 (8th Cir. 1999) (noting *Bousley* appears to have foreclosed a showing of cause and prejudice for claimants challenging their convictions based on subsequent interpretations of substantive criminal law, and must instead prove actual innocence).

⁴⁹ See *United States v. Villarreal Torres*, 163 F.3d 909 (5th Cir. 1999) (holding defendant alleging *Bailey* error can only overcome his procedural default if he demonstrates that “in light of all the evidence . . . it is more likely than not that no reasonable juror would have convicted him”); *United States v. Garth*, 188 F.3d 99 (3d Cir. 1999) (remanding for a hearing at which defendant alleging *Bailey* error following plea-based conviction can establish his actual innocence).

⁵⁰ *Latorre v. United States*, 193 F.3d 1035 (8th Cir. 1999) (holding in § 2255 challenge under *Bailey*, that “if, as part of the plea agreement, the government withdrew more serious charges, the defendant must demonstrate actual innocence of those charges as well”). Judges presently disagree on whether a “more serious” charge is measured by the statu-

tory maximum, or by the recommended sentence under the sentencing guidelines. Compare the majority opinion in *United States v. Halter*, 2000 U.S. App. LEXIS 15527 (8th Cir. 2000) (joining Third Circuit in holding that actual punishment rather than statutory maximum is the relevant factor in comparing the seriousness of the charges), with the dissenting opinion in *Halter* (statutory maximum controls). Given the use of statutory maximum as the gauge for *Apprendi* error, as well as for entitlement to jury trial, we respectfully disagree with the *Halter* majority decision.

⁵¹ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (establishing two-part standard for evaluating claims of ineffective assistance of counsel — defendant must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (if a defendant challenges representation in connection with a guilty plea, he must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

⁵² *Strickland*, 466 U.S. at 687–88.

⁵³ See note 8, *supra*. In the period between the announcement of the *Jones* and the Court's decision in *Apprendi*, however, the failure to raise this argument could arguably fall below professional standards.

⁵⁴ Your coauthors disagree with each other about the probable resolution of this double jeopardy issue. One believes that once a defendant has been tried on a nested offense, and succeeds in raising an *Apprendi* challenge to his enhanced sentence, he may not be retried on the higher offense on remand, because the jury convicted him of the lesser offense, and by attacking his sentence he does not seek to vacate this conviction. See *Brown v. Ohio*, 432 U.S. 161 (1977) (conviction on lesser offense of joyriding bars trial on greater offense of auto theft). The other maintains that retrial on the higher offense may be permissible, because the error is essentially an error in jury instructions which does not bar retrial after a successful appeal.

For cases ordering resentencing, see, e.g., cases collected in note 24, *supra*; and notes 56–61, *infra*. See also *United States v. Brown*, 202 F.3d 691, 703–04 (4th Cir. 2000) (*Richardson* error not harmless, vacating CCE conviction and sentence, but affirming conviction and sentence for other charges); *United States v. Mack*, 201 F.3d 1312, 1312–13 (11th Cir. 2000) (vacating Continuing Criminal Enterprise conviction for *Richardson* error, but remanding for sentencing on conviction of lesser offense). Two Circuits have vacated a sentence and offered the district court the choice of retrying the defendant on the vacated count or resentencing at the lowest statutory drug amount. *United States v. Von Meshack*, 225 F.3d 556 n.20 (5th Cir. 2000); *United States v. Lewis*, 2000 WL 1390065 (4th Cir. 2000) (unpublished).

⁵⁵ See also *Edwards v. United States*, 118 S. Ct. 1475, 1477 (1999) (enhanced sentence under the relevant conduct provision of the federal sentencing guidelines for crack did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

⁵⁶ 220 F.3d 926 (8th Cir. 2000) (the indictment charged, and the jury was instructed upon, the type of drug but not the quantity).

⁵⁷ Defendant received a two-level enhancement for possession of a gun during his drug-dealing activity, and a one-level downward departure because he faced immediate deportation upon completion of his sentence. His offense level of 37, combined with his criminal history category of 2, allowed a

sentencing range of 235 to 293 months' imprisonment.

⁵⁸ See Federal Sentencing Guidelines Manual § 2D11, p. 100 (West 1998–99).

⁵⁹ The judge is also bound by the statutory minimum sentence for the amount of drugs that he determines defendant possessed. Thus, the district judge was compelled to sentence Aguayo-Delgado to at least 240 months, despite the lower sentence of 235 months available under the Guidelines. *Apprendi* did not overturn *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which permits a judge to impose a mandatory minimum sentence (with the statutory maximum) based upon a finding by a preponderance of the evidence.

⁶⁰ See, for example, *United States v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000) (reducing a defendant's sentence from 300 to 240 months based upon *Apprendi* error); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (vacating 10 year sentence and remanding for sentence not to exceed five years' imprisonment).

⁶¹ See *United States v. Henderson*, 105 F. Supp. 2d 523 n.13 (S.D. W. Va. 2000) (noting possible sentence reduction to one year under 21 U.S.C. § 841(b)(4) for defendants who distribute marijuana, but finding that section inapplicable to the case at bar as the indictment charged conspiracy to distribute both methamphetamine and marijuana).

⁶² However, a prosecutor who adds a recidivism enhancement after defendant successfully appeals his sentence may face a claim of prosecutorial vindictiveness. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (trial judge's imposition of higher sentence after defendant's appeal and reconviction raises question of vindictiveness).

⁶³ See e.g., *State v. Baker*, 8 P.3d 817 (Mont. 2000) (Leaphart, J., concurring) (finding that MCA § 45–5–502(3), which increases penalty for sexual assault from maximum of 6 months to maximum of 100 years based upon fact that victim was less than 16 years old and offender is three or more years older than victim, is an element of the offense, but affirming verdict and sentence on ground that substantial and credible evidence presented to the jury established the element); *State v. Velasco*, 253 Conn. 210, 751 A.2d 800, 814 (2000) (following *Neder*, vacating enhanced sentence for use of a firearm as evidence was neither uncontested nor overwhelming); *State v. Benavides*, 979 P.2d 234, 242 (N.M. App. 1998) (following *Johnson*, but vacating perjury conviction because the defendant properly objected to the trial court's failure to submit materiality to the jury). *But see State v. Greene*, 623 A.2d 1342, 1345 (N.H. 1993) (reversing and remanding, when instructions omitted the requirement that the jury's finding that the defendant committed the predicate offense must be unanimous, because such an error "can never be harmless"); *Smith v. Hardrick*, 266 Ga. 54, 464 S.E.2d 198 (1995) (indictment that fails to either track statutory language or allege every element of the crime charged is fatally defective, even after guilty plea).

⁶⁴ See, e.g., *People v. Buchholz*, 74 Cal. Rptr. 2d 38, 46 (Cal. App. 5 Dist. 1998) (limiting *Johnson* to federal cases, holding failure to instruct on element was reversible error per se despite defendant's failure to object). See also *People v. Duncan*, 610 N.W.2d 551 (Mich. 2000) (refusing to apply *Neder's* harmless error analysis where judge failed to instruct regarding any elements of felony-firearm offense, though facts were included in murder allegation and jury verdict form included the offense); *Cooper v. People*, 973 P.2d 1234 (Colo. 1999) (failure to instruct jury on element of burglary was structural error).

⁶⁵ See, e.g., *Parker v. Oklahoma*, 917 P.2d 980 (Ok. Cr.App. 1996) (holding that because constitution protects only notice, an information that alleges sufficient facts such that a person can prepare his defense does not violate due process, even

where the information does not allege each element of the crime); *State v. Kjorsvik*, 812 P.2d 86, 92 (Wash. 1991) (*en banc*) (holding that charging document challenged for first time after verdict is to be more liberally construed in favor of validity, and defendant must show actual prejudice by establishing that he received no actual notice of the charges from either the charging document itself or from "other circumstances of the charging process").

⁶⁶ See, e.g., *State v. Childs*, 724 N.E.2d 781, 786 (Ohio 2000) (affirming appellate court reversal of conviction, following plea of no contest, on count of conspiracy, on the grounds that "the state's failure to allege a specific, substantial, overt act committed in furtherance of the conspiracy . . . rendered the indictment invalid"); *Jefferson v. State*, 556 So. 2d 1016, 1019 (Miss. 1989) (stating that "the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived" by a guilty plea); *Cook v. State*, 902 S.W. 2d 471, 480 (Tex. Crim. App. 1995) (declaring conviction void because the indictment failed to charge "a person," and thus "did not vest the trial court with jurisdiction"). However, in some states, the issue of omitting an element from the indictment must be raised prior to trial. See, e.g., *Sawyer v. State*, 938 S.W.3d 843, 845 (Ark. 1997) (denying habeas corpus petition, in part on grounds that petitioner did not object to omission of element from indictment prior to trial).

⁶⁷ In states that follow *Teague's* retroactivity doctrine for their own post-conviction review, relief may be blocked. Cf. *State v.*

Purnell, 735 A.2d 513, 523 (N.J. 1999) (rejecting retroactive application of decision classifying materiality as element under the state's version of *Teague*, reasoning that if instructing the jury on materiality were fundamental enough to qualify for an exception to the rule against retroactive application of new rules, then *Neder* and *Johnson* would have been decided differently).

⁶⁸ Those state prisoners who failed to raise the issue in state court will have to show cause for and prejudice from that failure, or actual innocence, as discussed in the text at notes 45–50 *supra*.

⁶⁹ 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III).

⁷⁰ See *Williams v. Taylor*, 120 S.Ct. 1495, 1499, 1512 (2000) (interpreting § 2245(d)).

⁷¹ *Id.*

⁷² Cf. *State v. Atwood*, 16 S.W.3d 192, 196–97 (Tex. Ct. App. 2000) (because the State had not proven all elements necessary for a felony conviction, in particular the fact of prior convictions, the appellate court reduced the sentence from a felony to a misdemeanor); *State v. Tofoya*, 91 Haw. 261, 982 P.2d 890 (1999) (following *Jones* and remanding for resentencing to unenhanced penalty because element was not proven to jury).

⁷³ For example, distributing 400 grams or more of cocaine in Texas yields a possible 99 year sentence, whereas the statutory ceiling for distributing any amount of cocaine is only 2 years. TEXAS HEALTH & SAFETY CODE § 481.112 (West 2000).