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The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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After Apprendi...

"It's so complicated. I'm so frustrated. . . . I hate it."

Caroline Dawn Johnson

By Jerrold Schrottenboer

APPRENDI V NEW JERSEY

Justice O'Connor's dissent in *Apprendi v New Jersey*,¹ calls *Apprendi* "a watershed change in constitutional law." Using that phrase to compare subsequent Sixth Circuit decisions with Michigan decisions interpreting *Apprendi* leads to a rather odd image. On the one side is a raging, flooding torrent of cases (Sixth Circuit). On the other side is a dry creek bed (Michigan). Barely a month goes by between Sixth Circuit opinions applying *Apprendi* to a new set of facts. On the other hand, in Michigan, *Apprendi* has hardly been noticed at all.

Unfortunately, *Apprendi* and its progeny are not that particularly easy to understand. Not only are the concepts difficult, but the law is also in flux. Recently, the Sixth Circuit stated that it has "an inordinately complicated *Apprendi* doctrine," and an "*Apprendi* cacophony."² This case summarized the law as follows:

Under our current doctrine, a district judge may sentence a defendant to a term of imprisonment which exceeds, but does not equal, the mandatory minimum of a higher penalty range without concern that such a sentence will raise an inference that she felt herself constrained by the mandatory minimum. However, if evidence in the record indicates that the judge thought herself constrained to sentence the defendant within the higher statutory range, such evidence will demonstrate a potential *Apprendi* violation. A penalty which exactly equals the bottom of the higher range is probative of such a perception of constraint.³

Get that? To understand, I merely had to reread *Apprendi* and every intervening Sixth Circuit case.

To a certain extent, a lot of this "cacophony" stems from *Apprendi* itself. Not only is this subject matter difficult itself, but the opinion is written in a way that allows, at times, for varying interpretations. Quite probably, the Supreme Court itself does not yet fully understand *Apprendi*'s full ramifications.

In any event, given this flood of cases (at least in the federal court) and the continued flux, this article may easily be hopelessly outdated by the time that it is published. As I have not yet completely perfected predicting the future, I will restrict myself to the opinions that have been released before I write this article.

Apprendi's facts themselves are straight forward enough. By firing some shots into a home, Charles Apprendi

violated a New Jersey statute which called for a sentence between 5 and 10 years. He ended up pleading guilty to that charge. New Jersey, however, has a "hate crime" enhancement provision. If, at sentencing, the judge finds by a preponderance of the evidence that the defendant committed the crime intending to intimidate the victim because of race, then, through this provision, the sentence must be between ten and twenty years. Given the victim's race and certain statements that the defendant had made, the sentencing judge eventually concluded that the defendant had in fact committed a hate crime. He then sentenced the him to 12 years, 2 years above the maximum for the underlying offense.

Essential here is understanding that New Jersey's hate crime statute is not a separate substantive offense like Michigan's felony firearm statute. Instead, it is an enhancement statute like Michigan's habitual offender statutes. It would be as if Michigan's robbery statute merely required the prosecution to prove robbery, a 15 year felony. If the judge, however, finds that the defendant was armed, then the maximum would be life. This extra fact, found by a mere preponderance, raises the maximum penalty.

In an 5 - 4 decision, the Supreme Court said that this racial *mens rea* enhancement aspect is really an element of the offense that needs to be decided beyond a reasonable doubt, not merely by a preponderance: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁴

SIXTH CIRCUIT

The federal defense lawyers did not take long to find the *Apprendi* motherlode. The federal drug statutes contain enhancement provisions that classically violate *Apprendi*. A maximum sentence may be raised if (1) death resulted, (2) the quantity is over a certain amount, or (3) the defendant has prior drug convictions.⁵ About two months after *Apprendi*, the Sixth Circuit released *United States v Rebmann*.⁶ There, the defendant pled to distributing heroin, a 20 year offense. Because a person died, however, the maximum became life. The judge then sentenced her to 24 years, 4 months, imprisonment. Because the indictment had not alleged death resulting nor did the defendant admit such a fact in pleading guilty, the Sixth Circuit found an *Apprendi* violation and remanded for resentencing.

At least to me, *Rebmann* naturally flows from *Apprendi*. Other cases as well have properly ordered resentencing under

Apprendi (at least if one ignores certain procedural problems, to be discussed later). In *United States v Page*,⁷ one of the defendants was convicted of conspiracy to distribute cocaine base, a 20 year offense. Because of how much cocaine was involved, however, he received a sentence over 20 years. Because the jury had not decided that particular element, the drug amount, the Sixth Circuit remanded for resentencing. Similar cases are *United States v Martinez*,⁸ and *United States v Graham*,⁹

Other cases have similarly correctly rejected applying *Apprendi* to situations too far off the mainstream, so to speak. In a number of cases, the Sixth Circuit has rejected any claim that *Apprendi* applies to mere guidelines calculations.¹⁰ It has also ruled that *Apprendi* does not apply to either forfeitures¹¹ or restitution orders.¹² Last, it has rejected any attempt to expand *Apprendi* to habitual offender type statutes.¹³ Even though *Apprendi* itself has questioned this particular exception, it did not overrule it. The Sixth Circuit has been firm on this point. As stated in *Matthews*, “[t]he Supreme Court, however, has recently reminded us that though its decisions may have cast doubt on earlier opinions, we should give the Court the opportunity to overrule them, and district and circuit courts should not overrule its decisions.”¹⁴

Unfortunately, in at least three areas, the cases have been rather difficult to follow. One deals (or dealt) with mandatory minimums. In cases like *United States v Flowal*,¹⁵ *United States v Ramirez*,¹⁶ *United States v Strayhorn*,¹⁷ *Gibson v United States*,¹⁸ and *Humphrey*, the Sixth Circuit remanded for resentencing merely because the amount involved had put a mandatory minimum sentence into effect, even though the sentence imposed was not over the maximum penalty for the underlying offense, the mandatory minimum, was not over the maximum penalty for the underlying offense. These cases, at least on their face, became a little difficult reconciling with *United States v Muñoz*,¹⁹ *United States v Page* (three of the defendants),²⁰ *United States v Neuhausser*,²¹ and *United States v Hough*,²² where the Sixth Circuit did not order resentencing even though the judge had improperly decided a certain fact by a mere preponderance. They reasoned that *Apprendi* does not require resentencing unless the sentence exceeds the maximum. Matters then became even more complicated with *United States v García*,²³ *United States v King*,²⁴ and *United States v Lucas*,²⁵ where the Sixth Circuit upheld the sentences in situations because “nothing indicates that the district court thought itself constrained by a specific statute to impose the sentence it did.”²⁶

Humphrey is right. This is a “cacophony.” Fortunately, the Supreme Court cleared up the matter in *Harris v United States*.²⁷ There, the enhancement factor was brandishing a firearm during the drug trafficking crime, which required a seven year mandatory minimum, precisely the sentence that he received. Although much can be said both ways, *Harris*

(5-4) simplified matters immensely. It said that the Constitution allows a judge to decide facts that merely impose mandatory minimums without also taking the sentence above the maximum.

The second confusing area deals with issue preservation. In *Page*, the Sixth Circuit said that, because the defendant did not object at sentencing, the court reviews for plain error only. It then found plain error in the case because the sentence imposed was not authorized by law.²⁸ The *Apprendi* violation had substantially increased the sentence.²⁹ This becomes confusing when one remembers that this is not the plain error standard. Plain error concerns itself with realities, not with whether or not the matter would have been reversed had the issue been preserved. Fortunately, the Supreme Court cleared up this matter too. In *United States v Cotton*,³⁰ the Court unanimously found no plain error even though the sentence was not authorized by law simply because the evidence showing this element had been overwhelmingly established. This is the real plain error test. Since *Cotton*, the Sixth Circuit abandoned *Page* and correctly found no plain error where, once again, this particular element had been overwhelmingly shown.³¹

The last confusing area deals with the most confusing case of all, *United States v Stubbs*,³² which found a quasi-*Apprendi* violation in the judge using a guidelines cross reference provision. The defendant had pled to conspiracy to use firearms during a drug trafficking crime.³³ Because of a guidelines cross reference,³⁴ he was sentenced under a different statute³⁵ which called for a consecutive sentence (though not above the maximum for what the defendant had pled to). *Stubbs* ordered resentencing, using the new discredited *Page* plain error analysis. At least on its face, reconciling it with *Harris*,³⁶ which found no *Apprendi* violation in using a cross reference provision, is difficult. Further it probably cannot survive the Supreme Court’s *Harris* and *Cotton* decisions.

One more matter. Recently, the Sixth Circuit found an *Apprendi* violation in a consecutive sentence situation.³⁷ Although the court declined to reverse noting that the plea agreement waived such an issue, it opened up interesting new vistas to ponder.

In any event, *Apprendi* has changed the practice. Either the prosecutors have begun putting the drug amount into the indictment³⁸ or they ensure that the defendant’s plea includes the amount.³⁹

MICHIGAN

The Sixth Circuit’s vast wealth of cases contrasts sharply with Michigan’s dearth. So far, only two published cases have even mentioned *Apprendi*. The first one, *People v Bearss*,⁴⁰ merely cites it. The second one, *People v Mass*,⁴¹ discussed *Apprendi* at length but, unfortunately, may have misanalyzed it. In finding that Michigan law requires knowledge of the drug amount as an element for conspiracy, the

majority relied on *Apprendi* and *Page*. Perhaps I am missing something, but such an analysis baffles me. As Justice Markman’s concurrence points out, *Apprendi* says nothing of the kind. It does not impose any knowledge requirement.⁴² Further, no cases say that the Constitution requires knowledge of the amount as a conspiracy element.⁴³

SUMMARY

In the end, the confusion and complication probably stems from no one really knowing where the stream will take us. To use a hackneyed phrase, these are “uncharted waters.” As pointed out above, the Supreme Court itself probably does not yet fully see where *Apprendi* is taking us. The next number of years could give us plenty more cases to ponder.

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ENDNOTES

- 1 530 US 466, 523; 120 S Ct 2348; 147 L Ed 2d 435 (2000).
- 2 *United States v Humphrey*, 287 F3d 422, 450 (CA 6, 2002).
- 3 *Id.*
- 4 530 US 490.
- 5 21 USC 841(b).
- 6 226 F3d 521 (CA 6, 2000).
- 7 232 F3d 536, 545 (CA 6, 2000), cert den 532 US 1056; 121 S Ct 2202; 149 L Ed 2d 1032 (2001).
- 8 253 F3d 251, 255-256 (CA 6, 2001).
- 9 275 F3d 490, 521-524 (CA 6, 2001), cert den US ; 122 S Ct 1625; 152 L Ed 2d 636 (2002).
- 10 *United States v Corrado*, 227 F3d 528, 542 (CA 6, 2000); *United States v Harris*, 238 F3d 777, 779 (CA 6, 2001); *United States v Laster*, 258 F3d 525, 531-532 (CA 6, 2001), cert den US ; 122 S Ct 1116; 151 L Ed 2d 1010 (2002); *United States v Schulte*, 264 F3d 656, 660 (CA 6, 2001); *United States v Orlando*, 281 F3d 586, 598 (CA 6, 2002); *United States v Fitch*, 282 F3d 364, 368 (CA 6, 2002).

- 11 *United States v Corrado*, 227 F3d 543, 550-551 (CA 6, 2000).
- 12 *United States v Bearden*, 274 F3d 1031, 1042 (CA 6, 2001).
- 13 *United States v Gatewood*, 230 F3d 186, 192 (CA 6, 2000), cert den US ; 122 S Ct 911; 151 L Ed 2d 878 (2002); *United States v Adams*, 265 F3d 420, 425 (CA 6, 2001); *United States v Matthews*, 278 F3d 560, 563 (CA 6, 2002), cert den US 122 S Ct 1991; 152 L Ed 2d 1038 (2002); *United States v Aparco-Centeño*, 280 F3d 1084, 1089 (CA 6, 2002), cert den US ; 122 S Ct 2638; 153 L Ed 2d 818 (2002).
- 14 278 F3d 563.
- 15 234 F3d 932, 936-938 (CA 6, 2000).
- 16 242 F3d 348, 351-352 (CA 6, 2001).
- 17 250 F3d 462, 469 (CA 6, 2001).
- 18 271 F3d 247, 257 (CA 6, 2001).
- 19 233 F3d 410, 413-414 (CA 6, 2000).
- 20 232 F3d 536, 544-545 (CA 6, 2000), cert den 532 US 935; 121 S Ct 1389; 149 L Ed 2d 312 (2001).
- 21 241 F3d 460 (CA 6, 2001), cert den US ; 122 S Ct 181; 151 L Ed 2d 125 (2001).
- 22 276 F3d 884, 890 (CA 6, 2002), cert den US ; 122 S Ct 986; 152 L Ed 2d 1042 (2002).
- 23 252 F3d 838, 843-844 (CA 6, 2001).
- 24 272 F3d 366, 374-376 (CA 6, 2001).
- 25 282 F3d 414, 421 (CA 6, 2002).
- 26 252 F3d 843.
- 27 US ; 122 S Ct 2406; 153 L Ed 2d 524 (2002).
- 28 232 F3d 544.
- 29 232 F3d 545.
- 30 US ; 122 S Ct 1781; 152 L Ed 2d 860 (2002).
- 31 *United States v Harris*, 293 F3d 970 (CA 6, 2002).
- 32 279 F3d 402, 409 (CA 6, 2002).
- 33 21 USC 846 and 18 USC 924(o).
- 34 2K2.1(c).
- 35 18 USC 924(c).
- 36 238 F3d 779.
- 37 *United States v Sykes*, 292 F3d 495, 497 (CA 6,2002).
- 38 *United States v Garcia*, 268 F3d 407, 415-416 (CA 6, 2001), cert den 5/20/02.
- 39 *United States v Sandlin*, 285 F3d 407, 413-414 (CA 6, 2002).
- 40 463 Mich 623, 629; 625 NW2d 10 (2001).
- 41 464 Mich 615, 639-644; 628 NW2d 540 (2001).
- 42 464 Mich 666.
- 43 464 Mich 667.

Notes