Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing

The Rehnquist Court, not known for favoring criminal defendants, gave them several victories at the end of last year’s Supreme Court term. The Court forbade executions of the mentally retarded, and it forbade judicial capital sentencing in the absence of jury findings of aggravating factors. The latter ruling, in Ring v. Arizona, extended a two-year-old landmark case, Apprendi v. New Jersey. Some commentators read Apprendi and Ring as a growing pro-defendant trend, especially since Apprendi seemed to threaten mandatory minimum sentences and even the U.S. Sentencing Guidelines.

In truth, while Ring extended Apprendi modestly, two other decisions from this past term limited it greatly. The upshot is that Apprendi, which once threatened the sentencing guidelines and the national trend toward determinate sentencing, is now a caged tiger. And the irony is that Justice Antonin Scalia, the only Justice who voted to strike down the Sentencing Guidelines fourteen years ago, provided the fifth vote that ensures that the Guidelines will survive today.

I. The Apprendi Revolution

Until Apprendi, criminal juries found whatever facts were labeled elements of an offense and judges found all sentencing factors. Legislatures were free to define what was an element and what was a sentencing factor. Apprendi changed all of that. It held that juries rather than judges must find, beyond a reasonable doubt, any facts (apart from recidivism) that raise a defendant’s statutory maximum sentence. For example, if possessing a gun or carrying a large drug quantity raises the maximum sentence for drug trafficking, prosecutors must now prove the gun or drug quantity to the jury beyond a reasonable doubt. The Court implied that grand juries would have to charge such facts in indictments in federal cases. It did not resolve whether this rule might invalidate mandatory minima, sentencing guidelines, or capital-sentencing procedures that depend on judicial fact-finding.

Apprendi’s narrow 5-4 majority bloc was unusual: normally conservative Justices Scalia and Clarence Thomas joined more liberal Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg. The majority laid down a bright-line rule to shore up the historic right to a jury trial against judicial encroachment: Justices Scalia and Thomas’s interest in history and bright-line rules dovetailed with Justices Stevens, Souter, and Ginsburg’s solicitude for criminal defendants. In contrast, the dissenters worried about the rule’s impracticality. In particular, Justice Stephen Breyer feared that Apprendi might spell the end of judicial sentencing guidelines (of which he was the architect in the federal system as a member of the U.S. Sentencing Commission). The Apprendi principle, he feared, might require juries to find all facts that by law increase punishment, as Justice Thomas’s concurrence suggested. In contrast, sentencing guidelines typically rely on judges to make the requisite complex factual findings, in part because judges are thought to be more expert, consistent, and insulated from bias. To oversimplify, one might see Apprendi as pitting the defenders of the venerable jury versus flexibility, practicality, and deference to legislative experimentation and judicial discretion.

Apprendi unleashed a tidal wave of prisoner appeals and collateral attacks. In the past two years, federal courts of appeals have heard and decided literally thousands of cases in which prisoners raised Apprendi challenges to their sentences (or even convictions). Lower courts have struggled to define Apprendi’s scope, both because it upset much settled procedure and because Apprendi’s jury-sentencing principle could extend well beyond its holding. Taken to an extreme, Apprendi’s principle could have upset all judicial sentencing, including sentencing guidelines, in favor of jury sentencing. It was only a matter of time before the Court had to resolve the issues it had reserved in Apprendi.

II. Extending Apprendi

The Supreme Court revisited Apprendi’s scope in a trilogy of cases this year. Ring raised the issue of how to reconcile Apprendi with the special procedures required in capital cases. Since Furman v. Georgia and Gregg v. Georgia, the Supreme Court has required special procedures to structure capital sentencing and reduce the risk of arbitrariness. As part of these procedures,
states have required a finding of one or more aggravating factors as a prerequisite to the death penalty. Twenty-nine states have entrusted these aggravating factors to juries, five entrusted them to judges, and four had juries render advisory verdicts followed by final judicial determinations. The Court had upheld allowing judges to make these findings, most recently in Walton v. Arizona. There is much to be said for judicial capital sentencing: judges, especially appointed judges, may be more insulated and better able to dispense even-handed justice, reducing the risk of discrimination in capital sentencing.

This approach, however, conflicted with Apprendi’s requirement that juries find all facts that expose defendants to more punishment. Apprendi had distinguished Walton, but did so in an ad hoc way that ensured that the issue would recur. Ring acknowledged the inconsistency between the two lines of cases and decided 7-2 that Walton had to go. Ring overturned judge-only capital sentencing and cast serious doubt on systems in which juries play only an advisory role. 797 inmates are on death row in the nine states that allowed judges to find aggravating factors. Procedural bars, however, may prevent many of these inmates from challenging their sentences, as Ring may not be retroactive and any errors may not have been plain enough to warrant relief.

III. Restraining Apprendi

Ring, however, was only a blip, not a trend toward reading Apprendi broadly. The Court showed itself willing to limit Apprendi’s impact on past cases when it decided United States v. Cotton. The federal indictment in Cotton had charged a cocaine conspiracy without specifying the drug quantity, but the judge enhanced the sentence on finding respondents responsible for large quantities. The court of appeals vacated the sentence, but the Supreme Court unanimously reinstated it. The Court refused to treat Apprendi defects in indictments as jurisdictional errors that require automatic resentencing and instead applied the more permissive plain-error test. According to the Supreme Court, because the evidence of drug quantity was overwhelming and uncontested, the error did not seriously affect the fairness, integrity, or public reputation of the proceeding. Thus, the Court affirmed the defendants’ sentences even though they violated Apprendi’s new mandates.

While Cotton limited Apprendi’s retroactive effects, United States v. Harris checked Apprendi’s future expansion. In Harris, a pawnbroker sold drugs while carrying a semiautomatic pistol. The federal indictment charged Harris with using or carrying a firearm in drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A). That statute specifies a punishment of five years to life imprisonment, but not less than seven years if the firearm is brandished. The indictment did not allege that Harris had brandished the weapon. The Sentencing Guidelines set the presumptive penalties for these gun offenses equal to the statutory minimum. Harris was convicted at a bench trial. After trial, the presentence report noted that Harris had brandished the gun. The sentencing judge agreed, found that Harris had brandished the gun, and sentenced him to seven years.

Harris argued that under Apprendi, federal indictments must charge all facts that mandate additional punishment, whether minimum or maximum sentences. The Supreme Court rejected this extension of Apprendi and affirmed, 5-4. The majority comprised the four Apprendi dissenters (Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer) plus Justice Scalia. The Court held that sentencing facts that raise minimum but not maximum sentences need not be elements of the crime. Thus, indictments need not charge them and juries need not find them beyond a reasonable doubt. Instead, judges may find them by a preponderance of the evidence.

Why did Justice Scalia, who raised and championed the Apprendi argument for several years before persuading the Court to adopt it, slam on the brakes? It was not out of respect for stare decisis. Though the Court had previously upheld judicial mandatory minimum sentences, in McMillan v. Pennsylvania, Justice Scalia is not known for deferring to precedents that he thinks are wrong. Indeed, he voted in Ring to overrule Walton, showing his willingness to overrule precedents that conflict with Apprendi.

Rather, Justice Kennedy’s plurality opinion in Harris is tailored to accommodate three of Justice Scalia’s favorite themes. First, there is history, or rather the lack of history. There was no historical practice in the eighteenth or nineteenth century of having juries find facts that trigger minimum sentences. Mandatory minimum sentences are largely twentieth-century inventions. The closest historical analogues are other facts that judges have historically found in setting sentences within the applicable range. Not every fact that gives rise to extra stigma and punishment need be an element; judges have long found many such facts at sentencing.

Second, there is notice. Justice Scalia’s concurrence in Apprendi stressed the need for clear, bright-line rules to “ensure that the defendant will never get more punishment than he bargained for when he did the crime.” Justice Kennedy quoted this passage, asserting that mandatory minima, unlike maxima, do not exceed the punishment of which the defendant had fair warning. The indictment signals the maximum punishment authorized by the grand jury, and the crime of conviction signals the maximum punishment authorized by the petit jury. (Of course, this notion that the jury is authorizing a particular punishment is a fiction, as grand and petit juries never learn what
punishments they are authorizing. Indeed, judges admonish jurors not to think or speculate about punishments.) These juries’ pronouncements authorize and expose a defendant to any sentence below the maximum. Judges may find facts in setting sentences within this range, and legislatures are free to specify how much weight judges should give to particular facts.

Third, there is limiting judicial discretion. Justice Scalia prefers rules to judicial discretion and is hostile to giving judges unbridled power. Mandatory minima, unlike facts that raise maximum sentences, limit judges’ discretion and give legislatures a tool with which to control them.

Though one cannot be sure, it may be that Justice Scalia originally voted at conference with the dissenters, but then flipped his vote later on. There are a few indications that this may have happened: Justice Thomas’s dissenting opinion is unusual in including a facts section, which suggests that it may have been a draft majority opinion until it lost Justice Scalia’s vote. And, as noted, Justice Kennedy’s opinion is written along very Scalia-esque lines. This approach may have been calculated to persuade Justice Scalia to change sides or may instead have been dictated by Justice Scalia’s expressed opinion at conference. On the other hand, Justices Thomas and Kennedy each wound up with one majority or plurality opinion from the March sitting. Chief Justice Rehnquist tends to spread opinion assignments evenly, which suggests that each Justice was assigned to write his opinion at the March conference and did not fortuitously gain a second opinion by a post-conference vote flip. In the end, it is impossible to know.

IV. Scalia’s Ironies

There are two ironies here. The first is that, in *Almendarez-Torres v. United States*, Justice Thomas voted to uphold judicial sentencing enhancements. Justice Scalia, by persistently challenging judicial enhancements in dissent in *Almendarez-Torres* and *Monge v. California,* convinced Justice Thomas to change sides and cast the crucial fifth vote for *Apprendi.* Now it is Justice Thomas’s turn to write an impassioned dissent for four members of the Court, arguing the majority’s decision is not consistent with *Apprendi* and *Harris.*

The broader irony is that Justice Scalia, a longtime opponent of the federal Sentencing Guidelines, is now their savior. In *Mistretta v. United States,* he cast the sole vote to strike down the United States Sentencing Commission and its sentencing guidelines. He reasoned that the Sentencing Commission violated the separation of powers, as it was “a sort of junior-varsity Congress” outside of the legislative branch. Today, however, Justice Scalia’s vote means that judges are free to find all sorts of facts under the sentencing guidelines, so long as they do not raise the statutory maximum sentence.

One might perhaps question whether *Harris* is really the stake through the *Apprendi* vampire’s heart, or rather just a temporary setback. Perhaps *Ring* indicates a willingness to apply *Apprendi* to all types of maxima, whereas *Harris* simply says that *Apprendi* will not apply to minima. So, one might contend, *Apprendi* might still reach factors that increase sentencing guidelines ranges, even if those facts do not raise statutory maxima. The theory is that sentencing guidelines specify default sentences and that juries only the maximum sentences specified by statute and guidelines. From defendants’ point of view, sentencing guidelines are the functional equivalent of statutes, so facts that raise guidelines calculations are functionally indistinguishable from facts that raise statutory maxima. One might find support for this argument in *Apprendi,* where both Justice Stevens’ majority opinion and Justice Thomas’s concurrence sharply distinguished aggravating from mitigating factors. One might also cite a footnote in Justice Thomas’s concurrence, which suggested that *Apprendi* should apply to sentencing guidelines because they “have the force and effect of laws.” Indeed, Justice Thomas quoted this last phrase from Justice Scalia’s dissent in *Mistretta,* suggesting that Justice Scalia might agree.

This argument, however, is unlikely to work. Though Justice Scalia joined most of Justice Thomas’s concurrence in *Apprendi,* he conspicuously declined to join the portion with the footnote that questioned the Guidelines. Moreover, this theory simply cannot explain the outcome in *Harris* itself. Under Guideline § 2K2.4(a)(2), the default sentence for a violation of 18 U.S.C. § 924(c)(1)(A) is the statutory minimum. Thus, absent a finding that Harris brandished the gun, his guidelines sentence would have been five years. To go above five years, the judge would have had to depart upward (a rare step, which he did not do) or find that Harris brandished the gun. By making that finding, the judge raised the otherwise-applicable maximum under the guidelines. Justice Thomas unsuccessfully made a version of this argument in his *Harris* dissent; the majority implicitly rejected it. *Apprendi* no longer threatens most judicial sentencing guidelines. A fortiori, it does not threaten the venerable practice of judicial sentencing.
discretion and most judicial fact-finding. It applies only to the less-common situation of facts that increase statutory maxima.

The Court has finally caged the potentially ravenous, radical Apprendi tiger that threatened to devour modern sentencing law. Harris tells us that we need not abandon two centuries of judicial sentencing discretion in favor of jury sentencing. Apprendi will still reshape capital sentencing, gun enhancements, drug-quantity enhancements, and the like but will leave most determinate sentencing untouched. And Cotton erects another barrier to reopening already-final convictions in light of Apprendi. In short, the Court has stepped back from the brink, thanks to the unlikely figure of Justice Scalia.

Notes
3 530 U.S. 466 (2000).
5 See Ring, 122 S. Ct. at 2449 & n.1 (O’Connor, J., dissenting) (noting that a Westlaw search found 1,802 federal Apprendi claims in the two-year period following Apprendi, and that 18% of certiorari petitions filed during the preceding year raised Apprendi-related claims).
6 408 U.S. 238 (1972).
10 122 S. Ct. 2406 (2002).
11 See 18 U.S.C. § 924(c)(1)(A) (mandating minimum punishment of five years’ imprisonment for using or carrying a firearm during and in relation to a drug trafficking crime, or seven years’ imprisonment if the firearm is brandished, or ten years’ imprisonment if the firearm is discharged).
14 Apprendi, 530 U.S. at 498 (Scalia, J., concurring).
18 Id. at 427.
19 Apprendi, 530 U.S. at 523 n.11 (Thomas, J., concurring) (quoting Mistretta, 488 U.S. at 413 (Scalia, J., dissenting)).
21 See 518 U.S. 81, 97–98 (1996) (holding that appellate courts must use deferential abuse-of-discretion standard in reviewing district courts’ decisions to depart from guidelines ranges, and that they should accord “substantial deference” to district courts’ departure decisions, in keeping with the traditional discretion accorded to sentencing judges).