

# **APPRENDI AND STATE COURTS**

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**CHAPTER 4**



**TABLE OF CONTENTS**

**I. INTRODUCTION.....1**

**II. CASES LEADING UPTO APPENDI.....1**

**III. APPENDI.....14**

**IV. APPENDI’S PROGENY: COTTON, HARRIS AND RING.....17**

**A. Cotton.....17**

**B. Harris.....17**

**C. Ring.....19**

**V. APPENDI’S TRILOGY: BLAKELY, BOOKER AND SHEPARD.....20**

**A. Blakely.....20**

**B. Booker.....22**

**C. Shepard.....23**

**VI. APPENDI AND TEXAS COURTS.....24**

**A. Capital Murder.....24**

**B. Cumulative Sentences.....25**

**C. Family Violence Finding.....26**

**D. Unlawful Restraint.....31**

**E. Court’s Charge and Appendi.....31**

**F. Jury Probation and Judicial Conditions.....33**

**VII. APPENDI AND RELATED ISSUES.....34**

**A. Indictment.....34**

**B. Pleas.....35**

**C. Jury Trials.....36**

**D. Recidivism/Criminal History.....37**

**E. Consecutive Sentences.....37**

**F. Restitution.....38**

**G. Retroactivity.....39**

**H. Waivers.....39**

**VIII. DEFENSE’S ARGUMENT.....40**

**IX. STATE’S ARGUMENT.....40**

**X. CONCLUSION.....41**



## **APPRENDI AND THE STATE COURTS**

By

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### **I INTRODUCTION**

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court decided one of its most significant sentencing decisions in several years. The court found that due process and the right to a jury trial requires that where facts other than prior convictions are used to increase the maximum sentence authorized for a crime, those facts must be submitted to the jury and proved beyond a reasonable doubt. The Court decided that a fact which increases the authorized sentence is not merely a sentencing factor. Instead, “when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense. . . . Indeed, it fits squarely within the usual definition of an ‘element’ of the offense.” (Majority opinion, note 19). Due process requires that elements of crimes be determined by the trier of fact under the reasonable doubt standard. *U.S. v. Gaudin*, 515 U.S. 506 (1995); In re *Winship*, 397 U.S. 358 (1970).

### **II. CASES LEADING UP TO APPRENDI**

To appreciate the import of *Apprendi*, we need to begin with several earlier cases, the first being *Duncan v. Louisiana* 391 U.S. 145 (1968). In *Duncan v. Louisiana*, the Court held that the right to trial by jury applied to state prosecutions under Fourteenth Amendment due process in situations where the right would attach under Fifth Amendment due process. Calling the right to trial by jury in criminal prosecutions

“fundamental to the American scheme of justice,” the Court framed the jury’s role as that of a citizen buffer between the government and the accused whose primary purpose was to prevent governmental oppression. *Id.* 149 & 156. With respect to the reliability and accuracy of jury verdicts, the Court acknowledged that opinion was divided as to whether jury verdicts were more reliable than bench verdicts. *Duncan*, 391 U.S. at 156–57.

Two years later, the Court handed down *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Although the case involved the standard of proof that applied to the adjudicative phase of a juvenile delinquency proceeding, the Court held that due process protected criminal defendants “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364. The *Winship* Court made clear that the reasonable doubt standard for determining guilt in a criminal (or juvenile delinquency) case was required as an aspect of Constitutional Due Process. The Court explained that the reasonable doubt standard “is a prime instrument for reducing the risk of convictions *resting on factual error*” and that it “provides concrete substance for the presumption of innocence . . . .” *Id.* at 363, 90 S. Ct. at 1072, 25 L. Ed. 2d at 375 (emphasis added). The *Winship* Court recognized that the standard served the interests of both the accused and the government *Id.* at 363–64. It protected the defendant’s interests in avoiding undue deprivation of liberty and the stigmatization that accompanies a criminal conviction. *Id.* at 363–64. It served the governmental interest of ensuring the “respect and confidence of the community in applications of the criminal law.” *Id.* at 364.

Although the Supreme Court through *Winship* established that the Fifth

Amendment's Due Process Clause incorporated "beyond a reasonable doubt" as the standard of proof applicable in criminal cases, it did not suggest that this standard of proof was to be applicable at sentencing. Rather the Supreme Court repeatedly stated that at sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Grayson*, 438 U.S. 41, 50 (1978) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972); see also *Roberts v. United States*, 445 U.S. 552, 556 (1980) (reaffirming as fundamental a "fundamental sentencing principle" that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come") (quoting *Grayson* and *Tucker*).

Five years after *Winship* the Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). In *Mullaney*, the Court applied *Winship* to hold unconstitutional a Maine statute that presumed malice aforethought from an intent to kill, and required a defendant charged with murder who sought to reduce the homicide to manslaughter to bear the burden of proving, by a preponderance of the evidence that he acted in the heat of passion or with sudden provocation. In seeking to distinguish *Winship*, Maine urged that the absence of heat of passion or sudden provocation was not a "fact" necessary to the crime of felonious homicide. The Court rejected that argument, noting the importance of the differing degrees of culpability between murder and manslaughter and holding that, if *Winship* were limited to only those facts that constitute a crime as defined by State law, a State could undermine many of the interests of that

decision by simply redefining the elements that constitute different crimes as factors bearing only upon punishment. *Winship*, the Court said, was concerned with substance and not “this kind of formalism.” *Id.* at 699, 95 S. Ct. at 1890, 44 L. Ed. 2d at 519.

In *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Court dispelled some of the suppositions that lower courts had drawn from *Mullaney* and sustained, against an attack based on *Winship* and *Mullaney*, a requirement of New York law that a statutory affirmative defense to the crime of second degree murder be established by the defendant, by a preponderance of the evidence. The attack was on any scheme that required the defendant to prove a fact that would lessen or mitigate criminality, that relieved the State of having to negate the existence of that fact beyond a reasonable doubt. Limiting the breadth of *Mullaney*, the Court declined to adopt as a constitutional imperative “that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused,” leaving it, rather, to the State legislatures to allocate the burden of establishing such defenses. *Id.* at 210, 97 S. Ct. at 2327, 53 L. Ed. 2d at 292. The Court concluded that, subject to some undefined Constitutional limits, if the State “chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.” *Id.* at 209, 97 S. Ct. at 2326, 53 L. Ed. 2d at 291. It declined to read *Mullaney* as holding

“that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact . . . beyond a reasonable doubt.” *Id.* at 214-15, 97 S. Ct. at 2329, 53 L. Ed. 2d at 294-95.

*Patterson* was a prelude to *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).. In *McMillian* the Supreme Court confronted a direct constitutional attack on sentencing. *McMillan* involved a constitutional challenge to a Pennsylvania statute passed in 1982, which provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses. The defendant in *McMillan* argued that the Constitution required treating the fact of firearm possession as an offense element with the traditional trial procedures of proof beyond a reasonable doubt and the right to a jury.

Nevertheless, the Supreme Court found no Constitutional defect in the Pennsylvania statute. The Court stressed that it is “normally ‘within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.’” *McMillian*, 477 U.S. at 85 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). The Court noted that the statute neither altered the maximum sentence available for the enumerated offenses nor created any separate offense calling for a separate penalty but merely operated “to limit the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm” by “raising to five years the minimum sentence which may be imposed within the statutory plan.” *Id.* at 88, 106 S. Ct. at 2417, 91 L. Ed. 2d at 77. Although acknowledging that some States had made possession of

a weapon an element of various aggravated offenses, the Court found it permissible for Pennsylvania to adopt a different approach and regard such possession as merely a sentencing factor. The Court noted that sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and that it had “consistently approved sentencing schemes that mandate consideration of facts related to the crime.” *McMillan*, 477 U.S. at 92, 106 S. Ct. at 2419, 91 L. Ed. 2d at 80. On those bases, the Court found no Constitutional violation, either of due process or the Sixth Amendment right to jury trial, in the judge making the requisite finding by a mere preponderance of the evidence. The Court noted, in the course of its opinion, that the law in question did not subject the defendant to any greater punishment than was attached to the offense generally and that *McMillan*’s claim “would have at least more superficial appeal if a finding of visible possession exposed [him] to greater or additional punishment.” *Id.* at 88, 106 S. Ct. at 2417, 91 L. Ed. 2d at 78.

Notably, Justice Stevens delivered a passionate dissent in *McMillan* which did engage conceptually with the new realities of Pennsylvania’s sentencing law. Stressing the significance of the fact that Pennsylvania’s statute “automatically mandates a punishment” for visible firearm possession, Justice Stevens, argued that “a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties.” *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting). Justice Stevens asserted that “[o]nce a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.” *Id.* Consequently, according to Justice Stevens, because the mandatory minimum statute “describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, . . . the conduct so

described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.” *Id.* at 96 (Stevens, J., dissenting).

The next important case leading to *Apprendi* is *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). *Walton* involved an attack on a capital punishment law and was the product of much discussion in the *Apprendi* opinions. Under Arizona law, after a defendant was convicted of first degree murder, a separate sentencing proceeding was held before a judge to determine whether the sentence should be death or life imprisonment. The judge was directed to determine the existence or non-existence of any of the aggravating or mitigating circumstances set forth in the statute. The burden of proving an aggravating factor was on the State; the burden of proving a mitigating factor was on the defendant. The judge was directed to return a special verdict setting forth his or her findings as to aggravating and mitigating circumstances and then impose a sentence of death if the judge found one or more aggravating circumstances “and that there are no mitigating circumstances sufficiently substantial to call for leniency.” *Id.* at 644, 110 S. Ct. at 3052, 111 L. Ed. 2d at 522. Upon the imposition of the death penalty, the Arizona Supreme Court was required to conduct an independent review of the sentence to ensure that aggravating factors were proven beyond a reasonable doubt and all appropriate mitigation was considered.

Among the arguments made by Walton, who was convicted and sentenced to death pursuant to that procedure, was “that every finding of fact underlying the

sentencing decision must be made by a jury, not by a judge.” *Id.* at 647, 110 S. Ct. at 3054, 111 L. Ed. 2d at 524. The Court noted that, in prior decisions, it had “soundly rejected” the argument “that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence.” *Id.* (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S. Ct. 1441, 1446, 108 L. Ed. 2d 725, 736 (1990) and citing as well *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and *Profit v. Florida*, *supra*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913). The Court found no persuasive distinction between the Florida approach, where the jury merely recommended a sentence to the judge but made no specific factual findings with regard to the existence of aggravating or mitigating circumstances, and the Arizona law. Nor did the Court find merit in Walton’s contention that, under the Arizona approach, aggravating circumstances constituted elements of the offense rather than sentencing considerations. In that regard, the Court iterated its statement from *Poland v. Arizona*, 476 U.S. 147, 156, 106 S. Ct. 1749, 1755, 90 L. Ed. 2d 123, 132-33 (1986):

“Aggravating circumstances are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment. Thus, under Arizona’s capital sentencing scheme, the judge’s finding of any particular aggravating circumstance does not of itself ‘convict’ a defendant (*i. e.*, require the death penalty), and the failure to find any particular aggravating

circumstance does not ‘acquit’ a defendant (*i.e.*, preclude the death penalty).”

*Walton*, 497 U.S. at 648, 110 S. Ct. at 3054, 111 L. Ed. 2d at 525.

Subsequent to *Walton* came the decision of *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). In *Almendarez-Torres* the defendant was convicted of illegal reentry into the United States, a violation of 8 USC § 1326. *Id.* at 1222. The defendant pleaded guilty, and at that plea admitted that he had been deported, had later unlawfully returned to the United States, and that his earlier deportation had taken place “pursuant to” three earlier “convictions” for aggravated felonies. *Id.* at 1223. This plea brought into consideration two Federal Statutes – one, 8 U.S.C. § 1326(a), making it a crime, punishable by up to two years in prison, for a deported alien to return to the United States without permission, and another, § 1326(b) authorizing a prison term of 20 years if the deportation followed a conviction for an aggravated felony. The indictment against the defendant referenced § 1326 generally but made no allegation that he had been deported following conviction of an aggravated felony. On appeal, the defendant argued that because the enhancement fact of a prior conviction was not proved at trial, the district court could not have sentenced him above the lower sentence cut-off of two years. *Id.* at 1223. The issue presented was whether the enhancement fact of a prior conviction is an *element* of the crime of illegal reentry, or a *sentencing factor*? *Id.* In particular whether § 1326(b), defined a separate crime or simply authorized an enhanced penalty. Thus, if it defined a separate crime, the element of a prior conviction for aggravated felony would have to be alleged in the indictment. The Court

characterized § 1326(b) as a recidivist provision which, in its view, was “as typical a sentencing factor as one might imagine.” *Id.* at 230, 118 S. Ct. at 1224, 140 L. Ed. 2d at 359.

The Court turned, then, to whether, under *Winship* and *Mullaney*, it was an element as a matter of Constitutional law. In *Winship* the Court found irrelevant and, to the extent language in *Mullaney* might support the defendant’s position, it had been circumscribed in *Patterson*, which the Court regarded as requiring “scarcely any sentencing factors” to be treated as elements of the offense. *Id.* at 241, 118 S. Ct. at 1229, 140 L. Ed. 2d at 366. Though noting a distinction between the case at hand, where the second statute increased a maximum penalty, and *McMillan*, where the statute under attack created a mandatory minimum sentence, the Court regarded that distinction as favorable to the defendant and therefore not requiring a different result. In closing, the Court noted that, because the defendant had conceded his prior conviction for an aggravated felony, he made no separate argument concerning the standard of proof applicable to the aggravating factor, and it therefore expressed no view on “whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.” *Id.* at 248, 118 S. Ct. at 1233, 140 L. Ed. 2d at 371.

The common issue in the cited cases was whether, from a Constitutional perspective, a fact that, if shown to exist or not exist, might or would increase or decrease either the degree of criminality or punishment, constituted an element of

the offense charged. That issue was dealt with in four different, though obviously related, contexts: who had the burden of persuasion in the matter, the standard of proof applicable to establishing the fact, whether a dispute over the fact was for the trier of fact to resolve or could be resolved by the judge alone as a sentencing factor, and whether the fact had to be alleged in the charging document. Those contexts came together in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the most pertinent precursor to *Apprendi*.

In *Jones* the defendant carjacked a car, and in the process hit a victim sufficiently hard to cause his ear to bleed and perforate the eardrum. The defendant was arraigned under federal carjacking charges, was told he was facing a maximum of fifteen years, and there was no proof of trial about the injury to the victim. At sentencing, however, the probation office recommended a twenty-five year sentence because a victim had suffered serious bodily injury and because a subsection of the carjacking statute allowed for the higher sentence if injury occurred. *Id.* at 1218. The indictment against Jones mentioned the Federal Car Jacking statute §2119 generally but did not charge that any serious injury resulted and did not mention § 2119(2). The specific issue before the Supreme Court was whether the statute effectively created three separate offenses, thereby making the existence of serious injury or death elements of an offense, or, conversely, those facts were merely sentencing considerations. The Court noted at the outset that “[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements *must be charged in the indictment, submitted to a jury, and proven by the Government*

*beyond a reasonable doubt.*” *Id.* at 232, 119 S. Ct. at 1219, 143 L. Ed. 2d at 319 (emphasis added).

The Court concluded, as a matter of statutory construction, that the intent of Congress was to create separate offenses and not to make serious injury or death merely sentencing considerations. In support of that conclusion, the Court observed that a contrary construction would raise serious Constitutional issues and that it was obliged to construe the statute to avoid that problem.

The significance of *Jones*, in contrast to *Castillo v. United States*, 530 U.S. 120, 120 S. Ct. 2090, 147 L. Ed. 2d 94 (2000) (reaching a similar conclusion based solely on statutory construction regarding 18 U. S. C. § 924(c)(1), prohibiting the use of firearms in the commission of a crime of violence), lies in the Court’s explanation of the Constitutional concerns that would flow from regarding the additional facts as simply sentencing considerations. The concern most prominently addressed emanated from the Sixth Amendment right of jury trial. Noting its prior admonitions that there were limits on the State’s (and Congress’s) ability to define facts serving to increase criminality or punishment as sentencing considerations, the Court observed that, if a potential penalty might rise from 15 years to life based on a non-jury determination, the role of the jury would be significantly diminished: “The point is simply that diminishment of the jury’s significance by removing control *over facts determining a statutory sentencing range* would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.” *Jones*, 526 U.S. at 248, 119 S. Ct. at 1226, 143 L. Ed. 2d at 329 (emphasis added).

The Court’s discussion of Constitutional issues, as noted, was solely in the context of its statutory construction analysis, and it took pains to announce that its decision did “not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century.” *Id.* at 251 n.11, 119 S. Ct. at 1228 n.11, 143 L. Ed. 2d at 331 n. 11. It nonetheless restated its view, from the earlier cases, that “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.” *Id.* at 243 n.6, 119 S. Ct. at 1224 n.6, 143 L. Ed. 2d at 326 n.6 (emphasis added). The Court expressly noted several cases dealing with fact-finding in capital punishment cases that permitted a level of factfinding to be made by the judge, rather than the jury, but did not regard them as pertinent. In *Walton*, it said, “[t]he Court . . . characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling *of the sentencing range available.*” *Id.* at 251, 119 S. Ct. at 1228, 143 L. Ed. 2d at 331 (emphasis added). This point was made as well in the concurring opinions of Justices Stevens and Scalia, both of whom noted their Constitutional concern over removing from the jury the assessment of facts that increase “the prescribed range of penalties to

which a criminal defendant is exposed.” *Id.* at 252, 119 S. Ct. at 1228, 143 L. Ed. 2d at 332 (concurring opinion by Stevens, J.) and at 253, 119 S. Ct. at 1229, 143 L. Ed. 2d at 332 (concurring opinion by Scalia, J.) Justice Steven’s and Scalia’s concerns soon came to the forefront in *Apprendi*.

### **III. APPRENDI**

In *Apprendi*, the defendant, Charles Apprendi fired several bullets into the home of an African American family that had recently moved into his previously all white neighborhood in New Jersey. *See State v. Apprendi*, 159 N.J. 7, 10, 731 A.2d 485, 487 (1999). There was evidence, which Apprendi disputed, that he had targeted the family because he did not want them as his neighbors. *See id.*, 159 N.J. at 10, 731 A.2d at 486. Apprendi faced 23 charges, including allegations of other shootings, possessing illegal firearms and bombs. As a result of a plea agreement, he plead guilty to counts of second degree possession of a firearm for an unlawful purpose and one count of third degree unlawful possession of an anti-personnel bomb. *See State v. Apprendi*, 159 N.J. 7, 10, 731 A.2d 485, 487 (1999). Although the possession of a weapon for an unlawful purpose normally carried between five and ten years imprisonment, New Jersey had a separate “hate crime” statute that increased the punishment for a second degree offense to a prison term of 10 to 20 years if the judge found, by a preponderance of the evidence, that the defendant committed the underlying offense with a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. Apprendi was not charged under the hate crime law, and, though pleading guilty to the underlying offense, he objected to

the sentence enhancement under that law. The judge rejected the challenge and sentenced Apprendi to 12 years.

In a 5-2 decision, the New Jersey Supreme Court held that New Jersey's "biased purpose" law was not an element requiring a jury to find such a purpose beyond a reasonable doubt, but rather was merely a sentencing enhancement which could be found by a judge by a preponderance of the evidence. *See id.*, 159 N.J. at 23-27, 731 A.2d at 494-96. Justice Stein, joined by Justice Handler, dissented:

In my view, the critical determination required by the statute, that a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof. Moreover, the significantly increased sentencing range triggered by that statute also persuades me that the finding of a purpose to intimidate must be treated as a material element of a defendant's crimes. Accordingly, I conclude that N.J.S.A. 2C:44-3(e) is unconstitutional because it permits the finding of a purpose to intimidate based on race to be made by a judge under a preponderance-of-the-evidence standard.

*See id.*, 159 N.J. at 30, 731 A.2d at 498 (Stein, J., dissenting); *see also id.*, 159 N.J. at 29-54, 731 A.2d at 497-513.

On November 29, 1999, the United States Supreme Court granted certiorari, and on June 26, 2000, the Court, by a 5-4 vote, reversed the judgment of the New Jersey Supreme Court. The opinion for the Court was written by Justice Stevens. After surveying historical practice, and the Court's prior case law, the Court held that "[o]ther 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."

The Supreme Court based its decision in part upon a footnote statement made in *Jones* – that under the 14th Amendment (as under the Fifth and Sixth, which applied to the

Federal prosecution in *Jones*) “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.” *Apprendi*, 530 U.S. at 476, 120 S. Ct. at 2355, 147 L. Ed. 2d at 446 (quoting from *Jones*, 526 U.S. at 243 n.6, 119 S. Ct. at 1224 n.6, 143 L.Ed. 2d at 326 n.6).

The Court determined that the enhanced penalty imposed by the hate crime statute was not merely a sentencing consideration but effectively “turn[ed] a second-degree offense into a first-degree offense, under the State’s own criminal code” (*id.* at 494, 120 S. Ct. at 2365, 147 L. Ed. 2d at 457) and therefore constituted “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.” *Id.* at 497, 120 S. Ct. at 2366, 147 L. Ed. 2d at 459. The Court made clear, however, that it was not impermissible “for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute” and noted that judges have long “exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.” *Id.* at 481, 120 S. Ct. at 2358, 147 L. Ed. 2d at 449 (emphasis in original).

#### **IV. APPRENDI’S PROGENY: COTTON, HARRIS AND RING**

##### **A. Cotton**

In *United States v. Cotton*. 122 S. Ct. 1781 (2002), the defendant was charged with cocaine conspiracy without specifying the drug quantity. The judge enhanced the

sentence on finding that the respondent was 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.

## **B. Harris**

While *Cotton* limited *Apprendi*'s retroactive effects, *United States v. Harris* checked *Apprendi*'s future expansion. *United States v. Harris*, 243 F.3d 806 (4th Cir. 2001). In *Harris*, it appeared the Court would limit *Apprendi* solely to factors that increase the statutory maximum. The Court also acknowledged certain important exceptions to the *Apprendi* principle. For example, where mandatory minimums, or "traditional" sentencing factors like prior convictions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), were at issue, a judge could make findings in lieu of a jury. See *Harris*, 536 U.S. at 553, 557.

*Harris* involved a defendant named William Harris. William Harris owned a pawn shop in North Carolina and sold an undercover agent and an informant a small amount of marijuana. *Id.* at 807. The next day he sold the agent another 114 grams of pot. *Id.* While dealing with the agent, the defendant carried a 9mm pistol in an unconcealed hip holster. *Id.* The agent testified that at one point, Harris removed the gun and said it was outlawed because it has a "high-capacity magazine" – he further stated that his

homemade bullets could pierce a police officer's armored jacket. *Id.* The defendant was charged with distribution of marijuana, and with 18 USC § 924(c)(1)(A), carrying a firearm "in relation to" drug trafficking. He pleaded guilty to one distribution count, and had a bench trial on the remaining count of carrying a firearm. *Id.*

At trial, the district court found the defendant carried the gun "in relation to" a drug trafficking offense and convicted him of that crime. At sentencing, the district court found the defendant had "brandished" the gun, and sentenced Harris to the mandatory minimum of seven years associated with the "brandishing" section of the statute. *Id.* On appeal the fourth circuit held as a matter of statutory interpretation, it viewed the term "brandishing" as a sentencing factor instead of an element. *Id.* It also declined to extend *Apprendi* to mandatory minimums, observing, "While the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or 'range' of punishment, rather than only the maximum punishment . . . that is not our role." *Id.* at 809 (internal citations omitted).

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.

Justice Thomas dissented, joined by Justices Stevens, Souter and Ginsburg, characterizing *Apprendi*'s holding more broadly than the decision's majority. They opined that *Apprendi* applies whenever a "fact exposes a defendant to greater punishment than what is otherwise legally prescribed," whether that fact "raises the floor or raises the ceiling." *Id.* at 579 (Thomas, J., dissenting).

### **C. Ring**

In *Ring* the Supreme Court struck down the Arizona death penalty statute because it permitted the trial court alone to determine the presence of aggravating factors necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at 609.) "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Id.*, at 602.) Concurring in *Ring*, Justice Scalia clarified the basic rule underlying whether a jury finding is required, "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* - must be found by the jury beyond a reasonable doubt." (*Id.*, at 610 [conc. opn. of Scalia, J.])

## **V. APPRENDI'S TRILOGY: BLAKELY, BOOKER AND SHEPARD**

### **A. Blakely**

The first case in the Apprendi trilogy is *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2543 (U.S. 2004). *Blakely* broadened *Apprendi* by requiring that all facts “which the law makes essential to the punishment” be subject to Sixth Amendment protections. *Blakely*, 124 S. Ct. at 2537 (quoting 1 J. Bishop, Criminal Procedure § 87 (2d ed. 1872)). The Court effectively chose an “impact” test, focusing on the impact of such facts on punishment, rather than on the formalistic distinctions between sentencing factors and offense elements. Its concern was not simply about a fact’s effect on the statutory maximum, but more generally, about its effect on punishment.

In *Blakely*, Ralph Blakely was charged by the state of Washington with first-degree kidnapping. He reached a plea agreement with the prosecutor to plead guilty to second-degree kidnapping involving domestic violence and use of a firearm in exchange for the prosecutor’s dismissal of the first-degree kidnapping charge. Washington State has a guideline sentencing scheme that provides two kinds of statutory sentence maxima for each offense. In the first instance, because second-degree kidnapping is a class B felony, Blakely could not be sentenced to more than 10 years imprisonment. In the second instance, under the scheme engendered by a Washington State sentencing reform act, there is a standard or presumptive sentencing range of 49 to 53 months.

The first statutory maximum, 10 years, sets an absolute limit beyond which the sentencing judge cannot go. The second statutory maximum, 53 months (i.e., the high end of the presumptive sentencing range) is not an absolute limit; rather, the sentencing judge can adjust the sentence upward if the judge finds one or more of the statutorily-enumerated aggravating factors (or an analogous factor) to be present in the case. Such an

upward adjustment or “exceptional sentence” is legal, however, only if the judge explicitly finds an aggravating factor apart from the elements found by the jury during the guilt phase of the case.

In Blakely’s case, the Washington state judge, rejecting the prosecutor’s recommendation of 53 months, found that Blakely had acted with deliberate cruelty, one of the statutorily-enumerated aggravating factors. On that basis, the judge adjusted Blakely’s sentence upward by 37 months for a final sentence of 90 months. Blakely appealed, citing *Apprendi* for the proposition that 37 months could not be tacked on to his presumptive sentence maximum unless the fact supporting the additional increment of punishment was found by a jury beyond a reasonable doubt.

The Supreme Court agreed with Blakely, concluding that the upward adjustments of the Washington state scheme violate the constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): “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.” (Cited by *Blakely*, 2004 WL 1402697 at \* 4). The *Blakely* Court noted that the Court’s precedents clarified what the term “statutory maximum” means for *Apprendi* purposes: “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 2004 WL 1402697 at \* 4 (italics in original).

Applying this definition of “statutory maximum,” the *Blakely* Court made it very clear that in guideline systems such as the Washington state scheme that contain two types of statutory maxima (e.g., in Blakely’s case, there was a 10-year maximum because the offense of conviction was a Class B felony and a 53 month maximum because that was the high end of the presumptive sentence range for the offense of conviction), the *Apprendi* rule applies to the lower statutory maximum:

In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

*Id.* Because the Washington State sentencing judge could not impose a sentence above 53 months unless he explicitly found one or more additional facts, the *Apprendi* rule applies to the 53-month maximum.

The *Blakely* Court also noted that a defendant's Sixth Amendment right to trial by jury is not violated if the defendant stipulates to the facts upon which the sentence is based or consents to judicial fact finding. *Id.* at 2551.

## **B. Booker**

On January 12, 2005 the Supreme Court handed down its decision in *United States v. Booker*, -- S. Ct. --, 2005 WL 50108 (Jan. 12, 2005), finding certain provisions of the Federal Sentencing Guidelines, promulgated pursuant to the Sentencing Reform Act of 1984, unconstitutional. The Court first held that the Guidelines violated the defendant’s Sixth Amendment right to a jury trial because they require judges to find facts which in turn increase a defendant’s sentence beyond what could be imposed based solely on the jury’s verdict. In the second part of the decision, the Court considered whether the unconstitutional portions of the Guidelines could be severed and the rest of the statutory scheme preserved. The Court held that by severing the two provisions in the Act that make the Guidelines mandatory, the rest of the sentencing scheme could be preserved. Specifically, the Court held that 18 U.S.C. § 3553(b)(1), and 18 U.S.C. § 3742(e), were “incompatible with today’s constitutional holding.” *Booker*, 2005 WL, at \* 16. The former provision stated that courts “*shall* impose a sentence . . . within the range” established by the Guidelines. 18 U.S.C. § 3551(b)(3) (emphasis added). The latter provision mandated a *de novo* standard of review – a standard which, according to the

Court, “depends upon the Guidelines’ mandatory nature.”<sup>5</sup> “So modified,” the Court continued, “the Federal Sentencing Act . . . makes the Guidelines effectively advisory.” *Booker*, 2005 WL, at \* 16. Both of these holding came as a result of the Court finding that its *Blakely* decision applied to the Guidelines. *United States v. Booker*, 125 S.Ct. 738 (2005).

The importance of *Booker* for state court purposes is that it reaffirmed the importance of *Apprendi*. In the first part of the *Booker* opinion delivered by the court Justice Steven wrote “we affirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”

### **C. Shepard**

The final part of the *Apprendi* trilogy, is *Shepard v. United States*, 125 S.Ct. 1254 (2005). In *Shepard*, the Supreme Court found that even prior convictions, if improperly substantiated, cannot be used to increase punishment. The Court held that a sentencing court could only rely on prior convictions as predicates for Armed Career Criminal status, if the statutorily required characteristics of these convictions were evidenced by “the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant or [ ]some comparable judicial record of this information.” 125 S. Ct. at 1263. The Court foreclosed a broader evidentiary inquiry that would allow a sentencing court to conduct its own review of the record to ascertain the applicability of prior convictions because this would “raise[ ] the concern underlying Jones and Apprendi: the Sixth and

Fifth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence.” Id. at 1262. Thus, even in *Shepard*, where the disputed fact could “be described as a fact about a prior conviction[ ,] ” the Supreme Court deemed it “too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute.” Id.

Justice Thomas, in his concurrence, cast doubt on Almendarez-Torres, “prior conviction exception” by noting that it was “eroded” by the Court’s subsequent decisional law. See id. (Thomas, J., concurring in part and concurring in the judgment). Indeed, he went so far as to count the votes for reversing Almendarez-Torres; a majority of the Court, he maintained, now recognized that Almendarez-Torres was wrongly decided. See id. (citing Almendarez-Torres, 523 U.S. at 248-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, J., dissenting); Apprendi, 530 U.S. at 520-21 (Thomas J., concurring)).

## **VI. APPRENDI AND TEXAS COURTS**

### **A. Capital Murder**

#### **1. Indictment and Special Issues.**

*Apprendi* does not compel the State to allege the special issues under Article 37.071 in the indictment. *Resendiz v. State*, 112 S.W.3d 541, 550 (Tex.Crim.App.2003).

#### **2. Burden of Proof on Mitigation**

*Apprendi* does not require the State to prove beyond a reasonable doubt that there are no mitigating facts. *Rayford v. State*, 125 S.W.3d 521 (Tex. Crim. App. 2003); *Allen v. State*, 108 S.W.3d 281 (Tex. Crim. App. 2003); *Blue v. Texas*, 125 S.W. 3d 490 (Tex. Crim. App. 2003).

### **3. New Punishment Hearing**

*Apprendi* does not require that the original jury assess punishment on a remand for a new punishment hearing. *Smith v. Texas*, 74 S.W. 2d 868 (Tex. Crim. App 2002).

#### **B. Cumulative Sentences**

*Apprendi* does not prohibit the trial court from otherwise cumulating sentences (stacking). *Millslagle v. State*, \_\_S.W.3d \_\_ (No. 03-03-00560-CR, Tex. App. – Austin, 2004). Texas trial courts have the discretion to order cumulative sentences in virtually every case. *See* Tex. Code Crim. Proc. Ann. art. 42.08(a) (West Supp. 2005). The principal exception to this rule is found in penal code section 3.03(a), which provides that when a defendant is found guilty at a single trial of more than one offense arising out of the same criminal transaction, the sentences for each offense must run concurrently. Tex. Pen. Code Ann. § 3.03(a) (West 2003). Section 3.03(b)(2)(A) creates an exception to this exception; that is, it exempts certain offenses, including indecency with a child and aggravated sexual assault of a child, from the application of section 3.03(a). Tex. Pen. Code Ann. 3.03(b)(2)(A).

#### **C. Family Violence Finding**

Neither *Apprendi* or *Blakely* prohibit the trial court from making an affirmative finding of family violence. *Thomas v. State*, \_\_S.W.3d \_\_, (No. 05-03-01589-CR, Tex. App. – Dallas 2004). However, this general proposition may not be true when there is a

family violence finding and the offense is a terroristic threat. Under article 42.013, Code of Criminal Procedure, in the trial of an offense under Title 5 of the Penal Code, if the court determines that the offense involved family violence, the court must make an affirmative finding of that fact and enter the finding in the judgment. This finding increases the penalty under Penal Code Section 22.07 (Terroristic Threat) from a Class B misdemeanor to a Class A misdemeanor. In this particular circumstance *Apprendi* may apply.

Also *Apprendi* may be applicable if the defendant was convicted of family violence assault and had a previous conviction of family violence and the previous conviction was used to increase the defendant's punishment. Under the penal code, a misdemeanor assault becomes a third degree felony if it is committed against "a member of the defendant's family or household, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense against a member of the defendant's family or household." Tex. Penal Code Ann. § 22.01(b)(2) (Vernon Supp. 2004-05); *See Thomas v. State*, [150 S.W.3d 887](#) (Tex. App.--Dallas 2004, pet. filed). Under the code of criminal procedure, in the trial of an offense against a person, "if the court determines that the offense involved family violence . . . the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case." Tex. Code Crim. Proc. Ann. art. 42.013 (Vernon Supp. 2004-05); *see also Thomas*, [150 S.W.3d at 888](#). The family code defines family violence as "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, [or] assault." Tex. Fam. Code Ann. § 71.004(1) (Vernon 2002); *see Thomas*, [150 S.W.3d at 888](#). The family code's definition of "family"

includes individuals who are the parents of the same child, without regard to marriage. Tex. Fam. Code Ann. § 71.003. Additionally, the family code's definition of "household" includes persons living together in the same dwelling, without regard to whether they are related to each other. *Id.* § 71.005.

A finding of family violence "impacts a defendant's sentence only if the defendant has previously committed a family-violence assault." *Thomas*, 150 S.W.3d at 888.

At least one justice, Justice J. Dauphinot, in the dissenting opinion, would hold that any finding of family violence would violate *Apprendi*. See *Butler v. State*, \_\_\_S.W.3d \_\_\_ (No. 2-04-178-CR, Tex. App.- Fort Worth, decided March 31, 2005). This particular dissenting opinion is worthy of note and will be provided in major part below:

In Article 42.013 of the Texas Code of Criminal Procedure, the Texas Legislature provided, "In the trial of an offense under Title 5, Penal Code, if the court determines that the offense involved family violence, as defined by Section 71.004, Family Code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case."(fn15) When the Texas Legislature enacts a statute, it is presumed to comply with both the Texas Constitution and the U.S. Constitution.(fn16) If at all possible, we must therefore interpret a statute in a manner that renders it constitutional.(fn17) Almost ninety years ago, Justice Holmes wrote that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."(fn18) If there are two reasonable interpretations of a statute and if one would make the statute unconstitutional and the other would not, then we must choose the reasonable interpretation that avoids the constitutional infirmity.(fn19) The majority violates this canon, as demonstrated by the discussion of the *Apprendi* line of cases below.

In *Apprendi v. New Jersey*, the U.S. Supreme Court held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."(fn20) As the *Ring* court explained, in *Apprendi* the Court held that Apprendi's sentence violated his right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. New Jersey, the Court observed, "threatened Apprendi with certain pains if he

unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race." "Merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently."

The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.(fn21)

"[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."(fn22) The *Ring* court, in extending *Apprendi's* holding to death penalty determinations, noted that

"[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."(fn23)

With *Blakely*, in striking down Washington's sentencing guidelines, the U.S. Supreme Court further clarified what it meant by "statutory maximum":

Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.(fn24)

The *Blakely* court also emphasized the right to a jury trial provided in the U.S. Constitution:

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.(fn25)

Finally, in *Booker*, the Court applied *Blakely* to reduce the status of the federal sentencing guidelines from mandatory to advisory.(fn26) Before *Booker*, the sentencing guidelines required a trial court to make independent findings after a jury verdict. These judge-made findings, in turn, often mandated that a defendant receive a higher sentence than the jury verdict justified. The guidelines address such areas as

the defendant's criminal history and his role in the offense but also examine such issues as the status of the complainant, whether the defendant accepted responsibility for the offense (by pleading guilty), and whether he used a special skill in the completion of a crime (such as those skills possessed by a lawyer, accountant, pilot, or chemist).(fn27)

It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."(fn28)

The majority asserts that *Blakely* and *Apprendi* do not affect the validity of the trial court's family violence finding because that finding "had no effect whatsoever on Appellant's punishment in this case."(fn29) I disagree.

While a family violence finding may not increase the length of the sentence in the first case in which a finding is entered, it does make more onerous the possible conditions of community supervision. That is, the finding affects the sentence in a way that is similar to the effect of the federal sentencing guidelines before *Booker*. Section 42.12 of The Texas Code of Criminal Procedure provides,

If a judge grants community supervision to a person convicted of an offense under Title 5, Penal Code, that the court determines involves family violence, the judge may require the person to make one payment in an amount not to exceed \$100 to a family violence shelter center that receives state or federal funds and that serves the county in which the court is located. In this subsection, "family violence" has the meaning assigned by Section 71.004, Family Code, and "family violence shelter center" has the meaning assigned by Section 51.002, Human Resources Code.(fn30)

That section further provides,

If the court grants community supervision to a person convicted of an offense involving family violence, as defined by Section 71.004, Family Code, the court may require the defendant to attend, at the direction of the community supervision and corrections department officer, counseling sessions for the elimination of violent behavior with a licensed counselor, social worker, or other professional who has been trained in family violence intervention or to attend a battering intervention and prevention program if available that meets guidelines adopted by the community justice assistance division of the Texas Department of Criminal Justice. If the court requires the defendant to attend counseling or a program, the court shall require the defendant to begin attendance not later than the 60th day after the date the court grants community supervision, notify the community supervision and corrections department officer of the name, address, and phone number of the counselor or program, and report the defendant's attendance to the officer. The court shall require the defendant to pay all the reasonable costs of the counseling sessions or attendance in the program on a finding that the defendant is financially able to make payment. If the court finds the defendant is unable to

make payment, the court shall make the counseling sessions or enrollment in the program available without cost to the defendant. The court may also require the defendant to pay all or a part of the reasonable costs incurred by the victim for counseling made necessary by the offense, on a finding that the defendant is financially able to make payment. The court may order the defendant to make payments under this subsection for a period not to exceed one year after the date on which the order is entered.(fn31)

The judgment in this case reveals that Appellant was subjected to both of these conditions of community supervision. The majority states in a footnote that "a court may impose any reasonable condition on probation, but that does not constitute an increase in Appellant's sentence."(fn32) However, given the text of sections eleven and twelve of article 42.12, imposing a requirement of a \$100 payment to a family shelter on a criminal defendant convicted of a misdemeanor would not be reasonable *without* a family violence finding.(fn33)

Additionally, the finding of family violence subjects Appellant to future consequences that one convicted of simple assault does not face. When a person commits assault, the offense is a class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

...

(2) a member of the defendant's family or household, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense against a member of the defendant's family or household under this section.(fn34)

Under the majority's reasoning, an affirmative finding of family violence is entered on the judgment despite the factfinder making no such finding and despite the fact that the judge making the finding is not required to make the finding beyond a reasonable doubt or even by a preponderance of the evidence. Yet that finding, and only that finding, subjects Appellant *in this case* to paying \$100 to an agency unconnected to either the judicial system or the community supervision system.(fn35) And in a subsequent prosecution for a family violence offense, the jury would rely on that judgment alone to find *beyond a reasonable doubt* that an earlier jury convicted the defendant of an offense involving family violence, boosting the offense from a class A misdemeanor to a third degree felony.

Consequently, at the time the trial court entered the family violence finding and as a result of such finding, Appellant was subject to additional, unique burdens of community supervision and was branded with the additional mark of a family violence offender. The trial court's finding therefore imposed a greater hardship on him than the jury's verdict allowed. As a result, I would hold that Appellant was subject to a greater punishment under the family violence finding than he would have been under the jury's verdict and that the trial court's actions violated the strictures of the *Apprendi* line.(fn36)

#### **D. Unlawful Restraint**

*Apprendi* applies in certain unlawful restraint cases. For example under Penal Code Section 20.02 (Unlawful Restraint) if the trial court makes an affirmative finding that the person restrained was a child younger than 17 years of age, the penalty is increased from a Class A misdemeanor to a state jail felony. (See Article 42.015 of the Code of Criminal Procedure for the affirmative finding.) *Apprendi* should apply in this type of case.

#### **E. Court's Charge and Appendi**

In any case where *Apprendi* would be applicable, the court's charge must reflect the correct burden of proof. In *Olivas v. State*, \_\_\_S.W.3d. \_\_\_, (No. 10-02-00308-CR, No. 10-02-00309-CR, No. 10-02-00310-CR, Tex. App. – Austin, delivered November 10, 2004), *Olivas* was found guilty of evading arrest. Tex. Pen. Code Ann. § 38.04 (Vernon 2003). Under section 38.04(a) of the Penal Code, evading arrest is a Class B misdemeanor. *Id.* § 38.04(a). If the offense is committed using a vehicle, it becomes a state jail felony under section 38.04(b). *Id.* § 38.04(b). A state jail felony is punishable by confinement in a state jail for no more than two years and by a fine up to \$10,000. *Id.* § 12.35 (Vernon 2003). However, section 12.35 provides that a state jail felony shall be punished as a third degree felony if it is shown on the trial of the offense that a deadly weapon was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense. *Id.* Three of the evading arrest verdicts contain findings that a deadly weapon was used.

The charge in this case failed in two respects. First, it did not place the burden of proof on the state. The court reasoned a charge allowing a finding of use of a deadly

weapon to enhance the offense to a third degree felony under section 12.35 must properly place the burden of proof on the State as part of the law applicable to the case. The opinion stated:

The prosecution bears the burden of proving all elements of an offense and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993). The use or exhibition of a deadly weapon is not an element of the state jail felony of evasion, but the State is required to prove such use when, as here, it wants to increase the punishment beyond the statutory maximum for a state jail felony. The Supreme Court has said that a sentencing enhancement that increases punishment beyond the maximum statutory sentence "is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S.Ct. 2348, 2365 n.19, 147 L.Ed.2d 435 (2000). Thus, a charge allowing a finding of use of a deadly weapon to enhance the offense to a third degree felony under section 12.35 must properly place the burden of proof on the State as part of the law applicable to the case. This charge did not.

The second reason the charged failed is because it did not place the correct burden of proof upon the state. The correct burden of proof is beyond a reasonable doubt. The charge did not require that the jury make a finding that Olivas used a deadly weapon "beyond a reasonable doubt." Although the trial court gave a reasonable doubt instruction in the main body of the charge regarding the elements of the state jail felony of evading a peace officer by fleeing in a vehicle, it did not provide a reasonable doubt instruction as it relates to the deadly weapon. Thus, an *Apprendi* violation occurred.

#### **F. Jury Probation and Judicial Conditions**

In *Ledet v. State*, \_\_\_S.W\_\_\_, (No. 01-03-00437-CR, Tex App. – Houston [1<sup>st</sup>], decided February 10, 2005), the appellant lost an opportunity for the Court to resolve several issues surrounding jury assessed community supervision and judicial imposed conditions. On appeal appellant, in his second issue, contended that the 180 days' confinement the trial judge imposed as a condition of his community supervision is a

violation of his Sixth Amendment right to trial by jury. Appellant argued that the United Supreme Court decision in *Blakely v. Washington* prohibits trial judges from adding a time of incarceration to a jury's assessed punishment of probation. \_\_ U.S.\_\_, 124 S. Ct. 2531 (2004). In his third and fourth issues, appellant asserted that the \$400,000 restitution order imposed by the trial judge was unconstitutional because (1) it violates his Sixth Amendment right to trial by jury and (2) it violates his right to due process. Specifically, in his third issue, appellant argued that *Blakely* prohibits trial judges from adding a restitution order to a jury's assessed punishment of probation. \_\_ U.S.\_\_, 124 S. Ct. 2531 (2004). In his fourth issue, appellant contended that the restitution order violates his right to due process because the trial court did not orally add the restitution order at the sentencing hearing and there was no factual basis for the amount of the restitution. Unfortunately, the appellant did not preserve his complaint for appellate review.

## **VII. APPRENDI AND RELATED ISSUES**

### **A. Indictment**

Aggravating sentencing factors subject to *Apprendi* should probably be placed in the charging instrument to avoid any issue of sufficient notice. The Sixth Amendment right to a jury trial may include notification regarding which aggravating factors the prosecutor will rely upon.

In the context of federal cases, the Supreme Court cast constitutional doubt on notice being provided by a means other than an indictment by a grand jury. In *Apprendi*, the Supreme Court held that the Sixth Amendment requires that any fact

increasing a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

*Blakely* went further, holding that ““an accusation which lacks any particular fact which the law makes *essential to the punishment* is . . . no accusation within the requirements of the common law, and it is no accusation in reason.”” *Blakely*, 124 S. Ct. at 2536 (emphasis added) (quoting 1 J. Bishop, Criminal Procedure § 87 (2d ed. 1872)) . Accordingly, the Supreme Court read *Apprendi* as giving “every defendant . . . the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” Id. at 2543. (emphasis added).

In *Ring*, the Supreme Court applied *Apprendi* to the death penalty and, in effect, to a sentencing jury context. It held that an aggravating factor under Arizona’s death penalty statute must be proven to a jury beyond a reasonable doubt before it can be used by a judge to impose the death penalty. The decision’s rationale readily extends beyond factors that make a defendant death-eligible, embracing *all* aggravating factors that may be weighed by a capital jury in its final sentencing decision.

Significantly, none of these cases distinguishes between the Sixth Amendment petit jury requirement, and the Fifth Amendment Indictment Clause, suggesting instead that they are both components of a two-tiered process of procedural protections. Although the Fifth Amendment Indictment Clause is not implicated in the state court sentencing scheme there can at least be an argument that facts which increase the defendant’s punishment beyond that which would have been allowed based solely on the offense of conviction should be included in the indictment. Some interesting language in *Harris v. United States*, 536 U.S. 545, 563 (2002) may provide support for this argument. The

Supreme Court in *Harris*, issued on the same day as *Ring*, interpreted *Apprendi* to hold that both the grand and petit juries must review all facts to which the legislature has attached the maximum punishment: “A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict include all the facts to which the legislature had attached the maximum punishment.” *Harris*, 536 U.S. at 563.

### **B. Pleas**

An interesting issue raised by *Apprendi* is whether a defendant can plead guilty to the offense and then request that a jury determine whether there are aggravating facts which increase his sentence beyond that which he would otherwise be exposed based solely on his plea. In Texas, the defendant will typically sign a waiver of jury before he is allowed to enter his plea. Such a waiver may be construed as waiving a jury’s determination of facts relating to his sentence. A prudent prosecutor may well be advised to specifically include in the defendant’s jury trial waiver an *Apprendi* waiver just to avoid any potential problems.

### **C. Jury Trials**

Another interesting issue raised by *Apprendi* is whether the defendant can demand that the jury make certain factual determinations where he fails to file an election as to punishment prior to trial. One might argue that the election is a procedural matter and his constitutional right to have the jury to determine the facts which will increase his punishment beyond that found by the jury in the

guilt/innocence phase or admitted by him, trumps the procedural failure. The State on the other-hand will argue that the failure to file an election constitutes a waiver of the right to have a jury assess punishment as to any matter. The defendant in turn will argue that the waiver of a constitutional right must be knowingly and voluntarily done with a full understanding that he is specifically waiving that right.

Even if the trial court allows the jury to hear the aggravating or enhancing factors, the question becomes must the trial court submit a special verdict form.

#### **D. Recidivism/Criminal History**

*Apprendi* carved out an exception to its rule for enhancements based on prior convictions. It preserved the holding of *Almendarez-Torres*, which allowed judges to find prior convictions that trigger recidivism enhancements. States have followed the Supreme Court's lead and continued to allow judges to find facts that trigger these enhancements. See e.g. *State v. Lebaron*, 808 A.2d 541, 544-45 (N.H. 2002). In Texas, prior convictions that are used to enhance punishment are alleged in the indictment. There is no Sixth Amendment problem when the jury assesses punishment. However, for purposes of punishment the question becomes whether in a trial before the Court can a defendant request that a jury assess his punishment. The State will probably argue the defendant signed a waiver of jury therefore he waived his right to have a jury assess punishment. A judge may decide that the waiver did not include an *Apprendi* type waiver and therefore decide to allow a jury to determine the validity of the prior convictions. (Note: a guilty plea alone does not necessarily waive a Sixth Amendment right; recall *Blakely* had a plea

agreement). In some cases it may be a better use of judicial time for the Court to allow a TBC and then let the jury make a special fact finding regarding the prior convictions, rather than have a full blown jury trial on guilt/innocence and punishment. This would indeed be a rare case that the defendant would make such a request.

### **E. Consecutive Sentences**

State courts generally agree that judges may find facts that trigger consecutive instead of concurrent sentences. They reason that because the ultimate sentence does not exceed the combined statutory maxima, there is no *Apprendi* problem. See *Wright v. State*, 46 P.3d 395, 398 (Alaska 2003); *People v. Clifton*, 69 P.3d 81, 83-86 (Colo. Ct. App. 2001); *Hall v. State*, 823 So. 2d 757, 764 (Fla. 2002); *People v. Harris*, 784 N.E.2d 792, 798 (Ill. 2003); *State v. Jacobs*, 644 N.W.2d 695, 698 (Iowa 2001); *State v. Bramlett*, 41 P.3d 796, 798 (Kan. 2002); *State v. Wilson*, 2002-Ohio-5920, 2002 WL 31420758, at \*8-\*9 (Ohio Ct. App. Oct. 25, 2002). However, there are some courts which hold *Apprendi* applies to consecutive sentencing. In *People v. Clifton*, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2000) (Nos. 1-98-2126 & 1-98-2384, 9/29/00), the First District held that when considering *Apprendi* issues, the relevant question is not whether a statute expressly increases the authorized sentence, but whether it has the practical effect of doing so. In other words, if the factor in question exposes the defendant "to greater punishment than is authorized by the jury's guilty verdict," *Apprendi* applies.

The *Clifton* court held that under this test, the mandatory consecutive sentencing statute (730 ILCS 5/5-8-4) is subject to *Apprendi*. Thus, whether the defendant acted in a "single course of conduct" and inflicted "severe bodily injury" must be decided by the jury under the reasonable doubt standard.

## **F. Restitution**

In *State v. McMillan*, 2005 Ore. App. LEXIS 538 (Ore App. Ct. May 4, 2005), the defendant raised *Blakely* to contest the sentencing judge's fact-finding which set the amount of a restitution order. The *McMillan* court rejected this claim, asserting simply:

The statutory maximum is...the amount of pecuniary damages as determined by the court, and no more. Therefore, even assuming that *Apprendi* and *Blakely* apply to restitution, see *State v. Gutierrez*, 197 Or.App. 496, 505, 106 P3d 670 (2005) (*Apprendi* and *Blakely* "arguably do not apply" to restitution), the principles announced in those cases were not violated.

Thus, *Apprendi* has been held not to apply to restitution, at least according to *McMillan*.

## **G. Retroactivity**

Texas has applies *Apprendi* retroactively to cases on collateral review. *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001). See also *See Rethinking Retroactivity*, 118 Harvard Law Review 1642 (2005) ("*Apprendi*'s reasonable doubt holding demands retroactive application')

## **H. Waivers**

The question of whether a defendant can waive *Apprendi*'s application was addressed in *Blakely*. The *Blakely* court stated

But nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial

factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Although *Blakely* allows the waiver of *Apprendi* rights, appellate courts will not presume a valid waiver of fundamental constitutional rights from a silent record. *Boykin v. Alabama*, 395 US 238, 243, 89 S Ct 1709, 23 L Ed 2d 274 (1969) ("We cannot presume a waiver of [the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers] from a silent record."). In particular, waiver of the right to jury trial requires "the *express* and intelligent consent of the defendant." *Patton v. United States*, 281 US 276, 312, 50 S Ct 253, 74 L Ed 854 (1930), *abrogated on other grounds by Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed 2d 446 (1970) (emphasis added). Therefore any waiver of an *Apprendi* right should be expressly done either open court or in writing.

### **VIII. DEFENSE'S ARGUMENT**

One of the strongest and broadest reading of *Apprendi* comes from *Blakely*. The Court stated that "every defendant has the *right* to insist that the prosecution prove to a jury all facts legally essential to the punishment" (*Blakely* 124 S.Ct. at 2543) and that "every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury." *Id.* At 2536 n.5 (internal quotation marks omitted).

The underlying rationale of the *Apprendi-Blakely* line of cases is the Court's historical conclusion that the Framers intended for the trial jury to exercise "control" over judges' sentencing authority or, stated differently, the jury should act as a

“circuitbreaker” in the governmental process leading to criminal prosecution. *Id.* At 2538-39.

## **IX. STATE’S ARGUMENT**

Texas has an indeterminate sentencing system. The *Blakely* and *Booker* majorities endorsed in no uncertain terms the continuing constitutionality of traditional indeterminate sentencing system in which the trial judges are allowed but not required to engage in freeform factfinding before selecting punishment within broad statutory ranges. *Williams v. New York*, 337 U.S. 241 (1949) highlights the breath of factfinding at sentencing available to trial courts in indeterminate sentencing structures:

A sentencing judge. . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.

*Williams*, 337 U.S. at 247.

## **X. CONCLUSION**

The scope and application of *Apprendi* will be evaluated for years to come. Its application should be evaluated under the United States Constitution as well as the Texas Constitution. The right to trial by jury serves an important function in our criminal justice system and it should be preserved. It’s purpose is particularly important in the area of punishment.

As a result of the *Apprendi-Blakely* line of cases several questions still remain:

- Are sentencing factors subject to *Apprendi* now to be understood as full-blown elements of the offense?
- Must the factfinding prerequisite to a confinement sanction – or the revocation of community supervision – now be performed by juries?
- Must a jury be instructed on the sentencing consequences of their finding of fact?
- Must the factfinding attendant to the transfer of juveniles to the adult criminal court now be performed by juries?
- Does the right to trial by jury apply to parole determinations?

These as well as many other issues will confront judges and lawyers in the criminal justice system. The only certainty within this legal maze is that jury trials are here to stay.