Illinois *Apprendi* Case Law: Two and a Half Years of Broad Application and Rapid Evolution

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Introduction

In June 2000, the United States Supreme Court decided, in *Apprendi v. New Jersey*,1 that the federal Constitution requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, to be submitted to the trier of fact (judge or jury) and proved beyond a reasonable doubt. Pursuant to *Apprendi*, all sentencing enhancement provisions set forth in the Illinois Code of Corrections or the penalty section of a specific criminal offense must be proven beyond a reasonable doubt to the trier of fact.

In the spring of 2001, Illinois State Senator Dan Cronin and Peter Baroni analyzed the status of *Apprendi v. New Jersey* as applied to criminal cases in Illinois by federal and State courts.2 At the time of that article's publication, the applicability of *Apprendi* was, in the main, unclear in Illinois. Over the intervening two years, a cavalcade of case law has materialized and *Apprendi*'s applicability is now much more apparent. This article answers many of the questions left open in that spring 2001 examination, by discussing case law under *Apprendi* in nine different sentencing areas.

1. Consecutive Sentencing

The Illinois Supreme Court has answered the question whether *Apprendi*'s dictates apply to consecutive sentencing. In *People v. Carney*,3 the defendant was convicted and sentenced to consecutive terms of 29 years' imprisonment for murder and 10 years' imprisonment for armed robbery.4 The court found that "consecutive sentences do not constitute a single sentence and cannot be combined as though there were one sentence for one offense. Each conviction results in a discrete sentence that must be treated individually."5 Thus, *Apprendi* does not apply to consecutive sentences in Illinois.6

2. First Degree Murder - Death Penalty

In *Ring v Arizona*,7 the United States Supreme Court addressed the applicability of *Apprendi* to death penalty cases. In *Ring*, the Court reversed part of its earlier holding in *Walton v. Arizona*,8 holding that under *Apprendi*, capital defendants have a Sixth Amendment right to have a jury determination of the facts necessary for death penalty eligibility. However, the decision has no effect in Illinois because in this state, there already exists a statutory right to a jury determination at the death penalty eligibility stage of a capital trial. Further, the Court expressly stated that its holding did not mean that *Apprendi* was applicable

to the existence of mitigating circumstances or that a jury was required to make the ultimate sentencing decision in capital cases.9

The Illinois Supreme Court addressed the applicability of *Apprendi* to capital cases in *People v. Davis*.10 The *Davis* court held that *Apprendi* neither applied to the aggravation/mitigation phase of a capital case nor required the indictment to include the particular eligibility factors relied upon by the prosecution, provided the defendant had sufficient notice of the State's intent to seek the death penalty so that he could adequately prepare his defense. Moreover, in *People v. Harris*,11 the court held that *Apprendi* did not require the sentencing body (judge or jury) to find beyond a reasonable doubt that there were no mitigating factors sufficient to preclude a death sentence.

3. First Degree Murder – Capital Eligible, Non-Capital, Natural Life, and Extended Term Sentences

Illinois courts have also settled questions regarding the applicability of *Apprendi* to capital eligible, non-capital, natural life, and extended term sentences in first-degree murder cases. In *People v. Ford*,12 the Illinois Supreme Court held that the defendant's 100-year sentence did not violate *Apprendi* because he had been found eligible for the death penalty beyond a reasonable doubt. The court went on to state that even if the particular statutory aggravating factor underlying the extended term sentence ("brutal and heinous," for example) were not proven to the trier of fact beyond a reasonable doubt, no *Apprendi* violation occurred because the defendant was not sentenced beyond the statutory maximum period authorized by the verdict, in this case death.

Additionally, the decision of the Illinois Supreme Court in *People v. Hopkins*13 affirmed the defendant's 75-year sentence because the jury had found the existence of one of the aggravating factors as an element of another offense. The court held that once *Apprendi* was satisfied, "[a]dditional aggravating factors can be considered by the trial judge, including statutorily enhanced factors not proved beyond a reasonable doubt, to fashion an appropriate sentence within the new sentencing range."14

By contrast, in *People v. Swift*,15 the Illinois Supreme Court held that the defendant's 80-year sentence for first-degree murder was unconstitutional because, for a non-capital murder case, the maximum penalty is 60 years. The defendant's sentence was extended from 60 to 80 years based on the trial court's finding, by a preponderance of the evidence after trial, that the offense was exceptionally brutal or heinous. Because the State did not seek death (no capital eligibility factors were proven at trial) and none of the elements of the underlying criminal offense extended the statutory maximum beyond 60 years, the court held that the "brutal and heinous" nature of the offense must be proven beyond a reasonable doubt. In other words, no other facts or factors were proven at trial that increased the first-degree murder statutory maximum beyond 60

years. Thus, according to the *Swift* court, the fact that extended the statutory maximum, namely, that the offense was "brutal or heinous," must be proven to the jury beyond a reasonable doubt, or the defendant cannot be sentenced to a term greater than 60 years.

Finally, consistent with *Swift*, in *People v. Rivera*,16 the Second District Appellate Court affirmed the defendant's natural life sentence for murder, notwithstanding the failure of the prosecution to seek the death penalty, because the jury necessarily found beyond a reasonable doubt that the defendant committed the murder in the course of another felony, aggravated criminal sexual assault, when it found him guilty of those offenses. In *Rivera*, the jury's felony-murder finding increased the statutory maximum to death, and therefore imprisonment for natural life was upheld as within the statutory maximum.

4. Guilty Pleas

The Illinois Supreme Court has also settled the applicability of *Apprendi* to guilty pleas. In *People v. Jackson*,17 the court held that an *Apprendi*-based sentencing challenge cannot be raised where the defendant pled guilty to the offense, even if he was not informed that the extended term factors needed to be proven beyond a reasonable doubt to the trier of fact.18

5. Recidivist Provisions

Although *Apprendi* explicitly excepts prior criminal convictions from its mandate, there have been countless recidivist-based appeals invoking *Apprendi*. All such appeals have been summarily rejected.19

6. Truth in Sentencing

In the spring of 2001, another open question was whether *Apprendi*'s dictates applied to truth in sentencing or mandatory minimum sentencing. The United States Supreme Court addressed the issue in *Harris v. United States*.20 The *Harris* court reaffirmed *McMillan v. Pennsylvania*,21 holding that mandatory minimum sentencing schemes comport with *Apprendi* because such a scheme merely limits the judge's discretion with respect to a minimum sentence. In other words, because truth in sentencing or mandatory minimum sentencing does not expand a sentence beyond the existing statutory maximum, it does not run afoul of *Apprendi*.

Illinois appellate courts have followed the *Harris* holding. In *People v. Garry*,22 the Fourth District held that *Apprendi* does not invalidate the truth in sentencing provisions of the Code of Corrections, which restrict good time credit for certain felonies upon a judicial finding of "great bodily harm," because those provisions do not "trigger any penalty for those crimes—much less increase the maximum penalty" for the offense.23

7. Juvenile Transfer

The Second District has addressed the applicability of *Apprendi* to juvenile transfer hearings. In *People v. Beltran*,24 the court held that *Apprendi* did not apply to juvenile transfer proceedings because the hearing was simply a procedure intended to determine the forum in which the minor's guilt would be adjudicated and did not assess guilt or impose punishment.

8. Retroactivity — Applicability to Post-Conviction Cases

One of the biggest questions raised by *Apprendi* was whether it applies retroactively. Federal courts have collectively held that *Apprendi* should not apply retroactively. In *United States v. Cotton*,25 the United States Supreme Court held unanimously that *Apprendi* should not be applied retroactively because *Apprendi* error "did not seriously affect the fairness, integrity or public reputation of judicial proceedings."26

Illinois courts are divided among districts and, indeed, even within districts as to the issue of retroactive application of *Apprendi*. The leading cases denying and allowing *Apprendi*'s retroactive application both stem from the First District. In *People v. Kizer*,27 a First District panel held that *Apprendi* should not be retroactively applied.28 However, in *People v. Beachem*,29 a different First District panel held that *Apprendi* should be retroactively applied.30 The matter is pending before the Illinois Supreme Court for a final determination whether *Apprendi* applies retroactively in Illinois.

9. Harmless Error

The question of what appellate review standard applies to an *Apprendi* appeal has been uniformly answered: harmless error. In *United States v. Cotton*,31 the Court found that an *Apprendi* error was a "structural error" and such an error "did not seriously affect the fairness, integrity or public reputation of judicial proceedings." Further, in *Ring v Arizona*,32 the Court expressly remanded the case to the Arizona Supreme Court for a harmless error analysis under *Neder v. United States*.33

Illinois courts have also applied the harmless error standard to *Apprendi* appeals. In *People v. Peacock*,34 the First District found that any *Apprendi* error was harmless where the evidence at trial established beyond any doubt that the victim was over 60 years old. Similarly, in *People v. Pearson*,35 the Fourth District affirmed the defendant's extended term sentence for armed robbery on the ground that any *Apprendi* error was harmless given the overwhelming evidence that the victim was over 60 years of age. In both those cases, the victim's age was the fact that had resulted in increasing the penalty beyond the statutory maximum.

Further, in *People v. Blackwell*,36 the court affirmed the defendant's 84-year sentence for first-degree murder because any *Apprendi* error was harmless beyond a reasonable doubt. And in *People v. Gholston*,37 the court held that an *Apprendi* error based on the trial court's finding that the offense was committed in a brutal and heinous manner could be considered harmless error.

Conclusion

The vast body of law stemming from the *Apprendi* decision continues to expand in epidemic proportion; however, the "watershed" change anticipated by its mandate has yet to come to fruition. From retroactivity to post-conviction petitions to capital cases, the change has been less dramatic than initially contemplated by this author and many others.

1 530 U.S. 466, 120 S. Ct. 2348 (2000).

2 *The Apprendi Problem: House Bill 1511's Intent in the Face of Unclear Precedent and Disparate Case Law*, DCBA Brief, Mar. 2001, Vol. 14, at 10 (reprinted in the Chicago Daily Law Bulletin, Apr. 24-25, 2001).

3 196 Ill. 2d 518, 752 N.E.2d 1137 (2001).

4 *Id.* at 520, 752 N.E.2d at 1138.

5 *Id.* at 530, 752 N.E.2d at 1144.

6 *Id.*; *accord People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430 (2001).

7 536 U.S. __, 122 S. Ct. 2428 (2002).

8 497 U.S. 639, 110 S. Ct. 3047 (1990).

9 *Ring*, 536 U.S. at __, 122 S. Ct. at 2437 n. 4.

10 No. 89704 , 2002 Ill. LEXIS 286 (Ill. Feb. 22, 2002).

11 No. 89796 , 2002 Ill. LEXIS 343 (Ill. Jun. 20, 2002).

12 198 Ill. 2d 68, 761 N.E.2d 735 (2001).

13 No. 91938, 2002 Ill. LEXIS 330 (Ill. Jun. 6, 2002).

14 *Id.*

15 No. 91840 , 2002 Ill. LEXIS 954 (Ill. Nov. 21, 2002).

16 No. 2-98-1662, 2001 Ill. App. LEXIS 920 (2nd Dist. Dec. 5, 2001).

17 199 Ill. 2d 286, 769 N.E.2d 21 (2002).

18 *See also Hill v. Cowan*, No. 90229, 2002 Ill. LEXIS 308 (Ill. Apr. 18, 2002) (following *Jackson* and holding that the same rule applies to collateral challenges to a sentence).

19 *People v Ware*, 323 Ill. App. 3d 47, 751 N.E.2d 81 (1st. Dist. 2001) (rejecting the defendant's *Apprendi* challenge to his life sentence for aggravated criminal sexual assault premised upon a prior conviction for the same offense); *People v. Childress*, 321 Ill. App. 3d 13, 746 N.E.2d 783(1st Dist. 2001) (affirming the defendant's extended term sentence for attempt aggravated criminal sexual assault because it was based on his prior convictions and holding that "*Apprendi* does not render recidivist provisions unconstitutional."); *People v. Lathon*, 317 Ill. App. 3d 573, 740 N.E.2d 377 (1st Dist. 2000) (upholding the constitutionality of the mandatory Class X sentencing provision (730 ILCS 5/5-5-3(c)(8)) because *Apprendi* clearly exempts recidivist provisions from its scope); and *People v. Pickens*, 323 Ill. App. 3d 429, 752 N.E.2d 1195 (5th Dist. 2001) (holding that *Apprendi* does not invalidate the Habitual Criminal Act).

20 536 U.S. ___, 122 S. Ct. 2406 (2002).

21 477 U.S. 79, 106 S. Ct. 2411 (1986).

22 323 Ill. App. 3d 292, 752 N.E.2d 1244 (4th Dist. 2001).

23 *See also People v. Bell*, 327 Ill. App. 3d 238, 764 N.E.2d 551 (3rd Dist. 2002); *People v. Fender*, 325 Ill. App. 3d 168, 757 N.E.2d 645 (5th Dist. 2001).

24 327 Ill. App. 3d 685, 765 N.E.2d 1071 (2nd Dist. 2002).

25 535 U.S. ___, 122 S. Ct. 1781 (2002).

26 *See also Harris*, 536 U.S. at ___, 122 S. Ct. at 2427 ("No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect.") (Thomas, J., dissenting); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001) (holding that *Apprendi* does not apply retroactively); *Curtis v. United States*, Nos. 01-2826 & 01-2827, 2002 U.S. App. LEXIS 12029 (7th Cir. Jun. 19, 2002) (same); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (same); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (same); *United States v. Mora*, No. 01-8020, 2002 U.S. App. LEXIS 12658 (10th Cir. Jun. 18, 2002) (same); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (same).

27 318 Ill. App. 3d 238, 741 N.E.2d 1103 (1st Dist. 2000).

28 *See also People v. Acosta*, ___ Ill. App. 3d ___, 768 N.E.2d 746 (2nd Dist. 2001); *People v. Helton*, 321 Ill. App. 3d 420, 749 N.E.2d 1007 (4th Dist. 2001).

29 317 Ill. App. 3d 693, 740 N.E.2d 389 (1st Dist. 2000).

30 *See also People v. Rush*, 322 Ill. App. 3d 1014, 748 N.E.2d 832 (5th Dist. 2001); *People v. Lee*, 326 Ill. App. 3d 882, 888, 762 N.E.2d 18 (3rd Dist. 2001), petition for leave to appeal allowed, April 3, 2002.

31 535 U.S. ___, 122 S. Ct. 1781 (2002).

32 *Ring*, 536 U.S. at ___, 122 S. Ct. at 2443 n.7.

33 527 U.S. 1, 119 S. Ct. 1827 (1999).

34 324 Ill. App. 3d 749, 756 N.E.2d 261 (1st

Dist. 2001).

35 324 Ill. App. 3d 622, 756 N.E.2d 438 (4th Dist. 2001).

36 325 Ill. App. 3d 354, 757 N.E.2d 589 (1st Dist. 2001).

37 No. 1-99-2845 , 2002 Ill. App. LEXIS 527 (1st Dist. Jun. 27, 2002).

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