The Apprendi Problem: House Bill 1511's Intent in the Face of Unclear Precedent and Disparate Case Law

By Senator Dan Cronin and Peter G. Baroni

The United States Supreme Court's landmark decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), created a new constitutionally mandated standard of proof when a prosecutor seeks an extended term sentence in a criminal case. The Apprendi Court held due process (U.S. Const. Amend. V & XIV) and the right to a jury trial (U.S. Const. Amend VI) require 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." Apprendi, 120 S. Ct. at 2362-63. The new standard of proof dramatically changes criminal proceedings involving enhancing or aggravating factors (facts that increase criminal penalties beyond the statutory maximum) and must be considered from the inception of the case to sentencing. This article will, first, briefly review the Apprendi decision; second, discuss the opinion's ambiguous standard; third, assess recent Illinois case law interpreting Apprendi; and finally, analyze the legislative effort in Illinois to address the Apprendi conundrum.

In 1994 Charles Apprendi fired several .22-caliber bullets into the home of a black family that had moved into a previously all-white neighborhood. Apprendi, 120 S. Ct. at 2351. Apprendi was arrested and admitted his guilt to police. Id. Additionally, Apprendi told police he knew the family in the home he shot at was black and he did not want them in the neighborhood. Id. Apprendi pled guilty to the second-degree offense of possession of a firearm for an unlawful purpose. Id. At the sentencing hearing the judge found by a preponderance of evidence that Apprendi had committed the offense with a racially biased intent and that it was a "hate crime" for purposes of sentencing. Apprendi, 120 S. Ct. at 2351. As a result, the court imposed a sentence based on an extended range of 10-15 years rather than the 5-10 year range generally applicable to second-degree offenses in New Jersey. N.J. Stat. Ann § 2C: 43-6(a)(2) and § 2C: 43-7(a)(3)(1999). Apprendi appealed the extension of his sentence beyond the statutory maximum for a second-degree offense, arguing that the extended term "hate crime" sentencing scheme was unconstitutional because it did not require enhanced sentencing factors to be proven beyond a reasonable doubt to a jury. Apprendi, 120 S. Ct. at 2351. The United States Supreme Court agreed with Apprendi and reversed his conviction.

New Jersey's "hate crime" statute authorized the extension of a sentence beyond the statutory maximum when the offense was committed with the intent to intimidate a person based on "race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. Stat. Ann § 2C: 44-3(e)(2000). The Court found the statute unconstitutional because the "hate crime" enhancing factor only required proof by a preponderance of the evidence, not proof beyond a reasonable

doubt—required by due process. Apprendi, 120 S. Ct. at 2358-60. Additionally, the court found the "hate crime" statute unconstitutional because only a judge could hear evidence on the existence of an enhancing factor, not a jury—required by the right to a jury trial. Id. at 2360-69.

Apprendi brought about a "watershed change in constitutional law" by requiring that a sentence enhancing or aggravating fact, which does not relate to the guilt or innocence of the accused, be proven beyond a reasonable doubt. Id. at 2380 (O'Connor, J. dissenting). Never before has that burden applied to proving facts that are not elements of the underlying offense. Id. at 2381 (O'Connor, J. dissenting). Unfortunately, Apprendi is a 5-4 decision, with two significant concurrences, that leaves numerous unanswered questions: First, what procedural approach should be taken to implement the new Apprendi standard? Second, should the enhancing factor be included in the indictment? Third, does the discussion in the Apprendi opinion, analogizing enhancing factors to underlying offense elements, mean enhancing factors should be treated as elements – procedurally or substantively – or was that discussion illustrative only? Fourth, does Apprendi apply to consecutive sentencing, murder cases involving natural life and recidivist provisions? Fifth, is the Apprendi ruling retroactive? Sixth, is an Apprendi error amenable to an harmless error analysis?

The next section of this article addresses the fall-out in Illinois produced by Apprendi. First, it reviews Illinois court case law addressing many of the foregoing issues and the disparity of the holdings caused by Apprendi's confusion. Second, it discusses legislation passed by the Illinois Legislature in the fall 2000 veto session addressing the procedural vacuum Apprendi created.

Consecutive Sentencing

There is a clear divide among Illinois Appellate Courts as to the applicability of Apprendi to consecutive sentences. First, in People v. Primm, 2000 Ill. App. LEXIS 1014 (1st Dist. No. 1-97-3685 Dec. 29, 2000), the court held that Apprendi is not implicated by the imposition of consecutive sentences because, "when sentences are 'made consecutive to one another, a new single sentence [is] not formed.'" Id. 2000 Ill. App. LEXIS 1014 at *36 (quoting Thomas v. Greer, 143 Ill. 2d 271, 278, 573 N.E.2d 814, 822 (1991)). Additionally, in People v. Sutherland, 2000 Ill. App. LEXIS 927 (1st Dist. No. 1-98-3802 Dec. 1, 2000), the court found Apprendi inapplicable to consecutive sentences imposed pursuant to the consecutive sentencing section of the Code of Corrections (730 ILCS 5/5-8-4(a)), notwithstanding that the findings the offenses were committed in a "single course of conduct," and the defendant inflicted "severe bodily injury," were made by the trial court rather than the jury. Id. 2000 Ill. App. LEXIS 927 at *24. The Sutherland court further stated that Apprendi was distinct because, "the trial judge's findings . . . did not increase [the] defendant's punishment beyond the statutory maximum" and because the "defendant's sentence for each crime fell within the

statutory range for the offense." Id. at *29-*30. Petitioner's Brief in People v. Carney at 18-19.

Several other courts, however, have ruled that the Apprendi doctrine does apply to consecutive sentencing. In People v. Clifton, 2000 Ill. App. LEXIS 804 (1st Dist. No. 1-98-2126 & 1-98-2384 (cons.) Sep. 29, 2000), the court held consecutive sentences imposed pursuant to 730 ILCS 5/5-8-4(a) are unconstitutional because the trial court's finding that the defendant inflicted "severe bodily injury" extended the sentence beyond the prescribed statutory maximum for the underlying offense. Id. 2000 Ill. App. LEXIS at *6. The Clifton court found that section 5-8-4(a) violates Apprendi because a judge's finding that consecutive sentences are warranted due to severe bodily injury serves to increase "the actual and potential sentence which the defendant may receive for a given course of conduct." Id. at *8.

Also, in People v. Waldrup, 2000 Ill. App. LEXIS 942 (2nd Dist. No. 2-99-0242 Nov. 30, 2000), the court found Apprendi applicable to consecutive sentences imposed pursuant to the sex offense provision of section 5-8-4(a) because the finding that the offenses were part of a single course of conduct with no change in the offender's motivation was made by the judge rather than the jury. Id. 2000 Ill. App. LEXIS at *6. Faced with these contradictory rulings, the Illinois Supreme Court on January 2, 2001 granted, on an expedited basis, leave to appeal in People v. Carney, 2000 Ill. App. LEXIS 877 (1st Dist. 1-98-4677 Nov. 13, 2000, appeal No. 90549), which should ultimately decide the consecutive sentencing issue in Illinois.

Murder Cases – Natural Life and Extended Term

Apprendi's focus on the "prescribed statutory maximum" has similarly resulted in a split among the Illinois districts as to Apprendi's applicability to first-degree murder cases. In People v. Williams, 2000 Ill. App. LEXIS 963 (4th Dist. No. 4-99-0325 Dec. 15, 2000), the court determined that where a defendant in a first-degree murder case has been found eligible for death, the trial court may impose a sentence of natural life without implicating Apprendi. Id. 2000 Ill. App. LEXIS at *6. The court based its decision on Illinois' statutory sentencing scheme, under which first-degree murder has its own separate sentencing provisions, and thus it is not under any particular felony class such as Class X or 1. Id. at *7-*8. The Williams court further observed that the statutory maximum penalty for first-degree murder is the death penalty, a greater sanction than natural life (720 ILCS 5/9-1(b) and 730 ILCS 5/5-8-1(a)(1)(c)). Id.

Several other districts, however, have found Apprendi applicable to natural life and extended term first-degree murder sentences. In People v. Nitz, 2000 Ill. App. LEXIS 1030 (5th Dist. No. 5-98-0657 Dec. 29, 2000), the court acknowledged that the maximum penalty for first-degree murder under 720 ILCS 5/9-1 is death or natural life, but held that a life sentence is unconstitutional under

Apprendi because the relevant factor authorizing a life term was never determined by the jury. See also People v. Joyner, 2000 Ill. App. LEXIS 885 (2nd Dist. No. 2-99-0433 Nov. 8, 2000) (holding a defendant's sentence of natural life was unconstitutional). In People v. Lee, 2000 Ill. App. LEXIS 962 (No. 1-98-3631 and No. 1-99-2203 (cons.) Dec. 14, 2000), the court vacated the defendant's life sentence based on Apprendi, finding Illinois' sentencing scheme for first-degree murder factually distinct from the Arizona scheme approved of in Walton v. Arizona, 479 U.S. 639 (1990), which was constitutional because in Arizona the only sentencing options for first-degree murder were death or life in prison. Because the Illinois first-degree murder penalties go as low as 20 years and as high as death — the Lee court found the disparity in potential sentences triggered an Apprendi analysis —essentially focusing on the prescribed statutory *minimum* rather than the maximum as mandated by Apprendi.

Once again the Illinois Supreme Court has agreed to decide this Apprendi issue in People v. Eric Ford, Case No. 90083 (petition for leave to appeal granted Nov. 29, 2000 by the Illinois Supreme Court). In Ford, the defendant is challenging his 100-year sentence for first-degree murder based on Apprendi.

Retroactive Application of Apprendi (Post-Conviction Cases)

There is also a split among and within the districts in Illinois over Apprendi's retroactivity. Two cases decided in December 2000 in the First District Appellate Court typify the split. In People v. Kizer, 2000 Ill. App. LEXIS 973 (1st Dist. No. 1-99-0733 Dec. 26, 2000), the court held Apprendi should not be retroactively applied. In People v. Beachem, 2000 Ill. App. LEXIS 868 (1st Dist. No. 1-99-0852 Dec. 6, 2000), the court held that the procedures set forth in Apprendi are "implicit in the concept of ordered liberty," and therefore must be given retroactive effect. Id. 2000 Ill. App. LEXIS at *9-*10.

Several federal cases have held that Apprendi does not require reversal where the enhanced sentence imposed, without the benefit of Apprendi procedures, was nevertheless harmless. The Seventh Circuit Court of Appeals affirmed a defendant's sentence of 262 months imprisonment which was based on the trial judge's factual finding at sentencing that five grams or more of crack cocaine was involved, even though the jury never made any finding as to a particular quantity, and the maximum penalty for a lesser amount of crack cocaine was 240 months. United States v. Nance, 2000 U.S. App. LEXIS 33841 (7th Cir. No. 00-1836 Dec. 29, 2000). Similarly, in United States v. Anderson, 2001 U.S. App. LEXIS 88 at *7-*8 (8th Cir. No. 00-1718MN and No. 00-2098MN Jan. 5, 2001), the court affirmed the defendant's 30-year sentence based on the trial court's finding regarding the quantity of drugs involved, where the applicable prescribed statutory maximum was only 20 years.

Apprendi explicitly excepted from its rule a factor elevating the sentence beyond the statutory maximum when that factor relates to a defendant's prior criminal

history. Several cases in Illinois have obediently followed that exception. In People v. Lathon, 2000 Ill. App. LEXIS 869 (1st Dist. No. 1-99-0261 Nov. 6, 2000), the court upheld the constitutionality of the mandatory Class X sentencing provision, based on prior convictions (730 ILCS 5/5-5-3(c)(8)), because Apprendi clearly exempts recidivist provisions from its scope. See also People v. Ramos, 2000 Ill. App. LEXIS 961 (1st Dist. No. 1-99-0991 Dec. 14, 2000).

The most significant problem raised by the Apprendi decision from a legislative perspective is the absence of judicial direction on how to implement, procedurally, this "watershed change in constitutional law." How does a prosecutor allege an enhancing factor (i.e. put the defendant on notice), and how does a prosecutor present evidence to the trier of fact and instruct a jury on alternative findings? These are some of the issues HB1511 and the legislative effort during the 2000-01 veto session intend to address.

The ambiguity of Apprendi continues as it relates to the treatment of aggravating factors, in other words, how one addresses the elemental nature of such factors. In dicta, via a footnote, the Apprendi Court observed that a fact which increases a sentence beyond the statutory maximum ". . . is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." Apprendi v. New Jersey, 120 S. Ct. 2348, 2365 n. 19. Additionally, in his concurrence, Justice Thomas found that "[i]f a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element [of the offense]." Id. at 2379 (Thomas, J., concurring).

However, the Court elsewhere cautioned against choosing form over substance: "[d]espite what appears to us the clear, 'elemental' nature of the factor here, the relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's verdict?" Id. at 2365; see also, People v. Beachem, 2000 Ill. App. LEXIS 868, *12-*13 (No. 1-99-0852 Dec. 6, 2000). Thus, Apprendi makes no specific finding as to the category an enhancing factor falls into: formal element of the offense or treatment substantively as an element of the offense via standard of proof required. The Seventh Circuit, however, has arguably chosen substance over form, finding that such factors should be "treated as elements" for the purpose of proof by the trier of fact, but not rigidly pigeonholed into actual elements of the offense. Talbot, Nos. 00-3080, 00-3035, slip op.

Given this lack of guidance, finding a legislative solution to address these concerns has not been easy. The legislation set forth in HB1511 attempts to bridge the gap between the two conflicting philosophies. It provides that prosecutors give notice to defendants of enhancing factors sought to be used to increase the defendant's penalty beyond the statutory maximum by either (i) the charging instrument or (ii) by way of written notice before trial. Form of charge,

720 ILCS 5/111-3(c-5); HB1511, Attachment A at 2. The reason for this flexible approach is based on current case law, discussed above, which is unclear as to the rigidity of form, and the potential for future case law which might definitively favor form over substance, that is, interpreting enhancing or aggravating factors as actual elements of the underlying offense. See Beachem, 2000 Ill. App. LEXIS at *13-*14 (urging the adoption of a more formalistic approach wherein aggravating factors are actual elements). HB1511 provides for both approaches – allowing for notice to be in writing before trial or via indictment as is the case for every other element of an offense.

Apprendi's ambiguity continues with respect to the procedure a prosecutor should use to prove up enhancing factors to the trier of fact (judge or jury). HB1511 deals with this problem in the same way it addresses the elemental issue – with flexibility. The legislation simply allows a prosecutor to submit the aggravating factor to a trier of fact and prove it beyond a reasonable doubt. HB1511, Attachment A at 2. Thus, it leaves the procedural choice to the judge. If a judge chooses to require proof of the aggravating factor at the underlying trial, he or she may do so. If the judge chooses to require a bifurcated proceeding, where proof of the aggravating factor is heard in a post-trial hearing in front of the same trier of fact (similar to the eligibility and death phases in death penalty trials), that is also permissible. Again, the law is malleable, allowing different approaches as changing case law requires or as the judge deems appropriate.

HB1511 excepts aggravating factors from the requirements of the Speedy Trial Demand statute, 725 ILCS 5/103-5, because they are not underlying elements of the offense. This acknowledges the fact that the Speedy Trial Demand statute does not apply to facts beyond the underlying elements of an offense. 725 ILCS 5/103-5. Aggravating factors do not relate to the commission of the underlying offense and should not be subject to the requirements of the Speedy statute. This explicit exception allows amendments to pending charges and amendments to cases that may be charged before aggravating or enhancing factors are known, such as gang motivated crime, etc.

The final substantive change made by HB1511 is to the Disposition section of the Code of Corrections, 730 ILCS 5/5-5-3(d). This change is intended to avoid the wholesale revisiting of sentences already imposed where they are vacated on appeal or collaterally attacked based on an Apprendi violation. HB1511, Attachment A at 6. In plain terms, if a sentence is set aside based on the retroactive application of Apprendi, the only effect is with respect to the portion of the sentence that goes beyond the statutory maximum. If the portion of the sentence that goes beyond the statutory maximum is set aside based on Apprendi, then the defendant shall be required to serve the portion of the sentence within the statutory range. In the alternative, the State has the option to seek a new trial and prove the offense as well as the aggravating factor beyond a reasonable doubt to a trier of fact.

Conclusion

The watershed change in con-stitutional law brought about by Apprendi has wrought havoc on criminal justice in Illinois because the opinion failed to address exactly what procedures were con-stitutionally required to adequately account for: "elemental" aggravating factors in criminal prosecutions. Indeed, the disparate attempts by Illinois Appellate Courts to address some of the questions implicated by Apprendi are a harbinger of likely increasing confusion. HB1511 provides legislation that attempts to address the primary concerns of Apprendi in a constitutional and commonsensical fashion. The opinions that will arise out of the Apprendi-related petitions for leave to appeal allowed by the Illinois Supreme Court should provide additional guidance to criminal practitioners. In the interim, both the bench and the bar will have to carefully consider the ramifications of Apprendi at every stage of criminal proceedings.

Senator Dan Cronin *represents the 39th legislative district covering DuPage and Cook Counties. He is a member of the Illinois Senate Judiciary Committee. Sen. Cronin is a partner in the law firm of Power & Cronin, Oakbrook Terrace, IL. He received his Undergraduate Degree in 1981 from North Western University and his Law Degree from Loyola University School of Law.*

Peter G. Baroni*, Criminal Issues Editor, is Legal Counsel to the Illinois Senate Judiciary Committee. Mr. Baroni was an Assistant State's Attorney in the DuPage County State's Attorney's Office from 1996-2000. He received his B.A. in 1989 from DePauw University and his J.D., cum laude, from Howard University School of Law in 1996.*