SELECTED DEVELOPMENTS IN SUBSTANTIVE CRIMINAL LAW

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In this section, we summarize the holdings – and in some instances the repercussions – of five significant cases recently decided by the U.S. Supreme Court and the New York Court of Appeals.

***APPRENDI v. NEW JERSEY*,** 530 U.S. 466 (2000)

- **Held**: "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." *Id.* at 470 (emphasis supplied). "In federal prosecutions, such facts must also be charged in the indictment." *United States v. Cotton*, 122 S. Ct. 1781, 1783 (2002) (citations omitted).

- **Impact**: Landmark ruling dramatically alters the prosecution and sentencing of federal crimes – particularly drug crimes, where the type and quantity of narcotics involved, formerly sentencing factors for a judge to determine by a preponderance of the evidence, are now considered offense elements that must be pled in the indictment and proved to the jury beyond a reasonable doubt. *See United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (*en banc*).

- **Other Ramifications & Open Questions**: 1. Does *Apprendi* apply to facts that trigger statutory **minimum** as well as **maximum** sentences? In the Second Circuit, the answer is "yes." *See United States v. Guevara*, 277 F.3d 111 (2d Cir. 2001). The issue is presently before the U.S. Supreme Court. *See Harris v. United States*, *cert. granted*, No. 00-10666, 122 S. Ct. 663 (Dec. 10, 2001).

  2. On the broadest reading, and in the view of at least four Justices, *Apprendi* may well implicate the constitutionality of **all** determinate sentencing schemes – including, most notably, the federal Sentencing Guidelines. *See Apprendi*, 530 U.S. at 470 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase **the prescribed range of penalties** to which a criminal defendant is exposed.") (majority opinion) (emphasis supplied); *see also id.* at 523 n.11 (Thomas, J., concurring) (suggesting, with apparent approval, that *Apprendi* may threaten Guidelines' constitutionality); *id.* at 543-52 (O'Connor, J., joined by Kennedy and Breyer, JJ., and Rehnquist, C.J., dissenting) (suggesting same *dubitante*). On this view, **any** fact that increases a defendant's sentencing range – **not** just the statutory maximum punishment – must be pled in the indictment, presented to the jury and found beyond a reasonable doubt. Though every federal circuit, including the Second, currently rejects this approach (*see United States v. Norris*, 281 F.3d 357 (2d Cir. 2002)), the issue may or may not be resolved in a capital case now before the Supreme Court. *See Ring v. Arizona*, *cert. granted*, No. 01-488, 122 S. Ct. 865 (Jan. 11, 2002) (Question Presented: Should *Walton v. Arizona*, 497 U.S. 639 (1990), be overruled in light of Court's subsequent holding

in *Apprendi* that it violates Sixth Amendment jury trial right "for a legislature to remove from the jury the assessment of facts that increase **the prescribed range of penalties** to which a criminal defendant is exposed?") (citation and internal quotes omitted) (emphasis supplied).

3. As the dissenters predicted, *Apprendi* has unleashed a flood of federal *habeas corpus* petitions and 28 U.S.C. § 2255 motions by prisoners seeking to vacate their sentences – if not overturn their convictions – on the ground that factors used to enhance those sentences should have been treated as offense elements, and were found by a judge by a bare preponderance instead of a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 551 (O'Connor, J., joined by Kennedy and Breyer, JJ., and Rehnquist, C.J., dissenting); *Beatty v. United States*, No. 01-2493, __ F.3d __, slip op. at 2211 n.11 (noting that Second Circuit "currently has *sub judice* the issue of whether *Apprendi* applies retroactively to a collateral attack upon a conviction") (citing *United States v. Luciano (Parise)*, No. 01-1198 (2d Cir. argued Jan. 28, 2002)).

PEOPLE v. ROSEN, 96 N.Y.2d 329 (2001)

- **Held:** Absent timely objection, enhanced sentence under New York's discretionary persistent felony offender provisions (*see* PL § 70.10, CPL 400.20(5)) does not amount to "mode of proceedings" error violating *Apprendi* jury trial right, and does not render indictment "jurisdictionally defective" under state or federal law.

- **Comment**: Holding undoubtedly correct because recidivist statutes fall squarely within the *Apprendi* exception for prior convictions, which are traditional sentencing factors that need **not** be pled in the indictment, submitted to the jury or proved beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 470; *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Moreover, the Supreme Court recently rejected the same jurisdictional argument urged in *Rosen* – that an indictment omitting a sentence-enhancing factor is jurisdictionally defective and warrants automatic reversal, without a contemporaneous objection or a showing of prejudice. *See Cotton*, 122 S. Ct. 1781.

WHREN v. UNITED STATES, 517 U.S. 806 (1996)

- **Held** (unanimously): When police officer has probable cause to detain motorist for a traffic infraction, the ensuing seizure does not violate the constitution's Fourth Amendment – even if the stop is a pretext to investigate another offense for which probable cause is lacking.

- **Reasoning**: 1. Since "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," the "actual motivations of ... individual officers" are legally irrelevant. *Id.* at 813. 2. Rather, the presence of objective probable cause

suffices to justify such stops, rendering them reasonable and constitutional *per se*. *Id.* at 817-19. 3. Alternative test proposed by petitioners – whether reasonable officer in same circumstances would have made stop for the reasons given – rejected as capricious, impracticable and analytically flawed. *See id.* at 813-16.

- **Issues and Implications**: Case pits the utility of a bright-line rule – *i.e.*, its ease of application – against its potential for abuse by racial profiling. Given the multitude of traffic regulations and their ubiquitous violation, the mere existence of a traffic infraction does not meaningfully limit police discretion, inviting arbitrary and selective vehicle stops. This is especially true because the Second Circuit has extended *Whren* even further, holding that "an observed traffic violation legitimates a stop" even if the officer **admits** *ex post* that he did "not rely on the ... violation" and the stop was **wholly** pretextual. *See United States v. Dhinsa*, 171 F.3d 721, 724-25 (2d Cir. 1999). The *Whren* court's response to this criticism – that civil Equal Protection claims will deter selective enforcement, while the Fourth Amendment continues to restrict the duration, intensity and scope of vehicle seizures and searches – is unpersuasive. It is virtually impossible to prove discriminatory intent – let alone disparate treatment of persons similarly situated – so as to establish an Equal Protection violation. Moreover, the cases permit the police to open passenger doors, make exterior visual inspections, shine flashlights into vehicle interiors, order drivers and occupants out, and detain vehicle and passengers to verify license, registration and insurance. *See* Kamins, *New York Search & Seizure* at 382-84, 390-92 (11th ed.). Thus, contrary to the *Whren* court's assumption, the duration, intensity and scope of vehicle seizures and searches are functionally unfettered. On the other hand, the Court correctly rejected the petitioners' suggested approach, in that it is easier to divine "the intent of an individual officer than to plumb the collective consciousness of law enforcement ... to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation.... [O]ne would [then] be reduced to speculating about the hypothetical reaction of a hypothetical constable – an exercise that might be called virtual subjectivity." *Whren*, 517 U.S. at 815. Indeed, one court that previously adopted the "reasonable officer" test eventually scrapped it, after years of practical experience, as unwieldy and infeasible. *See United States v. Botero-Ospina*, 71 F.3d 783, 786-87 (10th Cir. 1995) (*en banc*).

PEOPLE v. ROBINSON, 97 N.Y.2d 341(2001)

- **Holding and Comment**: By 4-3 vote, Court of Appeals adopts *Whren* rule as a matter of state constitutional law. Judge Smith, joined by Judges Wesley, Rosenblatt and Graffeo, pens the Court's opinion. Judge Levine, joined by Judge Ciparick and Chief Judge Kaye, writes the dissent. Appropriate result since Art. 1, § 12 of the New York constitution substantially parallels the Fourth Amendment. *See id.* at 350 & n.2. Dissent arguments mirror those of the *Whren* petitioners, and are rejected for largely the same reasons. *Accord People v. Wright*, 2002 N.Y. Slip Op. 04469, _ N.Y.2d _, 2002 WL 1162852 (June 4, 2002) (reversing suppression order where

trooper received anonymous tip concerning reckless driving, followed suspect vehicle until observing faulty muffler, pulled vehicle over for traffic stop and ultimately made DWI arrest; quoting *Robinson*, Court reiterates that in traffic stop context, "neither the primary motivation of the officer nor a determination of what a reasonable ... officer would have done under the circumstances is relevant") (citation, internal quotes and alteration omitted).