

Overlooked consequences of *Apprendi*: the unconstitutionality of Indiana's non-capital sentencing

In a recent series of cases, the United States Supreme Court has held that a criminal defendant's rights to due process and a jury trial are violated when a sentence above the prescribed statutory maximum is imposed based on any fact – other than the fact of a prior conviction – that is not submitted to a jury and proven beyond a reasonable doubt. The effect of these rulings on Indiana's presumptive sentencing scheme and several enhancements has gone relatively unnoticed, and, based solely on the likely number of cases affected, this oversight may have sweeping consequences.

I. Right to jury trial interpreted by U.S. Supreme Court

A. *Jones v. United States*

The Sixth Amendment, applicable to the states by the Fourteenth Amendment, guarantees criminal defendants the right to a jury trial.¹ Since 1999, there have been four important Supreme Court cases explaining a criminal defendant's right to a jury trial in sentencing proceedings. *Jones v. United States*² laid the groundwork for the decisions to follow when it interpreted a federal carjacking statute as defining three separate offenses, rather than one offense with a choice of three maximum penalties. The statute at issue stated:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or

imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.³

A grand jury indicted Jones under this statute, but made no reference to its numbered subsections and charged none of the facts in the latter two.⁴ After Jones was found guilty, the district court received a presentence report recommending that Jones be sentenced to 25 years for the carjacking, not 15, citing testimony that the victim had suffered serious bodily injury.⁵ The court agreed, finding the serious bodily injury allegation was supported by a preponderance of the evidence, and imposed a 25-year sentence.⁶

On appeal, the Supreme Court held that the 25-year sentence violated Jones' rights to due process and a jury trial. The Court called attention to the issue of whether there is a substantive difference between "elements" defining an offense and "penalty enhancers" that increase the possible sentence for the offense,⁷ but left the question unresolved, satisfied that the government's interpretation of the statute – that the "bodily injury" factor constituted only a "penalty enhancer" – "would raise serious constitutional questions on which precedent is not dispositive."⁸

Under a theory of statutory construction intended to avoid those questions,⁹ the Court construed the statute as "establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."¹⁰

As important as the conclusion in *Jones* is the opinion's distinguishing of *Almendarez-Torres v.*

United States,¹¹ which was decided the year before.¹² In *Almendarez-Torres*, the Court upheld a statute that first set forth a two-year prison term for an alien, once deported, who returned to the United States without special permission, and then provided for an increase of that prison term up to 20 years if the trial court found that the initial deportation was "subsequent to a conviction for commission of an aggravated felony."¹³ The Court in *Jones* limited the effect of that decision, which otherwise would have dictated a different result, by describing *Almendarez-Torres*' precise holding as "being that recidivism increasing the maximum penalty need not be so charged" and "rest[ing] in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment."¹⁴ The Court also set forth the principle on which it would elaborate in *Apprendi v. New Jersey*, *Ring v. Arizona* and *Harris v. United States*:

[U]nder 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.¹⁵

B. *Apprendi v. New Jersey*

Charles Apprendi, a white male, fired several shots into the home of an African-American family that had moved into a previously all-white neighborhood.¹⁶ Apprendi entered into a plea agreement, pursuant to which he pleaded guilty to two counts of second-degree possession of a firearm for an unlawful pur-
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third-degree unlawful possession of an antipersonnel bomb.¹⁷ Under New Jersey law, a second-degree offense carried a penalty range of five to 10 years, and a third-degree offense carried a penalty range of three to five years.¹⁸

A separate "hate crime" statute provided for an extended prison term of 10 to 20 years if the trial court found by a preponderance of evidence that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."¹⁹ After accepting Apprendi's guilty pleas, the trial judge held an evidentiary hearing and, finding that the crime was motivated by racial bias, imposed a 12-year sentence on the firearm possession count, two years beyond the maximum sentence for a second-degree offense.²⁰

Apprendi challenged the sentence on the ground that whether his crime was racially motivated was a fact that had to be proven to

a jury beyond a reasonable doubt.²¹ The Supreme Court agreed, and picked up where it left off in *Jones*:

[In *Jones v. United States*] [w]e ... noted 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." The Fourteenth Amendment commands the same answer in this case involving a state statute.²²

However, the *Apprendi* Court had to go further than it did in *Jones* to directly confront the "constitutionally novel and elusive distinction" between "sentencing factors" and "elements."²³ The Court noted that it first used the term "sentencing factor" in *McMillan v. Pennsylvania*²⁴ to refer to "a fact that was not found by a jury but that could affect the sentence imposed by the judge."²⁵ The State argued that racial bias was a "sentencing factor," appropriately found by the judge, not an "ele-

ment" of Apprendi's crime.²⁶ Derailing that argument, the Court held that "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"²⁷ In other words, "It 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. It is equally clear that such facts must be established beyond a reasonable doubt."²⁸

C. *Ring v. Arizona* and *Harris v. United States*

In *Ring v. Arizona*, the Court tied up a loose end left by *Apprendi*, i.e., whether the constitutional requirements it had outlined also applied in capital cases. In *Apprendi*, the Court distinguished an earlier case, *Walton v. Arizona*,²⁹ which held that due process did not require a jury finding, other than a guilty verdict, before the death penalty may be imposed in Arizona. The Court in *Apprendi* reasoned that, in Arizona, the maximum penalty for a murder conviction was death, regardless of any additional balancing of aggravating and mitigating circumstances by the trial judge who imposes the sentence.³⁰ In other words, although the trial court considered those circumstances in reaching a decision to impose the maximum possible penalty, it did not "find facts" that increased the possible maximum penalty. This reasoning drew a harsh rebuke from Justice O'Connor, a former Arizona trial and appellate judge:

The distinction of *Walton* offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings

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necessary to expose the defendant to a death sentence... [T]hat claim is demonstrably untrue.³¹

When the Arizona Supreme Court agreed with Justice O'Connor's explanation of how that state's death penalty operated, the Court saw no choice but to overrule *Walton*, stating that because "the Arizona court's construction of the State's own law is authoritative, we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*."³²

The issue in *Harris v. United States* was whether the logic of *Apprendi* applied to increases in minimum sentences based on facts found by the trial judge, not the jury.³³ In *McMillan v. Pennsylvania*, the Court held that due process did not require the State to prove those facts beyond a reasonable doubt to a jury because the penalty range for the underlying crime was not increased, only the minimum sentence within that range.³⁴ In *Harris*, four Justices, in an opinion written by Justice Kennedy, had no problem distinguishing *Apprendi* from *McMillan* because, they reasoned, *Apprendi*'s sole concern was an increase in the possible maximum penalty.³⁵ Justice Breyer concurred in the judgment.³⁶ Thus, the result of *Harris* is that *Apprendi* does not apply to increases in minimum sentences, only to increases in the possible maximum penalty.

II. Application of *Apprendi* doctrine to Indiana's non-capital sentencing

Determining whether Indiana's non-capital sentencing scheme is constitutional under *Apprendi* requires answers to two key questions:

(1) At the moment the jury renders its verdict, what is the maximum penalty that may be imposed

on the defendant before any other action is taken?

(2) Is the defendant's sentence then increased beyond that maximum penalty based upon a fact – other than the fact of a prior conviction – that is found by the court, not the jury?

If the answer to the second question is "yes," then *Jones*, *Apprendi*, *Ring* and *Harris* teach that the defendant's sentence is unconstitutional.

A. Unconstitutional enhancements under *Apprendi*

Indiana Code Sec. 35-50-2-11 permits the State to seek, separately from the charging instrument, an additional fixed term of imprisonment if it can prove beyond a reasonable doubt the defendant know-

ingly or intentionally used a firearm in the commission of one of a list of enumerated felonies.³⁷ That section also makes it clear that the determination of whether the defendant used a firearm is left to the trial judge after a sentencing hearing.³⁸ If the judge so finds, he or she may then sentence the defendant to an additional five years imprisonment.³⁹ Section 35-50-2-13 provides for increased sentences if the trial judge finds that a defendant, guilty of dealing a controlled substance, used a firearm or illegally possessed a handgun (up to five additional years), sawed-off shotgun (up to 10 additional years), or machine gun (up to 20 additional years) while committing the offense.⁴⁰

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Looking at these two statutes, it is clear that: (1) at the time the jury's verdict is returned, the maximum penalty for the defendant is the sentence for the underlying crime; and (2) the judge is left to find facts – possession or use of any firearm, generally, or a certain firearm, in particular – that increase the maximum possible

penalty. Under *Apprendi* and its progeny, these statutes are unconstitutional. This issue has been raised in the Indiana Supreme Court once, in *Crawford v. State*, but the Court decided that case on other grounds.⁴¹

In fact, since *Apprendi* was handed down in 2000, only one reported Indiana appellate decision

has considered its effect on a non-capital sentence. In *Parker v. State*,⁴² the Indiana Court of Appeals held that the firearm enhancement is constitutional, or at least was constitutionally applied.⁴³ In *Parker*, the defendant was sentenced to 40 years for robbery as a Class A felony,⁴⁴ plus an additional five years under the firearm enhancement for using a gun during the robbery.⁴⁵ Parker challenged the constitutionality of the enhancement, arguing that the trial court had found a fact – his use of a firearm – that was not submitted to a jury and that increased his maximum possible penalty.⁴⁶ The Court of Appeals held, in part, that the enhancement was constitutionally applied because it believed that the jury, not the trial judge, had found that Parker used a gun.⁴⁷ The court explained:

Parker's charging information explicitly stated that Parker committed the robbery "while armed with a handgun." The charging information was included in the jury instructions. The jury was given alternative theories upon which to convict Parker of the Class A felony: serious bodily injury to [the victim], the use of or threat of use of force during the course of the robbery, or the use of a handgun itself.⁴⁸

Although the court admitted that "[t]he jury's verdict did not reveal upon what theory it found Parker guilty of the Class A felony," the court concluded that because "all of these bases for the Class A felony conviction arose out of the use of a gun during the course of the robbery ... , the jury must have found beyond a reasonable doubt that a gun was used."⁴⁹

If anything, cases like *Ring* demonstrate that, without the use of special verdict forms, we are not to assume the facts upon which the jury based its guilty verdict. Ring shot his victim in the course of an armed robbery, and the aggravating

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circumstance at issue was that Ring committed his crime in expectation of receiving something of pecuniary value.⁵⁰ The trial judge in that case likely could have assumed the jury concluded that Ring killed his victim for the money. However, the Supreme Court stated that the trial court's action in that case constituted unconstitutional fact-finding that violated Ring's due process rights.⁵¹

Parker's case is further removed from such a direct inference because, despite the charging information, the testimony established that a cohort of Parker's actually fired the gun.⁵² In fact, the trial court based its enhancement of Parker's sentence on his admission that he supplied the gun, utilizing a theory of accomplice liability that may or may not have been before the jury to support the enhancement.⁵³ Thus, the Court of Appeals likely should have found that the trial court's sentence was improperly increased and remanded for resentencing.⁵⁴

B. The problem with presumptive sentences

Any discussion of the effect of *Apprendi* on Indiana's non-capital sentencing scheme, and its use of aggravating circumstances to enhance a sentence, has to begin with the notion of the presumptive sentence. The Indiana Code sets forth "fixed terms" for different classes of felonies, and a separate "fixed term" for murder.⁵⁵ For example, the presumptive sentence for a Class A felony is "a fixed term of 30 years."⁵⁶ The Code also allows for a limited increase or decrease in those standard sentences depending on the trial judge's finding and balancing of aggravating and mitigating circumstances.⁵⁷ For a Class A felony, up to 20 years may be added if an aggravating circumstance is present, and up to 10 subtracted if a

mitigating circumstance is present.⁵⁸

The first issue is whether *Apprendi* even affects this system, recalling that *Apprendi* applies only if the maximum possible penalty is increased by a factual finding not made by the jury. Thus, if the Code provides for a sentencing range within which the aggravating circumstances operate to determine the final sentence, *Apprendi* does not apply.⁵⁹ If the Code provides for a standard sentence that is then increased by separate factual findings by the judge, *Apprendi* does apply.

In *Parker*, the Indiana Court of Appeals stated in a footnote that "[a] Class A felony has a sentencing range from a presumptive 30 years to a maximum of 50 years."⁶⁰ Under the court's reasoning, aggra-

vating circumstances are merely sentencing factors that operate within a given statutory range. If, as the United States Supreme Court stated, "the relevant inquiry is one not of form, but of effect,"⁶¹ then *Parker's* interpretation of the effect of presumptive sentences cannot be correct. As with the evaluation of Indiana's sentence enhancements, there are two key questions: (1) when the jury tenders its verdict, what is the maximum possible sentence? and (2) is the defendant's sentence then increased beyond that maximum penalty based on a finding of fact made by the court, not the jury? The sentencing statutes clearly provide for fixed sentences that become unfixed only if the trial judge – not the jury – makes a determination of fact: the

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presence of an aggravating circumstance.⁶² Whether a statute refers to sentence-increasing facts as "enhancements" or "aggravating circumstances," those facts must, based on the reasoning in *Apprendi*, be proven beyond a reasonable doubt to the jury, not the trial judge. The Indiana statute setting forth the list of aggravating circumstances includes facts that relate to prior convictions, e.g., the defendant's criminal record, and whether the defendant recently violated the conditions of probation, parole or pardon. However, it also includes facts that do not relate to prior convictions, e.g., the risk that the person will commit another crime, any statement made by the victim, and the person is in need of correctional or rehabilitative treatment best provided by a penal facility.⁶³

This is not to say that a trial court's discretion in sentencing has been eliminated by *Apprendi*. As the Indiana Supreme Court has stated, a defendant's right to a jury trial does not necessarily include the right to have the jury fix the sentence.⁶⁴ To the contrary,

Apprendi approved of a trial judge's use of discretion in sentencing, but it restricted the use of that discretion to imposing a sentence "within the range [of sentences] prescribed by statute."⁶⁵ If, for example, the legislature provided that the sentence for a Class A felony is "20 to 50 years," with the trial judge deciding – based on its own finding and balancing of aggravating and mitigating circumstances – what sentence to mete out within that range, that system would operate as the Court of Appeals in *Parker* believed the current statute operates and would not violate the defendant's right to a jury trial. In fact, many states specify sentencing ranges for offenses, either for classes of offenses or for each specific offense.⁶⁶

In Indiana, however, the only sentence authorized by a guilty verdict for a Class A felony is "a fixed term of 30 years."⁶⁷ Under the current sentencing scheme, there is no room for a constitutional exercise of the Indiana trial judge's discretion because a jury verdict authorizes only a "fixed term" and does

not automatically open the door to a sentencing "range."

III. Limiting the consequences of *Apprendi*

At first blush, the application of *Apprendi* to Indiana's non-capital sentencing scheme would seem to require correction of a substantial number of criminal sentences, i.e., any sentence above the presumptive based on an aggravating circumstance or enhancement other than criminal history. But two issues, in particular, may limit the possible effect on those defendants sentenced under the current scheme: retroactivity and the harmless error doctrine.

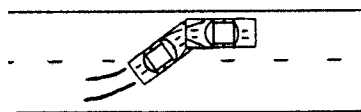
A. Retroactivity

The first issue is the time period that courts must examine; in particular, whether defendants whose appeals became final before *Apprendi* was handed down benefit from its holding. Under the "new rule" doctrine announced in *Teague v. Lane*,⁶⁸ as applied to initial federal habeas corpus proceedings and adopted in *Daniels v. State* for Indiana post-conviction relief,⁶⁹ "a new constitutional rule of criminal procedure is generally not applicable to those cases on collateral review, that is, those which have become final before the new rule was announced."⁷⁰ For a new constitutional rule of criminal procedure to apply retroactively on collateral review, that rule must either place certain kinds of conduct "beyond the power of the criminal law-making authority to proscribe" or require the observance of those procedures "implicit in the concept of ordered liberty."⁷¹

At least seven federal circuit courts of appeal have examined the issue of whether *Apprendi* applies retroactively on initial petitions for habeas corpus, the functional equivalent of Indiana's post-con-

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viction relief process. All seven have said no.⁷² The Supreme Court has not yet decided the issue, a point made by Justice Thomas in his dissenting opinion in *Harris*.⁷³ But assuming *Apprendi* does not apply retroactively, only Indiana defendants whose direct appeals were not final when it was decided would have a possible claim that they require resentencing.⁷⁴

B. Harmless error

There is also the likelihood that many errors would be considered harmless under the particular facts of each case.⁷⁵ As the Seventh Circuit Court of Appeals put it: “[I]t is now well established in this circuit that *Apprendi* errors in both the indictment and the charge to the jury are subject to harmless error analysis.”⁷⁶ And in *United States v. Cotton*,⁷⁷ the Supreme Court reviewed an *Apprendi* claim under the “plain error” standard, which applies when federal appellate courts are asked to review errors that are not objected to at trial.⁷⁸ Cotton was convicted and sentenced before *Apprendi* was decided. On appeal, after *Apprendi* was issued, he claimed that his sentence was invalid because the indictment did not charge the fact by which his sentence was increased.⁷⁹ The Supreme Court denied relief, however, because of the “overwhelming” and “essentially uncontroverted” evidence of the sentence-enhancing fact.⁸⁰ In the Court’s view, the error in Cotton’s case “did not seriously affect the fairness, integrity, or public reputation of judicial proceedings,” a requirement for relief under the plain-error test.⁸¹

Conclusion

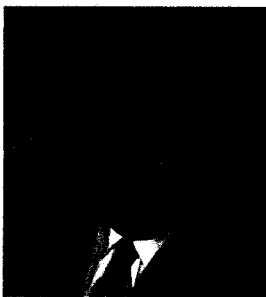
The Supreme Court’s holdings in *Apprendi*, *Harris* and *Ring* all lead to the conclusion that Indiana’s non-capital sentencing scheme is constitutionally flawed.

This will require a response on the part of both the courts and the legislature. The likelihood is that many sentences under the current system will be upheld either because of timing issues or harmlessness of error. However, the prudent course is to change the system as soon as possible to eliminate the possibility of *Apprendi* errors in the first instance, and preserve the judiciary’s resources for other issues that are not so easily corrected. ☞

1. *Ring v. Arizona*, 536 U.S. ___, ___, 122 S. Ct. 2428, 2437 (2002).
2. 526 U.S. 227 (1999).
3. *Id.* at 230 (quoting 18 U.S.C. §2119 (1988 ed., Supp. V)).
4. *Id.*
5. *Id.* at 231.
6. *Id.*
7. *Id.* at 232-34, 237-41.
8. *Id.* at 251.
9. “[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *Id.* at 239 (quoting *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).
10. *Id.* at 252.
11. 523 U.S. 224 (1998).
12. The other cases the Court discussed and distinguished were *Spaziano v. Florida*, 468 U.S. 447 (1984) (addressing Florida’s capital sentencing scheme), *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam) (same), and *Walton v. Arizona*, 497 U.S. 639 (1990) (addressing Arizona’s capital sentencing scheme). *Walton* was later overruled by the Court’s decision in *Ring v. Arizona*, 536 U.S. at ___, 122 S. Ct. at 2440.
13. *Almendarez-Torres*, 523 U.S. at 226.
14. *Jones*, 526 U.S. at 248-49. The Court also stated, “[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” *Id.* at 249. In *Apprendi v. New Jersey*, the Court went even further, referring to *Almendarez-Torres* as “at best an exceptional departure,” and “a narrow exception” based on “unique facts.” 530 U.S. 466, 487, 489 (2000).
15. *Jones*, 526 U.S. at 243 n. 6.
16. *Apprendi*, 530 U.S. at 469.
17. *Id.* at 469-70.
18. *Id.* at 470.
19. *Id.* at 468-49 (quoting N.J. Stat. Ann. §2C:44-3(e) (West Supp. 1999-2000)).
20. Sentences on the other two counts were to run concurrently. *Id.* at 471.
21. *Id.*
22. *Id.* at 475-76 (citations omitted).
23. *Id.* at 494.
24. 477 U.S. 79 (1986).
25. *Apprendi*, 530 U.S. at 485.
26. *Id.* at 492.

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27. *Id.* at 494.
28. *Id.* at 490 (quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring) and 526 U.S. at 253 (Scalia, J., concurring)). The Court did state, however, that the term "sentencing factor" was not devoid of meaning. *Id.* at 494 n. 19. A discussion applying the language of footnote 19 to Indiana's use of aggravating circumstances is in Part II.B.
29. 497 U.S. 639 (1990).
30. *Apprendi*, 530 U.S. at 496-97.
31. *Id.* at 538 (O'Connor, J., dissenting).
32. *Ring*, 536 U.S. at ___, 122 S. Ct. at 2440 (citations omitted).
33. *Harris v. United States*, 536 U.S. ___, 122 S. Ct. 2406 (2002).
34. *McMillan*, 477 U.S. at 87-88.
35. *Harris*, 536 U.S. at ___, 122 S. Ct. at 2412-13.
36. *Id.* at ___, 122 S. Ct. at 2420 (Breyer, J., concurring).
37. *Id.* §35-50-2-11(c). Section 35-50-2-11(b) defines the relevant felonies as: "(1) a felony under IC 35-42 that resulted in death or serious bodily injury; (2) kidnapping; or (3) criminal confinement as a Class B felony." *Id.* §35-50-2-11(b).
38. *Id.* §35-50-2-11(d).
39. *Id.*
40. *Id.* §35-50-2-13.
41. 755 N.E.2d 565, 567-68 (Ind. 2001). Crawford's sentence was reversed because "attempted murder" was not an offense eligible for sentence enhancement.
42. 754 N.E.2d 614 (Ind. Ct. App. 2001).
43. *Id.* at 619.
44. There is no mention in the Court of Appeals opinion why a 40-year sentence, instead of the presumptive 30-year sentence, was imposed for the Class A felony.
45. *Id.* at 616.
46. *Id.* at 617-19.
47. *Id.*
48. *Id.* at 618. Parker apparently did not raise, as the Court of Appeals did not address, the issue of allowing the jury to choose from "alternative theories" to convict. In *Castillo v. State*, 734 N.E.2d 299, 304-05 (Ind. Ct. App. 2001), the Court of Appeals held that this practice constituted error because it raises the possibility that the jury's verdict is, in fact, not unanimous.
49. *Parker*, 754 N.E.2d at 618.
50. *Ring*, 536 U.S. at ___, 122 S. Ct. at 2435.
51. *Id.* at ___, 122 S. Ct. at 2442-43.
52. *Parker*, 754 N.E.2d at 619.
53. *Id.* The jury instructions are not restated in the Court of Appeals opinion.
54. This assumes the Court of Appeals also incorrectly determined that the sentence authorized by a jury's guilty verdict for a Class A felony was a range of 30 to 50 years. *Id.* at 618 n. 7. That issue is discussed in Part II.B. At least four state supreme courts have correctly concluded that applying enhancements in this manner, when they result in a higher possible maximum penalty, is unconstitutional. See *State v. Palermo*, 818 So. 2d 745 (La. 2002); *State v. Burdick*, 782 A.2d 319 (Me. 2001); *State v. Grossman*, 636 N.W.2d 545 (Minn. 2001); *State v. Lucas*, 548 S.E.2d 712 (N.C. 2001).
55. See Ind. Code §35-50-2-4 (1998) (Class A); *id.* §35-50-2-5 (Class B); *id.* §35-50-2-6 (Class C); *id.* §35-50-2-7 (Supp. 2002) (Class D); *id.* §35-50-2-3 (1998) (murder).
56. *Id.* §35-50-2-4 (1998). The presumptive sentence is 10 years for Class B felonies, *id.* §35-50-2-5, four years for Class C felonies, *id.* §35-50-2-6, one and one-half years for Class D felonies, *id.* §35-50-2-7 (Supp. 2002), and 55 years for murder, *id.* §35-50-2-3 (1998).
57. *Hollen v. State*, 761 N.E.2d 398, 400 (Ind. 2002).
58. Ind. Code §35-50-2-4 (1998).
59. *Harris*, 536 U.S. at ___, 122 S. Ct. at 2419.
60. *Parker*, 754 N.E.2d at 618 n. 7.
61. *Apprendi*, 530 U.S. at 494.
62. Ind. Code §35-38-1-3 (1998); *Hollen*, 761 N.E.2d at 400 ("In general, the Legislature has prescribed standard sentences for each crime, allowing the sentencing court limited discretion to enhance each sentence to reflect aggravating circumstances or reduce the sentence to reflect mitigating circumstances."); *Guenther v. State*, 501 N.E.2d 1071, 1072 (1986) ("Only one valid aggravating factor need be shown to sustain the enhancement of a presumptive sentence."); *Shippen v. State*, 477 N.E.2d 903, 905 (Ind. Ct. App. 1995). This is not to suggest that simply removing the word "fixed" from the statute would alter its effect. Whether or not the word "fixed" is included, the statute would still provide for a sentence from which the court would not be permitted to deviate absent its finding the presence of an aggravating or mitigating circumstance.
63. Ind. Code §35-38-1-7.1 (Supp. 2002).
64. *Williams v. State*, 395 N.E.2d 239, 245 (Ind. 1979).
65. *Apprendi*, 530 U.S. at 494 n. 19 (emphasis in original).
66. See, e.g., Ark. Code Ann. §5-4-401 (2001); Conn. Gen. Stat. §53a-35a (2001); Del. Code Ann. tit. 11 §4205 (2001); Fla. Stat. ch. 775.082 (2001); 730 Ill. Comp. Stat. 5/5-8-1 (2001); Iowa Code §902.9 (2002); Mo. Rev. Stat. §558.011 (2001); Nev. Rev. Stat. §193.130 (2001); N.H. Rev. Stat. Ann. §651:2 (2002); Or. Rev. Stat. §161.605 (2001); S.D. Codified Laws §22-6-1 (2002); Wis. Stat. §939.50 (2001).
67. Ind. Code §35-50-2-4 (1998).
68. 489 U.S. 288 (1989).
69. 561 N.E.2d 487 (Ind. 1990).
70. *Id.* at 488-89.
71. *Teague*, 489 U.S. at 307.
72. See *United States v. Brown*, 305 F.3d 304, 305 (5th Cir. 2002); *Curris v. United States*, 294 F.3d 841, 842 (7th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000).
73. *Harris*, 536 U.S. at ___, 122 S. Ct. at 2427 (Thomas, J., dissenting) ("No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect.").
74. There would be no legitimate claim of ineffective assistance of appellate counsel for those defendants whose appeals were final before *Apprendi*, because the failure to anticipate or effectuate a change in the law does not constitute ineffective assistance. *Harrison v. State*, 707 N.E.2d 767, 776 (Ind. 1999).
75. Constitutional errors are harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).
76. *United States v. Adkins*, 274 F.3d 444, 454 (2001).
77. 535 U.S. 625, 122 S. Ct. 1781 (2002).
78. *Id.* at ___, 122 S. Ct. at 1785-86.
79. *Id.* at ___, 122 S. Ct. at 1784.
80. *Id.* at ___, 122 S. Ct. at 1786. Cotton's sentence for conspiring to possess with intent to distribute cocaine base was increased based on the quantity of cocaine base involved.
81. *Id.*

Mike Limrick is an associate at McTurnan & Turner in Indianapolis. He is a 2001 graduate of the University of Toledo College of Law and a former clerk to Justice Theodore Boehm of the Indiana Supreme Court.

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