COMMENTS

Is Drug Quantity an Element of 21 USC § 841(b)? Determining the *Apprendi* Statutory Maximum

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INTRODUCTION

Over twenty-seven thousand defendants are charged with federal drug trafficking offenses each year.[1] The principal trafficking statute, 21 USC § 841, sets out a schedule of imprisonment and fines based on the amount of drugs that was manufactured, distributed, or possessed.[2] Currently, there is a circuit split over whether drug quantity in § 841 is a sentencing factor, and therefore may be found by a judge by a preponderance of the evidence, or whether drug quantity is an offense element that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

Historically, the distinction between sentencing factors and offense elements has been difficult for courts to draw. Congress and state legislatures did not always specify which components of an offense they intended to imbue with additional trial rights.[3] For example, if a statute assigns a fifteen-year maximum penalty for carjacking with a firearm, but assigns a twenty-five-year maximum penalty for that same offense if serious bodily injury occurred, does the prosecutor need to prove beyond a reasonable doubt that serious injury occurred?[4] Or can a judge find that fact at sentencing? Courts have struggled to determine the answer. In *Apprendi v New Jersey*,[5] the Supreme Court set out the bright-line rule that any fact other than a prior conviction that increased the penalty for a crime beyond the statutory maximum had to be submitted to a jury and proved beyond a reasonable doubt.[6]

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1 See Bureau of Justice Statistics, *Federal Justice Statistics, 2008* table 4.1, online at http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf (visited May 7, 2011).

2 21 USC § 841(b).

3 See *Jones v United States*, 526 US 227, 232 (1999).

4 See id at 230–31.

5 530 US 466 (2000).

6 Id at 490.

Circuit courts' interpretations of § 841 indicate that the *Apprendi* "rule" is far from clear, however. Six circuits have held that drug quantity is an element of § 841(b), because the maximum potential sentence to which a defendant is exposed increases as the amount of drugs in question does.[7] In contrast, five circuits have held that drug quantity is not an element of § 841,[8] for two primary reasons. First, they state that no *Apprendi* violation has occurred unless a defendant's actual sentence exceeds the statutory maximum.[9] Second, they explain that drug quantities in § 841 trigger mandatory minimums, rather than higher statutory maximums only.[10] The Eleventh Circuit, concurring in the conclusion that drug quantity is not an element, bypassed the question of statutory minimums and held that drug quantity is an element only when the actual sentence imposed is above the statutory maximum set out in the applicable portion of § 841(b).[11]

This circuit split implicates the central holding in *Apprendi*, a landmark case in federal sentencing. A resolution in favor of the first cluster of circuits would expand the scope of *Apprendi*, while a resolution favoring the second cluster would substantially limit *Apprendi*'s applicability. While much has been written about *Apprendi*, the two ways of interpreting the rule have never been noted or examined. It is important to reconcile the circuit split, as *Apprendi* controls fundamental aspects of criminal procedure, including defendants' constitutional rights.

This Comment argues that drug quantity should be treated as an element of § 841 for three reasons. First, the Supreme Court has indicated after *Apprendi* that elements are not only those facts that cause a defendant's actual sentence to exceed the statutory maximum, but also those facts that increase the range of penalties to which a

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7 See *United States v Gonzalez*, 420 F3d 111, 123, 133–34 (2d Cir 2005); *United States v Velasco-Heredia*, 319 F3d 1080, 1085 (9th Cir 2003); *United States v Promise*, 255 F3d 150, 156–57 (4th Cir 2001); *United States v Fields*, 242 F3d 393, 395–96 (DC Cir 2001) (vacating the defendants' sentences based on the conclusion that quantity is an element); *United States v Doggett*, 230 F3d 160, 164–65 (5th Cir 2000); *United States v Hinshaw*, 235 F3d 565, 575 (10th Cir 2000). These cases are discussed in Part III.

8 See *United States v Clark*, 538 F3d 803, 812 (7th Cir 2008); *United States v Franco*, 484 F3d 347, 356–57 (6th Cir 2007) (holding that the defendant's actual sentence was below the statutory maximum in § 841(b)(1)(C), so no *Apprendi* violation had occurred); *United States v Serrano-Lopez*, 366 F3d 628, 638 & n 9 (8th Cir 2004); *United States v Goodine*, 326 F3d 26, 27–28 (1st Cir 2003); *United States v Leachman*, 309 F3d 377, 383 (6th Cir 2002) (holding that drug quantities in § 841 increase statutory minimums rather than maximums); *United States v Vazquez*, 271 F3d 93, 98 (3d Cir 2001).

9 See, for example, *Clark*, 538 F3d at 811–12.

10 See, for example, *United States v Washington*, 558 F3d 716, 720 (7th Cir 2009).

11 See *United States v Underwood*, 446 F3d 1340, 1345 (11th Cir 2006).

defendant is exposed.[12] Circuit courts that have held that drug quantity is a sentencing factor either were writing before this recent clarification from the Court or wrote afterward and ignored it. Second, the same circuits ignore or bypass Supreme Court precedent disfavoring the technique of statutory mixing and matching, where a drug quantity can trigger a statutory minimum from one provision of the statute while retaining the statutory maximum from another. Finally, both sets of circuit courts have overlooked several instances where the Supreme Court has used components of its traditional test for distinguishing elements from sentencing factors in examining the role of drug quantity in § 841(b). Combined, these three lines of analysis reveal that drug quantity should be an element rather than a sentencing factor.

Part I of this Comment provides background on the distinction between sentencing factors and offense elements. Part I also introduces the statute at issue, 21 USC § 841. Part II explains *Apprendi* itself, along with *Harris v United States*,[13] which held that statutory minimums could be triggered by facts that had not been proved beyond a reasonable doubt.[14] Part II also discusses *United States v Booker*,[15] which expands on the holding in *Apprendi* in the context of § 841. Part III describes and analyzes the current split in the circuit courts. This circuit split is characterized by two differences: first, courts disagree over whether *Apprendi* applies only to actual sentences that exceed statutory maximums or whether *Apprendi* protections also attach to potential sentences that may exceed those maximums. They also disagree over whether the mandatory maximum sentence from one subsection of § 841 can be paired with a mandatory minimum sentence from another subsection.

Finally, Part IV argues that circuit courts should treat drug quantity as an element of § 841. That approach is more consistent with the Supreme Court's own application of *Apprendi*, and it reflects what the Court itself would likely hold. Part IV.A demonstrates that the Supreme Court applies *Apprendi* to both actual and potential sentences. Part IV.B shows that the Court has also indicated that statutory maximums should be linked to the minimum sentences within the same subsections. Then, in Part IV.C, this Comment illustrates that even under the traditional five-factor test that the

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12 See *Cunningham v California*, 549 US 270, 293 (2007); *United States v Booker*, 543 US 220, 230 (2005); *Harris v United States*, 536 US 545, 568 (2002).

13 536 US 545 (2002).

14 Id at 568.

15 543 US 220 (2005).

Supreme Court uses to distinguish elements from sentencing factors, drug quantity would be treated as an element.

I. BACKGROUND

In criminal procedure, the distinction between offense elements and sentencing factors is crucial: when a fact is designated as an offense element, it must be proved to a jury beyond a reasonable doubt.[16] Sentencing factors, however, can be found by a judge by a preponderance of the evidence.[17] At the federal level, Congress establishes the elements of each offense.[18] But Congress does not always articulate which facts are offense elements and which are sentencing factors.[19] This leaves the determination to courts. Knowing whether a fact will be submitted to a jury has a tremendous impact on both prosecution and defense strategy; revealing the type of weapon—or the quantity of drugs—present during an offense can prejudice, or benefit, a defendant.[20] Accordingly, the Supreme Court has given concrete guidance about whether a fact should be an element or a sentencing factor, absent a clear indication from Congress. This Section outlines this multi-factor method and then introduces 21 USC § 841.

A. The Traditional Five Factors

The Supreme Court has used five primary categories to determine whether Congress intended to render a fact an element or a sentencing factor: (1) historical use, (2) statutory structure, (3) the degree to which a punishment would be increased, (4) legislative

16 See *In re Winship*, 397 US 358, 364 (1970).

17 See *McMillan v Pennsylvania*, 477 US 79, 86 (1986).

18 See *Liparota v United States*, 471 US 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). See also John S. Baker Jr, *Reforming Corporations through Threats of Federal Prosecution*, 89 Cornell L Rev 310, 311 (2004). But see Ben E. Rosenberg, *The Growth of Federal Criminal Common Law*, 29 Am J Crim L 193, 194 (2002) (arguing that federal criminal common law is growing because of broadly worded statutes).

19 See *Jones v United States*, 526 US 227, 232 (1999) (explaining that the distinction between elements and sentencing factors was crucial but that not every statute clearly specified which components of the offense were sentencing factors). See also Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 Buff Crim L Rev 297, 318–19 (1998); Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 L & Contemp Probs 249, 251–52 (Autumn 1998).

20 See Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 Fed Sent Rptr (Vera) 197, 198 (2000).

history, and (5) potential unfairness.[21] Before *Apprendi*, the Court had not specifically articulated this test as such; rather, its method had emerged through various cases considering the element–sentencing factor distinction.

First, the Court has examined historical use. In *Castillo v United States*,[22] the defendants were members of the Branch-Davidian sect whose compound was seized by federal agents in Waco, Texas, in 1993.[23] They were indicted for conspiracy to murder federal officers and faced an enhanced sentence under 18 USC § 924(c) for carrying a firearm during or in relation to a crime of violence (in this case, the conspiracy to murder).[24] If the firearm were a machine gun, the statute raised the mandatory minimum sentence from five years to thirty years.[25] The Court was faced with the question whether the fact of carrying a machine gun was an offense element that had to be proved beyond a reasonable doubt. Explaining that it was an element, the Court stated that weapon type was not traditionally a sentencing factor, unlike offender characteristics or the manner in which a basic offense was carried out. The traditional-use factor therefore favored treatment as an element.[26] In *Almendarez-Torres v United States*,[27] the defendant had been charged with violating 8 USC § 1326(a), which prohibited reentry to the United States after deportation and assigned a two-year maximum sentence. Subsection (b) of the statute authorized a maximum sentence of twenty years for reentry after a deportation following conviction for an aggravated felony. The Court explained that the recidivism enhancement could be a sentencing factor, looking to past opinions that had explained prior convictions' lack of connection to the underlying offense.[28] Traditional usage favored treating recidivism as a sentencing factor.

In addition to historical use, the Supreme Court has looked to statutory structure.[29] In *Castillo*, for example, the Court used the

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21 See *United States v O'Brien*, 130 S Ct 2169, 2175–80 (2010). Before *Apprendi*, the Court also considered constitutional avoidance, the cannon of construction under which an ambiguous statute will be interpreted so as not to implicate important constitutional questions. See *Jones*, 526 US at 243 & n 6. But *Apprendi*, as will be explained in Part II of this Comment, ruled squarely on the constitutional avoidance question by requiring any factor that increased the penalty for a crime to be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See *Apprendi*, 530 US at 490.

22 530 US 120 (2000).

23 Id at 122.

24 Id. See also 18 USC § 924(c) (1988 & Supp 1993).

25 *Castillo*, 530 US at 122.

26 Id at 123, 126.

27 523 US 224 (1998).

28 Id at 226–27, 243–44. See also *Jones*, 526 US at 235.

29 See, for example, *McMillan*, 477 US at 85–86.

structure of the statute itself as evidence of the legislature's intent to make carrying a machine gun an element rather than a sentencing factor. It explained that the element "uses or carries a firearm" was included in the same opening sentence as the word machine gun, instead of being "broken up with dashes or separated into subsections."[30] The Court also emphasized that there were three sentencing-specific provisions after the provision setting out the elements of the two crimes:

> The next three sentences of § 924(c)(1) (which appear *after* the sentence quoted above . . .) refer directly to sentencing: the first to recidivism, the second to concurrent sentences, the third to parole. These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three is the description of factors (such as recidivism) that ordinarily pertain only to sentencing.[31]

The Court explained that whether Congress intended a fact to be treated as an element or a sentencing factor was often apparent in the statutory structure and by whether a fact was included in the same sentence with the underlying offense. (In this case, the machine gun enhancement appeared in the first sentence, with the "definition of the crime" itself.)[32] In *Jones v United States*,[33] three defendants were charged with carjacking, in violation of a statute that carried a maximum penalty of fifteen years in prison.[34] The maximum penalty increased to twenty-five years if serious bodily injury occurred during the crime.[35] The Court explained that separate statutory provisions within the same offense section would generally indicate the presence of sentencing factors rather than elements of a separate offense.[36] The *Jones* Court rejected this general interpretation of statutory construction, holding that other considerations pointed to the conclusion that the subsections each constituted separate elements of new offenses rather than sentencing factors.[37]

The third factor that the Court has analyzed is the degree to which the fact in question increases the potential penalty for a crime. The

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30 *Castillo*, 530 US at 124–25. The provision at issue read: "Whoever . . . uses or carries a firearm, shall . . . be sentenced to . . . five years . . . and if the firearm is a [machine gun] . . . to . . . thirty years." Id at 122.

31 Id at 125.

32 See id at 124–25.

33 526 US 227 (1999).

34 See id at 229–30.

35 18 USC § 2119.

36 *Jones*, 526 US at 232–33.

37 See id at 234–39.

Jones Court explained if a fact triggers significantly higher penalties, then it is an essential component of the crime rather than a mere sentencing factor.[38] The *Harris* Court also used this method, explaining that facts that only slightly increase a potential penalty faced by a defendant should be sentencing factors as opposed to elements.[39]

Fourth, the Court has considered legislative history. The *Castillo* Court, for example, noted that the legislative history of the federal firearms statute did not particularly favor treating carrying a machine gun as a sentencing factor rather than an element.[40] The Government argued that the legislative history surrounding the machine gun provision was focused primarily on new prison terms for different weapons; but the Court noted that the primary provision, which penalized carrying an unspecified firearm, also dealt primarily with sentencing.[41] In *Jones*, the Court also looked to legislative history but found it unpersuasive, as various congressional statements had hinted at the intention to treat serious bodily harm both as an element and as a sentencing factor.[42] In both cases, the Court examined the Congressional Record from around the time of the statute's enactment and found neither express nor implied intention to designate a fact as either a sentencing factor or as an element.[43] Finding no clear intention, the Court effectively disregarded the legislative history prong of the test.

Finally, the Court has questioned whether treating a fact as a sentencing factor would increase the risk of "potential unfairness."[44] In *Almendarez-Torres*, the Court explained that recidivism could be treated as a sentencing factor in part because putting a defendant's criminal history before a jury for proof beyond a reasonable doubt would unfairly prejudice the trial.[45] In contrast, the *Castillo* Court stated that it would not be unfair to treat machine gun use as an offense element under § 924(c), as the jury would already be presented with a weapon during the guilt phase of the 924(c) trial.[46] A defendant would rarely need to argue, "I did not carry a firearm," and "[e]ven if I did carry one, I did not carry that one." In both cases, the Court's primary concern was whether putting a factor before the jury would complicate

38 See id at 233.

39 See 536 US at 554 (holding that brandishing a firearm was a sentencing factor in part because the statute in question did "not authorize the judge to impose 'steeply higher penalties' ").

40 See 530 US at 129–30.

41 See id.

42 See 526 US at 237–38.

43 See id at 238; *Castillo*, 530 US at 129–30.

44 *Castillo*, 530 US at 127.

45 See 523 US at 234–35.

46 See 530 US at 127–28.

the trial or prejudice the defendant.[47] If so, then the Court preferred saving the fact for finding by a judge during sentencing.

The Supreme Court has consistently used different combinations of these five factors to draw the element–factor distinction, although the method was neither an established test nor a bright-line rule. *Castillo*, decided just before *Apprendi*, was the first case in which the Court used all five factors in a sentencing factor determination.[48] Still, the Court did not treat the application of the five factors as a strict test until *United States v O'Brien*,[49] ten years later.[50] In the interim, and before *Castillo*, the Court applied individual factors on an ad hoc basis, using *Apprendi* as the primary mechanism for determining whether a fact was a sentencing factor or an element.[51] *Apprendi*, discussed in Part II, remains the first test for whether a fact should be an offense element or a sentencing factor.[52] Once a court determines that a fact does not increase the penalty for a crime beyond the statutory maximum, however, the five-factor test comes into play.[53] This Comment argues that both standards favor treating drug quantity as an element of § 841(b). In order to understand the argument, it is important to analyze the statute itself. Part I.B discusses the history and text of § 841(b).

B. The Statute

In 1970, Congress enacted the Controlled Substances Act[54] to combat drug abuse and to enhance law enforcement authority in the field of drug trafficking.[55] The law, which initially assigned penalties based on drug type, was amended in 1984 to create a schedule of penalties based on the amount of a controlled substance that had been

47 See id; *O'Brien*, 130 S Ct at 2177 (borrowing *Castillo*'s reasoning to hold that the machine gun enhancement in a later version of § 924(c)(1) was an element rather than a sentencing factor).

48 *Castillo*, 530 US at 124–31.

49 130 S Ct 2169 (2010).

50 See id at 2175–80 (explaining that the *Castillo* Court had considered five factors in determining that using a machine gun was an element, and that in applying the factors again, it reached the same conclusion). In his *O'Brien* concurrence, Justice Clarence Thomas referred to the five factors as a "test." See id at 2184 (Thomas concurring).

51 See, for example, *Harris*, 536 US at 552–56 (examining only statutory structure and the degree to which a sentence was increased to determine that brandishing and discharging a weapon were sentencing factors); *Ring v Arizona*, 536 US 584, 609 (2002) (holding that *Apprendi* required aggravating elements supporting the death penalty to be found by a jury beyond a reasonable doubt and applying none of the five factors).

52 See *O'Brien*, 130 S Ct at 2175.

53 See id.

54 Pub L No 91-513, title II, 84 Stat 1242 (1970), codified as amended at 21 USC § 801 et seq.

55 See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L No 91-513, 84 Stat 1236, codified in various sections of Titles 21 and 42. See also *Gonzalez v Oregon*, 546 US 243, 250 (2006).

manufactured, sold, or possessed with intent to distribute.[56] Congress continued this shift from punishment based on type of drug to punishment based on quantity with the Anti–Drug Abuse Act of 1986[57] (ADAA), which also established mandatory sentences for threshold quantities.[58] The goal of this shift was to focus scarce enforcement resources on major traffickers; Congress assigned minimum sentences based on quantities that it believed were associated with a powerful position in a drug distribution organization.[59]

The resulting statute, 21 USC § 841, sets out graduated penalties for dealing in increasing quantities of drugs or drug mixtures:

> (a) . . . [I]t shall be unlawful for any person . . . (1) to manufacture, distribute . . . or possess with intent to . . . distribute . . . a controlled substance; or (2) to create . . . or dispense . . . a counterfeit substance.
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> (h) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
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> (1)(A) In the case of a violation of subsection (a) of this section involving . . . 1 kilogram or more of . . . heroin . . . [or] . . . 5 kilograms or more of . . . cocaine . . . or . . . 280 grams or more of . . . [crack]; such person shall be sentenced to . . . not . . . less than 10 years or more than life.
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> (B) In the case of a violation . . . involving . . . 100 grams . . . of heroin . . . [or] . . . 500 grams . . . of . . . cocaine . . . or . . . 28 grams or more of . . . [crack] . . . such person shall be sentenced to . . . not . . . less than 5 years and not more than 40 years.
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> (C) In the case of a controlled substance in schedule I or II[60] . . . such person shall be sentenced to a term of imprisonment of not more than 20 years.[61]

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56 See Controlled Substances Penalties Amendments Act of 1984 § 502, Pub L No 98-473, title II, 98 Stat 1837, 2068, codified as amended at 21 USC § 841(b).

57 Pub L No 99-570, 100 Stat 3207, codified at 21 USC § 801 et seq.

58 ADAA § 1002, 100 Stat at 3207-2–3207-4. The Act also increased penalties for quantities of drug mixtures, rather than merely the quantity of the pure drug involved. See ADAA § 1002, 100 Stat at 3207-2–3207-4; *Chapman v United States*, 500 US 453, 461 (1991).

59 See *Kimbrough v United States*, 552 US 85, 95 (2007).

60 Subsection (C) regulates unquantified drug amounts—that is, a detectible amount of a substance is found, but is either smaller than the threshold quantities set out in subsection (B) or was not found by a jury beyond a reasonable doubt.

61 21 USC § 841 (2006 & Supp 2010). In 2010, the statute was amended to insert "280 grams" and "28 grams" of crack in place of "50 grams" and "5 grams," respectively. See Fair Sentencing Act of 2010 § 2, Pub L No 111-220, 124 Stat 2372, 2372. The previous ratios—5 kilograms of cocaine and 50 grams of crack under subsection (b)(1)(A); 500 grams of cocaine and 5 grams of crack under

Circuit courts disagree over whether the drug quantities listed in subsections (A), (B), and (C) are sentencing factors that can be determined by a judge or elements that must be proved to a jury beyond a reasonable doubt. In accordance with *Apprendi*, the central inquiry in this determination is whether the drug quantity increases the defendant's maximum sentence.[62] The circuits are split over two issues: first, whether the minimum sentences of ten and five years set out in subsections (b)(1)(A) and (b)(1)(B) can be paired with the maximum sentence of twenty years in subsection (b)(1)(C); and, second, whether *Apprendi* applies only when an actual sentence exceeds the statutory maximum based on facts found by a jury, or whether any increase in a potential sentence beyond that statutory maximum must also be protected by *Apprendi*. Part II discusses the *Apprendi* rule and two later cases, *Harris* and *Booker*, that apply and expand upon *Apprendi*'s reasoning.

II. CONSTITUTIONAL LIMITATIONS ON SENTENCING FACTORS: *APPRENDI*, *HARRIS*, AND *BOOKER*

The element landscape changed with *Apprendi*. In the early morning hours of December 22, 1994, Charles Apprendi fired shots into the home of an African American family.[63] After he was arrested, Apprendi admitted both that he was the shooter and that, although he did not know the occupants of the house personally, he had fired because they were African American, and he did not want them in the neighborhood. He later withdrew his statement.[64] Based on that incident, Apprendi pleaded guilty to second-degree possession of a firearm with an unlawful purpose, which under New Jersey law carried a maximum penalty of ten years. At the plea hearing, however, the judge found by a preponderance of the evidence that Apprendi had acted with a racially biased purpose, in violation of a state statute that carried a maximum penalty of twenty years. Based on that finding, the judge sentenced Apprendi to twelve years in prison—two years beyond the maximum authorized by the statute to which Apprendi pleaded guilty.[65]

The Court was faced with the question whether acting with a racially biased purpose was an element or a sentencing factor.[66] If it

subsection (b)(1)(B)—established the infamous 100-to-1 ratio for punishment of trafficking in crack versus punishment for trafficking in cocaine.

62 See *Apprendi*, 530 US at 490.

63 Id at 469 (describing the circumstances of the crime).

64 Id.

65 Id at 469–71.

66 See *Apprendi*, 530 US at 471–72.

were a sentencing factor, Apprendi's sentence could be upheld. But, if it were an element, his sentence would have to be vacated, as the enhancement had not been admitted by the defendant, charged in the indictment, or proved beyond a reasonable doubt to a jury.[67]

The Court did not employ a five-factor test to make the determination. Instead, it focused solely on the connection between punishment and constitutional protection to determine that any factor other than a prior conviction that increased the statutory maximum for an offense was an element rather than a sentencing factor.[68] The Court explained that constitutional protections must attach to penalties such as stigma and the loss of liberty.[69] Under the statute at hand, the defendant's maximum penalty would increase—from twenty to thirty years—if the judge found that the defendant had acted with a purpose to intimidate based on race.[70] Because the defendant's maximum penalty would be doubled, the Court reversed the New Jersey Supreme Court's affirmation of the twelve-year sentence.[71] Thus, the most important question after *Apprendi* is whether a fact increases the statutory maximum for an offense. The five-factor analysis that the Court used in *Castillo* is necessary only after it is clear that a fact has not increased the statutory maximum without being proved beyond a reasonable doubt.

Apprendi left open the question whether statutory provisions triggering mandatory minimum sentences would also have to be proved beyond a reasonable doubt. Two years later, in *Harris*, the Court answered in the negative.[72] William Joseph Harris was convicted of using a firearm in furtherance of a drug trafficking crime in violation of 18 USC § 924(c)(1)(A).[73] The statute established a seven-year mandatory minimum if the firearm was "brandished."[74] Harris sold drugs out of his pawnshop, keeping an unconcealed semiautomatic pistol next to him.[75] In this case, brandishing the firearm had no effect on the statutory maximum, as there was no set statutory maximum for the offense.[76] Still, Harris protested that the

67 See id at 476.

68 Id at 490.

69 Id at 483–84, citing *In re Winship*, 397 US 358, 363 (1970).

70 *Apprendi*, 530 US at 469–70.

71 See id at 490.

72 *Harris*, 536 US at 568 (plurality).

73 See id at 550.

74 Id at 551. Brandishing a firearm is defined as "display[ing] all or part of the firearm, or otherwise mak[ing] the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 USC § 924(c)(4).

75 *Harris*, 536 US at 550.

76 See 18 USC § 924(c)(1)(A).

mandatory minimum triggered by the "brandishing" enhancement violated *Apprendi*.

The Court held that the mandatory minimum did not violate *Apprendi*, explaining that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing d[id] not evade the requirements of the Fifth and Sixth Amendments."[77] The majority reasoned that the statute set out a single offense, which included brandishing as a sentencing factor.[78] The plurality, joining in the holding, squarely confronted the *Apprendi* issue, stating that a jury's role was to find all of the elements necessary to support a maximum sentence.[79] After that, a judge was free to impose any sentence within the jury's authorized range, including a mandatory minimum.[80] The *Harris* majority did examine some of the traditional components that courts had looked to in distinguishing between elements and sentencing factors,[81] but the Court's primary focus was on whether constitutional concerns, such as additional punishment based on judge-found facts, were implicated.[82] The "brandishing" enhancement did impose a mandatory seven-year sentence, but it did not increase the maximum sentence authorized by a jury. As long as the enhancement did not exceed the sentence authorized by the jury, the judge was free to assign a sentence within the range already so authorized.

Harris was followed in short order by *Booker*.[83] Freddie Booker and Duncan Fanfan were convicted of possession with intent to distribute crack and cocaine in violation of § 841(a)(1). The jury found that Booker had possessed 92.5 grams of crack. This finding authorized a maximum penalty of twenty-one years and ten months under the Federal Sentencing Guidelines, which were mandatory at the time of his

77 *Harris*, 536 US at 568.

78 See id at 556.

79 See id at 565 (plurality).

80 When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*. See id.

81 See *Harris*, 536 US at 553 (noting that statutory construction supported treating the provision as a sentencing factor); id at 554 (explaining that facts that only slightly increased a potential punishment would more likely be sentencing factors).

82 See id at 552–53.

83 The Supreme Court decided *Blakely v Washington*, 542 US 296 (2004), between *Harris* and *Booker*. *Blakely* invalidated Washington State's mandatory sentencing scheme and is considered to have laid the foundation for *Booker*. See id at 305. *Blakely* is discussed in Part IV.A of this Comment, but *Booker* is given a greater emphasis because the defendant in *Booker* was charged with violating 21 USC § 841.

sentencing.[84] The Guidelines, which were created by the United States Sentencing Commission to increase uniformity in federal sentencing, effectively imposed a statutory maximum and minimum—a mandatory Guidelines range—within the statutory maximum established by Congress for any particular federal offense.[85] Factors affecting a Guidelines range could be found by a sentencing judge by a preponderance of the evidence.

In Booker's case, the sentencing judge found by a preponderance of the evidence that Booker had possessed an additional 556 grams of crack cocaine and had obstructed justice. Those facts mandated a Guidelines range of 360 months to life.[86] Fanfan was convicted by a jury of possessing at least 500 grams of cocaine. The maximum Guidelines sentence for that amount was 78 months. At sentencing, the judge found by a preponderance of the evidence that Fanfan had actually possessed 2.5 kilograms of cocaine powder and 261.6 grams of crack. He also found that Fanfan had been an organizer of the criminal activity.[87] The additional findings prescribed a Guidelines range of 188 to 235 months. The Supreme Court held that the Guidelines scheme violated *Apprendi*, because it mandated increased statutory maximums based on facts that had not been charged in the indictment, submitted to a jury, or proved beyond a reasonable doubt.[88]

Thus, after the line of cases culminating in *Booker*, if a fact increases the penalty beyond the statutory maximum, it is an element, although facts that trigger mandatory minimum sentences do not require the same protections as elements.[89] But if a statutory scheme allows judges to find by a preponderance of the evidence facts that increase the statutory maximum, that scheme violates *Apprendi*.[90]

The Supreme Court has never applied the traditional five-factor test to drug quantity.[91] Lower courts also have not used a consistent test to determine whether drug quantity is an element of § 841 or a sentencing factor. Before *Apprendi*—but without consistently applying the Supreme Court's five-factor test—circuit courts generally treated drug quantity as a sentencing factor.[92] After *Apprendi*, lower

84 See *Booker*, 543 US at 227–28.

85 Id at 246 (stating that Congress intended the Guidelines to create uniformity in federal sentencing).

86 Id.

87 Id at 227–28.

88 *Booker*, 543 US at 232–33.

89 See *Apprendi*, 530 US at 490; *Harris*, 536 US at 568.

90 See *Booker*, 543 US at 233–34.

91 This Comment applies the five-factor test to drug quantity in Part IV.C.

92 See *United States v Gonzalez*, 420 F3d 111, 123 (2d Cir 2005) (noting that *Apprendi* had caused it to reconsider its former treatment of drug quantity as a sentencing factor);

courts have used *Apprendi* to determine whether drug quantity is an element—that is, the courts ascertain whether drug quantity increases the penalty for a crime beyond the statutory maximum. Part III demonstrates that lower courts have applied the *Apprendi* test in widely diverging ways, with conflicting outcomes.

III. THE CURRENT CIRCUIT SPLIT

Circuits are split over whether the drug quantities listed in 21 USC § 841(b) are sentencing factors or elements. Recall that § 841(b)(1)(C) assigns a twenty-year maximum sentence for unquantified amounts of drugs, subsection (b)(1)(B) assigns five to forty years for intermediate drug amounts, and subsection (b)(1)(A) mandates ten years to life for the largest drug quantities. Courts that hold that drug quantity is an element do so because, as the quantity of drugs increases, the maximum *potential* penalty increases from twenty years under subsection (C) to life under subsection (A). In other words, the sentence that a defendant *may* receive—the sentence that a judge may legally impose—increases from twenty years to life. Because drug quantity raises the maximum potential penalty above the statutory maximum authorized by a jury, courts in the element group hold that it is an *Apprendi* violation not to find drug quantity beyond a reasonable doubt.[93] In contrast, courts in the sentencing factor group are concerned with the sentence that a defendant actually received. They hold that no *Apprendi* violation occurs unless the sentence that a judge actually imposes exceeds the statutory maximum authorized by a jury.

The second component of the circuit split is whether a defendant can face a maximum sentence of twenty years under subsection (C) while simultaneously having a mandatory minimum from subsection (B) or (A). Circuits that have held that drug quantity is not an element permit this type of mixing and matching. For these courts, if a defendant's actual sentence does not exceed the maximum set out in (C), there is no *Apprendi* violation.

Working together, these two divergent methods produce different outcomes for similarly situated defendants. To illustrate, compare the outcomes in two real cases in which a defendant was convicted of

United States v Velasco-Heredia, 319 F3d 1080, 1084 (9th Cir 2003); *United States v Doggett*, 230 F3d 160, 164 (5th Cir 2000).

93 These courts are also concerned about a defendant's *actual* sentence exceeding the statutory maximum, but the point of divergence is over whether a potential sentence is also guarded by *Apprendi*. Also, since the statutory maximums under (b)(1)(B) and (b)(1)(C) are forty years and life, respectively, it is rare that a defendant's *actual* sentence would, or could, exceed those maximums.

trafficking in crack and assigned a twenty-year sentence.[94] In neither case did a jury find that the defendant possessed the quantity of drugs corresponding to subsection (b)(1)(A)—the range according to which the defendants were sentenced, which calls for a sentence of ten years to life.[95] In the First Circuit, which holds that drug quantity is not an element, the court explained that the actual sentence of twenty years did not exceed the statutory maximum available when no jury has found a quantifiable drug amount—the twenty-year maximum under subsection (b)(1)(C).[96] The court affirmed the sentence.[97] But in the Second Circuit, where the court is also concerned about the potential sentence, the court vacated a defendant's twelve-year sentence, explaining that the potential statutory maximum he faced (life) had been increased by drug quantity, which had not been found by a jury.[98]

A. Drug Quantity Is an Element

The courts holding that drug quantity is an element of § 841(b) emphasize that the statute's construction links drug quantity to the length of imprisonment and that, under *Apprendi*, the sentencing exposure faced by a defendant includes sentences that *may* be imposed, rather than only sentences that *have* been imposed.

In *United States v Gonzalez*,[99] the defendants pleaded guilty to possession with intent to distribute fifty or more grams of crack.[100] They had arranged to sell crack to a confidential informant; when they arrived at the designated location in Manhattan, Drug Enforcement Administration agents arrived and the defendants fled. They were arrested one month later. The corresponding mandatory minimum

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94 See *United States v Gonzalez*, 420 F3d 111, 114 (2d Cir 2005); *United States v Goodine*, 326 F3d 26, 28 (1st Cir 2003).

95 *Gonzalez*, 420 F3d at 115; *Goodine*, 326 F3d at 27. Due to a previous conviction, Goodine was assigned a twenty-year statutory minimum. The normal statutory maximum would have been ten years. See 21 USC § 841(b)(1)(A); *Goodine*, 326 F3d at 27.

96 See *Goodine*, 326 F3d at 33.

97 See id at 33–34.

98 See *Gonzalez*, 420 F3d at 123 (remanding to allow Gonzalez to withdraw his guilty plea after determining that quantity was an element). Compare also *United States v Lizardo*, 445 F3d 73, 88–90 (1st Cir 2006) (affirming a five-year mandatory minimum sentence under subsection (b)(1)(B) based on an intermediate quantity of drugs found by a judge by explaining that the five-year sentence did not exceed the twenty-year maximum set out in subsection (b)(1)(C)), with *United States v Velasco-Heredia*, 319 F3d 1080, 1085, 1087 (9th Cir 2003) (vacating a five-year mandatory minimum sentence under subsection (b)(1)(B) based on an intermediate quantity of marijuana found by a judge, explaining that exposure to the greater maximum sentence of forty years under subsection (b)(1)(B) meant that drug quantity, which triggered the increased maximum, should have been found by a jury).

99 420 F3d 111 (2d Cir 2005).

100 See id at 114.

sentence was twenty years.[101] *Apprendi* was decided just before sentencing (but after his plea), so Manuel Gonzalez moved to withdraw his plea because the drug quantity had not been proved beyond a reasonable doubt.[102] Thirty years was the maximum amount of time that could have been assigned to Gonzalez under § 841(b)(1)(C), so the government argued that Gonzalez's "potential sentence"—the actual sentence—of twenty years did not exceed the statutory maximum.[103]

The Second Circuit rejected this argument on two grounds. First, the court explained that the protections in *Apprendi* took effect before sentencing rather than after the sentence was imposed.[104] In other words, any fact that increased the potential sentence that a judge could impose must be found by a jury beyond a reasonable doubt. The court explained that any fact that would "expose a defendant to a greater punishment than authorized by the jury's guilty verdict" must be treated as an element.[105] Crucially, the insertion of a specific quantity of drugs into a violation of § 841(a) triggered the punishments in § 841(b)(1)(A), which were higher than the penalty faced by a defendant without the inclusion of quantity.[106] Thus, the court explained, drug quantity was always an element of 21 USC § 841.[107]

The court also criticized the government's method of statutory interpretation. It stated that § 841 could not be deconstructed to render drug quantity an element for the purposes of determining a statutory maximum but a sentencing factor for the purposes of determining the statutory minimum.[108] That is, Gonzalez could not have both a mandatory minimum of ten years (or twenty years in his case, for a prior felony drug conviction)[109] under subsection (a)(1)(A) and a statutory maximum of twenty years under subsection (a)(1)(C). The court explained that the statute's structure precluded this type of "mixing and matching"; each subsection contained a maximum sentence linked to a minimum sentence, and the statute did not allow any cross-referencing.[110] Thus, the court rebutted the contention that *Harris* supported treating drug quantity as a sentencing factor, since

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101 See id at 114–15. See also 21 USC § 841(b)(1)(A) (setting out a mandatory minimum of twenty years, rather than the usual ten years, for a defendant with a prior conviction for a felony drug offense).

102 *Gonzalez*, 420 F3d at 115.

103 See id at 127. See also 21 USC § 841(b)(1)(C).

104 See *Gonzalez*, 420 F3d at 115.

105 Id at 123, quoting *Apprendi*, 530 US at 494.

106 *Gonzalez*, 420 F3d at 124.

107 See id at 130.

108 See id at 115–16.

109 See note 101.

110 See *Gonzalez*, 420 F3d at 121.

Harris permitted statutory minimums based on facts found by a judge by a preponderance of the evidence. Section 841 did not use drug quantity only to increase the statutory minimum, but rather to trigger both mandatory minimums and corresponding statutory maximums.[111]

The Fourth Circuit reached the same conclusion. In *United States v Promise*,[112] the defendant had supplied crack to a drug ring in Gastonia, North Carolina. He was sentenced to thirty years' imprisonment after the sentencing court found by a preponderance of the evidence that the defendant had conspired to possess with intent to distribute more than 1.5 kilograms of crack cocaine.[113] The defendant appealed, asserting that the drug quantity should have been found by a jury beyond a reasonable doubt.[114] The *Promise* court explained that the statute permitted an increase in the potential penalty from the twenty years set out in § 841(b)(1)(C) to the greater amounts articulated in § 841(b)(1)(A)–(B) only if drug quantity was found by a jury. To comply with *Apprendi*, the drug quantity would therefore need to be found by a jury beyond a reasonable doubt.[115] In this case, both the actual sentence of thirty years and the potential maximum sentences of forty years (in subsection (B)) and life (in subsection (A)) violated the Fourth Circuit's understanding of *Apprendi*.

Turning to the question whether *Apprendi* applied before trial or after sentencing, the *Promise* court noted that *Apprendi* had stated that a fact that "increased the statutory maximum" did so whenever it exposed the defendant to a penalty greater than the one that would have been authorized by the jury's verdict alone.[116] Thus, the sentencing judge was bound by the facts alleged in the indictment and sent to a jury.[117] Like the *Gonzalez* court, the *Promise* court held that, regardless of a defendant's actual sentence, drug quantity increased the statutory maximum for the offense of drug trafficking and so had to be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

The *Promise* court then implicitly rejected statutory mixing and matching, explaining that the statutory structure in § 841(b) revealed congressional intent to pair mandatory minimums and maximums.[118]

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111 See id at 126.

112 255 F3d 150 (4th Cir 2001).

113 Id at 152–53. See also 21 USC § 841(b)(1)(A)(ii).

114 *Promise*, 255 F3d at 153.

115 Id at 156–57.

116 See id at 157–58 n 7, citing *Apprendi*, 530 US at 482–83.

117 *Promise*, 255 F3d at 157–58 n 7.

118 See id at 159.

"[T]he penalty gradations," the court wrote, "are not the product of constitutionally mandated procedures as a condition precedent to the imposition of the maximum penalty, but rather are the result of congressional prerogative to apply graduated penalties to acts of increasing severity."[119] Congress was free to establish a single maximum penalty to correspond to all of the mandatory minimums, but it did not.[120] Congress instead chose to make the penalties conditional upon additional facts—drug quantities—and the Constitution, as interpreted in *Apprendi*, controlled the process for determining those additional facts.[121]

B. Drug Quantity Is Not an Element

On the other hand, several circuits have held that drug quantity is not an element of § 841 unless the actual sentence imposed is greater than the statutory maximum for the offense of conviction—that is, the statutory maximum authorized by the jury. They explain that the drug quantities in § 841(b) trigger statutory minimums only, not statutory maximums. For example, a quantity of one hundred grams of heroin would trigger a statutory minimum of five years under § 841(b)(1)(B), but the relevant statutory maximum for *Apprendi* purposes would be the twenty-year cap set out in subsection (b)(1)(C), not the forty-year cap in subsection (b)(1)(B). These courts hold that, even when the statutory minimum is triggered by judicial fact-finding, the relevant "statutory maximum" is the one found by a jury. Thus, if the jury did not find a drug quantity, then the cap for an unquantified drug amount applies (subsection (b)(1)(C)) at the same time a minimum is triggered from elsewhere in the statute (subsection (b)(1)(A) or (b)(1)(B)). In short, these courts imply that Congress authorized courts to "mix and match" statutory maximums and minimums.

The Seventh Circuit explained its reasoning most thoroughly. In *United States v Clark*,[122] the defendant was sentenced to ten years in

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119 Id.

120 See id.

121 See *Promise*, 255 F3d at 159. Other courts have held similarly. See, for example, *Velasco-Heredia*, 319 F3d at 1085 (concluding that the defendant's sentence violated *Apprendi* because the district court determined only by a preponderance of the evidence that he had trafficked more than fifty kilograms of marijuana); *United States v Fields*, 242 F3d 393, 395–96 (DC Cir 2001) (vacating the defendants' sentences based on the conclusion that quantity was an element); *United States v Doggett*, 230 F3d 160, 164–65 (5th Cir 2000) (noting that *Apprendi* compelled the conclusion that quantity was an element, notwithstanding the court's prior precedent); *United States v Hinshaw*, 235 F3d 565, 575 (10th Cir 2000) (agreeing with *Doggett*'s reasoning and holding that drug quantity should have been found by a jury, but that the error was harmless).

122 538 F3d 803 (7th Cir 2008).

prison after he was convicted of possessing cocaine with intent to distribute, and the district judge found by a preponderance of the evidence that the quantity he had possessed was fifteen kilograms.[123] The court rejected the defendant's argument that *Apprendi* prevented judge-found facts from subjecting him to the mandatory minimum set out in § 841(b)(1)(A).[124] This was, and remains, consistent with the Supreme Court's holding in *Harris*.[125] Implicitly advocating statutory mixing and matching, the court then explained that the mandatory minimum sentence that Clark was subjected to was below the statutory maximum sentence that he would have been exposed to based only on the facts found by the jury (that is, the twenty-year maximum for unquantified drug amounts set out in § 841(b)(1)(C)).[126] The court stated that *Apprendi* applied only after a defendant received his sentence: "*Apprendi* has no application where a drug dealer is given a sentence at or below the maximum provided in § 841(b)(1)(C)."[127] The court acknowledged the contrary holding in *Gonzalez* but declared that it was not bound by it. In addition, circuit precedent supported treating drug quantity as a sentencing factor.[128]

In *United States v Washington*,[129] the Seventh Circuit reinforced the holding and reasoning of *Clark*.[130] The defendants were part of a drug distribution ring called the "Bigelow boys," operating in a house on Bigelow Street in Peoria, Illinois.[131] The court asserted that under *Harris*, statutory minimums provoked by judge-found facts were lawful.[132] Thus, the judge could assign a twenty-year mandatory minimum under § 841(b)(1)(A) for possession of more than fifty grams of cocaine, but since that sentence did not exceed the thirty-year statutory maximum under § 841(b)(1)(C), based on facts found

123 See id at 805, 808. See also 21 USC § 841(b)(1)(A)(ii).

124 See *Clark*, 538 F3d at 811–12.

125 See Part II.

126 See *Clark*, 538 F3d at 811.

127 Id at 812 (quotation marks omitted), quoting *United States v Hernandez*, 330 F3d 964, 980 (7th Cir 2003). See also *United States v Abdulahi*, 523 F3d 757, 760 (7th Cir 2008); *United States v Martinez*, 301 F3d 860, 864 (7th Cir 2002).

128 See *Clark*, 538 F3d at 812. See, for example, *Hernandez*, 330 F3d at 968; *Abdulahi*, 523 F3d at 760.

129 558 F3d 716 (7th Cir 2009).

130 Id at 720.

131 See id at 716.

132 See id at 720. See also *United States v Krieger*, 628 F3d 857, 863 (7th Cir 2010); *Martinez*, 301 F3d at 864. The Seventh Circuit, echoing scholars and other courts, has expressed skepticism about the holding in *Harris* on the basis that the defendant is "exposed" to greater penalties when a mandatory minimum is imposed. See *Krieger*, 628 F3d at 864. See also Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan L Rev 235, 261 & n 100 (2005).

by the jury, *Apprendi* was not implicated.[133] The court did not provide an explicit holding for the mixing-and-matching issue, since the question of statutory interpretation had been neither briefed nor presented before the court.[134] But it explained in dicta that *Harris* did not preclude Congress from linking a judge-found statutory minimum to a jury-found statutory maximum. In the case of § 841, because Congress did not write language into the statute requiring the pairing of minimums and maximums that corresponded to the same drug quantities, courts were not required to pair them together. While the *Gonzalez* court had explained that the absence of express permission from Congress to combine statutory maximums and maximums meant that the method was forbidden, the *Washington* court took the opposite stance: since the method was not expressly prohibited, it was permitted.[135] This point of disagreement was pivotal, because the *Washington* court, relying on earlier circuit precedent, noted that drug quantity must be found by a jury when it increased the statutory maximum sentence.[136] Using mixing and matching, however, the statutory maximum for *Apprendi* purposes would never increase past the term in (b)(1)(C) for an unquantified amount.

The Seventh Circuit has also looked independently at several of the *Castillo* factors. In *United States v Martinez*,[137] the court explained that statutory structure favored treating drug quantity as a sentencing factor.[138] Citing *Harris*, the court noted that when a statute contained a principal paragraph and subparagraphs, elements were generally contained in the principal paragraph—in that case, in § 841(a) rather than in § 841(b).[139]

In *United States v Goodine*,[140] the First Circuit used a similar method to the Seventh Circuit's after conducting an extensive analysis of Supreme Court precedent on the issue of sentencing factors versus elements.[141] The court then discussed legislative history and historical use, explaining that both factors favored treating drug quantity as a

133 See *Washington*, 558 F3d at 720. Subsection (C) sets a thirty-year, rather than the typical twenty-year, maximum for dealing in unquantified drug amounts after a conviction for a prior felony drug offense. 21 USC § 841(b)(1)(C).

134 See *Washington*, 558 F3d at 720.

135 See id.

136 See id at 719.

137 301 F3d 860 (7th Cir 2002).

138 See id at 865.

139 See id. See also *Krieger*, 628 F3d at 865 (considering the language and structure of § 841 and finding that it favored treating facts in § 841(b) as sentencing factors).

140 326 F3d 26 (1st Cir 2003).

141 See id at 28–31.

sentencing factor.[142] The court explained that the statutory structure included drug quantities in the penalty provisions, which were typically the location for sentencing factors, and that drug quantity was a "classic sentencing factor."[143] In addition, Congress passed § 841 at a time when, according to the court, it wanted sentencing courts to have maximum flexibility.[144] The *Goodine* court did not apply all five factors from the *Castillo* opinion, which had been decided three years earlier. Rather, consistent with the directive in *Apprendi*, it used *Apprendi* as the primary test for whether drug quantity was a sentencing factor. The court explained that the Supreme Court's ruling applied only when a defendant's actual sentence exceeded the statutory maximum based on jury-found facts.[145] Earlier in the opinion, the court embraced mixing and matching, explaining that the jury's determination would cap the statutory maximum under § 841(b) even while a judicial finding could determine which subcategory's statutory minimum applied.[146]

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There is an equal number of circuits on each side of the circuit split. Examining Supreme Court cases that have applied *Apprendi* demonstrates that the circuits that have treated drug quantity as a sentencing factor have erred. Part IV discusses the recent Supreme Court cases and their application to § 841.

IV. TURNING THE FOCUS BACK TO THE SUPREME COURT

The circuit split implicates two critical aspects of criminal procedure: the extent of *Apprendi*'s due process protections and

142 See id at 31–32. *Goodine* draws a different conclusion about legislative history than this Comment does in Part IV.C.4, but *Goodine* was decided before *Kimbrough*, which discussed the legislative history of 21 USC § 841(b).

143 *Goodine*, 326 F3d at 31–32.

144 See id at 31.

145 See id at 33.

146 See id at 32. Other courts have held similarly. See, for example, *United States v Franco*, 484 F3d 347, 356–57 (6th Cir 2007); *United States v Serrano-Lopez*, 366 F3d 628, 638 & n 9 (8th Cir 2004); *United States v Vazquez*, 271 F3d 93, 98 (3d Cir 2001). The Eleventh Circuit has its own method for determining whether drug quantity is an element of § 841. It has held only that *Apprendi* is not implicated unless a defendant's actual sentence is above the statutory maximum set out in the portion of § 841(b) under which he was sentenced. See *United States v Underwood*, 446 F3d 1340, 1344–45 (11th Cir 2006). No statutory "mixing and matching" is involved: "The maximum term of imprisonment under 21 USC § 841(b)(1)(A)(iii) is life . . . [The defendant] was sentenced to 135 months in prison, well below the statutory maximum. In a § 841 case where the defendant's ultimate sentence falls at or below the statutory maximum [ ] in § 841(b)(1)(A)(iii), there is no *Apprendi* error." Id.

whether statutory minimums and maximums can be "mixed and matched." This Comment argues that the Supreme Court has provided guidance on both issues. First, Part IV.A outlines several of the Court's opinions that apply *Apprendi*, arguing that they clarify that the *Apprendi* Court was concerned both with actual and potential sentences. Next, Part IV.B argues that the Court has also shown its hand on the question of statutory mixing and matching, clearly disfavoring it. If courts are not permitted to combine statutory maximums with statutory minimums, then a quantifiable drug amount above a certain level in 21 USC § 841(b) will move both the minimum and the maximum. When the statutory maximum is thus shifted, drug quantity necessarily must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. Finally, Part IV.C argues that the Supreme Court has indicated in recent opinions that the drug quantity component of 21 USC § 841(b) would be an element under its traditional five-factor test.

A. The Future of *Apprendi*

Initially, the two competing interpretations of *Apprendi* appear equally valid. After all, the language in *Apprendi* is ambiguous: "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."[147] "Increases the penalty" can indicate either an increased potential penalty, as the Second Circuit's side of the split concludes, or it can indicate actual liability, as explained by the Seventh Circuit and others.

There is good reason to believe that the Second Circuit's approach is correct. First, the central holding in *Harris* is concerned with potential exposure.[148] The petitioner in *Harris* argued that statutory minimums should be unconstitutional under *Apprendi* because they force a judge to impose a sentence without finding the triggering facts beyond a reasonable doubt.[149] In effect, he was arguing that his actual sentence must be protected by due process. The Court was able to hold that statutory minimums were constitutional after *Apprendi* because the statutory maximum would still be justified by facts found by a jury or admitted by the defendant. In the words of the plurality, "The Fifth and Sixth Amendments ensure that the defendant will never get *more* punishment than he bargained for when he did the

147 *Apprendi*, 530 US at 490, citing *Jones*, 526 US at 252–53.
148 See *Harris*, 536 US at 568–69.
149 See id.

crime, but they do not promise that he will receive anything less than that."[150]

When sentences are reviewed on appeal, courts—including the Supreme Court—examine the sentence that was actually imposed to determine whether that sentence exceeds the statutory maximum. But the Court has gone further than merely invalidating individual sentences. In cases where a sentencing scheme permits a judge to find a fact that would increase a potential sentence beyond the statutory maximum authorized by a jury, the Court has held that scheme unconstitutional, first in *Blakely v Washington*,[151] followed by *Booker*, and finally in *Cunningham v California*.[152] These holdings indicate that the Court is concerned not only about an individual defendant's actual sentence, but also with increased sentencing exposure.

After *Harris*, the Court further clarified the dual role of *Apprendi* in three opinions that analyzed sentencing plans as a whole, rather than just individuals' sentences. First, in *Blakely*, the Court faced Washington's sentencing guidelines regime, which allowed a judge to increase a sentence beyond the "standard range" if she found "substantial and compelling reasons justifying an exceptional sentence."[153] Ralph Blakely Jr was convicted of second-degree kidnapping and faced a standard range of forty-nine to fifty-three months in prison.[154] The judge imposed ninety months based on a finding that Blakely acted with deliberate cruelty.[155] At the time, the maximum sentence authorized for kidnapping, a class B felony, was ten years.[156] The Court explained, however, that ten years was not the "statutory maximum" beyond which *Apprendi* protections were triggered.[157] Rather, the "statutory maximum" for *Apprendi* purposes was the maximum sentence that a judge could impose based only on the facts admitted by the defendant or found by a jury beyond a reasonable doubt.[158] Because the Washington regime permitted a judge to impose sentences beyond that statutory maximum, both Blakely's sentence and the procedure that allowed it were invalid.[159]

The Court reached a similar conclusion in *Booker*, in which a judge had sentenced Freddie Booker to thirty years in prison, but the

150 Id at 566.
151 542 US 296 (2004).
152 549 US 270 (2007).
153 *Blakely*, 542 US at 299.
154 See id.
155 See id at 300.
156 See id at 303.
157 See *Blakely*, 542 US at 304.
158 See id at 303.
159 See id at 304–05.

maximum sentence authorized by jury-found facts was twenty-one years, ten months.[160] The Court held that the Guidelines, which mandated the judge's higher sentence, were no longer binding.[161] The Court emphasized that its concern was that judge-found facts not only could increase a defendant's actual sentence beyond the statutory maximum, but also would increase the potential sentence that a defendant faced. A jury must determine facts that "raise[d] a sentencing ceiling."[162]

In *Cunningham*, the Court examined California's Determinate Sentencing Law[163] (DSL). For the majority of offenses, the DSL prescribed lower, middle, and upper terms of imprisonment and required the sentencing judge to impose the middle sentence unless there were aggravating or mitigating factors.[164] Cunningham was charged with the continuous sexual abuse of a child, an offense that carried potential punishments of six, twelve, or sixteen years.[165] The DSL permitted the judge to find the facts that would trigger an upper-term sentence.[166] The Court held that Cunningham's sixteen-year sentence was unconstitutional. Again, the Court articulated the *Apprendi* guarantee in terms of a defendant's potential sentence: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury . . . and established beyond a reasonable doubt."[167] Accordingly, the Court did not limit its holding to Cunningham's sentence. Rather, it held that the entire DSL was unconstitutional.[168] *Cunningham*, like *Booker* and *Blakely*, establishes that anytime a sentencing statute allows a judge to find facts that would push a sentence past the statutory maximum as found by a jury, the scheme is unconstitutional.

If drug quantity can be found by a judge by a preponderance of the evidence, then the penalty regime in § 841(b) is like the sentencing schemes that the Court has found unconstitutional in *Cunningham*, *Blakely*, and *Booker*. In § 841, the maximum permissible penalty increases from twenty years for an unquantifiable amount of drugs in subsection (C), to a maximum penalty of forty years for a small amount of drugs in subsection (B), to life in prison for a larger

160 See *Booker*, 543 US at 227.
161 See id at 245.
162 Id, quoting *Jones*, 526 US at 251–52 n 11.
163 Cal Penal Code § 1170 (West 1976), repealed by *Cunningham*, 549 US 270.
164 See *Cunningham*, 549 US at 277.
165 See id at 275–76.
166 See id at 274.
167 Id at 281.
168 See *Cunningham*, 549 US at 293.

quantity of drugs in subsection (A).[169] Like California's DSL, § 841(b) hinges an increase in a defendant's potential penalty to an aggravating factor—in this case, drug quantity. Allowing a judge to find that factor by a preponderance of the evidence, rather than requiring it to be found by a jury beyond a reasonable doubt, is akin to the DSL's permitting judges to find aggravating factors. As the Supreme Court held in *Cunningham*, such a scheme is unconstitutional.[170] Courts should take into account recent Supreme Court precedent and hold that *Apprendi* violations occur when judge-found facts push either actual or potential sentences past the statutory maximum.

B. Statutory Mixing and Matching

Taken together, these ideas suggest that courts ruling on drug quantity in § 841(b)—and courts ruling on *Apprendi* in general—should apply due process protections both before trial and after sentencing. Yet even a pre-trial application of *Apprendi* in all instances would not unify the circuits' views about whether drug quantity is an element of § 841. As long as *Harris* is good law and statutory mixing and matching is permitted, courts can conceivably hold that drug quantity is a sentencing factor triggering a statutory minimum under § 841(b)(1)(A) or (B), but one that invokes only the lower statutory maximum set out in § 841(b)(1)(C).

As the Seventh Circuit noted in *Washington*, this method of statutory interpretation is novel, and it has been neither explicitly permitted nor outlawed.[171] But it is important to acknowledge that the Supreme Court has treated the penalty clause of § 841 as setting out mandatory minimums that cannot be severed from their statutory maximums. In *Booker*, the Court wrote, "Having heard evidence that he had 92.5 grams in his duffel bag, the jury found [Booker] guilty of violating § 841(a)(1). That statute prescribes a minimum sentence of ten years in prison and a maximum sentence of life for that offense. § 841(b)(1)(A)(iii)."[172] The language that the Court chose suggests that trafficking in larger amounts of drugs is a separate offense from trafficking in smaller amounts of drugs: the singular act of possessing 92.5 grams of crack was connected to a sentence of 10 years to life.[173] The Court did not state that there was a sliding scale for the offense of

169 21 USC § 841(b).
170 See *Cunningham*, 549 US at 293.
171 See *Washington*, 558 F3d at 720.
172 *Booker*, 543 US at 227.
173 See id.

possessing drugs, but rather that there was a set maximum for the offense of possessing more than a threshold quantity.[174]

This treatment is similar to the Court's earlier analysis in *Castillo*, where the Court analyzed the following provision: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall . . . be sentenced to . . . five years . . . and if the firearm is a machine gun . . . to . . . thirty years."[175] The Court explained that both the machine gun provision and the firearm provision were contained in the principal paragraph of the statute, and were followed by three numbered subsections that pertained only to sentencing.[176] The containment of these two elements in the principal paragraph "strongly favored" treating the machine gun provision as a new crime.[177]

Furthermore, in *Kimbrough v United States*,[178] the Court treated each subsection of § 841 as an independent whole. Writing for the majority, Justice Ruth Bader Ginsburg rejected the Government's argument that the ADAA mandated that Guidelines sentences be higher for trafficking in crack, stating that the statute established statutory minimums and maximums only for each drug quantity: five to forty years for five grams or more of crack and ten years to life for fifty grams or more.[179] The statute said nothing about the appropriate sentences "within these brackets."[180] Justice Ginsburg argued that Congress had established a fixed sentencing range for each drug quantity, indicating that the range was bound by both a statutory minimum and a statutory maximum. If the minimums and the maximums could operate independently, then *Kimbrough*'s bracket analogy fails.[181]

Together, *Booker* and *Kimbrough* indicate that the Court disfavors mixing and matching the statutory minimums and maximums in § 841(b). *Jones* sheds some light on the justification for treating each subdivision as an independent whole. In that case, the Supreme Court analyzed a statute with a penalty provision similar to § 841(b)—the federal carjacking statute, 18 USC § 2119.[182] It mandated

174 See id (treating the crossing of the fifty-gram threshold as a discrete offense).

175 *Castillo*, 530 US at 122, quoting 18 USC § 924(c) (1988 & Supp 1993).

176 See *Castillo*, 530 US at 124–25.

177 See id.

178 552 US 85 (2007).

179 See id at 102–03.

180 Id at 103.

181 As in *Clark*, where the court assigned the ten-year statutory minimum under 21 USC § 841(b)(1)(A) but maintained that the statutory maximum for *Apprendi* purposes was twenty years under § 841(b)(1)(C). See *Clark*, 538 F3d at 811.

182 See *Jones*, 526 US at 232–33 (analyzing the various subsections of § 2119 and claiming that the subsections appear to be sentencing provisions).

under subsection (1) that a defendant be sentenced to a maximum of fifteen years in prison for stealing a car with a firearm.[183] Subsection (2) established a maximum sentence of twenty-five years if serious bodily injury occurred while stealing a car with a firearm.[184] Subsection (3) increased the maximum penalty to life in prison if death resulted from the underlying offense.[185] The Court noted that each subsection included a higher penalty that was conditioned on an additional fact.[186] Critically, the Court explained that this pairing of fact and consequence made each subsection of the penalty provision operate independently.[187] In this instance, the Supreme Court showed how the separate penalty provisions should be read, suggesting that separate clauses in sentencing provisions should be treated as independent wholes where, as in *Jones*, a fact is paired with a consequence. Just as in § 2119, the subsections of § 841(b) pair a fact (drug quantity) with a consequence in the form of both a mandatory minimum and a statutory maximum. Recall, for example, that § 841(b)(1)(B) assigns a sentence of five to forty years for certain specified quantities of drugs.[188] Lower courts should follow the Supreme Court's method in *Jones*, *Booker*, and *Kimbrough* and, when a fact is paired with a consequence, consider the pairing an indivisible whole.

C. The Traditional Five Factors

Even after *Apprendi*, courts have used the traditional five factors in considering whether a fact is an element or a sentencing factor.[189] Courts look to (1) historical use, (2) statutory structure, (3) the degree to which a fact increases the potential sentence, (4) legislative history, and (5) potential unfairness. Most recently, in *O'Brien*, the Supreme Court explained that *Apprendi* was the primary arbiter of whether a fact was a sentencing factor or an element.[190] Once a fact passes *Apprendi*'s muster by not increasing a sentencing range without submission to a jury and proof beyond a reasonable doubt, it is up to Congress to determine whether a fact is a sentencing factor or an offense element.[191] For example, stating that four of the traditional five

183 See 18 USC § 2119(1).

184 See 18 USC § 2119(2).

185 See 18 USC § 2119(3).

186 See *Jones*, 526 US at 233.

187 See id ("These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph.").

188 See 21 USC § 841(b)(1)(B).

189 See, for example, *Harris*, 536 US at 552–56; *Goodine*, 326 F3d at 31–32.

190 *O'Brien*, 130 S Ct at 2174–75.

191 See id at 2175.

factors favored treatment as an element, the *O'Brien* Court held that the machine gun enhancement of 18 USC § 924(c) was an element even though it did not increase the punishment for the offense beyond the statutory maximum.[192]

As indicated in Part IV.A and Part IV.B, courts should treat drug quantity as an element of § 841 because *Apprendi* requires it. This Section explains that, even under a traditional five-factor test, drug quantity merits additional constitutional protections at trial. The Supreme Court has not applied the five-factor test, as a whole, to drug quantity. In cases where a defendant is charged with violating § 841, however, the Court has discussed four of the five factors independently. Combining this evidence with the Supreme Court's language regarding a prospective application of *Apprendi* and statutory mixing and matching further confirms that courts should treat drug quantity as an element, rather than a sentencing factor.

1. Historical use.

Before *Apprendi*, circuit courts typically treated drug quantity as a sentencing factor.[193] As Justice Sandra Day O'Connor noted in her *Blakely* dissent, this reflected the historical use of drug quantity in determining the sentence after conviction.[194] Historical use can be a difficult determination to make, however. Because of the relatively short history of the distinction between offense elements and sentencing factors, there is precious little precedent to render a treatment genuinely "historical."[195] Drug quantity is also a relatively new player in the sentencing landscape, suggesting that the factor's historical use is still in flux. There is support for the argument that quantity, specifically in the context of § 841(b), should be treated as an offense element. In *Kimbrough*, the Court explained that the scale of the drug trafficking scheme was at the very heart of § 841(b)—and that the scale was determined solely by the quantity of drugs trafficked.[196] The Court explained that Congress had enacted the ADAA (the act that elaborated and expanded the drug quantities in § 841) to link the five-year statutory maximum to "serious" drug traffickers and the ten-year statutory minimum to "major" drug dealers.[197]

192 See id at 2180.

193 See note 92 and accompanying text.

194 542 US at 318 (O'Connor dissenting).

195 See Nancy Gertner, *What Has* Harris *Wrought*, 15 Fed Sent Rptr (Vera) 83, 85, 87 & n 28 (2002).

196 See *Kimbrough*, 552 US at 95.

197 See id.

In *Castillo*, the Court explained that Congress typically made characteristics of the offender into sentencing factors and characteristics of the particular offense into elements.[198] For example, a traditional "offender characteristic" is recidivism, which the Court has held to be a sentencing factor.[199] Other traditional offender characteristics include cooperation with law enforcement and acceptance of responsibility (both of which can lead to a reduced sentence).[200] In contrast, an "offense characteristic" is a fact that lies "closest to the heart of the crime at issue."[201] The Court explained that using a machine gun, instead of a pistol, to commit a crime of violence was the type of offense characteristic that effectively transformed the offense into something new.[202] The larger, more violent weapon amplified the scale of the crime.[203] Likewise, drug quantity escalates the scale of the crime under § 841, rendering it either "serious" or "major."[204] This connection to the nature of the particular offense—rather than to the offender—suggests that drug quantity under § 841 should be treated as an offense element instead of a sentencing factor.

2. Statutory structure.

When the Supreme Court analyzes statutory structure looking for congressional intent, it looks to whether Congress appeared to create a separate offense. The Court has explained that, when a relevant fact appears in a separate subsection from the other elements, it is more likely a sentencing factor than a sentencing element. For example, in *Jones*, the Court stated that the fact that the statute included a principal paragraph with elements followed by numbered subsections with various sentences favored treating any enhancement in the subsection as a sentencing factor.[205] The converse is also true, as when, in *Castillo*, the Court explained that the "machine gun" enhancement appeared in the same sentence as "uses or carries a firearm," the principal elements, which cut in favor of treating it as an element.[206]

198 See *Castillo*, 530 US at 126. See also Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan L Rev 277, 277 (2005) (arguing that "[h]istorically, offense conduct . . . and offender characteristics . . . have both played a significant role in sentencing," but that the Supreme Court has recently given "great attention to offender characteristics at sentencing").

199 See *Almendarez-Torres*, 523 US at 230.

200 See *O'Brien*, 130 S Ct at 2176.

201 Id, quoting *Castillo*, 530 US at 127.

202 See *Castillo*, 530 US at 126.

203 See id.

204 See *Kimbrough*, 552 US at 95.

205 See 526 US at 232–33.

206 *Castillo*, 530 US at 124–25.

The statute at issue in this Comment, § 841(a), sets out the principal elements of possessing or trafficking narcotics, while § 841(b) establishes sentences attached to the quantities of narcotics trafficked.[207] *United States v Cotton*[208] was one instance in which the Supreme Court explicitly analyzed the structure of § 841 after *Apprendi*. The *Cotton* Court examined an appeal from two defendants who had been sentenced to thirty years' imprisonment under § 841(b)(1)(A) based on a drug quantity that had been found by a judge by a preponderance of the evidence.[209] The Court reasoned that Congress had designed § 841(b) to separate different levels of drug traffickers from one another at sentencing.[210] The Court explained that "[i]n providing for graduated penalties . . . Congress intended that defendants . . . involved in large-scale drug operations receive more severe punishment than those committing drug offenses involving lesser quantities."[211] The subsection structure suggests that drug quantity should be a sentencing factor.

There are two indications, however, that this second factor does not weigh heavily against treating quantity as an element. First, in *O'Brien*, the Court explained that the fact that enhancements appeared in subsections should not be the deciding factor in the element–sentencing factor determination, particularly where conditions existed that pointed the other way.[212] Second, the *O'Brien* Court explained that breaking lengthy statutes into subsections that are easier to read is consistent with good congressional practice and not necessarily an indication of intent.[213]

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207 See 21 USC § 841(a)–(b) (2006 & Supp 2010) (establishing an elaborate system of criminal penalties for trafficking heroin, cocaine, marijuana, and other drugs, where penalties depend on quantity, drug type, and prior convictions).

208 535 US 625 (2002).

209 See id at 628. Without ruling on the issue of whether drug quantity was an element, the Court noted that it was plain error not to allege drug quantity in an indictment under 21 USC § 841(b)(1)(A), since drug quantity increased the statutory maximum for the offense. None of the circuit courts ruling on the question whether drug quantity was a sentencing factor or element used *Cotton* in its reasoning. Rather, circuit courts have used *Cotton* for its primary holdings, which were that a defective indictment did not necessarily deprive a district court of jurisdiction, and that *Apprendi* errors could be subjected to a three-pronged plain error review. See, for example, *United States v Portes*, 505 F3d 21, 25–27 (1st Cir 2007) (explaining that the *Apprendi* error had not been properly preserved, and so review was for plain error under the *Cotton* test); *Wadlington v United States*, 428 F3d 779, 785–86 (8th Cir 2005) (holding that failure to allege drug quantity in the indictment, an *Apprendi* error, was not plain error).

210 See *Cotton*, 535 US at 634.

211 Id.

212 See *O'Brien*, 130 S Ct at 2180.

213 See id at 2179–80.

3. Degree to which a fact increases the potential sentence.

Twice, the Court has commented that the degree to which drug quantity can increase a potential sentence should trigger the additional protections of *Apprendi*. First, the *Blakely* Court lamented that, under § 841, a defendant's maximum sentence could increase from five years for a small amount of marijuana or hashish under subsection (b)(1)(D) to life in prison for a large amount of a drug like cocaine under subsection (b)(1)(A).[214] The Court used this example to illustrate that large increases in potential sentences merit the additional due process protection of the "beyond a reasonable doubt" standard.[215] In *Booker*, the Court also examined a case in which a defendant was charged with, and convicted of, violating § 841(a). While the jury found that Booker had possessed 92.5 grams of crack, and therefore could be sentenced under the sentencing guidelines to twenty-one years and ten months in prison, the judge found that he possessed an additional 556 grams of crack and sentenced him to thirty years.[216] The Court was concerned that Booker had received a significantly higher sentence due to a fact found by a judge by a preponderance of the evidence.[217] This large increase is akin to the sentencing increments in *Jones*, which the Supreme Court held could not be based on judge-found facts.[218] Based on the Supreme Court's recent jurisprudence, the third factor favors treatment of drug quantity as an offense element.

4. Legislative history.

There is no legislative history that directly addresses whether Congress intended drug quantity in § 841(b) to be an element or a sentencing factor.[219] When the Supreme Court analyzes legislative history in the absence of express intent, it looks to whether Congress directly paired a fact with a new prison term. In *Castillo*, for example, the Court wrote that legislative statements about assigning an additional prison sentence for using a machine gun rather than merely using a generic firearm, indicated that the provision might be an

214 *Blakely*, 542 US at 311–12.

215 See id.

216 See *Booker*, 543 US at 226.

217 See id at 238.

218 See *Jones*, 526 US at 233 (explaining that the penalty range would increase by two-thirds and therefore should be protected by due process). See also *Mullaney v Wilbur*, 421 US 684, 698 (1975).

219 See *Promise*, 255 F3d at 156 ("No legislative history speaks to the question."). See also *Goodine*, 326 F3d at 31; *United States v McAllister*, 272 F3d 228, 231 (4th Cir 2001).

offense element.[220] The firearm law's supporters noted that the bill included "stiff mandatory sentences for the use of . . . machine guns and silencers" and "would have many benefits, including the expansion of mandatory sentencing to those persons who use a machine gun in the commission of a violent crime."[221]

Advocating for the ADAA, Senator Joseph Biden asserted that the legislation would establish mandatory minimum penalties for the highest level of drug traffickers.[222] As noted in Part IV.C.2, the *Kimbrough* Court discussed this intent to punish top-level drug traffickers more harshly, linking mandatory minimums of five and ten years to "serious" and "major" drug traffickers.[223] Congress was also particularly concerned with the problem of crack cocaine, establishing in the ADAA a 100-to-1 ratio between the punishment of crack offenses and the punishment of cocaine crimes.[224] Trafficking in any quantity of crack carried a new penalty, while for the first time mandatory minimum sentences attached to threshold quantities of crack and other drugs.[225] The Supreme Court's interpretation of the legislative history of § 841(b) is rooted in the connection of larger-scale drug offenses to larger mandatory penalties. This is similar to the connection made in *Castillo* between using a machine gun and higher penalties,[226] indicating that the Court would likely analyze the legislative history of § 841 to favor treating quantity as an element.

5. Potential unfairness.

In one passage in *Blakely*, the Court explained that allowing a defendant to face a maximum of life in prison under § 841(b)(1)(A), based on a drug quantity that had been found only by a judge by a preponderance of the evidence, was fundamentally unfair.[227] The Court was particularly concerned about the judge's method of finding a fact that could increase a sentence so dramatically, criticizing the scheme

220 See *Castillo*, 530 US at 130 (rejecting the government's claim that the legislative history necessarily supported the conclusion that firearm type was a sentencing factor and explaining instead that "the legislative statements that discuss a new prison term for the act of 'us[ing] a machine gun,' . . . seemingly describe offense conduct, and, thus, argue *against* (not *for*) the Government's position") (emphasis in original).

221 Id.

222 132 Cong Rec S 26439 (Sept 26, 1986) (Sen Biden) ("This legislation . . . increase[s] penalties for most drug-related offenses, including a mandatory minimum penalty of 10 years imprisonment, and up to life, for the highest level of drug kingpins.").

223 See note 196.

224 See *Kimbrough*, 552 US at 94–95. See also 132 Cong Rec at S 26435 (cited in note 222) (Sen Chiles) (discussing enhanced penalties for crack cocaine in particular).

225 See *Kimbrough*, 552 US at 95.

226 See notes 175–77 and accompanying text

227 See *Blakely*, 542 US at 311–12.

under which a defendant could face life in prison "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong."[228] In that instance, the Court was concerned about the extent to which a defendant would be prejudiced by treating quantity as a sentencing factor, due to the lower standard of proof it required.

This is consistent with earlier Supreme Court opinions that have established the unfairness prong as one focused primarily on prejudice to the defendant. In *Almendarez-Torres*, the Court explained that treating recidivism as a sentencing factor reduced the potential for prejudice to the defendant, because a defendant's criminal history would therefore not be put before the jury.[229] In contrast, the *O'Brien* Court explained that treating the machine gun enhancement as an element would *not* prejudice the defendant, because it would reduce the potential for conflict between the judge and the jury.[230] Specifically, treating the machine gun enhancement as a sentencing factor might allow the jury to find that a defendant used a pistol while allowing a judge to find that he had used a machine gun—a conflict that would deprive the defendant of a fact-finding jury.[231] In *Booker*, Justice John Paul Stevens expressed a similar concern: modern sentencing had begun to allow judges, rather than juries, to find an increasing number of facts that enhanced a potential sentence.[232] The jury's role in finding the underlying offense elements was thus less significant. Restoring the central role of the jury was the only way to "preserv[e] an ancient guarantee under a new set of circumstances."[233] Under this analysis, drug quantity should be treated as an element, bringing the jury right that designation requires.

* * *

Four of the five factors that the Supreme Court traditionally uses to distinguish elements from sentencing factors favor treating drug quantity as an element of § 841(b). Historical use, the degree to which a fact increases a sentence, potential unfairness, and legislative history

228 Id.

229 See *Almendarez-Torres*, 523 US at 234–35.

230 See *O'Brien*, 130 S Ct at 2177.

231 See id. See also *Castillo*, 530 US at 128.

232 See *Booker*, 543 US at 237 ("The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.").

233 Id.

all suggest an element interpretation. Statutory structure cuts the other way, but the Court has explained that statutory structure should not be the final arbiter of the distinction between sentencing factors and elements.[234] In *O'Brien*, the most recent Supreme Court opinion on point, the Court held that four out of five factors was enough to justify treating a fact as an element.[235]

CONCLUSION

Apprendi implicates critical constitutional rights. The circuit split over whether drug quantity is an element of 21 USC § 841 indicates that the *Apprendi* opinion did not go far enough toward clarifying these rights. A close analysis of recent Supreme Court precedent indicates that the courts favoring treatment of drug quantity as an element are correct: *Apprendi* must be read to apply to both potential sentences and actual sentences. In addition, while statutory mixing and matching may be permissible, the Supreme Court disfavors it. Finally, even the traditional five-factor analysis favors treating drug quantity as an element rather than as sentencing factor. Future courts interpreting § 841 should take note and should assign drug quantity the constitutional protections that both *Apprendi* and the Court's five-factor test require.

234 See *O'Brien*, 130 S Ct at 2180. See also *Harris*, 536 US at 553; *Jones*, 526 US at 232.

235 See *O'Brien*, 130 S Ct at 2178, 2180.