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To Err Is Human: The Judicial Conundrum of Curing Apprendi Error

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I. INTRODUCTION

Trial by jury is the centerpiece of the criminal law. The possibility that innocent people might be convicted is tolerable only because a jury has found that a specific defendant is guilty beyond a reasonable doubt on each element of the crime charged.[1] If the decision of guilt or innocence has been taken away from the jury entirely, we say that a defendant was not properly convicted because he did not receive a trial by jury. We are not sufficiently convinced that the defendant is guilty.

Yet there are times when a jury is prevented from finding a defendant guilty beyond a reasonable doubt on each element of a crime. A trial court judge might fail to send just one element of the crime to the jury, but allow the jury to make a determination on the remainder of the elements of the crime. This is clearly a mistake of constitutional proportions: to satisfy due process and the constitutional guarantee of a jury trial, the jury must decide that every element of the crime has been proven beyond a reasonable doubt in order for a conviction to hold. There is another side to the story, however. Often, the missing element is so easy to establish, and so obviously present, that on appeal a remand of the case would be a waste of judicial resources.[2]

For defendants who believe they have not received a fair jury trial, the remedy—as for all sorts of error at trial—is to appeal. But courts of appeals cannot reverse every conviction or sentence on trivialities and technicalities. Rather, courts of appeals apply one of two basic standards to determine whether they should reverse: harmless error review or plain error review. Appellate courts apply the harmless error standard when a defendant has preserved his objection for appeal by raising it in the court below. An error is not harmless, and the court will reverse, if the prosecution fails to establish that the error did not harm the defendant's "substantial rights."[3] Alternatively, appellate courts apply plain error review when the defendant did not raise an objection at trial.[4] A defendant seeking reversal under the

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[1] *In re* Winship, 397 U.S. 358, 364 (1970).

[2] Indeed, some of the earliest cases in this area dealt with the failure of a trial court to ask a jury, in federal bank robbery cases, whether the bank in question was Federal Deposit Insurance Corporation (FDIC) insured. Although FDIC insurance was an element of the crime (for Commerce Clause purposes), nobody seriously doubted the bank was FDIC insured. Reversing a conviction for error because the court failed to ask the jury if the bank was FDIC insured would have been a reversal on a true technicality.

[3] FED. R. CRIM. P. 52(a).

[4] *Id.* 52(b).

plain error standard bears the burden of persuading the court that not only did the error affect his substantial rights, but that the public reputation of the courts will be called into question if such an error is not corrected.[5]

In *Apprendi v. New Jersey*, the Supreme Court held that sentencing factors increasing a defendant's sentence above the statutory maximum punishment are essential elements of the crime that must be submitted to a jury.[6] Although *Apprendi* was not a drug case, courts most commonly apply the *Apprendi* doctrine to hold that the amount of drugs involved in a drug crime is an essential element of that crime and must therefore be submitted to the jury and proven beyond a reasonable doubt. Given the volume of drug crimes, *Apprendi* appeals are now among the most common types of appeals before the circuit courts.

The question, on appeal, is whether the court of appeals should affirm or remand sentences where the trial court failed to submit the element of drug quantity to the jury. At first, most courts routinely remanded such cases for re-sentencing, recognizing that under *Apprendi*, the defendant had not received a trial on every element of the crime. However, the Supreme Court's recent decision in *United States v. Cotton* now allows a court of appeals to disregard *Apprendi* error and affirm the erroneous sentence if the appeals court determines the evidence of the drug amount was "overwhelming" and "essentially uncontroverted."[7] Courts are now grappling with what those terms mean, and defendants are seeking innovative ways to present their appeals in order to avoid application of this stringent standard.

Under this new regime of review for *Apprendi* error, defendants seeking to raise an *Apprendi* challenge to their post-*Cotton* conviction not only face a likely unfavorable ruling on the substance of their claims, but also substantial procedural hurdles preventing them from asserting *Apprendi* claims on *habeas corpus*. As a result, defendants have begun devising new and innovative techniques for presenting their *Apprendi*-style cases. For example, a defendant might challenge the failure of the prosecution to present every element of the crime charged to a grand jury for indictment, as is required under the Fifth Amendment. When the crime proven at trial is different from the crime charged in the indictment, courts have held that

[5]United States v. Young, 470 U.S. 1, 15 (1985).

[6]530 U.S. 466, 496 (2000).

[7]United States v. Cotton, 535 U.S. 625, 634 (2002).

the indictment has been "constructively amended."[8] Because some courts continue to treat such Fifth Amendment constructive amendment of indictment claims more favorably than a straightforward *Apprendi* claim, defendants have begun to bring their *Apprendi* challenges as Fifth Amendment claims.

This Article will first analyze the Supreme Court precedent on plain and harmless error review that eventually resulted in the *Cotton* decision. Next, the Article will discuss the *Apprendi* decision itself, the expansion of the *Apprendi* doctrine to new areas of the law, and some problems that courts have encountered in applying the rule of *Apprendi* in subsequent cases. Third, the Article will explore the *Cotton* decision and the application of the *Cotton* rule by the courts of appeals. Finally, the Article concludes with several recommendations. First, courts should apply the *Cotton overwhelming and uncontroverted* test in a common-sense manner, and should remand cases when the evidence against that particular defendant is not overwhelming or uncontested. Second, courts should apply the overwhelming and uncontroverted standard differently when reviewing a decision of a trial court for harmless error, rather than for plain error, in light of the underlying principles of each test. Third, at the same time that courts apply a more open reading of *Cotton*, they should also act to close loopholes that some defendants are currently using to present their *Apprendi* claims under cover of other doctrines.

The question of how to review *Apprendi* error properly has never been more compelling. The Supreme Court's recent decision in *Ring v. Arizona* placed review of *Apprendi* error at the heart of almost every death penalty appeal pending in the nation, during a period of national crisis over the accuracy and fairness of the death penalty.[9] Death row inmates can now argue that their right to a jury trial was violated because a judge, rather than a jury, found their crimes contained aggravating factors that merited the imposition of the death penalty.[10] At the same time, the Court's recent ruling in *Harris v. United States* raises more questions than ever about which sentencing factors are actually *essential elements* of a crime.[11] Given the state of flux in the law, district courts will inevitably err in their interpretation of *Apprendi*. Careful review of these errors is an absolute

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[8]United States v. Syme, 276 F.3d 131, 148 (3d Cir. 2002); United States v. Wade, 266 F.3d 574, 583 (6th Cir. 2001); United States v. Harrelson, 754 F.2d 1153, 1174 (5th Cir. 1985).

[9]536 U.S. 584, 609 (2002).

[10]*Id.*

[11]536 U.S. 545, 549 (2002).

necessity if courts are to prevent complete erosion of the basic right to trial by jury.

II. REVIEW FOR ERROR

Rule 52 of the Federal Rules of Criminal Procedure sets forth the harmless and plain error rules.[12] This rule states:

a) Harmless Error. Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.

b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.[13]

The doctrine of harmless error bars courts of appeals from reversing trial convictions on technicalities that did not impact the trial or affect the "substantial rights" of the defendant.[14] The doctrine of plain error allows courts to notice errors causing manifest injustice even when the defendant failed to object below. However, under the plain error doctrine, the focus falls on the integrity of the court proceedings, rather than on the rights of the defendant. A court will only reverse for plain error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[15] The body of law surrounding these doctrines is complicated and conflicting. A review of the history and case law of the harmless error and plain error doctrines will inform the discussion of the *Cotton* standard as applied to *Apprendi* cases.

A. Harmless Error

At common law, error at trial merited reversal, leading to endless reversals of trial decisions and waste of judicial resources as cases were remanded for technicalities that had no impact on the overall outcome of the case.[16] This was altered by the first federal harmless error statute, passed in 1919, the text of which was largely the same as the current Rule 52(a).[17]

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[12]FED. R. CRIM. P. 52(a).

[13]*Id.*

[14]*Id.*

[15]Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

[16]2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 7.03 (3d ed. 1999).

[17]*Id.*

The purpose of the statute was to prevent endless retrials based on meaningless quibbles over violations of the rules.[18] To that end, courts were directed to disregard errors that did not affect the substantial rights of the defendant below. Under the modern rule, this harmless error review is triggered only when the defendant preserves his objection for appeal by raising it at the trial level.[19]

On appeal, harmless error review follows a two-step inquiry.[20] The reviewing court first discerns whether an error occurred at trial, then asks whether the error affected the defendant's substantial rights.[21] The standard for the substantial rights determination depends on whether the error is of constitutional dimensions or simply consists of deviation from a statutory rule.[22] The rule for statutory harmless error is largely that set forth in Rule 52(a): if the error substantially impacted the trial, the error is reversible.[23]

The analysis for constitutional error is, in theory, more favorable to the defendant. In the seminal case, *Chapman v. California*,[24] the Supreme Court held that constitutional error could be held harmless only if the reviewing court believed "that it was harmless beyond a reasonable doubt."[25] The Court stated:

> [A constitutional] error affects substantial rights if it was "prejudicial," meaning that the error must have affected the outcome of the district court proceedings. In making this inquiry we do not become in effect a second jury to determine whether the defendant is guilty. Rather, we must determine whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.[26]

In sum, if a defendant raises his objection at trial, on review, he will benefit from a more lenient standard of review. Under harmless error review, the prosecution bears the burden of persuasion, and an error will be

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[18]*Id.*

[19]Ramirez-Burgos v. United States, 313 F.3d 23, 28 (1st Cir. 2002).

[20]28 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 652.03 (3d ed. 2002).

[21]*Id.*

[22]CHILDRESS & DAVIS, *supra* note 16, § 7.03; MOORE ET AL., *supra* note 20, § 652.03.

[23]FED. R. CRIM. P. 52(a).

[24]386 U.S. 18, 24 (1967).

[25]*Id.*; *accord* CHILDRESS & DAVIS, *supra* note 16, § 7.03.

[26]Ramirez-Burgos v. United States, 313 F.3d 23, 29 (1st Cir. 2002) (citations omitted).

reversed unless the reviewing court finds the error harmless beyond a reasonable doubt[27] and that the defendant's substantial rights were not affected by the error.[28]

B. Plain Error

When a criminal defendant has failed to object to an error at trial, he may nevertheless ask a reviewing court to reverse for plain error. "Under [plain error], before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'"[29] "If all three conditions are met, [a court] may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of the courts'."[30]

Unlike harmless error, the doctrine of plain error was first born from precedent, then codified. The doctrine already existed in 1868 when the Supreme Court restated the plain error principle: "[i]f a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."[31] The rule was originally rooted in the concept that courts possess the discretion to correct errors that would cause a wrong result at trial; essentially, plain error was noticed when it would have resulted in a miscarriage of justice.[32] The doctrine evolved, however, based on the fact that a defendant could forfeit a right by failing to raise an objection at trial.[33] Plain error review in every context, therefore, seeks to balance these two principles: A defendant can forfeit objections by failing to raise them below, but some errors have such a destructive effect on the trial process that they must be corrected to maintain faith in the courts and the justice system.[34]

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[27]*Chapman*, 386 U.S. at 24.

[28]Neder v. United States, 527 U.S. 1, 8 (1999) (citing *Chapman*, 386 U.S. at 24); FED. R. CRIM. P. 52(a).

[29]Johnson v. United States, 520 U.S. 461, 466–67 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

[30]*Id.* at 467 (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

[31]Wiborg v. United States, 163 U.S. 632, 658 (1896).

[32]*Id.*

[33]*Id.*

[34]*Id.*

Harmless error review focuses on the rights of the defendant and whether those rights were impaired as a result of the particular trial error. Plain error review—while incorporating harmless error review's requirement that any error must affect the defendant's substantial rights in order to be reversed—further focuses on the entire trial process, and concludes that if the error does not cause doubt as to the competence or legitimacy of the courts, it should not be reversed. The second difference is that under harmless error review, the prosecution bears the burden of persuasion on appeal,[35] while a defendant asking the court to reverse an unobjected-to error under the plain error standard bears the burden of establishing prejudice and that the error will affect the fairness, integrity, or reputation of the courts.[36]

C. Structural Error vs. Trial Error

The cases dealing with error are split along another axis as well. There are a set of constitutional errors that are considered harmful per se.[37] *Structural errors*, so named because they affect the integrity of the trial process itself, are reversible without any actual finding as to prejudice to the defendant's substantial rights. At last count, the Supreme Court has found that an error is structural, and therefore not subject to harmless or plain error analysis when there has been: (1) complete denial of counsel; (2) a biased trial judge; (3) racial discrimination in selection of a grand jury; (4) denial of self-representation at trial; (5) denial of public trial; or (6) a defective reasonable doubt instruction.[38]

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[35]United States v. Olano, 507 U.S. 725, 734 (1993).

[36]Ramirez-Burgos v. United States, 313 F.3d 23, 29 (1st Cir. 2002).

[37]In *Neder v. United States* the Court summarized:

> Rule 52(a) of the Federal Rules of Criminal Procedure, which governs direct appeals from judgments of conviction in the federal system, provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Although this Rule by its terms applies to *all* errors where a proper objection is made at trial, we have recognized a limited class of fundamental constitutional errors that "defy analysis by harmless error standards."

527 U.S. 1, 7 (1999) (citations omitted).

[38]*Neder*, 527 U.S. at 8; *see generally* Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggings, 465 U.S. 168 (1984) (denial of self representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Gideon v.

Trial errors are the set of errors, most commonly raised below and on appeal, that are best dealt with within the context of an otherwise fair trial. An erroneous jury instruction that does not accurately reflect the law, for example, is not deemed to be a structural error, but rather an error that may *possibly* be harmless, since it might not affect the outcome of the trial process.[39] Structural error, by contrast, could never be held harmless, since the error touches the structure of the trial and taints any outcome.

It is especially important to fit the two different dichotomies, harmless-plain error and structural-trial error, together. When an error is *structural*, prejudice to the defendant's substantial rights is presumed. Therefore, a structural error is reversed automatically under harmless error review and is reversed under plain error review if the structural error also affects the reputation of judicial proceedings. However, if the error is *trial* error, then the court will proceed to determine whether the substantial rights of the defendant were in fact harmed. Thus, the determination of whether an error is structural or trial error only settles whether the substantial rights portion of the error analysis—common to both plain error and harmless error review—is satisfied.

The failure to present each essential element of the crime to the jury is especially difficult to characterize in terms of structural or trial error. A jury is the most important structural component of a trial; certainly the total denial of a trial by jury would constitute a structural error that would be per se reversible on appeal. Challenges to the proper composition of the jury are also deemed structural.[40] A directed verdict in favor of the prosecution would, similarly, deny the defendant trial by jury altogether and, therefore, is also structural. However there are a set of errors, comprised of erroneous instructions or failures to instruct the jury, that hamper the jury in performing its role, but are not necessarily treated as structural error. The Court has engaged in a case-by-case analysis of these errors of instruction or omission, seeking to determine whether in such cases the error can be fairly dealt with within the context of the trial, or whether the effect of the error on the jury was so destructive that the defendant was effectively denied a jury trial altogether.

Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge).

[39]*See* Pope v. Illinois, 481 U.S. 497, 503 (1987) (holding a misstatement of an element of an offense is subject to harmless error review).

[40]*See* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (racial discrimination in jury composition is structural error).

D. Sullivan v. Louisiana: *Deficient Instructions and Structural Jury Error*

In 1993, the Supreme Court decided *Sullivan v. Louisiana* to settle whether an error affecting the jury's deliberations constituted structural error or trial error.[41] The Court had previously decided *Vasquez v. Hillery*, holding racial discrimination in the selection of a grand jury was per se reversible.[42] However, *Vasquez* turned on a right to have a properly constituted jury, something that was rightly deemed clearly structural.[43] In contrast, *Sullivan* considered whether a district court's error in submitting an erroneous jury instruction could so impact the jury's deliberations as to essentially deprive the defendant of a jury trial.[44]

Sullivan had been convicted of first-degree murder, committed in the course of an armed robbery of a New Orleans bar.[45] The trial judge instructed the jury on reasonable doubt using an instruction that had been previously declared unconstitutional by the Court because it could allow a court to convict "based on a degree of proof below that required by the Due Process Clause."[46] The government conceded that the instruction was erroneous but argued that the error was harmless.[47]

Justice Scalia, writing for the Court, stated that the Sixth Amendment guarantee of a jury trial in all criminal prosecutions "includes . . . as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"[48] He continued: "[C]ertain constitutional errors, no less than other errors, may have been harmless in

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[41] 508 U.S. 275, 281 (1993).

[42] 474 U.S. at 263–64.

[43] *Id.*

[44] *Sullivan*, 508 U.S. at 281.

[45] *Id.* at 276.

[46] Cage v. Louisiana, 498 U.S. 39, 41 (1990). In *Cage* the trial court gave an instruction on reasonable doubt that included such phrases as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and that the jury must have a "moral certainty" in order to acquit. Relying on *In re Winship*, 397 U.S. 358, 363–64 (1970), *Cage* held that such an instruction was unconstitutional. "It [is] clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.*

[47] *Sullivan*, 508 U.S. at 281.

[48] *Id.* at 277. The Court noted that this was the source of the inability of a judge to direct a verdict in favor of the prosecution. *Id.* (citing Sparf v. United States, 156 U.S. 51, 105–06 (1895)).

terms of their effect on the fact-finding process at trial."[49] Justice Scalia determined that the failure to instruct a jury so as to deprive it of its role in the trial required a different result because "there has been no jury verdict within the meaning of the Sixth Amendment."[50] "The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough."[51]

E. United States v. Olano*: Applying Harmless Error to Jury Error*

Despite the wide-reaching nature of its logic, *Sullivan* was qualified one month later by the Supreme Court's next decision considering jury error, *United States v. Olano*.[52] *Olano* applied plain error review to affirm despite conceded jury error, and in so doing established the modern standard for plain error review.[53]

In *Olano*, petitioners had been convicted on multiple counts for their participation in an illegal loan kickback scheme.[54] Both parties agreed that fourteen jurors would hear the case, but that two alternates would be selected (and removed from deliberations) before deliberations began.[55] Since the eventual alternate jurors had listened to the trial *qua* jurors, the court suggested they be allowed to observe, but not participate in, the jury deliberations.[56] The defendant at first objected, but later relented, and the

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[49] *Id.* at 279 (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)) (quotations omitted).

[50] *Id.* at 280.

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279.

[51] *Id.* at 280.

[52] 507 U.S. 725, 741 (1993).

[53] *Id.*

[54] *Id.* at 727.

[55] *Id.*

[56] *Id.* at 727–28.

court allowed the alternate jurors to attend the jury deliberations.[57] During deliberations, one of the alternate jurors was excused, but the other attended the deliberations until the end.[58]

The *Olano* Court determined this was both error (defined by the Court as a deviation from an unwaived legal rule) and plain (defined by the Court as "clear" or "obvious") then proceeded to the third step of its analysis, that of substantial rights.[59] The Court determined that an error affected substantial rights if it "affected the outcome of the district court proceedings."[60]

The *Olano* Court first acknowledged that a remedy under plain error review was discretionary.[61] The Court then proceeded to establish a rule for when that discretion should be exercised: "The court of appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[62] The circuits have adopted the *Olano* framework, with minor glosses.[63]

Olano set forth the now-familiar requirements for plain error review: to recognize plain error, the defendant must show (1) that there was error at trial; (2) the error was plain; (3) the error affected the defendant's substantial rights; and (4) the error seriously affected the fairness, integrity,

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[57] *Id.*

[58] *Id.* at 729.

[59] *Id.* at 733.

[60] *Id.* at 734.

[61] *Id.* at 735.

[62] *Id.* at 736 (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).

[63] United States v. Godwin, 272 F.3d 659, 672–73 (4th Cir. 2001) (citing *Olano*, 507 U.S. at 732) (citations omitted).

> It was not until 1993, in *United States v. Olano* that the Supreme Court clarified the limitations on appellate authority to correct forfeited error. Under *Olano*, we may not address a defendant's forfeited claim unless three requirements are met: (1) there is error, i.e., deviation from a legal rule, (2) the error is plain, meaning clear or obvious; and (3) the error affects substantial rights, actually changing the outcome of the trial proceedings. Even when these three prongs of *Olano* are satisfied, a court of appeals should not intervene unless "the error seriously affects the fairness, integrity or public reputation of judicial proceedings."

Id. (citations omitted).

or public reputation of judicial proceedings.[64] The decision rejected the principle that plain errors may only be remedied to prevent miscarriages of justice, which the Court defined as the conviction of a defendant who is actually innocent.[65]

The Court decided that no harm resulted from allowing the extra juror to observe the proceedings.[66] "Respondents have made no specific showing that the alternate jurors in this case either participated in the jury's deliberations or 'chilled' deliberations by the regular jurors . . . . In sum, respondents have not met their burden of showing prejudice under 52(b)."[67] Because the Court determined that the defendant had not met the burden of showing substantial prejudice, the majority did not apply the *public reputation* portion of the test, leaving that analysis for a later date.[68]

F. United States v. Johnson

The Supreme Court reiterated and polished its plain error standard as applied to jury error in *United States v. Johnson*.[69] *Johnson* considered an appeal from a conviction for perjury.[70] At trial, the district court instructed the jury that the judge would decide whether Johnson's misrepresentations were sufficiently material to support conviction.[71] Johnson was convicted and sentenced to thirty months in prison.[72] Johnson appealed,[73] but before her appeal could be heard, the Supreme Court held, in *United States v. Gaudin,* that the element of materiality in a perjury charge must be submitted to the jury.[74] On appeal, Johnson claimed that the failure to submit the element of materiality to the jury was per se reversible as structural error.[75]

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[64]*Olano*, 507 U.S. at 732.

[65]*Id.* at 736 ("[W]e have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.").

[66]*Id.* at 737.

[67]*Id.* at 739–41.

[68]*Id.* at 741.

[69]520 U.S. 461, 468–70 (1997).

[70]*Id.* at 463.

[71]*Id.* at 464. This was in keeping with contemporaneous circuit precedent. *See* United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983).

[72]*Johnson*, 520 U.S. at 464.

[73]*Id.*

[74]515 U.S. 506, 523 (1995).

[75]*Johnson*, 520 U.S. at 466.

The Court disagreed. Applying the *Olano* analysis, the Court found that because Johnson had not raised the issue below,[76] plain error review was applicable.[77] The Court expressed doubt as to whether the failure to submit an element of a crime to a jury was "structural."[78] While recognizing that the logic of *Sullivan* was applicable because, as in *Sullivan*, there would be no way to truly determine what a jury would have done if properly charged, the Court reasoned that the closer analogy was to an improper jury instruction: "The failure to submit materiality to the jury, as in this case, can just as easily be analogized to improperly instructing the jury on an element of the offense, . . . an error which is subject to harmless-error analysis."[79]

However, the Court reserved judgment on the question of whether the failure to submit an element of a crime was structural, such that prejudice to the defendant would be presumed, and instead concentrated on the fourth element of the *Olano* plain error test: the effect of failing to correct the error on the public reputation of the courts.[80] *Johnson* suggested a shorthand standard for the *public reputation* portion of the *Olano* test. "[T]he evidence supporting materiality was 'overwhelming.' Materiality was essentially uncontroverted at trial and has remained so on appeal."[81] Therefore the failure to instruct on the issue of materiality could not affect

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[76]Because, of course, the decision upon which it relied did not then exist.

[77]*Johnson*, 520 U.S. at 467.

[78]*Id.*

[79]*Id.* at 469.

> It is by no means clear that the error here fits within this limited class of cases [structural error]. *Sullivan v. Louisiana*, the case most closely on point, held that the erroneous definition of reasonable doubt vitiated all of the jury's findings because one could only speculate what a properly charged jury might have done.

Id.

[80]*Id.* at 469–70.

> But we need not decide that question because, even assuming that the failure to submit materiality to the jury affected substantial rights, it does not meet the final requirement of *Olano*. When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error "seriously affects the fairness, integrity, or public reputation of judicial proceedings" before it may exercise its discretion to correct the error.

Id. (citations omitted).

[81]*Id.* at 470.

the public reputation of the courts. Although at the time this language merely explained the Court's decision to find that the error at trial did not affect the reputation for fairness or integrity of the courts, these words in *Johnson* took on a life of their own in later cases and became the core analysis by which courts now determine questions of plain error.

G. Neder v. United States

Sullivan, *Olano*, and *Johnson* set the stage for the Supreme Court's decision in *Neder*, in which the Supreme Court held that the failure to submit an element of a crime to the jury was not *structural*, and therefore was subject to harmless error review.[82] Ellis Neder was a Jacksonville attorney who financed real estate transactions with fraudulently obtained bank loans.[83] He was indicted for mail fraud, in violation of 18 U.S.C. § 1341, wire fraud § 1343, bank fraud § 1344, and filing a false income tax return, in violation of 26 U.S.C. § 7206(1).[84] At trial, the court instructed the jury to disregard the "materiality" of Neder's statements when deciding the tax offenses because, the court determined, materiality was not a question for the jury to decide.[85]

Neder held first that because the omission of an element would not "*always* render a trial unfair," the error was not structural.[86] The Court stated:

> We have recognized that "most constitutional errors can be harmless." If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis . . . . The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review.[87]

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[82]Neder v. United States, 527 U.S. 1, 8 (1999).

[83]*Id.* at 4.

[84]*Id.* at 6.

[85]*Id.*

[86]*Id.* at 9.

[87]*Id.* at 8. This holding continues to draw significant criticism, especially in light of the fact that the decision flies in the face of *Sullivan* without overruling it. *See* Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in* Neder v. United States, 28 AM. J. CRIM. L. 229, 232 (2001).

The Court in *Neder* next chose a standard by which to measure whether the error was harmless. Two tests, one subjective and one objective, had emerged in the circuits for determining harmless error. The subjective test, based on *Chapman*, looked to whether or not the error impacted the jury's deliberations.[88] For example, a court might be required to speculate as to whether or not a given piece of inadmissible evidence figured into the jury's decision to convict.[89] The objective test considered whether or not the evidence in favor of conviction was overwhelming such that no rational jury could have failed to convict the defendant.[90] The tests were elided by some circuits; the D.C. Circuit used the *effect-on-the-jury* test for constitutional error, while using the *overwhelming evidence* standard for statutory error.[91]

Neder followed the general pattern of twentieth century jurisprudence, and adopted the objective test, for several reasons.[92] First, the effect-on-the-jury standard requires a counterfactual speculation about the actual jury deliberations that courts dislike.[93] Second, courts are overburdened, and this problem is exacerbated by the subjective test because it is more complex and lends itself less to the quick cleaning of dockets bloated by appeals which must raise every conceivable claim in the first instance.[94] *Neder* therefore picked out and polished the language in *Johnson* regarding overwhelming and uncontroverted evidence:

> In *Neder*, the Court applied a harmless error analysis to the failure to instruct on an element of a crime. This case, more than any other in a series of decisions expanding the role of harmless error analysis, severs the doctrine from a principled mooring. Harmless error analysis depends on the existence of a verdict of guilty beyond a reasonable doubt on the elements of the crime. The appellate court must assess the possibility that the error affected the jury's verdict. If there is no verdict on an element of the crime, it is not possible to conclude that the error did not affect the verdict.

Id.

[88]Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 KAN. L. REV. 309, 331 (2002).

[89]*Id.* at 310.

[90]*Id.* at 311.

[91]*Id.* at 326–27.

[92]*Neder*, 527 U.S. at 9 (1999).

[93]Cooper, *supra* note 88, at 333.

[94]Cooper, *supra* note 88, at 333.

> Although reserving [in *Johnson*] the question whether the omission of an element *ipso facto* "affects substantial rights," we concluded that the error did not warrant correction in light of "overwhelming" and "uncontroverted" evidence supporting materiality. Based on this evidence, we explained, the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[95]

Neder chose to apply this language in its harmless error analysis, despite the fact that the reasoning of *Johnson* applied to the public reputation portion of the plain error test, which is not a part of harmless error review.[96] The Court noted: "We believe that where an omitted element is supported by uncontroverted evidence . . . this approach reaches an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made.'"[97]

In sum, *Neder* had three holdings of consequence. *Neder* determined that the failure to submit an essential element of a crime to the jury was trial error, subject to harmless or plain error review as the presence or absence of trial objections below dictate.[98] *Neder* also applied *Johnson's* overwhelming and uncontroverted language—developed in the plain error context—to harmless error's review of a defendant's substantial rights.[99] Neder finally determined that an objective test—the overwhelming and uncontroverted test—was superior to the *actual impact on the jury* method of determining whether the defendant's substantial rights had been prejudiced.[100]

With *Neder* and *Johnson*, the *overwhelming and essentially uncontroverted* test reached its current level of extraordinarily broad applicability. *Neder* used the overwhelming and uncontroverted test as an

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[95]*Neder*, 527 U.S. at 9. *Neder* drew its "overwhelming and uncontroverted" rule from *Olano*, a plain error case. The "overwhelming and uncontroverted" standard for trial error may therefore be applied in both plain and harmless error settings. However, it must be differently applied in keeping with the different concerns of each type of review. United States v. Olano, 507 U.S. 725, 736 (1993).

[96]*Neder*, 527 U.S. at 18.

[97]*Id.* (citations omitted).

[98]*Id.* at 9.

[99]*Id.*

[100]*Id.* at 18.

objective standard to review the impact a decision had on the jury.[101] *Johnson* used it to measure the extent to which failure to correct the error would damage the public reputation of the courts.[102] Both cases paved the way for a new regime of review for error in the most commonly appealed issues before modern courts of appeals: whether a sentencing factor that increases a defendant's sentence is an *essential element* to be charged to the jury, and whether the failure to submit that element to the jury may be reversed on appeal.

III. THE *APPRENDI* DECISION AND THE FEDERAL DRUG REGIME

A. Apprendi v. New Jersey: *Sentencing Factors and Essential Elements of a Crime*

Sentencing factors are factual findings—such as brandishing a firearm during the commission of a robbery, or possessing certain large amounts of drugs—not included in the criminal statute itself, that affect the sentence that may be imposed on the defendant upon conviction.[103] For example, though a defendant is found guilty of robbery, he may be subject to extra years in prison if he used an automatic weapon in the commission of the offense. Similarly, a defendant may be guilty of possessing drugs if he possessed any measurable amount of a controlled substance, but he will be subject to more time in prison, the more drugs he possessed.

Such sentencing factors have not historically been subject to the *Winship* rule that every essential element of the crime charged must be proven to the jury beyond a reasonable doubt.[104] Sentencing factors were traditionally proven only to the judge—at a sentencing hearing following conviction—subject to a preponderance of the evidence standard. *Apprendi* was a vastly important decision because it recognized that some sentencing factors were in fact essential elements of the crime charged that must be submitted to the jury for proof beyond a reasonable doubt.[105]

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[101] *Id.*

[102] *Id.*

[103] *See* McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (describing sentencing factors as distinct from the essential elements of a crime).

[104] *In re* Winship, 397 U.S. 358, 361 (1970).

[105] Apprendi v. New Jersey, 530 U.S. 466, 470 (2000).

B. *Facts of* Apprendi

In the early morning of December 22, 1994, Charles Apprendi fired a .22-caliber handgun into a house occupied by new African-American owners.[106] He was upset because they had moved into the previously all-white neighborhood.[107] When questioned, Charles Apprendi told police that "because [the homeowners were] black in color he [did] not want them to live in the neighborhood."[108]

Apprendi then agreed to a plea bargain, in which he pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of third-degree unlawful possession of an antipersonnel bomb. [109] However, the prosecution reserved the right to request that the sentencing court impose an enhanced sentence under New Jersey's hate crime law,[110] which allowed judges to impose additional terms of imprisonment when a crime was committed out of racial bias.[111] The combined maximum sentence for the underlying weapons offenses was twenty years—ten years per weapons conviction.[112] This maximum could be increased to thirty years if the judge determined that an enhancement for racial bias was appropriate.[113]

At an evidentiary hearing held to determine the purpose of the shooting, the prosecutor presented the testimony of the interviewing officer, who described Apprendi's statement to police with regard to Apprendi's racial bias.[114] Apprendi contested the officer's description of his statement to police, and presented witnesses to testify that he did not have a reputation for racial bias.[115] Apprendi argued that he fired the shots because he had been drunk, and not because of racial animus.[116]

The sentencing judge determined that the officer's testimony was more believable, and therefore determined, based on a preponderance of the

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[106] *Id.* at 469.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 469–70.
[110] *Id.* at 470.
[111] N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (repealed 2001).
[112] *Apprendi*, 530 U.S. at 469–70.
[113] *Id.* at 468–70.
[114] *Id.* at 470–71.
[115] *Id.*
[116] *Id.* at 471.

evidence standard, that a sentencing enhancement under the hate-crime law was appropriate.[117] The judge then imposed a twelve year sentence on one of the firearm counts.[118] The judge imposed shorter, concurrent sentences on the other two counts.[119]

On appeal, the Supreme Court of New Jersey affirmed *Apprendi*'s conviction, stating that "[t]here is . . . no litmus test or unerring 'constitutional calculus' for determining what is an essential element of a crime."[120] The court relied on United States Supreme Court precedent, holding that "linking the severity of punishment to the presence or absence of an identified fact [does] not automatically make that fact an element."[121]

The United States Supreme Court granted certiorari and reversed.[122] In so doing, the Court established precisely the "litmus test" that the New Jersey Supreme Court lacked.[123] *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[124] The Court further noted: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."[125]

C. Apprendi *and the Federal Drug Sentencing Regime*

Apprendi was not a drug case. However, *Apprendi* is most often applied in the federal drug sentencing context, where increases in the drug amount correspond to increased ranges of penalties. The federal drug sentencing

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[117] *Id.*

[118] *Id.*

[119] *Id.* This fact in *Apprendi*, which differs from nearly every other case successfully brought under the *Apprendi* rule, begins one of the most difficult aspects of the *Apprendi* analysis: whether there has been an *Apprendi* violation when the sentence *actually imposed* was shorter than the maximum sentence involved.

[120] State v. Apprendi, 731 A.2d 485, 491 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000).

[121] *Id.* at 491–92 (citing McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986)) (quotations omitted).

[122] Apprendi v. New Jersey, 530 U.S. 466, 470 (2000).

[123] *Id* at 488.

[124] *Id.* at 490.

[125] *Id.* (citing Jones v. United States, 526 U.S. 227, 252–53 (1999)).

statutes are 21 U.S.C. § 841(b)(1)(A), (B), and (C).[126] Each sentencing category contains its own range of applicable sentences and its own requirements for the amount of drugs required to trigger the application of that sentence. For example, section 841(b)(1)(C), the lowest echelon, carries a sentencing range of zero to twenty years.[127] Section 841(b)(1)(B) has a sentencing range from five to forty,[128] and section 841(b)(1)(A) mandates a sentence from ten years to life.[129] Each one of the sentencing echelons in the scheme requires a threshold drug amount. So, for example, a defendant found with any detectable amount of crack cocaine can be sentenced under section 841(b)(1)(C) to zero to twenty years in prison; a finding of five grams of crack cocaine suffices for a sentence, under section 841(b)(1)(B), of five to forty years and a finding of fifty grams of crack cocaine suffices for a sentence, under section 841(b)(1)(A), of ten years to life. Although very small amounts of crack cocaine suffice for the highest section 841 sentence bracket, more substantial amounts are required for other drugs.

So, in the most common set of cases (drug cases sentenced under the federal 21 U.S.C. § 841 statutes) a court's choice as to whether to apply *Apprendi* or not causes a wide difference in applicable sentencing ranges. A sentence under the minimum range, which courts can employ in the absence of a jury finding of fact as to drug amount, is zero to twenty years.[130] If the *Apprendi* error is deemed not reversible either by application of the harmless error or plain error doctrines, sentences under 21 U.S.C. § 841(b)(1)(A) range from ten years to life.[131]

IV. DEVELOPING *APPRENDI*: SENTENCING FACTORS AND SENTENCING GUIDELINES

A. *Treatment of Sentencing Factors in* Ring *and* Harris

Two more decisions, *Ring v. Arizona* and *Harris v. United States*, handed down by the Supreme Court on June 24, 2002, should figure into

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[126] 21 U.S.C. § 841(b)(1)(A)-(C) (1999 & Supp. 2003).

[127] § 841(b)(1)(C).

[128] § 841(b)(1)(B).

[129] § 841(b)(1)(A).

[130] § 841(b)(1)(C).

[131] § 841(b)(1)(A).

any analysis of current trends in the interpretation of *Apprendi*.[132] First, the cases describe in more—and sometimes opposing—detail which sentencing factors should be considered essential elements of a crime under *Apprendi*. Second, the cases open up a broad spectrum of important cases, including extremely highly-counseled and hotly contested death penalty cases, to review under *Apprendi*.

1. *Ring v. Arizona:* Death Sentence Aggravating Factors

In *Ring v. Arizona*, the Supreme Court applied *Apprendi* to aggravating factors in death penalty cases.[133] The Supreme Court analyzed Arizona's death penalty system. Arizona's murder statute condemned those found guilty of murder to death or life imprisonment.[134] However, the Supreme Court had previously held that the death penalty could not be constitutionally imposed without some finding of aggravating factors.[135] Under Arizona's death penalty scheme, once the jury had convicted the defendant of first degree murder, a judge made the required findings of aggravating factors as part of the sentencing proceedings.[136] The Supreme

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[132]*See* Ring v. Arizona, 536 U.S. 584 (2002); Harris v. United States, 536 U.S. 545 (2002).

[133]*Ring*, 536 U.S. at 588.

[134]*Id.* at 591.

[135]Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding the death sentence may only be imposed within the confines of the Eighth Amendment when applied consistently).

[136]ARIZ. REV. STAT. ANN. § 13-703(G), *amended by* S.B. 1267, 46th Leg., 1st Reg. Sess. (Ariz. 2003). This statute listed ten aggravating circumstances to be determined by a judge before the death sentence could be imposed:

> (1) The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> (2) The defendant was previously convicted of a serious offense, whether preparatory or completed.
>
> (3) In the commission of the offense, the defendant knowingly created a grave risk of death to another person or persons in addition to the persons murdered during the commission of the offense.
>
> (4) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
>
> (5) The defendant committed the offense as consideration for the receipt, or

Court had, only ten years earlier, confirmed the constitutionality of the Arizona death penalty scheme in *Walton v. Arizona*.[137]

Ring found the Arizona death penalty scheme unconstitutional, taking the extraordinary step of overruling *Walton*, a fairly recent decision.[138] The Court found the aggravating factors considered by the judge subjected the defendant to greater penalties than would have been possible from the jury verdict alone.[139] Arizona argued that the original statute set forth all of the elements required to convict the defendant of the ultimate penalty: the statute authorized death or life in prison for first degree murder.[140] Once a

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in expectation of the receipt, of anything of pecuniary value.

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

(7) The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

(8) The defendant has been convicted of one or more homicides, as defined in § 13-1101, which were committed during the commission of the offense.

(9) The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

(10) The murdered person was an on duty peace officer who was killed in the course of performing his official duties, and the defendant knew, or should have known, that the murdered person was a peace officer.

Id.

[137]497 U.S. 639, 655 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002). "In *Walton* . . . this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." *Ring*, 536 U.S. at 588.

[138]*Ring*, 536 U.S. at 589.

[139]*Id.* Although the Arizona statute would have permitted such a result on its face, such a system would be unconstitutional under *Furman*. As a result, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Id.* at 597.

[140]*Id.* at 603–04.

jury had convicted the defendant of first degree murder, Arizona reasoned, he was subject to the death sentence.[141]

However, the Supreme Court pierced the formal veil of the statute and looked to the actual effect of Arizona's death penalty scheme.[142] Critical to *Ring's* holding was the belief that *Apprendi* governs "even if the State characterizes the additional findings made by the judge as 'sentencing factors.'"[143] *Ring* concluded: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[144] Under Arizona's death penalty scheme, the judge was to make a factual determination, the result of which was life or death for the defendant.[145] The Court found that, as a practical matter, the judge's factual determination subjected the defendant to a greater range of punishment, and was thus barred by *Apprendi*.[146]

2. *Harris v. United States:* The Rebirth of Sentencing Factors

In *Harris v. United States*, released the same day as *Ring*, a different majority of the Supreme Court relied on the distinction between a sentencing factor and an element of a crime in the context of determining whether a mandatory *minimum* sentence was unconstitutional under *Apprendi*.[147] *Harris* reviewed the sentencing framework under which criminal defendants received enhanced prison sentences for possession of a firearm in connection with a drug crime.[148] Under that framework, a defendant was subject to certain minimum sentences for various forms of conduct with the firearm.[149] Simple possession of the firearm exposes a defendant to five years in addition to the sentence for the underlying drug crime.[150] Brandishing the firearm earns a defendant a minimum of seven

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[141] *Id.* at 604–05.

[142] *Id.* at 589.

[143] *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 492 (2000)).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] 536 U.S. 545, 549 (2002).

[148] *Id.* at 550–51; *see generally* 18 U.S.C. § 924(c)(1)-(3) (1996 & Supp. 2003).

[149] *Harris*, 536 U.S. at 551.

[150] 18 U.S.C. § 924(c)(1).

years.[151] Finally, discharge of the firearm subjects a defendant to a mandatory minimum sentence of ten years.[152]

The Court ruled that because the mandatory minimums were sentencing factors, rather than elements of the offense, the factual determination of the judge did not violate *Apprendi*.[153] *Harris* held that a given factual determination may be designated by the legislature as a sentencing factor or an element of the offense.[154] *Harris* indicated that the legislative designation must stand unless the sentencing factor would permit a court to sentence the defendant to a penalty more stringent than that authorized by the statute of conviction.[155] Under 18 U.S.C. § 924(c), the judge had the ability to sentence defendants to more than the mandatory minimums.[156] Therefore, in making a finding of fact subjecting a defendant to mandatory minimums, the judge was merely making a sentencing determination within the range already approved by the jury's conviction.[157]

Ring and *Harris* conflict to a significant degree.[158] Both considered single-sentence statutes that authorized, at first blush, the entire available range of punishment. The factual determination of the judge subjected each defendant to a higher penalty than he would have been subject to on the jury's determination alone.[159] *Harris* treated that element as a sentencing factor.[160] *Ring* treated it as an element of the crime.[161] As courts contend with *Apprendi* claims in new areas of the law, they must decide which of these approaches to take: whether to pierce the veil of the statute to determine that a sentencing factor is actually an element of the crime, or to take the legislature at its word and decide that the factual determination is actually a sentencing factor.

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[151] *Id.* § 924(c)(2).

[152] *Id.* § 924(c)(3).

[153] *Harris*, 536 U.S. at 565.

[154] *Id.*

[155] *Id.* at 554.

[156] 18 U.S.C. § 924(c).

[157] *Harris*, 536 U.S. at 565.

[158] This is no moral failing on the part of the Court, rather the result of a multi-member decisionmaker. For an excellent description of the multi-peakedness of preference that generated opposite outcomes in *Harris* and *Ring*, see Andrew M. Levine, *The Confounding Boundaries of "Apprendi-Land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377 (2002).

[159] *Harris*, 536 U.S. at 554.

[160] *Id.*

[161] Ring v. Arizona, 536 U.S. 584, 588 (2002).

B. *Application of* Apprendi *to the Sentencing Guidelines*

The single greatest set of sentencing factors is the Federal Sentencing Guidelines. Unsurprisingly, courts and academics have begun to debate whether *Apprendi* should apply to the Sentencing Guidelines.[162] There is, perhaps, a legitimate question as to whether the *logic* of *Apprendi* (that decisions of fact increasing the punishment to which the defendant is subject implicate his right to a jury trial) could be applied to the Guidelines.[163] However, as a matter of current law, it is clear both from *Apprendi* and the Guidelines themselves that *Apprendi* cannot apply.

The issue is most often seen when defendants challenge role enhancements. Under the Guidelines, a sentence may be enhanced several levels for an aggravating, supervisory, or leadership role in the offense.[164] Defendants then challenge the enhancements as violating *Apprendi*, arguing that they are factual determinations that enhance their exposure to heightened sentences.

The only case to affirmatively hold that *Apprendi* applies to the sentencing guidelines is a District of Columbia decision, *United States v. Fields*.[165] In this case, a leadership role enhancement was applied to a defendant who had played a prominent role in violent gang-related activities.[166] *Fields* held: "Because the fact of [sic] leadership role may increase a defendant's sentence beyond the prescribed statutory maximum, *Apprendi* applies. Accordingly, the issue of leadership must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt."[167]

Every circuit court opinion to address the question has disagreed with *Fields*.[168] However, the majority of courts inadequately explain why

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[162]*See, e.g.*, Levine, *supra* note 158, at 380–81.

[163]*See* Levine, *supra* note 158, at 427–447, arguing that *Apprendi* ought to apply to any factual determination that "has the effect, in real terms, of increasing the maximum or minimum punishment beyond an otherwise acceptable range . . . must be submitted to a jury and proved beyond a reasonable doubt" including guidelines determinations.

[164]U.S. SENTENCING GUIDELINES MANUAL § 3B1.1-4 (2002).

[165]242 F.3d 393, 398 (D.C. Cir. 2001). This case has since been reheard and reversed to the extent that it applies *Apprendi* to the Guidelines. United States v. Fields, 251 F.3d 1041, 104–44 (D.C. Cir. 2001).

[166]*Fields*, 242 F.3d at 395.

[167]*Id.* at 398.

[168]*See, e.g.*, United States v. Gallego, 247 F.3d 1191, 1201 (11th Cir. 2001); United States v. Jackson, 240 F.3d 1245, 1249 (10th Cir. 2001).

Apprendi exempts the Guidelines. They generally rely on an *Apprendi* footnote, which states: "The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held."[169] Of course, this footnote does not definitively establish that *Apprendi* does not apply to Guidelines sentencing factors, it merely reserves the question. Nevertheless, courts act as if the *Apprendi* dicta did exempt the Guidelines from *Apprendi* analysis: "Because we have held *Apprendi* does not apply to relevant conduct under the Guidelines, we hold that there was no *Apprendi* error in the district court's failure to require the jury to determine whether [the defendant] was a leader or organizer."[170] Similarly, in *United States v. Jackson*, the Tenth Circuit stated:

> Citing Justice O'Connor's dissent, [appellant] argues *Apprendi* overrules the Federal Sentencing Guidelines, including, specifically, those "portions of the Sentencing Guidelines that allow a four level increase for being a leader or organizer." This argument, too, lacks merit. A dissenting opinion obviously does not constitute binding precedent. More important, the Supreme Court majority "specifically avoided disrupting the use or the adequacy of the Sentencing Guidelines" by affirmatively stating in *Apprendi* "'the Guidelines are, of course, not before the Court.'"[171]

Both as a matter of precedent and logic, courts should not extend *Apprendi* to the Guidelines, but for a different reason than that expressed by these courts.[172] The Guidelines, by their own language, cannot allow or require the imposition of a sentence in excess of the statutory maximum.[173] Section 5G1.1(a) of the Sentencing Guidelines indicates that "where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."[174] In other words, the statutory maximum

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[169]Apprendi v. New Jersey, 530 U.S. 466, 497 n.21 (2000).

[170]*Gallego*, 247 F.3d at 1201 (citations omitted).

[171]240 F.3d 1245, 1249 (10th Cir. 2001); *accord* United States v. Sullivan, 255 F.3d 1256, 1264–65 (10th Cir. 2001) (holding that *Apprendi* does not apply to the sentencing guidelines insofar as they increase the penalty under the statutory maximum)

[172]*Compare* Andrew M. Levine, *supra* note 158, at 382 for a cogent opposition to this view.

[173]U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 (2002).

[174]*Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 cmt.

trumps the Guidelines in cases of conflict. And the rule of *Apprendi* limits itself to those cases in which the factual determination subjects the defendant to a penalty above the maximum authorized by the statute of conviction.[175] No determination under the Guidelines could ever permit a court to exceed the statutory maximum of the statute of conviction. Courts should rely less, therefore, on the *Apprendi* dicta preserving the Guidelines for the time being, and more on the rule of *Apprendi* and the Guidelines themselves in resolving this issue.

However, this conclusion does not resolve all questions in the application of *Apprendi* to the Guidelines, and it is likely courts will still have to review Guidelines cases for *Apprendi* error. For example, in the Fourth Circuit's recent decision in *United States v. Shaw* the court considered whether the statutory maximum or Guidelines sentence should serve as the point of departure when the court decided to depart downward from the Guidelines.[176]

In *Shaw*, the defendant entered into a plea bargain for drug conspiracy.[177] The court calculated Shaw's Guidelines sentencing range at 360 months to life.[178] The government entered a motion for downward departure under Guidelines section 5k1.1 for substantial assistance provided by Shaw to the government in its investigation and prosecution of other members of the drug trafficking ring.[179] The court granted the motion, and departed downward from the 360 month guidelines sentence to the 240 month maximum that Shaw could be sentenced for under 21 U.S.C. § 841(b)(1)(C).[180] The end result was that the motion for downward departure, although granted, had no effect on Shaw's actual sentence.[181]

> This section describes how the statutorily authorized maximum sentence . . . may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines . . . is 48 months.

Id.

[175] Apprendi v. New Jersey, 530 U.S. 466, 487 (2000).

[176] 313 F.3d 219, 223–24 (4th Cir. 2002).

[177] *Id.* at 222–23.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

Shaw then appealed, arguing that *Apprendi* required the court to use the statutory maximum as the point of departure for the reduction in sentence for substantial assistance.[182]

The panel agreed, but did not remand the case for re-sentencing because Shaw had not established plain error.[183] The court agreed that section 5G1.1 operated such that the statutory maximum of 240 months for a drug conviction where drug amounts had not been submitted to the jury became the Guidelines sentence.[184] Nevertheless, the circuit relied on *Cotton* to affirm, because Shaw had pleaded guilty and had allocuted (essentially confessed at sentencing) to the requisite drug amounts.[185]

Shaw recognized (as few cases have yet to date) that the Guidelines themselves prohibit a sentence above the statutory maximum. But the case nevertheless chose to categorize the failure of the district court to select the statutory maximum as the starting point from which a downward departure might begin as *Apprendi* error.[186] This is probably incorrect. First, the final sentence in the case was twenty years, the statutory maximum to which a court may sentence a defendant without any jury determination whatsoever.[187] Phrased slightly differently, *Shaw* was a challenge by a defendant who (1) brought an *Apprendi* challenge regarding his twenty-year sentence and (2) challenged the failure of the court to grant a downward departure.[188] The case involved no *Apprendi* error because a sentence of twenty years does not implicate *Apprendi* and because a court of appeals may not hear an appeal of a district court's failure to depart downward.[189] In other words, it was not clear that analysis for error was required at all.

As *Shaw* makes clear, although the Guidelines themselves are not directly subject to *Apprendi*, courts will still need to review the intersection

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[182]*Id.*

[183]*Id.* at 223–24.

[184]*Id.* ("We agree with Shaw that 240 months was the applicable guideline sentencing range by operation of § 5G1.1(a), and that, as a result, 240 months should have served as the starting point for any downward departure the district court exercised its discretion to grant.")

[185]See discussion of the application of *Cotton* to *Apprendi* error in the circuits *infra* Part VI.A. at 926–30.

[186]*Shaw*, 313 F.3d at 233.

[187]*See, e.g.*, United States v. Luciano, 311 F.3d 146, 149 (2d Cir. 2002) (affirming sentence of less than twenty years, because under 21 U.S.C. § 841(b)(1)(C), a court may impose a sentence of up to twenty years without a jury finding as to drug amounts).

[188]*Shaw*, 313 F.3d at 222–23.

[189]*See, e.g.*, *Luciano*, 311 F.3d at 149.

between statutes and the Guidelines for *Apprendi* error.[190] And, as in *Shaw*, a clear understanding of the nature of *Apprendi* error review may save a court unnecessary analysis. Finally, since the Guidelines apply to nearly all criminal convictions, as courts continue to expand *Apprendi* analysis to new areas, concerns about how those statutes interact with the Guidelines will provide fresh challenges to the courts of appeals.

V. PROCEDURAL BARS TO *APPRENDI* CHALLENGES

As the above demonstrates, *Apprendi* is being applied to an increasingly large range of statutes at the same time that—as discussed below—actual relief under the doctrine is contracting because of procedural bars to *Apprendi* claims and affirmances under the plain and harmless error standards.[191] *Ring* is a perfect example.[192] *Ring* opened the door to *Apprendi* challenges for every death row case in which the judge has made a finding of an aggravating factor subjecting the defendant to the death sentence: some 800 death sentences in nine states.[193] And recent court determinations of the retroactive applicability of *Apprendi* render the question of review of *Apprendi* error more important than ever.[194] Yet, at

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[190] *Shaw*, 313 F.3d at 224.

[191] Courts are still parsing the ramifications of the *Apprendi* rule for statutes to which it clearly applies. For example, courts are only now considering whether a range of drugs specified in the indictment is sufficiently clear to permit conviction. *See* United States v. Moreci, 283 F.3d 293, 297 (5th Cir. 2002).

> [T]he government charged Moreci with possessing or conspiring to possess "more than 50 kilograms" of a marijuana mixture .... The question is, whether this is sufficient to inform a defendant of the specific charges made against him, including the quantity of drugs alleged for the purpose of sentencing enhancements and what those enhancements may be, in satisfaction of *Apprendi*. This is an issue of first impression in this circuit.

Id. at 297.

[192] *See generally* Ring v. Arizona, 536 U.S. 584 (2002).

[193] *See* http://deathpenaltyinfo.org/article.php?scid=388&did=247. The actual number on direct appeal is lower. Given that *Ring* is, in this author's opinion, likely not to be found retroactive under the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), the impact of *Ring* would be limited to those death penalty cases on direct appeal. However, the Ninth Circuit Court of Appeals has recently held that *Ring* applies retroactively and at the time of publication, the United States has granted certiorari. Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003), *cert. granted, sub. nom.* Schriro v. Summerlin, No. 03-526, 2003 U.S. LEXIS 8574, at *1 (Dec. 1, 2003).

[194] *Summerlin*, 341 F.3d at 1084 (applying *Apprendi* retroactively under *Teague*).

the same time, the chances that any of these sentences will actually be reversed under *Apprendi* is slim, even when the question is a matter of life and death.

A. Second or Successive Habeas Petitions: AEDPA, Tyler, *and* Apprendi

In stark contrast to the rapid expansion of *Apprendi* into new areas of the law, procedural bars are limiting actual relief under *Apprendi* to fewer and fewer appellants. First, defendants who have filed a prior habeas corpus petition will find it impossible to receive a hearing on their *Apprendi* claims. The Antiterrorism and Effective Death Penalty Act (AEDPA) contains a number of restrictions on the writ of habeas corpus itself; the most important of these restrictions is that a prisoner may only file one post-AEDPA habeas corpus petition.[195] A second or successive habeas petition can only succeed if it is based on new evidence that was not available at the original trial, which shows that the petitioner is innocent, or if the claim is based on a new rule of law, the new rule of law is made retroactive to cases on collateral (habeas) review.[196]

In *Tyler v. Cain*, the Supreme Court held that under AEDPA, a new rule of law is only "made retroactive" to cases on collateral review when the Supreme Court expressly states it should apply retroactively.[197] *Apprendi* contained no such clear statement of retroactivity. Therefore, circuit courts have determined that, under *Tyler*, second or successive habeas petitions cannot be heard because of the limitations section of AEDPA.[198]

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[195]28 U.S.C. § 2244 (2000). AEDPA, which became effective on April 24, 1996, fixes a one-year limitations period for federal habeas petitions by state prisoners. § 2244(d)(1); David v. Hall, 318 F.3d 343, 344 (1st Cir. 2003). If a defendant was convicted prior to AEDPA, had a pre-AEDPA petition, and filed a second or successive petition for habeas review within one year of the date of passage of AEDPA, then that defendant would receive substantive review of his second or successive petition as long as it did not violate the older *abuse of the writ* standard. *See, e.g.*, *David*, 318 F.3d at 344.

[196]28 U.S.C. § 2244(b)(2) (2000).

[197]533 U.S. 656, 662–63 (2001). *Tyler* concerned a sixth post-conviction habeas petition filed after the Court had declared a certain type of jury instruction unconstitutional. Melvin Tyler had been convicted on a similar instruction and brought a habeas petition seeking reversal of his sentence. The Court noted: "Based on the plain meaning of the [statute] read as a whole, we conclude that 'made' means 'held' and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review." *Id.* at 662.

[198]*See, e.g.*, *In re* Clemmons, 259 F.3d 489 (6th Cir. 2001).

B. First Habeas Petitions: Teague v. Lane

Even timely first habeas petitions are unlikely to receive much shrift when asserting an *Apprendi* claim.[199] In *Teague v. Lane*, the Supreme Court set forth a new standard for determining whether a new rule of constitutional law should apply retroactively to cases on collateral (habeas) review.[200] The Court held that new rules were not retroactively applicable unless (1) the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"[201] or (2) the new rule establishes a watershed rule of criminal procedure that "implicates the fundamental fairness of the trial," without which "the likelihood of accurate conviction is seriously diminished."[202] Courts have overwhelmingly rejected applying *Teague* to achieve a result for first habeas petitions that *Tyler* would forbid for second or successive petitions.[203]

The end result of *Tyler* and *Teague* is that a defendant who believes that he was convicted without benefit of a full trial by jury cannot advance this claim in a habeas proceeding—the purpose of which is to test unlawful convictions. Yet even if a defendant was fortunate enough to have been on

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[199]The term "habeas" is used here as a term of convenience. An initial petition for post conviction relief from federal custody is, technically, not a habeas petition but a collateral attack on the validity of federal custody. 28 U.S.C. § 2255 (2000). Under section 2254, state custody may be challenged in federal court if all questions have properly been exhausted before the state tribunal. 28 U.S.C. § 2254 (2000). For simplicity's sake, I will refer to both section 2255 initial petitions for postconviction relief from federal custody and section 2254 attacks on state custody as initial habeas petitions.

[200]489 U.S. 288, 310–13 (1989).

[201]*Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[202]*In re* Clemmons, 259 F.3d at 492 (citing *Teague*, 489 U.S. at 310–13).

[203]Curtis v. United States, 294 F.3d 841, 844 (7th Cir. 2002); Goode v. United States, 305 F.3d 378, 384–85 (6th Cir. 2002); United States v. Brown, 305 F.3d 304, 309 (5th Cir. 2002) (per curiam) (*Apprendi* is not a *Teague* "watershed rule."); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001); Burrell v. United States, No. 97 CV 7358 (SJ), 2002 U.S. Dist. LEXIS 18195, at *25–*26 (E.D.N.Y. Aug. 19, 2002) (on remand from the Second Circuit, holding *Apprendi* non-retroactive as applied to initial habeas petitions); United States v. Enigwe, 212 F. Supp. 2d 420, 430–31 (E.D. Pa. 2001) (noting that although the Third Circuit had not expressly decided the question of retroactivity on first habeas petitions, sufficient authority existed to refuse a petition on those grounds); *but see* Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003), *cert. granted, sub. nom.* Schriro v. Summerlin, No. 03-526, 2003 U.S. LEXIS 8574, at *1 (Dec. 1, 2003).

direct review when the *Apprendi* decision was decided, the application of plain and harmless error review to *Apprendi* cases has further narrowed relief, such that obtaining re-sentencing under *Apprendi* is now nearly an impossibility. This is not as it should be. Courts that think deeply about plain error analysis under *Apprendi*, as outlined below, will come to the conclusion that relief should be granted more liberally than is the current practice of the circuits.

VI. *UNITED STATES V. COTTON:* APPLYING THE OVERWHELMING AND ESSENTIALLY UNCONTROVERTED TEST TO *APPRENDI* ERROR

United States v. Cotton, decided in the summer of 2002, applied *Neder's* objective overwhelming and uncontroverted standard to *Apprendi* error.[204] *Cotton* held that plain error analysis should govern *Apprendi* cases on direct appeal and adopted the *Neder-Johnson* overwhelming and uncontroverted standard as the measure of that plain error review.[205] *Cotton* held that if a court of appeals believes that there is overwhelming evidence of a minimum threshold amount of drugs, it may affirm a sentence given under 21 U.S.C. § 841(b)(1)(A) or (B), even though a jury did not make a decision as to drug amount.[206]

The facts of *Cotton* are representative of the usual *Apprendi* drug conspiracy challenge. In *Cotton*, accused participants in a drug ring challenged their convictions for drug conspiracy.[207] The conspirators were indicted for 21 U.S.C. § 841 possession with intent to distribute and 21 U.S.C. § 846 conspiracy to possess with intent to distribute.[208] While a drug amount (over fifty grams of cocaine base) was set forth in the first indictment, a superseding indictment charged the defendants of conspiring to possess and distribute any detectable amount of cocaine and cocaine base.[209] The defendants were sentenced under 21 U.S.C. § 841(b)(1)(A) to

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[204]535 U.S. 625, 633 (2002).

[205]*Id.* at 633.

[206]*Id.* ("The evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.' Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base.").

[207]*Id.* at 627–28.

[208]*Id.* at 627.

[209]*Id.* at 627–28.

sentences above twenty years, the statutory maximum for 21 U.S.C. § 841(b)(1)(C).[210]

At oral argument, the Court discussed the central practical matter of the case: whether a defendant could legitimately be charged with having waived a right under a case that did not yet exist at the time of the defendant's trial. Counsel for respondent argued that a right of which the defendant was unaware could not be effectively waived:

> [T]he propositions and fundamental beliefs that all of us went into the trial with are far different because none of us could ever imagine that the Apprendi case was forthcoming. Both Jones and Apprendi were decided while this case was on direct appeal. So, I don't see how we could forfeit an error that we could never even imagine would—would result in —[211]

Justice Scalia responded: "Now, wait, wait, wait. It wasn't that much of a bolt from the blue."[212] Justice Scalia continued to argue that although *Apprendi* had been decided while *Cotton* was on appeal, the underlying jury right grew out of the common law tradition and therefore, should have been raised as an objection at trial, even without the example of *Apprendi*.[213] Apparently Justice Scalia's view prevailed since the Court's written opinion contained no discussion of the question.

The first holding of *Cotton* was that a defect in the indictment does not deprive the court of jurisdiction to hear the case.[214] Prior to *Cotton*, the

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[210]*Id.* at 628. Title 21 U.S.C. § 841(b)(1)(c) merely requires a finding of possession, not a finding of a specified drug amount.

[211]Transcript of Oral Argument at *30, United States v. Cotton, 535 U.S. 625 (2002) (No. 01-687), *available at* 2002 U.S. TRANS LEXIS 34.

[212]*Id.*

[213]This is, to me, an unconscious expression of sympathy for the philosophy of natural law, most famously asserted in *Swift v. Tyson*, 41 U.S. 1 (1842) (permitting federal courts to base decisions on a federal common law, founded on pre-existing but as-yet undiscerned legal principles), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that there is no general federal common law). Although the modern trend has been to treat new rights as new-minted, and applicable only going forward, under Justice Scalia's interpretation of the law, defendants can be legitimately required to discern and raise objections based upon rights that are pre-existing but undiscovered.

[214]U.S. v. Cotton, 535 U.S. 625, 630–31 (2002).

> [Supreme Court precedent] confirm[s] that defects in an indictment do not deprive a court of its power to adjudicate a case . . . .

Fourth Circuit had held, based on the nineteenth century decision *Ex Parte Bain*, that a sentencing court lacked jurisdiction to sentence a defendant when an essential element of the crime was not charged in the indictment.[215] As a result, the Fourth Circuit found that the failure to properly allege the drug amounts deprived the court of the ability to enter a sentence above the statutory maximum.

In *Cotton* the Court first stated the general *Olano* framework for plain error and concluded that for plain error to merit reversal, there must be (1) error, which is (2) plain, and (3) affects the criminal defendant's substantial rights.[216] If each of those elements were met, an appellate court would be able to exercise its discretion to determine whether (4) failing to correct the error would negatively impact the public reputation of judicial proceedings.[217]

Cotton's second holding adopted plain error analysis and applied *Neder's* overwhelming and uncontroverted standard. The Court held that, as in *Johnson*, no inquiry into the defendants' substantial rights was required because the error did not affect the fairness and integrity of judicial proceedings if the evidence of drug amounts was found to be uncontroverted and overwhelming.[218]

> Thus, this Court some time ago departed from *Bain*'s view that indictment defects are 'jurisdictional.' . . . Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.

Id.

[215]*See* United States v. Hooker, 841 F.2d 1225, 1232 (4th Cir. 1988) (en banc); *see also Ex parte* Bain, 121 U.S. 1, 13 (1887).

[216]*Cotton*, 535 U.S. at 631.

[217]*Id.*

[218]*Id.* at 632–33. At oral argument, Justices Souter and Scalia both hinted that the failure to adequately include every element of the crime in the indictment, or present it to the jury, would constitute prejudice to the defendant's substantial rights. Justice Souter noted:

> And that, Mr. Dreeben [counsel for the United States], seems to me a substantial difference. So, I follow your argument at the—the very last step in a plain error analysis, but you seem to stop short of that and you said there wasn't any substantial difference. And I think that that's troublesome because the disparity in sentencing is large.

Transcript of Oral Argument at *17, United States v. Cotton, 535 U.S. 625 (2002) (No. 01-687), *available at* 2002 U.S. TRANS LEXIS 34. Justice Scalia stated:

> Mr. Dreeben, I—I'm not sure I—you say we should determine whether substantial rights have been affected by—by asking whether if the procedure

Finally, the Court found the evidence against the defendants was in fact overwhelming and uncontroverted because the evidence of the weight of drug amounts introduced at trial showed many multiples of the fifty grams of cocaine base required to sustain defendants' convictions under 21 U.S.C. § 841(b)(1)(A).[219] First, the Court noted that the trial court had found one defendant responsible for 500 grams of cocaine base, and the others responsible for 1.5 kilograms—respectively 100 and 300 times the amount of cocaine base necessary to sustain a sentence under 21 U.S.C § 841(b)(1)(A).[220] The Court looked at the drug amounts gathered by police over the course of the conspiracy and the drug amounts directly testified to by cooperating co-conspirators and concluded that "[s]urely the grand jury, having found that a conspiracy existed, would have also found that the conspiracy involved at least fifty grams of cocaine base."[221]

Cotton, therefore, confirmed that *Apprendi* error was not to be treated as structural error, although it undertook no analysis of the substantial rights of respondents because they had failed to anticipate *Apprendi* and raise an

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> that has been omitted had not been omitted, he would have been—he would have been convicted anyway. [T]hat seems to me extravagant. I mean, that— that would mean that if there were no indictment at all, you just go to the jury without an indictment and the jury convicts him of murder, you could come in and say, well, his substantial rights weren't affected because had there been a murder indictment, there was plenty of evidence to—to convict him of murder.

Id. at *20.

[219] *Cotton*, 535 U.S. at 633.

[220] *Id.* at 628.

[221] *Id.* at 633. The Court stated:

> Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than fifty grams of cocaine base. Baltimore police officers made numerous state arrests and seizures between February 1996 and April 1997 that resulted in the seizure of 795 ziplock bags and clear bags containing approximately 380 grams of cocaine base. A federal search of respondent Jovan Powell's residence resulted in the seizure of 51.3 grams of cocaine base. A cooperating co-conspirator testified at trial that he witnessed respondent Hall cook one-quarter of a kilogram of cocaine powder into cocaine base. Another cooperating co-conspirator testified at trial that she was present in a hotel room where the drug operation bagged one kilogram of cocaine base into ziplock bags.

Id.

Apprendi-style objection at trial. From the exchange at oral argument, it further seems that the Court agreed with Justice Scalia's position that plain error is properly applied when a potential objection is founded in the common law, even when the case definitively establishing the right has not yet been decided. As a result, *Cotton* focused on the fourth element of plain error review—the requirement that any error affect the integrity and public reputation of judicial proceedings—and held that when the evidence of drug weights was overwhelming and essentially uncontroverted, the conviction should be affirmed. The remaining question for the circuits, therefore, was what considerations should weigh into the determination that evidence of drug amounts was overwhelming and uncontroverted.

A. Conceptual Problems in Applying the Overwhelming and Uncontroverted Standard

Following *Cotton,* the circuits are now in the process of defining overwhelming and essentially uncontroverted when reviewing convictions for *Apprendi* error. Without some guiding principle, the *Cotton* standard will become a justification rather than a reason for affirming a sentence. There are three distinct practical problems. First, under the pre-*Apprendi* regime, a defendant's objections to drug amounts could only be raised in a sentencing hearing. Courts must decide whether an objection to a drug amount at sentencing is simply that—a challenge to drug amounts—or whether it should be read as raising an *Apprendi* objection at the trial level.[222] Second, in determining what weight of evidence is overwhelming, courts must first decide whether the evidence is properly attributed to that defendant and then determine both the quality and quantity of the evidence. Finally, the evidence of responsibility for drug amounts is always contested. If courts are to apply the *Cotton* rule effectively, they must establish parameters for determining how much controversy is necessary before a given block of evidence is no longer essentially uncontroverted.

[222]The difference in characterization of a drug-amount objection raised at sentencing means the difference between remand. United States v. Strayhorn, 250 F.3d 462, 464 (6th Cir. 2001), *overruled by* United States v. Leachman, 309 F.3d 377 (6th Cir. 2002), and *affirmed by* United States v. Lopez, 309 F.3d 966 (6th Cir. 2002).

1. Controverted or Harmless: Distinguishing an Objection on Drug Amounts from Raising an *Apprendi* Objection

First, before a court can even decide whether to apply the overwhelming and uncontroverted standard, it must determine whether the defendant preserved the question for review by objecting below. When a defendant objects to drug amounts below, courts have held that he has effectively made an *Apprendi* objection (especially in cases that pre-dated *Apprendi*, such that any objection could not be by name).[223]

Two contrasting Sixth Circuit cases frame the issue nicely. In *United States v. Strayhorn*, the Sixth Circuit considered the fact that "Strayhorn specifically and repeatedly expressed reservations about the amount of marijuana that would be attributed to him by the district court during the sentencing phase" to be sufficient objection to preserve an *Apprendi* objection for review on appeal.[224]

United States v. Lopez held the opposite: that a defendant must raise the precise *Apprendi* objection for the court to consider; merely objecting to the amount of drugs at trial is not enough.[225] *Lopez* held that because defendants' sentencing hearings fell after *Jones v. United States*, the defendants should have raised an *Apprendi*-style objection under *Jones*; their failure to do so, reasoned the court, meant that the decision would be reviewed for plain error.[226]

Within the overall scheme of things, the *Strayhorn* approach is correct on the spirit, and the *Lopez* approach is correct on the law. Under *Cotton*, a defendant (such as Strayhorn) who vigorously disputes the drug amount

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[223] *See, e.g.*, *Strayhorn*, 250 F.3d at 464 (vacating and remanding for re-sentencing in light of *Apprendi* on a harmless error standard where the defendant objected to drug amount determinations below).

[224] *Id.* at 467

> Contrary to the government's assertions that Strayhorn's constitutional challenge was waived, we believe the record makes plain that Strayhorn preserved his challenge by repeatedly objecting to the drug quantity determination at his plea hearing and at his sentencing hearing . . . . Although he did not utter the words "due process" at either of these hearings, he made it well known that he disputed the district court's factual finding with respect to drug quantity.

Id.

[225] *See Lopez*, 309 F.3d at 969–70 (6th Cir. 2002) (relying on *Cotton* to distinguish *Strayhorn*).

[226] *Id.* at 969.

determination at trial should be deemed to have raised sufficient controversy on the issue to permit reversal and remand under the *Cotton* test. In that sense, *Strayhorn* reached the right result by the wrong method. But *Lopez* dovetails much more neatly with the Supreme Court's analysis in *Cotton*, especially considering that, at oral argument, the *Cotton* Court seemed to believe that *Jones* was a sufficient warning of the upcoming *Apprendi* decision to tax defendants with the burden of having to raise an objection at trial.

2. Overwhelming: Scope of the Conspiracy for Purposes of Determining the Drug Amount Determination and the Quality versus Quantity Problem.

a. Conspiracy and Apportionment

Courts first must determine whether the weight of evidence against a defendant is *overwhelming*. The majority of courts simply look to the evidence of drug amounts introduced at the sentencing hearing and add up weights. If the weight of evidence that was adduced at the sentencing hearing was significantly higher than the amount required to support the defendant's conviction, the court affirms, convinced that the evidence of drug amounts was overwhelming.

The *Cotton* rule raises a troubling issue: a jury could convict for conspiracy without a finding as to the scope of the conspiracy or without any decision as to what drugs actually count as evidence against the defendant. Courts should, therefore, be concerned about finding overwhelming evidence where there is no indication that the jury necessarily agreed with the scope of the conspiracy charged or considered that evidence even remotely relevant to their determination of guilt for conspiracy.

One very strong counterargument to this view of conspiracy cases is that, in conspiracy cases, the jury actually convicts the defendant of conspiracy, and that therefore any drugs attributable to the conspiracy should be properly counted as part of the weight of the evidence against the defendant. This does not solve the problem, however. Under the pre-*Apprendi* regime, juries were not required to decide the scope of the conspiracy in order to convict a defendant of drug conspiracy. In fact, there was no need for the jury to consider drug quantities at all. Evidence of drug amounts was reserved for the sentencing hearing. To argue, therefore, that the jury convicted on a conspiracy, the scope of which included all drug

amounts appearing at sentencing, cannot be correct: the jury in most cases never heard that evidence, much less made any determination based upon it.[227]

Cotton rested on the fact that, given the large amounts of uncontestable evidence amassed against the conspirators, the grand jury surely would have indicted the defendants for the requisite drug amounts.[228] Therefore, *Cotton* does not absolve courts from considering whether the jury could have convicted the defendant for a conspiracy of lesser scope—elimination of that possibility is part and parcel of a determination that the jury surely would have convicted of a large enough conspiracy to support the sentence.[229]

United States v. Carrington[230] is a good example. *Carrington* considered the *Apprendi* challenge of a defendant who vigorously contested his participation in a drug conspiracy at trial.[231] Defendant Carrington was convicted of drug conspiracy for accompanying a group of people purchasing cocaine in New York City and transporting the drugs to Charlottesville, Virginia.[232] While the conspiracy was quite large, involving at various times between eight and ten people and multiple trips to purchase cocaine over a period of years, at Carrington's trial, the government presented evidence of only two overt acts in furtherance of the conspiracy.[233]

At trial, Carrington vigorously contested his involvement in the conspiracy.[234] He was convicted, and the conviction was affirmed on

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[227]*See* United States v. Bartholomew, 310 F.3d 912, 926–27 (6th Cir. 2002) (despite conviction for conspiracy, restricting evidence to that directly applicable to the defendant, and noting that other evidence of drug amounts was only before the court for sentencing purposes, not before the jury for purposes of conviction, the court concluded that the sentence constituted plain error).

[228]*See id.* (restricting analysis of evidence for purposes of "overwhelming" analysis to drug evidence directly attributable to the defendant).

[229]*See id.* The Second Circuit has used this analysis in a slightly different context. Under the Second Circuit's decision in *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998), when a jury returns a general verdict of drug conspiracy on an indictment that charges several different drug types, the trial court must sentence the defendant as if convicted of a conspiracy that involved only the substance that carries the lowest sentencing range.

[230]301 F.3d 204 (4th Cir. 2002).

[231]*Id.* at 206–07

[232]*Id.* at 206.

[233]*Id.* at 206–07.

[234]*Id.*

appeal.[235] The Supreme Court granted certiorari and remanded in light of *Apprendi*.[236] On remand, the Fourth Circuit again affirmed the conviction. Reviewing for plain error under *Cotton*, the court noted that the government had introduced evidence at trial that Carrington was linked to two of the six overt acts charged in connection with the overall conspiracy.[237]

A jury need not decide the scope of the conspiracy (and, by extension, the applicable drug amounts) to convict of conspiracy.[238] When, therefore, the members of a conspiracy have contested drug amounts generally, and the evidence of connection between a specific defendant and a certain amount of drugs is less than overwhelming, courts should restrict their analysis of the weight of the evidence to those drugs which no rational jury could have avoided attributing to the defendant.[239]

b. Quantity versus Quality of Evidence

Next, courts must be cautious not to substitute quantity of evidence for quality. In the drug context, nebulous evidence of a large amount of drugs, admissible at trial on a mere relevance standard, should not take the place of overwhelming and uncontroverted proof of the requisite threshold amount of drugs. Similarly, evidence relied upon by the judge to make his sentencing determination has only been proven by a preponderance of the evidence. Under *Cotton*, the reviewing court must make its own determination as to the quality of the evidence and not merely rely on impressive amounts of drugs adduced at trial.

This is not to say that relevant evidence introduced at trial and relied upon by the judge at sentencing cannot meet *Cotton's* overwhelming and uncontroverted requirement. Rather, not all such evidence does so. Indeed, if we were to assign (concededly arbitrary) mathematical values to the standards, we might set the relevance standard at about twenty percent (tending to establish the proposition for which it is asserted), the

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[235]United States v. Martin, No. 99-4471, No. 99-4537, 2000 U.S. App. LEXIS 7334, at *1 (4th Cir. Apr. 21, 2000) (per curiam).

[236]*Carrington*, 301 F.3d at 208.

[237]*Id.* at 209.

[238]*See* United States v. Bartholomew, 310 F.3d 912, 926–27 (6th Cir. 2002) (restricting analysis of evidence for purposes of "overwhelming" analysis to drug evidence directly attributable to the defendant).

[239]*See id.* at 926 ("Other evidence presented at trial as to the amount of marijuana involved in the conspiracy was also disputed by the defendants.").

preponderance standard at fifty-one percent, and the reasonable doubt standard (the least quantifiable) at somewhere around ninety percent. *Overwhelming* proof must be still higher. For courts to rely on evidence that is only part of the record because of its relevance to establish overwhelming proof of drug amounts invites erroneous decisions.

3. Uncontroverted: Witness Evidence, Bias, and Duplicative Testimony

Most convictions are won on witness testimony, which is, without fail, contested by defendants either as mistaken or biased. This cannot mean that every case based on witness testimony fails the *Cotton* test. Any inquiry into the degree of *controvertedness* of witness evidence bearing on an essential element of the crime charged inevitably runs afoul of this problem: while the *Cotton-Neder* test speaks in absolute terms (the evidence must be uncontroverted), the analysis is necessarily one of degree, not of type. In applying the standard, courts must consider a defendant's challenges, at trial, to credibility and content of witness testimony to determine whether the defendant's objection could have raised a reasonable doubt with a jury.[240]

A court's analysis is further complicated by the fact that most objections to drug amounts are made at the sentencing hearing. A defendant's objection to drug amounts are most often contained in objections submitted to the presentence report. One common objection to presentence reports is that witness testimony is duplicative when many witnesses testify to the same transaction. The very number of witnesses that may make a case based on witness testimony compelling at trial invariably raises the question of whether two witnesses may have described the same transaction or amount of drugs. This is inevitable: duplicative evidence is of great use in confirming probability of a given fact, for example, that a given defendant dealt drugs. However, the more duplicative evidence is used, the more likely some portion of it will overlap.

*B. Post-*Cotton*: Application of* Cotton *and* Apprendi *by the Circuits*

Although the *Cotton* rule clearly makes it more difficult for defendants who were unconstitutionally convicted to obtain remands of their sentences, the rule by no means should operate only to affirm unconstitutional

[240] *See id.* at 922.

sentences.[241] Current applications of *Apprendi* and *Cotton* are best understood in terms of a continuum of certainty regarding the correct outcome of the case. At one end of the spectrum, courts have found cogent ways of explaining that in certain common types of appeals, no *Apprendi* violation actually occurred. Next along the continuum are cases in which a jury did not make a formal finding as to the omitted element of the crime, but the court is able, nonetheless, to discern that the jury in fact decided the issue. Similarly, courts affirm when a defendant's allocution to drug amounts in a plea hearing definitively settled the drug amount question. Finally come the gray-area cases in which courts apply the rule of *Cotton* to weigh the evidence against a defendant and determine whether it was indeed overwhelming and uncontroverted. Of this last type, the majority of courts affirm the sentence. Most of these affirmances are correct applications of the *Cotton* rule, but a significant minority are erroneous and bear examination.

1. Concurrent and Consecutive Sentences

The first trend in modern cases is not as much an application of the *Cotton* rule as it is a decision not to apply *Apprendi* analysis at all.

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[241]For example, *Cotton* is more of a pro-defendant rule than the pre-existing circuit rules for plain error. The circuits did not wait until the Supreme Court's decision in *Cotton* to begin applying plain error review of *Apprendi* error. *United States v. Vazquez*, which presaged *Cotton* by nearly a year, is a good example. 271 F.3d 93 (3d Cir. 2001) (en banc). *Vazquez* affirmed a drug conviction despite conceded *Apprendi* error because the defendants' substantial rights were not impacted when the evidence conclusively established the amount of drugs beyond a reasonable doubt, and because the public reputation of the courts was not drawn into question by such an affirmance. *Id.* at 96. *Vazquez* required that the defendant show that his sentence would have been different had the drug amount been properly charged before the jury. *Id.* at 99. The court stated: "[T]he evidence established beyond a reasonable doubt that Vazquez had been involved with 992 grams of powder cocaine and 859 grams of crack cocaine. Indeed . . . there [was never] any question about the amount." *Id.* at 104. The court concluded: "In these circumstances, we can say without a doubt that Vazquez conspired to possess and/or distribute the [drugs]." *Id.*

Cotton can therefore operate to the benefit of a defendant. While *Cotton* does require a showing that the drug amount was "overwhelming" and "essentially uncontroverted," *Vazquez* and similar cases require a showing that the jury would in fact have made such a finding of drug amounts that the defendant's sentence would have been different on remand. While both of these constructions fit within *Olano*'s suggestion that a defendant's substantial rights are affected if the error impacts the jury's deliberations, the question is one of degree. At least on a plain reading, *Cotton* requires the sincere possibility of a different result, whereas *Vasquez* and earlier cases would require a different result.

Apprendi itself granted remand even though the actual sentence imposed was less than the combined statutory maximum for the two firearms counts.[242] Charles Apprendi's actual sentence was twelve years; the Court reversed this sentence even though the combined statutory maximum of the firearms counts was twenty years—ten years each.[243]

The circuits have not followed *Apprendi* in this respect and affirm sentences exceeding the statutory maximum for one crime, when the sum of the sentences that could have been imposed, absent a jury determination of the sentencing factor, equals or exceeds the actual sentence imposed.[244] Thus, when the actual sentence imposed could have been reached by stacking consecutive sentences rather than by enhancing one concurrent sentence under a sentencing factor, courts will affirm.[245] The first step, therefore, for a court hearing an *Apprendi* challenge is to determine whether the sentence actually imposed is below the statutory maximum for the sentence that the judge could have imposed without any additional factual finding by the jury. The second step is to determine whether there were sufficient multiple convictions that, upon remand, the trial court could re-sentence the defendant to the same sentence by using consecutive, rather than concurrent sentences. If neither of these are true, courts then proceed to apply harmless error review (if the defendant raised an *Apprendi* objection below) or plain error review (if they did not), based on the *Johnson-Neder* overwhelming and essentially uncontroverted standard. These cases fall into several categories, discussed below.

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[242]Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).

[243]*Id.* at 470. Charles Apprendi pled guilty to two counts of second degree possession of a firearm for an unlawful purpose, and one count of third-degree unlawful possession of an antipersonnel bomb. The trial court then enhanced the sentence based on its finding, by a preponderance of the evidence, that Apprendi acted to intimidate his victims because of their race. *Id.* at 469–71.

[244]*See* United States v. Martin, 49 Fed. Appx. 418, 419 (4th Cir. 2002) (per curiam) ("We need not, however, conduct the plain error analysis that was conducted in *Cotton* because in this case, there are multiple counts of conviction, and the Sentencing Guidelines require the sentencing court to impose consecutive sentences to the extent necessary to achieve a sentence within the guidelines range.") (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2000) and United States v. White, 238 F.3d 537, 542–43 (4th Cir. 2001)). *Martin*, therefore, held that because the defendant had been convicted for three separate offenses, each subject to sentencing under section 841(b)(1)(C) (imposing a statutory maximum of twenty years) even without a jury amount determination, the statutory maximum that would trigger an *Apprendi* violation was a sentence over sixty years. *Id.* at 419–20. As this demonstrates, Charles Apprendi's sentence was not in fact a violation of the rule set forth in *Apprendi*.

[245]*Martin*, 49 Fed. Appx. at 419–20.

2. Actual Jury Findings and Plea Allocutions

First, courts are most comfortable affirming sentences in cases in which (1) the verdict makes clear that the jury did consider the drug amounts but did not do so expressly, or (2) in which the defendant has entered a plea bargain and has allocuted to the specific drug amount. In these cases, courts determine that the error is truly harmless: the jury actually made the relevant determination, or the defendant waived his right to jury trial on the given element.

For example, in *United States v. Reyes*, the Sixth Circuit reviewed the convictions of three drug dealers who raised *Apprendi* challenges for the first time on appeal.[246] At trial, the defendants were charged and convicted on multiple counts. Although the first count of the indictment alleged that the defendants had violated 21 U.S.C § 841(b)(1)(A), which requires a finding that the defendants were responsible for more than five kilograms of cocaine, at trial, the court instructed the jury only to consider whether the defendants were responsible for any measurable amount of cocaine.[247] This was the basis for the defendants' *Apprendi* challenge on appeal.

However, as the Sixth Circuit noted, the third count of the indictment, on which defendants had also been convicted, was a drug-related murder count under 21 U.S.C. § 848 (e)(1)(A).[248] In order to convict on the third count, the jury was required to make an express finding that the defendants in question had violated section 841(b)(1)(A), including the fact that the defendants were responsible for more than five kilograms of cocaine.[249]

Applying plain error review under *Cotton*, the court concluded: "In the current case, we have no need to speculate whether the jury would have found that the drug conspiracy charged in Count 1 involved five or more

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[246]51 Fed. Appx. 488, 495 (6th Cir. 2002) (per curiam).

[247]*Id.* at 495–96.

[248]Title 21 U.S.C. § 848(e)(1)(A) (2000) reads:

> [A]ny person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

[249]*Reyes*, 51 Fed. Appx. at 496.

kilograms of cocaine: the jury *actually made* such a finding as part of the Count 3 conviction."[250]

Similarly, courts are and should be comfortable affirming sentences without a jury determination as to drug amount when the defendant pleads guilty and confesses to the drug amount at the sentencing hearing. "[I]n a guilty plea setting, error may be avoided even absent a fact-finder's beyond a reasonable doubt conclusion as to drug quantity if the defendant has given an 'allocution that settles the issue of drug quantity.'"[251] The Court's decision in *Cotton* indicates that an *Apprendi* error may be waived by failing to raise it below. *A fortiori*, when a defendant intentionally waives the right to have the drug issue tried, the court may respect that decision, and affirm the sentence.[252]

3. Challenge Unrelated to the Element

Another type of case—not quite as strong as those in which the jury has decided or the defendant has allocuted to the drug amount—affirms the conviction because the element of the crime not presented to the jury has nothing to do with defense strategy chosen by the defendant at trial. A good example is the Third Circuit's decision in *United States v. Knight*.[253] In that case, a jury convicted the defendant of drug conspiracy and possession under 21 U.S.C. §§ 841 & 846 without making any determination as to drug amounts. The defendant was convicted, and the Third Circuit affirmed on appeal. The defendant appealed to the Supreme

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[250] *Id.*

[251] United States v. Doe, 297 F.3d 76, 89 (2d Cir. 2002) (quoting United States v. Yu, 285 F.3d 192, 198 (2d Cir. 2002)); *accord* United States v. Roldan-Hernandez, 41 Fed. Appx. 576, 577–78(3d Cir. 2002) (per curiam); United States v. Schaar, 45 Fed. Appx. 264, 264–65 (4th Cir. 2002) (per curiam).

[252] *But see* United States v. Rebmann, 226 F.3d 521, 524 (6th Cir. 2000).

> We conclude that pursuant to her plea agreement, Rebmann waived her right to a jury trial of the issue of whether her distribution of heroin caused the death. However, we find that Rebmann did not waive the right to have a court decide any remaining elements of the offense beyond a reasonable doubt, as opposed to making those determinations by a mere preponderance of the evidence.

Id.

[253] *See generally* 50 Fed. Appx. 565 (3d Cir. 2002).

Court, which granted certiorari and remanded the case in light of *Apprendi*.[254]

On remand, the Third Circuit again affirmed the conviction, this time in light of *Cotton*. The court noted:

> This jury's verdict clearly establishes that it was convinced beyond a reasonable doubt that Knight did conspire to possess with intent to distribute, and did distribute, cocaine base. His defense did not go to the amount of drugs involved. He argued that he was not involved in a conspiracy to distribute illegal drugs at all. The jury obviously rejected that argument.[255]

The court reasoned that the jury's finding that the defendant was involved with the requisite amount of cocaine was satisfied by the jury's finding that the defendant was involved with the conspiracy. Yet, as discussed above, this rationale is troubling, since the jury in fact was never presented with the question of drug amount, nor did the finding of conspiracy implicitly indicate any finding as to drug amount.

4. Affirmances after Weighing Evidence

The most common type of *Cotton* case balances the weight of the evidence of drug amounts against any objections to the admission (at trial) or applicability (at sentencing) of the evidence.[256] Nearly every case

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[254] *Id.* at 566.

[255] *Id.* at 568.

[256] *See, e.g.*, United States v. Byrd, 55 Fed. Appx. 115, 118 (4th Cir. 2003) (per curiam).

> We find, however, that any resulting error did not seriously affect the fairness, integrity or public reputation of judicial proceedings, based on the overwhelming and essentially uncontroverted evidence presented at the guilty plea hearing and at sentencing indicating that Byrd was responsible for far more than the 500 grams of cocaine necessary to sentence him under 21 U.S.C. § 841(b)(1)(B), which authorizes a forty-year maximum term of imprisonment.

Id. (citations omitted); United States v. Shaw, 313 F.3d 219, 224 (4th Cir. 2002); United States v. McGill, 50 Fed. Appx. 602, 605–06 (4th Cir. 2002) (per curiam); United States v. Melvin, 48 Fed. Appx. 63, 65 (4th Cir. 2002) (per curiam); United States v. Graham, 48 Fed. Appx. 46, 48 (4th Cir. 2002) (per curiam); United States v. Pauley, 304 F.3d 335, 336 (4th Cir. 2002) (per curiam); United States v. Vereen, 46 Fed. Appx. 138, 140 (4th Cir. 2002) (per curiam).

affirming a conviction despite conceded *Apprendi* error engages in this analysis to some degree. However, courts have pursued this balancing analysis very close to, and in some cases over, the line of the *Cotton* rule.

Cotton is an example of the proper application of the balancing approach. There, the weight of drug amounts was sixty times the amount necessary to support the sentence that the defendants received.[257] However, the Court did not rely only on the amount, but also the quality of the evidence.[258] The court noted that approximately 380 grams of cocaine base had been directly recovered by police, and that the defendants, as the ringleaders of the conspiracy, would surely have been indicted by the grand jury on the entire amount.[259] Finally, the Court noted that eyewitnesses had confirmed further amounts of drugs.[260] Thus, the Court examined (1) the quality of the evidence, (2) the quantity of evidence meeting the quality test, (3) the proper attribution of that evidence to the defendants, and (4) concluded to a certainty that the jury would agree.

Not all opinions follow these steps; instead, *Cotton* becomes an excuse to affirm without close analysis. For example, in *United States v. Campbell*, the Third Circuit found that a defendant cannot satisfy the substantial rights or public reputation elements of plain error review when the defendant presented a defense as to drug amount but not as to the correct limit.[261] The court stated: "Though Campbell's attorney sought to establish doubt as to whether the crack cocaine equaled or exceeded 50 grams, there was no dispute that the crack cocaine weighed at least 5 grams."[262] This is parsing the *Cotton* rule too closely. One central intuition of an *Apprendi* challenge is that the indictment must correctly reflect the elements of the crime that are to be proven before the jury so that the defense can focus its efforts appropriately. It is easier to raise doubt as to whether the case involved fifty grams of cocaine than it is to raise doubt about five, but that is not to say that the defense could not have risen to the occasion had it been properly informed of the nature of the challenge.

The Fourth Circuit's recent decision in *United States v. McGill* is a good example of how this approach can overstep the *Cotton* line.[263] *McGill*

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[257]United States v. Cotton, 535 U.S. 625, 628 (2002).

[258]*Id.* at 633.

[259]*Id.*

[260]*Id.*

[261]295 F.3d 398, 404–05 (3d Cir. 2002).

[262]*Id.*

[263]*See generally* 50 Fed. Appx. 602 (4th Cir. 2002) (per curiam).

considered an *Apprendi* challenge to a drug conspiracy conviction for distribution of marijuana.[264] The panel reviewed for plain error since McGill failed to challenge the indictment or jury instructions on drug quantity.[265] The court stated the *Cotton* standard and then attempted to determine whether the "evidence supporting the conclusion that the narcotics conspiracy involved a threshold drug quantity was 'overwhelming and essentially uncontroverted.'"[266]

McGill found that "[t]he evidence at the trial of this matter demonstrated the extraordinary scope and pace of drug sales involved in this conspiracy."[267] The court referenced a videotape that demonstrated the pace of sales at the conspirator's base of operations and witness testimony describing an even quicker pace of sales in other years. The court noted that "[t]he government arguably demonstrated that marijuana sales [at the location] approached ten pounds per day."[268]

The defendant argued that the evidence against him was not overwhelming or uncontroverted.[269] Indeed, he had contested the drug amounts at the presentence hearing, which was the first time in the case that the issue of amounts arose between the parties.[270] The court, nevertheless, found that, under *Cotton*, the evidence was sufficiently overwhelming and uncontroverted to merit affirmance: "That McGill objected to the drug quantity calculations in the presentence report and at the sentencing hearing does not change this court's analysis, nor does it preclude this court from affirming the district court's well-founded determinations as to the amounts of marijuana . . . ."[271] This determination is simply incorrect; the fact that the evidence of drug amounts was not uncontroverted should have led the

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[264]Marijuana is treated slightly differently under the federal drug sentencing regime. There is actually a lower echelon for unspecified amounts of marijuana that carries a statutory maximum of five years. Title 21 U.S.C. § 841(b)(1)(D) (1999 & Supp. 2003). Therefore, despite the fact that McGill's sentence was under twenty years, because there was a still lower "catchall" sentencing provision available, McGill could legitimately argue that the failure to instruct the jury as to drug amounts was an *Apprendi* error.

[265]*McGill*, 50 Fed. Appx. at 604.

[266]*Id.* (quoting United States v. Cotton, 535 U.S. 625, 633 (2002)).

[267]*Id.*

[268]*Id.* at 605 n.2.

[269]*Id.* at 605.

[270]Under the pre-*Apprendi* regime, since drug amounts were sentencing factors determined before a judge on a predominance standard, the question of drug amounts arose before the judge at the sentencing hearing rather than at trial.

[271]*Id.* at 605.

court to either remand or at least closely examine the objection below.[272] While it would be entirely reasonable to affirm a sentence despite an objection below if, for example, the objection was completely frivolous, the *McGill* court did not analyze the nature or weight of the objection at all. Regardless of the outcome, the objection below should have changed the court's analysis, but it did not.

McGill demonstrates the pitfalls of simply considering the quantity, rather than the quality, of the evidence of drug amounts. Courts seduced by massive amounts of drug evidence that never appeared before the jury will make similar mistakes. The quality, applicability, and provenance of the evidence must be scrutinized, and only that evidence which is truly uncontestable can be counted. If the court determines that the truly uncontestable drug amounts are properly applied as against that defendant, then, and only then, is the sentence properly affirmed under *Cotton.*

5. Vacation and Remand

In a few cases, however, courts have applied *Cotton* to benefit a defendant. *United States v. Doe* appeared to be a core *Apprendi* case for affirmance.[273] The defendant, a foreign national, was apprehended attempting to import narcotics into the United States.[274] He entered into a plea bargain with federal prosecutors, and he also allocuted to importing and possessing the narcotics, but not specifically to drug amounts.[275]

The Second Circuit found, based on *Cotton*, that the failure to submit the question of drug amounts to the jury constituted plain error.[276] The case concerned a plea bargain under which the defendant pled guilty to importing narcotics into the United States, in violation of 21 U.S.C. § 960(a), the structure of which mirrors the standard federal drug statute, section 841.[277] *Doe* concluded first that the failure to submit drug amounts

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[272]The fact that the defendant raised his objections at the pre-sentence hearing rather than at trial does not matter. Under the pre-*Apprendi* regime, the only time that drug amounts would have been discussed was at sentencing.

[273]*See generally* 297 F.3d 76 (2d Cir. 2002).

[274]*Id.* at 79.

[275]*Id.* at 90.

[276]*Id.*

[277]That statute reads: (a) Unlawful acts. Any person who—(1) . . . knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided in subsection (b). Title 21 U.S.C. § 960(a) (2000).

to a jury was an error.[278] First, the court held that the defendant's allocution during his plea hearing did not establish the drug amounts so as to render *Apprendi* error harmless:

> Doe did not . . . admit to or otherwise specifically address drug quantities in his plea allocution. Despite his acknowledgment of the quantity-specific punishments assigned by 21 U.S.C. § 960(b)(1)(B)(ii) to importation of 5 kilograms or more of cocaine, Doe did not make any statements on drug quantity related to his own indicted crime. Without discussion of quantity relating specifically to Doe, Doe's allocution simply did not "settle[] the issue of drug quantity" . . . .[279]

Next, *Doe* concluded that the error affected the defendant's substantial rights.[280] The court reasoned that "*Apprendi* and *Thomas* have established Doe's constitutional right to have the drug quantity which would invoke a sentence under 21 U.S.C. 960 (b)(1)(B)(ii) determined by a jury under the beyond a reasonable doubt standard."[281] *Doe* continued:

> Doe could, of course, waive that right by entry of a guilty plea during which he stipulated or allocuted to drug quantity. However, at the time of the plea in this case, neither *Apprendi* nor *Thomas* had been decided . . . . Nothing in the plea allocution or the sentencing in this case suggests that Doe was aware of and waived his right to beyond a reasonable doubt proof as to drug quantity.[282]

Next, the court passed to the discretionary prong of plain error review and analyzed the weight of the evidence under the overwhelming and essentially uncontroverted standard. The court held that in the absence of overwhelming evidence, it would correct the error.[283] Acknowledging *Cotton*,[284] the court applied the overwhelming and essentially uncontroverted standard to find plain error:

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[278] *Doe*, 297 F.3d at 90.

[279] *Id.*

[280] *Id.* at 91.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 92.

[284] *See id.* at 91.

> [W]e do not believe that Congress or the Court intended these greater punishments [for higher drug amounts] to fall upon defendants the breadth of whose activities was not charged in an indictment and proved beyond a reasonable doubt as *Apprendi* and *Thomas* guarantee where the evidence against the defendants falls below the "overwhelming" and "essentially uncontroverted" standard that *Cotton* applies.[285]

Finally, *Doe* weighed the evidence and found that it fell short of the *Cotton* requirements.[286] The court reasoned that because the evidence of

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> After this Court heard oral argument in this case, the Supreme Court issued a decision in United States v. Cotton applying plain error review to the appeal of defendants sentenced under 21 U.S.C. § 841(b)'s quantity based provisions, rather than under § 841(c) for unquantified offenses, despite the omission of drug quantity from their indictment. In reversing the Fourth Circuit's conclusion that the failure to charge drug quantity in the indictment deprived the court of jurisdiction to impose a sentence above the statutory maximum for offenses involving an indeterminate amount of drugs, the Court found the evidence of drug quantity that had been presented at trial to be both "overwhelming" and "essentially uncontroverted." The Court noted that faced with this evidence (including physical evidence collected from the residences and rooms occupied by the defendants) the grand jury that charged the defendants with conspiracy to possess with intent to distribute drugs "surely . . . would have also found that the conspiracy involved at least 50 grams of cocaine base."

Id.

[285] *Id.* at 92.

[286] *Id.*

> In the case before this Court, we cannot find the evidence against Doe sufficient to meet *Cotton's* deservedly high standard. The evidence of drug quantity that appears from the record on appeal is summarized in the government's letter seeking to amend the [presentence report]. The evidence derives from Doe's testimony at the Camancho trial, the testimony of other Camancho trial witnesses, and Doe's statements to government agents. Even ignoring the complications arising from the fact that the testimony in question was in a proceeding at which Doe was a witness for the government against a co-conspirator rather than a defendant addressing the evidence on his own behalf . . . we note that the testimony from the Camancho trial indicated drug quantities related to the importation of drugs between 1993 and "late 1995" or "early 1996." Doe's indictment, however, covered only an approximate six-day period in July, 1996 . . . .

drug amounts was obtained from a separate trial, and because the drugs were allegedly imported over a period of several years (while Doe was only indicted for a period of six days), "we would stretch *Cotton* too far to find 'overwhelming' as evidence of quantity involved in drug deals conducted during one week in July, 1996, reports of amounts imported over a much more extensive three-year period ending approximately six months before the time in question."[287]

Similarly, the Sixth Circuit, in *United States v. Bartholomew,* found plain error in the sentencing of a defendant for sixty-five months on a marijuana charge, where the court decided that the evidence of drug amounts was not overwhelming or uncontroverted.[288] The court noted:

> Evidence concerning the amount of marijuana that Bartholomew conspired to distribute was neither overwhelming nor essentially uncontroverted. For example, the government's witness could not state with certainty whether the four additional tubs in Harris's residence had contained marijuana. One law enforcement officer conceded that . . . he had inspected only one closely. *Although evidence of the tubs supports a determination of drug quantity by a preponderance of the evidence (as was applied by the district court in determining Harris's sentence), it would not necessarily amount to proof of drug quantity beyond a reasonable doubt.*[289]

Bartholomew, therefore, removed certain evidence from the weight of evidence against the defendant because that evidence could only meet a preponderance of the evidence standard and not a reasonable doubt standard. Furthermore, *Bartholomew* distinguished between the vague drug amounts alleged against the overall conspiracy and the indisputable amounts properly assessed against the particular defendant: "As the government concedes, the jury could have convicted Bartholomew based solely on the single UPS package delivered on December 23, 1998 . . . . But if the jury had found only that amount to have been proved beyond a reasonable doubt, Bartholomew's sentence could not have exceeded 60

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[287] *Id.*

[288] 310 F.3d 912, 927 (6th Cir. 2002).

[289] *Id.* at 926 (emphasis added).

months' imprisonment."[290] By considering the weight of drugs that was truly unassailable as applied to that defendant, *Bartholomew* correctly applied *Cotton's* intuition that an error will affect the public reputation of the courts if the nature of the evidence against the defendant as to drug amounts is less than absolutely conclusive.

Yet *Bartholomew* does not go far enough. *Bartholomew* equates the overwhelming and uncontroverted standard with reasonable doubt, subtracting out all evidence that would only be provable by a preponderance of the evidence. But by its very terms, the overwhelming and uncontroverted standard is more than just reasonable doubt. Logically, there must be a set of cases in which the jury would have convicted (i.e., the evidence as to drug amounts would have been proven beyond a reasonable doubt), but a court must still remand, not being absolutely sure that such is the case.

In sum, while *Apprendi* is applied to a growing number of sentencing-factor statutes, and in increasingly important cases (such as the death penalty under *Ring*), the actual protection that it provides defendants is rapidly waning. This decreasing protection is the result of courts using insufficient care in applying *Cotton*. *Cotton* does not permit courts to affirm drug sentences simply because the prosecution included unverified heavy weights of drugs in the presentence report or alleged vague and vast amounts of drugs at the sentencing hearing. That evidence was never before the jury, played no part in its deliberations, and there is no control on its quality, source, or even its truth. That some subset of that evidence convinced a judge by a preponderance of the evidence is at least some indication of quality, but even that evidence is not good enough. Rather, the accumulation of unassailable and properly attributable evidence must rise beyond the level of a preponderance of the evidence, or even reasonable doubt. To affirm a drug sentence without a jury determination of an essential element of the crime requires evidence so overwhelming that no rational jury could have chosen but to convict on the omitted element. Courts should be aware of the pitfalls inherent in applying the *Cotton* rule and should take special care to reserve application of the rule to those cases in which the evidence establishing an element of the crime is directly applicable to the defendant seeking relief and was truly uncontroverted at either the trial or at sentencing.

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[290] *Id.* at 926–27.

VII. EVADING *COTTON: APPRENDI* CHALLENGES BROUGHT UNDER THE FIFTH AMENDMENT

Courts afford *Apprendi* violations substantive review only on direct appeal.[291] Even on direct appeal, *Apprendi* appeals face *Cotton's* overwhelming and essentially uncontroverted test. Defendants seeking habeas review and defendants who did not raise an *Apprendi* objection at trial are seeking new ways to cast their claims for relief. The most common of these alternative forms has been to cast a routine *Apprendi* claim as a claim for violation of the Fifth Amendment—constructive amendment—of the indictment.

The Fifth Amendment of the United States Constitution requires, *inter alia*, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[292] In *Stirone v. United States*, the Supreme Court established the principle that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."[293] Subsequent courts extended the holding of *Stirone* to cover constructive amendments of an indictment, where, although the prosecution did not formally amend the indictment, a different crime was charged to the jury than was originally included in the indictment.[294] The Supreme Court has never added constructive amendments of the indictment to its list of per se reversible errors.[295] However, prior to *Cotton*, constructive amendments of the indictment were considered structural error by several circuits.[296]

A person who has an *Apprendi* claim may also, if convicted in a federal court, assert a plausible Fifth Amendment claim. Pre-*Apprendi* drug indictments usually did not contain drug quantities and were simply charges under 21 U.S.C. § 841(a) (possession) or section 846 (drug conspiracy). However, at sentencing, the defendant would be sentenced under one of the

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[291]Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003), *cert. granted, sub. nom.* Schriro v. Summerlin, No. 03-526, 2003 U.S. LEXIS 8574, at *1 (Dec. 1, 2003).

[292]U.S. CONST. amend. V.

[293]361 U.S. 212, 215–16 (1960).

[294]*See, e.g.*, United States v. Barrow, 118 F.3d 482, 489 (6th Cir. 1997); United States v. Ford, 872 F.2d 1231, 1235–37 (6th Cir. 1989). A constructive amendment is "a variance that is accorded the per se prejudicial treatment of an amendment," because, like an actual amendment, it infringes upon the Fifth Amendment's grand jury guarantee. *Id.*

[295]*See* Neder v. United States, 527 U.S. 1, 8 (1999).

[296]*See* United States v. Syme, 276 F.3d 131, 148 (3d Cir. 2002); United States v. Wade, 266 F.3d 574, 583 (6th Cir. 2001); United States v. Olson, 925 F.2d 1170, 1175 (9th Cir. 1991).

section 841(b)(1) sentencing statutes, depending on the amount of drugs proven by a preponderance of the evidence before the judge. *Apprendi*, the argument goes, held that those sentencing factors were essential elements of the crime. Insofar as a crime is defined by its elements, *Apprendi* claimants may argue that they were convicted of a different crime than that charged to the grand jury, which did not consider evidence of drug amounts.[297]

In the current jurisprudential climate, a Fifth Amendment constructive amendment challenge may very well succeed where a straightforward *Apprendi* argument would not. First, some circuits treat constructive amendment of an indictment as per se reversible structural error, thus bypassing harmless error review.[298] Although the logic of *Neder* and *Cotton* would seem to apply to constructive amendments of an indictment as well as the failure to present a jury with an element, several circuits have reaffirmed their adherence to per se treatment of constructive amendment of the indictment claims, even when presented on *Apprendi* facts.[299] Second, *Apprendi* has generally been held not to apply to cases on collateral review under the Supreme Court's reasoning in *Teague v. Lane*.[300] It is not, however, settled that Fifth Amendment claims are *Teague*-barred, and courts have indeed granted relief on first habeas petitions.[301]

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[297]*See* United States v. Holt, 46 Fed. Appx. 306, 310–11 (6th Cir. 2002). *Holt* stated:

> While we recognize that there is a serious question as to whether convictions under the various federal drug sentencing statutes are, after *Apprendi*, separate crimes such that a conviction under the [21 U.S.C.] § 841(b)(1)(C) catch-all sentencing provision would constitute a constructive amendment of an indictment under any of the other sections, we do not find it necessary to resolve that question here.

Id. at 310. *Holt* ultimately rejected the defendant's constructive amendment argument because the jury indicated on the verdict form that the defendant was guilty of the requisite drug amounts. Thus, the actual conviction matched the indictment, and the court could not notice the forfeited error. *Id.*

[298]*Compare* United States v. Syme, 276 F.3d 131, 148 (3d Cir. 2002) (constructive amendment of an indictment per se reversible under harmless error review), *and* United States v. Wade, 266 F.3d 574, 583 (6th Cir. 2001), *with* United States v. Prentiss, 256 F.3d 971, 984–85 (10th Cir. 2001) (per curiam) (constructive amendment of an indictment is trial error subject to harmless error analysis).

[299]*See Syme*, 276 F.3d at 148–49.

[300]Hartman v. Lee, 283 F.3d 190, 194–95 (4th Cir. 2002) (asserting Sixth Amendment due process claims for state constructive amendment argument instead of relying on *Apprendi* proper).

[301]The *Tyler* analysis, above, would indicate that a second or successive petition based on a constructive amendment claim would not constitute a new rule of law made retroactive on

Courts should close the Fifth Amendment loophole for three reasons. First, constructive amendments are primarily concerned with notice to the defendant. To the extent that an indictment is broadened, a defendant is required to defend against charges of which he had no notice. However, to the extent that an indictment is narrowed, there is no notice problem. Second, *Cotton* squarely applied plain error review to the failure of a grand jury to consider each element of the indictment. As a fixed point, therefore, when a grand jury surely would have indicted a defendant based on overwhelming and essentially uncontroverted evidence, the sentence may be affirmed under plain error analysis.[302] Finally, to the extent that *Cotton* does leave the possibility of treating constructive amendment claims as structural error for purposes of harmless error analysis open, *Neder* closes the loophole, both under its holding and under its logic.

A. The Mechanics of Constructive Amendments

"A constructive amendment occurs where a defendant is deprived of his 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.'"[303] The Fifth Amendment offers an opportunity to challenge both conviction and sentence if the defendant can show that the facts proven at trial deviate sufficiently from the crime for which he was indicted. Several circuits treat an amendment to the indictment as a "per se violation of the fifth amendment's grand jury clause."[304] This gives a constructive amendment claim a chance of success when a regular *Apprendi* claim would be denied, either because *Apprendi* is *Teague*-barred from being first asserted on collateral review, or because the chances of prevailing on a Fifth Amendment claim may simply be better than a standard *Apprendi* argument.

Not every deviation from the indictment invalidates the trial. A slight change in the charge will not be considered sufficient grounds to overturn

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collateral review, if only because the Supreme Court case establishing the constructive amendment line of analysis, *Stirone v. United States*, 361 U.S. 212, 215–16 (1960), is not a *new* law with respect to AEDPA. However, whether such a claim would be barred by *Teague* on a first habeas petition remains an open question. *See, e.g.*, Lucas v. O'Dea, 179 F.3d 412, 416–18 (6th Cir. 1999) (affirming grant of first petition for a writ of habeas corpus on constructive amendment grounds).

[302]United States v. Cotton, 535 U.S. 625, 634 (2002).

[303]*Syme*, 276 F.3d at 148 (citing United States v. Miller, 471 U.S. 130, 140 (1985)).

[304]*Id.* (internal quotation marks omitted); *accord* United States v. Wade, 266 F.3d 574, 583 (6th Cir. 2001).

the conviction. A variance between the indictment and the crime proven at trial will only prove fatal if the difference between the indictment and the crime charged to the jury is so severe that the defendant would be convicted for a different crime than that for which he was indicted.[305]

Indeed, the fact that constructive amendment claims are primarily concerned with notice provides courts with a first, and simple, objection to permitting defendants to raise constructive amendment claims on what are essentially *Apprendi* facts. Constructive amendment claims are generally *impermissible broadening* claims—yet constructive amendment claims based on *Apprendi* facts are for *impermissible narrowing* of the indictment.[306] Variances from the indictment are not fatal under the Fifth Amendment if the variance narrows, rather than expands, the indictment.[307]

Certainly the Court's reasoning in *Cotton* bears out this premise. The Fourth Circuit had reversed the sentences in *Cotton* "on the question of whether respondents had notice that they would face an increased sentence" as the result of the sentencing judge's findings of drug amounts.[308] Despite this, the Court applied plain error review indicating that either the Court found that there was no notice problem created by the narrowing of the indictment or, as argued below, that constructive amendment claims are not per se reversible, and are properly subject to harmless and plain error review.

B. Cotton *and the Failure to Present an Element of the Crime to a Grand Jury*

Courts must also consider the impact of *Cotton* on the constructive amendment jurisprudence of their respective circuits. *Cotton* expressly contemplated the Fifth Amendment ramifications of the *Apprendi* rule, both

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[305]*See, e.g.*, United States v. Matthews, 47 Fed. Appx. 456, 461 (9th Cir. 2002) ("Generally, a variance warrants reversal only if it constitutes a constructive amendment of the indictment—that is, if the defendant was effectively convicted of a crime that was not charged in the indictment.").

[306]This is because an indictment without drug amount specification would put the defendant prior to *Apprendi* on notice that he could be indicted for any one of the drug amount defenses under 21 U.S.C. § 841(b)(1)(A), (B), or (C). By proving a specific drug amount, the prosecution narrowed the broad initial indictment down to one of the specific sentencing statutes.

[307]*See, e.g.*, United States v. Weinstock, 153 F.3d 272, 279 (6th Cir. 1998) ("A distillation of the above cases establishes the principle that if the evidence offered at trial proves a narrower scheme than the one alleged in the indictment, then the variance is not fatal.").

[308]Transcript of Oral Argument at *2–*3, United States v. Cotton, 535 U.S. 625 (2002) (No. 01-687), *available at* 2002 U.S. TRANS LEXIS 34.

at oral argument and in the written opinion. At oral argument, Chief Justice Rehnquist asked Mr. Dreeben, counsel for the United States, to discuss the impact of the government's position on *Stirone*.[309] Mr. Dreeben argued that a government-favorable decision would not require *Stirone* to be overruled for two reasons. First, he pointed out that *Stirone* was a harmless error case because in that case the defendant had raised an objection below.[310] Second, he noted that *Stirone* presented a true notice problem because the defendant in *Stirone* was required to defend against a completely different charge at trial than was included in the indictment.[311]

In the written opinion, the Court noted that the respondent defendants had raised the question of whether, under *Stirone*, a constructive amendment of the indictment constituted per se reversible structural error.[312] However, the Court reserved that question, along with the question of whether the defendant's substantial rights were violated.[313] By contrast, the central holding of *Cotton* expressly stated that the failure to raise a constructive amendment claim could be waived by failing to object at the trial level.[314] *Cotton* held that failure to submit the element of drug amounts

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[309] *Id.* at *11.

[310] *Id.*

[311] *Id.* at *12.

[312] United States v. Cotton, 535 U.S. 625, 632 (2002).

[313] *Id.* at 632–33.

[314] For a good analysis of the intersection between the holding of *Cotton* and Fifth Amendment jurisprudence, see *United States v. Carr*, 303 F.3d 539, 543–44 (4th Cir. 2001).

> At oral argument [defendant's] lawyer emphasized the importance of the Fifth Amendment right to a grand jury to support Carr's claim that the indictment defect seriously affected the fairness, integrity, or public reputation of judicial proceedings. Specifically, the lawyer argued that it is essential to the basic fairness and integrity of the criminal process that the indictment set forth every ingredient of the crime charged. However, in *Cotton* the Supreme Court, citing *Johnson*, rejected essentially the same argument. In *Johnson* the Court held that the judge's failure in a perjury trial to instruct the jury on the essential element of materiality did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. This was because the "evidence of materiality . . . was 'overwhelming' and 'essentially uncontroverted.'" Thus, in *Johnson* the defendant's conviction was upheld because even though the petit jury was not charged on one of the essential elements of perjury, the uncharged element (materiality) was nevertheless established by evidence that was one-sided and overwhelming . . . .
>
> Here, as in *Cotton* and *Johnson*, there is no question that the evidence

to the grand jury was not plain error when the evidence of drug amounts was so overwhelming and uncontroverted that the grand jury would surely have indicted for the requisite drug amounts. Therefore, *Cotton* must be read for the proposition that a defendant who fails to object to a constructive amendment of the indictment at trial forfeits that objection and may only seek remand under plain error analysis.[315]

C. *Circuit Precedent on Constructive Amendments in the Wake of* Cotton

Despite *Cotton*'s guidance, there is still considerable confusion over how to deal with constructive amendment claims brought on *Apprendi* facts. Courts have taken several approaches: (1) per se reversal and remand of constructive amendments under both plain error and harmless error review;[316] (2) per se treatment of constructive amendment claims of harmless error, but unvarnished review of unobjected-to errors for plain error;[317] (3) per se treatment of constructive amendments under harmless error, and a presumption of prejudice for the substantial rights portion of the analysis under plain error review;[318] and (4) complete rejection of per se treatment, and the application of full substantial rights analysis to constructive amendments under both harmless and plain error review.[319]

> unequivocally and overwhelmingly supported the missing element, namely, that the apartment building was damaged or destroyed by fire.

Id. (citations omitted); *accord* United States v. Carrington, 301 F.3d 204, 213 (4th Cir. 2002) (holding that when an indictment gave sufficient notice of the drug amounts in contention, the failure to include a precise charge as to drug amounts did not render the indictment fatally defective under *Cotton*).

[315] *See, e.g.*, United States v. Matthews, 47 Fed. Appx. 456, 462 (9th Cir. 2002).

> At one point in our circuit, before *Cotton* and *Olano*, it was established that a constructive amendment [of the indictment] always warranted reversal. But . . . *Cotton* conclusively holds that a defendant may forfeit his claim of error regarding a defective indictment if he fails to object. . . . Under such circumstances, we review for plain error.

Id. (citations omitted).

[316] United States v. Olson, 925 F.2d 1170, 1175 (9th Cir. 1991). *But see Matthews*, 47 Fed. Appx. at 462 (implying that *Olson* is no longer good law after *Cotton*).

[317] *See generally* United States v. Wade, 266 F.3d 574 (6th Cir. 2001).

[318] United States v. Syme, 276 F.3d 131, 136 (3d Cir. 2002).

[319] United States v. Trennell, 290 F.3d 881, 887 (7th Cir. 2002).

In *United States v. Syme*, for example, the defendant owner and operator of a private ambulance service was convicted of fraud because he misrepresented the "home state" of his business, and thereby was overcompensated for services.[320] The prosecution alleged that Syme made transports which were not "medically necessary" in order to receive reimbursements that were improper under the relevant health plans.[321] On appeal, Syme argued that the prosecution had improperly added a legally impermissible theory to the case, since "home state" had not been sufficiently defined to be a basis for a fraud conviction. The court rejected this claim of legal impermissibility but did decide to reverse and remand one count of the conviction because the district court constructively amended the indictment "by instructing the jury on a fraud theory that was not alleged in the count."[322]

Syme held that the third element of the plain error test, prejudice to substantial rights, is automatically satisfied in constructive amendment cases: "[W]e hold that constructive amendments, which are per se reversible under harmless error review, are presumptively prejudicial under plain error review."[323] *Syme* continued: "[I]t is uncertain whether . . . application of the per se rule has survived *Olano*, which recognized broader discretion for appellate courts exercising plain error review."[324] The court noted the division among the circuits on this important question and turned to the text of *Olano* for instruction.[325] The court noted: "*Olano* stated that in order for an error to 'affect substantial rights' under the plain error test, the defendant usually must show that the error was 'prejudicial,' that is that it 'affected the outcome of the district court proceedings.'"[326] Following *Olano*, *Syme* held that a constructive amendment falls into that category of errors in which the defendant no longer bears the burden of establishing prejudice to his substantial rights.[327]

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[320] *Syme*, 276 F.3d at 137–38.

[321] *Id.* at 138.

[322] *Id.* at 136.

[323] *Id.*

[324] *Id.* at 152.

[325] "Several courts of appeals have considered the question whether a constructive amendment is per se reversible under the plain error standard, but the circuits are divided and the resulting law is checkered . . . ." *Id.*

[326] *Id.* at 153 (quoting United States v. Olano, 507 U.S. 725, 734 (1993)).

[327] *See id.* at 154

Like a denial of the right of allocution, a constructive amendment also

Indeed, *Cotton* could be read to leave open this *presumed prejudice* approach. The Court connected the questions: whether the defendant had suffered a structural constructive amendment of the indictment, and whether the substantial rights of the defendants had been affected, and avoided both at once, by concentrating its analysis on the judicial reputation element of plain error review. *Cotton*, therefore, left courts to speculate whether such an error would constitute a violation of the defendant's substantial rights under harmless error analysis. Thus, the best argument against completely closing the Fifth Amendment loophole is that *Cotton* considered the question of structural error to go only to the question of prejudice and substantial rights and not to impact the fourth (judicial reputation) element of plain error review.

D. Courts Should Close the Fifth Amendment Loophole

Courts should nevertheless reject this reasoning as incomplete and close the Fifth Amendment loophole entirely. First, *Cotton* held that the failure of a grand jury to include every element of a crime in an indictment was subject to plain error review. Plain error analysis must therefore apply to constructive amendments under *Cotton* when the court is considering the fourth element (judicial reputation and integrity) of a plain error analysis.[328] For the majority of *Apprendi* appeals, which are for plain error, courts should apply *Cotton's* overwhelming and essentially uncontroverted test to determine whether an impermissible broadening of the indictment would damage the integrity and reputation of judicial proceedings. If there is overwhelming and essentially uncontroverted evidence on point, then the grand jury's failure to include that element in the indictment may be affirmed under *Cotton*.

> violates a basic right of criminal defendants, the grand jury guarantee of the Fifth Amendment. We follow the holding of *Adams* that some serious errors should be presumed prejudicial in the plain error context even if they do not constitute structural errors and find that constructive amendments fall into that category. Similar to the plight of a defendant who is denied the right of allocution, it is very difficult for a defendant to prove prejudice resulting from most constructive amendments to an indictment.

Id.

[328] *See, e.g.*, United States v. Matthews, 47 Fed. Appx. 456, 462 (9th Cir. 2002) ("*Cotton* conclusively holds that a defendant may forfeit his claim of error regarding a defective indictment if he fails to object. . . . Under such circumstances, we review for plain error.").

Harmless error is a much more difficult question, but the answer should be the same. As discussed above, *Cotton* discussed *Stirone* as part of the substantial rights question for harmless error review and reserved consideration of *Stirone* at the same time that it decided not to answer whether the error affected defendants' substantial rights. However, to be fully consistent with Supreme Court precedent, courts should apply the overwhelming and essentially uncontroverted test to constructive amendments claims even when the appeal is based on harmless error.

First, *Neder* covers any loophole left by *Cotton*. *Neder* applied the overwhelming and essentially uncontroverted test to substantial rights analysis under the harmless error standard. *Cotton* was based on the premise that where there is an overwhelming amount of evidence establishing an element of the crime, the courts will not be thrown into disrepute by affirming the sentence. *Neder*, however, used the overwhelming and uncontroverted standard to explain that, in the context of harmless error review, the defendant's substantial rights were not affected when there was unassailable evidence establishing the element of the crime. *Neder* reasoned that most constitutional errors were harmless, and that only those errors that rendered a trial fundamentally unfair would be reversed as structural. *Neder* then noted:

> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations that we have found to defy harmless-error review . . . .
>
> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair . . . .[329]

Neder's logic—that the failure to submit a single element of a crime to a jury does not render the trial fundamentally unfair—applies equally to the constructive amendment context, where the variance between what is charged in the indictment and what instructions are given to the jury at trial creates the violation.

Second, and more practically, the Supreme Court has never recognized constructive amendments as structural error. *Stirone* was not included in

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[329]Neder v. United States, 527 U.S. 1, 8–9 (1999).

the *Neder* list of established structural errors, which the Court has further declined to expand.[330] The Supreme Court was presented, in *Cotton*, with the opportunity to add constructive amendments of the indictment to the list of formally recognized structural errors.[331] The Court declined to do so. Thus, in both the harmless error and plain error settings, there is no reason to treat the failure to present an element of a crime to a grand jury any differently than a failure to present an element of a crime to a petit jury.

VIII. CONCLUSION

While the theoretical protections of the right to a jury trial continue to expand as *Apprendi* is applied in new legal contexts, the practical protections of that same right are drastically contracting. Based on *United States v. Cotton*, too many courts now disregard *Apprendi* error, based on overwhelming and essentially uncontroverted evidence, when the evidence is neither overwhelming nor uncontroverted as a matter of common sense.

Properly read, the *Cotton* rule allows a court to disregard a clear-cut violation of the defendant's right to a jury trial under very special circumstances—when the evidence of the essential element is unassailable. As applied, however, the *Cotton* standard has worked a complete and across-the-board reversal in the treatment of these cases. Prior to *Cotton*, courts routinely reversed clear *Apprendi* errors; after *Cotton*, *Apprendi* appeals were and are routinely denied by courts, holding that the evidence of drug amounts was sufficiently overwhelming and uncontroverted to omit the need for a jury to find that element beyond a reasonable doubt.

This has caused defendants to abandon their straightforward *Apprendi* claims for the murkier Fifth Amendment constructive amendment of the indictment claims. Courts should close the Fifth Amendment loophole. Leaving the loophole open only promotes confusion over what is a structural error and permits a meaningless distinction to determine whether the defendant's sentence is per se reversed or routinely affirmed. Furthermore, *Cotton* applied plain error review to a claim that every element of the crime was not included in the indictment. At a bare minimum, therefore, courts should apply plain error review, under *Cotton*, to constructive amendment claims.

As they close a window, however, the courts should open the door. Courts of appeals should think deeply about the *Cotton* standard and how to

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[330] *See id.* at 8.

[331] *See* United States v. Cotton, 535 U.S. 625, 632 (2002).

apply it. First, courts must define more carefully what weight of evidence is overwhelming and what type of objections render a drug amount controverted. Courts should not continue to affirm convictions where the drug amounts were only admitted at trial under the evidentiary standard of relevance (only tending to establish a point in contention), only proven before a judge to a preponderance of the evidence, or even proven beyond a reasonable doubt. The evidence must meet a higher standard to satisfy *Cotton*: the court must not only be satisfied that the jury in the case would have convicted, but that no rational jury could do otherwise on that weight of the evidence.

Also, courts should remand convictions for re-sentencing where the defendant did in fact contest drug amounts at the sentencing hearing. While cases like *Lopez* are probably correct that an objection to the amount of drugs should not count as raising an *Apprendi* objection for the purposes of preserving error for harmless error review, that same objection, if made in good faith, should act as *controversy* under the *Cotton* rule, sufficient to permit the court to remand under the plain error standard.[332] Even if the evidence is strong (short of overwhelming) as to the drug amount, a defendant's vigorous protests below should convince courts that the failure to submit the element of the crime to the jury would constitute plain error.

This Article began with the assertion that the protection of the innocent was the animating force of criminal law, but innocence is a strange beast. In the cases discussed above, the defendants are never completely innocent; the entire thrust of the question on appeal is to establish whether the defendant is responsible for a greater or a lesser crime. The question is whether the defendant has been proven guilty enough to be subjected to a higher range of punishment, and how willing we are, as a society, to impose punishment despite the fact that a jury has not made that finding beyond a reasonable doubt.

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[332] *Compare* United States v. Strayhorn, 250 F.3d 462, 467 (6th Cir. 2001) (drug quantity objection counts as *Apprendi* objection below), *with* United States v. Lopez, 309 F.3d 966, 969 (6th Cir. 2002) (drug quantity objection does not raise *Apprendi* objection, and review is for plain error).