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# Criminal Procedure - United States v. Nordby

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# CRIMINAL PROCEDURE

## *UNITED STATES v. NORDBY,*

## 225 F.3D 1053 (9TH CIR. 2000)

### I. INTRODUCTION

In *Apprendi v. New Jersey*,[1] the United States Supreme Court held that other than the fact of a prior conviction,[2] any fact that increases the penalty for a crime beyond the prescribed statutory maximum to which a defendant is exposed must be submitted to a jury and proved beyond a reasonable doubt.[3] The *Apprendi* decision has had its most significant im-

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[1] 120 S.Ct. 2348 (2000). At the time of publishing, official pagination for *Apprendi v. New Jersey* was unavailable. All citations to *Apprendi*, therefore, will reference pagination as provided in the Supreme Court Reporter.

[2] *See* Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998). In *Almendarez-Torres*, the United States Supreme Court upheld a conviction and sentence where the sentence was increased from two to twenty years based on a prior conviction. *See id.* at 226-227. *Almendarez-Torres* involved the constitutionality of a provision of the Immigration and Naturalization Act, 8 U.S.C. § 1326(b)(2), which authorizes an increased prison sentence for an alien who has re-entered the United States after deportation if there is evidence of a prior aggravated felony. *See id.* at 227. Even though the fact of prior conviction had not been charged in the indictment nor the issue submitted to the jury, the Court noted that "recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's [decision to] increas[e] an offender's sentence." *See id.* at 243. In *Apprendi*, the Court left *Almendarez-Torres* untouched. *See Apprendi*, 120 S.Ct. at 2362. The Court in *Apprendi* retained an exception for recidivism, finding that prior convictions can serve as the basis for a sentence enhancement exceeding that sustainable by the facts found by a jury beyond a reasonable doubt. *See id.* at 2362-2363. It is noteworthy, however, that *Almendarez-Torres* was a five-to-four decision in which Justice Scalia, joined by Justices Stevens, Souter and Ginsberg, dissented. *See Almendarez-Torres*, 523 U.S. at 248. Justice Thomas, who cast the fifth and deciding vote in *Almendarez-Torres*, stated in *Apprendi* that *Almendarez-Torres* was wrongly decided. *See Apprendi*, 120 S.Ct. at 2379 (Thomas, J. concurring).

[3] *See Apprendi*, 120 S.Ct. at 2362-2363. In *Apprendi*, the state convicted Charles Apprendi of possession of a firearm for an unlawful purpose after firing several shots from a rifle into the home of a neighbor. *See id.* at 2351-2352. Under New Jersey law, Mr. Apprendi faced imprisonment of five to ten years for the second-degree offense. *See id.* at 2352. At sentencing, however, a judge found by a preponderance of the evi-

pact in drug-trafficking cases, where judges rather than juries traditionally make findings of fact as to drug quantities at sentencing pursuant to a preponderance-of-the-evidence standard.[4] The United States Court of Appeals for the Ninth Circuit recently applied the rationale of *Apprendi* to drug-trafficking cases under 21 U.S.C. § 841 in *United States v. Nordby*.[5] The *Nordby* court held that a finding of drug quantity under 21 U.S.C. § 841(b)[6] by the district court at sentenc-

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dence that Mr. Apprendi's crime was motivated by racial bias, a finding that increased Mr. Apprendi's sentence under New Jersey's hate-crime law to imprisonment between ten and twenty years. *See id.* Mr. Apprendi was sentenced to twelve years imprisonment. *See id.* The Court framed the question presented as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt." *See id.* at 2351. The Court reversed the trial court, holding that the increase in the prescribed statutory maximum penalty to which Mr. Apprendi was exposed violated Mr. Apprendi's constitutional rights under the Fifth and Sixth Amendments because the factual determination that had served to elevate his maximum statutory exposure had not been submitted to a jury and proved beyond a reasonable doubt. *See id.* at 2362-2363.

[4] The most famous definition of the beyond-a-reasonable-doubt standard was that of Chief Justice Shaw, instructing the jury in *Commonwealth v. Webster*, 5 Cush. 295, 320, 52 Am.Dec. 711 (Mass. 1850):

> [R]easonable doubt . . . is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

*Id.* Expressed more recently by the Court, reasonable doubt exists when jurors lack "a subjective state of near certitude of the result of guilt of the accused." Jackson v. Virginia, 443 U.S. 307, 315 (1979), *reh'g denied*, 444 U.S. 890 (1979). On the other hand, the preponderance-of-the-evidence standard, applied most often in civil cases, is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

[5] *See* 225 F.3d 1053, 1056 (9th Cir. 2000). The appeal from the United States District Court for the Northern District of California, Judge Vaughn R. Walker presiding, was argued and submitted on July 10, 2000 before Circuit Judges Canby, Reinhardt, and Fernandez. *See id.* at 1053, 1056. Judge Canby authored the opinion. *See id.* at 1056. Judge Reinhardt filed a concurring opinion. *See id.* at 1062-1063.

[6] *See* 21 U.S.C. § 841(b) (1994). Section 841(b) is the provision through which penalties are assessed for violations of 21 U.S.C. § 841(a). *See id.* Section 841(a) pro-

ing pursuant to a preponderance of the evidence violated the Due Process Clause of the Fifth Amendment[7] and the notice and jury-trial guarantees of the Sixth Amendment[8] when drug quantity was used to increase the prescribed statutory maximum penalty.[9] In requiring that drug quantity be submitted to the jury and proved beyond a reasonable doubt, the Ninth Circuit overruled nearly fifteen years of its own precedent.[10]

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vides that " . . . it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." *See* 21 U.S.C. § 841(a) (1994).

[7] *See Nordby*, 225 F.3d at 1059. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . " U.S. CONST. amend. V.

[8] *See Nordby*, 225 F.3d at 1059. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[9] *See Nordby*, 225 F.3d at 1056. The "prescribed statutory maximum" refers to the punishment to which the defendant is exposed solely under the facts found by the jury. *See id.* at 1059.

[10] *See id.*, at 1059. The *Nordby* decision effectively overruled Ninth Circuit precedent inconsistent with *Apprendi*. *See* United States v. Brinton, 139 F.3d 718, 722 (9th Cir. 1998); United States v. Ramos-Oseguera, 120 F.3d 1028, 1035 (9th Cir. 1997); United States v. Alerta, 96 F.3d 1230, 1237 (9th Cir. 1996); United States v. Baker, 10 F.3d 1374, 1417 (9th Cir. 1993); United States v. Castaneda, 9 F.3d 761, 769 (9th Cir. 1993); United States v. Sotelo-Rivera, 931 F.2d 1317, 1319 (9th Cir. 1991); United States v. Rosales, 917 F.2d 1220, 1223 (9th Cir. 1990); United States v. Walker, 915 F.2d 480, 486 (9th Cir. 1990); United States v. Klein, 860 F.2d 1489, 1494-1495 (9th Cir. 1988); United States v. Kinsey, 843 F.2d 383, 391-392 (9th Cir. 1988); United States v. Normandeau, 800 F.2d 953, 956 (9th Cir. 1986). Even more, the Ninth Circuit in *Nordby* joined the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits in holding that prosecutions under Section 841 require the government to submit the fact of drug quantity to a jury for a finding beyond a reasonable doubt if the government seeks to impose a sentence enhancement under either 21 U.S.C. § 841 (b)(1)(A) or 21 U.S.C. § 841(b)(1)(B). *See* United States v. Doggett, 230 F.3d 160, 164-165 (5th Cir. 2000); United States v. Page, 232 F.3d 536, 542-543 (6th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-934 (8th Cir. 2000), *cert. denied*, Aguayo-Delgado v. United States, 121 S.Ct. 600 (2000); United States v. Jones, 2000 WL 1854077, *3 (10th Cir. 2000); United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir. 2000).

## II. FACTS AND PROCEDURAL HISTORY

The police arrested Kayle Nordby on September 28, 1993, after federal and state officers found thirty-one outdoor marijuana gardens containing 2,308 marijuana plants on two parcels of property owned by Mr. Nordby in Humboldt County, California.[11] Mr. Nordby was indicted for possessing and manufacturing marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1)[12] and conspiring to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846.[13]

At trial, the district court did not instruct the jury to determine the amount of marijuana that Mr. Nordby actually manufactured, possessed, or conspired to possess with intent to distribute.[14] Instead, the district court instructed the jury that "the government is not required to prove the amount or quantity of marijuana manufactured as long as the government proves beyond a reasonable doubt that [Mr. Nordby] manufactured a measurable or detectable amount of marijuana."[15] The jury convicted Mr. Nordby on all three counts.[16]

At sentencing, Mr. Nordby admitted that he had grown some marijuana on the property in question in 1992 and the spring of 1993.[17] He challenged, however, the amount of marijuana that the government sought to attribute to him during

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[11] *See Nordby*, 225 F.3d at 1056. The authorities searched four properties in all. *See id.* In addition to the 2,308 marijuana plants found on Mr. Nordby's property, the police also discovered an indoor growing shed that had been used to grow marijuana. *See id.* The police subsequently arrested Mr. Nordby, as well as co-defendants Cory Marchese, Terry Medd, Jeb Stafslien, and Sam Stafslien. *See id.*

[12] *See id.* at 1056. Section 841(a)(1) provides that " . . . it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . " *Id.* The counts for manufacture and possession with intent to distribute charged Mr. Nordby with 2,308 plants of marijuana. *See Nordby*, 225 F.3d at 1056.

[13] *See Nordby*, 225 F.3d at 1056. Section 846 provides that "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *See* 21 U.S.C. § 846 (1994). The conspiracy charged in the indictment was alleged to have run from "on or about August 1, 1993 [to] on or about September 28, 1993." *See Nordby*, 225 F.3d at 1056.

[14] *See Nordby*, 225 F.3d at 1056.

[15] *See id.*

[16] *See id.*

[17] *See id.*

the alleged conspiracy charged in the indictment.[18] Nevertheless, the court found by a preponderance of the evidence that Mr. Nordby had grown 1,000 or more marijuana plants.[19] As a result, Mr. Nordby was exposed to a statutory minimum sentence of ten years in prison and a statutory maximum of life in prison.[20] The district court sentenced Mr. Nordby to the ten-year minimum penalty.[21]

Mr. Nordby appealed his conviction and sentence to the United States Court of Appeals for the Ninth Circuit.[22] The

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[18] *See id.* at 1056-1057. In particular, Mr. Nordby insisted that his partnership with the Stafslien brothers to grow marijuana in 1992 had dissolved by 1993. *See id.* at 1056. Mr. Nordby further admitted that he had conspired with Mr. Marchese to grow about 200 marijuana plants indoors in 1993, but asserted that this conspiracy ended by June 1993. *See id.* To support his contention, Mr. Nordby asserted that he and Mr. Marchese had been in Minnesota and Costa Rica from late July 1993 until five days before their arrest on September 28, 1993. *See id.* at 1056-1057. Finally, Mr. Nordby contended that unknown "guerilla growers" were responsible for planting and tending other gardens charged in the indictment. *See id.* at 1057. He claimed that this practice of maintaining "guerilla gardens" was common in Humboldt County, and that he should not be held responsible for any marijuana found in these gardens. *See id.*

[19] *See Nordby*, 225 F.3d at 1057. The district court applied United States Sentencing Guidelines Manual ("U.S.S.G.") § 1B1.3 to determine the amount of marijuana for which Mr. Nordby was responsible. *See id.* at 1057. *See* U.S. SENTENCING MANUAL § 181.3(a)(1)(A)–(B) (1998). This section is entitled "Relevant Conduct (Factors that Determine the Guideline Range)" and it provides in pertinent part that:

> [T]he base offense level . . . shall be determined on the basis of . . . (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully cased by defendant; and (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation of that offense, or in the course of attempting to avoid detection for that offense . . .

*See id.*

[20] *See Nordby*, 225 F.3d at 1057. Mr. Nordby was sentenced according to 21 U.S.C. 841(b)(1)(A)(vii). *See id.* Under Section 841(b)(1)(A)(vii), "any person who violates [Section 841(a)] involving . . . 1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . ." *See* 21 U.S.C. § 841(b)(1)(A)(vii) (1994).

[21] *See Nordby*, 225 F.3d at 1057.

[22] *See id.* at 1057. To be clear, Mr. Nordby appealed twice to the Ninth Circuit. The focus of this case summary is Mr. Nordby's second appeal in which he challenged

court affirmed Mr. Nordby's conviction but vacated his sentence and remanded for re-sentencing on the ground that the district court had made insufficient factual findings at sentencing.[23] On remand, the district court determined again that Mr. Nordby was responsible for 1,000 or more marijuana plants under 21 U.S.C. § 841(b)(1)(A)(vii) and sentenced Mr. Nordby to ten years.[24] Mr. Nordby appealed his re-sentencing to the United States Court of Appeals for the Ninth Circuit.[25]

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only his re-sentencing. *See id.* at 1057. In his first appeal to the Ninth Circuit, Mr. Nordby contested both his conviction and sentence on several grounds. *See* United States v. Nordby, 156 F.3d 1240, 1998 WL 476113, *2-10 (9th Cir. 1998) (unpublished opinion). First, Mr. Nordby claimed that the search warrant issued to search his property was invalid. *See id.* at *2-4. Second, he argued that the district court improperly admitted hearsay, which violated his Sixth Amendment right to confront adverse witnesses. *See id.* at *4-5. Third, Mr. Nordby alleged that the Assistant United States Attorney engaged in prosecutorial misconduct by eliciting perjury, impermissibly vouching for the credibility of a witness, and making improper statements during closing arguments. *See id.* at *5-8. Mr. Nordby challenged his original sentence by arguing that the district court failed to make factual findings regarding the number of plants for which he was responsible. *See id.* at *8-9. More specifically, Mr. Nordby alleged that he should not have been held accountable for 1,000 or more marijuana plants because he had not agreed to grow some of the plants, he could not have foreseen that his co-defendants would grow some of the plants, and unknown growers had grown some of the plants. *See id.* at *9 (citations omitted).

[23] *See Nordby*, 225 F.3d at 1057. The Ninth Circuit found a number of faults with the district court's determination of Mr. Nordby's sentence. *See id.* (citing *Nordby*, 1998 WL at *9-10) (unpublished opinion). The district court's analysis failed to explain why the facts it relied upon could not have applied to a smaller 1992 conspiracy rather than the large 1993 conspiracy charged in the indictment. *See Nordby*, 1998 WL at *9. Moreover, the Ninth Court considered the fact that Mr. Nordby recruited his co-defendants insufficient to explain why he should have been held responsible for the marijuana plants the co-defendants grew after they allegedly ended their conspiracy, nor did it answer the assertion that Mr. Nordby could not have foreseen that his co-defendants would increase the scale of the drug-trafficking operation. *See id.* Similarly, the Ninth Circuit held that the district court failed to explain why Mr. Nordby's loan to the Stafslien brothers meant that he could have foreseen that they would grow increased amounts of marijuana. *See id.* The district court also failed to address the argument that unknown individuals grew some of the plants. *See id.* In finding that the pre-sentence investigation report on which the district court relied did not provide greater specificity, the Ninth Circuit concluded that the district court's comments were "general and conclusory statement[s] [that] f[e]ll[ ] short of the specificity required [in a drug-trafficking case like this one.]" *See id.* at *9-10 (quoting United States v. Conkins, 9 F.3d 1377, 1387 (9th Cir. 1993)).

[24] *See Nordby*, 225 F.3d at 1057. *See also supra* text accompanying note 20.

[25] *See Nordby*, 225 F.3d at 1057.

## III. THE NINTH CIRCUIT'S ANALYSIS

### A. *APPRENDI* APPLIES TO SENTENCE ENHANCEMENTS UNDER 21 U.S.C. § 841

In *Apprendi v. New Jersey*,[26] the United States Supreme Court held that the determination of "sentencing factors" by a judge using a preponderance-of-the-evidence standard violated a defendant's right to due process under the Fifth Amendment and right to a jury trial under the Sixth Amendment.[27] The Court in *Jones v. United States*[28] first hinted to these constitutional concerns.[29] In *Jones*, however, the Court avoided the constitutional implications subsequently addressed in *Apprendi*, and construed the serious-bodily-injury penalty-enhancement provisions of 18 U.S.C. § 2119,[30] the federal carjacking statute, to establish separate offenses that must be charged by indictment, submitted to a jury, and proved by the prosecution beyond a reasonable doubt.[31] In *Apprendi*, on the other hand, the Court directly addressed the Fifth and Sixth Amendment concerns.[32] Accordingly, the *Nordby* court considered whether drug quantity was a sentencing factor or an element of the underlying crime under 21 U.S.C. § 841(a).[33] A corollary issue was whether the determination of drug quantity increased the maximum penalty to which Mr. Nordby was exposed for the underlying crime of drug trafficking charged in the indictment.[34]

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[26] 120 S.Ct. 2348 (2000).

[27] *See id.* at 2362-2363. *See also supra* text accompanying notes 3, 7 and 8.

[28] 526 U.S. 227 (1999).

[29] *See Jones*, 526 U.S. at 243 n.6.

[30] Section 2119 provides "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall . . . be fined . . . or imprisoned not more than fifteen years, or both . . . if serious bodily injury . . . results, be fined . . . or imprisoned not more than twenty-five years, or both, and . . . if death results, be fined . . . or imprisoned for any number of years up to life, or sentenced to death." 18 U.S.C. § 2119 (1994).

[31] *See Jones*, 526 U.S. at 251-252.

[32] *See Apprendi*, 120 S.Ct. at 2355.

[33] *See Nordby*, 225 F.3d at 1058.

[34] *See id.* at 1059.

The court relied on Ninth Circuit precedent to find that Congress did not intend drug quantity to be an element of the crime under Section 841(a).[35] Ninth Circuit precedent also states that a judge, not a jury, decides drug quantity under a preponderance-of-the-evidence standard, regardless of the impact of drug quantity on the applicable sentencing range.[36] The Ninth Circuit held that Section 841 plainly distinguished between elements and sentencing factors.[37] The court found that Section 841(a) does not contain prescribed maximum or minimum sentences for violations of the statute.[38] Rather, Section 841(b) assesses penalties for violations of Section 841(a), and any person who violates Section 841(a) is sentenced according to the quantity of the controlled substance for which the defendant is charged.[39] The court concluded, therefore, that Congress clearly intended that drug quantity be a sentencing factor, not an element of the crime under Section 841(a), and that the statute could not be construed in a manner to avoid the constitutional issues raised by *Apprendi*.[40] Once the court extended the rationale of *Apprendi* to drug-trafficking crimes under Section 841(a), its "application of *Apprendi* [to the facts of Mr. Nordby's case was] straightforward."[41]

In *Nordby*, the Ninth Circuit recognized that the jury had been instructed that possession of any "measurable or detectable amount of marijuana" was sufficient to warrant a finding of guilt.[42] The jury made no finding regarding the specific amount of marijuana that Mr. Nordby manufactured, pos-

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[35] *See id.* at 1058 (citing *Sotelo-Rivera*, 931 F.2d at 1319) "Section 841(a) does not specify drug quantity as an element of the substantive offense of possession with intent to distribute; quantity is instead relevant to the penalty provisions of Section 841(b), and is a matter for the district court at sentencing." *Id.*

[36] *See id.*

[37] *See id.* at 1058.

[38] *See id.* Section 841(a) is entitled "Unlawful acts." *Id. See also supra* text accompanying note 6.

[39] *See* 21 U.S.C. 841(b). Section 841(b) is entitled "Penalties" and states that "any person who violates [Section 841(a)] shall be sentenced [as Section 841(b) prescribes.]" *Id.*

[40] *See Nordby*, 225 F.3d at 1058. The Ninth Circuit found Section 841(a) to stand on its "own grammatical feet." *Id.* (quoting *Jones*, 526 U.S. at 233-234).

[41] *See Nordby*, 225 F.3d at 1058.

[42] *See id.* at 1058-1059.

sessed with intent to distribute, or conspired to possess with intent to distribute.[43] Instead, the jury found merely that Mr. Nordby conspired and possessed marijuana with the intent to distribute.[44] Therefore, the fact of drug quantity could not, pursuant to *Apprendi*, be used by the district court to enhance the maximum penalty beyond the prescribed statutory maximum to which Mr. Nordby was exposed.[45]

In this way, although Section 841(a) does not contain penalty provisions,[46] the court stated that the only sentence under Section 841(b) justifiable under the facts as found by the jury would have been a sentence (and possible fine) of not more than five years applicable to possession of less than fifty plants of marijuana.[47] The district court's finding, however, that Mr. Nordby possessed 1,000 or more marijuana plants increased the penalty for Mr. Nordby's crime beyond the prescribed statutory maximum.[48] That is, the district court's finding that Mr. Nordby possessed 1,000 or more plants under Section 841(b)(1)(A)(vii) increased Mr. Nordby's sentence to not less than 10 years or more than life.[49] Thus, the district court's finding, made by a preponderance of the evidence, increased the statutory maximum penalty for Mr. Nordby's crime from five years to life.[50]

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[43] *See id.* at 1058.

[44] *See id.*

[45] *See Nordby*, 225 F.3d at 1059.

[46] *See supra* note 6 and accompanying text.

[47] *See Nordby*, 225 F.3d at 1059 (citing 21 U.S.C. § 841(b)(1)(D)). Section 841(b)(1)(D) provides in pertinent part that "[i]n the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight . . . such person shall . . . be sentenced to a term of imprisonment of not more than 5 years . . . " 21 U.S.C. § 841(b)(1)(D) (1994). Section 841(b)(1)(D) exists as a catchall penalty provision in drug-trafficking indictments for, among other types of drugs, marijuana, where the prosecution does not charge a specific quantity of marijuana as required for the enhanced penalties provided in Section 841(b)(1)(A) or Section 841(b)(1)(B). *See id.*

[48] *See Nordby*, 225 F.3d at 1058-1059.

[49] *See id.* at 1059.

[50] *See id.* The Ninth Circuit rejected the government's argument that Section 841 contains "no prescribed statutory maximum," and that, therefore, *Apprendi* does not apply to Mr. Nordby's case. *See id.* Under *Apprendi*, the "prescribed statutory maximum" refers to the punishment to which the defendant is exposed solely under the facts found by the jury. *See id.* The district court's finding of drug quantity increased the maximum penalty to which Mr. Nordby was exposed and sentenced. *See id.* The

The court held that such a penalty enhancement was inconsistent with the constitutional rule expressed in *Apprendi*.[51] Hence, the court concluded that the district court had erred by sentencing Mr. Nordby under Section 841(b) for possessing and manufacturing marijuana with intent to distribute 1,000 or more marijuana plants without submitting the question of marijuana quantity to the jury for a finding beyond a reasonable doubt.[52]

### B. THE COURT'S PLAIN-ERROR REVIEW

At the time of Mr. Nordby's re-sentencing, neither *Jones v. United States*[53] nor *Apprendi v. New Jersey*[54] had been decided.[55] Mr. Nordby, therefore, did not specifically object to the district court's determination under a preponderance of the evidence of the amount of marijuana for which he was held responsible.[56] Nevertheless, the Ninth Circuit could afford Mr. Nordby relief if the district court's error was "plain."[57] The sig-

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Ninth Circuit, therefore, did not have to decide whether the increase in statutory minimum sentence also fell within the scope of Apprendi. *See Nordby*, 225 F.3d at 1059 n.3 (citing *Apprendi*, 120 S.Ct. at 2363. "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *See id.* (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J. concurring).

[51] *See id.*

[52] *See Nordby*, 225 F.3d at 1059. In so applying the constitutional rule expressed in *Apprendi*, the Ninth Circuit overruled its existing precedent that had previously held that a defendant's sentence under Section 841 could be based on a judge's finding at sentencing of drug quantity under a preponderance-of-the-evidence standard. *See id.*; *see also* cases cited *supra* note 10.

[53] 526 U.S. 227 (1999).

[54] 120 S.Ct. 2348 (2000).

[55] *See Nordby*, 225 F.3d at 1059. Mr. Nordby's case went to the Ninth Circuit on direct review, so there was no question that he was entitled to the benefit of *Apprendi's* new rule decided after his re-sentencing. *See id.* (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). *Griffith* mandates that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *See Griffith*, 479 U.S. at 328.

[56] *See Nordby*, 225 F.3d at 1059-1060.

[57] *See id.* at 1060 (citing FED. R. CRIM. P. 52(b)). Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought attention to the court." *Id.* Under the plain-error standard, reversal is appropriate where: (1) there was "error;" (2) the error was "plain;" and (3) the error affected the defendant's "substantial rights." *See id.* at 1060 (citing United States v. Olano, 507 U.S. 725, 732 (1993)). If the first three elements of

nificance of the court's plain-error review inheres in its conclusion that the district court erred by finding that Mr. Nordby was responsible for 1,000 or more marijuana plants.[58] The district court's finding could not stand pursuant to *Apprendi* since drug quantity was used to increase Mr. Nordby's sentence beyond the maximum penalty charged in the indictment.[59] The court considered it "enough that the *Apprendi* error [was] 'plain' at the time of [Mr. Nordby's] appeal," to the extent that drug quantity was not submitted to the jury for a finding beyond a reasonable doubt.[60]

The Ninth Circuit then decided whether the district court's failure to submit the question of drug quantity to the jury affected Mr. Nordby's "substantial rights."[61] The court noted that there are two approaches to the substantial-rights inquiry under plain-error review.[62] First, the court can weigh the extra sentence imposed upon a defendant beyond that permitted by the jury's verdict.[63] In *Nordby*, the court recognized that the jury convicted Mr. Nordby of violating Section 841(a)(1) without making a specific finding as to the amount of drugs involved.[64] Yet, at sentencing, the district court imposed an additional five years of imprisonment.[65] The court found that such a result affected Mr. Nordby's substantial rights if the actual quantity was less than 1,000 plants of marijuana, "since a longer sentence undoubtedly affects substan-

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the test are met, the court may exercise its discretion to notice the forfeited error, so long as the error (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *See id.*

[58] *See id.* at 1060.

[59] *See id.* at 1059. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See Apprendi*, 120 S.Ct. at 2362-2363.

[60] *See id.* at 1060 (citing Johnson v. United States, 520 U.S. 461, 468 (1997); United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997)).

[61] *See Nordby*, 225 F.3d at 1060 (citing *Olano*, 507 U.S. at 732).

[62] *See id.* at 1060.

[63] *See id.*

[64] *See id.* Mr. Nordby, therefore, could not receive more than five years imprisonment. *Id.*

[65] *See Nordby,* 225 F.3d at 1060. The additional sentence was based on the district court's conclusion that Mr. Nordby possessed 1,000 or more marijuana plants. *See id.*

tial rights."[66] Second, under a more stringent approach, drug quantity can be treated as an element of the offense on which the jury was not instructed.[67] Under this standard, the court conducts a harmless-error analysis as to whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."[68] If the error was harmless, Mr. Nordby's substantial rights could not have been affected.[69] The error would have been harmless if no rational jury could have concluded that Mr. Nordby was responsible for less than 1,000 marijuana plants.[70]

The Ninth Circuit did not choose which approach to apply on the ground that Mr. Nordby satisfied the more stringent standard of the substantial-rights inquiry.[71] The court found that the record left little room for doubt that Mr. Nordby was prejudiced by the failure to submit drug quantity to the jury because the jury could not have found more than fifty marijuana plants.[72] The court noted that Mr. Nordby consistently

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[66] *See id.* at 1060 (quoting United States v. Anderson, 201 F.3d 1145, 1152 (9th Cir. 2000)).

[67] *See id.* at 1060. "Despite the functional equivalence between an element of the crime and a sentencing factor that increases the prescribed statutory maximum beyond that permissible on the facts as found by a jury, [the Ninth Circuit does] not necessarily equate the two for all purposes." *See id.* at 1060 n.5 (citing *Apprendi*, 120 S.Ct. at 2365 & n.19).

[68] *See id.* 1060. The harmless-error standard was articulated in *Neder v. United States*, 527 U.S. 1, 17 (1999). In *Neder*, the defendant was charged with, among other things, filing false federal income tax returns. *See Neder*, 527 U.S. at 6. The defendant challenged the trial court's failure to instruct the jury on the element of materiality with regard to the tax fraud charge. *See id.* Applying harmless-error principles to the defendant's claim, the United States Supreme Court held that a jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court "concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . " *See id.* at 17. Accordingly, the test for determining whether harmless error results from the failure to instruct on an element in a criminal case is as follows: It appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *See id.*

[69] *See Nordby*, 225 F.3d at 1060 (citing *Olano*, 507 U.S. at 734) (the harmless-error and substantial-rights inquiries are the same except that the defendant bears the burden of proof in the latter).

[70] *See id.* at 1060.

[71] *See id.*

[72] *See id.* The Ninth Circuit's review of Mr. Nordby's sentence encompassed the "whole record." *See id.* at 1061 n.6 (citing Delaware v. Van Arsdall, 475 U.S. 673, 681

maintained that he was not responsible for growing all of the 2,000 plants found on his property, or for conspiring to do so at the time charged in the indictment.[73] At sentencing, when the amount of marijuana Mr. Nordby would be responsible for became relevant, Mr. Nordby presented additional evidence that suggested that he did not grow or participate in the conspiracy to grow all the marijuana found on his land.[74]

After reviewing all the evidence, the court held that Mr. Nordby had contested the omitted element of drug quantity and raised evidence sufficient to support a finding that he was not responsible for 1,000 or more plants of marijuana.[75] Mr. Nordby had met his burden of proving that the district

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(1986)). The Ninth Circuit looked at Mr. Nordby's sentencing proceedings as well as his briefing on appeal in order to determine what evidence Mr. Nordby would have introduced at trial on the question of drug quantity had the issue been submitted to the jury. *See id.* at 1061 n.6. The court, however, made it clear that it would not "consider any admissions made by [Mr. Nordby] at sentencing in assessing the prejudice suffered by [Mr. Nordby] because of the *Apprendi* error." *See id.* The harmless-error/substantial-rights inquiry is directed at whether the error affected the jury's verdict, that is, whether the appellate court concludes "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See id.* (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Accordingly, any new admissions made by Mr. Nordby at sentencing after the jury had already rendered its verdict were considered irrelevant. *See id.* at 1061 n.6.

[73] *See Nordby*, 225 F.3d at 1060. Although Mr. Nordby's counsel had admitted at trial that Mr. Nordby had grown relatively small amounts of marijuana in the past, Mr. Nordby had never conceded that he had been part of the conspiracy to grow and distribute marijuana in August and September of 1993. *See id.* at 1060-1061. The Ninth Circuit found persuasive that Mr. Nordby himself did not live on the land in question, and had been vacationing for much of the time that the marijuana crop had been in the ground, and only returned to Humboldt County five days before he was arrested on September 28, 1993. *See id.* at 1060.

[74] *See id.* at 1061. More specifically, Mr. Nordby presented evidence that he had conspired in 1992 with the Stafslien brothers to grow marijuana outside on Mr. Nordby's land, but that this conspiracy ended by the beginning of 1993. *See id.* He presented evidence that the amount of marijuana grown in the 1992 conspiracy was considerably less than that grown in 1993, and that it was not reasonably foreseeable that the Stafslien brothers would grow such a large amount of marijuana on his land in 1993. *See id.* Mr. Nordby further presented evidence that he had conspired with Mr. Marchese to grow approximately 200 marijuana plants indoors, but that this conspiracy ended by June 1993. *See id.* Finally, Mr. Nordby presented evidence regarding the size, location and growing methods used in the thirty-one gardens that could have permitted an inference that some of the gardens were tended by "guerilla gardeners" who were not arrested at all. *See id.*

[75] *See Nordby*, 225 F.3d at 1061 (citing *Neder*, 527 U.S. at 19).

court's error prejudiced him, for he received a sentence five years longer than the maximum he could have received had he been sentenced on the facts as found by the jury.[76] Accordingly, the court determined that since Mr. Nordby had "demonstrated more than a reasonable doubt that he was responsible for possessing or manufacturing 1,000 or more marijuana plants in August and September 1993,"[77] the *Apprendi* error affected the outcome of Mr. Nordby's trial, which affected his substantial rights under the plain-error standard.[78]

Next, the court concluded that the district court's failure to submit drug quantity to the jury for a finding beyond a reasonable doubt "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[79] Our constitutional system of justice was built on the rights to jury trial and a determination of guilt beyond a reasonable doubt.[80] The court determined that the fairness of that system was undermined when a court's error "impose[s] a longer sentence than might have been imposed had the court not plainly erred."[81] Accordingly, the Ninth Circuit vacated Mr. Nordby's sentence.[82] The Ninth Circuit remanded to the district court for re-sentencing subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt.[83]

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[76] *See id.* at 1061.

[77] *Id.*

[78] *See Nordby*, 225 F.3d at 1061 (citing *Olano*, 507 U.S. at 734).

[79] *See id.* at 1061 (quoting *Olano*, 507 U.S. at 732).

[80] *See id.* at 1061 (citing *Apprendi*, 120 S.Ct. at 2355-2356).

[81] *See id.* at 1061 (quoting United States v. Castillo-Casiano, 198 F.3d 787, 792 (9th Cir. 1999), *amended by*, 204 F.3d 1257 (9th Cir. 2000)).

[82] *See id.* at 1061-1062.

[83] *See Nordby*, 225 F.3d at 1062. In considering the appropriate procedure on remand, the Ninth Circuit recognized that in cases in which the jury's finding does not support the defendant's sentence, and where the conviction as well as the sentence are on appeal, the Ninth Circuit has given the government the opportunity to accept a re-sentencing of the defendant to the lesser term permitted by the jury's findings. *See id.* If the government so chooses, the conviction is affirmed and the defendant is re-sentenced subject to the lower maximum sentence. *See id.* If the government does not so choose, a new trial is ordered. *See id.* at 1062 (citing United States v. Garcia, 37 F.3d 1359, 1371 (9th Cir. 1994); United States v. Alerta, 96 F.3d 1230, 1236 (9th Cir. 1996)). In Mr. Nordby's case, however, since he appealed only his re-sentencing, his conviction was not properly before the court. *See id.* at 1062. On that ground, the Ninth Circuit was not presented with the option of ordering a retrial of a conviction that Mr. Nordby accepted as final. *See id.* The court did not express an opinion as to

### C. JUDGE REINHARDT'S CONCURRENCE

Judge Reinhardt wrote separately to discuss in more detail the "substantial rights" element of the standard for plain error.[84] He focused on the nature and basis of the less stringent standard of substantial-rights review, a discussion that the court was not required to develop because Mr. Nordby demonstrated that his substantial rights were affected under the more stringent *Neder* test for harmless error.[85] Judge Reinhardt supplemented the court's analysis of substantial-rights review to clarify the applicability of the less stringent standard in future cases.[86]

As opposed to the *Neder* standard of review, the less stringent standard does not involve a review of the evidence not considered by the jury to try to determine what the jury could have concluded had it been properly instructed.[87] Rather, it requires invalidation of the sentence simply because the verdict reached by the jury does not support the imposition of a sentence greater than five years.[88] Judge Reinhardt presented two alternative theories that underlie the less stringent standard and its rejection of the *Neder* approach.[89] Under the first rationale, a defendant must be convicted of the crime for which he is sentenced.[90] Mr. Nordby

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whether offering an option to the government would be a permissible or appropriate remedy in this case if it were available. *See id.* at 1062 n.7. Finally, because of the Ninth Circuit's disposition of Mr. Nordby's *Apprendi* claim, it declined to address his claim that the district court made insufficient factual findings at sentencing under U.S.S.G. § 1B1.3. *See id.* at 1062 n.8.

[84] *See id.* at 1062-1063. *See supra* text accompanying note 57.

[85] *See Nordby*, 225 F.3d at 1060. Under the *Neder* approach, the court treats drug quantity as an element of the offense on which the jury was not instructed and thereafter conducts a harmless-error analysis as to whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *See id.* at 1060 (citing *Neder*, 527 U.S. at 19). The defendant's substantial rights cannot be affected if the error was harmless. *See id.* at 1060 (citing *Olano*, 507 U.S. at 734).

[86] *See id* at 1062-1063. The opinion for the court in *Nordby* did not specify which approach to the substantial-rights inquiry should be applied in future cases. *See id.* at 1060.

[87] *See id.* at 1062.

[88] *See id.*

[89] *See id.*

[90] *See Nordby*, 225 F.3d at 1062. Judge Reinhardt distinguished *Neder* from the facts in *Nordby* by noting that the defendant in *Neder* was sentenced for the crime of

had been charged with violating Section 841(a), a crime that carries, without a greater specification as to a quantity of marijuana, a five-year maximum sentence.[91] The court, however, sentenced Mr. Nordby to ten years of imprisonment.[92] Judge Reinhardt found that for a defendant who grows marijuana to receive more than five years imprisonment, he must be convicted of growing 1,000 or more marijuana plants in violation of Section 841(a) *and* Section 841(b)(1)(A).[93] Simply growing a detectable amount of marijuana in violation of Section 841(a) or Section 841(a) *and* Section 841(b)(1)(D) imports a sentence not to exceed five years.[94] Accordingly, the trial court violated Mr. Nordby's substantial rights because he was not convicted of the crime for which he was sentenced.[95]

Judge Reinhardt then explained the second rationale of the less stringent standard, which finds it improper to weigh evidence that the jury did not consider when the missing element is central to the offense.[96] He concluded that the second rationale would be applicable in cases like Mr. Nordby's, where, for sentencing purposes, the particular offense depends entirely on the quantity of drugs, and drug quantity, therefore, is a central element of the crime.[97]

The application of the less stringent approach, under either rationale, would result in the same conclusion in Mr. Nordby's case, for the failure of the jury to determine drug quantity was not harmless regardless of what the record disclosed regarding the amount of marijuana for which Mr.

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which the jury convicted him. *See id.* at 1062 (citing *Neder*, 527, U.S. at 6). Mr. Nordby, on the other hand, was not convicted of the crime for which he was sentenced. *See id.*

[91] *See* note 47 and accompanying text.

[92] *See* note 20 and accompanying text.

[93] *See Nordby,* 225 F.3d at 1062 (citing *Anderson*, 201 F.3d at 1152) (emphasis in original).

[94] *See id.* (emphasis in original). *See also supra* note 47.

[95] *See Nordby*, 225 F.3d at 1062 (citing *Neder*, 527 U.S. at 6).

[96] *See id.* at 1062. According to Judge Reinhardt, although "the *Neder* opinion makes clear that its scope is limited," the opinion does not articulate "the nature of the rule's boundaries." *See id.* (citing *Neder*, 527 U.S. at 17 n.2 (Scalia, J. dissenting)). Still, the basis of the second rationale is that where the element the jury failed to consider is central to the existence of an offense, the omission of the element falls outside the scope of *Neder's* harmless-error review. *See id.* at 1062.

[97] *See id.* at 1062.

Nordby could have been found culpable.[98] Thus, Judge Reinhardt concluded that Mr. Nordby's substantial rights had been violated pursuant to the less stringent standard as well.[99]

## IV. IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION

If the government seeks penalties in excess of those applicable by virtue of the elements of the offense alone, the government must allege the facts giving rise to the increased sentence in the indictment and prove those facts to a jury beyond a reasonable doubt.[100] Under 21 U.S.C. § 841, when drug quantity increases the penalty for a crime beyond the prescribed statutory maximum, the fact of drug quantity must be charged in the indictment, submitted to the jury, and proved by the prosecution beyond a reasonable doubt.[101] The prosecution's failure to do so would violate the constitutional rule expressed in *Apprendi v. New Jersey* and affirmed in *United States v. Nordby*; otherwise, drug quantity would be the "tail which wags the dog of the substantive offense."[102]

The implications of *Nordby*, at first glance, appear dramatic. *Nordby* can be interpreted to require prosecutors to charge drug quantities and prove those quantities to a jury beyond a reasonable doubt in all drug-trafficking cases. The holding of *Nordby*, however, is narrow.[103] In cases where the defendant's sentence does not exceed the statutory maximum, even if the district court by a preponderance of the evidence made a finding as to drug quantity, *Nordby* does not apply.[104]

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[98] *See id.* at 1063.

[99] *See id.*

[100] *See Apprendi*, 120 S.Ct. at 2362-2363.

[101] *See Nordby*, 225 F.3d at 1059; *Doggett*, 230 F.3d at 164-165; *Page*, 232 F.3d at 542-543; *Aguayo-Delgado*, 220 F.3d at 933-934; *Jones*, 2000 WL at *3; *Rogers*, 228 F.3d at 1327.

[102] *See Almendarez-Torres*, 523 U.S. at 243 (quoting McMillan v. United States, 477 U.S. 69, 88 (1999)).

[103] *See Nordby*, 225 F.3d at 1059.

[104] The First and Eighth Circuits have already distinguished *Nordby*. *See* United States v. LaFreniere, 236 F.3d 41, 49 (1st Cir. 2001) (distinguishing *Nordby* and finding no *Apprendi* error where determination of quantity of heroin by judge rather than jury did not cause defendant's sentence to exceed statutory maximum); *see also* United States v. Chavez, 230 F.3d 1089, 1091 (8th Cir. 2000) (interpreting *Nordby* to hold that *Apprendi* mandates reversal only when a finding of drug quantity by the sentencing judge under a preponderance of the evidence results in a sentence exceed-

Thus, a district court, pursuant to a preponderance of the evidence, may still alter a defendant's sentence within the range allowed by statute so long as the sentence does not exceed the maximum prescribed by statute. In *Nordby*, for example, had the district court sentenced Mr. Nordby to five years imprisonment or less, he would not have had a claim under *Apprendi*. Under those circumstances, the fact of drug quantity would not have been used to enhance Mr. Nordby's sentence beyond the statutory maximum prescribed by Section 841(b)(1)(D).[105] Accordingly, only if prosecutors seek enhanced penalties beyond those maximum levels for unspecified quantities of controlled substances, will *Nordby's* holding require prosecutors to charge specific drug quantities.[106]

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ing statutory maximum prescribed for minimal or unspecified drug quantities).

[105] *See supra* text accompanying note 47.

[106] Presumably, the Ninth Circuit's decision in *Nordby* also does not prevent the government from superceding its original indictment to allege drug quantities should it decide to pursue enhanced penalties under either 21 U.S.C. § 841(b)(1)(A) or 21 U.S.C. § 841(b)(1)(B).

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