State v. Grossman: The Minnesota Supreme Court Applies Apprendi to Minnesota's Patterned Sex Offender Statute, but What Lies Ahead?

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STATE V. GROSSMAN: THE MINNESOTA SUPREME COURT APPLIES APPRENDI TO MINNESOTA'S PATTERNED SEX OFFENDER STATUTE, BUT WHAT LIES AHEAD?

Eric C. Hallstrom†

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I. INTRODUCTION

Since the United States Supreme Court’s decision in Apprendi v. New Jersey,1 commentators and courts have struggled with the implications of the decision and its various, fractured opinions. Criminal law practitioners, academics, and jurists, as well as Supreme Court observers, have become familiar with the Court’s oft-quoted conclusion 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.”2 The rule announced in Apprendi may seem straightforward, but the question of how far the

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1. 530 U.S. 466 (2000).
2. Id. at 490.
principle underlying that rule should extend proves more elusive.\textsuperscript{3} This is reflected, to some extent, in the difference of opinion that exists as to whether the decision in \textit{Apprendi} represented a transformation in the law at all. While some suggest the Court’s pronouncement constituted a sea change in its approach to criminal law,\textsuperscript{4} others insist the Court was merely restating the law as it had existed for some time.\textsuperscript{5} This term, the Minnesota Supreme Court heard its first \textit{Apprendi}-based challenge in \textit{State v. Grossman}.\textsuperscript{6}

In \textit{Apprendi}, the U.S. Supreme Court significantly restricted the degree of freedom previously enjoyed by legislatures to decide which facts constituted the essential elements of a crime and which were merely sentencing enhancements to be considered by the judge during the sentencing phase of a criminal trial.\textsuperscript{7} The case arose from an incident in 1994 when Charles Apprendi was arrested for firing several shots into the home of an African American family who had recently moved into his neighborhood. Apprendi received ten years in prison for possession of a firearm for unlawful purposes, but was also given two additional years based on the sentencing judge’s finding “that the crime was motivated by racial bias.”\textsuperscript{8} Under the New Jersey scheme, the judge’s finding needed only to be based on a preponderance of the evidence.\textsuperscript{9} In a 5-4 decision written by Justice Stevens, the court concluded that “[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. It is equally

\textsuperscript{3} See Alan Michaels, \textit{Truth in Conviction: Understanding and Evaluating Apprendi}, 12 \textit{Fed. Sentencing Rep.} 320, 324 (2000) (arguing the court’s narrow rule-based approach was preferable to enacting a grand (but likely unenforceable) "standard" or doing nothing at all).

\textsuperscript{4} Justice O’Connor is probably the most notable member of this group, referring to the decision as a "watershed change in constitutional law." \textit{Apprendi}, 530 U.S. at 524 (O’Connor, J., dissenting). For further discussion of the extent to which \textit{Apprendi} represents a change in constitutional criminal procedure, see infra Part III.C.

\textsuperscript{5} See, e.g., Robert S. Lewis, \textit{Note, Preventing the Tail From Wagging the Dog: Why Apprendi’s Bark is Worse Than Its Bite}, 52 \textit{Case W. Res. L. Rev.} 599, 625 (2001) (concluding that \textit{Apprendi} “did not actually state a new rule of constitutional law,” but “merely synthesized existing case law into a clear, concise rule”).

\textsuperscript{6} 636 N.W.2d 545 (Minn. 2001).


\textsuperscript{9} \textit{Apprendi}, 530 U.S. at 472-73.
clear that such facts must be established by proof beyond a reasonable doubt.”

“Simply put, the Court found it violates due process as well as the Sixth Amendment to convict a person for one crime but punish him or her for another.”

The decision in Apprendi dealt with “a core issue” in criminal law—the constitutional limitations on legislatures’ power to define the elements of a given crime. Thus, it is not surprising that the decision raised a number of questions about our current approach to sentencing and brought a great deal of judicial attention to an area of law previously considered to be the near exclusive province of the legislative branch. As the Court demonstrated this past term, it has not yet finished fine-tuning this area of the law. Nevertheless, the task of faithfully applying the Court’s decision in the myriad contexts in which it arises inevitably falls to the state and lower federal courts.

In December 2001, the Minnesota Supreme Court handed down its decision in State v. Grossman, applying the Apprendi decision for the first time. This case presented the court with a relatively simple decision. The sentencing enhancement at issue quite clearly violated Apprendi because it increased the maximum

10. Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (opinion of Stevens, J.)).
13. Justice Breyer’s dissent (and to some extent O’Connor’s) was concerned with the practical impact of the decision on the Federal Sentencing Guidelines and other guided discretion sentencing schemes. Apprendi, 530 U.S. at 555-66 (Breyer, J., dissenting).
14. See Douglas A. Berman, Appraising and Appreciating Apprendi, 12 Fed. Sentencing Rep. 903, 903 (2000) (stating that “most . . . reforms to state and federal sentencing systems have been legislative developments driven principally by policy considerations rather than constitutional concerns”); see also Nancy J. King & Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1468-69 (2001). While some may approach this as an exercise in apportioning power between the legislative and judicial branches, at least one commentator has suggested that it is more appropriate to view the cases in this area as apportioning responsibilities between the judge and jury. See Kyron Huigens, Solving the Apprendi Puzzle, 90 Geo. L.J. 387, 392 (2002).
15. This past term, the Supreme Court heard three Apprendi-related appeals despite the absence of a circuit split or clear inconsistencies in the application of Apprendi by state courts of last resort. See infra Part III. As of the writing of this article, there are no Apprendi-based claims on the Court’s 2002-03 docket, but it is safe to assume at least one will make it there within the next few years.
16. 636 N.W.2d 545 (Minn. 2001).
available sentence based on findings made by the sentencing court by a preponderance of the evidence. This article will look at the Minnesota Supreme Court’s decision in Grossman with an eye toward the issues that may yet arise as a result of Apprendi and subsequent U.S. Supreme Court decisions, potential legislative and judicial responses, and specifically those developments unique to Minnesota.

Part II describes in detail the decision in Grossman, focusing on any discernable indications of how the Minnesota Supreme Court views this developing area of the law. Part III looks briefly at some of the other developments in the law post-Apprendi, including the U.S. Supreme Court’s decisions in Harris v. United States, Ring v. Arizona, and United States v. Cotton. Part IV then identifies some potential issues and challenges that lie ahead for attorneys and the courts. Finally, I conclude that, like many courts, the Minnesota appellate courts will move cautiously when considering due process and Sixth Amendment challenges to state sentencing statutes. It is always possible that the Minnesota Supreme Court will be forced to apply Apprendi and its progeny to unique and unexpected circumstances. For the time being, however, the U.S. Supreme Court has indicated its willingness to take a lead in this area, and the Minnesota Supreme Court has resisted the urge to be unnecessarily creative.

II. STATE V. GROSSMAN

In November 1998, Jay Grossman agreed to give R.C., a young woman whom he had never met before, a ride home from Moose Country, a restaurant in Lilydale, Minnesota. After dropping off a member of his own party, Grossman stopped the car in the vicinity of R.C.’s friend’s townhouse. R.C. identified a vehicle parked outside as belonging to one of her friends. As they got out of the car, however, Grossman struck R.C. in the face, knocking her unconscious. When R.C. regained consciousness, she found herself in a field with Grossman on top, raping her. When she tried to scream, Grossman put his hands over her mouth, repeatedly punched her, and began to choke her. He stopped only after R.C.

\[17. 122 \text{ S. Ct.} 2406 (2002).\]
\[18. 122 \text{ S. Ct.} 2428 (2002).\]
\[19. 122 \text{ S. Ct.} 1781 (2002).\]
pretended to be dead. After raping her again, Grossman then left R.C. lying in the field where she waited approximately thirty minutes before she dared move to get help.\footnote{Grossman, 636 N.W.2d at 546-47.} R.C. suffered, among other things, a fractured rib, a torn lingual frenulum (the tissue attaching the tongue to the bottom of the mouth), and numerous scratches and abrasions.\footnote{Id. at 547.} At trial, Grossman confessed to beating R.C. and causing her injuries, but he denied raping her and claimed that he never intended to kill her. Nonetheless, the jury returned guilty verdicts on six counts: attempted second-degree murder, first-degree assault, third-degree assault, and three counts of first-degree criminal sexual conduct.\footnote{Id.}

At sentencing, the court acknowledged that Minnesota Statutes section 609.342 (first-degree criminal sexual conduct) prescribes a maximum of thirty years imprisonment, a $40,000 fine, or both, but noted that under certain circumstances section 609.108 increases the maximum time of imprisonment for a “patterned sex offender.”\footnote{Id. Section 609.108, subdivision 1(a) makes doubling the presumptive sentence mandatory if:

(1) the court is imposing an executed sentence, based on a sentencing guidelines presumptive imprisonment sentence or a dispositional departure for aggravating circumstances or a mandatory minimum sentence, on a person convicted of committing or attempting to commit [first-, second-, third-, or fourth-degree criminal sexual conduct], or on a person convicted of committing [a predatory crime] if it reasonably appears to the court that the crime was motivated by the offender’s sexual impulses or was part of a predatory pattern of behavior that had criminal sexual conduct as its goal;

(2) the court finds that the offender is a danger to public safety; and

(3) the court finds that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. The finding must be based on a professional assessment by an examiner experienced in evaluating sex offenders that concludes that the offender is a patterned sex offender.

MINN. STAT. § 609.108, subd. 1(a) (2001). Pursuant to subdivision 2 of the statute, the maximum may be increased:

If the fact-finder determines, at the time of the trial or the guilty plea, that a predatory offense was motivated by, committed in the course of, or committed in furtherance of sexual contact or penetration, as defined in section 609.341, and the court is imposing a sentence under subdivision 1, the statutory maximum imprisonment penalty for the}
pursuant to Minnesota Statutes section 609.108, (1) that Grossman’s actions were part of a pattern of behavior that had criminal sexual conduct as its goal and were motivated by his sexual impulses, (2) that he was a danger to public safety, and (3) that he needs long-term treatment or supervision beyond the presumptive term of imprisonment or supervised relief. 21 In addition, the court found that the record was “filled with aggravating circumstances.” 25 Thereafter, the court sentenced Grossman to the enhanced maximum prison term under Minnesota Statutes section 609.108: forty years. 26

Grossman appealed the forty-year sentence. He argued that Minnesota Statutes section 609.108, as applied, violated the U.S. Supreme Court’s pronouncement in Apprendi that any fact increasing the maximum penalty for a crime must be proven to a jury beyond a reasonable doubt. The Minnesota Court of Appeals agreed and remanded the case to the trial court with instructions to impose a maximum sentence of thirty years imprisonment. 27 The appellate court reasoned that the enhancement rested on findings that must be made by a jury based on proof beyond a reasonable doubt. 28 Because section 609.108 sanctioned the sentencing court’s imposition of the enhanced sentence based on its own findings, the court concluded that it ran afoul of Apprendi. 29

Before the Minnesota Supreme Court, the state took the position that section 609.108, subdivision 1, did not actually authorize the sentencing court to increase the maximum penalty. Rather, the state argued it was the jury’s finding under subdivision 2—that the offense “was motivated by, committed in the course of, or committed in furtherance of sexual contact or penetration,”—that authorizes application of the sentencing enhancement. 30 The court recognized that subdivision 1 did not by its own terms

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22. Id.
23. Id.
24. Id. at 398.
25. Id.
26. Id.
28. Id. at 398.
29. Id.
authorize the enhanced penalty. Similarly, the court acknowledged that sexual penetration is an element of first-degree criminal sexual conduct, and was therefore implicit in the jury’s guilty verdict. The state’s call for the court to isolate the sexual penetration requirement, however, was rejected.\footnote{31}{\textit{Id.} at 550.}

The \textit{Grossman} court, looking exclusively at subdivision 2, explained that “the jury’s finding of sexual penetration did not, by itself, expose Grossman to an increased sentence. Section 609.108, subdivision 2, contains the additional mandate that ‘the court is imposing a sentence under subdivision 1.’”\footnote{32}{\textit{Id.}} Subdivision 1, in turn, applies if the sentencing judge makes a series of findings by a preponderance of the evidence. In order to apply the enhanced sentence, then, the sentencing court must have satisfied “two conditions precedent: (1) the jury had to find sexual contact or penetration; and (2) the court had to make the findings required by subdivision 1. Both the finding of the jury and those of the court were necessary, but neither was sufficient.”\footnote{33}{\textit{Id.}} The state’s interpretation would separate the two conditions and ignore the use of the conjunctive “and.” The \textit{Grossman} court refused to disregard the plain and unambiguous language of subdivision 2.\footnote{34}{\textit{Id.}}

Moreover, like New Jersey in \textit{Apprendi}, Minnesota argued that the factors considered by the sentencing court were traditional sentencing factors, as opposed to elements of the offense, because they focused on the defendant rather than the offense.\footnote{35}{\textit{Id.}} The factors were, therefore, appropriately within the purview of the sentencing court. The Minnesota Supreme Court quickly disposed of this contention by referencing the U.S. Supreme Court’s observation that such an argument is “nothing more than a disagreement with the rule we apply today.”\footnote{36}{\textit{Id.} at 550-51 and n.2 (quoting \textit{Apprendi}, 530 U.S. at 492).}

The Minnesota court signaled its agreement with the U.S. Supreme Court’s admonition that the distinction between “elements” and “sentencing factors” was “constitutionally novel and
elusive.” The Minnesota court embraced the U.S. Supreme Court’s focus on the practical effect of the required findings—whether they would increase the maximum penalty—as opposed to determining whether they were traditionally considered elements or sentencing factors. The court concluded:

[The fact that the findings listed in Minnesota Statutes § 609.108, subd. 1, are of a kind traditionally left to the sentencing court rather than the jury is simply not relevant to the constitutional issue at hand. The effect of the sentencing court’s findings, when coupled with the jury’s finding of sexual penetration, was to increase by 10 years the prison sentence to which Grossman was exposed. Due process requires that each of these findings be made by a jury based on proof beyond a reasonable doubt.

The Minnesota Supreme Court, like the court of appeals, remanded the case to the trial court for imposition of the maximum sentence of thirty years in prison pursuant to Minnesota Statutes section 609.342, subdivision 2.

The court thought it “clear that Minnesota threatened [Grossman] with . . . additional pains . . . if the conditions of Minn. Stat. § 609.108, subd. 2, were satisfied.” Therefore, “the procedural safeguards designed to protect [Grossman] from unwarranted pains should apply equally’ to all of the facts Minnesota has singled out for enhanced punishment.” Finally, although Grossman challenged the patterned sex offender statute as applied in his particular case, the Minnesota Supreme Court noted its “doubts as to whether there

37. Id. at 550 (quoting Apprendi, 530 U.S. at 494).
38. Id. at 550-51. The Minnesota court also embraced the Supreme Court’s definition of the terms:

The term ["sentencing factor"] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury’s finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.

Id. at 550 n.2 (quoting Apprendi, 530 U.S. at 494 n.19).
39. Id. at 551.
40. Id.
41. Id.
42. Id. (quoting Apprendi, 530 U.S. at 476) (alteration in original).
are any circumstances under which subdivision 2 could be constitutionally applied.\textsuperscript{15}

III. THE STATE OF THE LAW

In order to appreciate Grossman and, more generally, the sentencing laws in Minnesota, it is necessary to be familiar with some of the key recent decisions from both the state and federal courts. A thorough exploration of the jurisprudence of criminal sentencing may be found elsewhere. What follows is a brief summation of the law in four major areas affected by the decision in Apprendi, as it has developed since the decision: (1) the federal drug laws and mandatory minimums; (2) recidivism statutes; (3) retroactivity; and (4) the death penalty.

A. The Federal Drug Laws and Mandatory Minimums

The federal drug laws were some of the first to be scrutinized after Apprendi was decided. 21 U.S.C. § 841 makes it illegal to possess a controlled substance with the intent to distribute. § 841(b) then specifies the penalty range depending on the quantity of the controlled substance involved. The penalty can reach a maximum of life imprisonment under § 841(b)(1)(B). If a specific quantity is not proven, § 841(b)(1)(C) allows for the imposition of a penalty of up to twenty years in prison. Prior to the decision in Apprendi, the United States Courts of Appeals had uniformly concluded “the amount of controlled substance ‘involved’ was a sentencing factor for the judge to decide, not an element of the offense that had to be charged and found by a jury by proof beyond a reasonable doubt.”\textsuperscript{44} After Apprendi was decided, this approach necessarily changed.\textsuperscript{45} Currently, in order to sentence a defendant under § 841(b)(1)(A) or (B), the quantity must be charged in the indictment and proven to the jury beyond a reasonable doubt.\textsuperscript{46}

\textsuperscript{15} See United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); see also United States v. Doe, 297 F.3d 76, 83 (2d Cir. 2002) (extending the reasoning in § 841 cases to § 960, which prohibits the importation of controlled substances, based on the parallel structure of the two provisions).

\textsuperscript{44} See, e.g., United States v. Promise, 255 F.3d 150, 156-58 (4th Cir. 2001) (“Thus, if a specific threshold quantity of drugs is not found by the jury beyond a reasonable doubt, a judicial finding of that fact increases the allowable penalty
At least that was commentators’ initial inclination. Less than a month after Apprendi was decided, the United States Court of Appeals for the Eighth Circuit decided United States v. Aguayo-Delgado. Aguayo-Delgado was the first in a long line of cases from the various courts of appeals to hold that it was not a violation of Apprendi for the sentencing court to rely upon a finding of drug quantity “not charged in the indictment or found by the jury to have been beyond a reasonable doubt” as long as the court sentenced the defendant to less than 20 years, which is the maximum for a violation of the statute simpliciter pursuant to § 841(b)(1)(C). The rationale for this outcome is found in McMillan v. Pennsylvania, a case seemingly at odds with, but ultimately approved of by, the Apprendi majority.

McMillan upheld a provision of Pennsylvania’s Mandatory Minimum Sentencing Act imposing a minimum sentence of five years for certain crimes “if the sentencing judge found, by a preponderance of the evidence, that the defendant ‘visibly possessed a firearm’ during the offense.” Although the Apprendi Court explicitly indicated its approval of McMillan, Professor Erwin Chemerinsky noted the tension between the two cases:

If Apprendi is read literally, it applies only when the punishment is greater than the statutory maximum for the offense. In other words, it has no application when the sentence is within the range prescribed by law. Yet its central rationale—that it is wrong to convict a person of one crime and impose punishment for another—logically applies to factors used to enhance penalties within the statutory range.

47. See, e.g., Michaels, supra note 3, at 322; Nancy J. King & Susan R. Klein, Aprés Apprendi, 12 FED. SENTENCING REP. 331 (2000).
48. 220 F.3d 926 (8th Cir. 2000).
49. Id. at 934.
50. E.g., United States v. Sanchez, 269 F.3d 1250, 1269-70 (11th Cir. 2001); United States v. Rodgers, 245 F.3d 961, 965-68 (7th Cir. 2001); United States v. Harris, 245 F.3d 806, 809 (4th Cir. 2001); United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001); United States v. Garcia-Sanchez, 238 F.3d 1200, 1201 (9th Cir. 2001); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000).
52. Apprendi, 530 U.S. at 487 n.13.
53. Lewis, supra note 5, at 609 (quoting McMillan, 477 U.S. at 81).
54. Chemerinsky, supra note 11, at 104. “Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to
Despite the inconsistency between the rationale in *Apprendi* and the holding in *McMillan*, the general consensus is that unless and until the U.S. Supreme Court indicates otherwise, a sentence that falls within the range authorized by the statute charged in the indictment will not violate *Apprendi*. This was the conclusion arrived at by the Minnesota Court of Appeals in *State v. McCoy*, which affirmed the trial court’s imposition of a prison term four times longer than the presumptive sentence because it “did not exceed the statutory maximum of 25 years for second-degree criminal sexual assault.”

To make matters worse, the U.S. Supreme Court, in a case decided this past term, failed to completely resolve the question of mandatory minimum sentencing schemes after *Apprendi*. In *Harris v. United States*, the Court presumably intended to provide a final answer to the question of whether the rationale articulated in *Apprendi* would extend to circumstances where a defendant was sentenced based on facts not charged in the indictment or found by the jury beyond a reasonable doubt but where the sentence did greater punishment than is otherwise prescribed.” *Harris v. United States*, 122 S. Ct. 2406, 2426 (2002) (Thomas, J., dissenting).

55. See, e.g., *Harris*, 122 S. Ct. at 2414 (opinion of Kennedy, J.); *United States v. Foster*, 2002 WL 1808434 (6th Cir. Aug. 6, 2002).

The vast majority of appeals being brought under *Apprendi* have been quickly dismissed because they don’t involve sentences that extend beyond the statutory maximum. Samuel Buffone of the Washington, D.C., office of Boston’s Ropes & Gray says the flood of failed appeals reflects an expectation among defense lawyers that future *Apprendi*-related rulings from the U.S. Supreme Court will be coming. Certainly those people who have raised the issues in pending appeals will be in a much better position than those who don’t.


not exceed the maximum penalty authorized by law. The resulting 4-1-4 decision, however, while maintaining the status quo, failed to command a majority who saw a principled distinction between *Apprendi* and *McMillan*.

B. Recidivism Statutes

Another exception to the general rule laid down in *Apprendi* was made for recidivism statutes. Justice Stevens’s articulation of the holding in *Apprendi* famously declares 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.” *Apprendi*’s protections are unnecessary in such a context “because another jury had already had the opportunity to pass upon the defendant’s guilt beyond a reasonable doubt.” Nonetheless, Justice Stevens

59. In *Harris*, the Court upheld the imposition of a mandatory minimum sentence imposed pursuant to 18 U.S.C. § 924(c)(1)(A) (mandating graduated minimum sentences based upon a sentencing court’s findings regarding firearm use or possession during a drug trafficking offense). *Id.* at 2415. A majority of the Court held that Congress made brandishing a gun an element of 18 U.S.C. § 924(c)(1)(A) rather than a sentencing factor, and reaffirmed the validity of *McMillan*. *Id.* at 2414-15. Justice Breyer, however, did not agree with the reasoning of Justices Rehnquist, O’Connor, Kennedy, and Scalia. While Justice Kennedy’s leading opinion announced that “*McMillan* and *Apprendi* are consistent,” Justice Breyer could not distinguish the cases “in terms of logic.” *Id.* at 2414, 2420 (Breyer, J., concurring in part and in the judgment). Rather, he thought “extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences.” *Id.* at 2420-21. Thus, while five Justices voted in favor of maintaining *McMillan*’s continued validity, it appears that five also recognize the inherent conflict between the reasoning in *Apprendi* and *McMillan* (and consequently in *Harris* as well).

60. Recidivism statutes take a defendant’s prior convictions into account, usually as a sentencing factor, but conceivably as an element of the offense. See *Nichols v. United States*, 511 U.S. 738, 747 (1994).

61. *Apprendi*, 530 U.S. at 490 (emphasis added).

62. Lewis, *supra* note 5, at 617. The Minnesota Court of Appeals reached the same conclusion in State v. Hopkins, No. C4-01-923, 2002 WL 980867 (Minn. Ct. App. May 14, 2002), and Folden v. State, No. C0-01-31, 2001 WL 800025 (Minn. Ct. App. July 17, 2001). Relying on the explicit language in *Apprendi*, the Minnesota Court of Appeals held judicial finding of “the fact of a prior conviction . . . may serve to increase a criminal defendant’s sentence without violating his or her due process rights.” *Hopkins*, 2002 WL 980867, at *5. It is significant, though, that the “Minnesota Supreme Court has previously held that prior convictions resulting in increased penalties must be set out in an indictment and ultimately decided by the adjudicatory jury.” State v. Stewart, 486 N.W.2d 444, 446 (Minn. Ct. App. 1992) (holding the fact of a prior conviction of a "heinous
suggested the possibility that United States v. Almendarez-Torres,\textsuperscript{63} the case holding prior convictions were sentencing factors that did not have to be proved to the jury beyond a reasonable doubt, was decided incorrectly.

In Almendarez-Torres, the Court rejected an invitation to “simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a Constitutional ‘elements’ requirement.”\textsuperscript{65} In so doing, the court relied heavily upon McMillan’s finding that mandatory minimums were not constitutionally infirm.\textsuperscript{66} Furthermore, the Court thought “such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here.”\textsuperscript{67} It is no longer constitutionally permissible for a judge to make the crucial factual findings subjecting a defendant to the death penalty.\textsuperscript{68} It is unclear to what extent this change may affect the Court’s conclusion were it to revisit the issue, especially since McMillan is (apparently) still

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\textsuperscript{63} 523 U.S. 224 (1998).

\textsuperscript{64} Apprendi, 530 U.S. at 489. Justice Thomas would go further, requiring evidence of past crimes to be proven to a jury beyond a reasonable doubt, just like any other fact that could result in an increased sentence. \textit{Id.} at 501-02 (Thomas, J., concurring) (“[A] ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment).”). Justice Scalia, in a concurring opinion joined by Justice Thomas, argued the constitutional “‘right to . . . trial, by an impartial jury,’ has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment \textit{must} be found by the jury.” \textit{Id.} at 499 (Scalia, J., concurring). Justice Scalia seems to have retreated moderately from this view, given his alignment with Justice Kennedy’s opinion in \textit{Harris}. \textit{See} 122 S. Ct. at 2419 (“Within the range authorized by the jury’s verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.”).

\textsuperscript{65} 523 U.S. at 247.

\textsuperscript{66} \textit{Id.} at 246-47.

\textsuperscript{67} \textit{Id.} at 247 (citing Walton v. Arizona, 497 U.S. 639, 647 (1990)). Walton has since been overruled. \textit{See} Ring v. Arizona, 122 S. Ct. 2428 (2002); \textit{infra} Part III.D.

\textsuperscript{68} Ring, 122 S. Ct. at 2443.
It is clear, however, that until the U.S. Supreme Court decides to address the issue directly, *Apprendi* and *Almendarez-Torres* will continue to govern the lower courts’ approach to recidivism statutes. Thus, for the time being, federal law does not require a defendant’s prior convictions to be charged in the indictment or proven to a jury.

C. Retroactivity

When a defendant challenges his sentence under *Apprendi* or its progeny on direct appeal, he must survive harmless error review if the claim was properly reserved, and the more demanding plain error review if the claim was not. These doctrines may prove significant obstacles to relief, but at least the opportunity to present an *Apprendi*-based challenge is available. The vast majority of those who could potentially benefit from the Court’s decision, however, have exhausted their direct appeals. Those individuals must pursue relief through collateral review. In *Teague v. Lane*, the U.S. Supreme Court held “new rules” of criminal procedure should not be applied retroactively unless (1) they protect certain conduct from punishment altogether; or (2) they are “watershed ruling[s].”

69. *See supra* Part III.A.

70. *See*, e.g., United States v. Campbell, 270 F.3d 702, 708 (8th Cir. 2001) (“It is the law in this circuit, until the Supreme Court chooses to revisit the question of recidivism statutes, that *Apprendi* does not require the ‘fact’ of prior convictions to be pled and proved to a jury.”) (citing cases from other circuits holding the same); State v. Hopkins, 2002 WL 980867 at *4-5 (Minn. Ct. App. May 14, 2002).


72. *Id.* *See* United States v. Cotton, 122 S. Ct. 1781 (2002) (holding the defendant could not survive plain error review because, due to the overwhelming evidence against him, the increased maximum sentence did not seriously affect the fairness and integrity of the judicial proceedings); United States v. Olano, 507 U.S. 725, 731 (1993) (describing the court of appeals’ “limited power to correct errors that were forfeited because not timely raised in district court”). But see United States v. Doe, 297 F.3d 76 (2d Cir. 2002) (holding, in a case similar to *Cotton*, that the plain error standard was met because there was no overwhelming evidence against Doe, like there was against Cotton). *Cotton*, the first of the Court’s three post-*Apprendi* cases to be decided this past term, was somewhat more limited in scope than the others, yet it considered important procedural and jurisdictional questions. In addition to addressing the standard of review when the error is not raised at trial, it also held that a defective indictment under *Apprendi* (i.e., an indictment failing to set out all the facts that may lead to an enhanced sentence) will “not deprive a court of its power to adjudicate a case.” *Cotton*, 122 S. Ct. at 1785.

central to an accurate determination of guilt that ‘alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.’”\(^{74}\) It cannot be suggested that *Apprendi* protects specific conduct from punishment, so if it is to be applied retroactively, it must be a new rule falling into the second exception.

In order to be considered a “new rule,” a decision must not be “dictated by precedent existing at the time the defendant’s conviction became final.”\(^{75}\) This does not mean the Court must overturn a previous case or set forth a rule never previously contemplated. Rather, clarification of an existing, but confusing, rule may qualify as a new rule under *Teague*.\(^{76}\) “That *Apprendi* is a ‘new’ rule under *Teague*, not ‘dictated’ by prior precedent, is amply illustrated by the debate between the justices about its consistency with prior decisions.”\(^{77}\)

The more difficult question is whether *Apprendi* rose to the level of a “watershed” development in the law of criminal procedure. When *Apprendi* was decided, many commentators saw the decision as one of great importance that would fundamentally change the face of criminal sentencing.\(^{78}\) Given Justice O’Connor’s dissenting opinion explicitly referring to the decision as a “watershed change,”\(^{79}\) it is no surprise that some commentators and courts saw the decision as one warranting retroactive application

\(^{74}\) King & Klein, *supra* note 47, at 333 (quoting Sawyer v. Smith, 497 U.S. 227 (1990)).

\(^{75}\) *Teague*, 489 U.S. at 301.

\(^{76}\) Lewis, *supra* note 5, at 614. “*Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered.” *Sawyer*, 497 U.S. at 234.

\(^{77}\) King & Klein, *supra* note 47, at 333.


\(^{79}\) *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting) (“Today, in what will surely be remembered as a watershed change in constitutional law . . . .”).
on collateral review pursuant to *Teague’s* second exception. The majority of courts, however, have come to the contrary conclusion. The Eighth Circuit’s reasoning is representative:

To fall within the exception, the rule must impart a fundamental procedural right that, like *Gideon*, is a necessary component of a fair trial. “It is . . . not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” One need only peruse the cases, and the “new rules” therein, in which the Supreme Court has rejected the watershed exception’s applicability to appreciate how absolutely fundamental the right must be to satisfy the exception. *Apprendi* appears no more “important” to a fair trial than rules previously addressed by the Court, including the rule announced in *Batson v. Kentucky*, which the Court refused to apply retroactively in *Teague*.

Permitting a judge-found fact to affect the sentence imposed after a valid conviction, even if it is found under a more lenient standard, cannot be said to have resulted in a fundamentally unfair criminal proceeding. As the Fifth Circuit has noted, “one can easily envision a system of ‘ordered liberty’ in which certain elements of a crime can or must be proved to a judge, not to the jury,” and it is not as though defendants have been foreclosed prior to *Apprendi* from challenging facts that were previously thought to be sentencing considerations.

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81. United States v. Moss, 252 F.3d 993, 999-1000 (8th Cir. 2001) (internal quotations and citations omitted); accord San-Miguel v. Dove, 291 F.3d 257 (4th Cir. 2002); Goode v. United States, 39 Fed. Appx. 152 (6th Cir. 2002) (unpublished opinion); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). Many scholars agree. Professors Nancy J. King and Susan R. Klein have argued that, unlike deprivations of counsel, [the rule of *Apprendi*] does not protect the blameless from punishment, but instead protects the
Moreover, a number of courts have held that only the U.S. Supreme Court may declare a decision retroactive, at least with respect to successive collateral attacks. Therefore, unless there is a clear pronouncement by the Supreme Court of retroactivity for the rule announced in Apprendi or some future permutation thereof—potentially Ring v. Arizona—it seems highly unlikely any court will sanction its application on primary or successive collateral review.

D. The Death Penalty

Ring v. Arizona, the United States Supreme Court’s most reaching post-Apprendi decision, is of relatively little significance in Minnesota because Minnesota is one of twelve states that do not employ capital punishment. As noted in the previous sections, however, the reasoning underlying Ring may have an impact in other Apprendi-related cases. Therefore, it is important to understand the Court’s holding in Ring, and what compelled the extension of Apprendi to capital sentencing on the same day it was held not to apply to mandatory minimums.

Ring is, of course, noteworthy outside of the narrow context of the issues raised herein because it held Arizona’s capital unquestionably blameworthy from unauthorized amounts of punishment. The decision does no more to “alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding” than other rules rejected under the exception, including the ruling in Batson v. Kentucky. Indeed, the Court has yet to find any ruling that qualifies for this exception, and it seems unlikely to us that the Apprendi rule will be the first.

King & Kline, supra note 47, at 333; accord Lewis, supra note 5, at 613-16.

82. Talbott v. State, 226 F.3d 866, 869 (7th Cir. 2000) (“If the Supreme Court ultimately declares that Apprendi applies retroactively on collateral attack, we will authorize successive collateral review of cases to which Apprendi applies. Until then prisoners should hold their horses and stop wasting everyone’s time with futile applications.”).

83. See infra Part III.D.

84. 122 S. Ct. 2428 (2002).


86. Some have argued that Harris and Ring are inconsistent. See, e.g., Supreme Contradiction, supra note 78. Such an inquiry is beyond the scope of this article. It should be noted that in his concurring opinion, Justice Scalia articulates a defensible position for his decision to join the majority in Ring, while refusing to extend Apprendi to mandatory minimums in Harris. See Ring, 122 S. Ct. at 2443-45 (Scalia, J., concurring).
punishment system unconstitutional, invalidating the death sentences of over 150 convicted killers. In a nutshell, Ring held that a trial judge, sitting alone, could not constitutionally impose the death penalty based on his or her own findings of aggravating factors. Because Arizona’s first-degree murder statute authorized a maximum penalty of death only after the finding of an aggravating circumstance, Apprendi forbids that finding from being made by a judge. Instead, the presence or absence of any aggravating factors must be determined by a jury. Otherwise, “Apprendi would be reduced to a meaningless and formalistic rule of statutory drafting.” Ring is particularly significant because the case that it overruled, Walton v. Arizona, was not only a relatively recent decision (it was only twelve years old), but it held the exact same capital sentencing statute to be “compatible with the Sixth Amendment.”

Walton held “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” The Walton decision came on the heals of Hildwin v. Florida, a case upholding Florida’s capital sentencing scheme in which the jury recommends a sentence of either life imprisonment or execution, but does not make any findings respecting aggravating circumstances. In Jones v. United

87. While the decision addressed only Arizona’s capital punishment system, it will directly affect at least four other states’ death penalty sentencing schemes: Idaho, Montana, Colorado, and Nebraska. See Jan Crawford Greenburg, Sentencing Laws Rejected; Top Court Declares Right to have Jury Decide Death Penalty, Crit. Trib., June 25, 2002, at 1; Associated Press, Court Overturns More Than 150 Judge-Imposed Death Sentences (June 24, 2002), http://www.truthinjustice.org/ring.htm; David Lindorff, Another Strike Against the Death Penalty, at http://archive.salon.com/news/feature/2002/06/25/deathrow/index_np.html (June 25, 2002). The decision could conceivably spill over into four other states: Florida, Alabama, Indiana, and Delaware. Associated Press, supra. In these states, juries only recommend whether the sentencing judge should impose a life sentence or death. Id. In all, the decision could invalidate nearly eight hundred death sentences. Id. 88. 122 S. Ct. at 2443. 89. Id. at 2437, 2443. 90. Id. at 2443. 91. Id. at 2431 (internal quotations omitted). 92. 497 U.S. 639 (1990). 93. Ring, 122 S. Ct. at 2432. 94. 497 U.S. at 648 (internal quotations omitted). 95. 490 U.S. 638 (1989). 96. Id. at 640-41.
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the Court described the decision in Walton as one that “characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available.” Even though the Apprendi court thought its decision could be squared with Walton, by the time Ring was decided, it was clear that the decisions could not be reconciled.

IV. WHAT DOES IT ALL MEAN?

Since the Minnesota Supreme Court’s decision in Grossman was, more or less, a straightforward application of Apprendi, I have attempted to place the decisions in a broader context. Keep in mind that from the time Apprendi was decided in 2000, thousands of cases citing that opinion have issued from state and federal courts. Those cases, however, can be grouped into a few basic categories. Of the categories set out in Part III, some will be of greater importance to those concerned with the development of Minnesota’s criminal law and procedure. For instance, it appears the question of Apprendi’s retroactive applicability on collateral review has been all but settled. If any post-Apprendi decision has the potential to upset the status quo in that regard, it is Ring v. Arizona. And, as mentioned before, Ring is of extremely limited relevance in capital punishment-free states such as Minnesota.

One area that may not yet be resolved is that of mandatory minimums. As previously noted, Harris upheld McMillan but did so without a majority consensus as to the reasoning. Consequently, it seems likely that the U.S. Supreme Court will revisit the issue.

98. Id. at 251.
99. “[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.” Apprendi, 530 U.S. at 497.
100. Ring, 122 S. Ct. at 2432.
101. As of the publication of this article, a search for “Apprendi” in Westlaw’s “allcases” database yielded over 4,000 cases, both published and unpublished. Limiting that search to Minnesota state cases and federal cases having a direct bearing on Minnesota courts (Westlaw’s “mn-cs-all” database) yielded 255 results.
102. See Moss, 252 F.3d at 999; see generally supra Part III.C.
103. See supra Part III.D.
104. See supra Part III.A.
before long. In *Harris*, Justice Breyer walked a fine line between the majority’s conclusion and the dissent’s reasoning. Although he felt the key distinction supporting Justice Kennedy’s opinion was logically infirm, he expressed great trepidation over the practical impact of extending *Apprendi’s* rationale to mandatory minimums. Justice Breyer expressed both his disapproval for mandatory minimums as a matter of policy as well as his concern that extending *Apprendi* would not have the effect of ending their use, but instead further disadvantage defendants. Legally, Justice Breyer is afraid that extending *Apprendi* to mandatory minimums would jeopardize the current system of guided sentencing discretion.

It seems quite possible that Justice Breyer’s position in *Harris* is not intractable. It is not impossible for *Apprendi* to be applied in a manner consistent with guided sentencing schemes such as the United States Sentencing Guidelines. Justice Breyer has himself hinted at the potential for movement in his view in *Harris* by stating that he could not “yet” extend *Apprendi* to mandatory minimum sentences. The point is this: Given Justice Breyer’s seemingly tentative stance, as well as the ever present possibility of a change in Court personnel, *Harris* is most likely not the Court’s last word on

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105. 122 S. Ct. at 2420-21 (Breyer, J., concurring in part and in the judgment) (“And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal consequences, I cannot yet accept its rule.”).

106. *Id.* at 2420-22. Indeed, Justice Breyer argues that by taking away from the judge the power to make certain factual determinations, defendants will be forced to argue flagrantly inconsistent positions to a jury or stipulate to the triggering facts, which only serves to aggrandize the prosecutor’s power. *Id.* at 2421-22. For a detailed discussion of this particular theory, see generally Bibas, * supra* note 80. For an excellent rejoinder, see generally Nancy J. King & Susan R. Klein, *Apprendi* and *Plea Bargaining*, 54 STAN. L. REV. 295 (2001).

107. *Harris*, 122 S. Ct. at 2421-22; see also *Apprendi*, 530 U.S. at 555-66.


109. 122 S. Ct. at 2421 (emphasis added). In *Apprendi*, Justice Breyer suggested that, given the Court’s decision, mandatory minimum sentencing “simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums.” 530 U.S. at 564. This further supports the possibility that he may be willing to reevaluate his position in *Harris*.

the subject of mandatory minimums and *Apprendi*. Therefore, it is as imperative now as it was immediately following *Apprendi* for defense counsel to be “constantly alert and raise every issue that the Supreme Court has not definitively decided.” Failure to do so will risk the application of a more stringent—and potentially fatal—standard of review.

In addition, there are a few specific applications of *Apprendi* that are of particular importance. First, there is the question of conditional release under Minnesota Statutes section 609.108, subdivision 6:

At the time of sentencing under subdivision 1, the court shall provide that after the offender has completed the sentence imposed . . . the commissioner of corrections shall place the offender on conditional release for the remainder of the statutory maximum period, or for ten years, whichever is longer.\(^\text{113}\)

As recently held by the Minnesota Court of Appeals, this provision has the potential to “allow for both the maximum sentence and a conditional release period beyond the maximum.” In *State v. Jones*, the defendant was given, pursuant to Minnesota Statutes section 609.108, the maximum sentence for third-degree criminal sexual conduct: fifteen years imprisonment. Nonetheless, the sentencing court added ten years of conditional release under subdivision 6.\(^\text{115}\) Jones appealed his sentence, arguing that the addition of the conditional release exposed him to a greater sentence than that authorized by law for third-degree criminal sexual conduct.\(^\text{116}\) The appellate court agreed and remanded the case for resentencing.

The appellate court rightly concluded that conditional release was “an obvious penalty that would allow appellant to invoke *Apprendi*.\(^\text{117}\) The court went on to note that while conditional release is mandatory, the duration of the conditional release is

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\(^{112}\) *Id.*; *see supra* notes 71 and 72 and accompanying text.

\(^{113}\) MINN. STAT. § 609.108, subd. 6 (2001).

\(^{114}\) *State v. Jones*, 647 N.W.2d 540, 547 (Minn. Ct. App. 2002).

\(^{115}\) *Id.*

\(^{116}\) *Id.*; *see MINN. STAT. § 609.344, subd. 2.

\(^{117}\) *Jones*, 647 N.W.2d at 547; *see also* *State v. Calmes*, 632 N.W.2d 641, 649 (Minn. 2001) (recognizing conditional release is an aspect of punishment); *Apprendi*, 530 U.S. at 551 (holding applies to any increase in defendant’s penalty).
not. The court resolved the potential constitutional defects raised by concluding that:

[W]here application of the conditional release term and the rule forbidding imposition of prison time beyond the statutory maximum are in unresolvable conflict, to avoid unconstitutional application of law, the district court may reduce appellant’s conditional release time to less than ten years so that the conditional release time plus the incarceration time do not exceed the statutory maximum of 15 years.

While this approach is appealing, it conflicts with the clear language of section 609.108, subdivision 6. As such, the ultimate resolution of this conflict may well require the authoritative imprimatur of the state’s high court. Prosecutors and defense counsel alike would be wise to keep this in mind as they craft their arguments addressing conditional release statutes such as the one at issue in *Jones*.

Furthermore, as noted above, the Minnesota Supreme Court has previously held that “prior convictions resulting in increased penalties must be set out in an indictment and ultimately decided by the adjudicatory jury.” In *State v. Stewart*, the Minnesota Court of Appeals relied upon *State v. Findling* in holding that “[e]vidence of a prior conviction of a heinous crime must be presented to the grand jury in order for it to determine whether probable cause exists to indict a defendant for first degree murder punishable by life imprisonment without possibility of release as defined by Minnesota Statutes § [609.106].” More recently, the Minnesota Supreme Court explained that *Findling* is limited to instances where there is “no statutory method to determine the enhancement factors.” While *Findling* and *Stewart* were not applicable to the defendant’s argument in *State v. Ronquist*, it appears they still apply to sentencing enhancement provisions like those found in Minnesota Statutes section 609.106. To the extent that determination of a “heinous crime” is potentially subject to fact determinations, and where there exists no statutorily

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118. *Jones*, 647 N.W.2d at 547-48.
119. *Id.* at 548.
121. 12 Minn. 413, 144 N.W. 142 (1913).
122. *Stewart*, 486 N.W.2d at 448.
123. *State v. Ronquist*, 600 N.W.2d 444, 449 n.26 (Minn. 1999).
articulated method by which to determine the enhancement factors, Stewart should still apply. So, despite the fact that Apprendi explicitly carves out an exception for recidivism statutes, under Minnesota law there will be occasions where Apprendi must be extended to the fact of a prior conviction.

Finally, it will be important to watch the legislative response to Apprendi and its progeny. Professor Stephen A. Saltzburg has suggested that Apprendi “will serve as a legislative drafting guide.”124 The problem, as identified by numerous commentators, is that “the procedural due process limitations on sentencing that are apparent in Apprendi can be avoided fairly easily by a legislature.”125 In fact, it has been predicted that Apprendi will eventually “bring about the end of sentencing guidelines systems because ‘tough-on-crime’ legislators will favor the post-Apprendi world and enact legislation to take advantage of it.”126 This is compounded by the Court’s decision in Harris:

[B]y shifting statutory maximums and minimums around, Congress will be able to artfully modify the instances in which defendants do and do not get a jury—and thus to control when the Sixth Amendment applies. But, of course, the fair trial/jury trial right is supposed to be a check on Congress, not something it can easily circumvent by redrafting legislation a different way . . . .

This possibility did not slip by the members of the Apprendi majority undetected. Justice Stevens, writing for the majority, addressed the argument as articulated by Justice O’Connor in her

125. Id. at 250. As explained by Professor Alan Michaels, using the statute in Apprendi as an example,

New Jersey could also try to respond by revising the statutory penalty for second-degree offenses from five to twenty years, while enacting a separate provision that forbids the judge from imposing a sentence of more than ten years unless the judge finds that the defendant committed the offense with a biased purpose.

Michaels, supra note 3, at 320. This “Revised Penalty Statute” makes only a slight semantic change, yet achieves precisely the same result rejected in Apprendi without offending Apprendi’s rule as set out in that case. Id. at 321.
126. Standen, supra note 12, at 784.
127. Mark H. Allenbaugh, Why a Recent Supreme Court Decision Inexplicably will Continue to Allow Mandatory Minimum Sentences to be Based on Hearsay Evidence Never Presented to a Jury or Proven Beyond a Reasonable Doubt, FINDLAW’S WRIT, ¶119 (June 27, 2002), at http://writ.findlaw.com/commentary/20020627_allenbaugh.html.
dissent:

The principal dissent would reject the Court’s rule as a “meaningless formalism,” because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests—extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range—this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature’s judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged “to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices” of exposing all who are convicted to the maximum sentence it provides. So exposed, “[t]he political check on potentially harsh legislative action is more likely to operate.”

Although there is some empirical evidence that Justice Stevens is correct—that the worst case scenarios predicted will not come about—Professor Joseph L. Hoffman has identified a key difference: the class of persons affected by Apprendi and its progeny lack the type of political power required to turn the political process into an effective “structural democratic constraint.” In the event that such constraints fail, Justice Stevens has indicated the Court “would be required to question whether the revision was

128. Apprendi, 530 U.S. at 490 n.16 (internal citations omitted).
130. “Under Apprendi, the class of persons affected by the creation of ‘sentencing factors’ typically does not include legislators or their families or friends. This is because most such ‘sentencing factors’ are enhancements—meaning that they merely enhance the sentence for someone who already has been convicted of a crime.” Id. at 274-75.
constitutional under this Court’s prior decisions." And this second, legal check on the legislative branch’s ability to take “particularly draconian efforts to impose punishment” means the criminal bar will yet have a significant roll to play in the continuing effort to identify the limits on legislative hegemony over substantive criminal law.  

V. CONCLUSION

The Minnesota Supreme Court’s decision in State v. Grossman this term was anything but an earth-shattering decision. It affirmed a well-reasoned opinion by the Minnesota Court of Appeals, which in turn held a portion of the Minnesota patterned and predatory sex offender statute unconstitutional. While a majority of the cases to be brought in state and federal courts after Apprendi have not alleged clear, or even arguable, constitutional violations, the provision at issue in Grossman is clearly inconsistent with the rule articulated by the United States Supreme Court in Apprendi v. New Jersey. Although the decision may not have been exciting, or even challenging, it was important. The Minnesota Supreme Court has indicated its willingness to enter a complicated and vital debate about the limits on the legislative branch’s control over the substance of the criminal law. This is significant because it will require the court, from time to time, to invalidate democratically enacted and politically popular laws. And because of the political powerlessness of many of those who will feel the brunt of those sanctions, the court’s role is all the more important.

Apprendi-based challenges lie hidden in the criminal statutes. In this article I have identified just a few of the ways the complex amalgamation of laws we call the criminal code may present situations where they cannot be applied consistently with the Supreme Court’s pronouncements in Apprendi and its progeny. But as always, it is the practicing attorney who can and must be the

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131. Apprendi, 530 U.S. at 490 n.16.
132. As stated by Professors Nancy J. King and Susan R. Klein, “We believe this second admonishment is a viable threat, and will soon become the focus of intense litigation.” King & Klein, supra note 14, at 1487. It is imperative for anyone practicing criminal law to familiarize themselves with the impressively well-developed due process analysis set out by Professors King and Klein. The Supreme Court, it would seem, already has. See Harris v. United States, 122 S. Ct. 2406, 2416 (2002) (citing Professors King and Klein’s Essential Elements for its historical analysis).
driving force behind the efforts to bring our criminal laws into compliance with the demands of the Constitution.