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Overlooking a Sixth Amendment Framework

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Case Comment

Overlooking a Sixth Amendment Framework

State v. Kirk R., 812 A.2d 113 (Conn. App. Ct. 2002), *aff'd*, 857 A.2d 908 (Conn. 2004).

As the Supreme Court further plunges the world of criminal sentencing into turmoil, state courts in particular are scrutinizing their own statutory sentencing schemes and judicial practices. Ever since the Court's holding in *Apprendi v. New Jersey*[1] (recently reformulated and expanded in *Blakely v. Washington*[2]), states have been called upon to ensure that trial judges do not usurp the jury's exclusive fact-finding power and thereby violate criminal defendants' Sixth Amendment guaranty of a trial by jury. While the legal framework that protected this Sixth Amendment right has been developing for decades, *Apprendi* formulated a bright-line rule that prohibits a judge from finding by herself during sentencing, instead of submitting to a jury for determination at trial, any fact that increases a defendant's sentence beyond the prescribed statutory maximum absent that fact.[3] Under *Apprendi*, scores of factual determinations were taken from judges and placed back in the hands of juries.

But while courts have continued to occupy themselves with defining the scope of *Apprendi* and its progeny, they have remained blind to a more fundamental, and increasingly prevalent, problem. By mechanically examining the effect a factor has on the length of a defendant's sentence in determining whether it must be submitted to a jury, courts have permitted the *Apprendi* bright-line rule to eviscerate the preexisting substantive method for making that determination.

1. 530 U.S. 466 (2000).
2. 124 S. Ct. 2531 (2004).
3. *Apprendi*, 530 U.S. at 490.

Long before *Apprendi*, the Court applied a less mechanical, more substantive analysis to determine whether a fact must be submitted to a jury. In *Mullaney v. Wilbur*, the Court analyzed how the presence or absence of a particular fact related to the underlying crime in order to determine whether or not that fact was indeed an essential element of that crime.[4] *Apprendi* did not replace or eliminate the need for this *Mullaney* inquiry; it merely short-circuited the inquiry in cases where the finding at issue increased the sentence beyond the otherwise available maximum sentence.

The current widespread misapplication of the *Apprendi* doctrine threatens the very Sixth Amendment and due process protections *Apprendi* was designed to safeguard. A recent Connecticut Appellate Court case, *State v. Kirk R.*,[5] illustrates this problem. The *Kirk R.* court, relying primarily on the *Apprendi* doctrine, failed to conduct a *Mullaney* analysis and thereby permitted the finding of a particular element of a crime to be removed from the jury's purview, allowing the trial judge to make his own unilateral determination at sentencing.

Part I presents the relevant doctrinal background, describing the continuum between "element of a crime" and "sentencing factor" and demonstrating how *Apprendi* and its progeny do not—and were never intended to—displace the preexisting and entirely discrete element-of-a-crime analysis. Part II discusses the facts and holding of *Kirk R.* Part III argues that the Connecticut court improperly relied on the *Apprendi* doctrine as relevant to, and even dispositive of, this issue; in truth, all *Apprendi* could have done was remove a special protection from the *Kirk R.* court's arsenal, forcing the court to then apply *Mullaney*'s more basic element-of-a-crime test. Part IV closes by addressing the impact of *Blakely* on this Comment's thesis.

I

In the landmark *In re Winship* decision, the Court held that the prosecution must prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [the defendant] is charged."[6] Although this standard gave defendants significant constitutional protection, *Winship* failed to provide lower courts with much guidance regarding what specific facts are "necessary to constitute the crime." As a

4. 421 U.S. 684, 697-98 (1975). The fact at issue in *Mullaney*, a murder case, was the presence or absence of malice.

5. State v. Kirk R. (*Kirk R. I*), 812 A.2d 113 (Conn. App. Ct. 2002), *aff'd*, 857 A.2d 908 (Conn. 2004).

6. 397 U.S. 358, 364 (1970).

result, the Court in subsequent cases voiced its concern that a state could manipulate its way out of this burden of proof merely by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."[7]

In *Mullaney v. Wilbur*, the Court addressed this concern by prescribing a substantive analysis of a fact's traditional relevance to the underlying crime to determine whether that fact should be deemed an element of that crime.[8] Specifically, the Court reasoned that because "the presence or absence of the heat of passion on sudden provocation," the fact at issue, had traditionally been "the single most important factor in determining the degree of culpability attaching to an unlawful homicide," that fact constituted an element of the crime and had to be proven to the jury beyond a reasonable doubt.[9] Although the decision did not set forth a hard-and-fast rule, it provided an analytical framework that the Court has applied on numerous occasions.[10]

Within the bounds of *Mullaney*, legislatures retained the discretion to classify facts as either elements of a crime or as sentencing factors. In *McMillan v. Pennsylvania*, for instance, the Court held that, under a Pennsylvania statute, a judge could consider "visible possession of a firearm" as a factor in calculating a defendant's sentence, even absent a specific jury finding on the matter.[11] But *Mullaney* and its progeny made clear that there were limits to this legislative discretion.

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7. *Mullaney*, 421 U.S. at 698; *see also* Jones v. United States, 526 U.S. 227, 240-42 (1999) (describing the Court's reasoning in *Mullaney*).

8. 421 U.S. at 691-99. The notion of employing a substantive analysis to determine whether a given fact constitutes an element of the crime is not unique to *Mullaney* or to the federal system. *See, e.g.*, State v. Wedge, 652 P.2d 773, 777 (Or. 1982) (prescribing a test for Oregon state constitutional protections in which "facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing judge").

9. *Mullaney*, 421 U.S. at 696.

10. *See, e.g.*, *Jones*, 526 U.S. at 234-37. In the context of discerning legislative intent, the *Jones* Court relied upon the notion that bodily injury, the factor at issue, had "traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery," and held that a defendant's sentence could be increased on that basis only if a jury determined that bodily harm had resulted. *Id.* at 235; *see also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting a trial judge's imposition of an enhanced sentence on the basis of a prior conviction). The Court's "conclusion in *Almendarez-Torres* turned heavily on the fact that the additional sentence to which the defendant was subject was the prior commission of a serious crime." Apprendi v. New Jersey, 530 U.S. 466, 488 (2000). Recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" and "does not relate to the commission of the offense." *Almendarez-Torres*, 523 U.S. at 243-44 (internal quotation marks omitted).

For an overview of the evolution of this doctrine, see Leslie Yalof Garfield, *Back to the Future: Does* Apprendi *Bar a Legislature's Power To Shift the Burden of Proof away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1356-80 (2003).

11. 477 U.S. 79, 84-91 (1986).

Despite its intuitive appeal, the *Mullaney* framework was subjective, complex, and difficult to apply. Nearly five years ago, the Supreme Court crafted a supplementary bright-line rule in *Apprendi*. The Court held that any fact that itself increases the length of a defendant's sentence beyond the otherwise available maximum must be submitted to a jury, regardless of its traditional relevance to the crime at issue.[12] Until *Apprendi*, trial court judges at sentencing hearings comfortably made findings of fact ranging from the quantity of drugs to the presence of racial animus during the commission of a crime, so long as the fact found did not constitute a substantive element of the crime. After *Apprendi*, such facts had to be found by a jury during the trial, or else they would be unavailable for use by the court in calculating a defendant's sentence. In short, *Apprendi* recognized that the impact certain factors have on defendants' sentences can alone justify mandatory submission to a jury, apart from the preexisting *Mullaney* framework for that determination.

Within the context of the *Apprendi* rule, a question arose concerning facts that increased the minimum available sentence but remained within the prescribed statutory range. Two years after *Apprendi*, the Court resolved the issue in *Harris v. United States*, a highly criticized 5-4 decision that limits *Apprendi* to extended ceilings only, excluding mandatory minimums from its protection.[13]

Since *Apprendi*, and even more so since *Harris*, state courts have mechanically ruled on these challenges by looking only to the effect a particular factor had on a sentence.[14] If the finding of a particular fact

12. *Apprendi*, 530 U.S. at 494 ("Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

13. 536 U.S. 545, 567 (2002) ("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.").

14. The problem is widespread. In the three years since *Harris*, multiple jurisdictions have fallen prey to this mistake. *See, e.g.*, State v. Brown, 70 P.3d 454, 460 (Ariz. Ct. App. 2003) ("In sum, '[w]hether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be . . . submitted to the jury, or proved beyond a reasonable doubt. . . . The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from [the grand and petit] juries—and without contradicting *Apprendi*.'" (alterations and second omission in original) (quoting *Harris*, 536 U.S. at 565)); State v. Lee, 844 So. 2d 970, 999-1000 (La. Ct. App. 2003) (finding the statute at issue to be "nothing more than a sentencing enhancement statute that provides for the imposition of a mandatory minimum sentence . . . , with such sentence not exceeding the maximum statutory sentence for that offense" and consequently ruling that the "statutory scheme, providing for the determination of the statute's applicability by the trial court, not a jury, is entirely within the constitutional parameters set forth in *McMillan* and reaffirmed in *Harris*"); Young v. State, 806 A.2d 233, 251, 251-52 (Md. 2002) (examining the extent of the "increased penalty" in disposing of defendant's Sixth Amendment challenge (italics and capitalization altered)); State v. Shattuck, No. C6-03-362, 2004 WL 772220, at *6 (Minn. Ct. App. Apr. 13, 2004) (upholding district court's finding that defendant qualified for mandatory minimum sentence on facts not found by a

increased the sentence beyond the statutory maximum, then it was submitted to a jury (per *Apprendi*). If not, trial court judges were allowed to make the requisite determination (seemingly per *Harris*). This clear-cut binary test appealed to courts and quickly became the standard approach for judicial review of sentencing challenges based on deprivation of the right to trial by jury.

II

In *State v. Kirk R.*, the Connecticut Appellate Court reviewed a state statute defining the crime of sexual assault in the first degree.[15] The statute prescribes a sentence of up to twenty years and imposes a mandatory minimum sentence of ten years if the victim is under the age of ten.[16]

The defendant in *Kirk R.* was convicted by a jury of two counts of sexual assault in the first degree. At sentencing, the state moved to have the defendant's sentence imposed pursuant to the special ten-year mandatory minimum provision because the victims of the crime were younger than ten. The trial court complied, imposing the ten-year mandatory minimum sentence by unilaterally determining the victims' ages at sentencing.[17] The defendant subsequently appealed the court's finding on the grounds that the jury had never determined that the victims were under the age of ten. Consequently, the defendant argued that the imposition of a mandatory minimum violated his due process rights.[18]

On appeal, the *Kirk R.* court relied on *Harris* to uphold the trial court, ruling that, because the aggravating factor of victim age did not increase the sentence beyond the otherwise available maximum but instead only raised the minimum, that fact did not constitute an element of the crime and could consequently be removed from the purview of the jury without violating the Sixth Amendment.[19]

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jury, in primary reliance on *Harris*); State v. Luckey, 840 A.2d 862, 869 (N.J. Super. Ct. App. Div. 2004) (failing to substantively analyze the statute at issue and instead relying on *Harris* to dispose of defendant's claim).

15. *Kirk R. I*, 812 A.2d at 115.

16. *Id.* at 119 & n.11 (describing the statutory scheme).

17. *Id.* at 116.

18. *Id.* at 116, 118.

19. *Id.* at 120. The Connecticut Supreme Court disagreed with the appellate court on the merits, finding that the age of each victim was indeed an element of the crime at issue. State v. Kirk R. (*Kirk R. II*), 857 A.2d 908, 913 (Conn. 2004). The court affirmed the judgment, however, because it found the error to be harmless. *Id.* at 919-21. The implications of the Connecticut Supreme Court's decision are addressed *infra* note 28 and accompanying text.

III

The scope of *Harris* is fundamentally more limited than recent opinions like *Kirk R.* have presumed. *Harris* stands for the proposition that facts do not become elements of a crime "merely because legislatures require the judge to impose a minimum sentence when those facts are found—a sentence the judge could have imposed absent the finding."[20] But cases like *Kirk R.* have improperly treated this proposition as dispositive of a defendant's Sixth Amendment challenge. *Mullaney* held, and nothing has ever suggested otherwise, that facts can indeed become elements of a crime if their substantive relation to the crime at issue qualifies them as traditional elements of the crime.[21] *Apprendi* never purported to overrule or even replace *Mullaney*. As a result, the substantive difference between these tests manifests itself in a particularly dangerous way in cases like *Kirk R.* that pass the *Apprendi* test but would fail the *Mullaney* test—if that test were properly applied by the courts.

In *Kirk R.*, the appellate court correctly disposed of its requisite *Apprendi-Harris* analysis but should have then turned to the substantive *Mullaney* analysis before deeming the fact a sentencing factor and removing it from the jury.[22] Indeed, the facts and statute at the center of *Kirk R.* present a compelling basis on which to render the fact at issue an element of the crime under *Mullaney*. The facts that triggered the ten-year mandatory minimum sentences were the victims' ages. Age has traditionally played a critical role in defining sexual acts—and in the context of illegal sexual acts, defining the crime. From statutory rape to sexual assault, our laws have attributed particular significance to the ages of those involved in a sexual crime.[23] This appeal to the traditional treatment of a given factor is precisely what the *Mullaney* Court itself used in

20. Harris v. United States, 536 U.S. 545, 560 (2002).

21. *See* Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975).

22. The *Kirk R. I* court purported to proceed beyond the perfunctory *Apprendi-Harris* test and engage in legislative intent analysis. 812 A.2d at 118 ("At issue is whether the legislature intended the fact that the victims were younger than ten years of age to be treated as an element of the offense . . . ."). This Comment argues, however, that even such an effort would fall short of satisfying constitutional demands, because *Mullaney* dictates that traditional treatment can render a fact an element of the crime even in the face of contrary legislative intent. *See Mullaney*, 421 U.S. at 699. Moreover, the appellate court's legislative intent analysis is misleading because the court mistakenly applied *Harris* as dispositive of the legislative intent issue. *See Kirk R. I*, 812 A.2d at 120.

23. *See, e.g.*, CONN. GEN. STAT. § 53-21(a)(2) (2004) ("Any person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child *under the age of sixteen years* or subjects a child *under sixteen years of age* to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, . . . shall be guilty of . . . a class B felony . . . ." (emphasis added)).

deciding that malice qualified as an element of the crime charged in that case.[24]

We need look no further than the text of the very statute at issue in *Kirk R.* to validate this claim. Subsection (a)(2) of the statute enumerates the age of the victim as an indispensable element of the underlying crime, inasmuch as only sexual assault of a victim under thirteen years of age qualifies as first-degree sexual assault.[25] Not surprisingly, the *Kirk R.* trial court properly submitted this element to the jury for its finding.[26] It is irrational to treat the very same type of fact in subsection (b)—the age of the victim—as a sentencing factor that need not be submitted to the jury. Doing so ignores *Mullaney*'s mandate to evaluate the relationship between a fact and a crime in ascertaining the fact's status as an element of that crime.[27]

The Connecticut Supreme Court disagreed with the appellate court on the merits, finding that the age of the victim was indeed an element of the crime. The Connecticut Supreme Court supported its position, however, on a narrow statutory interpretive basis. In doing so, the court failed to resurrect the *Mullaney* mandate or rectify the appellate court's mistake of allowing *Apprendi* to overshadow the required substantive test.[28]

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24. *See Mullaney*, 421 U.S. at 696-99.

25. State v. Kirk R. (*Kirk R. II*), 857 A.2d 908, 910 n.3 (Conn. 2004). The statute provides three other circumstances that amount to first-degree sexual assault, including the use or threat of force, the presence of multiple perpetrators, or a mentally incapacitated victim. *Id.*

26. The trial court's jury instructions explained that "'[t]he second *element of the offense* charged is that the sexual intercourse was with a person [who] was under thirteen. That is, as she had not yet reached her thirteenth birthday at the time of the sexual intercourse.'" *Id.* at 911 (second alteration in original) (emphasis added).

27. Indeed, the only basis for distinguishing between subsections (a) and (b) is that they appear in two different subsections of the statute—a form-over-substance approach that has been unequivocally rejected by the courts. *See* Jones v. United States, 526 U.S. 227, 234 (1999) ("[S]tatutory drafting occurs against a backdrop not merely of *structural conventions* of varying significance, but of *traditional treatment* of certain categories of important facts . . . ." (emphasis added)). In short, "the mere fact that a state legislature has placed a criminal component within the sentencing provisions of the criminal code does not mean that the finding of [the provision] is not an essential element of the offense." Apprendi v. New Jersey, 530 U.S. 466, 472 (2000) (internal quotation marks omitted).

28. The Connecticut Supreme Court evidenced a clear uneasiness with the perfunctory approach of reviewing a factor's quantitative effect on a defendant's sentence to determine its status as an element of the crime. The court recognized that clear legislative intent to include a fact as an element of the crime trumps *Apprendi* analysis. *Kirk R. II*, 857 A.2d at 915 ("[T]here is nothing that prevents our legislature from requiring the jury to make a finding in order to oblige a trial court to impose a mandatory minimum sentence . . . ."). Nevertheless, the court fell short of pointing to a separate *Mullaney* substantive test as the basis for its disagreement with the appellate court. Instead, the court relied exclusively on a survey of the legislative history of the statute at issue. *Id.* at 915-19. In essence, the Connecticut Supreme Court made the same mistake as the appellate court in ruling that because the statute at issue "creates a mandatory minimum sentencing provision and does not *increase*, in an *Apprendi* sense, the statutorily authorized penalty for the underlying crime," it is "undisputed that the legislature was not constitutionally prohibited from permitting the sentencing court, as opposed to a jury, to determine whether a victim of sexual assault in violation of § 53a-70(a) was less than ten years of age." *Id.* at 915.

IV

In the wake of *Blakely v. Washington*, one thing has changed: The scope of *Apprendi* is once again up in the air, as it was in 2002 when the Court decided *Harris*. *Blakely* narrows the range of sentences that qualify as authorized maximums,[29] thus increasing the scope of *Apprendi* protections.[30] Regardless of the outcome of the Supreme Court's clarification of its decision,[31] there will still be many cases that can never qualify for *Apprendi* protections. This is true because many facts do not increase a defendant's sentence beyond the prescribed range, irrespective of how that range is defined.

In those instances, the thesis advanced in this Comment becomes critical. This Comment argues that there is a second, independent, and often overlooked test that must be employed (and satisfied) before the finding of a particular fact may be delegated to a trial court judge and removed from the purview of the jury. This test was made concrete in a line of cases beginning with *Mullaney v. Wilbur* and has never been overturned. Proliferation of the more recent bright-line test—the *Apprendi* test—has contributed to the systematic disregard of the original substantive test. Only an unwavering insistence on placing *Apprendi* in its proper context will ensure that the decision and its progeny, including *Harris*, maintain their proper scope and ensure the protection of defendants' Sixth Amendment rights.

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29. Under *Blakely*, a sentence exceeds the available maximum (and thus fails the *Apprendi* test) not only if it goes beyond the statutory maximum sentence for a particular crime, but even if it exceeds the presumptive range designated by a state's sentencing guidelines for the particular crime. *See* Blakely v. Washington, 124 S. Ct. 2531, 2537-38 (2004).

30. While *Blakely*'s immediate effect is to increase the range of cases covered by *Apprendi*, a likely outgrowth of *Blakely* may have the opposite effect. Consider Frank Bowman's proposal to save the Federal Sentencing Guidelines, should the Court apply *Blakely* to the federal system: Conform the guideline maximums to the applicable statutory maximums, thus ensuring that the guideline calculations would involve adjustments only to minimums (permitted by *Harris*) and have no impact on maximums (prohibited by *Apprendi* and *Blakely*). *See* Memorandum from Frank O. Bowman, M. Dale Professor of Law, Indiana University, to U.S. Sentencing Commission, *in* 16 FED. SENTENCING REP. 364, 367-68 (2004). If such a proposal were adopted—at either the state or federal level—courts would have to pay particular attention to the substantive distinction between elements of the crime and sentencing factors to ensure that judicial discretion does not run wild and to avoid stripping juries of their fact-finding role.

31. *See* United States v. Fanfan, No. 04-105 (U.S. filed July 21, 2004, argued Oct. 4, 2004); United States v. Booker, No. 04-104 (U.S. filed July 21, 2004, argued Oct. 4, 2004).