

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Appeal No. 02-3971
)))))))))

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JAMES E. JOHNSON,

Defendant-Appellant,

)))))))))

**Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable Charles N. Clevert, Presiding**

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**REPLY BRIEF
OF DEFENDANT-APPELLANT
JAMES E. JOHNSON**

)))))))))

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ARGUMENT

**ABSENT A JURY FINDING OF QUANTITY,
THE DISTRICT COURT'S ENHANCEMENT OF
JOHNSON'S SENTENCE UNDER THE FEDERAL
SENTENCING GUIDELINES VIOLATED THE
CONSTITUTIONAL PRINCIPLES UNDERLYING
APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000)**

The government is correct that this Court previously has rejected Johnson's argument that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to findings necessary for a higher sentencing range under the Sentencing Guidelines. Johnson conceded as much in his opening brief. For the reasons stated in that brief, however, Johnson respectfully submits that those

decisions are wrong. This is especially true in light of the clarification of *Apprendi* provided in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).¹

Nothing in the government's brief, other than a simple resort to *stare decisis* supports its view that *Apprendi* does not apply here. This Court did hold in *United States v. Scott*, 997 F.2d 340 (7th Cir. 1993), that, as a matter of statutory interpretation, the Guidelines are not "laws," the violation of which permits collateral relief under 28 U.S.C. §2255. However, the Court appears consistently to have recognized that the Guidelines are in fact "laws" for purposes of the *Ex Post Facto* Clause, e.g., *United States v. Shorter*, 54 F.3d 1248, 1261 (7th Cir.1995); *United States v. Kopshever*, 6 F.3d 1218, 1222-23 (7th Cir.1993) ("[W]hen the Sentencing Commission amends the Guidelines to increase the severity of a punishment, the Ex Post Facto Clause prohibits application of the amended Guidelines to crimes performed before the amendment's effective date" if the new range would have required an upward departure under the preamendment Guideline); *United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir.1994) ("[R]etroactive application of a harsher sentencing guideline contravenes the very purpose of the Ex Post Facto Clause"); *id.* at 1386 ("[A] guideline amendment which occurs after the commission of the defendant's crime which works to the defendant's detriment is inapplicable because

¹ Although this Court decided *United States v. Knox*, 301 F.3d 616 (7th Cir. 2002), after the decision in *Ring*, that case was briefed and argued before *Ring*, and there is nothing in the *Knox* decision which suggests that the Court even considered the impact of *Ring* on the Seventh Circuit precedent cited as controlling.

it is a violation of the Ex Post Facto Clause”).

This Court thus has rejected the position of Judge Easterbrook, concurring in *Seacott*, to the effect that *Scott’s* statutory interpretation of the term “laws” in §2255 applies as well to the question of whether the Guidelines are “laws” in other, constitutional contexts. *See, e.g., Seacott*, 15 F.3d at 1384-87 (rejecting theory of concurring opinion and holding that Sentencing Guidelines are “laws” subject to *ex post facto* clause, citing *Miller v. Florida*, 482 U.S. 423 (1987)). The government’s reliance upon *Scott* and the *Seacott* concurrence, Government Brief at 13, accordingly is misplaced.

The government’s attempt to distinguish away *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), is based on a misunderstanding of the punitive scheme at issue in that case. *See* Government Brief at 11. Contrary to the government’s assertion, *id.*, the state sentencing scheme at issue in *Ring* provided for a statutory maximum sentence of death based upon the jury’s felony murder verdict. Like the federal Sentencing Guidelines, however, that statutory maximum sentence could not be imposed absent a separate sentencing hearing, at which the judge was to make certain factual findings. State law authorized the court to impose the statutory maximum sentence of death only upon a finding of at least one enumerated “aggravating circumstance” and the absence of mitigating circumstances sufficient to call for leniency. 122 S.Ct. at 2434-35.

Contrary to the government’s assertion, therefore, the sentencing scheme

in *Ring* is directly analogous to that under the Sentencing Guidelines. As in *Ring*, each offense has a potential statutory maximum sentence, but the Court may impose a particular sentence only upon the finding of specific factors identified by law. Absent a finding of those facts, a lesser sentence is required. Just as the hypothetical statutory maximum in *Ring* could not be imposed absent certain findings, the hypothetical statutory maximum sentence, or any sentence above the base sentencing range provided by the Guidelines for a particular offense, is legally unavailable under the Guidelines absent findings of certain facts, such as the quantity of drugs attributable to the defendant.

Thus, just as it was constitutionally impermissible for the sentencing court's findings in *Ring* to increase the *effective* maximum sentence available within the statutory sentencing range, so is it constitutionally impermissible for a sentencing court to increase the functional maximum sentence available under the Sentencing Guidelines, even when that sentence remains within the hypothetical statutory maximum. The factors necessary for such an increase in the effective maximum sentence must, as held in *Ring*, be submitted to a jury, and proved beyond a reasonable doubt.

As applied in this drug case, therefore, the base offense level is 12 given the jury's finding of a measurable quantity of cocaine, *see* U.S.S.G. §2D1.1(c)(14),

resulting in a base sentencing range of 21 to 27 months.² For the reasons stated in *Ring* and *Apprendi*, any increase in that 27-month maximum requires a jury finding beyond a reasonable doubt of the facts, such as drug quantity, necessary for the increase.

Although not raised by the government, some courts have suggested that application of *Apprendi* and *Ring* to the Sentencing Guidelines is foreclosed by the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (2002). Unlike *Ring*, however, *Harris* is readily distinguishable.

In *Harris*, the Court reaffirmed the holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), to the effect that legislation may constitutionally provide for imposition of a mandatory minimum sentence based upon facts found, not by the jury, but by the sentencing court. The *Harris* Court deemed *McMillan* to be consistent with *Apprendi* and *Ring* because the judge's finding did not increase the defendant's effective maximum exposure:

As we shall explain, *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime--and thus the domain of the jury--by those who framed the Bill of Rights.

² This base sentencing range results from the interplay of the offense level of 12 and Mr. Johnson's criminal history category of IV. U.S.S.G. ch.5, Part A (Sentencing Table). Because *Apprendi* expressly excluded one's prior convictions from its requirement of a jury finding, 530 U.S. at 490, Johnson's base sentencing range must account for his criminal history, even though other enhancements to the sentencing range must be based on jury findings for the reasons stated in the text.

The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.

Harris, 122 S.Ct. at 2414.

Because it is the permissible maximum sentence which is determined by a sentencing court's assessment of quantity under the Guidelines, and not merely the requirement of a mandatory minimum sentence within an available statutory range set by the jury's findings, *Ring* is the controlling authority here, and not *Harris*.

CONCLUSION

Because the District Court based its Guidelines calculations upon its own findings rather than on the jury's findings, the sentence "was imposed in violation of law." Johnson accordingly asks that this Court vacate the sentence imposed and remand the case for resentencing.

Dated at Milwaukee, Wisconsin, March 18, 2003.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 1,308 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2003, I caused 15 hard copies of the Reply Brief of Defendant-Appellant James E. Johnson to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Government, AUSA Jason Torchinsky, Eastern District of Wisconsin, 517 East Wisconsin Ave., Milwaukee, WI 53202

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