Syracuse University
SURFACE

College of Law Faculty Scholarship | College of Law

Summer 7-26-2012

Discretionary Persistent Felony Offender Sentencing In New York: Can it survive Apprendi ?

Joseph E. Fahey
Syracuse University College of Law, jefahey@syr.edu

Follow this and additional works at: http://surface.syr.edu/lawpub

Part of the Law Commons

Recommended Citation
Fahey, Joseph E., "Discretionary Persistent Felony Offender Sentencing In New York: Can it survive Apprendi ?" (2012). *College of Law Faculty Scholarship.* Paper 68.
http://surface.syr.edu/lawpub/68

This Article is brought to you for free and open access by the College of Law at SURFACE. It has been accepted for inclusion in College of Law Faculty Scholarship by an authorized administrator of SURFACE. For more information, please contact surface@syr.edu.

Discretionary Persistent Felony Offender Sentencing in New York

Can it survive *Apprendi* ?

by

Joseph E. Fahey[1]

Since 1965, New York has had a discretionary "three strikes and you're out" law which authorized the imposition of a sentence of life imprisonment and life-time supervision in the court's discretion for a defendant convicted of a felony and who had two prior non-violent felonies. Although sparingly used[2], the statute went largely unchallenged until the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In the wake of *Apprendi* and its progeny, the New York discretionary sentencing scheme has come under repeated attack, which, to date, it has withstood. This article will analyze the provisions of the New York sentencing scheme, the various court decisions that have examined it in the *post-Apprendi* world, and discuss ways in which, in its present form, it might be applied consistent with *Apprendi's* dictates.

Section 70.10 of the Penal Law defines who is eligible for discretionary persistent felony offender sentencing and Section 400.20 of the Criminal Procedure Law sets forth the procedures necessary to implement it.

---

[1]The author is a Judge of the New York State Unified Court System, who presides in Onondaga County Court, as well as an Adjunct Professor of Law at Syracuse University College of Law. J.D. Syracuse University College of Law 1975, LLM in Criminal Law from the University at Buffalo Law School 2003.

[2]In response to an inquiry by the author, the New York State Department of Correctional Services reported that on May 19, 2007 it had 63,482 inmates and 194 inmates were serving persistent felony offender sentences for non-violent felony offenses.

Penal Law Section 70.10

Section 70.10 of the Penal Law defines a persistent felony offender as a person...

"...who stands convicted of a felony after having previously been convicted of two or more felonies , as provided in paragraphs (b) and (c) of this subdivision"[3]

[3]Penal Law Section 70.10 (McKinney's1978)

Subsection (b)(1) requires that a sentence of "imprisonment in excess of one year" have been imposed, and subsection (b)(ii) requires that " ...the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony."[4]

Subsection (2) of this statute further provides;

> "Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04, 70.06 or subdivision five of section 70.80 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-1 felony. In such event the reasons for the court's opinion shall be set forth in the record."

Section 400.20 of the Criminal Procedure Law

[4] *Ibid*.

Section 400.20 of the Criminal Procedure Law sets forth the procedures the court must follow in such a sentencing proceeding.[5]

Section 400.20 (1) of the Criminal Procedure Law merely declares that the procedures set forth in this section shall be applicable to any sentence to be imposed under Section 70.10 of the

[5]Criminal Procedure Law Section 400.20 (McKinney's 1970)

Penal Law.[6]

Section 400.20(2) of the Criminal Procedure Law provides that where information becomes available to a sentencing court that a defendant may be eligible for persistent felony offender sentencing and that such a sentence may be warranted based upon the history and character of the defendant, the court may order a hearing to determine whether such a sentence should be imposed. One of the interesting features of this subsection is the permissive use of the word *may* rather than the mandatory *shall*. Notwithstanding this apparent anomaly, nearly all of the decisions construing this section suggest that such a hearing is required before any sentence under Section 70.10 of the Penal Law may be imposed. Although it is the prosecution that commonly seeks a sentence under Section 70.10, Professor Preiser, in his practice commentary accompanying this provision, advises that it is the court who should be initiating this proceeding since such a sentence is imposed in the court's discretion.[7]

Section 400.20 (3) of the Criminal Procedure Law requires that the sentencing court file an order with the clerk of the court setting a hearing not less than twenty days from the date of the order's filing. It further requires that annexed to the order a statement shall be included which sets forth the date and the places of the defendant's previous convictions which are to be relied

---

[6]*Ibid*.

[7]Preiser, Peter, Practice Commentaries, Criminal Procedure Law Section 400.20 (McKinney's 2005).

upon. It also must contain those factors in the defendant's background and prior criminal conduct which the court considers relevant to the imposition of such a sentence.[8]

Criminal Procedure Law Section 400.20 (4) provides that upon receipt of the order, the

[8]Section 400.20 (3) of the Criminal Procedure Law (McKinney's 2005)

clerk of the court must send a copy of the order and the annexed statement to the defendant and the district attorney with the time and date of the hearing that is scheduled.[9]

Criminal Procedure Law Section 400.20(5) sets forth the standard of proof which governs the hearing. It places the burden of proving the existence of two prior felony convictions beyond a reasonable doubt, by evidence admissible under rules applicable to a trial on the issue of guilt, on the prosecution. It further relaxes both the standard and burden of proof concerning the issue of the defendant's criminal history, character, and circumstances of the defendant's criminal conduct. On these issues, any relevant evidence, regardless of admissibility, may be received, provided that it is not privileged. Further, the prosecution need only prove these matters by a preponderance of the evidence.[10] This subdivision of Section 400.20 would prove to be one of the more controversial issues under *Apprendi* and its progeny.

Section 400.20(6) of the Criminal Procedure Law excludes the use of any prior conviction obtained in violation of the defendant's constitutional rights as a predicate conviction for adjudicating the defendant as a discretionary persistent felony offender. The defendant may, at any time during the course of the hearing, challenge the constitutionality of any conviction being utilized and contained in the statement. Failure to make such a challenge, waives it, in the absence of good cause for the failure.[11]

Section 400.30 (7) of the Criminal Procedure Law requires the court, on the date of the

---

[9]Section400.20(4) of the Criminal Procedure Law (McKinney's 2005)

[10]Criminal Procedure Law Section 400.20 (5), (McKinney's 2005)

[11]Criminal Procedure law Section 400.20 (6), (McKinney's 2005).

hearing, to make a preliminary inquiry of the defendant to ascertain whether the defendant wishes to contest any allegation set forth in the statement served and filed by the court, and whether the defendant wishes to present evidence on the issue of being a persistent felony offender, or the issue of the defendant's background and criminal conduct. If the defendant does wish to challenge any issue in the statement or present any evidence on the latter two issues, the allegations and the evidence must be specified. Unchallenged allegations in the statement are deemed to be evidence in the hearing.[12]

Criminal Procedure Law Section 400.20 (8) provides where unchallenged allegations in the statement are sufficient to find that the defendant is a persistent felony offender; and there is uncontraverted evidence concerning the defendant's history and character warranting the finding that the defendant should be sentenced as a persistent felony offender; and either the defendant has no relevant evidence to present or the evidence would not affect the court's decision, it may enter a finding that the defendant is a persistent felony offender pursuant to Section 70.10 of the Penal Law.[13]

Criminal Procedure Law Section 400.20 (9) sets forth the procedures to be followed where the defendant contests any issue specified in the previous subsection or desires to present relevant evidence on any of the issues contained therein. In that situation, the court shall conduct a further hearing *without a jury*, and either party may present evidence on any of the contested issues. At the conclusion of the hearing the court must make a finding whether the defendant is a

---

[12]Criminal Procedure Law Section 400.20(7), (McKinney's 2005)

[13]riminal Procedure Law Section 400.20(8) (McKinney's 2005).

persistent felony offender, and if so, findings it deems relevant on the issue of whether a persistent felony offender is warranted. If the court finds that the defendant is a persistent felony offender, and that such a sentence is warranted, then it may sentence the defendant pursuant to Section 70.10 of the Penal Law and impose a sentence within the Class A felony sentencing range.[14] This particular subdivision of Section 400.20 has engendered the most controversy concerning New York's discretionary persistent felony offender sentencing scheme in the post-*Apprendi* world.

Finally, Section 400.20 (10) of the Criminal Procedure Law authorizes the court to terminate the hearing without making any findings of fact. Unless the court recommences the hearing, the defendant may not be sentenced as a persistent felony offender.[15]

The Constitutionality of Section 70.10

Prior to 2000, New York's discretionary persistent felony offender statute was subject to few constitutional challenges.

Apprendi v. New Jersey

Apprendi v. New Jersey, 530 U.S. 466 (2000). In that case the Supreme Court held that the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment guarantee to trial by jury required that a factual determination which authorized an increase in the maximum prison sentence, greater than the statutory maximum prescribed, must be made by a jury on the

[14]Criminal Procedure Law Section 400.20 (9),(McKinney's 2005)(emphasis added)

[15]Criminal Procedure Law Section 400.20 (10), (McKinney's 2005)

basis of proof beyond a reasonable doubt. Departing from its holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) which sanctioned the use of "sentencing enhancements", Justice Stevens, writing for the majority[16] observed;

> "As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentencing enhancement' to describe the latter surely does not provide a principled basis for treating him differently."(530 U.S. 466, 476)

[16]Stevens was joined by Justices Scalia, Souter, Thomas and Ginsburg.

In *Apprendi,* the defendant had been convicted of two counts of second-degree possession of a firearm for an unlawful purpose[17] and one count of unlawful possession of an anti-personnel bomb[18] resulting from an incident in which he had fired shots into a home whose occupants were African-American in a New Jersey suburb. At sentencing the judge found, by a preponderance of the evidence, that the crime was motivated by racial bias, and sentenced the defendant above the statutory maximum sentence.

In arriving at this determination, the Court carved out an important exception. Recalling its holding in *Almendarez-Torres v. United States*, 523 U.S.224 (1998), it held that the "fact" of a prior conviction was exempted from the reach of the *Apprendi* ruling. In discussing *Almemndarez-Torres*, Stevens wrote;

"Rejecting *Almendarez-Torres* objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies– all of which had

> been entered pursuant to proceedings with substantial procedural safeguards of their own– no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court."(*Supra*., at 488)

On this issue, he further declared;

> "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."(*ibid*.)

---

[17]N.J. Stat. Ann. Section2C:39-4a (West 1995).

[18]N.J. Stat. Ann. Section 2C:39-3a (West 1995)

In distinguishing the use of a prior conviction from other sentencing enhancements, Stevens further opined;

> "Moreover there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."(*id*., at 496)
>
> Ultimately, he summarized the Court's new rule, declaring;
>
> In sum, our reexamination of our cases in this area and the history upon which they rely, confirms the opinion we expressed in Jones. *Other than the fact of a prior conviction*, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."(*infra*., at 489 *emphasis added*)

People v. Rosen

The following April, the New York Court of Appeals addressed the constitutionality of Section 70.10 in light of the Supreme Court's holding in *Apprendi*. In *People v. Rosen* 96 N.Y. 2d 329, (April 3, 2001), Judge George Bundy Smith writing for a unanimous bench affirmed the constitutionality of the statute, observing;

"Under New York law, to be sentenced as a persistent felony offender, the court must first conclude that the defendant had previously been convicted of two or more felonies for which a sentence of over one year was imposed. Only after it has established that the defendant is a twice prior convicted felon may the sentencing court, based upon a preponderance of the evidence, review '[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct...established by any relevant evidence, not legally privileged' to determine whether to actually issue an enhanced sentence (CPL 400.20[5]). It is clear from the statutory framework that the prior felony

> convictions are the sole determinate of whether a defendant is subjected to enhanced sentencing as a persistent felony offender. Then the court must consider other enumerated factors to determine whether it 'is of the opinion that a persistent offender sentence is warranted' (CPL 400.20[9]). As the latter, the sentencing court is thus only fulfilling its traditional role-giving due consideration

to agreed-upon factors - -determining an appropriate sentence within the permissible statutory range (*see*, *People v Farrar*, 52 N.Y. 2d 302, 305-6). Defendant had no constitutional right to a jury trial to establish the facts of his prior convictions." (*see*, *Apprendi*, *supra*, 530 U.S., at 488).(96 N.Y. 2d 329, 334-5)

Ring v. Arizona

Slightly more than three months after *Rosen*, the United States Supreme Court decided *Ring v. Arizona,*[19] in which it invalidated a portion of the State of Arizona's death penalty scheme which allowed the trial judge, alone, to determine the existence, presence or absence of aggravating or mitigating facts for imposition of the death penalty. Justice Ginsburg, writing for the majority,[20] acknowledged that the Court would have to expressly overrule its holding in *Walton v. Arizona*,[21] decided twelve years earlier, in which the Court had approved Arizona's capital punishment procedures. On this point, she declared;

"*Apprendi's* reasoning is irreconcilable with Walton's holding in this regard, and today we overrule Walton in relevant part. Capital defendant's, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."(536 U.S. 584, 589).

Justice Scalia, in a separate concurrence, declared himself confronted by a Hobbsian choice, observing;

"The question of whether *Walton v. Arizona* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed. 2d 511,(1910), survives our decision in *Apprendi v. New Jersey*, 530 U.S.

[19]536 U.S. 584 (Decided June 24, 2004).

[20]Ginsburg was joined by Justices Stevens, Scalia, Kennedy, Souter, and Thomas.

[21]497 U.S. 639 (1990).

466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), confronts me with a difficult choice. What compelled Arizona (and many other States) to specify particular 'aggravating factors' that must be found before the death penalty can be imposed, see 1973 Ariz. Sess. Laws ch. 138 section 5 (originally codified as Ariz. Rev. Stat. section 13-454) was the line of this Court's cases beginning with *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed 2d 346 (1972)(*per curiam*). See, Walton, 497 U.S. 659-660, 110 S. Ct. 3047 (SCALIA, concurring in part and concurring in judgment). In my view, that line of decisions had no proper foundation in the Constitution, Id. At 670, 110 S. Ct. 3047 ("' the prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.'" (quoting *Gardner v. Florida*, 430 U.S. 349, 371, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (REHNQUIST, j. dissenting))). I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a jury must find beyond a reasonable doubt.

On the other hand, as I wrote in my dissent in *Almendarez-Torres v. United States*, 523 U.S. 224, 248, 118 S. Ct. 1219, 140 L.Ed. 2d 350 (1998), and as I reaffirmed by joining the opinion of the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee enshrined in the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives– whether the statute calls them elements of the offense, sentencing factors, or Mary-Jane --must be found by the jury beyond a reasonable doubt.

The quandary is apparent: Should I continue to apply the last–stated principle when I know that the only reason the fact *is* essential is that the Court has mistakenly said that the Constitution *requires* state law to impose such 'aggravating factors' ? In Walton, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*....But even if the point had been put with greater clarity in Walton, I think I still would have approved the Arizona scheme – I would have favored the States' freedom to develop their own capital sentencing procedures erroneously abridged by *Furman*) over the logic of *Apprendi*.(536 U.S., at 610-11)

After criticizing the Court's post-*Furman* death penalty jurisprudence, Scalia returned to his Sixth Amendment analysis, writing;

"Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt ' sentencing

factors' determined by judges that increase the punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of

> my colleagues that this novel practice is perfectly OK, see *Apprendi*, supra, at 523, 120 S. Ct. 2348 (O'Connor, J. dissenting), cause me to believe that our people's right to a jury trial is in perilous decline. This decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration of the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." (536 U.S. 584, 611-612)

Brown v. Greiner 258 F.Supp. 68

On March 27, 2003, United States District Court Judge, John Gleeson, of the Eastern District of New York held that the New York Court of Appeals had misapplied *Apprendi* in *People v. Rosen, supra*, and granted a *writ of habeas corpus* for a state prisoner sentenced pursuant to Section 70.10 of the Penal Law. During his discussion of *Apprendi* in his opinion in *Brown v. Greiner*, 258 F. Supp. 2d 68 (March 27, 2003), Judge Gleeson acknowledged the exception carved out by the Supreme Court concerning the use of prior convictions for enhanced sentencing (See, 258 F.Supp. 2d 68, 83-6). In discussing the reasons for this exception, he noted;

> "One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."(*Id*., at 84)

Turning to the New York Court of Appeals decision in *Rosen, supra*, he declared;

> "I also have no difficulty concluding that *Rosen's* conclusion is opposite to that reached by the Supreme Court in *Apprendi* on a question of law."(*supra*., at 90)

He went on to observe;

"The New York Court of Appeals rejected the claim, concluding that '[i]t is clear from...the statutory framework that the *sole determinate* of whether a defendant is subject to enhanced sentencing as a persistent felony offender' *Id.* At 335, 728 N.Y.S. 2d 407, 752 N.E. 2d 844 (emphasis added). Regarding the factual findings

> required by the second element of the statute, the Court of Appeals stated that the sentencing court is 'Only fulfilling its traditional role-giving due consideration to agreed-upon factors-in determining an appropriate sentence within the permissible statutory range'" *Id.*

With respect, the first of those observations is descriptively inaccurate. It could not be clearer that the prior felony convictions are not the sole determinant of whether a defendant is sentenced as a discretionary persistent felony offender. No such sentence complies with New York law unless, in addition to finding the prior convictions, the sentencing judge makes findings of fact, after a hearing that the defendant's history and character also warrant the enhanced sentence. New York Penal Law Section 70.10 (2); *see supra*.

Second, Rosen's conclusion that, in finding the facts (other than the fact of a prior convictions) warrant extended incarceration under the persistent felony offender statute, the sentencing court is 'only fulfilling its traditional role' is wrong. The Supreme Court reached the opposite conclusion; where, as in Brown's case, an enhanced statutory maximum only exists if the judge makes certain factual findings at sentencing, the judge's role 'is novel[ ]'not traditional, and the 'historic link between verdict and judgment' has been broken. *Apprendi*. 530 U.S. at 482-3, 120 S. Ct. 2348.To say, as the New York Court of Appeals has in *Rosen*, that those findings are analogous to 'traditional' sentencing considerations elevates form over substance, for the enhanced sentencing may be imposed without them. *Apprendi* 530 U.S. at 494, 120 S. Ct 2348. The question following *Apprendi* is whether the findings regarding the history and character of the defendant and the nature and circumstances of his criminal conduct exposed Brown to a greater punishment than that authorized by the jury's verdict. *Id.* Because the answer to that question is 'yes,' Brown's sentence violated his rights under the Due Process Clause of the Fourteenth Amendment. The contrary conclusions of the New York courts violated the clear mandate of *Apprendi*.

New York could, consistently with *Apprendi*, have a sentence-enhancing provision that subjects all persons convicted of a class D felony who have two prior felony convictions to the possibility of being sentenced as though they had been convicted of an A-1 felony. It could also guide the discretion of sentencing courts in those cases, such as by telling them to sentence the defendant more harshly than the maximum authorized by the offense of conviction only when they have the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest. Further, New York could require that the sentencing court set forth in the record the reasons for its opinion (including any factual findings) to permit appellate review, for example. Such a regime would be permissible because at the moment of conviction, the defendant faced the possibility of life in prison based on the fact of his prior convictions alone.

Rosen assumes that the foregoing describes the persistent felony statute at issue here. But it does not; based solely on the jury's verdict finding Brown guilty of criminal possession in the third degree, the maximum sentence that he could have received was seven years. This was so, because in New York, a discretionary

> persistent felony offender may not legally receive an enhanced sentence unless the court makes factual findings that support its 'opinion' that an extended sentence is appropriate. In that respect, this case and *Ring* are identical, with one meaningless exception: whereas the Arizona statute in *Ring* specifically enumerated (and thus circumscribed) the aggravating factors that would justify the enhanced sentence, see, 122 S. Ct. At 2434-37, the New York statute does not. It requires only that they relate the history and character of the defendant or the nature and conduct of his criminal conduct. But because both statutes require judicial findings, after a hearing, of at least one aggravating factor before the enhanced sentence is available, both violate *Apprendi*.

That some of the facts found by the sentencing court in Brown's case relate to his prior convictions does not matter. First, New York law is clear that the fact of the prior convictions, standing alone, is an insufficient basis for the finding required for the second prong of the statute. See, e.g. New York Penal Law Section 70.10(2); N.Y. CPL Section 400.20; *Perry*, 555 N.Y.S. 2d at 515. More is required to sustain the enhanced sentence, and it is precisely those additional facts (i.e. facts other than the fact of prior convictions) that bring the sentence into conflict with *Apprendi*. Second, aggravating facts relating to the prior convictions are no different than any other aggravating facts. For example the court in Brown's case relied on *inter alia*, his attack on a law enforcement officer when he was arrested in connection with his 1992 federal conviction. For purposes of the constitutional inquiry, that aspect of his prior conviction is indistinguishable from the 'fact' that contraband was found in the closet of his home, or from the 'fact' that his conduct in this case violated his supervised release. *Apprendi* precluded reliance on any of those facts to justify a sentence beyond the unenhanced maximum of seven years because Brown never had the right to a jury determination of them. In short, the rationale of the case explains why the exception to *Apprendis's* rule is stated as '[o]ther than the fact of a prior

> conviction.'Thus, with the possible exception of facts that constitute an element of the offense, even facts relating to prior convictions fall outside the exception."(258 F. Supp. 2d 68, 90-93)

In concluding that the Brown's *writ* should be granted, Judge Gleeson wrote;

"To the extent that *Apprendi* was applied at all in this case and in *Rosen*, it was applied not just incorrectly, but unreasonably. The rule requires that any fact,

> other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348. In applying that principle, the New York courts have held that only the fact of a prior conviction - not the additional facts required by N.Y. Penal Law Section 70.10(2) and CPL 400.20-enhances sentences under the persistent felony offender statute. That holding is unreasonable-it is flatly contradicted by both statutes, by New York caselaw, and by the procedural history of this very case." (*infra*)

Blakely v. Washington

The following year the Supreme Court invalidated the State of Washington's sentencing guidelines which allowed the sentencing judge to sentence a defendant to a term of imprisonment above the standard range for an offense, after conducting a hearing into the existence of certain aggravating factors. In *Blakely v. Washington*, 542 U.S. 296, (Decided June 24, 2004), Justice Scalia[22] restated the rule in *Apprendi*, writing;

> "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L. Ed2d 435 (2000): "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury, and proved beyond a reasonable doubt."(542 U.S., at 301)(emphasis added)

Likewise, the following year, the Supreme Court held that the United States Federal Sentencing Guidelines suffered from the same infirmity as Washington's and ran afoul of the *Apprendi*, although here, it invalidated only those particular sections which made them binding

[22]Scalia was joined by Justices Stevens, Souter, Thomas, and Ginsburg.

on the sentencing court and which permitted *de novo* review of departures on appeal. In *United States v. Booker*, 543 U.S. 220, (Decided January 12, 2005) once again, Justice Stevens[23] reaffirmed the holding in *Apprendi* including the exception that prior convictions need not be submitted to a jury for determination.[24] In this opinion, he appeared to put some flesh on the bones of the exception, (and which will be discussed further below) when he observed;

> "Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established, a plea of guilty *must be admitted by the defendant* or proved to a jury beyond a reasonable doubt." (543 U.S. 220, 244) (emphasis added).

Brown v. Greiner 409 F. 3d 523

[23]Stevens was joined by Justices Souter, Scalia, Thomas and Ginsburg. Additionally, Stevens dissented in part in an opinion joined by Justices Souter and Scalia. Justices Scalia and Thomas each filed separate opinions dissenting in part.

[24]543 U.S. 220, 230-31.

Later that year, the United States Court of Appeals for the Second Circuit in *Brown v. Greiner*, 409 F. 3d 523, (Decided June 3, 2005), reversed Judge Gleeson's holding in the court below. Addressing Judge Gleeson's analysis of the New York Court of Appeals holding in *Rosen*, supra, Judge Leval, writing for a unanimous panel,[25] declared;

> "...we do not believe that the Court of Appeals applied *Apprendi* unreasonably in distinguishing this judicial finding from the type of fact finding at issue in *Apprendi*. The fact at issue in *Apprendi* was whether the defendant's crime was committed 'with a purpose to intimidate...because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'*Id*. At 468-69, 120 S. Ct. 2348 (internal quotation marks omitted). This fact was specifically enumerated in the statute as an essential element, or functional equivalent, that was necessary to sentence a defendant at the increased level." (409 F. 3d 523, 534)

Turning to Section 70.10 of the Penal Law, he went on to observe;

"The second determination to be made under New York's persistent felony offender statute is a very different sort. It is a vague, amorphous assessment of whether, in the court's 'opinion,', 'extended incarceration and life-time supervision' of the defendant 'will best serve the public interest.'See N.Y. Penal Law Section 70.10(2). The New York Court of Appeals considered this exercise to be something quite different from the precise finding of a specific fact, as in the cases culminating in *Apprendi*. The Court stressed that unlike the specific factual finding of predicate felonies, which the court labeled 'the sole determina[nt]' of exposure to the enhanced sentence (and which is expressly

> excluded by the Supreme Court from the *Apprendi* rule), the other factor that determines whether the defendant will receive an enhanced sentence involves the sentencing court's fulfillment of ' its traditional role-giving due consideration to agreed-upon factors in determining an appropriate sentence within the permissible statutory range.' Rosen, 96 N.Y. 2d at 335, 752 N.E. 2d at 847, 728 N.Y.S. 2d at 410. We cannot say the New York Court of Appeals unreasonably applied *Apprendi* when it concluded that this second determination is something quite different from the fact-finding addressed in *Apprendi* and its predecessors.
>
> We recognize that determining what sentence 'best serve[s] the public interest' under the statue turns on findings relating to the 'history and character of the defendant and the nature and circumstances of his criminal conduct.' N.Y. Penal Law section 70.10(2). The statute, however does not enumerate any specific facts

[25]Leval was joined by Judges Walker and Katzman.

> that must be found by the sentencing court before it can conclude that the extended sentence is in the public's 'best... interest.' It was not unreasonable for the Court of Appeals to conclude that such determinations regarding the defendant's history, character, and offense fall into the different category from the essential statutory elements of heightened sentencing, or functional equivalents thereof, that were addressed by the Supreme Court's *Apprendi* ruling. We therefore conclude that the state court decisions affirming the Petitioner's sentences were not 'contrary to, or...an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." (409 F. 3d at 534-5)

People v. Rivera

On June 9, 2005. The New York Court of Appeals revisited and reaffirmed its decision in *People v. Rosen, supra*. In *People v. Rivera*, 5 N.Y. 3d 61, a divided court[26] held that *Rosen* was

[26]Chief Judge Kaye and Judge Ciparik dissented.

correctly decided and that the several United States District Courts that had held to the contrary[27] were wrong. Judge Rosenblatt at the outset of the majority opinion, declared;

"Defendant asks us to overrule *People v. Rosen*, (96 N.Y. 2d 329[2001]), in which we sustained the constitutionality of Penal Law Section 70.10 and Criminal Procedure Law Section 400.20(5), the persistent felony offender statutes. After

> studying the Supreme Court's recent decisions derived from *Apprendi v. New Jersey* (530 U.S. 466[2001]), we uphold *Rosen*, the statutes, and defendant's sentence as a persistent felony offender."(5 N.Y. 3d 61, 63)

After discussing the facts of the defendant's sentencing, the Judge went on to recount the particular holding of *Rosen*, in which he stated;

> "In *Rosen* this Court held that after the People have proved that a defendant is a twice-prior convicted felon, the sentencing court may review the history, character and criminality factors (CPL 400,20[5]) to determine whether to impose a recidivist sentence. More pertinently, we further held that this statutory framework makes it clear that the prior felony convictions are the sole determinant of whether a defendant is subject to recidivist sentencing as a persistent felony offender (*Rosen*, 96 N.Y. 2d at 335). This is in keeping with Penal Law Section 70.10(1)(a) which defines a persistent felony offender simply as a defendant with two prior felony convictions."(*supra*, at 66)

He went on to opine that although a defendant could not be sentenced as a persistent felony offender until the court makes the finding concerning the history and character pursuant to Section 400.20 of the Criminal Procedure Law, it was Section 70.10 of the Penal Law which controlled and defined who was a persistent felony offender.

Discussing the applicability of *Apprendi*, he observed;

"We could have decided Rosen differently by reading the statutes to require judicial factfinding as to the defendant's character and criminal acts *before* he became eligible for a persistent felony offender sentence. If we had construed the statutes to require the court to find additional facts about the defendant before imposing a recidivism sentence, the statutes would violate *Apprendi*. But we did not read the law that way. Under our interpretation of the relevant statutes,

[27]See 5 N.Y. 3d 61 70 Fn.9.

defendants are eligible for persistent felony offender sentencing based *solely* on whether they had two prior felony convictions. Thus, as we said in *Rosen*, no further findings are required. This conclusion takes the defendant's sentence outside the scope of the violations described in *Apprendi* and its progeny.(*infra*., at 67)

After discussing the findings and ultimate conclusion of the sentencing court,

Rosenblatt re-emphasized the Court's position concerning the meaning of *Rosen*

and its construction of the

persistent felony offender sentencing scheme, stating;

"...the relevant question under the United States Constitution is not whether those facts were essential to the trial court's opinion (CPL 400.20[1][b]) but whether there are any facts other than the predicate felony convictions that must be found to make recidivist sentencing possible (see *Blakely* 542 U.S. at 303-4). Our answer is no. As we explained in *Rosen*, the predicate felonies are both necessary and sufficient for imposition of the authorized sentence for recidivism; that is why we pointedly called the predicate felonies the 'sole' determinant (96 N.Y. 2d at 335). By this unequivocal statement, we mean, and confirm today, that Criminal Procedure Law Section 400.20, by authorizing a hearing on facts related to the defendant's history and character, does not grant defendants a legal entitlement to have those facts receive controlling weight in influencing the court's opinion. The statutory language requiring the sentencing court to consider the specified factors and to articulate the reason for the chosen sentence grants defendants a right to an airing and an explanation not a right."(5 N.Y. 3d., at 67-8)

The Judge closed the opinion by answering the Court's critics on the federal bench,

declaring;

"A number of federal trial courts have awarded (or have recommended awarding) writs of habeas corpus to state prisoners under a different view of our statutes. These courts believed that our statutes would not permit the imposition of a recidivist sentence until the trial justice found facts about the defendant's history and character beyond the prior convictions. These courts might be correct, if their interpretation of our statutes were correct. As we explained in *Rosen*, however, no additional factfinding beyond the fact of the two prior felony convictions is required under Penal Law Section 70.10 or under Criminal Procedure Law

Section 400.20. If, for example, a defendant had an especially long and disturbing history of criminal convictions, a persistent felony offender sentence might well be within the trial justice's discretion even with no further factual findings. Once the defendant is adjudicated a persistent felony offender, the requirement that the sentencing justice reach an opinion as to the defendant's history and character is merely another way of saying the court should exercise its discretion." (*infra*, at 70)

Unlike *Rosen*, which commanded a unanimous bench, *Rivera* drew two dissenters. Chief Judge Kaye, taking note of the Supreme Court's overruling *Walton v. Arizona* in *Ring*, observed that

"...the decision in *Rosen* was neither contrary to, nor involved an unreasonable application of, *Apprendi* at the time it was decided (*See, Brown v. Greiner*, 409 F. 3d 523 [2d Cir 2005]) (5 N.Y. 3d 61 at 72)

Turning to the statute itself, she went on to note;

"Second I agree that the statutory scheme the Court describes would pass constitutional muster. The problem though, is that the statute as construed by the majority was not the law in New York. The language of the statute is plain, and reflects the intent of the Legislature, that not every two-time (nonviolent) recidivist is eligible, without more, to be sentenced to an indeterminate life term. Only some are.

True, a persistent felony offender is defined 'simply as a defendant with two prior felony convictions' (majority op. At 66, Penal Law Section 70.10[1]). But under the statute a defendant's classification as a persistent felon does not in and of itself subject the offender to enhanced punishment. Fitting the definition of a persistent felony offender under Penal Law Section 70.10(1) is necessary but not sufficient to render a defendant eligible for enhanced sentencing under CPL 400.20. Rather, an enhanced sentence is available only for those who are additionally found to be of such history and character, and to have committed their criminal conduct under such circumstances, that extended incarceration and lifetime supervision will best serve the public interest. (See, Penal Law section 70.10[2]). The persistent felony offender statute thus stands in stark contrast to Penal Law Section 70.08, which requires that all three-time violent felons be sentenced to an indeterminate life term on the basis of the prior convictions alone. I cannot agree that the second prerequisite is merely optional."(ibid., at 72-3)

She went on to further observe;

"That the statute calls this finding of fact an 'opinion' is of no moment. *Blakely* makes clear that *any factfinding* essential to the sentence enhancement must be decided by a jury, even if it is general and unspecified in nature, and even if the
ultimate sentencing determination is discretionary."[28]

Judge Kaye concluded her dissent, declaring;

"In recasting the statute as one in which a defendant bears the burden of demonstrating that an enhanced sentence is not warranted, the Court ignores both
the language and intent of the law. By requiring that a court hold a hearing and make findings before it could impose a persistent felony sentence, the Legislature sought to limit the availability of enhanced punishment to a subclass of persistent offenders. Today, however, the majority announces that every three-time nonviolent felon is automatically eligible, without more, for a potential life sentence. That decision is for the Legislature not the Court."(5N.Y. 3d 61, 76)

Judge Ciparik also dissented, noting;

"The majority offers the interpretation of our discretionary persistent felony offender sentencing statute that purportedly does not violate a defendant's Sixth Amendment constitutional rights. However, the description as proffered is not consistent with the plain language of Penal Law Section 70.10 and CPL 400.20 nor does it comply with the mandates of recent United States Supreme Court holdings, in essence, the majority has rewritten the statute."(5 N.Y. 3d 61, 76)

After offering her analysis of *Apprendi*, she went on to take issue with the majority's rationale and its treatment of *Rosen*, declaring;

"However contrary to the majority's analysis here, our inquiry does not end at
recidivism. Instead recidivism is one of two material findings that must be made before an enhanced sentence can be imposed. Although the majority wishes now to separate itself from this second prong and its explicit role in determining an

[28] *Id.*, at 73.

enhanced sentence, we did acknowledge its existence in *Rosen*.(*ibid*., at 79)

She further held that Section 70.10 of the Penal Law could not survive *Ring* and *Blakely* observing;

"We can no longer distinguish our statute as it bears too much resemblance to the statutes struck down in *Ring* and *Blakely*. When a statute, like ours, considers facts beyond the recidivism that were neither proven to the jury beyond a reasonable doubt nor admitted by a defendant for the purpose of enhancing a sentence beyond the statutory maximum, then the statute runs counter to the United States Supreme Court's current interpretation of the Sixth Amendment."(5 N.Y. 3d, at 80-1)

Ultimately, Judge Ciparik decided that *Rosen* could no longer stand in the wake of *Apprendi's* progeny, conceding;

"In conclusion, *Rosen* was the right decision in terms of the constitutional landscape at the time, (see, *Brown v. Greiner*, 409 F. 3d 523, 534 [2d Cir. 2005][holding that our interpretation of Rosen was a reasonable application of *Apprendi* 'as understood at the time']). I joined in that decision and do not retreat from it. However, I must now defer to the United States Supreme Court's interpretation of the Federal Constitution that has developed since our decision in *Rosen*. The majority fails to recognize that the Supreme Court holding in *Ring*, *Blakely* and *Booker* represent a significant shift in Sixth Amendment jurisprudence. It is thus evident that a *Rosen* analysis is no longer appropriate. It is also evident that our discretionary persistent felony offender statute contravenes the Sixth Amendment to the United States Constitution as it requires additional factfinding – 'the functional equivalent of an element of a greater offense' (*Apprendi*, 530 U.S. at 494 n.19) - -beyond that found by a jury or admitted by a defendant."(*ibid*., at 82-3)

Portlain v. Graham

Undaunted by the Second Circuit's reversal in *Brown v. Greiner, supra*, and the Court of Appeals reaffirmation of *Rosen* in *Rivera,* Judge Gleeson again held the New York discretionary

persistent felony offender sentencing scheme unconstitutional in *Portlain v. Graham*,__F. Supp.2d.__,(March 22, 2007). After recounting the proceedings in the New York State court and the provisions of the sentencing scheme, and the *Rosen* and *Brown* decisions, Judge Gleeson turned his attention to the *Rivera* decision. Addressing the holding in *Rivera* and the State's view of it, he declared;

> "After the Supreme court decided *Blakely* and *Booker* (in June 2004 and January 2005, respectively), the New York Court of Appeals revisited Section 70.10 in *People v. Rivera*, 5 N.Y. 3d 61, 800 N.Y.S. 2d 51, 833 N.E. 2d 194 (2005). Specifically, the defendant in *Rivera* asked the court to overrule *Rosen* in light of the intervening Supreme Court precedent. The New York Court of Appeals declined to do so. 5 N.Y. 3d at 63, 800 N.Y.S. 2d 51, 833 N.E. 2d 194.
> In opposition to Portlain's petition, respondent contends that *Rivera* did nothing more than reaffirm *Rosen*. See resp. Mem. 22 ('The decision of the New York Court of Appeals in *Rivera* merely reaffirmed what the New York Court of Appeals had stated four years earlier in *People v. Rosen*.').If that were so it might end the matter as discussed above, *Rosen's* (and *Brown and Geiner's*) effort to justify certain types of judicial factfindings in the sentencing phase on the ground that they fall within the 'traditional role' of judges, see *Rosen*, 96 N.Y. 2d 333, 728 N.Y.S.2d 407, 752 N.E. 2d 844, Brown, 409 F. 3d at 534, may have been reasonable error prior to *Blakely* but it clearly does not survive that case.
>
> But I see more in *Rivera* than respondent sees. Although it certainly reaffirmed *Rosen* (rather than overruling it), *Rivera* appears to add to it. Edified by *Ring*, *Blakely* and *Booker*, which all came after *Rosen*, the New York Court of Appeals in *Rivera* did not merely rely on *Rosen's* analysis, it refined and added to that analysis in an effort to accommodate the intervening precedent. Like several other state high courts, the Court of Appeals tried gamely to retrofit a sentencing statute enacted decades ago into the rapidly developing Sixth Amendment doctrine."(__F. Supp. 2d__at p.12.)

He further conducted a detailed analysis of *Rivera* in which he observed;

> "The most important aspect of *Rivera* is that, despite its insistence that no factfindings (other than the fact of prior convictions) are necessary to make Section 70.10's enhanced sentence possible, it leaves all of Sections 70.10 and 400.20 intact." *(id*., at 15)

Addressing this perceived deficiency, Gleeson wrote;

> *Rivera* could have excised the factfinding requirements of Section 400.20 (9) (just as Booker excised 18 U.S.C. Section 3553 (b)(1), and if it had, Section 70.10's enhanced sentence might have well become authorized without the necessity of judicial factfindings. Instead, the factfindings are still mandated by statute, and Rivera contains two rationales for its conclusion that they do not offend the *Apprendi* principle." (*ibid*., at 16)

Gleeson said the first rationale was based upon the rationale that the factfinding was essential for "Interest of justice appellate review, citing language from *Rivera*. Addressing this contention he wrote;

"But the *Apprendi* principle as discussed above, is one of effect, not form. If, as

> remains the case in New York even after Rivera, a judge's authority to impose an enhanced sentence arises only after he or she makes one or more findings of fact, the jury trial right is violated. The Supreme Court's decision in Cunningham demonstrates what was already established by *Apprendi* and *Blakely*, namely that judicial factfindings cannot be rescued from Sixth Amendment scrutiny by characterizing them as grist for appellate review." (*supra*.)

After some further discussion, he dismissed this rationale with the observation;

> "'It is comforting, but beside the point' that New York's system allows sentence reductions on appeal in the interest of justice. *Id.* The point is that New York continues to require that factfindings be made before the enhanced sentence is imposed." (*Id*.)

Turning to the second rationale advanced in *Rivera*, that the factfinding done by the New York courts concern the defendant's history and character holistically rather than the facts peculiar to the case, Gleeson also rejected, noting;

"That dichotomy, as discussed above, cannot be squared with the *Apprendi* rule. The rule says that any fact other than a prior conviction– not other than an offender characteristic-that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. No matter how distant the facts at issue may be from the elements of the offense or

> their 'functional equivalent' and no matter how 'holistic' or 'amorphous' the inquiry may be, if the sentencing court's authority to impose a persistent felony offender sentence is conditioned on factfindings that must be made by the court, such sentence cannot withstand the Sixth Amendment scrutiny."(*ibid*., p.17)

Gleeson went on to acknowledge that deference is owed to the New York Court of Appeals in the interpretation of its own statutes, however, citing *Wisconsin v. Mitchell*,[29] he declared;

"Once any ambiguities as to the meaning of Section 70.10 are resolved by the New York court, a federal court must reach its own judgment as to the operative effect...The unambiguous text of Section 400.20 (9) still commands the

> sentencing courts to make findings of fact before they may impose an enhances sentence under Section 70.10. Although Rivera casts those factfindings as essential to appellate review rather than the imposition of sentence, it nevertheless leaves them as a 'mandatory' part of the statutory scheme. 3N.Y. 3d at 69, 781 N.Y.S. 2d 488, 814 N.E. 2d795. That feature of the scheme compels my conclusion here.
>
> Put another way, I defer to the Court of Appeals conclusion with respect to what Section 70.10 means but I do not defer to its determination that '[i]n practical terms, the legislative command' that findings of fact be made does not violate the jury trial right...The Court of Appeals analysis, i.e. that the statute merely aims to make explicit 'what sentencing courts have always done' *Rivera* 3 N.Y. 3d at 57, 781 N.Y.S. 2d 482, 814 N.E. 2d 789, and thus does not have unconstitutional effects, does not preempt my independent obligation to assess the constitutionality of the statute as the court itself construed it."(*infra*., at 18)

The Judge made two observations about how, in his view, New York could salvage its persistent felony offender scheme. Either it could subject all persons convicted of a felony, who have two prior nonviolent felony convictions, to the possibility of life imprisonment, or it could submit the issue of the defendant's history and character and the need for extended incarceration

[29]508 U.S. 476(1993).

and supervision to a jury.[30] Absent one of those alternatives, he believed that Portalain's sentence was unconstitutionally imposed, and that he was compelled to grant the writ.

Notwithstanding Judge Gleeson's thoughtful and thorough analysis of New York's discretionary persistent felony offender sentencing scheme in *Brown v.Greiner*,, 258 F.Supp. 2d 68,(2003), and *Portalain v. Graham*, __F. Supp.__(2007), both the New York Court of Appeals and the United States Court of Appeals have spoken in *Rosen, Rivera*, and *Brown v. Greiner*, 409 F. 3d 523 (2005) and have put their *imprimatur* on New York's discretionary persistent felony offender scheme in the wake of *Apprendi* and its progeny. Unless one of these Courts choose to revisit the issues decided there,[31] or the United States Supreme Court conducts its own review, discretionary persistent felony offender sentencing in New York, as it presently exists, will continue.

Post *Rosen* and *Rivera* Treatment and Review

The New York courts, in the wake of the Court of Appeals determinations, for the most part, have followed the Court's decision with little discussion or dissent.

The Appellate Division First Department has applied *Rosen* and *Rivera* to the various *Apprendi* claims that have come before it on appeal.[32] It has likewise expressed fealty to those

---

[30]See__F. Supp. 2d__, at p.19)

[31]In People v. Daniels, 5 N.Y. 3d 738, the Court unanimously rejected a claim that an unpreserved *Apprendi* violation could still be reviewed because it was a mode of proceedings error. In affirming the lower court, it noted that such a claim "... would not prevail on the merits (see *Rivera*)." Thus, suggesting that it would not revisit these cases any time soon.

[32]See, *People v. Bailey*, 19 A.D. 3d 302 (June 28, 2005); *People v. Morris*, 21 A.D. 3d 251 (August 4, 2005);*People v. Duncan*, 21 A.D. 3d 252 (August 4, 2005); *People v. Washington*, 21

decisions, even when rejecting such claims as unpreserved.[33] The Second Department has taken a similar approach.[34] The Second Department has, however, spawned two interesting decisions concerning the application of Section 70.10 of the Penal Law *post-Apprendi*, which will be discussed below.

A.D. 3d 253 (August 4, 2005); *People v. Jenkins* 21 A.D. 3d252 (August 4, 2005); *People v. Brown* 24 A.D. 3d 213 (December 13, 2005); *People v. Hilton* 25 A.D. 3d 505 (January 31, 2006); *People v. Rawlins* 37 A.D. 3d 183 (February 6, 2007); and *People v. Garvin* 37 A.D. 3d 372 (February 27, 2007).

[33]See, *People v. Gurley*, 28 A.D. 3d 347 (April 20, 2006); and *People v. White*, 29 A.D. 3d 329 (May 4, 2006)

[34]See *People v. Jordan*, 21 A.D. 3d 1039 (September 19, 2005); *People v. Ortiz*, 23 A.D. 3d 499 (November 14, 2005); *People v. Black*, 23 A.D. 3d 490 (November 14, 2005);*People v. Martin*, 24 A.D. 3d 470 (December 5, 2005); *People v. Hasty*, 25 A.D. 3d 740 (January 26, 2006); *People v. Washington*, 26 A.D. 3d 400 (Feb. 14, 2006); *People v. Rivera*, 31 A.D. 3d 790 (July 25, 2006) and *People v. Kirby*, 34 A.D. 3d 695 (November 21, 2006).

The Third Department, like the First, has applied these decisions without comment or deviation from their holdings.[35]

The Fourth Department has also applied it, but like the Second Department with an interesting twist.[36]

As noted previously, the Second Department handed down two decisions which are of interest in the way in which it applied *Rosen* and *Rivera*. The first arose out of *People v. Ortiz*[37] in which the trial court held that in deference to *Apprendi* it would require that the prosecution

---

[35]*See, People v. Buckley*, 20 A.D. 3d 821 (July 28, 2005); *People v. Johnson*, 24 A. D. 3d 967 (December 15, 2005); *People v. Pelkey*, 27 A.D. 3d 785 (March 2, 2006) and *People v. Knox*, 32 A.D. 3d 617 (August 10, 2006).

[36]*People v. Reddin*, 27 A.D. 3d1173 (March 17, 2006); and *People v. Gomez,* 38 A.D. 3d 1271 (March 16, 2007).

[37]11 Misc 3d 192 (Supreme Court, Bronx County [October 6, 2005])

prove all facts, which it would rely on in sentencing the defendant as a discretionary persistent felony offender, beyond a reasonable doubt. The prosecution sought Article 78[38] relief in the form of a writ of prohibition contending that the trial court erred in requiring to prove matters pursuant to Section 400.20 (5) of the Criminal Procedure Law beyond a reasonable doubt, when the statute only required a preponderance of the evidence.[39] In denying the writ because such relief generally does not lie in a criminal proceeding, the Court held that the trial court did not have the discretion "...to impose a different burden of proof than that directed by the Legislature."[40] Despite the language in *Rosen* and *Rivera* that suggests that the fact-finding required by Section 70.10(2) of the Penal Law and governed by Section 400.20(5) of the Criminal Procedure Law is apparently superfluous to the determination, the Second Department has religiously adhered to the requirements of both statutes. In *People v. Perry,*[41] it rejected a constitutional challenge to a discretionary persistent felony offender sentence relying upon *Rosen* and *Rivera* but was careful to note that all of the procedural requirements of Section 400.20 of the Criminal Procedure Law had been met. Likewise, in *People v. Murdaugh,*[42] it reversed such a sentencing determination because the trial court failed to specify the reasons for its "...

---

[38]Article 78 of the Civil Practice Law and Rules, (McKinney's 1994).

[39]*Johnson v. Price*, 28 A.D. 3d 79 (February 2, 2006).

[40]*Ibid*., at 81.

[41]19 A.D. 3d 619(June 20, 2005).

[42]38 A.D. 3d 918 (March 27, 2007).

opinion...in the record"[43] thereby making it "...impossible for this court, as the reviewing court, to determine what conduct or circumstances the sentencing court relied upon in determining that the second prong of the required persistent felony offender analysis was satisfied (*see People v. Garcia, supra*.)."[44]

The Fourth Department in *People v. Reddin*,[45] handed down a decision similar to *Perry,* in which it rejected a challenge to a Section 70.10[46] sentence, citing *Rivera*, but also pointing out that the Section 400.20[47] requirements had been met.

The Application of Section 70.10 of the Penal Law

It seems clear from the Court of Appeals opinions in *Rosen*[48] and *Rivera*,[49] as well as the opinion of the Second Circuit Court of Appeals in *Brown v. Greiner,*[50] that a defendant who stands convicted of his third felony, alone, is eligible for enhanced sentencing carrying a potential term of life imprisonment. While such a determination may be legally possible, it seems unlikely that such a draconian measure would be imposed, and that the application of Section

---

[43] *supra*.

[44] *Ibid*.

[45] 27 A.D. 3d 1173 (March 17, 2006).

[46] Penal Law Section 70.10.

[47] Criminal Procedure Law Section 400.20.

[48] *Ibid*.

[49] *Ibid*.

70.10 would still be reserved for those defendants who have a lengthy history of felony convictions. This raises an issue, although somewhat tangential to *Apprendi*, calling into question the continued vitality of Section 400.20 of the Criminal Procedure Law, which Judge Gleeson observed in *Portlain*[51], is still intact.

It was noted previously that Section 400.20(6) of the Criminal Procedure Law allows a defendant to challenge the constitutionality of any conviction which will be used as a predicate under Section 70.10 of the Penal Law in determining whether the defendant should be adjudicated a discretionary persistent felony offender.[52] Indeed, as this section indicates, such a challenge may be raised to a previous conviction "...in this or any other jurisdiction..."[53] Thus, it is conceivable that a court considering the imposition of such a sentence on a career criminal, having a criminal history in New York and other jurisdictions, spanning several decades, could be forced to adjudicate such a claim arising out of proceedings in which there is an inadequate record or no record at all. One of the ways in which New York has allowed its courts to resolve such a claim, is by applying collateral estoppel to a defendant who has previously admitted the prior predicate conviction during a second felony offender sentencing.[54] But is such a procedure

---

[50]*Ibid*.

[51]*Ibid*.

[52]*Ante*, at p.

[53]*Ibid*.

[54]See, *People v. Froats*, 163 A.D. 2d 906 (Fourth Department[1990])

fair, considering the obvious disparity of the sentences to be imposed ?

Surely, a defendant offered a favorable plea-bargained sentence, as a second felony offender, will have no compunction about admitting and not contesting the first felony conviction, in order to obtain the benefit of that plea-bargained sentence. Whereas a defendant faced with the possibility of a sentence of life imprisonment, pursuant to Section 70.10 of the Penal Law has every incentive to contest the validity of the prior conviction, only to discover that the opportunity to do so has been lost because of the benefit conferred in the prior sentencing proceeding. While *Apprendi* holds that all facts which might enhance a sentence beyond that authorized by the statute, other than a prior conviction, must be found by a jury: shouldn't a defendant facing an enhanced sentence under Section 70.10 be, at least, allowed a *denovo* challenge to the constitutionality of a predicate felony conviction before the sentencing court alone, where a sentence of life imprisonment is to be imposed ? Indeed the language of Section 400.20(6) of the Criminal Procedure Law seems to suggest that such a claim is authorized without regard to the collateral estoppel found by the courts, and permitting such a challenge would not run afoul of the holding of *Apprendi* and its progeny since no jury determination is required.

The Requirements of Section 400.20 of the Criminal Procedure Law

While the New York Court of Appeals has made it clear in both *Rosen*[55] and *Rivera*[56] that

[55] *Ibid*.

[56] *Ibid*.

discretionary persistent felony offender sentencing is authorized upon the mere finding that the defendant has two prior felony convictions pursuant to Section 70.10(1) of the Penal Law, Judge Gleeson's observation in *Portlain* that the procedures mandated by Section 400.20 of the Criminal Procedure Law are still viable, and the failure of the Court of Appeals and the Second Circuit to state otherwise in those cases and *Brown v. Greiner*,[57] requires some discussion of how their respective dictates may be reconciled so as not to offend *Apprendi* and its progeny.

Perhaps the easiest, and most facile way to reconcile them, would be simply to say that the procedures required under Section 400.20 of the Criminal Procedure Law to support the findings required under Section 70.10 (2) of the Penal Law, were subsumed into the determination that the defendant has three felony convictions in Section 70.10(1). However, the language in all of those decisions suggest otherwise. As noted above, the Court of Appeals in *Rosen* and *Rivera* have suggested that the findings concerning the "...opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest..."[58] are little more than the traditional findings made by a sentencing court, and no more is required. Clearly the United States Court of Appeals has put its *imprimatur* on this determination in Brown v. Greiner.[59] Notwithstanding those holdings, both the facts of those cases, and the existence of this

---

[57] *ibid*.

[58] Penal Law Section 70.10(2) (McKinney's [1965])

[59] *Ibid*.

sentencing scheme clearly run afoul of the principles enunciated in *Apprendi* and its progeny, as observed by Judge Gleeson in *Brown v. Greiner* and *Portlain v. Graham* and Judges Kaye and Ciparik contended in their dissents in *Rivera*.

In *Rosen*, the trial court considered evidence "...concerning Rosen's psychiatric condition, his own extensive history of abusing children, his own history of being abused as a child, and the impact of the crime on the victim's family."[60] In *Rivera*, the trial court considered evidence presented by the prosecution "...that the defendant had three prior felony convictions, and 14 misdemeanor convictions, in addition to the two felony convictions that underlay his persistent felony offender status. The prosecution also contended that the defendant had used multiple aliases, had failed many times to comply with probation and parole conditions, had an ongoing drug addiction and would be unlikely ever to give up the lifestyle he supported by crime."[61] Moreover in declaring him a discretionary persistent felony offender, the trial judge "...reviewed some of the defendant's convictions, noting that they were uniformly connected with theft. It then pointed out that in the defendant's presentence report, he described his violent abuse by his father, but in a much older probation report he claimed to have had a good father and a peaceful home. The court found further inconsistency between defendant's assertion of a life-long drug dependency and his stable employment history. Next, the court reviewed the effect of the theft on the victim and the defendant's apparent attempt to distract police so that the other occupant of the

---

[60]*Brown v. Greiner*, 409 F.3d. 523, at 528.

[61]5 N.Y. 3d 61 at 64.

car could escape. The court also noted that the police found burglary tools in the vehicle."[62] Clearly, in both *Rosen* and *Rivera*, both trial courts relied upon information in forming its opinion required by Section 70.10(2) of the Penal Law, far outside the *fact* of the prior convictions or even related to the elements of the underlying convictions. In light of this, it is difficult to disagree with Judge Gleeson's observation in *Portlain* that the Court of Appeals failure to excise the fact-finding function in Section 400.20 of the Criminal Procedure Law renders *Rivera* a violation of *Apprendi*.

Avoiding the Pitfalls of *Apprendi*

For those who still wish to avail themselves of the option of discretionary persistent felony offender sentencing but not run afoul of the dictates of *Apprendi* and its progeny, the question arises of how to avoid such a result. Clearly Justice Price in *Ortiz* sought to avoid any *Apprendi* type defects by elevating the standard of proof for those facts, other than prior convictions to "beyond a reasonable doubt." As was previously discussed, the Appellate Division, Second Department, although denying the prosecution Article 78 relief, clearly warned the trial judge that elevating the standard of proof to one other than specified by the Legislature, would be plain error.[63] Moreover, although this is a creative approach, such a step would not cure an *Apprendi* defect. The rule in *Apprendi* is that anytime a court is going to impose a sentence beyond the statutory maximum, facts, other than prior convictions, must either be admitted by a

---

[62] *Ibid*., at 64-5.

[63] Ante, at p.26.

defendant or found by a jury beyond a reasonable doubt. Since the "facts" to be found in *Ortiz* were to be found by the court, and not by a jury, the compliance with *Apprendi* seems somewhat illusory and reminiscent of the procedures found to be lacking in *Ring*.

Judge Price's proposed remedy aside, the question remains about the best way to avoid an *Apprendi* error. It seems obvious that the most conservative approach to complying with the dictates of Sections 70.10 (2) of the Penal Law and 400.20 of the Criminal Procedure Law in forming an opinion concerning the defendant's "history and character...and the nature and circumstances of his criminal conduct" would be to rely *solely* on the criminal convictions, felony and misdemeanor alike, from his past. Since these are the result of either the defendant's prior admissions or a proceeding in which the elements have been proven beyond a reasonable doubt, no *Apprendi* error could lie, and the requirement of the statutes would be satisfied.[64] But is it necessary to stop there ? If the prior convictions can supply the required proof, why cannot the court also take into account the factual matters which make up the elements of these offenses ? Clearly the consideration of whether an offense was committed intentionally, recklessly, negligently, knowingly or while intoxicated is relevant to the formation of such an opinion and also satisfies the constitutional concerns required by *Apprendi* and its progeny. A trickier question is presented concerning the use of a prior Youthful Offender adjudication pursuant to Article 720 of the Criminal Procedure Law. While it is clear beyond cavil that such an

[64]The writer took this approach in *People v. Daggett* __Misc. 3d__(Onondaga County Court [May 15, 2007]).

adjudication may not serve as the basis of a persistent felony adjudication, since the adjudication replaces the conviction itself, can the court consider the underlying elements and facts of the adjudication in the same way it might consider those in the defendant's prior convictions ? Once again, the factual predicate for the elements of the underlying offense would have to have been established by the defendant's admission or by proof beyond a reasonable doubt thereby satisfying the constitutional requirements of *Apprendi*.[65] While there may be valid public policy reasons for affording a defendant the protection of Youthful Offender status, Section 720.35 of the Criminal Procedure Law authorizes disclosure to certain agencies, including the probation department that is charged with doing the pre-sentence investigation. Likewise, various courts have held that courts have the inherent authority to unseal its own records[66] and that such an adjudication may be utilized under the Sex Offender Registration Act.[67] It would certainly seem that if such records are able to be used in that type of a proceeding, they are appropriate for use in discretionary persistent felony offender proceeding.

In addition to the use of the defendant's prior criminal convictions, may the court also consider the frequency and timing of the convictions in the context of the defendant's history of

---

[65]The author considered the underlying facts of such an adjudication in a discretionary persistent felony offender proceeding in which the defendant had been adjudicated a Youthful Offender for a homicide in which he admitted driving drunk that preceded his conviction for six felony Driving While Intoxicated offenses and other convictions.

[66]See, e.g. *Matter of Dillon*, 171 Misc. 2d 665 (Nassau County Court [1997]) and *Matter of Green v. Giuliani*, 187 Misc. 2d 138 (Supreme Court New York County [2000]), and *Matter of Hynes v. Krassik*, 47 N.Y. 2d 659 (1979)..

[67]*People v. Vite-Acosta*, 184 Misc. 2d 206 (Supreme Court Bronx County [2000]).

incarcerations ? Surely, it is relevant to the determination of whether discretionary persistent felony offender status should be imposed, to consider how soon the defendant re-offended upon his entry back into society. While such a factor might never be the product of proof beyond a reasonable doubt, it seems only logical that a court should be able to take judicial notice of the dates of a defendant's prior sentences and the dates of his release from incarceration.

While *Rosen* and *Rivera* presently permit the sentencing courts to consider antisocial conduct such as "use of aliases, absconding from work release, and parole violations,"[68] it would seem that the further a sentencing court moves from the prior convictions and their essential elements as factors for consideration, the more suspect the court's analysis will be, and the sentence will be more susceptible under *Apprendi* should the Court of Appeals choose to revisit the issue or the United States Supreme Court decides to examine New York's discretionary persistent felony offender scheme in the future.

[68] *Portlain v. Graham*, ___F. Supp. 2d____, *supra*.