

WHY YOU SHOULD SUBMIT .15 BAC AT PUNISHMENT EVEN IF THE ODDS ARE NO BETTER THAN CHANCE AT PREDICTING HOW THE CCA WILL RULE

Trial Judge's Actions

CCA's Future Resolution of the Case & Relevant Defendant Choices

Anticipated Appellate Result for Preserved Error on Appeal (both state law issue & *Apprendi*)

JUDGE SUBMITS .15 AT GUILT

No *Apprendi* Issue: Regardless of resolution of the state law issue, Δ will get a jury finding to satisfy *Apprendi*
Or he will waive *Apprendi* by affirmatively waiving his jury-trial right at guilt

Possibility #1: It's a Guilt Issue.....

No error—judge guessed right.

Possibility #2: It's a Punishment Issue.....

Non-constitutional state law error & egregiously harmful or some harm where BAC (or high BAC) would not have been admitted at guilt & would make a difference (e.g., no retrograde + long delay between driving and testing + few bad driving/conduct facts or unreliability of the test above .08)

JUDGE SUBMITS .15 AT PUNISHMENT

(Likelihood and effect of there being *Apprendi* error must be considered)

Possibility #1: It's a Guilt Issue.....

State Law Error & Possible *Apprendi* error

+ Δ filed jury election.....

Harmless in all cases. Violation of state law but we know what jury did eventually & got jury finding for *Apprendi*

+ Δ filed nothing (default: judge).....

(Assumed case in *Do*) State law violation is harmless most of the time unless Δ contested reliability of BAC results. Might be *Apprendi* error & harmless for same reasons (maybe error might be waived if failure to file election can be considered affirmative waiver of jury trial?).

+ Δ filed judge election (affirmative waiver of jury at punishment).....

State law violation is harmless most of the time unless Δ contested reliability of BAC results. Any *Apprendi* error is affirmatively waived.

Possibility #2: It's a Punishment Issue.....

No State Law Error—judge guessed right.

+ Δ filed jury election.....

No *Apprendi* error: jury finding.

+ Δ filed nothing (default: judge).....

Remote chance of a federal court finding *Apprendi* error (and maybe there's no error if failure to file election can be considered affirmative waiver of jury trial?) but harmless unless contested.

+ Δ filed judge election (affirmative waiver of jury at punishment).....

Any *Apprendi* error is affirmatively waived.

Four of the *Oliva* factors favor submitting .15BAC at punishment: (1) the issue isn't prefaced by or in the subsection that says "A person commits an offense if..."; (2) it is prefaced by the phrase "if it is shown on the trial of"; (3) it is not jurisdictional; and (4) it is arguably not elemental conceptually—.08 isn't an element, only one of two methods of proving element of intoxication. Two *Oliva* factors favor its submission at guilt: it is a circumstance of the offense and has no "punishable as" language. Four judges joining Judge Newell's *Do* concurrence further suggest it's a punishment issue. But you don't have to predict how the courts will rule. As this chart shows, gaming out the possibilities still favors submitting the issue at punishment, as that will more often be harmless.