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Federal Sentencing: A Sketch of *Apprendi v. New Jersey* and Its Impact

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Summary

In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the Supreme Court called into question the sentencing role of federal judges. At the very least, the decision has required alterations in the manner in which federal drug statutes and similar provisions are prosecuted, and it may herald the demise of the federal sentencing guidelines. *Apprendi* holds that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 120 S.Ct. at 2355. The Court's sharp change of direction and the slim and fragile nature of the consensus among the members of the majority make predictions perilous. It is therefore perhaps not surprising that the various federal appellate courts have thus far construed *Apprendi* narrowly.

Winship and its progeny

Apprendi is the latest in a line of cases that begins with *Winship*, where the Court expressly confirmed that due process demands the guilt of an accused be found "beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 364 (1970). In doing so, it declared that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged," id.* (emphasis added).

Conviction cannot be had, it later explained, by requiring the defendant to prove the absence of one of the elements of the crime with which he is charged. Thus, for example, a state may not require an accused to prove that he acted in the heat of passion (*i.e.*, with an absence of malice aforethought) and therefore is not guilty of murder (for which malice aforethought is an element) but only of manslaughter, *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975).

Due process in this context is focused upon the prosecutor's responsibility to prove each of the crime's elements beyond a reasonable doubt. Due process is not offended if the defendant must prove the existence of a lesser crime rather than the one with which he was charged. So, a state may outlaw the intentional killing of another as murder, but allow the accused to claim guilt under a less severely punished crime when he can show by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance, *Patterson v. New York*, 432 U.S. 197, 205-7 (1977).

Still focused upon the prosecutor's responsibility to prove each of the crime's elements, the Court held that once the prosecution has done so no denial of due process occurs simply because the defendant, convicted of the crime, is subject to a mandatory minimum sentence based upon the prosecution's proof to the court (not the jury) of an additional sentencing factor (by a preponderance of the evidence and not beyond a reasonable doubt), *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).

Moreover, these sentencing factors could be used to enhance the maximum penalties as well as to establish a minimum penalty. Thus, a majority of the Court saw no constitutional impediment in a statutory scheme that raised the maximum penalty of a crime from 2 years to 20 years based on the presence of a particular sentencing factor to be established to the court's satisfaction by a preponderance of the evidence after conviction, *Almandarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).

Even in capital punishment cases where due process standards are sometimes insufficient to satisfy constitutional requirements for imposition of that unique penalty, the Court held that the judge as well as the jury may be entrusted with the task of determining the existence of aggravating factors necessary to justify execution, *Walton v. Arizona*, 497 U.S. 639, 647 (1990).

Logical though it may have been in light of the Court's precedents, a majority of the Court's members became uneasy with the implications of *Almandarez-Torres* almost immediately. *Jones v. United States*, 526 U.S. 227 (1999), presented facts similar to those in *Almendarez-Torres*. Jones was indicted and convicted of carjacking in violation of 18 U.S.C. 2119. Conviction carried a sentence of imprisonment for not more 15 years, 18 U.S.C. 2119(1), but the maximum sentence was increased to 25 years if the offense resulted in serious bodily injury, 18 U.S.C. 2119(2), and to life imprisonment if the offense resulted in death, 18 U.S.C. 2119(3). Neither the indictment nor the instructions to the jury made any mention of bodily injury, but the presentence report did and recommended a sentence of 25 years which the trial court imposed. The Court of Appeals affirmed, *United States v. Jones*, 60 F.3d 547 (9th Cir. 1995); the Supreme Court, in a 5-4 decision, reversed.

The Court concluded that the statute did not create a single crime with three possible sentences. Instead it created three separate crimes each with its own penalty, *i.e.*, simple carjacking (not more than 15 years); carjacking where serious bodily injury results (not more than 25 years); and carjacking where death results (life imprisonment). It observed, however, that "[w]hile we think the fairest reading of §2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule repeatedly affirmed, that where a statute is suspectable of two constructions, by one of which grave and doubtful

constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter," 526 U.S. at 239.

To find otherwise, the Court believed, might bring it into conflict with the principle that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 526 U.S. at 243 n.6.

Apprendi

Apprendi confirms the constitutional suggestions in *Jones*. Apprendi was convicted of shooting up the home of his African-American neighbors. There was evidence, which Apprendi disputed, that his crime was motivated by racial animus, *Apprendi v. New Jersey*, 120 S.Ct. at 2351, citing, *Apprendi v. State*, 159 N.J. 7, 10, 731 A.2d 485, 486 (1999). Under New Jersey law, possession of a firearm for an unlawful purpose is a second degree crime, N.J.Stat.Ann. §2C:39-4.a., and, unless otherwise provided, is punishable by imprisonment for a term fixed at between 5 and 10 years, N.J.Stat.Ann. §2C:43-6.a.(2). A second degree crime, however, carries an extended term of imprisonment if the court finds that it was committed by a defendant "acting with a purpose to intimidate an individual or group of individuals because of race . . ." N.J.Stat.Ann. §2C:44-3.e. A second degree crime found to have been committed under such circumstances carries a term of imprisonment fixed at between 10 and 20 years, N.J.Stat.Ann. §2C:43-7.a.(3).

Apprendi plead guilty under a multicount indictment which nowhere mentioned either the hate crime sentencing enhancement statute or the allegations which supported its application, 120 S.Ct. at 2352. Nevertheless, in the plea agreement the prosecution reserved the right to seek the hate crime enhancement and Apprendi reserved the right to challenge its constitutionality, *id.* The trial court sentenced Apprendi to a hate-crime-enhanced term of 12 years on one of the unlawful possession counts (which otherwise would have carried a maximum term of 10 years) and rejected his constitutional arguments; the New Jersey appellate courts affirmed, *Apprendi v. State*, 304 N.J.Super. 147, 698 A.2d 1265 (1997), *aff'd*, 159 N.J. 7, 731 A.2d 485 (1999).

The Supreme Court, in a decision written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg, reversed and remanded, 120 S.Ct. 2348. The Court declared that the jury trial and notification clauses of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments embody a principal that insists that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt," 120 S.Ct. 2362-363.

Justice Thomas, together with Justice Scalia, agreed but issued a concurrence that suggests they would have gone further. Justice O'Connor wrote a dissent in which she was joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, 120 S.Ct. at 2380. At the heart of the dissent lies the belief that the majority have announced as constitutional mandate a rule that the Constitution does not require. Justice Breyer and Chief Justice Rehnquist joined in an additional separate dissenting opinion, arguing the benefits of judicial participation in sentencing, 120 S.Ct. at 2396, a view whose constitutional foundations Justice Scalia questions in a separate concurrence, 120 S.Ct. at 2367.

Impact

The consequences of *Apprendi* are substantial and potentially enormous. Its most obvious and immediate impact is upon federal drug sentencing practices. Section 841(a) of title 21 of the United States Code outlaws trafficking in controlled substances. As a general rule, trafficking in heroin, cocaine and other schedule I or II controlled substances is punishable by imprisonment for not more than 20 years, 21 U.S.C. 841(b)(1)(C). Trafficking in large amounts of these controlled substances (*e.g.*, 100 grams of heroin) can increase the maximum penalties to imprisonment for not less than 5 nor more than 40 years (not less than 10 years nor more than life for repeat offenders), 21 U.S.C. 841(b)(1)(B), and trafficking in very large amounts (*e.g.*, a kilogram or more of heroin) raises the penalties to imprisonment for not less than 20 years nor more than life, 21 U.S.C. 841(b)(1)(A).

Prior to *Apprendi*, an accused was entitled to a jury determination of his guilt under section 841, but questions of the amount of the substance involved were considered sentencing factors to be decided by the judge. Subject to a few exceptions, *Apprendi* has changed all that. The sentencing factors of section 841 and its equivalents are now elements of separate offenses to be charged in the indictment and found by the jury beyond a reasonable doubt.

"Other than the fact of prior a conviction. . . ": *Apprendi*, however, limits its sweep, at least for the time being. It creates an unmistakable recidivism exception: "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury. . . ." 120 S.Ct. at 2362-363 (emphasis added). The limitation is not inadvertent, but it is hardly warmly embraced. Both Justice Steven's opinion for the Court and Justice Thomas' concurrence imply that *Almandarez-Torres*, upon which the exception is based, was probably incorrectly decided.

Nevertheless if only for now, *Almandarez* remains the law, and post-*Apprendi* courts continue to hold that recidivism is a valid sentencing factor that may be used to increase a defendant's sentence beyond the maximum term that would otherwise apply even if the prior conviction is neither mentioned in the indictment nor presented to the jury.

". . . increases the penalty . . . beyond the prescribed statutory maximum. . .": The second distinct limitation of the *Apprendi* rule is its deference to the statutory maximum. The restriction has obvious implications. First, it permits judicially determined and imposed mandatory minimum sentences, as long as they do not exceed the maximum penalty imposed by statute. Second, it leaves the federal sentencing guidelines unimpaired. Finally, it lets stand previously imposed sentences, grounded upon erroneous assumptions of law, which nevertheless came to rest within the applicable statutory maximum.

Apprendi disposes of any potential challenge to the validity of mandatory minimum sentences that do not exceed statutory ceilings by recasting *McMillan*: "We limit [*McMillan's*] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," 120 S.Ct. at 2361 n.13. The point has not been lost on subsequent federal appellate panels.

Apprendi seems to forego coverage of the federal sentencing guidelines by setting its rule to work beyond the applicable statutory maximum, knowing that the sentencing

guidelines operate only up to that maximum, U.S.S.G. §5G1.1(a). The *Apprendi* dissenters, however, sense this result may be in conflict with *Apprendi*'s underlying rationale. "The actual principle underlying the court's decision," the dissent opines, "may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt," 120 S.Ct. at 2391 (O'Connor, J., dissenting). If so the dissenters speculate, "[t]he principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal sentencing guidelines)," *id.*

And they add, Justice Thomas' concurrence appears to endorse this construction when he "essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the sentencing guidelines," 120 S.Ct. at 2391 (O'Connor, J. dissenting). In fact, neither Justice Stevens in his opinion for the Court nor Justices Thomas nor Scalia in their concurrences offer a great deal to allay the dissent's concerns. The Court notes that the issue was not before it and that guideline sentences must fall within the maximum prescribed by statute.

Be that as it may, the *Apprendi* rule, at least in its present form, begins where the sentence guidelines end, at the maximum penalty prescribed by statute. Later cases have rejected the contention that operation of the guidelines contravenes the *Apprendi* rule.

There is one other consequence of *Apprendi*'s deference to statutory maximums. Federal appellate courts, pointing to this aspect of *Apprendi,* have declined to overturn sentences, imposed before *Apprendi* was handed down, that fall beneath the applicable statutory maximum even if they were otherwise imposed contrary to the *Apprendi* rule.

Capital Punishment and Other Procedural Questions: Although the Court's capital punishment jurisprudence may sometimes call for more process than is due in due process cases, *Apprendi* does not abrogate the Court's existing construction under which the Constitution is said to permit assignment of the ultimate sentencing decision to either judge or jury. The exception stands on two critical distinctions. First, in capital punishment cases the sentencing decision follows a jury determination of guilt on a capital offenses, *i.e.*, the maximum penalty for the crime of conviction is death.

Apprendi deals with sentences, that is with punishment, and so it might be thought to apply to sentences in any form but not necessarily to the remedial repercussions of conviction. Nevertheless, some consequences of conviction which might have been considered remedial, such as supervised release, are bound by the *Apprendi* rule; while others which might have been considered punitive, such as criminal forfeiture, are not.

Retroactive Application: *Apprendi* says nothing of its possible retroactive application. May those already convicted claim the benefits of its new rule of constitutional interpretation? Judge-found sentencing factors have become a feature common to both state and federal criminal justice systems. Must all of the sentences imposed under those systems be re-examined? The answer thus far has been mixed, but predictably so.

Apprendi has been found to apply to cases pending on direct appeal when it was handed down. Yet, *Apprendi* does not require resentencing in these cases if the defendant failed to raise the issue at trial as long as the sentence-enhancing fact withheld from the jury's appraisal was conceded, indisputable, or inconsequential. Defendants who have exhausted their direct appeals must overcome the general rule that new constitutional interpretations will not be applied in habeas corpus cases unless the interpretation either renders a substantive criminal law unenforceable or constitutes a "watershed" interpretation of criminal procedure. The obstacles for defendants who have previously filed for habeas relief are even more substantial. They may proceed only with the permission of a federal appellate court which may grant the petition only after the Supreme Court makes *Apprendi* retroactive to cases on collateral review.

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