



The Jurisprudence of Justice John Paul Stevens: Selected Opinions on the Jury's Role in Criminal Sentencing

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Summary

Justice Stevens has played a critical role in the Supreme Court's interpretation of a jury's role in criminal sentencing. In 2000, he wrote the majority opinion for the Court in *Apprendi v. New Jersey*, a landmark case in which the Court held that a judge typically may not increase a sentence beyond the range prescribed by statute unless the increase is based on facts determined by a jury "beyond a reasonable doubt." In 2005, he wrote one of two majority opinions in *United States v. Booker*, in which the Court applied the *Apprendi* rule to the Federal Sentencing Guidelines. In those two cases and in several other cases on this issue during the past few decades, Justice Stevens has been a leading voice, articulating a broad interpretation of the jury trial and due process rights at issue.

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Introduction

Justice Stevens has been a key figure in the Supreme Court's recent decisions interpreting the scope of two "companion rights":¹ the due process right to a "beyond a reasonable doubt" determination and the right to trial by jury. The right to a jury trial in criminal prosecutions is explicitly protected in the Sixth Amendment to the U.S. Constitution.² The "proof beyond a reasonable doubt" standard is guaranteed by the Due Process Clauses of the Fifth Amendment (federal proceedings) and the Fourteenth Amendment (state proceedings).³ Together, those constitutional provisions require that a criminal conviction follow a jury determination of "proof beyond a reasonable doubt of every fact necessary to constitute the crime."⁴

Those rights have a strong legal and historical foundation. However, a question emerged regarding their application to sentencing determinations, particularly as "sentence enhancements" became a popular legislative tool: to what extent do facts taken into account during sentencing require a "beyond a reasonable doubt" determination by a jury?

Justice Stevens has had a critical role in the Supreme Court's resolution of that question, in several respects. First, he asserted that the constitutional question should be addressed, describing the constitutional guarantees at issue as being of "surpassing importance."⁵ Second, along with Justice Scalia, in early cases reviewing sentencing enhancements, he indicated his broad interpretation of the jury trial and due process rights. In a concurring opinion, for example, he wrote, "I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." He added that "[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt."⁶ Third, having persuaded five of the Court's nine justices of his views, he authored the opinion for the Court in a *Apprendi v. New Jersey*,⁷ the leading case in which the Court announced a broad reading of the constitutional rights at issue. Finally, he wrote for the Court in *United States v. Booker*,⁸ a decision applying the *Apprendi* holding to the Federal Sentencing Guidelines.

Although this line of cases has resulted in closely divided opinions, the justices were not divided along typical lines. Justice Scalia has been the other justice arguing in agreement with Justice

¹ See *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (referring to the proof beyond a reasonable doubt standard as a "companion right" to the right to a trial by jury).

² U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury"). The Sixth Amendment jury requirement applies to state prosecutions by virtue of that amendment's incorporation in the Due Process Clause of the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³ U.S. Const. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law...."); U.S. Const. amend. XIV ("No state shall ... deprive any person of life, liberty, or property, without due process of law....").

⁴ *In re Winship*, 397 U.S. 358, 364 (1970). See also *United States v. Gaudin*, 515 U.S. 506, 510 (1995) ("[The Due Process Clause and the Sixth Amendment] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.") (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993)).

⁵ *Apprendi*, 530 U.S. at 476.

⁶ See, e.g., *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring).

⁷ 530 U.S. 466 (2000).

⁸ 543 U.S. 220 (2005).

Stevens in many of the cases addressing a jury's role in criminal sentencing. In *Apprendi*, Justices Scalia, Thomas, Souter, and Ginsburg joined Justice Stevens's majority opinion.

Pre-*Apprendi* Cases

Justice Stevens's opinion in *Apprendi* was foreshadowed in several dissenting and concurring opinions in cases decided during the 1980s and 1990s. The first such case was *McMillan v. Pennsylvania*,⁹ decided in 1986. *McMillan* involved a Pennsylvania statute establishing a mandatory five-year minimum prison sentence in cases in which a judge finds, by a preponderance of the evidence (a lower standard than "beyond a reasonable doubt"), that the defendant visibly possessed a firearm during the commission of the offense. The statute expressly stated that the firearm possession "shall not be an element of the crime."¹⁰ Instead, it stated that it "shall be determined at sentencing," indicating that it was to be removed from typical jury trial and "beyond a reasonable doubt" requirements.¹¹ The U.S. Supreme Court upheld the statute. Writing for the Court, Chief Justice Rehnquist emphasized that the state legislature expressly designated firearm possession as a "sentencing factor," rather than "an element of the crime." The Court concluded that the state legislature had intended to create a sentencing factor which "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it."¹²

Justice Stevens wrote a dissenting opinion, not joined by any other justice, in which he first articulated his view of the constitutional implications of sentencing statutes of this kind. "In my view," he wrote, "a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties."¹³ His disagreement with the Court stemmed in part from his interpretation of prior precedents. He agreed with the statement from a prior case, also quoted by the majority, that "[the] applicability of the reasonable-doubt standard ... has always been dependent on how a State defines the offense that is charged."¹⁴ However, he interpreted that holding to ensure that states have discretion regarding what conduct to criminalize, not over which conduct will be treated as a "criminal element" versus a "sentencing factor."¹⁵ "In my opinion," he concluded, "the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely 'ups the ante' for the defendant."¹⁶

A 1998 case, *Almendarez-Torres v. United States*,¹⁷ involved a federal statute that makes it a crime to, among other things, return to the United States (without express consent of the Attorney General) after having been deported.¹⁸ A general provision authorizes criminal penalties of up to

⁹ 477 U.S. 79 (1986).

¹⁰ 42 Pa. Const. Stat. § 9712 (1982).

¹¹ *Id.*

¹² *McMillan*, 477 U.S. at 88.

¹³ *Id.* at 96.

¹⁴ *Id.* at 85 (quoting *Patterson v. New York*, 432 U.S. 197, 211 n. 12 (1977)); *Id.* at 98 (Stevens, J., dissenting).

¹⁵ *Id.* at 98.

¹⁶ *Id.* at 104.

¹⁷ 523 U.S. 224 (1998).

¹⁸ 8 U.S.C. § 1326.

two years imprisonment.¹⁹ A second provision authorizes greater penalties in cases in which the alien was removed after a conviction for one of several specified crimes.²⁰ In *Almendarez-Torres*, the defendant had been deported subsequent to three convictions for aggravated felonies, for which the statute increased the maximum prison sentence for reentry to 20 years. Prosecutors did not introduce the fact of the aggravated felonies at the indictment or trial phase. Nevertheless, at sentencing, the U.S. district court relied on those aggravated felony convictions to enhance the sentence.

A five-justice majority on the Supreme Court framed the question on appeal as “whether [the aggravated felony provision] defines a separate crime or simply authorizes an enhanced penalty.”²¹ Noting that the provision’s concern is recidivism—a factor commonly weighed in sentencing decisions, it held that it is “reasonably clear” that Congress intended to “set forth a sentencing factor” rather than a “separate crime.”²² Thus, it concluded that the statute “simply authorizes a court to increase the sentence,” and thus does not require a determination by a jury.²³

Justice Stevens and two other justices joined a dissent written by Justice Scalia. Justice Scalia asserted that the Court’s prior decisions made it “genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject.”²⁴

Justice Stevens wrote an opinion reiterating his view on the constitutional question the following year, in *Jones v. United States*.²⁵ The defendant in *Jones* was convicted for violation of a federal carjacking statute, 18 U.S.C. § 2119. That statute generally caps imprisonment for violations at 15 years, but a subsection increased the maximum prison term in cases in which “serious bodily injury ... results.” The defendant, Nathaniel Jones, was charged with carjacking, but the specific allegation that the carjacking resulted in serious bodily injury was not raised until the sentencing phase. At that time, the court found that serious bodily injury had occurred and increased Jones’s sentence accordingly. No jury determinations were made on that question. The Court resolved the case on statutory grounds. In an opinion by Justice Souter, it held that the “serious bodily injury” prong, as written in the existing statute, constituted a separate criminal offense, and thus needed to be determined by a jury “beyond a reasonable doubt.” It indicated that a different reading of the statute might “raise serious constitutional questions,” but avoided resolving such issues because the case could be resolved on statutory grounds.²⁶

In brief concurring opinions in *Jones*, Justices Stevens made clear that he would have reached the constitutional issues lurking in the case.²⁷ Furthermore, he expressed the view that “it is

¹⁹ 8 U.S.C. § 1326(a).

²⁰ 8 U.S.C. § 1326(b).

²¹ *Almendarez-Torres*, 523 U.S. at 226.

²² *Id.* at 230.

²³ *Id.* at 226-27.

²⁴ *Id.* at 251 (Scalia, J., dissenting). Although the conclusion articulated by Justice Scalia now generally represents the Court’s approach, the fact of a prior conviction has been treated differently. See *Apprendi*, 530 U.S. at 489 (carving an exception for a judge’s taking account of prior convictions during sentencing).

²⁵ 526 U.S. 227 (1999).

²⁶ *Id.* at 251-52.

²⁷ Justice Scalia also wrote a short concurring opinion in *Jones*, in which he expressed views similar to Stevens’s (continued...)

unconstitutional to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”²⁸

Apprendi v. New Jersey

Justice Stevens expressed that view on behalf of the Court in *Apprendi v. New Jersey*.²⁹ In *Apprendi*, the Court reviewed a New Jersey statute that authorized 10- to 20-year increases in prison sentences if a defendant's actions were found by a judge, by a preponderance of the evidence, to have been committed with a purpose to intimidate the victim because of the victim's race or other specified characteristics. The defendant, Charles Apprendi, was found to have fired a gun into the home of an African American family. The morning of his arrest, he was alleged to have stated that “because [the family is] black in color he does not want them in the neighborhood.” He later argued that his statements had been mischaracterized.³⁰

In the state prosecution, Apprendi pleaded guilty to three weapon possession charges. In the plea agreement, the state reserved the right to request a sentencing enhancement based on the state's “hate crimes” statute.³¹ At sentencing, evidence was presented to support and refute Apprendi's alleged racial motivation in firing into the victims' home.³² Applying a preponderance of the evidence standard as directed by the state statute, the state trial judge concluded that Apprendi had acted with racial prejudice and accordingly enhanced his sentence on that basis.

On appeal, Apprendi argued that the Fifth and Fourteenth Amendment Due Process Clauses require that the facts justifying the sentence enhancement (i.e., a motivation of prejudice) to be found by a jury using the “beyond a reasonable doubt” standard. Both a state appellate court and the New Jersey Supreme Court rejected Apprendi's argument.³³ Relying in part on the U.S. Supreme Court's rulings in *Almendarez-Torres* and *McMillan v. Pennsylvania*, they held that the “biased purpose” determination was not an element of the underlying offense and thus did not require a jury finding of proof beyond a reasonable doubt.

The U.S. Supreme Court reversed. Writing for the Court, Justice Stevens asserted that the constitutional question was “starkly presented” by the facts in the case.³⁴ He examined the history of the constitutional rights involved, noting that statutory sentence enhancements are a relatively new development in a landscape of constitutional rights with centuries-old foundations. He acknowledged that the history supports judges' ability to exercise discretion in sentencing. However, he argued that such discretion has generally been limited to determinations regarding an appropriate sentence within a given range; it has not historically been extended to authorize

(...continued)

approach. *See id.* at 253 (Scalia, J., concurring).

²⁸ *Id.* at 252 (Stevens, J., concurring).

²⁹ 530 U.S. 466 (2000).

³⁰ *Id.* at 469-70.

³¹ In its opinion, the New Jersey Supreme Court referred to the statute as one that provided a “hate crime” sentencing enhancement. The U.S. Supreme Court instead referred to the enhancement as a “biased purpose enhancement.”

³² Apprendi presented seven character witnesses and a psychologist to refute the allegations of racial bias. *Apprendi*, 530 U.S. at 470-71.

³³ *State v. Apprendi*, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997), *aff'd* 731 A.2d 485 (N.J. 1999).

³⁴ *Apprendi*, 530 U.S. at 476.

additional penalties on the basis of a new factual determination.³⁵ After reviewing the history and relevant precedents, he articulated the Court's major holding: "Other 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 a jury, and proved beyond a reasonable doubt."³⁶

Applying *Apprendi* to Sentencing Guidelines

Key cases decided after *Apprendi* have addressed the decision's application to sentencing guidelines. In a 2004 case, *Blakely v. Washington*,³⁷ the defendant challenged a sentence imposed pursuant to Washington State's sentencing guidelines. He was convicted of a crime for which the guidelines designated a maximum sentence of 53 months imprisonment, but was sentenced to 90 months after the sentencing judge found that he had acted with "deliberate cruelty"—a factor for which the guidelines authorized judges to increase a sentence. In an opinion written by Justice Scalia and joined by Justice Stevens and three other justices, the Supreme Court applied *Apprendi* to strike down the sentencing scheme. It held that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.³⁸

One year later, Justice Stevens wrote one of two majority opinions³⁹ for the Court in *United States v. Booker*,⁴⁰ in which the Court addressed the question whether the *Blakely* holding applied to the Federal Sentencing Guidelines. The case involved a conviction for possession with intent to distribute crack cocaine. At sentencing, the judge found, by a preponderance of the evidence, that the defendant had distributed additional drugs and obstructed justice, and increased the sentence on that basis. Applying *Apprendi* and *Blakely*, the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁴¹ Justice Stevens characterized the holding as a reaffirmation of the *Apprendi* holding.⁴² His opinion again emphasized the historical importance of the constitutional rights at issue.⁴³

A different majority of justices joined an opinion written by Justice Breyer. In that opinion, the Court interpreted the constitutional holding (announced in the opinion by Justice Stevens) as

³⁵ *Id.* at 481.

³⁶ *Id.* at 489.

³⁷ 542 U.S. 296 (2004).

³⁸ *Id.* at 302.

³⁹ *Booker* resulted in a complicated breakdown of opinions, with Justices Scalia, Souter, Thomas, and Ginsburg joining Justice Stevens's majority opinion resolving the constitutional issue, and another set of justices (Rehnquist, O'Connor, Kennedy, Breyer, and Ginsburg) joining to form a majority regarding the constitutional holding's impact on the guidelines.

⁴⁰ 543 U.S. 220 (2005).

⁴¹ *Id.* at 244.

⁴² *Id.*

⁴³ See, e.g., *id.* at 237 (stating that the "new sentencing practice forced the Court to address the question of how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.").

requiring the Court to strike down two provisions of the Federal Sentencing Act,⁴⁴ including one which made the guidelines mandatory.⁴⁵ That holding was based on the Court's determination of what Congress might have intended in light of the Court's constitutional holding. It concluded that Congress would not have intended the guidelines to be made mandatory in situations where a judge is constitutionally required to receive jury determinations regarding facts relevant to sentencing.

Justice Stevens dissented from that opinion. He characterized the Court's invalidation of the Sentencing Act provisions as judicial overstepping, arguing that the constitutional holding in the case "does not authorize the Court's creative remedy" with regard to the Federal Sentencing Act.⁴⁶ He asserted that "[b]ecause the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and discretionary decisions within those ranges, they allow ample latitude for judicial factfinding that does not even arguably raise any Sixth Amendment issue."⁴⁷

Conclusion

The impact of Justice Stevens's role, and of the *Apprendi* case in particular, has been to limit the extent to which criminal penalties can be increased based on facts found by a judge rather than a jury. Although it remains permissible for judges to take relevant facts into consideration when rendering criminal sentences, they now may not increase sentences beyond the prescribed statutory maximum unless the facts supporting such an increase are found by a jury beyond a reasonable doubt. As can be seen in the cases applying that holding to sentencing guidelines, Justice Stevens's interpretation of the constitutional trial-by-jury and due process rights has had practical and lasting effects on criminal sentencing.

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⁴⁴ 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. § 991 *et seq.*

⁴⁵ *Booker*, 543 U.S. at 245, 259.

⁴⁶ *Id.* at 272 (Stevens, J., dissenting).

⁴⁷ *Id.* at 273.