

New Jersey Law Journal

VOL. CLXI - NO.13 - INDEX 1304

SEPTEMBER 25, 2000

ESTABLISHED 1878

IN PRACTICE

CRIMINAL LAW

By PATRICK A. MULLIN

The *Apprendi* Watershed

Hate Crimes Act ruling may radically alter federal sentencing landscape

Decided in the shadows of Supreme Court rulings addressing the *Miranda* doctrine and a ruling knocking down Nebraska's partial-birth-abortion ban, the June 26 decision in *Apprendi v. U.S.*, 120 S.Ct.2348 (2000), may well have an enormous impact on the federal criminal justice system, perhaps bearing out dissenting Justice O'Connor's admonition that the ruling creates "a watershed change in constitutional law."

The Court addressed the constitutionality of the New Jersey Hate Crimes Act. Apprendi had pled guilty to two counts of possession of a weapon for an unlawful purpose, among other charges. This crime is a second-degree offense and is punishable by a term of between five and 10 years.

The Hate Crimes Act provides for an extended term of imprisonment of between 10 and 20 years where a judge finds, by a preponderance of the evidence, that a crime was committed with the purpose of intimidating individuals or groups of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

Mullin, a certified criminal trial attorney in Hackensack, is a member of the Practitioners' Advisory Group to the United States Sentencing Commission.

Since there was evidence that one of the pled weapons counts involved a racially motivated shooting of the home of an African-American family, the sentencing judge held a hearing to determine whether Apprendi had committed this crime with requisite racial bias. Finding in the affirmative, the judge sentenced Apprendi to a 12 year term of imprisonment on this assault charge.

Apprendi appealed, arguing that his alleged violation of the Hate Crimes Act should have been submitted to a jury and should have been proven beyond a shadow of a doubt, rather than presented to a judge at a sentencing under the preponderance-of-the-evidence standard. A divided Appellate Division panel rejected this argument. The state Supreme Court also upheld the judge's ruling, finding by a 5-2 majority that "biased purpose" was not an element of a crime requiring determination by a jury under the beyond-a-reasonable-doubt standard; rather, it could be resolved by a judge at a sentencing hearing under the preponderance-of-the-evidence standard. *State v. Apprendi*, 159 N.J. 7 (1999).

However, in a 5-4 decision, the U.S. Supreme Court agreed with Apprendi. Writing for the majority, Justice Stevens found that because the "fact" of racial bias in Apprendi's actions created the possibility of an increase in punishment, beyond the statutory maximum for the offense of conviction, that "fact" was an element of the offense. As such, it should have been explicitly charged in the indictment and subject to proof beyond-a-reasonable-doubt standard. Allowing judges to decide "facts"

that may increase punishment beyond the statutory maximum for the underlying offense, Stevens wrote, violates Fifth Amendment due process and the Sixth Amendment right to a trial by jury.

Justice Thomas wrote a concurrence, joined by Justice Scalia in which he noted that he would require a much broader rule than set forth by the majority in *Apprendi*. Justice Thomas then asserted that any "fact" that either increases a statutory maximum sentence or creates a minimum mandatory sentence must be proven before a jury beyond a reasonable doubt. As explained below, his approach may well require the reversal of at least two significant Supreme Court rulings.

In her scathing dissent, Justice O'Connor found that the extended term provision under the hate Crimes Act permitting a judge to rule upon the presence of biased purpose at a sentencing was constitutionally approved. She cited a long line of U.S. Supreme Court precedents authorizing judicial consideration of such "facts" as sentencing factors under the preponderance-of-the-evidence standard.

It is the tension between what is considered an element or ingredient of a criminal offense and what is deemed a sentencing factor that lies at the heart of the *Apprendi* decision.

There are two significant recent trends in criminal law that bear on this issue. First, there has been an explosion of statutes that permit a maximum penalty to be increased by an aggravating factor such as the amount of drugs or the seriousness of injury to a victim. Congress alone has passed at least 196 such statutes.

Just as important is the trend toward determinative sentencing, which grants sentencing judges exclusive authority to decide

significant sentencing issues in application of tightly woven mandatory guidelines and other criteria. The federal system, for example, is now governed by the Sentencing Reform Act of 1984, which went into effect Nov. 1, 1987.

Under *Apprendi*, where such "facts" as the presence of a "biased purpose" increase the punishment faced by a defendant to a level beyond the maximum provided by the underlying offense (i.e. second-degree unlawful possession of a weapon), they are considered elements of the underlying crime and must be included in the indictment and proven beyond a reasonable doubt or specifically pled to by a defendant on a Rule 11 plea hearing.

The determination as to whether a "fact" is an element of a crime or a sentencing factor has significant procedural impact. If, for example, the quantity of drugs in a distribution statute is found to be an element of the offense, then the government must prove beyond a reasonable doubt the amount of drugs attributable to the defendant. If so, the accused has the right to confront witnesses at trial with the safeguards that the rules of evidence lend to ensure that information being provided to the jury is reliable. If, however, the quantity of drug issue is considered only to be a sentencing factor, then one judge rather than 12 jurors may be substituted as the ultimate decision-maker. There is, additionally, little or no opportunity to cross-examine the defendant's accusers. Also, the rules of evidence are much more loosely applied at a sentencing hearing than during a jury trial.

It is Congress and the state legislatures that initially determine whether facts regarding criminal violations are either elements of the offense or sentencing factors. For example, in *Apprendi*, the Legislature determined, in the Hate Crimes Act, that a biased motive in perpetrating certain violent acts is a sentencing factor and subject to determination by a judge.

Similarly, Congress gave birth in 1984 to the aforementioned determinative-sentencing scheme known as the Federal Sentencing Guidelines, which accords district court judges sole authority in applying its criteria to a whole range of issues that heavily impact on sentencing.

The U.S. Supreme Court has grappled with the distinction between characterizing a "fact" as an element of an offense requir-

ing jury deliberation versus characterizing that same "fact" as a sentencing factor to be decided by a judge under a lesser standard. Perhaps the most significant decision on this issue before *Apprendi* was *McMillan v. Pennsylvania*, 477 U.S. 798 (1986). There, the Court addressed a Pennsylvania statute that provided for any convicted defendant who "visibly possessed" a firearm while committing a crime. The issue of visible possession of a firearm was made a sentencing factor rather than an element of the crime, even though it created a minimum mandatory sentence for a convicted defendant. As a result, a judge was permitted to determine by a preponderance-of-the-evidence standard whether the factor of visible possession had been proven and thus triggered the minimum term of imprisonment.

In approving this statutory scheme, the *McMillan* Court rejected due process arguments that would later be raised in *Apprendi*. Rather, the Court found that legislatures might create reasonable and just statutory schemes calling for minimum mandatory sentences decided by judges.

The next significant decision on this issue was *Almendarez-Torres v. U.S.*, 118 S.Ct. 1219 (1998), in which the Court approved even greater legislatively created powers for judges at sentencing hearings. There, an alien was convicted of the crime of re-entering the United States after deportation. The statute in question provided for a two-year maximum term of imprisonment, which could be enhanced to either a 10-year or 20-year maximum term if the defendant had previously been convicted of certain misdemeanors or felonies.

The *Almendarez-Torres* Court approved Congress' authority to permit sentencing judges to determine whether prior convictions by an accused can trigger a significant enhancement in maximum sentencing exposure for re-entering the United States. In *Almendarez-Torres*, the sentencing judge was given the authority to decide by a preponderance whether a defendant facing a two-year term of imprisonment could in fact be sentenced for up to 20 years in jail.

Just one year later, the Court abruptly curtailed judicial authority in *U.S. v. Jones*, 526 U.S. 227 (1999). There, a defendant convicted on car-jacking charges faced three potential maximum sentences under the applicable statute, depending upon whether

serious injury or death resulted from this crime. The sentencing judge determined that the victim sustained a serious injury and sentenced the defendant to an enhanced 25 years in jail.

The Supreme Court reversed, holding that the defendant's sentencing exposure should have been capped at 15 years since the government had failed to include in the indictment, as an additional element, allegations that serious injury had resulted from the defendant's acts.

The *Jones* majority ruled that unless the government includes in the indictment such a statutory enhancement and makes it subject to proof before a jury beyond a reasonable doubt, a sentencing judge could not impose a term beyond the 15-year statutory maximum. The *Jones* Court determined on statutory grounds alone that such an enhancement in punishment must be charged and proven before a jury or specifically pled to by a defendant.

The *Apprendi* ruling now makes it constitutionally imperative that such "facts" as the nature and extent of injury to the victim or the presence of a biased purpose, which enhances a sentence beyond the core offense, are also deemed to be elements or ingredients of the offense and proven to a jury beyond a reasonable doubt. The ruling limits the authority of judges in such circumstances and, unless a defendant has entered a guilty plea, must defer to the right of the jury to decide whether an enhancement in punishment is appropriate.

Drug Cases Soon To Be Affected

The *Apprendi* ruling has triggered shock waves throughout the federal criminal justice system. A July 23 front-page article in *The Washington Post* suggests that "dozens of other state and federal statutes may be unconstitutional based on the ruling" and that "in the long run [the ruling] also could jeopardize federal sentencing guidelines in similar state systems." The article quotes Chief Third Circuit Judge Edward Becker as stating that *Apprendi* "is a case of enormous potential importance and we are going to have to spend a lot of time dealing with it."

The most probable immediate target for applying the *Apprendi* doctrine are drug cases under Title 21 of the Federal Criminal Code. In 1999, drug violations were

the primary offense in 41.7 percent of all guideline cases. Moreover, approximately 61,000 federal prisoners are currently serving drug related sentences.

The principle drug statute, 21 U.S.C. 841, has penalties that are determined primarily by the amount and type of illegal drugs involved in the offense. For example, possession of less than 100 grams of heroin with intent to distribute is capped at a 20-year maximum for a defendant without any prior conviction for a felony offense. If the quantity of heroin exceeds 100 grams, but is less than 1 kilogram, then that same offender faces a 5-year mandatory minimum sentence with a 40-year maximum term of imprisonment. Should the quantity of heroin exceed 1 kilogram, that same defendant faces a mandatory 10 years in jail with a maximum life sentence exposure. Moreover, if death or serious injury result from the use of this heroin, that same defendant now faces a minimum 20-year sentence as well as having a potential lifetime exposure.

The *Apprendi* decision may mean that a defendant could not receive a sentence greater than a 20-year maximum unless the indictment brought against him charges an aggravating drug quantity and is either proved to a jury beyond a reasonable doubt or pled to by the defendant at a Rule 11 pleas hearing.

The government may now be required to put witnesses in its case in chief to testify about the drug quantity charged against the defendant in the indictment. Since these drug cases very often are based on negotiations between government undercover agents or informants and the accused, rather than on drug seizures, estimates as to drug quantity may now be subject to vigorous cross-examination by defense counsel. Under the pre-*Apprendi* guideline procedure, sentencing judges made determinations of drug quantity based on a preponderance of the evidence presented before them. Such evidence primarily rested on involved government agents estimates as to the amount of drugs involved in a particular case. Now, it may well be juries who will be making these determinations.

Apprendi may also impact on those cases in which drug quantity involved triggers a minimum mandatory sentence. When a defendant distributing more than 100 grams of heroin faces a five year minimum sen-

tence, the argument can now be made that *Apprendi* requires that the "fact" of drug quantity is also an element of the offense and must be proven before a jury beyond a reasonable doubt. Now such an argument would comport with the Supreme Court's previous ruling in *McMillan*, which sanctioned judges deciding minimum mandatory sentences, remain to be seen.

Also subject to future decision-making are a host of other issues triggered by the *Apprendi* ruling. For example, the Federal Sentencing Guidelines permit a judge to increase a defendant's sentence based on "relevant conduct," U.S.S.G. 1B1.3, which is often separate and distinct from the activities which that the basis of the offense of conviction. It would seem that *Apprendi*'s grounding on the due process clause and the constitutional right to a trial by jury could easily be extended to ensure a defendant's protection from punishment for such "relevant conduct." Other enhancements such as for obstruction of justice, U.S.S.G. 3C1.1, may also eventually be subject to scrutiny under the *Apprendi* doctrine.

Perhaps the most extreme view on the impact of the *Apprendi* decision was articulated by Justice O'Connor in her dissenting opinion. Together with Justices Kennedy, Rehnquist and Breyer, she expressed the great concern that determinative-sentencing schemes like the Federal Sentencing Guidelines may not survive the majority's ruling. She noted that the majority opinion will "halt the current debate on sentencing reform in its tracks and to invalidate with a stroke of the pen, three decades worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree." She further predicts that, while federal and state judges are "left in a state of limbo" until the true meaning of this opinion is made clear in subsequent decisions, a "flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the court's decision" will be litigated.

There have already been 21 reported decisions in the federal courts addressing or referring to the *Apprendi* ruling, including one opinion that has emanated to date out of the District of New Jersey, *Doe v. U.S.*, 2000 U.S. Dist. Lexis 12238, wherein the author represented the petitioner in the habeas corpus.

There will surely be many additional rulings made district and circuit Courts, attempting to grapple with the import of this decision, as the anticipated avalanche of *Apprendi*-driven claims are brought before them. Ultimately, the U.S. Supreme Court will of necessity be forced to expound on its ruling in *Apprendi* as these anticipated cases wind their way through the court system. As Justice O'Connor has predicted, it may be some time before the ultimate impact of the *Apprendi* decision is determined.