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# Casenote

## ***Apprendi v. New Jersey*: Should Any Factual Determination Authorizing an Increase in a Criminal Defendant's Sentence Be Proven to a Jury Beyond a Reasonable Doubt?**

In *Apprendi v. New Jersey*,<sup>1</sup> the United States Supreme Court held, with the exception of the fact of prior criminal convictions, that any factual determination that authorizes an increased sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt.<sup>2</sup>

### I. FACTUAL BACKGROUND

In the early morning hours of December 22, 1994, Petitioner Charles C. Apprendi fired several .22 caliber bullets into the home of an African-American family that had recently moved into a predominately white neighborhood in Vineland, New Jersey. The police promptly arrested Apprendi who later admitted that he had fired the shots.

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1. 120 S. Ct. 2348 (2000).

2. *Id.* at 2362-63.

Apprendi also made a statement, which he later retracted, that even though he did not know the family personally, he fired the shots because he wanted to deter the presence of African-Americans in the community.<sup>3</sup> The shooting marked the fourth time the home had been fired upon since the family moved into the neighborhood.<sup>4</sup>

A New Jersey grand jury returned a twenty-three-count indictment against Apprendi; however, it did not include a formal hate crime or otherwise mention Apprendi's racially motivated purpose in committing the crimes. Pursuant to a plea agreement, Apprendi later pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb.<sup>5</sup> The State sought to have Apprendi's sentence extended based on a New Jersey statute, which permits a sentence enhancement if a trial judge finds by a preponderance of the evidence that a defendant's criminal activities were motivated by racial bias.<sup>6</sup> The trial court accepted the three guilty pleas and conducted an evidentiary hearing on the issue of Apprendi's purpose in committing the December 22 shooting.<sup>7</sup>

Apprendi introduced a number of character witnesses, a psychologist and his own testimony to rebut the State's contention. However, at the conclusion of the hearing, the trial judge found by a preponderance of the evidence that Apprendi was motivated by racial bias. Consequently, the trial judge imposed a twelve-year term of imprisonment on the charge of second-degree possession of a firearm for an unlawful purpose arising from the December 22 shooting. This sentence is two years greater than the statutory maximum penalty for the offense. The trial judge also imposed a shorter, concurrent sentence on the two remaining counts.<sup>8</sup>

Apprendi appealed his sentence to the Appellate Division of the Superior Court of New Jersey arguing, *inter alia*, that the Due Process Clause of the Fourteenth Amendment requires racial bias under the New Jersey Hate Crime Statute to be proven beyond a reasonable doubt.<sup>9</sup>

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3. *Id.* at 2351.

4. *Id.* at 2352.

5. *Id.* (citing N.J. STAT. ANN. 2C:39-4(a) (West 1995); N.J. STAT. ANN. 2C: 39-3(a) (West 1995)).

6. *Id.* (citing N.J. STAT. ANN. 2C:44-3(e) (West 1999)).

7. *Id.*

8. *Id.*

9. *State v. Apprendi*, 698 A.2d 1265, 1268 (N.J. Super. Ct. App. Div. 1997), *rev'd*, 120 S. Ct. 2348 (2000).

However, the court stated that because racial bias under the statute is a "sentencing factor" and not an "element" of the offense, the State was not required to submit proof of the racial bias beyond a reasonable doubt.<sup>10</sup> The court further concluded that the requisite findings of the statute are best characterized as relating to motive, which has been traditionally used by trial judges in sentencing without offending the Constitution unless the legislature chooses to define motive as an actual element of the offense.<sup>11</sup> Thus, the court affirmed Apprendi's sentence.<sup>12</sup>

A divided Supreme Court of New Jersey affirmed Apprendi's sentence but disagreed with the reasoning of the appellate division.<sup>13</sup> The court refused to draw a distinction between an element of an offense and a sentencing factor in determining when to apply the reasonable doubt standard and further noted that characterizing the statute as relating to motive simply did not answer the constitutional question.<sup>14</sup> The court instead relied on decisions of the United States Supreme Court, which hold that a defendant's prior criminal history or possession of a firearm may be considered by a trial judge in determining whether to increase his or her punishment for a crime.<sup>15</sup> The court also recognized that "almost invariably" there is no real doubt as to whether a particular crime is committed for a racially biased purpose, and enhancement under the statute is limited to cases in which the State has a compelling interest in protecting its citizens from invidious discrimination.<sup>16</sup> Concerned that the decision may jeopardize the traditional role of a jury in the criminal justice system, the United States Supreme Court granted certiorari,<sup>17</sup> reversed the Supreme Court of New Jersey's decision, and remanded for further proceedings.<sup>18</sup>

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10. *Id.* at 1268 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (holding constitutional a statute which permits a sentence enhancement if a trial judge finds by preponderance of the evidence that the defendant Avisibly possessed@ a gun during the commission of a felony)).

11. *Id.* at 1269-71.

12. *Id.* at 1271.

13. *State v. Apprendi*, 731 A.2d 485, 496-97 (N.J. 1999), *rev'd*, 120 S. Ct. 2348 (2000).

14. *Id.* at 492 ("We must search for firmer principles of decision.").

15. *Id.* at 493-95 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 246-47 (1998) (holding constitutional a statute permitting an alien's prior illegal entry to be used as a sentencing factor following a subsequent conviction for illegal entry)).

16. *Id.* at 495.

17. *Apprendi v. New Jersey*, 120 S. Ct. at 525 (1999).

18. 120 S. Ct. at 2366-67.

## II. LEGAL BACKGROUND

A. *The Right of Proof to a Jury Beyond a Reasonable Doubt*

Overwhelming acceptance of the right to a trial by jury in criminal cases is clearly indicated by its longstanding history. From the early to late eighteenth century, recognition of this right even led to reluctance on the part of many English trial judges to accept guilty pleas from criminal defendants.<sup>19</sup> This strict adherence followed English colonists to American shores<sup>20</sup> and ultimately became a part of the Bill of Rights to the United States Constitution via the Sixth Amendment.<sup>21</sup> The United States Supreme Court soon recognized that the right to a jury trial in serious cases was of paramount importance to a fair criminal justice system.<sup>22</sup> In fact the Court eventually held that the right was so fundamental to the notion of ordered liberty that it should be applied to the states through the Due Process Clause of the Fourteenth Amendment.<sup>23</sup> As indicated by the Court in *Duncan v. Louisiana*,<sup>24</sup> "[t]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges."<sup>25</sup>

Of equal constitutional significance is the longstanding principle, recognized by the Court as early as 1881,<sup>26</sup> that the State must prove all elements of a crime beyond a reasonable doubt. The Court reaffirmed this principle in 1970 in *In re Winship*.<sup>27</sup> In *Winship* a New York Family Court found a juvenile guilty of larceny without requiring proof beyond a reasonable doubt.<sup>28</sup> The Court held that the Fourteenth Amendment of the United States Constitution requires the State to

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19. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 278-79 (1978).

20. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (citing R. PERRY, ed., *SOURCES OF OUR LIBERTY* 270 (1959)).

21. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." *Id.*

22. *Thompson v. Utah*, 170 U.S. 343 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 35, 51-52 (1990).

23. 391 U.S. at 156.

24. 391 U.S. 145 (1968).

25. *Id.* at 156.

26. *Miles v. United States*, 103 U.S. 304 (1881).

27. 397 U.S. 358 (1970).

28. *Id.* at 359-60.

prove, beyond a reasonable doubt, every fact necessary to constitute a crime for which a defendant is charged.<sup>29</sup> Concluding that the reasonable doubt standard applies to juveniles as well as adults, the Court recognized that a stigma of criminal culpability accompanies a criminal conviction in addition to any penalties that may be imposed.<sup>30</sup> Thus, the Court concluded that “[the reasonable doubt standard] is a prime instrument for reducing the risk of convictions resting on factual error.”<sup>31</sup>

The Court has extended the procedural safeguards of the right to a jury and proof beyond a reasonable doubt to determinations that bear solely on the degree of punishment and culpability associated with a crime rather than the actual guilt or innocence of the defendant. In *Mullaney v. Wilbur*,<sup>32</sup> the Court addressed a Maine law that presumed that a criminal defendant charged with murder acted with the requisite malice aforethought and denied a reduction to manslaughter unless the defendant could prove that he or she acted with justifiable provocation. Recognizing that murder carried a penalty of life in prison and manslaughter carried a maximum term of imprisonment of twenty years,<sup>33</sup> the Court held the law to be unconstitutional and contrary to the Court’s holding in *Winship*.<sup>34</sup> The Court reasoned that because the effect of the Maine law was to place a criminal defendant’s personal liberty in substantial jeopardy, the State should not be permitted to avoid the reasonable doubt standard by shifting the burden to the defendant to prove mitigating circumstances.<sup>35</sup>

However, two years later in *Patterson v. New York*,<sup>36</sup> the Court limited its holding in *Mullaney*. In *Patterson* the Court upheld a New York law, which placed the burden of proving the affirmative defense of extreme emotional disturbance in a murder trial on the defendant.<sup>37</sup> The Court stated that its holding in *Mullaney* should not be read so broadly as to require proof beyond a reasonable doubt in every instance in which the State gauges the severity of punishment based on the existence of a particular fact.<sup>38</sup> The Court instead stressed that the determination of when to apply the reasonable doubt standard is

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29. *Id.* at 363.

30. *Id.* at 363-64.

31. *Id.* at 363.

32. 421 U.S. 684 (1975).

33. *Id.* at 690.

34. *Id.* at 697-701.

35. *Id.* at 703-04.

36. 432 U.S. 197 (1977).

37. *Id.* at 198.

38. *Id.* at 210.

resolved by looking to the elements of the crime as defined by the legislature.<sup>39</sup> With regard to the New York law at issue, the Court noted that, unlike the law at issue in *Mullaney*, an affirmative defense is a separate issue raised by the defendant and the State is still required to prove every essential ingredient of murder beyond a reasonable doubt.<sup>40</sup>

In *McMillan v. Pennsylvania*,<sup>41</sup> the Court relied on *Patterson* and upheld the constitutionality of a Pennsylvania statute that required a lesser standard of proof while subjecting a defendant to greater punishment. The statute at issue in *McMillan* permitted visible possession of a firearm during the commission of a felony to be used by a trial judge in imposing a five-year minimum sentence without requiring proof to a jury beyond a reasonable doubt.<sup>42</sup> The Court stated that proof beyond a reasonable doubt was not required because the Pennsylvania legislature expressly provided that visible possession of a firearm is treated as a sentencing factor to be used by a trial judge and not as an actual element of the offense.<sup>43</sup> The Court further noted that, unlike the law at issue in *Mullaney*, the Pennsylvania statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."<sup>44</sup>

Over a decade later, in *Almendarez-Torres v. United States*,<sup>45</sup> the Court again addressed an issue somewhat similar to the issue raised in *McMillan*. In *Almendarez-Torres* a federal statute made it a crime for an illegal alien to return to the United States following deportation without special permission. The crime carried a maximum penalty of two years imprisonment; however, another section of the same statute permitted a trial judge to enhance the defendant's sentence to a maximum of twenty years imprisonment if the trial judge found that the defendant had been convicted of an aggravated felony prior to the initial deportation.<sup>46</sup> The Court held that recidivism under the statute did not require proof to a jury beyond a reasonable doubt.<sup>47</sup> The Court

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39. *Id.*

40. *Id.* at 204-08.

41. 477 U.S. 79 (1986).

42. *Id.*

43. *Id.* at 85-86.

44. *Id.* at 87-88.

45. 523 U.S. 224 (1998).

46. *Id.* at 226.

47. *Id.* at 247.

acknowledged that the statute was different than the statute at issue in *McMillan* because it increased the maximum penalty for the crime rather than establishing a minimum penalty within a range already prescribed by statute.<sup>48</sup> However, the Court concluded that this difference was not constitutionally significant because recidivism has been traditionally used by trial judges in sentencing without a finding beyond a reasonable doubt.<sup>49</sup> Also, the Court observed that because Congress has clearly chosen to characterize recidivism as a sentencing factor and not an element of the offense, proof to a jury beyond a reasonable doubt is not required.<sup>50</sup>

One year after *Almendarez-Torres*, the Court in *Jones v. United States*<sup>51</sup> opened the door for its decision in *Apprendi*. In *Jones* the defendant was charged with, inter alia, carjacking based on a federal statute.<sup>52</sup> The relevant portion of the statute stated that whosoever “takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall—(1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years.”<sup>53</sup> The defendant was told at arraignment that he would be subject to up to fifteen years in prison and his indictment made no mention of subsection two of the statute. After the defendant was subsequently convicted of carjacking, the trial judge imposed a twenty-five-year term of imprisonment based on a presentence report that indicated that one of the victims had suffered serious bodily injury during the carjacking. The defendant appealed this decision on the grounds that serious bodily injury was an element of the offense deserving of proof to a jury beyond a reasonable doubt.<sup>54</sup>

Raising serious doubts as to the constitutionality of permitting sentence-enhancing facts to be proven by less than reasonable doubt, the Court held that serious bodily injury under the statute was, in fact, an element of the offense and not merely a sentencing factor.<sup>55</sup> The Court began its analysis by looking at the overall structure of the carjacking statute.<sup>56</sup> Although the Court observed that serious bodily injury bears a striking resemblance to an element of a crime and not a sentencing factor, the Court concluded that the statute was susceptible to more than

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48. *Id.* at 243-46.

49. *Id.* at 243-44.

50. *Id.* at 246.

51. 526 U.S. 227 (1999).

52. *Id.* at 229.

53. 18 U.S.C. § 2119 (1994).

54. 526 U.S. at 229-31.

55. *Id.* at 227, 251-52.

56. *Id.* at 237.



one construction.<sup>57</sup> Thus, the Court applied the canon of statutory construction that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter."<sup>58</sup> The Court then expressed serious doubts as to the constitutionality of the statute if serious bodily injury is construed as a sentencing factor not deserving proof to a jury beyond a reasonable doubt.<sup>59</sup> The Court further noted that *Almendarez-Torres* was not controlling because serious bodily injury, unlike recidivism, had not been traditionally used as a sentencing factor.<sup>60</sup> The Court also noted that prior convictions, unlike the factual determination of serious bodily injury, have already been subject to the procedural safeguards afforded by the Constitution in prior proceedings.<sup>61</sup>

### B. Trial Court's Discretion in Sentencing Proceedings

Although the Court has recognized that a trial judge has wide discretion in imposing sentences on criminal defendants,<sup>62</sup> it is clear that a trial judge must operate within certain boundaries. In *United States v. Tucker*,<sup>63</sup> a defendant was charged with robbing a bank. On cross-examination of the defendant, the prosecution asked the defendant about three previous felonies for which he had been convicted. The defendant acknowledged the prior convictions<sup>64</sup> and admitted that he engaged in the conduct leading up to those convictions.<sup>65</sup> The jury convicted the defendant, and the trial judge enhanced his sentence based on the three prior convictions. Two of the prior convictions were later invalidated on constitutional grounds.<sup>66</sup> The Court held that the case should be remanded to the trial court for resentencing, reasoning that the defendant's sentence may have been different if the trial judge had known that two of the convictions were invalid.<sup>67</sup> In so holding the Court acknowledged that trial judges traditionally have broad discretion to impose sentences; however, the Court further noted that this

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57. *Id.* at 238-39.

58. *Id.* at 239 (quoting *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

59. *Id.* 243-44.

60. *Id.* at 248-49.

61. *Id.* at 249.

62. 404 U.S. 443, 446 (1972).

63. 404 U.S. 443 (1972).

64. *Id.* at 444.

65. *Id.* at 450 (Blackmun, J., dissenting).

66. *Id.* at 444-45.

67. *Id.* at 448-49.

discretion is limited to a range of sentences prescribed by the legislature.<sup>68</sup>

### III. RATIONALE OF THE COURT

In a majority opinion, the Court in *Apprendi* held that, with the exception of the fact of prior criminal convictions, any factual determination that authorizes an increase in the maximum sentence for an offense must be proven to a jury beyond a reasonable doubt.<sup>69</sup> In reaching this conclusion, the majority remained cognizant of the longstanding procedural safeguards provided to criminal defendants by the Constitution and limited its holdings in *McMillan* and *Almendarez-Torres*.<sup>70</sup> The majority ultimately concluded that the New Jersey sentence enhancement at issue was “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”<sup>71</sup>

Justice Stevens, writing for the majority, delivered his opinion in five parts. Justices Scalia, Souter, Thomas, and Ginsburg joined in the entirety of his opinion. Part I of the majority opinion sets out the factual and procedural aspects of the case.<sup>72</sup> For the sake of simplicity, each of the remaining four parts is individually analyzed.

In Part II of the majority opinion, Justice Stevens clarified why certain aspects of the case were not relevant to the Court’s holding.<sup>73</sup> The majority first rejected as not dispositive of the constitutional question the State’s argument that *Apprendi*’s sentence was within the statutory maximum because he could have received the same term of imprisonment if the trial judge had imposed consecutive sentences.<sup>74</sup> The majority also noted that the substantive constitutionality of New Jersey’s statutory enhancement was not raised on appeal and, thus, not an issue addressed by the Court.<sup>75</sup> The majority further dismissed the Supreme Court of New Jersey’s suggestion that “there is rarely any doubt” concerning the existence of racial bias for purposes of a sentence enhancement.<sup>76</sup> Justice Stevens explained that in a criminal case both the defendant’s purpose and his or her knowledge of the victim’s identity

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68. *Id.* at 447; *see also* *Williams v. New York*, 337 U.S. 241, 246 (1949) (recognizing that a trial judge is limited to a statutory range when imposing sentence).

69. 120 S. Ct. at 2362-63.

70. *Id.* at 2363-64.

71. *Id.* at 2366.

72. *Id.* at 2351-54.

73. *Id.* at 2354.

74. *Id.*

75. *Id.*

76. *Id.*

may be disputed factual issues deserving a determination by a jury.<sup>77</sup> Additionally, the majority recognized that the case did not involve a question of whether the State attempted to manipulate the prosecutor's burden in order to gain an unfair advantage over criminal defendants because the New Jersey statute was not ambiguous.<sup>78</sup> Justice Stevens concluded Part II of the opinion by pointing out that the Court's holding was "foreshadowed" by its opinion in *Jones*.<sup>79</sup>

Justice Stevens began Part III of the opinion by exploring the historical foundations of both the right to a jury trial and the right to proof beyond a reasonable doubt in criminal cases.<sup>80</sup> As the majority acknowledged, strict adherence to both of these principles has led to notable limitations on a trial judge's discretion in sentencing.<sup>81</sup> From eighteenth century England to the present, a trial judge has been limited to imposing punishment within a range prescribed by law.<sup>82</sup>

Recognizing the historical connection between the procedural safeguards afforded to criminal defendants and the limitations on a trial judge's discretion in sentencing, the majority noted the novelty of New Jersey's sentence enhancement.<sup>83</sup> Specifically, the New Jersey statute permits a trial judge to make a factual determination of racial bias after a jury has rendered a verdict as to the underlying offense.<sup>84</sup> Also, if the trial judge finds racial bias, the defendant will receive a punishment greater than the maximum sentence he or she would have received under the jury's verdict.<sup>85</sup> Justice Stevens pointed out that the threat to a defendant's liberty is heightened and a stigma attaches when a statute imposes a sentence beyond the statutory maximum range where certain circumstances are present.<sup>86</sup> Thus, the majority concluded that a criminal defendant should receive the benefits of all procedural safeguards when, as here, the State enforces a statute that extends punishment beyond the maximum range of sentence.<sup>87</sup>

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77. *Id.* at 2355.

78. *Id.*

79. *Id.* The majority noted that the court in *Jones* stated 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." *Id.* (quoting *Jones v. United States*, 526 U.S. at 227 (1999)).

80. 120 S. Ct. at 2355-56.

81. *Id.* at 2357-58.

82. *Id.* at 2358-59.

83. *Id.*

84. *Id.* at 2351.

85. *Id.*

86. *Id.* at 2359.

87. *Id.* at 2359-60.

In Part IV Justice Stevens announced the majority's holding<sup>88</sup> and provided an explanation of two of the Court's prior decisions that were relevant to the issue raised in *Apprendi*, specifically, *McMillan* and *Almendarez-Torres*.<sup>89</sup> In an attempt to limit the scope of the holdings in both of these cases, Justice Stevens began by distinguishing *McMillan*.<sup>90</sup> The majority recognized that *McMillan* is the first instance in which the Court made a distinction between a sentencing factor and a factual issue deserving of a jury verdict.<sup>91</sup> However, Justice Stevens pointed out that *McMillan*, though making this distinction, does not represent approval of a State's attempt to circumvent a jury verdict by merely defining the facts necessary to constitute an offense as sentencing factors.<sup>92</sup> Further, the majority noted that *McMillan* does not stand for the proposition that a statute that imposes punishment beyond the statutory maximum range for an offense will not raise constitutional questions.<sup>93</sup> Quoting directly from the *McMillan* opinion, Justice Stevens highlighted the fact that the statute at issue in *McMillan* only limited the trial judge's discretion to impose a sentence within, rather than beyond, the maximum range provided by law.<sup>94</sup>

Justice Stevens then attempted to explain the Court's holding in *Almendarez-Torres*.<sup>95</sup> The Due Process Clause and Sixth Amendment concerns, as the majority observed, were notably less in *Almendarez-Torres* where the sentencing judge was permitted to make a factual determination only as to the existence of prior convictions.<sup>96</sup> Justice Stevens explained that the procedural safeguards guaranteed by the Constitution were already provided to the defendant in *Almendarez-Torres* during the previous proceedings relating to the prior crimes for which

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88. *Id.* at 2362-63 ("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.").

89. *Id.* at 2360-63.

90. *Id.* at 2360-61.

91. *Id.* at 2360 (citing *McMillan*, 477 U.S. at 85-82).

92. *Id.* (citing *McMillan*, 477 U.S. at 85-88).

93. *Id.*

94. *Id.* (quoting *McMillan*, 477 U.S. at 87-88) ("Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm . . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.")).

95. *Id.* at 2361-62.

96. *Id.* at 2362.

he was convicted.<sup>97</sup> Justice Stevens further noted that the defendant in *Almendarez-Torres* did not challenge his sentence because the fact of prior convictions was incorrect but, instead, on the ground that the State's indictment was insufficient.<sup>98</sup> Although recognizing the possible inaccuracy of the *Almendarez-Torres* decision, the majority declined revisiting the validity of the decision and, instead, chose to treat recidivism as a narrow exception to the holding in *Apprendi*.<sup>99</sup>

In Part V the majority focused on the New Jersey statutory scheme at issue in *Apprendi*.<sup>100</sup> The majority began by refusing to distinguish between a sentencing factor and an element for purposes of requiring proof beyond a reasonable doubt to a jury. Justice Stevens noted that the requisite finding of racial bias under the New Jersey statute resembles a common element of a criminal offense, specifically, *mens rea*. However, the majority stated that the relevant question was one of form and not substance.<sup>101</sup> The effect of New Jersey's statutory scheme imposed a greater punishment on a criminal defendant based on his or her criminal culpability.<sup>102</sup> Recalling *Mullaney* and *Winship*, the majority concluded that when a legislature chooses to impose a greater sentence based on the level of a defendant's culpability, the defendant's liberty is at stake and a heightened stigma is associated with the offense.<sup>103</sup>

The majority further explained why reliance on *McMillan* and *Almendarez-Torres* is misplaced.<sup>104</sup> The majority noted that, unlike the statute at issue in *McMillan*, the New Jersey statute imposed punishment beyond the maximum amount prescribed by law and was, thus, "appropriately characterized as 'a tail that wags the dog of the substantive offense.'"<sup>105</sup> With regard to *Almendarez-Torres*, the majority reasoned that recidivism, unlike racial bias, does not relate to the actual commission of the offense.<sup>106</sup> Justice Stevens further explained that recidivism is obviously distinct from the issue raised in *Apprendi* because a defendant that is subjected to a greater punishment based on prior convictions has already had the benefit of having those

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97. *Id.* at 2361.

98. *Id.*

99. *Id.* at 2362.

100. *Id.* at 2363.

101. *Id.* at 2364-65.

102. *Id.* at 2365.

103. *Id.*

104. *Id.* at 2365-66.

105. *Id.* at 2365 (quoting *McMillan*, 477 U.S. at 88).

106. *Id.* at 2366.

crimes submitted to a jury for proof beyond a reasonable doubt.<sup>107</sup> Justice Stevens concluded the majority opinion by explaining why the decision would not have an effect on sentencing in capital cases.<sup>108</sup> Quoting *Almendarez-Torres* the majority reasoned that a defendant in a capital case will have every element of the offense proven beyond a reasonable doubt to a jury and the trial judge will only determine sentence within, rather than beyond, the maximum range provided by law.<sup>109</sup>

Justice Thomas, joined by Justice Scalia, filed a concurring opinion.<sup>110</sup> Justice Thomas determined that the question of whether there should be proof to a jury beyond a reasonable doubt is best answered by first looking to the true definition of the particular crime—the ingredients of the actual offense.<sup>111</sup> Relying primarily on past cases, Justice Thomas noted that any fact, relating to sentence or otherwise, resulting in an increase in punishment must be charged in an indictment in order to survive a constitutional attack.<sup>112</sup> Justice Thomas saw no reason to change the analysis, concluding that the majority's holding should be extended in two respects. First, Justice Thomas concluded that any fact resulting in an increase in punishment, including recidivism, should be proven to a jury beyond a reasonable doubt.<sup>113</sup> Second, Justice Thomas observed that the majority's holding should apply to all statutes that establish a mandatory minimum sentence based on the existence of certain facts regardless of whether the increased punishment is within or beyond the statutory range of punishment.<sup>114</sup> Justice Thomas reasoned that when a prosecutor invokes such a statute, a trial judge is still required to impose a sentence that is potentially greater than he or she may have imposed through an exercise of discretion.<sup>115</sup> Justice Thomas, like the majority, dismissed the notion that facts normally used in sentencing should be treated differently than facts that traditionally constitute elements of the offense.<sup>116</sup>

Justice O'Connor filed a dissenting opinion in which Justices Rehnquist, Kennedy, and Breyer joined.<sup>117</sup> According to Justice

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 2367 (Thomas, J., concurring).

111. *Id.* at 2368.

112. *Id.*

113. *Id.* at 2368-71.

114. *Id.* at 2379-80.

115. *Id.*

116. *Id.* at 2379.

117. *Id.* at 2380 (O'Connor, J., dissenting).

O'Connor, the majority's holding is contrary to a number of the Court's prior decisions allowing a trial judge to impose an increased sentence based on the existence of a particular fact.<sup>118</sup> Justice O'Connor also disagreed with the majority's characterization of the requisite findings of the statute as relating to mens rea.<sup>119</sup> Instead, Justice O'Connor agreed with the Appellate Division of the Superior Court of New Jersey to the extent that racial bias is best characterized as relating to motive, which has been traditionally used in other contexts by trial judges in imposing sentences without offending the Constitution.<sup>120</sup>

Justice O'Connor further noted that there are at least two interpretations of the majority's holding, neither of which is constitutionally sound.<sup>121</sup> First, the majority's holding could be read to require any fact that increases the maximum penalty beyond the statutory range to be proven to a jury beyond a reasonable doubt, but to allow the State to impose a minimum sentence within the statutory range based on the findings of a trial judge by preponderance of the evidence.<sup>122</sup> However, as Justice O'Connor noted, the New Jersey legislature could avoid offending the majority's holding and achieve the same results by merely establishing a minimum sentence within the statutory range when racial bias is proven to a trial judge by a preponderance of the evidence.<sup>123</sup> Second, the majority's holding could be interpreted to require proof beyond a reasonable doubt regarding facts that formally increase the defendant's sentence beyond the statutory range, while permitting the State to submit facts that formally decrease the defendant's sentence to a lesser standard of proof.<sup>124</sup> However, Justice O'Connor explained that New Jersey could easily cure the statute at issue by simply establishing a maximum sentence within the statutory range if the trial judge finds by a preponderance of the evidence that the crime involved

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118. *Id.* at 2381-96 (citing *Monge v. California*, 524 U.S. 721 (1998) (upholding a California law allowing for an enhanced sentence based on proof of prior convictions to a trial judge); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *Walton v. Arizona*, 497 U.S. 639 (1990) (upholding an Arizona law which allows a trial judge to conduct a sentencing hearing in a case of first-degree murder to determine whether the defendant will receive the death penalty or life in prison)).

119. *Id.* at 2396.

120. *Id.* (citing *Mitchell*, 508 U.S. 476 (1993) (characterizing a Wisconsin statute as relating to motive which allows for an increase in a defendant's sentence if the victim was selected based on his or her race)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2390.

was not committed for a racially biased purpose.<sup>125</sup> Thus, Justice O'Connor stated,

If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below 'beyond a reasonable doubt,' it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the [majority's] rule.<sup>126</sup>

Justice O'Connor also recognized that the majority's holding could potentially place the validity of the Federal Sentencing Guidelines and similar state sentencing schemes in jeopardy.<sup>127</sup> Specifically, Justice O'Connor reasoned that the majority's holding places an overwhelming number of past sentences under these sentencing schemes in question.<sup>128</sup> In addition Justice O'Connor was concerned that due to the lack of clarity in the majority's holding, both federal and state trial judges are left in a state of confusion as to whether the sentences they impose are constitutionally valid.<sup>129</sup>

Joined by Justice Rehnquist, Justice Breyer also filed a dissenting opinion.<sup>130</sup> Justice Breyer characterized the majority's holding as an impractical method of sentencing in criminal cases.<sup>131</sup> In Justice Breyer's view, a criminal justice system must contain fair, procedural compromises with regard to sentencing.<sup>132</sup> In support of his position, Justice Breyer provided a detailed discussion of why it is more practical to allow trial judges to exercise discretion in sentencing.<sup>133</sup> Justice Breyer stated that the overwhelming number of relevant factors involved in sentencing makes submission to a jury in every case impractical.<sup>134</sup> Also, Justice Breyer observed that the majority's holding ultimately

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125. *Id.*

126. *Id.* 2390-91.

127. *Id.* at 2391.

128. *Id.* at 2394-95. Justice O'Connor points out in her dissenting opinion that United States Sentencing Commission statistics prove that almost a half-million criminal defendants have been sentenced under the United States Sentencing Guidelines since 1989.

129. *Id.* at 2395.

130. *Id.* at 2396 (Breyer, J., dissenting).

131. *Id.* at 2397.

132. *Id.*

133. *Id.* at 2397-99.

134. *Id.* at 2397-98. Quoting the United States Sentencing Guidelines, Justice Breyer noted that, "a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Id.* at 2398 (quoting U.S. SENTENCING GUIDELINES MANUAL, Part A at 1.2).



places a criminal defendant in the awkward position of having to deny committing a crime to a jury while at the same time submitting evidence as to how or why the crime was committed.<sup>135</sup> Justice Breyer further noted that sentencing in federal court has been guided by the expertise of federal judges both prior to and after adoption of the Federal Sentencing Guidelines.<sup>136</sup> After reiterating most of the same concerns found in Justice O'Connor's dissent, Justice Breyer concluded that the majority's holding will ultimately prevent legislatures from providing trial judges with authoritative guidance in the sentencing of criminal defendants.<sup>137</sup>

Justice Scalia filed a separate concurrence in direct response to Justice Breyer's dissent.<sup>138</sup> According to Justice Scalia, Justice Breyer's dissent simply placed too much power in the hands of trial judges.<sup>139</sup> Justice Scalia pointed out that a criminal defendant, under the majority's holding, will receive a punishment that truly fits the crime committed, as determined by twelve fellow citizens and beyond a reasonable doubt.<sup>140</sup> Thus, Justice Scalia concluded that a literal reading of the Constitution, specifically the right to an impartial jury guaranteed by the Sixth Amendment, justifies the majority's holding.<sup>141</sup>

#### IV. IMPLICATIONS

In *Apprendi* the Court announced a holding that will without a doubt change the way courts review statutes permitting a greater sentence when certain facts are present. However, a number of questions remain in the wake of *Apprendi* as to what effect the opinion will have on the present system for sentencing criminal defendants. The potential changes in criminal sentencing that may result in the aftermath of *Apprendi* depend upon how broadly courts are willing to apply the decision. If, for example, courts choose to apply a broad reading of *Apprendi* and employ an approach similar to the one advocated by Justice Thomas' concurrence, *Apprendi* may result in revolutionary

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135. *Id.* at 2398.

136. *Id.*

137. *Id.* at 2402.

138. *Id.* at 2367 (Scalia, J., concurring).

139. *Id.* "[Justice Breyer's dissent] sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State—and an increasingly bureaucratic part of it, at that.)"

140. *Id.*

141. *Id.*

changes in criminal sentencing. Under such an approach, a prosecutor may be required to prove any and all facts that result in an increase in sentence to a jury beyond a reasonable doubt even if the fact only increases the defendant's sentence within, rather than beyond, the statutory maximum range.

As recognized by both Justice O'Connor and Justice Breyer in their dissenting opinions, a broad reading of *Apprendi* could also place the present United States Sentencing Guidelines and similar state schemes in jeopardy of being severely limited or totally abolished.<sup>142</sup> Additionally, a broad reading of *Apprendi* may place the constitutionality of an enormous number of past sentences in question and, thus, subject to collateral attack.

Courts may, on the other hand, choose to limit *Apprendi* to its facts and apply a narrow reading of the decision. Under such an approach, the requirements of *Apprendi* will only apply when a fact, other than recidivism, resulting in a greater term of imprisonment increases the defendant's sentence beyond, rather than within, the statutory maximum range. Further, courts applying a narrow reading of *Apprendi* may avoid collateral attacks on prior sentences by refusing to apply *Apprendi* retroactively and subject *Apprendi* violations to a harmless error standard.

The United States Court of Appeals for the Eleventh Circuit seems to apply *Apprendi* narrowly in its recent decisions. The court has recognized the impact of *Apprendi* on criminal sentencing by holding that all facts, other than recidivism, that increase a defendant's sentence beyond the statutory maximum range must be proven to a jury beyond a reasonable doubt. However, the court has sought to limit the impact of *Apprendi* in at least three respects. First, the court has held that a statute authorizing a trial judge to increase a defendant's sentence based on facts not proven to a jury does not violate *Apprendi* so long as the increase is within, rather than beyond, the statutory maximum range.<sup>143</sup> Secondly, the court has concluded that *Apprendi* violations are subject to the harmless error standard and the United States Sentencing Guidelines are not subject to *Apprendi*.<sup>144</sup> Finally, the

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142. *Rogers v. United States*, 228 F.3d 1318 (11th Cir. 2000) (holding that drug quantity must be proven to a jury beyond a reasonable doubt when a statute authorizes punishment beyond the statutory maximum range the amount of drugs possessed by the defendant).

143. *United States v. Shepard*, 235 F.3d 1295 (11th Cir. 2000) (holding that a defendant's sentence did not violate *Apprendi* when a trial judge increased a defendant's sentence based on a drug quantity that was not proven to a jury but the increase was within, rather than beyond, the statutory maximum range).

144. *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000).

court has attempted to avoid a flood of habeas corpus petitions based on past sentences by holding that *Apprendi* does not apply retroactively.<sup>145</sup>

Although the Eleventh Circuit seems presently to apply a narrow reading of *Apprendi*, it is important for prosecutors, criminal defense attorneys, and even legislators to remain cognizant of the potential changes that could result from *Apprendi* in the future. Prosecutors may be best served by expecting the worst and submitting any fact that may increase a defendant's sentence, especially in drug cases, to the jury for proof beyond a reasonable doubt. Defense attorneys, when faced with a sentence that may raise questions under *Apprendi*, should raise objections based on *Apprendi* in order to preserve the defendant's record in case a broad approach to *Apprendi* is adopted in the future. Additionally, legislators should recognize that the constitutional uncertainty of sentencing statutes may be avoided through careful drafting. For example, under a narrow reading of *Apprendi*, a legislature would be permitted to set a high maximum penalty for an offense and provide the trial judge with the discretion to sentence a criminal defendant within, rather than beyond, the maximum range based on the presence of particular facts.<sup>146</sup>

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145. *In re Joshua*, 224 F.3d 1281 (11th Cir. 2000).

146. In *United States v. Pounds*, 230 F.3d 1317 (11th Cir. 2000), for example, a defendant was charged with carrying a firearm while aiding and abetting a robber in violation of 18 U.S.C. § 924(c). The maximum possible sentence as provided by Congress was life imprisonment. The trial judge enhanced the defendant's sentence by five years based on 18 U.S.C. § 924(c)(1)(A)(iii), which establishes a mandatory minimum of five years if the sentencing judge finds that the firearm was discharged during a crime of violence. The court held that the defendant's sentence was not in violation of *Apprendi* because the mandatory minimum established by section 924(c)(1)(A)(iii) did not extend the defendant's sentence beyond the statutory maximum of life in prison.