

DUE PROCESS – ANY FACTOR THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE STATUTORY PRESCRIBED MAXIMUM MUST BE SUBMITTED TO A JURY BEYOND A REASONABLE DOUBT- *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

*Cherylyn Waibel**

The Seton Hall Legislative Journal recognizes that past volumes have included symposia and notes that address hate crime legislation.¹ Recently, the United States Supreme Court issued a decision that affects the current status of sentencing provisions for hate motivated crimes,² which will in turn also affect the arguments made these previously published pieces.

I. INTRODUCTION

The United States Supreme Court recently held unconstitutional part of a New Jersey statute that gives judges the discretion to increase a prisoner's sentences if it is determined that the crime was motivated by racial bias.³ In so holding, the Court reasoned that any fact that increases the penalty for a crime beyond its prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt.⁴

* J.D., anticipated 2002.

¹ See e.g., Seton Hall Legislative Journal, Volume 24, number 2, 2000.

² See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

³ See *id.*

⁴ See *id.*

II. STATEMENT OF THE CASE

Charles C. Apprendi, Jr., fired several .22-caliber bullets into the home of an African-American family living in an all-white neighborhood in Vineland, New Jersey.⁵ After Apprendi was arrested, he admitted he was the shooter.⁶ Although this admission was later retracted, Apprendi explained his actions by stating that because the family is black he did not want them in the neighborhood.⁷

Pursuant to a plea agreement, Apprendi pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of a third-degree offense of an anti-personal bomb.⁸ The state also reserved the right to request the imposition of a higher sentence on the ground that the offense was committed with a biased purpose⁹, as allowed by N.J.S.A. § 2C:44-3(e).¹⁰ Exercising this right, the prosecutor filed a formal motion to extend Apprendi's term and an evidentiary hearing was held to determine Apprendi's motive in committing the crime.¹¹ Concluding that the evidence supported the notion that Apprendi's actions were motivated by racial bias, the judge ruled that the hate crime enhancement applied.¹² Although the statute to which Apprendi pled guilty¹³ is punishable by imprisonment between five and ten years,¹⁴ the judge sentenced Apprendi to 12 years on this count, which was above the statutorily imposed maximum of ten years.¹⁵

Apprendi appealed, claiming that the Due Process Clause of the United States Constitution requires a finding that he acted with a biased purpose must be proven beyond a reasonable doubt to a jury.¹⁶ The

⁵ See *id.* at 2351.

⁶ See *id.*

⁷ See *id.* at 2351.

⁸ See *id.* at 2352.

⁹ See *id.*

¹⁰ N.J. STAT.ANN. §2C:44-3(e) (West 2001) states that a prison sentence may be extended where "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

¹¹ See *Apprendi* 120 S.Ct. at 2352.

¹² See *id.*

¹³ N.J. STAT.ANN. 2C:39-4(a) (West 2001) classifies the possession of a firearm for an unlawful purpose as a second degree offense.

¹⁴ N.J. STAT.ANN. 2C:43-6(a)(2) (West 2001).

¹⁵ See *Apprendi* 120 S.Ct. at 2354.

¹⁶ See *id.* at 2352.

Appellate Division, relying on *McMillian v. Pennsylvania*,¹⁷ upheld Apprendi's sentence,¹⁸ reasoning that the Legislature enacted hate crime enhancement as a sentencing factor, not an underlying element of the offense.¹⁹ The Court described this factor as a motive and reasoned it was a traditional sentencing factor.²⁰ Although the Appellate Court recognized that New Jersey's hate crime law exposed defendants to greater punishment, this insufficient grounds to render the statute unconstitutional.²¹

In affirming the Appellate Division, the New Jersey Supreme Court reasoned that while Due Process requires the State to prove each element of an offense beyond a reasonable doubt, simply placing a fact in sentencing provisions does not mean that the fact is not an essential element of the offense.²² The Court held that the New Jersey statute did not allow an impermissible burden shifting and did not create a separate offense.²³ Subsequent to the decision of the New Jersey Supreme Court, the Supreme Court of the United States granted certiorari.²⁴

III. APPRENDI V. NEW JERSEY: PRIOR CASE HISTORY

Several cases were examined by the Apprendi Court in making its determination that the New Jersey statute was unconstitutional.²⁵ Based on the Due Process Clause, the Court stated that the requirement that every fact constituting a crime be proven beyond a reasonable doubt was first mandated in *In re Winship*.²⁶ This proposition was broadened in *Mullaney v. Wilber*,²⁷ where the Court held that any substantive aspects of a crime must be proven beyond a reasonable doubt.²⁸

The Court, however, later retracted certain Due Process protections in *Patterson v. New York*,²⁹ where the defendant was found

17 *McMillian v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986).

18 *See id.*

19 *See id.*

20 *See id.*

21 *See id.*

22 *See id.* at 20, 731 A.2d at 492.

23 *See Apprendi v. New Jersey*, 159 NJ 7, 731 A.2d 485 (1999).

24 528 U.S. 1018 (1999).

25 *See Apprendi*, 120 S.Ct.2348.

26 397 U.S. 358 (1970).

27 421 U.S. 684 (1975).

28 *See id.* at 696-97.

29 *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

guilty of second-degree murder.³⁰ *Patterson* involved a New York law in which the fact a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder.³¹ The State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt, rather, this burden was on the defendant to prove by a preponderance of the evidence.³² The Court rejected *Patterson's* Due Process challenge, reasoning that the State does not have to disprove beyond a reasonable doubt every fact relating to affirmative defenses regarding the culpability of the defendant.³³

In *McMillan v. Pennsylvania*,³⁴ the Court examined a Pennsylvania statute that subjected a defendant to a mandatory minimum sentence of five years imprisonment if a judge found by a preponderance of the evidence that the defendant had visibly possessed a firearm during the commission of the offense.³⁵ While recognizing that the State was limited in defining elements of a crime, the Court held that the Pennsylvania statute was permissible.³⁶

In *Almendarez-Torres v. United States*³⁷ the Court considered a federal grand jury indictment charging the defendant with being found in the United States after deportation. If convicted of the offense the defendant faced a maximum sentence of two years.³⁸ The defendant plead guilty, and the government filed a pre-sentence report showing that he was deported because of three earlier convictions for aggravated felonies, and thus, could be sentenced up to 20 years.³⁹ The defendant objected, arguing that because the indictment did not mention the earlier convictions he could only be sentenced to up to two years in prison.⁴⁰ The Court, however, upheld the sentence, reasoning that

30 *See id.*

31 *See id.*

32 *See id.*

33 *See id.*

34 *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986).

35 *See id.*

36 *See id.* at 86.

37 *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 11219 (1998).

38 *See id.*

39 *See id.*

40 *See id.*

recidivism is a permissible sentencing factor.⁴¹

Significant to the *Apprendi* Court's decision, was *Jones v. United States*⁴², in which the Court considered whether a federal carjacking statute⁴³ which established three separate offenses by specific elements should be submitted to a jury and proven beyond a reasonable doubt.⁴⁴ In holding that the statute should be read as three separate offenses, the Court placed significant weight on the fact that the opposite construction would raise constitutional questions under the 5th Amendments Due Process Clause and the 6th Amendment's notice and jury trial guarantees.⁴⁵ The Court reasoned that where a fact is not a sentencing consideration but rather an element of the offense, it must be submitted to the jury and proven beyond a reasonable doubt.⁴⁶ The *Jones* Court concluded that 6th Amendment concerns were raised because the statute moved elements of the crime to sentencing determinations and diminished the significance of the role of the jury.⁴⁷ Thus, in order to avoid a possible Constitutional violation, the Court held that each part of the statute should be treated as a separate offense, must be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt.⁴⁸

IV. JUSTICE STEVENS' MAJORITY OPINION

A 5-4 majority struck down the New Jersey sentencing provision, which allowed a judge to impose an enhanced sentence for crimes motivated by race.⁴⁹ Justice Stevens, writing for the majority, explained that the provision violated the Due Process Clause because it removed a fact from the jury that increased the defendant's sentence.⁵⁰ The

⁴¹ See *id.*

⁴² See *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

⁴³ See 18 U.S.C. §2119, providing that a person possessing a firearm who "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) of serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and (3) if death results, be . . . imprisoned for any number of years up to left"

⁴⁴ See *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *Apprendi*, 120 S.Ct. at 2351.

⁵⁰ See *id.* at 2351.

Supreme Court limited the issue to whether Apprendi had a constitutional right to have a jury find such bias beyond a reasonable doubt.⁵¹ Justice Stevens noted that this question was foreshadowed by its decision in *Jones v. United States*.⁵²

The Court first extensively examined the history of the principles of Due Process and the right to a jury at common law.⁵³ Although the Court recognized that nothing in history suggests that it is impermissible for judges to exercise discretion in sentencing, the Court stressed that this judgment should be within the range prescribed by the statute.⁵⁴ In fact, the majority noted that the Court has upheld statutes giving judges discretion in sentencing.⁵⁵ The Court, however, maintained that this discretion is constrained by the limits fixed by the legislature.⁵⁶ The Court also insisted that the basic principles of the jury requirement must be adhered to by proving all facts beyond a reasonable doubt.⁵⁷

The Court noted that in *McMillan v. Pennsylvania* it stressed that constitutional limits exist to curb the States' authority to define away facts necessary to constitute a criminal offense.⁵⁸ In addition, the *Apprendi* Court noted that a State scheme that keeps facts from the jury, which may expose defendants to a greater punishment, raises serious constitutional concerns.⁵⁹ In addressing the dissent's accusation that the majority is overruling *McMillan*, the Court stated it was limiting the holding in *Apprendi* to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense.⁶⁰

Relying on their decision in *Jones*⁶¹, the majority distinguished *Almendarez-Torres* as representing an exceptional departure from

⁵¹ See *id.* at 2355.

⁵² See *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). (noting that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt).

⁵³ See *Apprendi* 120 S.Ct. at 2356.

⁵⁴ See *id.* at 2358.

⁵⁵ See *Williams v. New York*, 337 U.S. 241, 246, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949).

⁵⁶ See *Apprendi*, 120 S.Ct. at 2358.

⁵⁷ See *id.* at 2359.

⁵⁸ See *id.* at 2360.

⁵⁹ See *id.*

⁶⁰ See *id.* at 2361.

⁶¹ 523 US at 247.

precedent.⁶² The Court pointed out that the decision in *Almendarez-Torres* concerned the sufficiency of an indictment and was based on recidivism, which is a traditional basis for a court to increase a defendant's sentence.⁶³ The majority also distinguished *Apprendi* because he did not contest the decision's validity.⁶⁴

Therefore, the Court held that other than prior convictions, any fact that increases the penalty for a crime beyond its prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.⁶⁵ In addressing New Jersey's defenses, the majority states that the State's argument that the biased purpose is not an element, but a factor is nothing more than a disagreement with the Court's ruling.⁶⁶ The Court reasoned that because the statute allows an examination into the defendant's state of mind, it is an essential element of the crime because it is a mens rea factor.⁶⁷ The majority, however, recognized that the relevant question is whether the statute exposes a defendant to a greater sentence than that permitted by the Legislature.⁶⁸

The Court next explained why the State's reliance on the *McMillan* and *Almendarez-Torres* decisions were misplaced,⁶⁹ stressing that the New Jersey sentencing provision turned a second-degree offense into a first-degree offense.⁷⁰ The Court distinguished *McMillan* by reason of the vast difference in sentences, which would result through the application of these sentencing enhancement provisions.⁷¹ The fact that the Legislature did not create a separate offense for a crime motivated by racial bias, the Court explained that it does not mean that it is not an essential element of the offense.⁷² Further, the Court also explained that the statute in *Almendarez-Torres* was upheld because recidivism does not relate to the commission of the offense itself, whereas a biased purpose does.⁷³ Moreover, the Court noted that *Almendarez-Torres* was an entirely different case because the defendant had a jury first find him

⁶² See *Apprendi*, 120 S.Ct. at 2361.

⁶³ See *id.* at 2361-62.

⁶⁴ See *id.* at 2362.

⁶⁵ See *id.* at 2363.

⁶⁶ See *id.* at 2364.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at 2365.

⁷¹ See *id.*

⁷² See *id.* at 2365-66.

⁷³ See *id.* at 2366.

guilty beyond a reasonable doubt.⁷⁴ Finally, the Court stated that the prior cited cases held that once a defendant is found guilty by a jury of a crime which has a maximum sentence of death, the judge can decide what penalty to impose.⁷⁵

V. JUSTICE SCALIA'S CONCURRING OPINION

In a brief concurring opinion, Justice Scalia responded to Justice Breyer's dissent⁷⁶ by arguing that it is not unfair for a felon to receive less punishment than prescribed by statute. However, to receive more would be unjust.⁷⁷ Further, Scalia asserted that if the dissent disagrees with the notion that a jury should determine the facts then there is little that the right to a jury trial guarantees.⁷⁸

VI. JUSTICE THOMAS' CONCURRING OPINION

Justice Thomas concurred in the judgment yet disagreed with the Court's reasoning, focusing instead on the question of what constitutes a crime.⁷⁹ Justice Thomas explained that an indictment must allege all elements of the crime for the jury to determine beyond a reasonable doubt.⁸⁰ Thomas stressed that it is essential to know which facts are elements because a fact that increases a defendant's punishment is not entitled to the constitutional protections afforded elements.⁸¹

Thomas began his analysis by explaining that common-law has followed this approach since the 1840s.⁸² Examining *Commonwealth v. Smith*⁸³ and *Hope v. Commonwealth*,⁸⁴ from this era, Thomas noted that

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 2367.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.* at 2368-69.

⁸⁰ See *id.* at 2368.

⁸¹ See *id.*

⁸² See *id.* at 2369.

⁸³ *Commonwealth v. Smith*, 1 Mass. 245 (1804); Defendant was indicted and found guilty of larceny, however the indictment did not charge the value of the stolen goods. Under Massachusetts law, the distinction between simple and grand larceny was based on the value of the stolen goods. The court held that because the value of the goods had not been charged in the indictment, the defendant could not be sentenced.

⁸⁴ *Hope v. Commonwealth*, 50 Mass. 134 (1845); Defendant was indicted and convicted

the courts recognized the importance of determining the elements of a crime for facts that effect a defendant's sentence.⁸⁵ At the same time, Thomas recognized that the Court has found a fact not to be an element where the fact is not the basis for punishment.⁸⁶ Thomas examined several cases throughout history that recognized that where a statute increases the punishment based on a certain fact, that fact is an element of the offense which must be charged in the indictment, otherwise the court cannot impose an increased punishment.⁸⁷

Thomas next turned to the consideration of how courts have treated the fact of prior convictions.⁸⁸ Thomas noted that several cases have treated this fact as an element of a crime because of its effect of increasing a defendant's sentence.⁸⁹ Based on this history, Thomas asserted that the majority's ruling is a return to the past.⁹⁰ Lastly, Thomas maintained the Court should have a broader ruling and submitted that any fact which is a basis for a court's sentencing decision underlying a decision to increase a defendant's sentence should be an element of the crime.⁹¹

VII. JUSTICE O'CONNOR'S DISSENT

Justice O'Connor, joined by The Chief Justice, Justice Kennedy and Justice Breyer wrote a dissenting opinion. Relying on *McMillan*, *Almendarez-Torres*, and *Patterson*, Justice O'Connor noted that the Court has long recognized that not every fact effecting a defendant's

for larceny. The statute had two levels of sentencing based on the value of the stolen property. The court held that the value of the property was an element of the crime because the punishment depended on the value.

⁸⁵ See *Apprendi*, 120 S.Ct. at 2369.

⁸⁶ See *Commonwealth v. McDonald*, 59 Mass. 365 (1850); defendant was charged with attempted larceny. Defendant challenged the indictment relying on *Smith and Hope*. The Court, however, rejected his argument because the punishment did not depend on the amount stolen.

⁸⁷ See *Apprendi*, 120 S.Ct. at 2370-71.

⁸⁸ See *id.* at 2371.

⁸⁹ See *id.* at 2372; see also, *Kilbourn v. State*, 9 Conn. 560, 563 (1833); *Pumbly v. Commonwealth*, 43 Mass. 413, 414 (1841); *Hines v. State*, 26 Ga. 614, 616 (1859); *Commonwealth v. Phillips*, 28 Mass. 27, 33 (1831); *State v. Freeman*, 27 Vt. 523 (1855); *Goeller v. State*, 119 Md. 61, 66-67, 85 A. 954, 956 (1912); *State v. Haynes*, 35 Vt. 570, 572-573 (1863); *Graham v. West Virginia*, 224 U.S. 616, 620-621, 56 L. Ed. 2d 917, 32 S. Ct. 583 (1912).

⁹⁰ See *Apprendi*, 120 S.Ct. at 2378.

⁹¹ See *id.* at 2379.

punishment must be charged in an indictment and proven to a jury beyond a reasonable doubt.⁹² Although recognizing that there are constitutional limits to this proposition, O'Connor observed that the Court has proceeded with caution before deciding a fact must be treated as an element to be proven before a jury.⁹³ The dissent criticized the Court for establishing a bright-line rule which has the effect of limiting lawmakers' powers.⁹⁴

The dissent maintained that the rule adopted by the Court is not supported by history or case law.⁹⁵ In addressing the supporting history cited by the majority, the dissent noted that at common law, judges had little discretion in sentencing.⁹⁶ The dissent, however, explained that the Court rejected its relevancy because of decisions supporting the practice of judicial discretion.⁹⁷ The dissent also criticized the majority's reliance on statements taken from the Archbold treatise as simply meaning that a defendant can receive a greater statutory punishment only if he/she was charged in an indictment and the facts making up the statutory offense were proven.⁹⁸ For the dissent, the treatise only meant that each element of the statutory offense must be proven, which is a proposition that was not questioned by the Court.⁹⁹ The dissent defined the question in *Apprendi* as whether a fact bearing on the defendant's punishment should be treated as an offense element, despite the Legislature's failure to define it as such.¹⁰⁰

The dissent next examined Justice Thomas' concurring opinion calling for a broader rule.¹⁰¹ Again, the dissent criticized Justice Thomas's opinion citing a lack of evidentiary support.¹⁰² The dissent explained the faultiness with Thomas's concurrence is his failure to discuss decisions predating the ratification of the Bill of Rights.¹⁰³ As a result, the dissent reasoned that Thomas failed to demonstrate the

92 *See id.* at 2380.

93 *See id.* at 2381.

94 *See id.*

95 *See id.*

96 *See id.*

97 *See id.*

98 *See id.* at 2382.

99 *See id.*

100 *See id.*

101 *See id.*

102 *See id.*

103 *See id.* at 2383.

relevant definition of crime under preexisting common law.¹⁰⁴ Due to this failure, the dissent concluded that there is no such common law rule.¹⁰⁵ Although the dissent recognized that when there was a question, 19th century American courts treated it as fact and would increase a punishment as elements of the statutory offense, they refused to leap to the broad rule advocated by Justice Thomas.¹⁰⁶

Turning to the majority opinion, the dissent asserted that the Court ignored the decision in *Patterson v. New York*.¹⁰⁷ Although the dissent recognized that the law in *Patterson* would mitigate the culpability of the defendant, the dissent contended that the holding in *Apprendi* overrules *Patterson*.¹⁰⁸ The dissent reasoned that the decision in *Patterson* refutes the Court's expansive decision of *Mullaney*.¹⁰⁹ The dissent further noted that the decision in *Mullaney* has consistently been limited to the proposition that the State must prove every element of an offense beyond a reasonable doubt, and cannot shift the burden to the defendant.¹¹⁰

The dissent also criticized the majority's reliance on *McMillan v. Pennsylvania*,¹¹¹ accusing the majority of overruling *McMillan*.¹¹² The dissent reasoned that the *McMillan* Court reaffirmed the rule in *Patterson* that Legislature's definition of the elements of an offense are dispositive in determining what facts must be proven beyond a reasonable doubt.¹¹³ The dissent argued that the rule coming from *McMillan* should be that when a fact bears on the defendant's punishment and dictates the weight a court should give to that fact in determining the defendant's sentence, it does not have to be proven to a jury beyond a reasonable doubt as an element would.¹¹⁴ The dissent also relies on *Almendarez-Torres*¹¹⁵ in which the 'increase in the maximum penalty' rule was rejected.¹¹⁶

104 See *id.*

105 See *id.*

106 See *id.*

107 See *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1997).

108 See *Apprendi*, 120 S.Ct. at 2384.

109 See *id.*

110 See *id.* at 2385.

111 See *id.*

112 See *id.*

113 See *id.* at 2386.

114 See *id.*

115 See *Almendarez-Torres*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219.

116 See *Apprendi*, 120 S.Ct. at 2386.

Justice O'Connor next confronted the court's decision in *Monge v. California*,¹¹⁷ in which the Court rejects a bright line rule.¹¹⁸ O'Connor also placed significant weight on the Court's decision in *Walton v. Arizona*.¹¹⁹ Justice O'Connor failed to see the difference in removing a life or death decision from the jury and a decision that results in an increased sentence.¹²⁰ O'Connor stressed that the *Walton* decision was upheld on the ground that the Constitution does not require a jury to make the factual findings as a prerequisite to determining a defendant's sentence.¹²¹ Turning to Justice Thomas's distinction of *Walton*,¹²² O'Connor argues that Justice Thomas fails to provide a reason for not extending the same protections he advocates here to capital defendants.¹²³

O'Connor next examined the Court's failure to adequately explain why the Due Process Clause of the Fifth and Fourteenth Amendments, and the jury trial guarantee of the Sixth Amendment require the *Apprendi* holding.¹²⁴ First, O'Connor interpreted the Court's holding to require a fact be submitted to the jury and proven beyond a reasonable doubt, but only where the fact may extend the sentence beyond the prescribed statutory maximum.¹²⁵ O'Connor, however, asserts that a State may still remove the assessment of facts that define narrower ranges of punishment from the jury.¹²⁶ Another possible meaning O'Connor drew from the Court's holding is that the Constitution

¹¹⁷ *Monge v. California*, 524 U.S. at 729.

¹¹⁸ See *Apprendi*, 120 S.Ct. at 2387.

¹¹⁹ See *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). A jury found defendant guilty of first degree murder. A separate sentencing hearing was conducted to determine whether the defendant should receive the death penalty. At this hearing, the judge determines the existence of aggravating and mitigating factors. Thus, the judge, not a jury, decides if a defendant convicted of first degree murder receives the death penalty. The *Walton* Court rejected defendant's argument that the Constitution requires a jury to impose this sentence.

¹²⁰ See *Apprendi*, 120 S.Ct. at 2388.

¹²¹ See *id.* at 2388.

¹²² See *id.* Justice Thomas states that because the Constitution requires legislatures to narrow sentencing discretion in capital-punishment, facts that may rise to capital punishment are different than facts that may give rise to a more severe sentence.

¹²³ See *id.*

¹²⁴ See *id.* at 2389.

¹²⁵ See *id.*

¹²⁶ See *id.* O'Connor explains that under this meaning, the New Jersey statute can be cured simply by drafting the statute with a greater penalty for the crime and if a judge finds a defendant acted with a purpose to intimidate on the basis of race, the defendant may receive a sentence greater than ten years.

requires that a fact be submitted to a jury and proven beyond a reasonable doubt only if it increases the range of punishment beyond that which could legally be imposed, absent that fact.¹²⁷ In criticizing this reading O'Connor points out that the determination of whether a fact increases or decreases a punishment varies with the fact-finder.¹²⁸ O'Connor asserts that these possible meanings show that the statute was invalidated simply because the Court did not approve of the statute's language in expressing its intent as to how the crime should be punished.¹²⁹

O'Connor states that the Court's holding means that any fact which has the effect of increasing the maximum punishment beyond the statutorily permitted range must be submitted to a jury and proven beyond a reasonable doubt.¹³⁰ O'Connor rejects this principle as inconsistent with precedent¹³¹ which holds that a State may leave discretion to a judge as to the defendant's sentence and it does not have to be proven to a jury beyond a reasonable doubt.¹³²

O'Connor worried that the majority's holding will result in the invalidation of decades of sentencing reform.¹³³ O'Connor explained that in response to the evidence of disparate sentences under an indeterminate-sentencing scheme, Congress and State legislatures enacted determinate-sentencing schemes to limited judges' discretion achieve equal treatment.¹³⁴ O'Connor worried that the majority opinion will not only wipe out this reform, but will result in a "flood" of petitions from convicted persons seeking to invalidate their sentences.¹³⁵ O'Connor also examined the possible damaging effect on

¹²⁷ See *id.* at 2390. O'Connor explains that under this meaning, New Jersey could cure the statute by increasing the penalty in the statute and prescribe that if a judge finds that the defendant did not act with a purpose to intimidate on the basis of race, the defendant cannot receive a sentence greater than ten years.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.* at 2391.

¹³¹ See *id.*

¹³² See *id.* at 2392, relying on *Williams v. New York*, 337 U.S. 241, 246, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949), a jury found a defendant guilty of first-degree murder and recommended life in prison. The judge sentenced Williams to death on the basis of additional facts not in the indictment or presented to the jury. The Court rejected Williams's due process challenge explaining that judges have wide discretion in sentencing, and the Constitution does not restrict this discretion.

¹³³ See *id.* at 2394.

¹³⁴ See *id.*

¹³⁵ See *id.* at 2394-95.

federal and states judges given the lack of clarity in the majority's decision.¹³⁶

Lastly, O'Connor explained how she would evaluate the New Jersey statute in question.¹³⁷ First, O'Connor explained that the New Jersey statute does not shift the burden of proof on an essential ingredient of the offense.¹³⁸ Second, O'Connor asserted that the magnitude of the enhancement is constitutionally permissible.¹³⁹ Third, O'Connor pointed out that there is no evidence that the statute was enacted with the purpose of evading the constitutional requirements of an element of an offense.¹⁴⁰ Disagreeing with the majority's view of the "purpose to intimidate requirement" as a mens rea, O'Connor simply viewed the New Jersey statute as taking a motive and allowing that motive to weigh in the judges sentencing decision.¹⁴¹ Therefore, based on past decisions in *McMillan* and *Almenxarez-Torres*, O'Connor would hold the New Jersey statute constitutional and affirm the judgment of the New Jersey Supreme Court.¹⁴²

VIII. JUSTICE BREYER'S DISSENT

Joined by Chief Justice Rehnquist, Justice Breyer also wrote a dissent in which he sees the Court's ruling as a procedural ideal, which is impossible to satisfy.¹⁴³ Breyer believes sentencing guidelines to be a procedural compromise which is necessary for the criminal justice system to function¹⁴⁴ and without which, the system would be unfair and disproportionate.¹⁴⁵ In support of the purpose of this compromise, he reasoned that there are too many relevant sentencing factors to allow every one to be presented to a jury.¹⁴⁶ In addition, Justice Breyer reasoned that if a jury had to consider every factor, the defendant could be placed in a position of denying his guilt, while offering proof about

¹³⁶ See *id.* at 2395.

¹³⁷ See *id.*

¹³⁸ See *id.* at 2396.

¹³⁹ See *id.* at 2395.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 2396.

¹⁴² See *id.*

¹⁴³ See *id.* at 2397.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 2397-98.

how the crime was committed.¹⁴⁷

Justice Breyer also stated that to determine which sentencing factors to take into account to determine a defendant's sentence,¹⁴⁸ experience, relevance, and proportionality guide judges.¹⁴⁹ He also looked toward the legislature's decision of what elements are defined in the statute.¹⁵⁰ Noting that legislators look toward common law, history, and social needs, Breyer noted that legislatures have been left with freedom to determine what to define as elements of certain statutory offenses.¹⁵¹ In examining how legislators address sentencing discretion problems, Breyer noted that sentencing commissions have been created to promote more uniform sentencing decisions.¹⁵² In addition, Breyer pointed out that legislatures also have limited the use of certain factors in sentencing decisions, which Breyer thinks is a category the New Jersey statute falls under.¹⁵³ Breyer also questioned why the Constitution would require the majority's holding.¹⁵⁴ Breyer asserted that leaving sentencing discretion with judges is consistent with the Constitution.¹⁵⁵ He questions how the majority could not object to the creation of sentencing guidelines, and at the same time find unconstitutional a judge exercising the same discretion.¹⁵⁶ Breyer asserted that the solution is not limiting the power of legislators in enacting sentencing factors, but instead, the creation of sentencing rules with procedural protections in mind.¹⁵⁷

Although Breyer recognized that the current sentencing system is far from perfect, he believes that the majority's increased protection provides little help.¹⁵⁸ Breyer worried that the majority's rule

147 *See id.* at 2398.

148 *See id.*

149 *See id.*

150 *See id.*

151 *See id.* at 2399.

152 *See id.*

153 *See id.*

154 *See id.* at 2400.

155 *See id.* at 2399.

156 *See id.* at 2400. Breyer recognizes the majority's response that preventing the legislature from exercising broad authority from transforming facts that are elements of a crime into sentencing factors would remove constitutionally mandated procedural protections. Breyer responds by pointing out that the same problem exists under traditional sentencing law, which gives a judge broad discretion by providing no sentencing factors to consider, leading to the same end result.

157 *See id.* at 2401.

158 *See id.*

encourages legislatures who wish to control the sentencing process will simply create minimums, resulting in less procedural fairness.¹⁵⁹ Breyer also worries that this decision will create uncertainty about the constitutionality of similar statutes and of the confinements of those punished under such statutes.¹⁶⁰ Lastly, Breyer expressed his concern that the majority's decision will impede legislative efforts to provide guidance in sentencing.¹⁶¹ In Breyer's view, the New Jersey statute is constitutional.¹⁶²

IX. CONCLUSION

The decision in *Apprendi* represents a monumental change in Constitutional law because judges may no longer have the discretion to increase a prisoner's sentence beyond the maximum allowed in the statute, without first submitting the facts to a jury.¹⁶³ Specifically dealing with hate crimes, the *Apprendi* Court reasoned that any fact that increases the penalty for a crime beyond its prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt.¹⁶⁴ O'Connor's fear of a "flood" of petitions has become a reality. A significant number of cases have been remanded for further consideration in light of *Apprendi*. This decision has brought an influx of prisoner's suits requesting that their sentence be thrown out or modified. Although courts are not likely to apply *Apprendi* when the defendant's sentence is within the prescribed statutory limit, the decision left little guidance for the courts in handling this problem.

The Court additionally was silent as to whether or not the law should be applied retroactively. As a result, the circuit courts are split in the application of this decision, with some refusing to apply the decision retroactively, while others are willing to. In addition, while some sentences have been modified or set aside, in others it has not made a difference.

It remains to be seen what will happen as lower courts are continuing to interpret the decision and apply it differently. Because the Court was ambiguous in exactly what sentencing factors and

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 2402.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

statutes the decision applies to, depending upon the jurisdiction, some defendants who are challenging their sentences are benefiting, while others are not.