

Justice Stevens' Role in Making Federal Sentencing Matters More Flexible

# A Trail-Blazing Opinion

By Adam Sheppard

Five years before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), Justice Stevens laid the groundwork to render the Federal Sentencing Guidelines advisory, not mandatory.

In 1984 Congress passed the Sentencing Reform Act (18 U.S.C.A. §3553). The law created the Sentencing Commission which promulgated the Federal Sentencing Guidelines. On November 1, 1987, the Guidelines became effective. The Guidelines were designed to minimize the disparity of sentences for those convicted of similar crimes. The Sentencing Reform Act stated that the court "shall impose a sentence of the kind, and within the range" established by the Guidelines (although the court could depart from the guidelines in specific, limited instances). 18 U.S.C.A. §3553(b). Under the guidelines, judges are required to decide the existence of certain factors—such as the defendant's criminal history level, whether the defendant's conduct caused bodily injury to another, the total amount of drugs or money for which the defendant is responsible—and then cross-reference those factors with the offense of conviction. This calculation produces a narrow sentencing range from a box grid called the "Sentencing Table."

The Guidelines' sentencing scheme had remained largely immune from constitutional attack until Justice Stevens' opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). At issue in *Apprendi* was the constitutionality of a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the trial judge found, by a preponderance of the evidence, the crime to have been committed "with a purpose to intimidate...because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*, at



468-469. The trial judge in *Apprendi* had found had that the defendant's crime was racially motivated and imposed a 12-year sentence. The United States Supreme Court set aside the sentence. The Court held that the judge's actions in imposing a sentence greater than the prescribed statutory maximum based on a fact that had not been submitted to the jury violated the defendant's Sixth Amendment right to trial by jury and the due process rights guaranteed to him by the Fourteenth Amendment. Justice Stevens announced a new bright-line rule: "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." *Id.* at 490.

*Apprendi* was a 5-4 decision. An unusual coalition of justices formed the majority. In addition to Justice Stevens, the majority consisted of Justices Scalia, Thomas, Souter, and Ginsburg. These strange bedfellows would reunite to form the majority in *Blakely v. Washington*, 542 U.S. 296 (2004) and in *United States v. Booker*, 543 U.S. 220 (2005).

In 2004, the Court decided *Blakely v. Washington*. In *Blakely*, the Court held that Washington's determinate sentencing scheme, which was similar to the Federal Sentencing Guidelines, violated the Sixth Amendment (as it was construed in *Apprendi*). The Court held that "the 'statu-

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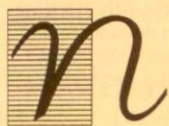
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tory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303.

After *Blakely*, the writing was on the wall for the Federal Sentencing Guidelines. In 2005, in *Booker*, the Court directly addressed the constitutionality of the Federal Sentencing Guidelines. *Booker* was a "split-majority" opinion. Justice Stevens wrote Part I of *Booker*, which held that application of the Federal Sentencing Guidelines violated the Sixth Amendment in light of the principles set forth in *Apprendi*.

Justice Breyer authored part II of *Booker* (known as the "remedial opinion") which answered the question of how to remedy the constitutional infirmity which had been identified by Stevens. The majority in the remedial opinion held that were the Guidelines merely advisory, not mandatory, then their application would not implicate the Sixth Amendment. The mandatory nature of the Guidelines was thus overturned.

Justice Stevens' analysis in *Apprendi* laid the bedrock for *Booker*, which restored considerable discretion to federal court judges in sentencing matters. *Apprendi* is widely credited with triggering this sea-change in sentencing law. ■

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Condolences to the family and friends of **Nate Brenner, Alfred E. Gallo, Lawrence Gray** and **Clyde Murphy**. ■