

JUSTICE JOHN PAUL STEVENS (Ret.)

Washington University in St. Louis
School of Law

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SOME THOUGHTS ABOUT A FORMER COLLEAGUE

Wiley Rutledge, for whom I served as a law clerk during the October 1947 Term of the Supreme Court, would sometimes reminisce about his experiences teaching at the Washington University School of Law. One of his students had been Clark Clifford, who was an influential member of the District of Columbia Bar while I was a law clerk, and who later served as Secretary of Defense in the Johnson Administration. The Justice recalled teaching a class in which he eventually realized that Clifford had been the leader of a group of students who occasionally engaged in group moaning during class. I do not remember either the purpose of the moans, how Justice Rutledge identified the moaners, or his reaction to them, but I do recall how much the Justice relished his memory of

the moanings when he later recounted the prank with his law clerks. I have a similar favorable memory of countless conversations with the Justice that represented one source of the admiration and affection that he generated during that year. It is a pleasure to be here at the law school where he taught and of which he had such happy memories.

Today I plan to say a few words about my former colleague, Nino Scalia, and a few of the cases we decided during the 28 years that we served together on the Court. Nino was well liked by his colleagues across the judicial spectrum. I first learned this in 1982, during a long telephone conversation with my friend Luther Swygert, a liberal judge and thinker on the Court of Appeals for the Seventh Circuit. Judge Swygert had just returned from a week as a visiting judge on the Court of Appeals for the District of Columbia Circuit, and I remember him telling me how much he had enjoyed that sitting, particularly because

he had become a good friend of then-Judge Scalia. Nino's friendship with his colleagues, including both those who frequently disagreed with his views and those who more regularly shared his views, is legendary.

I was particularly fortunate to be Nino's neighbor on the bench at the Supreme Court. There was one day on which we heard consecutive arguments about the admissibility of confessions. In one of the cases the defendant had freely admitted facts establishing his guilt while adamantly refusing to sign a written statement accurately quoting those facts, and in the second case the defendant had refused to acknowledge his guilt of one crime while volunteering a detailed description of a more serious offense. Nino's whispered reaction to those bizarre cases was "This is our dumb defendants day." While I had the good fortune to sit next to him during arguments, all of our colleagues shared the opportunity to enjoy his incomparably spontaneous sense of humor.

I shall begin by commenting on one of the many issues about which Justice Scalia and I both wrote significant opinions: the constitutional limits on a trial judge's power to select the appropriate sentence for a defendant convicted of a crime. Nino's primary concern was protecting the defendant's right to a jury trial, whereas I was more focused on the requirement that the facts supporting a prescribed sentence be established by proof beyond a reasonable doubt. Generally, but not always, both approaches led to the same result. I had a chance to develop my thoughts on this topic in a dissent written in 1986, a few months before Nino joined our Court.

In 1982 Pennsylvania enacted a mandatory minimum sentencing law providing that anyone convicted of certain felonies was subject to a sentence of at least five years if the sentencing judge found by a preponderance of the evidence that the defendant

"visibly possessed a firearm" during the commission of the offense. A Pennsylvania sentencing judge found the statute unconstitutional. The Pennsylvania Supreme Court reversed, and our Court granted certiorari in *McMillan v. Pennsylvania*, 477 U. S. 79 (1986).

In his opinion for a majority of the Court, Justice Rehnquist upheld the statute over the dissents of four justices. The majority reasoned that the requirement of proof beyond a reasonable doubt applied only to facts defining the crime charged in the indictment and did not apply to a sentencing factor that only came into play after the jury had found the defendant guilty. In reaching its conclusion, the majority relied on the fact that the sentencing factor did not raise the maximum penalty for any crime but rather required the sentencing judge to impose a particular minimum penalty within the range already prescribed by statute.

But, as I argued in my dissent, there is a vast difference between sentencing factors that bear on a discretionary decision to select a punishment within the range authorized by statute and elements of a crime mandating a higher minimum sentence. The *McMillan* majority's broad conception of sentencing factors allowed the States to evade the fundamental rule that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970).

The importance of the distinction between elements and sentencing factors was magnified by the adoption of mandatory sentencing guidelines pursuant to the Sentencing Reform Act of 1984. Under the mandatory guidelines, judges retained discretion to select a sentence within a given range that was determined by objective criteria, such as the type of offense and the

defendant's criminal history. A fact that required a judge to impose a sentence within a higher range would be comparable to an element of the crime that increased a mandatory minimum sentence. Whereas under the Pennsylvania statute in *McMillan* a defendant's visible possession of a firearm increased the mandatory minimum, under the guidelines comparable aggravating facts moved a convicted defendant's range of permissible sentences into a higher category that had both a higher mandatory minimum and a higher maximum.

In *United States v. Watts*, 519 U. S. 148 (1997) (*per curiam*), this Court reversed two judgments by the Court of Appeals for the Ninth Circuit. The Ninth Circuit had held that it was unconstitutional for a trial judge, when calculating the sentencing range for a defendant convicted on one count but acquitted on another, to consider evidence that the defendant was actually guilty of the offense for which the jury had returned a "Not Guilty" verdict. A contrary rule, the

court reasoned, would effectively punish the defendant "for an offense for which she has been acquitted." 519 U. S., at 151.

A majority of the Supreme Court, however, determined that a sentencing judge may consider acquitted conduct in calculating a defendant's guidelines range as long as the Government establishes that conduct by a preponderance of the evidence. I dissented in *Watts*. In my view, the majority's holding illustrated the problematic consequences of applying sentencing factors in conjunction with the "mandatory" guidelines.

My dissent explained that because the defendant was a first-time offender with no criminal history, her guidelines sentencing range was based only on the offense or offenses for which she was to be punished in this case. The defendant was found guilty of aiding and abetting the distribution of one ounce of cocaine

on May 8, 1982, but not guilty of participating in a similar transaction involving five ounces of cocaine on May 9, 1982. If the defendant had been sentenced based on the guilty verdict alone, the judge could have imposed a sentence of 15-21 months. Instead, however, the district court found by a preponderance of the evidence that the defendant had also participated in the May 9 transaction of which she had been acquitted, and so her sentencing range increased to 27-33 months. I wrote that:

"[a]s the District Court applied the Guidelines, precisely the same range resulted from the acquittal as would have been dictated by a conviction. Notwithstanding the absence of sufficient evidence to prove guilt beyond a reasonable doubt, the alleged offense on May 9 led to the imposition of a sentence six months longer than

the maximum permitted for the only crime that provided any basis for punishment." *Id.*, at 163-164.

Neither the Court's prior cases nor the text of the sentencing statute warranted this perverse result. The majority's reasoning effectively robbed an acquittal of any practical significance for defendants who were convicted of at least one offense. If a sentencing judge could increase the entire range of penalties applicable to a defendant based on acquitted conduct shown by only a preponderance of the evidence, the requirement that a jury find each criminal charge proven beyond a reasonable doubt would mean little in practice.

Although Justice Scalia did not join my dissent in *Watts*, he did join my opinion for the Court in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and also wrote a concurrence in response to the dissents. *Apprendi* was

a case in which the jury found the defendant guilty of possession of a firearm for an unlawful purpose, a crime punishable by imprisonment for between five and ten years; thereafter, the trial judge found by a preponderance of the evidence that the defendant had acted with racial animus and was therefore eligible for imprisonment between 10 and 20 years. The sentencing factor involving racial animus thus allowed the judge to impose a 12 year sentence, two years higher than the statutory maximum authorized by the jury's guilty verdict.

My reaction to the New Jersey statute that allowed the judge to impose a higher sentence than authorized by the jury's verdict was the same as my reaction to the majority's decision in *McMillan*. I have always thought that using a sentencing factor to increase either a mandatory minimum sentence or the permissible maximum sentence violates the rule requiring proof

beyond a reasonable doubt of every fact necessary to support a finding of guilt.

It seemed to me that Justice Scalia also would have shared this view; in his concurring opinion in *Jones v. United States*, 526 U. S. 227, 253 (1999) (Scalia, J., concurring), he declared "that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a defendant is exposed." Nevertheless, when Justice Scalia wrote the opinion for the Court in *Blakely v. Washington*, 542 U. S. 296 (2004)—the case that ultimately led to the conversion of the sentencing guidelines from a mandatory system to an advisory one—he relied only on the Sixth Amendment right to a jury where a fact increases the permissible maximum sentence.

It was not until 2002, in *Harris v. United States*, 536 U. S. 545 (2002), that the Court squarely confronted the question whether the distinction between

McMillan and *Apprendi* should survive. That question produced an interesting breakdown of views among members of the Court. Justice Scalia joined Justice Kennedy's opinion maintaining the distinction between sentencing factors that increase the minimum penalty for a crime and offense elements that raise the permissible maximum sentence. Concurring separately, Justice Breyer made two important points. First, he recognized that as a matter of logic there should not be a constitutional difference between facts that increase the mandatory minimum sentence and those that increase the statutory maximum. And second, Justice Breyer observed that as a matter of sentencing policy, mandatory minimums are particularly harmful insofar as they frustrate individualized sentencing, undermine proportionality in punishment, and enhance the leverage of prosecutors. I share Justice Breyer's views on both points, though I would have extended *Apprendi* to mandatory minimum sentences.

Although Justice Thomas and Justice Scalia were often aligned in their views, *Harris* found them on opposite sides of the constitutional question. Justice Thomas, joined by Justices Souter, Ginsburg and myself, dissented on the ground that the distinction between facts increasing a mandatory minimum and facts increasing a statutory maximum could not be maintained after *Apprendi*. As the dissent put it:

“Whether one raises the floor or raises the ceiling [for a given sentence] it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.” 536 U. S., at 579 (Thomas, J., dissenting).

It took another decade, but Justice Thomas’s forceful reasoning in *Harris* ultimately carried the day in the 2013 case *Alleyne v. United States*, No. 11-9335 (2013). In Justice Thomas’s opinion for the Court, the majority finally abandoned *McMillan* and *Harris* to hold

that facts increasing a defendant's mandatory minimum sentence must be proved to a jury beyond a reasonable doubt.

Justice Alito and Chief Justice Roberts both dissented. Chief Justice Roberts, joined by Justices Scalia and Kennedy, would have upheld the distinction between sentencing factors that increase the mandatory minimum, which he views as permissible, and those that increase the statutory maximum, which he views as a violation of the Sixth Amendment. The Chief focused primarily on the right to have a jury find facts that increase the maximum sentence, but that logic overlooks the vital due-process guarantee that every fact exposing the defendant to a higher penalty, including a higher minimum sentence, must be proved beyond a reasonable doubt. The standard of proof required by the Due Process Clause is as important as the right to a jury in ensuring fairness and accuracy in sentencing.

At least where increases to the statutory maximum are concerned, however, a majority of the current Court is on board with *Apprendi*'s rule that the Sixth Amendment requires jury findings of fact beyond a reasonable doubt. This past January, the Court decided *Hurst v. Florida*, No. 14-7505 (Jan. 12 2016), which relied on *Apprendi* and its progeny to invalidate an aspect of Florida's capital sentencing scheme. Florida law had permitted judges to make factual findings that render a defendant eligible for the death penalty. Seven Justices, including Justice Scalia, rejected that system as unconstitutional and held that the Sixth Amendment requires a jury to find the facts necessary for imposition of capital punishment. *Hurst* demonstrates the consensus that has developed around *Apprendi*'s rule since it was first announced in a 5-4 decision 16 years ago.

While Justice Scalia's views at times overlapped with my own in the Sixth Amendment context, we had

profound disagreements in other areas of the law. I shall say a few words about three of those disagreements, which involved the Eighth Amendment, legislative redistricting, and the role of original intent in interpreting the Second Amendment.

Justice Scalia and I often came out differently on Eighth Amendment questions, and our disagreements began early in Justice Scalia's tenure. In the 1991 case *Harmelin v. Michigan*, 501 U. S. 957 (1991), he wrote an opinion, joined by Chief Justice Rehnquist, rejecting the longstanding view that the Eighth Amendment contains a proportionality guarantee. Justice Scalia discarded the line of cases supporting the principle of Eighth Amendment proportionality as "simply wrong" and thus not deserving, in his view, of *stare decisis*. Fortunately, only Chief Justice Rehnquist joined that part of his opinion. I continue to disagree both with Justice Scalia's rigid reading of the Eighth Amendment

and with his willingness to dispense with the usual constraints of *stare decisis* in that case.

Justice Scalia and I likewise differed on the question whether challenges to partisan gerrymanders in legislative districting raise justiciable questions. Writing for a four-justice plurality in the 2004 case, *Vieth v. Jubelirer*, 541 U. S. 267, Justice Scalia said the issue was "not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy." 541 U. S., at 292. I argued in dissent that those questions can be answered by applying the same standards to political gerrymanders that the Court applies to racial gerrymanders. Justice Scalia's answer to my argument rested on his appraisal of the merits of the two different types of gerrymandering claims rather than any suggestion that one is more difficult for courts to adjudicate than the other. In his view, "setting out to segregate voters

by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary."

Id., at 293. In my view, one does go too far whenever there is no discernible explanation for a district boundary other than one party's political advantage. Our disagreement did not really turn on any difference in our appraisal of judges' capacity to identify different kinds of gerrymanders; it turned on our differing views about the harmful character of the two species of gerrymander. Even if one believes racial gerrymandering is more harmful than political gerrymandering, that belief does not affect a judge's ability to recognize either type.

My view that partisan and racial gerrymanders should be assessed under the same standards reflects the frequent artificiality of attempting to distinguish between a districting plan motivated predominantly by race versus one motivated by politics—especially as

race is often used as a proxy for partisanship. As I noted in my *Vieth* dissent,

[T]he essence of a gerrymander is the same regardless of whether the group is identified as political or racial. Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents. In seeking the desired result, legislators necessarily make judgments about the probability that the members of identifiable groups—whether economic, religious, ethnic, or racial—will vote in a certain way. The overriding purpose of those predictions is

political. 541 U. S., at 335-336

(Stevens, J., dissenting).

The final source of disagreement between Justice Scalia and myself on which I'll comment today concerned the Second Amendment, and in particular whether and how to interpret that provision in light of the framers' original intent. Our views diverged on two critical points. The first point was whether the framers understood the Second Amendment to protect the right of the people of each State to maintain a well-regulated militia, as I think, or whether the framers instead understood that Amendment as protecting a right of private civilians to own and use firearms for nonmilitary purposes, as Justice Scalia thought.

A few days ago, I finished reading Joseph Ellis' new book, "The Quartet," which shed light on this debate. Ellis' book is an interesting account of the part played by George Washington and the three authors

of the Federalist Papers in the important decisions made between 1783 and 1789—when the Constitution was drafted, ratified, and supplemented by the Bill of Rights. The final chapter of Ellis's book addresses the original understanding of the Second Amendment. At page 211, Ellis wrote:

“Finally, under the rubric of his fourth proposed amendment, Madison wrote the following words: ‘The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.’ This eventually, after some editing in the Senate, became the Second Amendment in the Bill of Rights, and

its meaning has provoked more controversy in our own time than it did in 1789.

"Madison was responding to recommended amendments from five states, calling for the prohibition of a permanent standing army on the grounds that it had historically proven to be an enduring threat to republican values. It is clear that Madison's intention in drafting his proposed amendment was to assure those skeptical souls that the defense of the United States would depend on state militias rather than a professional, federal army. In Madison's formulation, the right to bear arms was not inherent but derivative, depending on service in

the militia. The recent Supreme Court decision (*Heller v. District of Columbia*, 2008) that found the right to bear arms an inherent and nearly unlimited right is clearly at odds with Madison's original intentions." Joseph Ellis, *THE QUARTET* 211-212 (2015).

The second point of disagreement between Justice Scalia and myself speaks to a much broader difference in our approaches to constitutional analysis—namely, whether originalism should provide the sole means of interpreting the Constitution. As I am sure you know, Thomas Jefferson and John Adams, both died on July 4, 1826—fifty years after Jefferson authored the Declaration of Independence. Ellis closes his volume with this statement written by Jefferson in his senior years:

"Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it and labored with it. It deserved well of its country. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered . . . institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him as a boy as civilized society to remain ever under

the regime of their barbarous
ancestors." *Id.*, at 219.

Ellis had this to say about Jefferson's statement:

"Jefferson spoke for all the most prominent members of the revolutionary generation in urging posterity not to regard their political prescriptions as sacred script. It is richly ironic that one of the few original intentions they all shared was opposition to any judicial doctrine of 'original intent.' To be sure, they all wished to be remembered, but they did not want to be embalmed." *Id.*, at 220.

Thank you for your attention.