AT THE LIBRARY OF THE APPELLATE GODS

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In his 2019 autobiography, Justice John Paul Stevens called his landmark United States Supreme Court sentencing decision in *Apprendi v. New Jersey*[1] "what may well be the most significant majority opinion I authored as a justice."[2] *Apprendi* was my case. I represented the respondent, the State of New Jersey, in defending the constitutionality of New Jersey's Hate Crime Statute.[3] (Spoiler alert: I lost). So, when Justice Stevens's private papers on the *Apprendi* litigation were publicly released in early May 2023 and made available for review at the Library of Congress in Washington, D.C.,[4] I jumped at the opportunity to return to the mythical realm of "*Apprendi*-land."[5]

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1. 530 U.S. 466 (2000).

2. JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 357 (Bos.: Little, Brown & Co. ed., 2019).

3. N.J. Stat. Ann. § 2C:44-3e (deleted by amendment, P.L. 2001, c.443).

4. Over 1,200 boxes holding Justice Stevens's personal papers spanning his judicial career from 1939 to 2019 are archived at the Library of Congress. *See John Paul Stevens Papers*, LIBR. OF CONG. (Oct. 2023), https://findingaids.loc.gov/exist_collections/ead3pdf/mss/2019/ms019044.pdf.

5. Justice Antonin Scalia coined the term "*Apprendi*-land" in his concurring opinion in *Ring v. Arizona*, 536 U.S. 584, 613 (Scalia, J., concurring) ("There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.").

The important federal question presented in *Apprendi* was whether New Jersey's Hate Crime Statute deprived defendant Charles C. Apprendi, Jr., of his right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution.[6] The Hate Crime Statute authorized the trial judge, not the jury, to make the factual finding that Apprendi's violent crime against a Black family was racially motivated.[7] The trial judge's finding of racial bias, in turn, increased Apprendi's prison sentence by two years above the statutory maximum term of ten years for the underlying weapons offense to which Apprendi pled guilty at the trial court level.[8] The Supreme Court of New Jersey found the Hate Crime Statute was constitutional on the grounds that racial bias was a type of motive, and motive was a "very traditional sentencing factor" for the trial judge to consider.[9]

The United States Supreme Court reversed the New Jersey Supreme Court's decision, striking down New Jersey's Hate Crime Statute as unconstitutional.[10] Justice Stevens announced the holding in *Apprendi* from the bench on Monday, June 26, 2000, during the final "blockbuster" week of the Court's term:

> We conclude that the fact that has that importance in the sentencing scheme that it raises the maximum sentence from 10 to 20 years is one that has to be found by the jury and on the standard of proof beyond a reasonable doubt.
>
> Justice Scalia has filed a concurring opinion. He ends with the sentence, "[t]he guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by

6. *Apprendi*, 530 U.S. at 475–76.
7. *Id.* at 470.
8. *State v. Apprendi*, 159 N.J. 7, 11 (1999).
9. *Id.* at 24.
10. *Apprendi*, 530 U.S. at 497.

> the jury." That is the essence of the holding of the majority.[11]

The *Apprendi* decision begat the precedential *Apprendi* 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."[12]

Justice Stevens's personal papers on *Apprendi* are viewable only in person at the Manuscript Reading Room inside the James Madison Memorial Building of the Library of Congress. The personal papers of more than three dozen Justices—including John Jay, John Marshall, Thurgood Marshall, Hugo Black, Earl Warren, Harry Blackmun, and William J. Brennan—are also archived in the Madison Building. Unlike the ornate Beaux-Arts style Thomas Jefferson Building next door, the Madison Building is a hulking, plain white marble box, more Costco than Versailles. Constructed in the 1970s, its minimalist design has all the warmth and charm of Soviet-era Brutalist architecture.

I impatiently waited for eight weeks following the release of Justice Stevens's papers to make the pilgrimage from my home in New Jersey to Washington, D.C. The Supreme Court's most consequential decisions are typically issued in May and June, the final two months of its term, and the nation's capital is awash with Supreme Court journalists, practitioners, and academics. I presumed these SCOTUS fanatics would flock to the Library of Congress in their free time when the Court was not in session to research Justice Stevens's newly available papers on a host of Supreme Court decisions. It's first come, first served at the Library of Congress, and I wasn't taking any chances that another *Apprendi* junkie might be there at the same time as me.

My husband Steven and I arrived at the Madison building on a humid, hair-frizzing morning in early July

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11. *Apprendi v. New Jersey: Opinion Announcement*, OYEZ, at 2:30–3:15 (June 26, 2000) [hereinafter *Opinion Announcement*] (quoting *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring)), www.oyez.org/cases/1999/99-478.

12. *Apprendi*, 530 U.S. at 490.

2023. Chiseled into the exterior wall next to the C Street entrance is this quote by James Madison, the fourth president of the United States: "What spectacle can be more edifying or more seasonable than that of liberty & learning, each leaning on the other for their mutual & surest support?"[13] I was about to find out.

The security guard in the lobby directed us to the "Reader Registration Station," a small, windowless office where we obtained our official Library of Congress reader identification cards. The unflattering head shots rivaled those on our New Jersey driver licenses. ID cards in hand, we walked through the double glass doors leading into the Manuscript Reading Room.

I expected a room far more grandiose than the nondescript space where I stood. This could have been the reading room of any public library built in the United States in the 1970s, complete with a drop ceiling of sound-dampening acoustic panels, drab commercial-grade carpet, harsh fluorescent lights, and oak veneer tables with spindly black metal legs. In vivid contrast, the Main Reading Room of the Thomas Jefferson Building is a lavish, soaring rotunda with Roman archways, clerestory windows, and marble statues depicting historical and allegorical figures. That is the type of lofty cathedral the late Justice Stevens's personal papers deserved.

I was too excited, though, to dwell on the Madison Reading Room's humdrum design. I was moments away from reading Justice Stevens's papers on my case. Having listened to the June 26, 2000, audio recording of Justice Stevens's *Apprendi* opinion announcement[14] dozens of times, it would be his voice in my head doing the narration.

Before we could approach the circulation desk, my husband and I were required to stash all our belongings, except our cell phones and laptops, in a beige metal

13. Carol M. Highsmith, *[Exterior view. Detail at main entrance. Quotation from James Madison, beginning "What spectacle can be more edifying . . . ." Library of Congress James Madison Building, Washington, D.C.]*, *in* LIBR. OF CONG. (2007), https://www.loc.gov/item/2007687172/.

14. *See generally Opinion Announcement*, *supra* note 11.

locker. We were permitted to photograph and scan original documents but could not use ink pens that might indelibly mar them. Sharpened pencils and scrap paper were provided instead. Nor could we bring in purses, backpacks, or books for fear that original documents might be smuggled out. Surveillance cameras dotting the ceiling and the watchful eyes of the library staff kept us in check.

Backpacks securely stowed in a locker, I stopped at the circulation desk and requested the *Apprendi* documents, then anxiously waited at an assigned table for their arrival. A few minutes later, a librarian rolled a black metal cart bearing Boxes #826 and #827 of the "The John Paul Stevens Papers" to our table. Inside these treasure troves were five *Apprendi* folders to sift through. Per library rules, only one folder at a time could be physically removed from the boxes. I gently lifted out the first folder and immediately struck gold. The first document inside the first folder was a preprinted tally sheet with Justice Stevens's hand-entered check marks indicating which Justices voted to grant certiorari in *Apprendi*.

In the United States Supreme Court, majority rules, unless it doesn't. At least five of the nine justices must vote to publicly deliver the controlling opinion of the Court or to stay an execution in a death penalty case.[15] Under the unofficial "rule of four," however, it takes the votes of only four Justices to grant an applicant's petition for certiorari and bring a case before the Court for a decision on the merits.[16]

On Friday, November 26, 1999, the nine Justices of the Rehnquist Court met in their wood-paneled conference room in Washington, D.C., to consider the legal fate of 241 certiorari petitioners desperate to have their cases heard by the highest court in the land. One of these

15. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Mar. 23, 2025).

16. *Id.*; *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Stewart, J., concurring).

desperate petitioners was Charles C. Apprendi, Jr., who asked SCOTUS to find that New Jersey's Hate Crime Statute infringed upon his Sixth Amendment right to a jury trial.[17]

Regardless of which Justice votes to grant or deny certiorari, the final count is not publicly recorded. Even the parties to the litigation are not told which four or more Justices agreed to hear their case unless another Justice files a written dissent. SCOTUS's November 29, 1999, order in *Apprendi* was short and to the point: "The petition for a writ of certiorari is granted."[18] There were no written dissents.

My colleagues in the New Jersey Division of Criminal Justice and I were fairly certain that whichever Justices voted to grant certiorari did so because they believed the Hate Crime Statute deprived Charles Apprendi of his Sixth Amendment right to a jury trial. Had these same Justices believed that the Hate Crime Statute was constitutional, there would be no practical reason for them to grant certiorari simply to affirm the Supreme Court of New Jersey's decision below. Without confirmation from SCOTUS, however, we could only speculate.

This lack of transparency is par for the course in the United States Supreme Court. Members of the executive branch must follow strict rules for the preservation of work product and its release to the public pursuant to the Presidential Records Act,[19] but federal judges are not similarly required to retain any of their papers, let alone release them for public scrutiny. Most Justices who do choose to donate their internal work product and correspondence to libraries and archives place narrow restrictions on the public release dates of their documents.

17. Petition for Writ of Certiorari at 4, *Apprendi*, 530 U.S. 466 (No. 99-478).

18. Letter from William K. Suter, Clerk, U.S. Sup. Ct., to author (Nov. 29, 1999) (on file with author); *see also Apprendi v. New Jersey*, 528 U.S. 1018 (1999).

19. 44 U.S.C. §§ 2201-2209.

Aside from Justice Stevens's papers, the personal documents of the remaining eight Justices of the *Apprendi* Court are unavailable to the public for the foreseeable future. The late Chief Justice William Rehnquist's private papers on SCOTUS cases, archived at the Hoover Institution at Stanford University, remain closed during the lifetime of any member of the Supreme Court who served with him.[20] The same limitation applies to the late Justice Antonin Scalia's private papers, archived at the Harvard Law School Library,[21] and the late Justice Ruth Bader Ginsburg's private papers, archived at the Library of Congress.[22]

The late Justice Sandra Day O'Connor's private papers on SCOTUS cases heard between 1991 and 2005, archived at the Library of Congress, are unavailable to researchers as long as any Justice who participated in the decision of a case continues to serve with the Supreme Court;[23] Justice Clarence Thomas still sits on the bench. The late Justice David Souter's papers, donated to the New Hampshire Historical Society, will not be publicly accessible for fifty years after his death.[24] Retired Justices Anthony Kennedy and Stephen Breyer

20. *Rehnquist (William H.) papers*, ONLINE ARCHIVE OF CAL., https://oac.cdlib.org/findaid/ark:/13030/kt4z09r7tn/ (last visited Mar. 23, 2025).

21. Sarah Wharton, *Antonin Scalia Papers*, HARV. L. SCH. LIBR. (Oct. 17, 2023), https://guides.library.harvard.edu/scaliapapers.

22. *Ruth Bader Ginsburg Papers*, LIBR. OF CONG. (2020), https://findingaids.loc.gov/exist_collections/ead3pdf/mss/2019/ms019019.pdf.

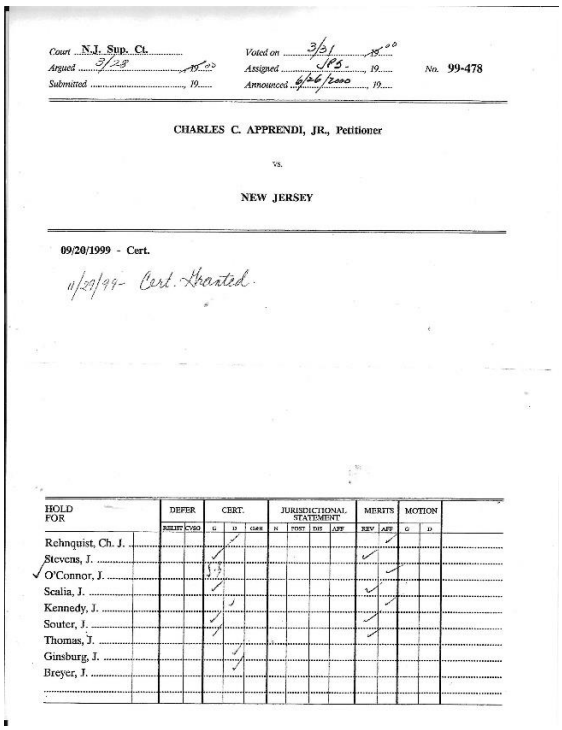
23. *Sandra Day O'Connor papers, 1944-2008*, LIBR. OF CONG., https://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms017018&_faSection=overview&_faSubsection=did&_dmdid= (last visited Mar. 23, 2025); *see also* Brett Zongker & Maria Peña, *Supreme Court Justice Sandra Day O'Connor Papers Open for Research at the Library of Congress*, LIBR. OF CONG. (Mar. 11, 2024), https://newsroom.loc.gov/news/supreme-court-justice-sandra-day-o-connor-papers-open-for-research-at-the-library-of-congress/s/9af4cba4-7a52-4023-ae5e-83aa61b857ad.

24. *David H. Souter Papers*, N.H. HIST. SOC'Y, https://www.nhhistory.org/object/266663/papers (last visited Mar. 23, 2025); *see also* Stephen Wermiel, *SCOTUS for law students: Supreme Court mysteries and the justices' papers (Corrected)*, SCOTUSBLOG (July 2, 2018, 1:19 PM), https://www.scotusblog.com/2018/07/scotus-for-law-students-supreme-court-mysteries-and-the-justices-papers/.

have not publicly announced when or if their papers will be released.

And that is why it took 24 years after SCOTUS's November 29, 1999, order to learn definitively from Justice Stevens's tally sheet which four of the nine Justices voted to grant certiorari in *Apprendi*: Stevens, Scalia, Souter, and Thomas. Voting to deny certiorari were Chief Justice Rehnquist and Justices Kennedy, Ginsburg, and Breyer.

Image 1. Front side of Justice John Paul Stevens's Tally Sheet in *Apprendi*



Court N.J. Sup. Ct. Voted on 3/31/ 19 00
Argued 3/28/ 19 00 Assigned 4/5/ 19 00 No. 99-478
Submitted 19 Announced 6/26/2000 19

CHARLES C. APPRENDI, JR., Petitioner

vs.

NEW JERSEY

09/20/1999 - Cert.

11/29/99 - Cert. Granted

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION	
	RELIST	CVSG	G	D	CAVS	N	POST	DIS	AFF	REV	AFF	G	D
Rehnquist, Ch. J.				✓							✓		
Stevens, J.				J-3									
✓ O'Connor, J.													
Scalia, J.				✓							✓		
Kennedy, J.					✓								
Souter, J.				✓							✓		
Thomas, J.				✓							✓		
Ginsburg, J.					✓								
Breyer, J.					✓								

Justice Stevens's hand-written notation, "J-3," appears next to Justice O'Connor's name on the tally sheet. "J-3" is shorthand for "Join Three," meaning Justice O'Connor would vote to grant certiorari only if there were three others so inclined and a fourth vote was

needed.[25] Because her vote was not required to grant certiorari in *Apprendi*, Justice O'Connor essentially abstained.

As my colleagues and I had suspected, the four Justices who voted to grant certiorari in *Apprendi* would later vote to find the Hate Crime Statute unconstitutional. I was surprised, however, to see Justice O'Connor leaning toward granting certiorari. She would later vote to find the Hate Crime Statute constitutional and vigorously dissented in *Apprendi*.[26]

Perhaps at the time she reviewed Charles Apprendi's petition, Justice O'Connor believed that she could assemble five Justices on her side. It seemed entirely possible. Two years earlier, in *Almendarez-Torres v. United States*, Justice Thomas joined the five-member majority, which included Justice O'Connor. The *Almendarez-Torres* majority held that a prior criminal conviction is a traditional sentencing factor for the trial judge's consideration.[27] This holding was consistent with New Jersey's position that motive, too, was a traditional sentencing factor.[28] How could Justice O'Connor have predicted before the votes were cast at the certiorari stage of *Apprendi* that Justice Thomas would later repudiate the position he took in *Almendarez-Torres* and find that *any* factor, including a prior conviction, that increases a defendant's prison sentence above the statutorily-prescribed term must be found by a jury?[29]

And why did Justice Ginsburg, who joined the five-member majority in *Apprendi*, vote to deny certiorari? I have no basis to hazard an educated guess. The check marks on the certiorari tally sheet merely indicate how an individual Justice voted without further detail. And I

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25. Special thanks to Justice Stevens's former law clerks—Dean Troy McKenzie of New York University School of Law, Professor Amy Wildermuth of the University of Minnesota Law School, and Professor Joseph T. Thai of the Oklahoma University College of Law—for explaining the meaning of "J-3" to me.

26. *Apprendi*, 530 U.S. at 523–54 (O'Connor, J., dissenting).

27. 523 U.S. 224, 226–48 (1998).

28. Brief for Respondent at 29–38, *Apprendi*, 530 U.S. 466 (No. 99-478).

29. *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring).

may never know. If Justice Ginsburg explained in her private papers why she voted to deny certiorari in *Apprendi*, those papers are off limits to the public during the lifetime of any Justice who served with her on the *Apprendi* Court.

Learning who voted to grant certiorari nearly 25 years after the fact didn't have any real-world consequences. The *Apprendi* litigation was long over by then. But finding the physical tally sheet among Justice Stevens's personal papers was an unexpected treat. To paraphrase Tevye and Golde from the musical *Fiddler on the Roof*, discovering who voted to grant certiorari in *Apprendi* "doesn't change a thing, but even so, after twenty-five years, it's nice to know."[30]

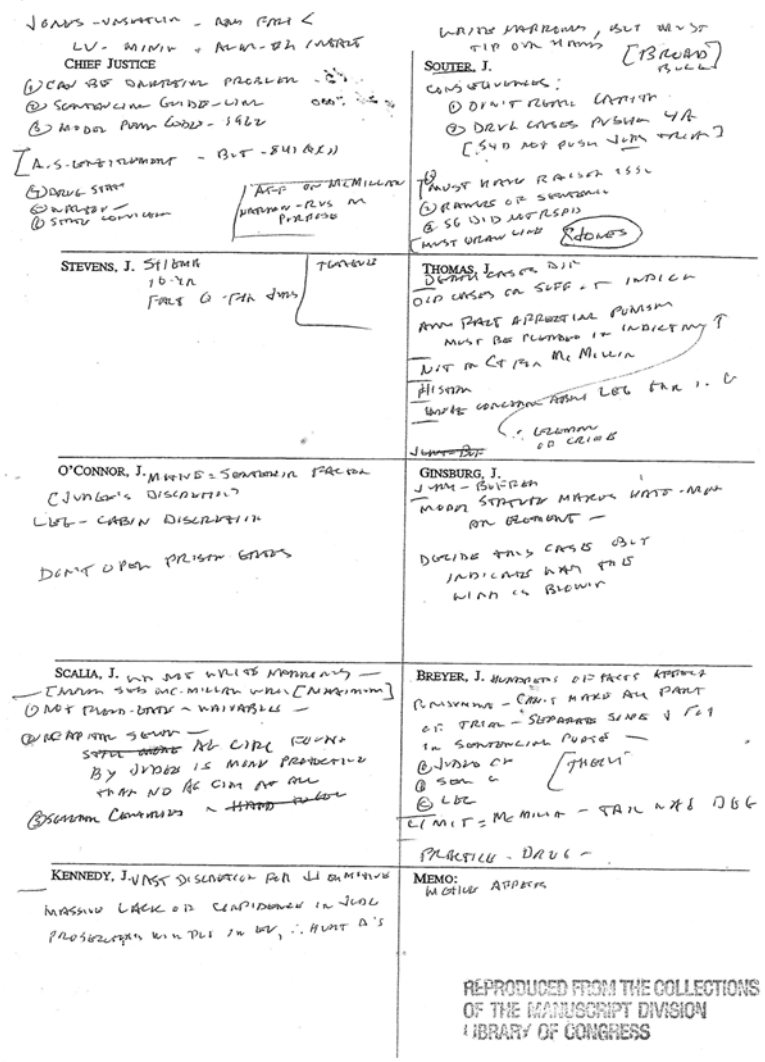
The reverse side of the tally sheet was evenly divided into ten rectangular boxes bearing the names of each Justice, plus one labeled "memo." Inside these ten rectangles were Justice Stevens's contemporaneous handwritten notes taken during the secretive, closed-door conference held Friday, March 31, 2000, three days after the *Apprendi* oral argument. It was during this conference that each Justice cast his or her preliminary vote on the merits to uphold or strike down New Jersey's Hate Crime Statute.

Who knew what fresh insights I would unearth from Justice Stevens's notes on his "most significant"[31] majority opinion? Not many, as it turned out, because Justice Stevens's cramped, all-caps handwriting is nearly impossible to read. I contacted several of Justice Stevens's former law clerks for help decoding the Justice's notes. All agreed that his penmanship was "the worst." I was on my own.

30. JERRY BOCK & SHELDON HARNICK, *Do You Love Me?*, *on* FIDDLER ON THE ROOF (RCA Victor Dynagroove Recordings 1964).

31. STEVENS, *supra* note 2, at 357.

Image 2. Back side of Justice John Paul Stevens's Tally Sheet in *Apprendi*



Five Justices—Stevens, Scalia, Thomas, Souter, and Ginsburg—preliminarily voted to strike down the Hate Crime Statute as unconstitutional. From what precious little I could decipher from his notes, Justice Stevens

believed that the stigma of racial bias, which served to increase Charles Apprendi's prison sentence above the ten-year maximum custodial term for the underlying weapons offense, was a question of fact for the jury's consideration. Justice Ginsburg agreed that the Hate Crime Statute made racial bias an element of the predicate crime. Justice Thomas added that any fact affecting punishment "must be pleaded in [the] indictment." Justice Souter sought to draw a clear line between sentencing factors and elements of a criminal offense. I could barely make out the disjointed words "write," "not," "waivable," and "is" scribbled inside the rectangle labeled "Scalia, J." Just two words are scrawled in the catch-all memo rectangle: "motive affects."

As for the four dissenters, Chief Justice Rehnquist found New Jersey's Hate Crime Statute constitutional based on the precedent of *McMillan v. Pennsylvania*, in which the Court held that trial judges may make findings of fact that increase a criminal defendant's mandatory minimum sentence.[32] Justice O'Connor was concerned that striking down the Hate Crime Statute would "open the prison gates." Justice Kennedy thought that submitting evidence of racial bias to the jury would prejudice defendants. Justice Breyer pointed out that hundreds of facts affecting punishment were routinely found at the sentencing phase of a criminal trial.

Unlike the Star Chamber-like secrecy of certiorari votes, the Justices' votes on the merits of a case, as well as their reasoning, are publicly disclosed through the Court's official majority, concurring, and dissenting opinions. The official *Apprendi* opinion was released to the public 25 years ago, so none of what I could interpret from Justice Stevens's notes was particularly revealing. Still, it was fun to imagine Justice Stevens sitting at the Court's conference table three days following oral argument, black pen in hand, jotting down his observations

32. 477 U.S. 79, 93 (1986). In 2002, SCOTUS affirmed *McMillan* in Harris v. United States, 536 U.S. 545, 552 (2002). In 2013, SCOTUS overruled *Harris* in Alleyne v. United States, 570 U.S. 99, 103 (2013).

as each of his colleagues, in order of seniority, offered his or her view on *Apprendi*.

Also in Justice Stevens's files were drafts of the majority, concurring, and dissenting opinions circulated among the Justices in the months following the preliminary votes. Notably, none of these drafts convinced any of the Justices to change his or her position on the substantive merits of the case and switch sides. I have little interest, though, in the tedious work of comparing the text of these lengthy drafts with the Supreme Court's final 99-page opinion to figure out what additions and deletions were made along the way. I happily leave that task to actual constitutional scholars.

Far more tantalizing was the personal correspondence exchanged between Justices indicating whether they would join Justice Stevens's majority opinion in *Apprendi*. Typed on official Supreme Court letterhead, they are the epitome of graciousness, formality, and brevity. Each letter bears the hand-written signature of its author.

"Dear John," Justice Ginsburg wrote to Justice Stevens, "I join your opinion. Respectfully, Ruth." Justice Scalia also was "pleased to join" Justice Stevens's majority opinion, as were Justices Thomas and Souter. The Justices in the minority were equally convivial. "Dear John," Justice O'Connor wrote to Justice Stevens, "I will circulate a dissent in this case. Sincerely, Sandra." No rancor or quarrel; no "What the heck are you thinking, John Paul?" Justice Kennedy "would be pleased" to join Justice O'Connor's dissent. In their respective letters to Justice O'Connor, the Chief Justice and Justice Breyer both used the odd syntax "please join me" in joining O'Connor's dissent.

These rare glimpses into the give-and-take among the Supreme Court Justices in the *Apprendi* case topped off my remarkable United States Supreme Court adventure. Here I was, two blocks from the Supreme Court building where I argued *Apprendi*, holding Justice Stevens's original handwritten notes in my hands. I snapped dozens of photographs of these documents as personal

mementos (permissible per Library of Congress rules), placed Boxes #826 and #827 of "The John Paul Stevens Papers" carefully atop the black metal cart, and wistfully returned them to the circulation desk.

I never had the honor of meeting Justice Stevens, other than appearing before him at oral argument, but the watershed opinion of *Apprendi v. New Jersey* was as important and as personal to him as it was to me. *Apprendi* is Justice Stevens's self-described legacy after 34 years on the Supreme Court.[33] As for me, defending the constitutionality of New Jersey's Hate Crime Statute in my one and only argument before the United States Supreme Court remains the unparalleled highlight of my four-decade career as a state and county appellate prosecutor. Justice Stevens likely did not feel quite as strongly about this as I do, but he and I will be forever linked by *Apprendi*.

As I surrendered Boxes #826 and #827 of "The John Paul Stevens Papers" to the library staff, I felt as if I had just had coffee with an old friend I hadn't seen in years and might not see again. I was sorry to be leaving the library of the appellate gods, but it was late afternoon and time to go. After retrieving our backpacks from the locker, my husband and I walked out of the James Madison Memorial Building and into the blinding summer sunlight, eternally grateful to Justice John Paul Stevens for the return ticket to "*Apprendi*-land."

33. *See* STEVENS, *supra* note 2, at 357 ("Nino Scalia, Clarence Thomas, David Souter, and Ruth Ginsburg joined what may well be the most significant majority opinion I authored as a justice: *Apprendi v. New Jersey*.").