

No. _____

In the Supreme Court of the United States

TYSHON BOOKER, PETITIONER

v.

STATE OF TENNESSEE, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS*

**PETITION FOR A WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS**

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QUESTION PRESENTED

The defendant in this case was sixteen when the alleged crime was committed. He was initially charged in Juvenile Court. He was transferred from Juvenile Court to Criminal Court after a transfer hearing where the Juvenile Court judge found three statutory factors, including that the defendant was involved in a crime and that the public interest favored transfer to adult court, to have been proven under a probable cause standard. As a result of that transfer ruling by the Juvenile Court, the defendant's maximum possible punishment for a charge of murder increased from punishment for two-and-a-half years (until he turned nineteen and juvenile jurisdiction expired) to punishment up to and including life imprisonment.

The question presented is:

Did it violate the Sixth and Fourteenth Amendments, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, for this increase in the range of potential punishment to be based on findings made by a judge under a probable cause standard rather than by a jury under a reasonable doubt standard?

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PETITION FOR WRIT OF CERTIORARI

Tyshon Booker petitions for a writ of certiorari to the Tennessee Court of Criminal Appeals.

OPINIONS BELOW

The opinion from the Tennessee Court of Criminal Appeals affirming Mr. Booker's conviction is unpublished, and appears below as Appendix A. *State v. Tyshon Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020), App.3a – 55a. On September 16, 2020, the Tennessee Supreme Court granted discretionary review in part, limited to the constitutionality of the Tennessee life sentence regime. That review did not include the issue raised in this petition. That order granting review in part appears below as Appendix B. App.57a. The Tennessee Supreme Court's opinion resolving the sentencing issue, unrelated to this

petition, was issued on November 18, 2022. *State v. Booker*, 656 S.W.3d 49 (Tenn. 2022). That opinion appears below as Appendix C. Appendix 59a – 111a.

JURISDICTION

The Tennessee Supreme Court issued its opinion in this case on November 18, 2022. By order dated February 7, 2023, Justice Kavanaugh extended the time for filing until April 1, 2023 (Application 22A719). The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part: “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...” The Fourteenth Amendment provides in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

Tennessee law provides for transfer of a juvenile accused of certain crimes from Juvenile Court to adult Criminal Court after a transfer hearing:

(a) After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

(1)(A) The child was:

(i) Less than fourteen (14) years of age at the time of the alleged conduct and charged with first degree murder or second degree murder or attempted first or second degree murder;

...

(4) The court finds that there is probable cause to believe that:

- (A) The child committed the delinquent act as alleged;
- (B) The child is not committable to an institution for the developmentally disabled or mentally ill; and
- (C) The interests of the community require that the child be put under legal restraint or discipline.

...

(c) The transfer pursuant to subsection (a) terminates jurisdiction of the juvenile court with respect to any and all delinquent acts with which the child may then or thereafter be charged, and the child shall thereafter be dealt with as an adult as to all pending and subsequent criminal charges.

Tenn. Code Ann. § 37-1-134.

STATEMENT OF THE CASE

I. Factual Overview.

The State contended that Mr. Booker, along with a friend, attempted to rob G'Metrick Caldwell while all three were sitting in Mr. Caldwell's car. Mr. Booker was sixteen years old, and his friend was seventeen years old. Mr. Caldwell was twenty-five years old. The State contended that, when Mr. Caldwell fought back by producing a gun, Mr. Booker shot him from the back seat of the car, and then fled with his friend. At his trial, Mr. Booker acknowledged shooting Mr. Caldwell but denied any robbery attempt and said that the shooting had been in self-defense of himself and his friend. He testified that a fight had broken out between Mr. Caldwell and his friend and Mr. Caldwell had taken out his gun, at which point Mr. Booker

had fired at him out of fear. The jury found Mr. Booker guilty of felony murder, which under Tennessee law is treated the same as first-degree premeditated murder. He was thus automatically sentenced to life imprisonment, which will require service of at least twenty-five years prior to parole eligibility (up to the maximum of sixty years).

II. Procedural Overview.

On November 17, 2015, Mr. Booker was charged by petition in the Knox County Juvenile Court with being delinquent due to committing first degree murder on November 15, 2015. On November 19, 2015, the State filed a “Notice and Motion to Transfer” seeking transfer to Criminal Court. Following a transfer hearing conducted over several days, on July 10, 2016, the Juvenile Court ordered that Mr. Booker be transferred to the Knox County Criminal Court to be tried as an adult.

On July 27, 2016, the grand jury charged Mr. Booker and a co-defendant, Bradley Robinson, with two alternative counts of felony murder and two alternative counts of especially aggravated robbery. Mr. Booker went to trial alone on January 22, 2018 in front of a jury. On January 30, 2018, the jury found him guilty of all four charges. He was sentenced to life imprisonment for murder and twenty years (to be served concurrently) for especially aggravated robbery. He appealed to the Tennessee Court of Criminal Appeals, which affirmed his conviction. He then sought discretionary review from the Tennessee Supreme Court. That court granted review, but limited only to a single issue relating to the constitutionality of the automatic

imposition of a life sentence precluding release for fifty-one years for a juvenile convicted of first-degree murder under cases such as *Miller v. Alabama*, 567 U.S. 460 (2012). That court reversed the decision of the Court of Criminal Appeals to the extent it upheld the automatic life sentence imposed on Mr. Booker. The judgment of conviction was thus modified to reflect eligibility for a parole hearing between twenty-five and thirty-six years.

III. Procedure Relating to *Apprendi* Claim.

Mr. Booker raised the *Apprendi* claim at each stage of the proceedings. After the notice of intent to transfer was filed in the Juvenile Court, Mr. Booker filed a motion opposing transfer on the grounds that the Tennessee statutory scheme violated his Sixth and Fourteenth Amendment rights under this Court’s line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it exposed him to the possibility of an increased maximum sentence on the basis of findings made on a probable cause standard by a judge, rather than on a reasonable doubt standard by a jury. The motion was denied, and after a transfer hearing the case was transferred to Criminal Court and indicted. In Criminal Court, Mr. Booker moved to dismiss the indictment on the basis of this same violation. That motion was also denied. On appeal, Mr. Booker raised the constitutional issue under *Apprendi* in the Tennessee Court of Criminal Appeals. That court decided the issue on the merits, finding no constitutional violation. It reasoned that transfer decisions are not “criminal

prosecutions,” and thus that *Apprendi* should not be “broadly construed” to apply to transfer proceedings. In particular, it explained:

[J]uvenile proceedings are not criminal prosecutions, and transfer determinations do not determine guilt or innocence. The transfer statute and the resulting findings of the juvenile court function only to determine the most appropriate forum to address the conduct for which the juvenile defendant is charged. We additionally conclude that even if *Apprendi* applied to the juvenile hearing transfer process, there can be no violation of the Defendant's Sixth Amendment right to a jury trial in this case. There is no question that the juvenile transfer statute exposed the Defendant to greater punishment. The Defendant's focus here however is misplaced because the statutory maximum sentence for purposes of *Apprendi* is not release upon the Defendant's nineteenth birthday as argued by the Defendant. The *Apprendi* rule applies only to statutes that enhance sentences beyond the prescribed statutory range for a given offense.... In this case, the Defendant was convicted by a jury of first-degree felony murder, which, for juvenile offenders, is statutorily punishable by a maximum sentence of life without parole.... Even applying the substance over form test to our analysis, as argued by the Defendant, we are not convinced *Apprendi* was intended to be so broadly construed.

Appendix C at 28-29, App.30a – App.31a.

Mr. Booker included this *Apprendi* issue in his application for discretionary review to the Tennessee Supreme Court, but that court did not accept review of the issue. Appendix B, App.57a.

REASONS FOR GRANTING THE PETITION

I. Introduction.

In Tennessee, as in many other jurisdictions, a juvenile is subject to punishment as an adult only if the Juvenile Court, after conducting a hearing, makes certain findings (including that the juvenile committed a crime and that the public interest favors transfer) in approving transfer to Criminal Court. If the juvenile remains in Juvenile Court, either because the State did not seek transfer or the Juvenile Court denied it, any punishment imposed will cease upon his nineteenth birthday. If he is transferred to Criminal Court, he faces full adult punishments, up to and including life imprisonment. In short, due to transfer, an individual such as Mr. Booker has the maximum possible punishment for an offense committed at age sixteen increased from two-and-a-half years (until age nineteen) to possible life imprisonment solely on the basis of findings on a probable cause standard made by a judge, not a reasonable doubt standard made by a jury. This is in straightforward violation of this Court's constitutional rule that facts that increase the range of potential punishment cannot be found by a judge, but instead must be submitted under a reasonable doubt standard to a jury. Yet despite the power of this conclusion, transfer hearings¹ are held in front of judges in dozens of jurisdictions across the country on a daily basis. This unconstitutional practice must stop.

¹ Other jurisdictions use slightly different terminology, characterizing the hearings as certification hearings or waiver hearings. The term "transfer hearing" is used herein to cover this range of similar proceedings.

II. *Apprendi* and Its Progeny.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that the New Jersey hate crime statute, which authorized an increase in the maximum prison sentence based on a judge's finding that the defendant acted with the purpose to intimidate because of race, violated the due process clause of the Fourteenth Amendment (incorporating the Sixth Amendment to apply to the states). The Court concluded that “[o]ther 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. In doing so, it rejected the state’s argument that the intimidating purpose was merely a sentencing factor and not an element of the offense. It noted that the “relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Id.* at 494.

In the wake of *Apprendi*, the Court has repeatedly applied its principles in striking down state and federal sentencing schemes. *See Ring v. Arizona*, 536 U.S. 584 (2002) (invalidating an Arizona statute that authorized the imposition of the death penalty based upon aggravating factors found by the trial court judge); *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating a Washington statute authorizing the imposition of a sentence beyond the standard range for the offense based upon findings made by the sentencing judge); *United States v. Booker*, 543 U.S. 220 (2005) (holding that facts triggering an elevated sentence under the then-mandatory Federal Sentencing Guidelines must be proved to a jury beyond a reasonable doubt);

Cunningham v. California, 549 U.S. 270 (2007) (holding that California's indeterminate sentencing law, which authorized the trial court judge to find facts exposing a defendant to an elevated upper term sentence, violated the right to a jury trial). In *Southern Union Co. v. United States*, 567 U.S. 343 (2012), the Court found that *Apprendi* applies to the setting of criminal fines. In doing so, it rejected the argument that such a ruling would be impractical or would cause confusion. It explained that practicality is beside the point: "even if these predictions are accurate, the rule the Government espouses is unconstitutional. That 'should be the end of the matter'." *Id.* at 360. Most recently, in *Alleyne v. United States*, 570 U.S. 99 (2013), the Court expanded the *Apprendi* doctrine to encompass facts that increase a mandatory minimum. It explained:

Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's "expected punishment has increased as a result of the narrowed range" and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish."

Id. at 113.

Two decisions from this Court have established exceptions to the *Apprendi* doctrine. The first is consideration of a defendant's criminal history at sentencing, as approved prior to *Apprendi* in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and never reconsidered. Secondly, in *Oregon v. Ice*, 555 U.S. 160, 172 (2009), the Court declined to apply *Apprendi* to consecutive-versus-concurrent sentencing decisions. The Court decided that for historical reasons, the Sixth Amendment does

not preclude states from assigning to judges, rather than to juries, the task of finding facts necessary to impose consecutive sentences for multiple offenses. *Id.*

This Court has never evaluated the application of *Apprendi* to transfer or certification proceedings that move an alleged offender from juvenile court to adult court and thus expose him or her to greatly increased minimum and maximum possible penalties.

III. The Lower Courts are Divided as to the Application of the *Apprendi* Doctrine to Juvenile Transfer or Certification Procedures. Many Simply Ignore *Apprendi*. This Court Should Address the Issue.

A. Substance of the Claim.

If he remained in Juvenile Court, Mr. Booker faced a maximum sentence of incarceration until he reaches the age of nineteen, which would have been two-and-a-half years. Once he was transferred, he faced (and received) an automatic sentence of life imprisonment, meaning at least twenty-five years prior to parole eligibility and a maximum of sixty years. *See* Tenn. Code Ann. § 39-13-202; Tenn. Code Ann. § 40-35-501(h)(1). The minimum sentence he could receive also increased, from a minimum of potentially receiving no incarceration in Juvenile Court (even upon a delinquent finding) to a minimum of a life sentence, meaning twenty-five years prior to parole.² Such transfer to Criminal Court was explicitly dependent on findings as to the three required facts under Tenn. Code Ann. § 37-1-134(a)(4) (commission of the act; non-committable; and interests of the community). If those three facts were all

² As the sole legal sentence for murder in this situation is life imprisonment, that is both the statutory minimum and the statutory maximum.

found on a probable cause standard, then the case would be transferred. If any one of them were not found, then the case could not be transferred.

Apprendi and its progeny set out a clear rule. If a defendant is to be subjected to an increased statutory maximum or minimum sentence based on predicate findings, then those findings must be submitted to a jury and must be proven beyond a reasonable doubt. The § 37-1-134(a)(4) factors trigger this requirement. Under *Apprendi*, it does not matter whether these are labeled “elements” of the offense or given some other name. The important question is “one not of form, but of effect,” *Apprendi*, 530 U.S. at 494 -- and the effect here was to subject Mr. Booker to the possibility of vastly increased punishment, from incarceration until age nineteen to life imprisonment. His Sixth and Fourteenth Amendment rights were therefore violated.

B. Favorable Treatment of Claim.

The courts of at least one jurisdiction have recognized that *Apprendi* applies to the decision of whether a juvenile is subject to the adult criminal justice system. Under the Massachusetts statutory scheme, juveniles between the age of fourteen and seventeen can be prosecuted by indictment in criminal court if certain statutory requirements are met. *See Mass. Gen. Laws c. 119, § 54.* In the leading case of *Commonwealth v. Quincy Q.*, 434 Mass. 859, 862 (2001), the Massachusetts Supreme Judicial Court held that these statutory requirements therefore fell under the scope of *Apprendi*, and thus had to be submitted to a jury. It wrote:

Similar to the New Jersey hate crime statute, the youthful offender statute authorizes judges to increase the punishment for juveniles

convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles, if the requirements set forth in G.L. c. 119, § 54, have been satisfied.... However, once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services (department) for a defined time period, see G.L. c. 119, § 58, any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt....

Id. at 864-66. Similarly, one dissenting judge in New Mexico has persuasively explained that, if a state chooses to provide a certain procedure for juveniles, that procedure must carry with it at the least the constitutional protections guaranteed to adult procedures such as the right to a jury determination. The judge wrote:

The Framers of the Bill of Rights would be alarmed to learn that a child can be condemned to an adult prison for up to a life sentence without at least the same constitutional protections afforded adults.... It is unconstitutional to increase an adult's sentence based on additional findings relating to the offense or the offender unless a jury finds such facts beyond a reasonable doubt.... The majority concludes that it is constitutional to increase a child's sentence by decades and imprison the child in an adult prison, based on additional findings relating to the offense and the child, even though a judge and not a jury makes those findings and even though the judge finds such facts by something less than a reasonable doubt.

State v. Rudy B., 243 P.3d 726, 740-41 (N.M. 2010) (Chavez, J., dissenting). Similarly, another judge has explained that historical practice provides no support for considering the transfer process as being beyond the scope of *Apprendi*. The judge wrote:

When a court decides that a juvenile is to be tried as an adult, *Apprendi* requires that the Sixth Amendment command of a jury trial be obeyed. The jury's verdict alone in this prosecution is insufficient to punish a 15-year-old defendant such as [the one in this case] with a lifetime in prison. To prosecute [him] as an adult, and to impose a sentence of life without parole, the additional fact-finding mandated by Missouri's

juvenile certification process also is necessary. To allow this additional fact-finding to be made by a judge and not by a jury violates the defendant's fundamental right to a jury under the Sixth Amendment of the United States Constitution.

State v. Andrews, 329 S.W.3d 369, 394-95 (Mo. 2010), as modified on denial of reh'g (Jan. 25, 2011) (Stith, J., dissenting). *See, generally*, Daniel M. Vannella, *Let the Jury Do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings*, 48 Wm. & Mary L. Rev. 723, 756 (2006).

C. Negative Treatment of Claim.

Other jurisdictions, however, have rejected this result, finding no problem when transfer rulings, with their attendant consequences for potential punishment, are made by judges. Their reasoning is hardly consistent, suggesting not application of firm legal principles but an outcome-driven result. For example, many courts have held that because the transfer decision can be characterized as “jurisdictional,” it does not fall under *Apprendi*. *See, e.g.*, *United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003) (“it merely establishes a basis for district court jurisdiction”). Other courts have termed the distinction as being that transfer hearings merely “involve[] the determination of which system is appropriate for a juvenile defendant.” *Caldwell v. Commonwealth*, 133 S.W.3d 445, 453 (Ky. 2004). Other courts have reasoned, as did the Tennessee Court of Criminal Appeals, that because transfer or certification hearings are “dispositional,” *Apprendi* does not apply. *See, e.g.*, *People v. Beltran*, 765 N.E.2d 1071, 1076 (Ill. 2002). Still others have characterized certification or transfer proceedings as being separate from criminal prosecution and covered only by due process. *See In re Welfare of J.C.P., Jr.*, 716 N.W.2d 664, 669 (Minn. Ct. App. 2006)

(“the adult certification procedure is the method to expel a juvenile from the juvenile system's protection and is not in itself a criminal prosecution”). Others have reasoned that *Apprendi* does not apply to “pretrial proceedings.” *State v. Potts*, 374 P.3d 639, 653 (Kan. 2016). And finally, some courts have reasoned that the transfer decision involves “value judgments” rather than specific facts. *Gonzales v. Tafoya*, 515 F.3d 1097, 1113 (10th Cir. 2008).

The problem with these widely-varying analyses is not merely that they are different (although their failure to cohere suggests their weakness), but that none of them derives support from this Court's decisions. That is, this Court has not declared that “jurisdictional” or “dispositional” decisions, or for that matter pretrial decisions or “value judgments,” are exempt from *Apprendi*'s requirements. The only criterion used by the Court is whether a decision has the effect of increasing the potential range of punishment. As one commentator has explained:

The majority of state courts facing the issue have held that juvenile waiver is a pretrial, jurisdictional decision that does not invoke *Apprendi*. However, this position is unsupported; as the Supreme Court has never indicated that *Apprendi* is limited to certain proceedings or certain prosecutorial stages.

Mark Kimbrell, *It Takes A Village to Waive A Child . . . or at Least A Jury: Applying Apprendi to Juvenile Waiver Hearings in Oregon*, 52 Willamette L. Rev. 61, 92 (2015); *see also* Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 Hastings L.J. 175, 204 (2009) (“There is nothing in the *Apprendi* case line that exempts this particular [jurisdictional] element”). And any logic that the transfer

decision does not examine a juvenile's factual guilt is inapplicable to a system, like Tennessee, that requires a probable cause finding that the defendant did in fact commit the offense before transfer can be ordered.

D. The Issue Should Be Resolved by This Court.

In sum, despite the fact that there is "no coherent way to evade *Apprendi*'s requirements where a juvenile transferred to adult court receives a sentence in excess of what he or she could have received in juvenile court," Carroll, 61 Hastings L.J. at 219, many courts have done exactly that, perhaps out of a fear of the practical consequences of imposing *Apprendi*'s jury-trial requirements in the juvenile court.³ But fear of practical consequences is not a justification for avoiding the holding of this Court's clear precedent. At the least, if an exception to *Apprendi* is to be developed, it should be this Court to do so, rather than the lower courts inventing a variety of disparate exceptions that conflict directly with this Court's precedent.⁴ This case -- where Mr. Booker raised and briefed the issue in Juvenile Court, in Criminal Court, and in the appellate courts of Tennessee -- is a perfect vehicle for resolution of this important issue, and reiteration of the continued vitality of the Sixth Amendment as set out in *Apprendi*.

³ Even courts that have rejected this argument have noted its logical force. *See, e.g. Gonzales v. Tafoya*, 515 F.3d 1097, 1111 (10th Cir. 2008) ("On that issue, reasonable minds have differed.").

⁴ *See, e.g., Descamps v. United States*, 570 U.S. 254 (2013) (rejecting Ninth Circuit's expansion of criminal history exception).

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted. This Court should determine that a decision that has the consequence of increasing Mr. Booker's potential sentence from a maximum of two-and-a-half years to an automatic sentence of life imprisonment must be made by a jury beyond a reasonable doubt in order to comply with the Sixth and Fourteenth Amendments under *Apprendi v. New Jersey*.

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