

ARSENEAULT, FASSETT & MARIANO, LLP
ATTORNEYS AT LAW

JACK ARSENEAULT*
KELLY DANIELS
DAVID W. FASSETT
THOMAS M. LENNEY+
STEVEN G. SANDERS++

560 MAIN STREET
CHATHAM, NEW JERSEY 07928
(973) 635-3366

FAX (973) 635-0855
EMAIL info@afm-law.com

JOHN B. MARIANO, JR. ++,
Of Counsel

*CERTIFIED CRIMINAL TRIAL ATTORNEY
+ALSO ADMITTED IN MICHIGAN
++ALSO ADMITTED IN PENNSYLVANIA
+++ALSO ADMITTED IN NEW YORK

March 8, 2005

BY OVERNIGHT DELIVERY

Stephen W. Townsend, Clerk
SUPREME COURT OF NEW JERSEY
Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625-0970

Re: **State v. Franklin (Docket No. 56,569)**

Dear Mr. Townsend:

On behalf of the Association of Criminal Defense Lawyers of New Jersey, I enclose herewith an original and nine (9) copies of our Letter pursuant to R. 2:6-11(d). Kindly file the original and return the extra copy of the letter to me stamped "received" in the postage-paid, pre-addressed envelope provided for that purpose.

I thank you in advance for your consideration.

Respectfully submitted,

ARSENEAULT, FASSETT & MARIANO, LLP

By: _____

Steven G. Sanders

Encls.

cc: All Counsel of Record
(By Fax & U.S. Mail)

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March 8, 2005

BY OVERNIGHT DELIVERY

Honorable Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0970

Re: State v. Franklin, Docket No. 56,569

Dear Honorable Justices:

We are counsel to Amicus Curiae the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ"). Pursuant to R. 2:6-11(d), we respectfully submit this letter to bring to this Court's attention the U.S. Supreme Court's decision in Shepard v. United States, ___ S. Ct. ___, 2005 WL 516494 (2005).

A condition precedent to the imposition of an extended-term Graves Act sentence is a prior conviction for a Graves Act offense. The New Jersey Attorney General ("NJAG") has argued strenuously that the recidivism exception recognized in Apprendi v. New Jersey, 530 U.S. 466 (2000), should be read broadly. Under the NJAG's understanding, if firearms possession is not readily discernible from a jury verdict (or from admissions made during a plea colloquy), judges may review the underlying trial transcripts and other evidence to determine, as a matter of fact, whether the defendant possessed a firearm during the prior offense. NJAG Br. Amicus Curiae at 26-33.

Shepard thoroughly debunks the NJAG's argument. In Shepard, the Court considered whether the defendant's guilty plea in state court to a generic burglary charge qualified as a "violent felony" for purposes of the mandatory sentence-enhancing provisions of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). Burglary qualifies as a "violent felony" under ACCA, but only if it involves the unlawful entry into a dwelling. The transcript of Shepard's

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guilty plea did not conclusively establish that he had burglarized a dwelling. However, the U.S. Court of Appeals for the First Circuit held that documents in the state court's file (such as police reports regarding the burglary) proved that the burglary offense in fact involved a dwelling and, thus, met ACCA's statutory definition of a violent felony. Thus, the First Circuit ordered the district court to impose the fifteen-year sentence mandated by ACCA (rather than a sentence of between 30 to 37 months, the range dictated by the U.S. Sentencing Guidelines).

The U.S. Supreme Court reversed the First Circuit's judgment. Prior to Apprendi, the Court confronted the same issue where a jury trial (not a guilty plea) had produced the generic burglary conviction. Taylor v. United States, 495 U.S. 575 (1990). The Taylor Court held, purely as a matter of statutory construction, that district courts could consider only the charging document, jury instructions and jury verdict to ascertain whether the jury had necessarily found the critical ACCA sentence-enhancing fact. Taylor's holding, coupled with Apprendi's proscription on judicial fact-finding, essentially dictated the result in Shepard: when a generic burglary conviction arises from a guilty plea, the only documents a district court may consider to determine whether the defendant had burglarized a dwelling are the plea agreement and the admissions made during the plea colloquy.

Significantly, a plurality of the Court in Shepard rejected an argument almost identical to the one the NJAG advances here about the breadth of the recidivism exception, explaining that

the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, **it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute.**

Shepard, 2005 WL 516494, at *8 (emphasis added).¹

¹Justice Thomas concurred in the judgment because he believes that Almendarez-Torres v. United States, 523 U.S. 224 (1998), was wrongly decided and should be overruled. According to Justice Thomas, juries (not judges) should determine the fact of prior conviction where that fact, when found, increases the defendant's maximum sentence.

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The same is true with respect to the Graves Act: if the jury instructions and verdict (or admissions during a plea colloquy) do not conclusively establish that a defendant possessed a firearm during a prior offense, the Sixth Amendment forbids a judge from sifting through the trial transcript and the evidence to make that factual determination. Because the Graves Act and the decisional law interpreting it purport to require that very sort of impermissible judicial fact-finding, the statute potentially works two separate Sixth Amendment violations in every extended-term case: (1) by requiring judges to determine whether the defendant possessed a firearm during the current offense; and (2) by requiring judges to determine whether the defendant possessed a firearm during a prior offense.

The NJAG observes that New Jersey judges began noting on the judgment of conviction that an offense qualified under the Graves Act "to minimize later questions on this issue." NJAG's Br. at 25. In so observing, the NJAG appears to suggest that a judge in a subsequent Graves Act case may rely solely on that notation to impose an extended-term sentence without violating the Sixth Amendment. But Shepard proves this suggestion is flawed. A notation on a judgment of conviction reflects only what **the judge** found or believed, but it does not reflect whether **the jury** necessarily found (or whether the defendant actually admitted during a guilty plea) the critical fact (firearms possession) that authorizes a judge in a subsequent case to impose an extended-term sentence. Had the Massachusetts judge in Shepard written on the judgment of conviction that Shepard had burglarized a dwelling even though Shepard did not admit that fact in pleading guilty, the U.S. Supreme Court still would have reversed the enhanced sentence.

We thank the Court for its consideration.

Respectfully submitted,

ARSENEAULT, FASSETT & MARIANO, LLP

By: 

Steven G. Sanders, Esq.

Counsel to the ACDL-NJ

cc: All Counsel of Record
(by fax & U.S. Mail)