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### Court of Appeals, People v. Rosen

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## RIGHT TO A JURY TRIAL

### *United States Constitution Amendment VI:*

*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 . . . .*

### *New York Constitution Article 1, Section 2:*

*Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . .*

## COURT OF APPEALS OF NEW YORK

People v. Rosen<sup>1</sup>  
(decided April 3, 2001)

Defendant, Harry Rosen, pleaded guilty to first-degree sexual abuse of a child after he put his hand beneath the skirt of a four-year-old girl and fondled her.<sup>2</sup> Rosen appealed his conviction and claimed that his federal and state constitutional rights were violated when he was adjudicated a persistent felony offender<sup>3</sup> as

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<sup>1</sup> 96 N.Y.2d 329, 752 N.E.2d 844, 728 N.Y.S.2d 407 (2001), *cert. denied*, 122 S. Ct. 224 (2001).

<sup>2</sup> *Id.* at 332, 752 N.E.2d at 845, 728 N.Y.S.2d at 408.

<sup>3</sup> N.Y. PENAL LAW § 70.10 (McKinney 1998) defines a persistent felony offender as:

(a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

defined by New York's Penal law.<sup>4</sup> Rosen raised two constitutional objections on appeal. Specifically, Rosen argued that he was deprived of his due process right to a jury trial when he was adjudicated a persistent felony offender following a hearing pursuant to Criminal Procedure Law Section 400.20.<sup>5</sup> Rosen further alleged that his rights were violated when the court applied the discretionary persistent felony offender statute to his conviction but failed to include the charge in the indictment, rendering it "jurisdictionally defective."<sup>6</sup>

The maximum sentence for first-degree sexual abuse is seven years, however as a condition of accepting the plea, Rosen was informed he would receive a lesser sentence of three to six years.<sup>7</sup> The pre-sentence report included a court ordered psychiatric evaluation of Rosen.<sup>8</sup> The prosecutor, relying on evidence contained in the pre-sentence report and psychiatric evaluation, sought to have Rosen sentenced as a persistent felony offender due to his prior sex-related convictions. Adjudicating Rosen a persistent felony offender permitted the court to impose a sentence beyond the seven-year maximum for first-degree sexual abuse.<sup>9</sup> The New York Supreme Court gave Rosen an option to withdraw his plea of guilty, and informed Rosen that if he was subsequently pronounced a persistent felony offender following a hearing, it would consider the prosecutor's application to increase

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(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and  
(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

<sup>4</sup> *Rosen*, 96 N.Y.2d at 333, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>5</sup> N.Y. CRIM. PROC. LAW § 400.20(2) (McKinney 1994) provides in pertinent part: "When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender . . . the court may order a hearing to determine (a) whether the defendant is in fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed."

<sup>6</sup> *Rosen*, 96 N.Y.2d at 333-34, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>7</sup> *Id.* at 332, 752 N.E.2d at 845, 728 N.Y.S.2d at 408.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the sentence.<sup>10</sup> Defense counsel argued for specific performance of the initial plea agreement, however, the court, *sua sponte*, vacated the plea and sent the matter to trial.<sup>11</sup>

Following a trial, Rosen was convicted of first-degree sexual abuse and endangering the welfare of a child.<sup>12</sup> Thereafter, pursuant to New York Criminal Procedure Law § 400.20(5),<sup>13</sup> the court held a hearing to determine whether Rosen should be sentenced as a persistent felony offender.<sup>14</sup> Based upon Rosen's two prior felony convictions, which caused the court to qualify him a persistent felony offender, Rosen was sentenced to 25 years to life for the abuse count and one year for the endangerment count.<sup>15</sup>

On appeal to the New York Court of Appeals, Rosen contended that his federal and state constitutional due process rights were violated by the sentence enhancement provisions set forth in § 70.10 and New York Criminal Procedure Law § 400.20(5); to wit, that due process guarantees inherent in the Fourteenth Amendment mandate a factual determination by a jury, based on proof beyond a reasonable doubt, prior to imposing or increasing a sentence beyond the statutory maximum.<sup>16</sup> Rosen claimed that pursuant to the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution,<sup>17</sup> an

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<sup>10</sup> *Id.*

<sup>11</sup> *Rosen*, 96 N.Y.2d at 333, 752 N.E.2d at 845, 728 N.Y.S.2d at 408.

<sup>12</sup> *Id.*

<sup>13</sup> N.Y. CRIM. PROC. LAW § 400.20(5) (McKinney 1994) states in pertinent part:

Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

<sup>14</sup> *Rosen*, 96 N.Y.2d at 333, 752 N.E.2d at 845, 728 N.Y.S.2d at 408.

<sup>15</sup> *Id.* at 333, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>16</sup> *Id.* at 333-34, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>17</sup> U.S. CONST. amend. XIV provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

accused is protected against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>18</sup> Rosen further maintained that his state and federal constitutional rights were violated because the indictment did not contain the persistent felony offender charge, thereby rendering the indictment jurisdictionally defective.<sup>19</sup> The Court of Appeals rejected both arguments.<sup>20</sup>

On appeal, Rosen focused his claim on the rule of law articulated in *Apprendi v. New Jersey*.<sup>21</sup> In particular, Rosen claimed that the application of the persistent felony offender sentence enhancement conditions violated his right to a trial by jury.<sup>22</sup> In *Apprendi*, the defendant fired several bullets into the home of an African-American family that had recently relocated to a predominantly all-white neighborhood.<sup>23</sup> The defendant admitted that even though he did not know the occupants of the house personally, he committed the shootings because the family was black and he did not want them in the neighborhood.<sup>24</sup> A grand jury indicted Apprendi on multiple offenses, none of which referred to New Jersey's "hate crime" law.<sup>25</sup> After pleading guilty to three counts, an evidentiary hearing was held on the issue of Apprendi's "purpose" for the shooting.<sup>26</sup> The judge concluded that the evidence supported a finding "that the crime was motivated by racial bias," and found "by a preponderance of the evidence" that Apprendi's actions were taken "with a purpose to intimidate" as provided by New Jersey's "hate crime" statute.<sup>27</sup> Apprendi then challenged the hate crime sentence enhancement on the ground

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<sup>18</sup> *Rosen*, 96 N.Y.2d at 334, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>19</sup> *Id.* at 335, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.

<sup>20</sup> *Id.* at 334, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>21</sup> *Id.* at 333, 752 N.E.2d at 846, 728 N.Y.S.2d at 409 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

<sup>22</sup> *Id.*

<sup>23</sup> *Apprendi*, 530 U.S. at 469.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 468-69. The New Jersey statute provided for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000).

<sup>26</sup> *Apprendi*, 530 U.S. at 470.

<sup>27</sup> *Id.* at 471.

that it violated his rights to due process under the United States Constitution.<sup>28</sup> Rejecting Apprendi's constitutional challenge to the statute, the trial judge sentenced him to an enhanced term of imprisonment.<sup>29</sup>

The issue in *Apprendi* was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."<sup>30</sup> The United States Supreme Court, relying on *Jones v. United States*,<sup>31</sup> reversed the decision of the Supreme Court of New Jersey. In *Jones*, the Supreme Court held that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (*other than prior conviction*) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>32</sup> With the exception for prior convictions, the *Apprendi* Court followed the rule promulgated in the concurring opinions of the *Jones* case which stated: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."<sup>33</sup>

The facts of *Apprendi* are similar to the instant case, but can be distinguished. In *Apprendi*, the New Jersey statute provided for a mandatory sentence enhancement if the trial judge determined that a defendant committed a crime with the requisite hateful intent enumerated in the statute.<sup>34</sup> This procedure violated the defendant's Fourteenth Amendment due process rights, because the Court found "facts regarding bias" to be an essential element of the crime that therefore must be proved to a jury

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 469.

<sup>31</sup> 526 U.S. 227 (1999).

<sup>32</sup> *Id.* at 243 (emphasis added).

<sup>33</sup> *Id.* at 252-53 (Stevens, J., concurring); *see also id.* at 253 (Scalia, J., concurring).

<sup>34</sup> *Apprendi*, 530 U.S. at 492 (reasoning that the statute required the factfinder to examine the defendant's *mens rea* to determine whether he acted with a "purpose to intimidate" on account of, *inter alia*, race).

beyond a reasonable doubt.<sup>35</sup> In *Rosen*, the defendant challenged the court's procedure for determining a persistent felony offender, arguing that it should be established by a jury beyond a reasonable doubt, and not merely be a determination made by the trial judge by a preponderance of the evidence pursuant to Section 400.20(5).<sup>36</sup> While this argument was the basis for reversal in *Apprendi*,<sup>37</sup> it was fatally flawed in *Rosen*. The Due Process clause of the United States Constitution "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."<sup>38</sup> In *Rosen*, it was the defendant's prior felony convictions that subjected him to the enhanced sentencing, not an element of the crime charged, and as such he fell within a clearly stated exception to the rule articulated in *Apprendi*.<sup>39</sup>

When applying the New York law, a court must determine that the defendant had previously been convicted of two or more felonies resulting in sentences of over one-year.<sup>40</sup> Once the convictions are established by a preponderance of the evidence, the court then considers other factors such as the defendant's history and character in order to determine whether the enhanced sentence should be levied.<sup>41</sup> Thus, the sentencing court is only carrying out its duty to determine an appropriate sentence within the statutory guidelines.<sup>42</sup> As such, *Rosen*'s constitutional due process rights were not violated by depriving him of a jury trial to establish the facts of his prior convictions, as the convictions did not constitute an element of the crime charged.<sup>43</sup>

*Rosen*'s second contention was that his state and federal constitutional rights were violated because his indictment did not include the charge of persistent felony offender.<sup>44</sup> The New York Court of Appeals again relied on *Jones* where the United States

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<sup>35</sup> *Id.*

<sup>36</sup> *Rosen*, 96 N.Y.2d at 334, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>37</sup> *Apprendi*, 530 U.S. at 497.

<sup>38</sup> *Rosen*, 96 N.Y.2d at 334, 752 N.E.2d at 846, 728 N.Y.S.2d at 409 (quoting *In re Winship*, 397 U.S. 358, 365 (1970)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 334-35, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.

<sup>41</sup> *Id.* at 335, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.

<sup>42</sup> *Id.* (see, *People v. Farrar*, 52 N.Y.2d 302, 305-06, 419 N.E.2d 864, 865, 437 N.Y.S.2d 961 (1981)).

<sup>43</sup> *Rosen*, 96 N.Y.2d at 335, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.

<sup>44</sup> *Id.*

Supreme Court held that facts regarding "recidivism increasing the maximum penalty need not be so charged."<sup>45</sup> The *Rosen* court also cited *Oyler v. Boles*,<sup>46</sup> in which the Court held that a defendant will be given adequate notice that an enhanced sentence may be imposed if the state utilizes the statute after the conviction, but prior to sentencing.<sup>47</sup> Therefore, in the instant case, Rosen was not deprived of his constitutional due process rights because he was notified by the trial court of the possibility that he may be adjudicated a persistent felony offender before the imposition of his sentence.<sup>48</sup>

In conclusion, federal and New York constitutional guarantees are similar with respect to a defendant's right to a jury trial. The due process rights ensured by the Sixth Amendment of the United States Constitution,<sup>49</sup> as well as the New York Constitution,<sup>50</sup> protect a defendant from being convicted unless all elements of the crime charged have been proven to a jury beyond a reasonable doubt.<sup>51</sup> The New York Court of Appeals in *Rosen* determined that adjudicating the defendant a persistent felony offender was not an essential element of the crime charged, and therefore did not need to be proved to a jury beyond a reasonable doubt.<sup>52</sup> New York's statutory scheme for adjudicating a defendant a persistent felony offender fell squarely within the exception to the rule promulgated in *Jones*.<sup>53</sup> The *Jones* rule requires that any fact, other than a prior conviction, which

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<sup>45</sup> *Id.* (quoting *Jones*, 526 U.S. at 248).

<sup>46</sup> 368 U.S. 448 (1962).

<sup>47</sup> *Rosen*, 96 N.Y.2d at 335, 752 N.E.2d at 847, 728 N.Y.S.2d at 410 (quoting *Oyler*, 368 U.S. at 453).

<sup>48</sup> *Id.* at 332, 752 N.E.2d at 845, 728 N.Y.S.2d at 408.

<sup>49</sup> U.S. CONST. amend. VI provides in pertinent 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 . . . ."

<sup>50</sup> N.Y. CONST. art. 1, § 2. Art. 1, § 2 of the New York Constitution provides in pertinent part: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."; N.Y. CONST. art. 1, § 6. Art. 1, § 6 of the New York Constitution provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ."

<sup>51</sup> *Rosen*, 96 N.Y.2d at 334, 752 N.E.2d at 846, 728 N.Y.S.2d at 409.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



enhances a sentence beyond the statutorily prescribed maximum, must be submitted to a jury and proven beyond a reasonable doubt.<sup>54</sup> The statute at issue in *Jones* was a federal statute, but the *Apprendi* Court opined that the Fourteenth Amendment commands the same answer when a state statute is involved.<sup>55</sup> Accordingly, a defendant has no federal or state constitutional due process rights to a jury trial if the sole purpose is to establish the facts of prior felony convictions.<sup>56</sup>

Additionally, Rosen's argument that his indictment was defective because it did not include the discretionary persistent felony offender enhancement provisions was equally without merit.<sup>57</sup> The Court of Appeals of New York again looked to decisions from the United States Supreme Court and determined that a defendant need not be charged in the indictment with the fact that recidivism may increase the maximum penalty.<sup>58</sup> A defendant's federal and state constitutional rights will not be violated if he is given notice of the potential enhanced sentence after the conviction but before the sentencing.<sup>59</sup> As a result, both of defendant's arguments on appeal were constitutionally defective, and the New York Court of Appeals affirmed his conviction.<sup>60</sup>

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<sup>54</sup> *Jones*, 526 U.S. at 243, n. 6.

<sup>55</sup> *Apprendi*, 530 U.S. at 476.

<sup>56</sup> *Rosen*, 96 N.Y.2d at 335, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (quoting *Jones*, 526 U.S. at 248 and *Oyler*, 368 U.S. at 453).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 336, 752 N.E.2d at 847, 728 N.Y.S.2d at 410.