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Why Did the Supreme Court Sidestep Sentencing Dispute?

Scalia, Thomas and Ginsburg align in dissent over court's refusal to hear case.

By Tony Mauro
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The U.S. Supreme Court's refusal to add a Washington drug case to its docket would not ordinarily get much notice. But when the court did just that on Oct. 14, it drew wide criticism for missing an opportunity to resolve a long-running dispute over judicial discretion in sentencing.

The court denied certiorari in *Jones v. United States*, which asked the court to rule that in deciding on a sentence, federal judges should not be able to take into consideration conduct for which the defendant was acquitted. In the Jones case, the trial judge significantly increased the sentences of three defendants by factoring in drug conspiracy charges that the jury had rejected.

"It is really hard to understand why the court ruled as it did," said University of Illinois College of Law professor Margareth Etienne, a sentencing expert. "It goes against everything the Supreme Court has said for the last 15 years."

Cato Institute senior fellow Ilya Shapiro said, "It's not just high-profile culture-war issues like same-sex marriage and the right to bear arms that the Supreme Court is avoiding like the plague." Shapiro said the court's action was "another opportunity lost by the Court, another responsibility shirked."The issue has been raised in numerous lower court decisions, and in a 2007 Supreme Court case, several justices said it should be taken up if the right case came along. As recently as Oct. 1, the U.S. Court of Appeals for the First Circuit mentioned the *Jones* case in a ruling that criticized the "questionable practice" of basing sentences on uncharged or unproven offenses.

An unusual lineup of three justices — Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg — took the rare step of dissenting from the denial of review.

"This has gone on long enough," Scalia wrote. "The present petition presents the non-hypothetical case the court claimed to have been waiting for."

In the case the court denied, a District of Columbia jury found Antwuan Ball, Desmond Thurston and Joseph Jones guilty in 2007 of selling between two and 11 grams of cocaine, relatively small amounts. They were acquitted on racketeering and other charges that they were part of an extensive narcotics conspiracy.

Yet, when U.S. District Judge Richard Roberts sentenced the three, he said he "saw clear evidence of a drug conspiracy," and sentenced Ball, Thurston and Jones to 18, 16 and 15 years in prison, respectively — four times higher than the highest sentences given for others who sold similar amounts of cocaine, according to filings with the Supreme Court.

Citing the *Apprendi* line of cases — which established that facts increasing a defendant's penalty must be found by a jury, not a judge — Scalia said, "petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been substantively unreasonable and therefore illegal."

The *Jones* case, Scalia continued, is "a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense."

The U.S. Court of Appeals for the D.C. Circuit ruled in *Jones* that the defendants' Sixth Amendment rights had not been violated, in part because even the enhanced sentences did not exceed the statutory maximum. The Justice Department made the same point in urging the Supreme Court to deny review.

Scalia concluded, "We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment or to eliminate the Sixth Amendment difficulty by -acknowledging that all sentences below the statutory maximum are substantively reasonable."

Stephen Leckar, of counsel to Kalbian Hagerty in Washington, who represented the defendants in the petition denied last week, said he was disappointed that the petition fell "one vote short" of being granted certiorari. The fact that conservatives Scalia and Thomas dissented — along with liberal Ginsburg — "ought to be a fire bell in the night" signaling that the issue should be resolved, Leckar said.Sentencing expert Douglas Berman, a professor at Ohio State University Michael E. Moritz College of Law, said on his blog it was especially disappointing newer justices did not vote for review.

"Anyone (like me) hoping that Justices Sotomayor and Kagan might end up being even more committed to defendants' procedural rights at sentencing has to be deeply troubled by their disinclination to provide a fourth vote for granting cert in Jones," wrote Berman, who also filed a brief in the *Jones* case.

The University of Illinois' Etienne speculated that some justices may have felt the facts of the *Jones* case were "too good" to be a vehicle for making a broad pronouncement on the issue. She explained that *Jones* involved a judge ignoring an actual acquittal by a jury, whereas a more common scenario is a judge basing an enhanced sentence on conduct that may or may not have been charged or was not part of a plea agreement. Ruling on a case involving an actual acquittal might leave the broader issue unresolved.

"It is going to take a while" for the court to revisit the issue, Etienne added. "Until it does, the old adage that one is 'innocent until proven guilty' will continue to have little meaning."