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What's Happening with Apprendi: Florida's Response

by George E. Tragos and Peter A. Sartes

As you probably already know, the Supreme Court decision in *Apprendi v. New Jersey* which held that "any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt"¹ has instigated scores of appeals throughout the nation's courts. In Florida alone there have been 56 reported cases from the federal dis-

tricts, Florida Supreme Court, and DCA's as of February 1, 2002 that allege an illegal indictment, an unconstitutional sentence, or a trial error.

This article is intended to identify the impact of the *Apprendi* decision on the Florida Federal Districts, the Florida Supreme Court and the Florida District Courts of Appeal, in order to provide a clearer focus on the current state of the law.

A recent issue of the *Criminal Law*

Bulletin featured several articles contemplating the *Apprendi* decision. One of those articles identifies the affects of *Apprendi* on the various Federal Circuit Courts throughout the country.

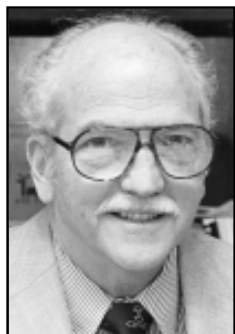
The circuits are split regarding the proper way to apply rules of appellate review in cases where the statutory maximums exceed those authorized by the jury's verdict of conviction. Four circuits have affirmed sentences that exceeded the statutory maxima applicable to the offenses that were in fact charged and proved. Four circuits treat an *Apprendi* error as refuting the legality of the sentence or the over-

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In Memoriam:

Robert T. Mann, Former Chief Judge, Second District Court of Appeal

by Susan W. Fox, Editor



The headlines gave just a glimpse into the life of an appellate judge and teacher of appellate law, Robert Trask Mann, who died February 26, 2002: "Witty Judge, Legislator

Mann Was An All-Time Favorite" (*Tampa Tribune*); "Judge Robert Mann, Known For His Integrity" (*St. Petersburg Times*).

The Gainesville Sun carried a column by Ron Cunningham: "Mann's Law: Solutions Cause Problems," stating "Bob Mann was an original—quick of wit; inclined to do the right thing, but ever mindful that our best intentions are apt to be undone by our own human capacity for error."

Who was this Mann?

Born in 1924, Mann began his public career in 1956 when he was elected to the Florida House of Representatives as a Democrat from Hillsborough County. In the Legislature, he was known for his intellect

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and quick tongue. He frequently won floor debates with quick one-liners. A compilation of these, called *Mannerisms* was once published by a young admirer, Bob Graham.

Here are some examples: Mann sponsored a bill limiting gifts to lawmakers. A legislator denounced Mann for suggesting they could be "bought." "Gentlemen," Mann replied, "we're all agreed that no member of this chamber can be bought; however, the purpose of this bill is to assure the public that a legislator cannot be rented for the season."

A Republican legislator attempted to filibuster one of Mann's bills by suggesting minor changes that would stall passage. The member happened to be wearing a yellow shirt and striped red and black tie. Mann brought the House down when he informed the House members of a new bird in Florida, called the "yellow-bellied, striped-tie nitpicker."

Mann was a "LeRoy Collins Democrat" who stood for integration and equality during the 1960s. Mann lost a close election for House Speaker in 1966, but still was selected "Most Valuable Legislator" by the St. Petersburg Times. He then ran for Congress, but lost to Sam Gibbons by the narrowest of margins. In 1968, he was appointed by then Governor Claude Kirk to the Second District Court of Appeal, where he served until 1974, the last two years as Chief Judge.

This article is dedicated to Mann's career as appellate judge, during which his wit, wisdom, literacy, maverick tendencies, and brilliant mind became reflected in a body of law.

A Sampling of Judicial Mannerisms

Mann's first published opinion starts like a Faulkner novel, with Southern gothic tragedy flair and attention to detail. It sets a tone for the opinions to follow:

The silk stocking set visited the lakeside home of Dr. Kenneth Jackson one evening at the dinner hour, entering through an unlocked door. The stockings were pulled down

over their faces. Pork-pie hats hid their hair. One of the startled diners said that it was a joke. Demonstrating that the guns in their hands were real, the visitors told them that it was no joke. They were right. . . .¹

Mann's opinions in criminal cases particularly reflected this fascination and wonderment at the human condition. He manifested this, as well as his love of stories with moral lessons in *Cobb v. State*,² in which a man set a companion on fire for being lazy. The defense tried to justify the act as having been provoked by the victim. Mann observed, "Whatever fires may in the next world consume those who spend Saturdays in sloth, the rights of Louis Banks and other free men protect them against premature ignition."

Mann's opinions became famous for his opening lines:

The sign on the tavern said 'Dew Drop Inn' and the appellant did . . .³

Everything is coming up thorns in Roseland Park.⁴

If oratory comes, can reversal be far behind?⁵

The order appealed from might be wrong, but it is not erroneous.⁶

Some will see this as the predictable collision between the new morality and the old biology, but . . . sweet-and-sour sex is not new in life and law.⁷

Pleasure mistaken for happiness is life's most persistent mirage.⁸

Difference of opinion is said to underlie the sale of inferior land and the marriage of ugly women.⁹

Mann had a way of drawing colorful analogies to illustrate his reasoning. He said of a prosecutor's excessive persistence in asking jurors on voir dire if they understood the defendant could choose not to testify: "This was done in such a way as to remind one of the old story in which the first mate of a vessel became incensed when he read in the log a notation by the Captain that 'The First Mate was drunk today,' whereupon at the end of his watch the First Mate wrote in the log 'The Captain was sober today.'"¹⁰

Mann's opinions raised questions of social justice. In criticizing a profanity conviction, he stated, "If in Stalin's time, in the St. Petersburg which had by then become Leningrad (saints having fallen from grace in the Soviet Union), a citizen had been arrested for cursing the 'goddam war' and calling the visibly present police 'goddam pigs,' I could understand it. But Canney was arrested at a peace rally in St. Petersburg, Florida, and I cannot understand it."¹¹

Mann was an early proponent for gender equality:

Women have not been chattels for centuries, but men have been a long time admitting it. . . . Over a century has passed since William Ross Wallace wrote that 'the hand that rocks the cradle is the hand that rules the world.' The ceremonial incantation of this line against a rising tide of support for women's rights has, we suspect been prompted by the unspoken hope that the hand that rocks the cradle would not also rock the boat. But women began to demand a more direct involvement in the management of mankind's affairs than the nurture of the next generation provides, as important as that is.¹²

Mann could not resist the temptation to comment on the personalities involved in the disputes which found their way to his court.

If James Henry Knight is an asset to society it does not appear of record in this proceeding. A multiple loser in the game of life . . .¹³

The late John Reid Topping had a talent for spending which topped his ancestors' capacity to accumulate. . . .¹⁴

A trial judge whose patience matches Job's . . . underwent a chemical change as a result of hyperacidity of the lawyers involved.¹⁵

Mann was a student of language and a man of words. He would analyze the origin and meaning of words. In a profanity case, he offered these thoughts:

"Goddam" is a word taken into the vocabulary, and infests our literature. It is a bi-partisan epithet: President Roosevelt applied it to a broken voting machine, and former

Attorney General John Mitchell was quoted by the Associated Press on June 15, 1972, as using it. It transcends terrestrial boundaries: an astronaut on the moon used it, and I heard no clamor for his prosecution, though I recognize a delicate venue problem. The law seems to be that you can't use the phrase in St. Petersburg if it offends the police.¹⁶

His love of literature came, oddly enough, from his father, who had little formal education, but prided himself on being self-taught and well-read. Mann demonstrated the breadth of his literary scope with quotations from the Bible,

I was . . . in prison, and ye visited me not. (Matthew 25:43)¹⁷

Methodist Hymns,

Are ye able to remember, when a thief lifts up his eyes, that his pardoned soul is worthy of a place in Paradise?¹⁸

H. L. Mencken,

Many euphemisms for Goddam have flourished . . . Goshdarn, goldarn, goshdad and Goshdang.¹⁹

Jonathan Swift,

I was this forenoon with Mr. secretary at his office, and helped to hinder a man of his pardon, who is condemned for a rape. The undersecretary was willing to save him, upon an old notion that a woman cannot be ravished: but I told the secretary, he could not pardon him without a favourable report from the judge; besides, he was a fiddler, and consequently a rogue, and deserved hanging for something else; and so he shall swing.²⁰

John Donne,

Any man's death diminishes me.²¹

and John Stuart Mill,

No one pretends that actions Should be as free as opinions.²²

Mann sometimes attempted innovative changes in the law which fell flat when they reached the Supreme Court of Florida. He advocated eliminating the "absolutely rigid line" separating invitees, licensees and trespassers, because "what is reasonable care . . . depends on all the

circumstances of the case."²³ In reversing, the Supreme Court said: "Judge Robert Mann undertook to remove all distinctions of standing and degrees of care involving trespassers, licensees and invitees upon a property owner's premises. Judge Mann would simply apply a test of reasonableness under the circumstances in every situation. No other Florida court has ventured so far with such an over-simplification of a complex problem . . ." ²⁴ Thirty years later, one wonders why the concept that negligence is the failure to use reasonable care under the circumstances ²⁵ would have seemed an oversimplification.

In *Smith v. State*,²⁶ Mann wrote an opinion reversing a conviction for rape. It reads as beautifully as anything ever penned by Justice Cardozo, his idol. It will make you laugh, it will make you cry. You will scratch your head in puzzlement over the jury's "binary thought process." But for all its erudition, you will know Mann was just flat off base, and the Supreme Court reversed in a terse no-nonsense fashion.

Mann was honest about his fallibility. He penned at least three opinions that began with the simple words "I erred . . ."²⁷

Mann always tried to find meaning in the law. His ability to find meaning and explain it in a way that made sense to himself and others sometimes elevated mundane proceedings to a transcendent level. Perhaps the most well-known example of this ability was copied from a 1973 opinion onto plaques which were then hung in most of the courtrooms in Hillsborough County, where many remain today, as a reminder to trial judges:

We receive the statutory law from the legislature and its interpretation from our Supreme Court, agreeing with some, disagreeing with some, following all, because our bondage to law is the price of our freedom.²⁸

Mann Was No Island

After leaving the court in 1974, Mann taught Appellate Law and Constitutional Law at the University of Florida law school until his retirement in 1986, after which he continued to teach as a Professor Emeritus. Literally thousands of law students

learned appellate law from "Judge Mann."

Mann found working with young people to be the most rewarding of his careers. Mann developed close relationships with his students and remained in touch with many of them after graduation. He often aided their careers with helpful advice, information, or letters of recommendation.

Rounding out his service in the legislative and judicial branches of government, Mann served the executive branch on the Public Service Commission from 1977 to 1980 under appointments by Governors Askew and Graham, and was Chair of the PSC in 1979-80. At the PSC, Mann continued his reputation for reform, ethics in government, and wisdom.

Mann was a Vice Chancellor of the Methodist Church, which he modestly translated to mean "Pro Bono Extraordinaire." He was a joyful scholar of theology, among many other subjects. Mann was a lifelong student himself, receiving three doctorate degrees as well as several honorary degrees.

Young lawyers who had the privilege of serving as Mann's law clerks and aides went on to have impressive careers. They include: Jon Mills, Dean of University of Florida College of Law; William Haddad, former Clerk of the Second District and a past winner of the Appellate Practice Section's Adkins Award; and F. Wallace Pope, founding partner of Johnson, Blakely, Pope, Bokor, Ruppel & Burns. The writer of this tribute also had the honor of serving as Mann's aide.

Judge Mann's career was supported and promoted by his wife, Dr. Elizabeth Mann, a librarian who became a professor of Library Science at Florida State University. Mann was proud of his children who followed their own dreams.

As we lament Mann's passing, we appreciate the gift of his life and the legacy of his words.

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