

No. 07-901

IN THE
Supreme Court of the United States

STATE OF OREGON,
Petitioner,

vs.

THOMAS EUGENE ICE,
Respondent.

**On Writ of Certiorari
to the Oregon Supreme Court**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

(Intentionally left blank)

QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and *Blakely v. Washington*, 542 U. S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

(Intentionally left blank)

TABLE OF CONTENTS

Question presented	i
Table of authorities	v
Interest of <i>amicus curiae</i>	1
Summary of facts and case	2
Summary of argument	6
Argument	7

I

The purpose of the <i>Apprendi</i> bright-line rule is to protect the historical function of the jury from encroachment, and the rule should not be applied where that purpose is not served	7
A. The <i>Apprendi</i> rule	7
B. <i>Booker</i> and <i>Cunningham</i>	10

II

At common law and in early America, the jury had no role in the decision of whether sentences for multiple crimes would be served consecutively, and the Sixth Amendment jury trial right therefore does not extend to that decision	15
A. Common Law	15
B. Early American cases	17
C. <i>Apprendi</i>	20

III

The state should not be penalized for adding structure
to a discretionary sentencing decision 21

Conclusion 25

TABLE OF AUTHORITIES

Cases

Ali v. Federal Bureau of Prisons, 552 U. S. ___, 128 S. Ct. 831 (2008)	13
Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	4, 7, 8, 14, 15, 21
Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) . . .	9, 10, 14, 15, 20, 21, 24
Commonwealth v. Leath, 3 Va. 151, 1 Va. Cas. 151 (1806)	17, 18
Cunningham v. California, 549 U. S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)	12, 13, 21, 24
In re De Bara, 179 U. S. 316, 21 S. Ct. 110, 45 L. Ed. 207 (1900)	19
People v. Black, 41 Cal. 4th 799, 161 P. 3d 1130 (2007)	24
Rex v. Williams, 168 Eng. Rep. 366 (1790)	15
State v. Ice, 178 Ore. App. 415, 39 P. 3d 291 (2001)	5
State v. Ice, 343 Ore. 248, 170 P. 3d 1048 (2007)	2-5, 9, 10
State v. Smith, 5 Day 175 (Conn. 1811)	18, 19
United States v. Booker, 543 U. S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)	9, 11, 12, 20

United States v. Santos, 553 U. S. __ (No. 06-1005,
June 2, 2008) 13

Washington v. Recuenco, 548 U. S. 212,
126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) 9, 14

Wilkes v. Rex, 2 Eng. Rep. 244 (H. L. 1769) . . . 16, 17

United States Statute

21 U. S. C. § 841(a)(1) 11

State Statutes

2007 Cal. Codes Adv. Leg. Serv., ch. 3 24

Ore. Rev. Stat. § 137.123 4, 10, 14, 22

Secondary Sources

1 J. Bishop, Commentaries on the Criminal Law
(1st ed. 1856) 16, 21

King, The Origins of Jury Sentencing in the United
States, 78 Chicago-Kent L. Rev. 937 (2003) 16

6 W. LaFave, J. Israel, N. King, & O. Kerr,
Criminal Procedure (3d ed. 2007) 21, 22, 23

Note, “Consecutive Sentences in Single Prosecutions:
Judicial Multiplication of Statutory Penalties,”
67 Yale L. J. 916 (1958) 15

H. Packer, The Limits of Criminal Sanction
(1968) 20

IN THE
Supreme Court of the United States

STATE OF OREGON,

Petitioner,

vs.

THOMAS EUGENE ICE,

Respondent.

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The line of cases beginning with *Apprendi v. New Jersey* has caused enormous disruption of systems of

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

sentencing established through broad, bipartisan consensus, with little or no gain in terms of fairness, accuracy, or even-handedness. This price may have been worth paying to protect the historical right of jury trial from encroachment, but the price was high nonetheless. There is no justification for spreading this damage into areas where the historical right of jury trial did not reach. The decision to sentence concurrently or consecutively for multiple offenses is one such area. Such a needless extension of the *Apprendi* rule would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Supreme Court of Oregon, *State v. Ice*, 343 Ore. 248, 250-251, 170 P. 3d 1049, 1050 (2007):

“Defendant managed an apartment complex where the 11-year-old victim, her mother, and younger brother lived. On two occasions, defendant entered into the family’s apartment at night. On each occasion, defendant went into the victim’s bedroom and touched her breasts and then her vagina.

“Based on those acts, a grand jury indicted defendant for committing six crimes. The indictment alleged that defendant twice committed first-degree burglary by entering the victim’s apartment with the intent to commit sexual abuse. The indictment also alleged that, during each burglary, defendant committed two acts of first-degree sexual abuse; specifically, the indictment alleged that, on each occasion, defendant touched the victim’s breasts and then her vagina. Defendant pleaded not guilty. The case was tried to a jury. After consider-

ing the evidence, the jury convicted defendant of all six charges.

“Before the sentencing hearing, the parties submitted sentencing memoranda. Regarding the length of the sentences, the state recommended that the trial court impose enhanced or upward departure sentences on the two burglary convictions and also on the two sexual abuse convictions based on touching the victim’s vagina. It did not argue that the court should impose departure sentences on the two sexual abuse convictions based on touching the victim’s breasts. With respect to the separate question of whether the sentences should run concurrently or consecutively, the state contended that there were two separate criminal episodes based on the two burglaries and that the sentences arising out of each of those criminal episodes should run consecutively to each other. The state also argued that, within each of the two criminal episodes, the sentence for sexual abuse based on touching the victim’s vagina should run consecutively to the sentence for burglary. It recommended, however, that the sentences for sexual abuse based on touching the victim’s breasts should run concurrently with the sentences for sexual abuse based on touching the victim’s vagina.

“In his sentencing memorandum, defendant did not address whether the court should impose departure sentences. Regarding consecutive sentences, defendant agreed that there were two criminal episodes and that ORS 137.123(2) would permit the trial court to impose the sentences arising out of the second episode consecutively to the sentences arising out of the first episode. Defendant noted, however (and the state agreed), that the trial court could impose consecutive sentences *within* each

episode only if it made certain factual findings set out in ORS 137.123(5).”

Before Ice’s sentencing hearing, this Court issued its opinion in *Apprendi v. New Jersey*, 530 U. S. 466 (2000). Ice filed a supplemental memorandum citing *Apprendi*’s rule that a jury must determine the facts of a crime and “the jury must also consider any factors which may result in a sentence more severe than contemplated by statute.” *Id.*, at 251, 170 P. 3d, at 1051.

At the sentencing hearing Ice argued, contrary to his statement in his sentencing memoranda, that under Oregon’s constitution a jury had to resolve whether the two convictions for burglary arose out of separate criminal episodes. *Id.*, at 252, 170 P. 3d, at 1051. The sentencing judge rejected the argument and adopted the state’s recommendations. *Ibid.*

The judge decided that Ice’s sentences for the first burglary charge, and the first sexual abuse conviction for touching the victim’s vagina would be served consecutively, making the findings of both “willingness to commit more than one criminal offense” and “greater, qualitatively different . . . harm to the victim” *Id.*, at 252-253, 170 P. 3d., at 1051. Either finding would have been sufficient to authorize consecutive sentences under Ore. Rev. Stat. § 137.123(5). The court ordered the sentence for touching the victim’s breasts run concurrently with the sentence for touching the victim’s vagina. *Id.*, at 253, 170 P. 3d, at 1051.

The court then found the second burglary to be a “second separate incident” and ordered the sentence on that conviction to run consecutively to the other sentence. *Ibid.*; see Ore. Rev. Stat. § 137.123(2). The sexual abuse sentence for touching the victim’s vagina was ordered to be served consecutively, with the sen-

tence for touching the victim's breasts to run concurrently. *Ice*, 343 Ore., at 252, 170 P. 3d, at 1051-1052. With upward departures and consecutive terms, Ice was sentenced to serve a total of 28 years, 4 months. Pet. for Cert. 5.

Ice appealed, alleging the trial court had violated his federal and state constitutional rights by making the upward departures and by ordering that four of his sentences run consecutively and not concurrently. *Ice*, 343 Ore., at 253, 170 P. 3d, at 1052. The Oregon Court of Appeals affirmed the trial court's decision without an opinion. *State v. Ice*, 178 Ore. App. 415, 39 P. 3d 291 (2001) (table).

The Oregon Supreme Court granted discretionary review. See *Ice*, 343 Ore., at 250, 170 P. 3d, at 1050. The state high court found that the objection to the upward departures was defaulted. *Id.*, at 253-254, 170 P. 3d, at 1052. The court also rejected the state constitutional argument on the merits. *Id.*, at 261-262, 170 P. 3d, at 1056. However, the Oregon Supreme Court found re-sentencing was warranted in Ice's case because of the rules established by this Court's decisions in the *Apprendi* line of cases. *Id.*, at 265, 170 P. 3d, at 1058. The Oregon Supreme Court held that the "judicial factfinding" that allowed the judge to impose consecutive sentences violated *Apprendi* and *Blakely* principles because they exposed Ice "to a greater punishment than that authorized by the jury's guilty verdict." *Id.*, at 265-266, 170 P. 3d, at 1058.

This Court granted certiorari on March 17, 2008, to address whether the Sixth Amendment is violated by a judge's finding of the facts required by state law for the imposition of consecutive sentences.

SUMMARY OF ARGUMENT

The rule of the *Apprendi* line of cases—that a fact that raises the ceiling on the maximum punishment must be found by the jury—must be understood in the context of the purpose of the rule. That purpose was to protect the right of jury trial from encroachment by modern sentencing systems that allow judges to effectively convict the defendant of a higher degree of offense. The *Apprendi* rule should not be extended to areas where there is no danger of such encroachment.

The decision to run multiple sentences consecutively was entirely for the court at common law in England and during the Founding era in America. The jury had no role in this decision.

In *Blakely v. Washington*, this Court settled on a bright-line rule to avoid the problem of the slippery slope presented by the dissent's proposal. For consecutive sentencing, the slope is not slippery. Consecutive sentencing is a self-contained area with no danger of encroaching on the traditional function of the jury.

The fact that the State of Oregon has chosen to place restraints on the traditionally unlimited discretion of the sentencing court should not change the result. It is perverse to say that a state's voluntary decision to add protections for the defendant—requiring certain facts be found before consecutive sentences may be imposed—automatically imposes the burdens of having those facts found by juries and proved beyond a reasonable doubt. The state may react by repealing that protection, as California did for upper-term sentencing after *Cunningham*.

ARGUMENT

I. The purpose of the *Apprendi* bright-line rule is to protect the historical function of the jury from encroachment, and the rule should not be applied where that purpose is not served.

A. *The Apprendi Rule.*

“The *historic* link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the *novelty* of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Apprendi v. New Jersey*, 530 U. S. 466, 482-483 (2000) (emphases changed; footnote omitted).

After *Apprendi*, “[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 491 (emphasis added). But to say that this rule applies to a sentencing procedure that allows a sentencing judge to impose consecutive sentences for *multiple crimes* is to take the *Apprendi* rule out of its context of preserving the jury’s historical role against the encroachment of modern innovation.

Apprendi prohibits sentencing systems that allow judges to find factors that are the functional equivalent of elements of an offense. In *Apprendi* itself, the sentencing factor, in effect, took the single offense from a statutorily defined second-degree felony to a first-degree felony. *Id.*, at 494-495. The factor was “perhaps as close as one might hope to come to a core criminal offense ‘element.’ ” *Id.*, at 493 (footnote omitted). This

is not the equivalent of allowing a sentencing judge to impose consecutive sentences for multiple offenses.

New Jersey's criminal statutes penalized possession of a firearm for an "unlawful purpose" as a "second-degree" offense. *Id.*, at 468. A second-degree offense was punishable by imprisonment "between five years and 10 years." *Ibid.* (quoting N. J. Stat. Ann. § 2C:43-6(a)(2) (West 1995)). At the time of Apprendi's sentence, New Jersey's criminal code allowed the judge to impose an "extended term" of imprisonment "if the trial judge finds, by a preponderance of evidence, that '[t]he 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.'" *Id.*, at 468-469 (quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). The imposition of an extended term could increase the defendant's sentence "between 10 and 20 years." *Id.*, at 469 (quoting N. J. Stat. Ann. § 2C:43-7(a)(3)). In imposing the extended term for a single offense, a trial judge was, in fact, "impos[ing a] punishment identical to that New Jersey provides for crimes of the first degree" based on a judge's finding of the defendant's "purpose" or mental state. *Id.*, at 491. This Court found fault with this practice because the jury had only convicted the defendant for the second-degree offense of "possession of a firearm." *Ibid.* The Sixth Amendment prohibited the effect of punishing for a single first-degree offense when the jury had not found the defendant guilty of a first-degree offense. See *id.*, at 491-492.

This enhanced sentence for a single crime is fundamentally different from a sentencing judge's choice regarding whether to give the defendant a "cheaper by the dozen" discount on multiple crimes. Traditionally, a trial judge has always been able to impose consecutive

sentences for separate crimes when the jury has found the defendant guilty of each separate crime beyond a reasonable doubt. While the result of consecutive sentences may be a longer term of punishment, the Sixth Amendment was not originally understood to require jury involvement in this decision. See Part II, *infra*. In each case in the *Apprendi* line, this Court has found that the defendant's constitutional rights were violated when a judge imposed a sentence for a single crime greater than the maximum he could have imposed for that crime, "without the challenged factual finding." See *Blakely v. Washington*, 542 U. S. 296, 303 (2004).

The Oregon Supreme Court read *Apprendi* and *Blakely* to prohibit " 'expos[ing a] defendant to a greater punishment than that authorized by the jury's guilty verdict,' *Apprendi*, 530 U. S., at 494, based on judicial fact-finding" *State v. Ice*, 343 Ore. 248, 266, 170 P. 3d 1049, 1058 (2007) (footnote omitted). Application of *Apprendi* and *Blakely*'s rules in such a manner is incorrect. This interpretation of the post-*Apprendi* Sixth Amendment right lifts *Apprendi* out of context. The underlying concern of *Apprendi* and *Blakely* was "the need to give intelligible content to the right of a jury trial" for a crime. See *Blakely*, 542 U. S., at 305. This is done so long as each fact setting the punishment ceiling for a *single* offense is submitted to a jury. See *United States v. Booker*, 543 U. S. 220, 230 (2005) (" 'sentencing ceiling' "); *Washington v. Recuenco*, 548 U. S. 212, 220 (2006) (sentencing factors subject to *Apprendi* are equivalent to elements of offenses). So long as each ceiling-raising sentencing factor for a single offense is submitted to the jury, the jury performs as the check on judicial power that the Sixth Amendment right to a jury was intended to provide. See *Blakely*, *supra*, at 306.

Apprendi and *Blakely* do not address multiple verdicts. The decisions involve a single verdict, operating alone, for a single charged offense. See *id.*, at 299, n. 2, and 300. Therefore, where a sentence for “second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping,” the sentence unconstitutionally impinged on the role of the jury. See *id.*, at 307.

The consecutive sentences imposed by the trial court in the present case did not infringe on the historical Sixth Amendment role of a jury as envisioned in *Blakely* or *Apprendi*. The Oregon statute merely provides structure for a decision that has always been one for the judge and not the jury. The defendant may be punished for each crime he committed—as opposed to being punished for one and getting off scot free for the others—if (1) the crimes are not part of a continuous, uninterrupted course of conduct; (2) the additional crime was not incidental but showed a willingness to commit more than one crime; or (3) the additional crime caused greater or different loss to the victim. See Ore. Rev. Stat. §§ 137.123(2) and (5). These determinations all involve relationships between crimes and do not resemble elements of crimes traditionally found by the jury.

B. Booker and Cunningham.

This Court’s decision in *United States v. Booker* does not support the Oregon Supreme Court’s interpretation that *Apprendi* and *Blakely* are meant to prohibit “sentencing schemes that permit or require judges to impose sentences that are *longer* than sentences that a jury’s verdict alone would authorize,” *Ice*, 343 Ore., at 264, 170 P. 3d, at 1057 (emphasis in original), as applied to consecutive sentences for multiple offenses. Like the other cases in the line, *Booker* concerns the

extent of the Sixth Amendment’s protection for a single charged offense. See *Booker*, 543 U. S., at 227-228. In *Booker*, both defendants received enhanced sentences for a single crime. *Ibid.* Booker had been charged with possession with the intent to distribute at least 50 grams of cocaine base. *Id.*, at 227. The jury found him guilty of a single offense under 21 U. S. C. § 841(a)(1). *Ibid.* Under the statute, this conviction carried with it “a minimum sentence of 10 years in prison and a maximum sentence of life” *Ibid.* However, for the bare offense, the Sentencing Guidelines required the trial court “to select a ‘base’ sentence of no less than 210 nor more than 262 months in prison.” *Ibid.* Then, in a post-sentencing proceeding, the trial judge found that Booker was in possession of 556 grams of crack and that he had obstructed justice. *Ibid.* Based on this finding, the Sentencing Guidelines required the judge to “select a sentence between 360 months and life imprisonment.” *Ibid.*

Fanfan, the other *Booker* defendant, was convicted for “conspiracy with intent to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U. S. C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii).” *Id.*, at 228. “Under the Guidelines, without additional findings of fact, the maximum sentence authorized by the jury verdict was imprisonment for 78 months.” *Ibid.* However, in a separate sentencing hearing, the trial judge found Fanfan was responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack, and that Fanfan “had been an organizer, leader, manager or supervisor in the criminal activity.” *Id.*, at 228. Under the Guidelines, these facts “required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone.” *Ibid.*

The Court’s decision was derived from the principle “that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the *elements* of the crime with which he is charged.’ ” *Id.*, at 230 (quoting *United States v. Gaudin*, 515 U. S. 506, 511 (1995)) (emphasis added). Booker and Fanfan’s sentences were invalid, not simply because they were “longer,” but because the judge had single-handedly convicted the defendants of what amounted to a greater offense. See *id.*, at 235 (judge found greater quantity of drugs than found by jury). The principle of *Booker* is not inconsistent with the imposition of consecutive sentences by a trial judge exercising his traditional, discretionary role, even when the result is a longer term of punishment, but instead is based on the need to preserve the significance of “the jury’s finding of the underlying crime.” See *id.*, at 236.

Cunningham v. California, 549 U. S. 270, 127 S. Ct. 856 (2007), has not altered or added new dimensions to *Apprendi*’s Sixth Amendment rule. *Cunningham* addressed the conviction and sentence for a single offense of “continuous sexual abuse of a child under the age of 14.” *Id.*, 127 S. Ct., at 860. At the time of his conviction, California sentencing law “obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation.” *Ibid.* If the trial judge found facts in aggravation, the judge could enhance Cunningham’s sentence and impose the “upper term sentence of 16 years.” *Id.*, at 860-861.

At issue in *Cunningham* was whether the defendant’s sentence reflected the “elements” of the crime as found by the jury. Under California’s Determinate Sentencing Law (DSL), the judge, and not the jury, was allowed to impose an upper-term sentence if he found facts beyond those “element[s] of the charged offense,

essential to a jury's determination of guilt, or admitted in a defendant's guilty plea." See *id.*, at 868. Under California's sentencing scheme, an upper-term sentence for a single crime could be imposed by the trial judge based on "facts found discretely and solely by the judge." *Ibid.* The longer sentence imposed by the court was unconstitutional because the defendant's right to have the functional equivalent of elements of the charged offense found by a jury had been violated. *Ibid.*

To say that *Apprendi*'s bright-line rule was violated by California's DSL simply because it allowed a judge to impose a longer term of punishment is to remove *Apprendi* and *Cunningham* from the context in which they were decided. " 'Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.' " *Id.*, at 864 (quoting *Harris v. United States*, 536 U. S. 545, 557 (2002) (plurality opinion)). Words must be understood in context. See *United States v. Santos*, 553 U. S. __ (No. 06-1005, June 2, 2008) (slip op., at 4) (plurality opinion); *Ali v. Federal Bureau of Prisons*, 552 U. S. __, 128 S. Ct. 831, 849-850 (2008) (Breyer, J., dissenting). The context of the *Apprendi-Blakely* bright-line rule is sorting out which sentencing factors would have been considered elements in the founding era. Language lifted from those opinions should not be applied mechanically to factual determinations that obviously would not have been considered elements at that time.

Apprendi was meant to preserve the traditional role of the jury to find every element of the single offense for which the defendant was charged. A sentence for a single offense departs from that tradition when the judge was allowed to find facts that in effect held the

defendant guilty for a greater offense. This is because, according to *Apprendi* and this Court's later holding in *Washington v. Recuenco*, 548 U. S. 212, 220 (2006), "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U. S., at 478 (footnote omitted). Accordingly, any "sentencing factor" that led to punishment for the functional equivalent of a higher offense has to be treated as an "element" of a crime and submitted to a jury. *Recuenco*, *supra*, at 220.

It would be an error to lift the "fact essential to the punishment" rule from the *Apprendi* line and apply it to the timing of punishment for multiple offenses. To do so would be to interpret *Apprendi*, *Blakely*, *Booker*, and *Cunningham* to prohibit the traditional role of a sentencing judge to use his discretion to impose consecutive sentences. In Oregon, judicial discretion to impose consecutive sentences is not done "at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty" for a single conviction. *Blakely*, 542 U. S., at 309. The statute relating to concurrent and consecutive sentences grants "the court . . . discretion to impose consecutive terms of imprisonment for *separate convictions*." When the "separate convictions" arose out of a "continuous and uninterrupted course of conduct," the court must find that the separate criminal offense, and resulting "separate convictions," were either indicative of the defendant's willingness to commit more than one crime or "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim" See Ore. Rev. Stat. § 137.123(5)(a) and (5)(b). This sentencing discretion is authorized only after the jury has found all the "facts essential to lawful imposi-

tion of the penalty” of each separate conviction. Cf. *Blakely, supra*, at 309. The resulting longer punishment does not take away from the jury’s traditional role of finding all facts determining the degree of each offense.

**II. At common law and in early America,
the jury had no role in the decision of
whether sentences for multiple crimes would
be served consecutively, and the
Sixth Amendment jury trial right therefore
does not extend to that decision.**

“[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.” *Blakely v. Washington*, 542 U. S. 296, 308 (2004). Consecutive sentencing has long been a discrete consideration by the trial judge, exercised after the jury has reached its verdicts on the merits. A judge’s ability to choose concurrent or consecutive sentences was clear “during the years surrounding our Nation’s founding.” Cf. *Apprendi v. New Jersey*, 530 U. S. 466, 478 (2000). There need be no concern that allowing the judge to find the facts required for consecutive sentences will erode the jury power reserved by the Sixth Amendment.

A. Common Law.

At common law, multiple count indictments were not unusual. See Note, “Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties,” 67 *Yale L. J.* 916, 920, n. 17 (1958) (“Yale Note”) (citing 2 M. Hale, *Pleas of the Crown* 173 (Wilson ed. 1778); 1 J. Chitty, *Criminal Law* 168-172 (1819)). And while consecutive sentencing was possible, see, e.g., *Rex v. Williams*, 168 *Eng. Rep.* 366, 370 (1790), it was generally unnecessary because of the

capital nature of most offenses. Because all felonies were punishable by death and benefit of clergy was only available for the first offense, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring v. Arizona*, No. 01-488, pp. 4-5, it was typically unnecessary to impose more than one sentence of imprisonment. In America, the common law system of felony sentencing was replaced by reform legislation in most states shortly after the Founding, and imprisonment became the usual punishment for most felonies. See King, *The Origins of Jury Sentencing in the United States*, 78 *Chicago-Kent L. Rev.* 937, 937 (2003).

“[W]hen there are two or more convictions, on which sentence remains to be pronounced; the judgment of the court may direct that, each succeeding period of imprisonment shall commence on the termination of the next preceding one.” 1 J. Bishop, *Commentaries on the Criminal Law* § 636, p. 527 (1st ed. 1856).

Wilkes v. Rex, 2 Eng. Rep. 244 (H. L. 1769), demonstrates the trial judge’s power to impose consecutive sentences for two separately charged crimes. *Id.*, at 248-249. John Wilkes was accused of “audaciously, wickedly, and seditiously” speaking out against the King “to impeach and disparage his veracity and honor, and to represent and cause it to be believed amongst his Majesty’s subjects, that his said most gracious speech contained falsities and gross imposition upon the public” *Id.*, at 244-245. Wilkes was then accused of printing and publishing “a certain malignant, seditious, and scandalous book and libel.” *Id.*, at 245. Wilkes was charged for both offenses, and convicted. *Ibid.* He was sentenced to pay a fine of £500 and to serve 10 months in custody of the Marshal. *Ibid.* At the time of the conviction, Wilkes had also been charged and convicted for “publishing an obscene and impious libel entitled ‘An Essay on Woman.’” *Ibid.* He was sentenced to pay

another fine of £500, and imprisoned for 12 months, “to be computed from the determination of the first imprisonment.” *Ibid.* Wilkes challenged his sentence, in part claiming that judgments at law must take immediate effect because they constrained the liberty of the defendant. *Id.*, at 247. Wilkes claimed, in particular, that because it was uncertain when the first imprisonment would end, it was unlawful to impose the 12-month sentence “from the determination of the first imprisonment.” *Ibid.*

The House of Lords rejected Wilkes’ challenge. *Id.*, at 248. “It would have been absurd to have made the imprisonment commence immediately, Mr. Wilkes being already under another sentence of imprisonment for ten months; and, in that case, would in effect have only suffered an imprisonment of two months; when the Court, on account of the enormity of the offence, intended he should be imprisoned twelve months” *Ibid.* “Under the circumstances of this case, there was no incongruity in the imprisonment commencing at a future time; and if there was any novelty in it, it was to be attributed to the accumulated guilt of its object.” *Ibid.*

B. Early American Cases.

Early American courts also found no novelty in imposing consecutive sentences. It was not uncommon for judges to impose consecutive sentences for crimes committed by prisoners who had been indicted and convicted for more than one crime. See, *e.g.*, *Commonwealth v. Leath*, 3 Va. 151, 1 Va. Cas. 151 (1806). In *Leath*, prisoners Peter Leath and Heartwell Leath had both been indicted, convicted, and sentenced to two years imprisonment “for the offence of malicious stabbing of A.B. on the 19th of February, 1805 by the District Court of Petersburg” *Ibid.* Both prisoners

were also indicted for the felonious and malicious stabbing of John Williams and Turner Fear on February 19th. *Id.*, at 151-152. Another indictment was also found against Heartwell for the malicious stabbing of Daniel Lyon, and Peter Leath was indicted for the “same crime against two other persons on the same day.” *Id.*, at 152. After conviction, they moved to arrest the judgment at sentencing because they “had already been found guilty of stabbing” and had “been sentenced to undergo confinement in the penitentiary house, and because no law of the land allows a man convicted, to be sentenced to undergo punishment at a far distant day . . .” *Ibid.* The district court adjourned the question to the general court. That court then held that the defendants could be confined “upon the five convictions last in the record in the said case mentioned, although they have already been adjudged to undergo such imprisonment upon the first conviction therein mentioned . . . ; and each imprisonment ought to commence from and after the expiration of the imprisonment or imprisonments which may have been adjudged against them before the rendition of such judgments respectively.” *Id.*, at 154-155.

A Connecticut decision acknowledged that the same practice was well established by 1811. See *State v. Smith*, 5 Day 175, 178-179 (Conn. 1811). Smith was convicted for using a counterfeit bank note when he knew the note was counterfeit. *Id.*, at 176. That same court term, Smith was indicted for using another similar counterfeit note. *Id.*, at 178. He was sentenced by the trial court to three years in prison for each offense, and “the second confinement should commence when the first term should expire.” *Ibid.* Smith challenged the terms of his imprisonment as “novel, without precedent, and cruel and illegal.” The court rejected the argument. “The postponement, was, therefore, necessary, to prevent the previous conviction

from operating as an exemption from punishment, for a subsequent offense. No injustice is done to the prisoner; and this proceeding is neither new, nor without precedent; *such has been the usage of our courts, for many years past, in this state.*" *Ibid.* (emphasis added). Conspicuously absent from all these cases is any mention of any role for the jury beyond convicting of the underlying offenses.

Discretion to impose multiple convictions for multiple crimes is not a new concept; it is one that has endured in England and the United States for centuries. In 1900, this Court recognized that multiple sentences can be given for multiple offenses, even when the offenses have all been charged in a single indictment. See *In re De Bara*, 179 U. S. 316, 322 (1900). De Bara had been convicted of multiple mail frauds. *Id.*, at 316, 320. He was sentenced to three years confinement in a federal prison, when the maximum sentence he could have received for one offense under the statute was 18 months. *Id.*, at 317. This Court reasoned that although De Bara had been tried under one indictment, he had been found guilty of multiple offenses. *Id.*, at 320. The Court first dispatched an argument based on the procedural peculiarities of the statute in question. See *id.*, at 321. Then it addressed sentencing discretion more generally.

"To [the trial court] is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offence. It may, though it is not required, to do more upon three offences, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of the defendant" *Id.*, at 322.

These cases illustrate that in cases of multiple convictions, it was the role of the trial judge to choose

the timing of the second and subsequent sentences. If the sentencing court believed that the offenses of the defendant warranted multiple punishments, it was within the discretion of the judge to structure the sentence so that the sentence for one offense began when the sentence for the first offense terminated. The purpose of the rule of *Apprendi*, *Blakely*, and *Booker* is to preserve the “ancient guarantee” of the jury trial “in a meaningful way” in the face of new circumstances, see *Booker*, 543 U. S., at 237, not to erode the traditional sentencing role of the judge. Traditionally, the sentencing role of the judge has been to exercise his discretion and impose consecutive sentences, instead of concurrent sentences, when he believed the defendant’s behavior warranted such punishment.

C. *Apprendi*.

This Court’s *Apprendi* decision reflected the tenets of common law that the “ ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’ ” See *Blakely*, 542 U. S., at 301-302 (quoting 4 W. Blackstone, Commentaries 343 (1st ed. 1769)). This was the sole purpose of the jury under the common law. The jury had the power to affirm or deny the state’s assertions of the defendant’s guilt. It did not have the power to order sentences to run concurrently or consecutively. Traditionally, the jury did not concern itself with the punishment that flowed from its determination of guilt or innocence. The jury’s function was to determine if the defendant had committed a crime in a system where “a ‘crime’ or an ‘offense’ is simply conduct that is forbidden by law and to which certain consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process.” See H. Packer, *The Limits of Criminal*

Sanction 18 (1968). In cases of multiple convictions, the judge remained free to impose consecutive sentences.

The *Apprendi* decision prohibited judges from imposing a sentence for a single crime only when the jury had not found all elements of that crime. *Apprendi*, 530 U. S., at 494. *Apprendi* concerned itself only with the manner in which elements of an offense were found and what should be considered an element for the purpose of the Fifth and Sixth Amendments. Recognition of the judicial power to impose consecutive sentences does not result in “judicial impingement upon the traditional role of the jury.” Cf. *Blakely*, 542 U. S., at 309. Nothing here violates the Sixth Amendment right to a jury trial, and to hold any differently would needlessly infringe the authority of the people of the state, through the democratic process, to structure the judicial function of sentencing as they see fit.

III. The state should not be penalized for adding structure to a discretionary sentencing decision.

“[T]he Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative direction and control.” *Cunningham v. California*, 549 U. S. 270, 127 S. Ct. 856, 872 (2007) (Kennedy, J., dissenting). As described in Part II, *supra*, judges traditionally had complete discretion to make sentences consecutive, subject only to the prohibition against multiple punishment for the same offense. See 6 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 26.3(f), pp. 730-731 (3d ed. 2007). “Without limits, this freedom could undercut legislative efforts to regulate sentence length, creating the possibility of grossly disparate total

terms of incarceration for similarly situated offenders. So it is not surprising that legislatures have taken additional steps to regulate the imposition of consecutive terms.” *Id.*, at 731.

The question before the Court in the present case is whether to create another “no good deed goes unpunished” rule, imposing additional constitutional burdens on the State of Oregon because it chose to limit the traditionally unlimited power of consecutive sentencing to particular factual situations. Oregon Revised Statutes § 137.123 provides:

“(1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.

“(2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.

“(3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.

“(4) When a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

“(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

“(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant’s willingness to commit more than one criminal offense; or

“(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.”

In comparison to the traditional rule, this statute is very generous to the defendant. The statute establishes concurrent sentencing as the rule with consecutive sentencing as the exception, and factual findings are required to invoke the exception. The state could avoid all *Apprendi* problems by making the opposite presumption, and some have. See LaFave, *supra*, at 732.

There is “considerable irony” in holding that a state violates the defendant’s constitutional rights by requir-

ing a factual finding that it could dispense with altogether. See *Cunningham*, 127 S. Ct., at 872 (Kennedy, J., dissenting). California did, in fact, react to *Cunningham* by repealing the fact-finding requirement at issue in that case with a bill that flew through the Legislature in a little over two months. See 2007 Cal. Codes Adv. Leg. Serv., ch. 3; see also *People v. Black*, 41 Cal. 4th 799, 808, n. 2, 161 P. 3d 1130, 1135, n. 2 (2007). In the single-offense cases, this ironic result was deemed necessary because of the slippery-slope problem. There was no objective place to draw the line between sentencing systems that merely structured a decision that had always resided with the judge and those that encroached on the traditional function of the jury by effectively authorizing the judge to find the degree of offense. See *Blakely v. Washington*, 542 U. S. 296, 306-308 (2004).

In the present case, the slope is not slippery. Consecutive sentencing differs from degree of offense qualitatively, not just quantitatively. Legislative structuring of consecutive sentencing cannot impinge on the function of the jury as it was understood at the time the Sixth Amendment was ratified because the jury had no role whatever in that decision at that time. In this case, the value of drawing a bright line, cf. *id.*, at 308, weighs on the other side of the scale. The rule of *Apprendi* and its progeny should simply be declared entirely inapplicable to the choice of consecutive or concurrent sentences for multiple offenses.

CONCLUSION

The decision of the Supreme Court of Oregon should be reversed.

June, 2008

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*