

No. 07-901

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In the Supreme Court  
of the United States

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STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

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BRIEF FOR PETITIONER STATE OF OREGON

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On Writ of Certiorari to the  
Oregon Supreme Court

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## **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.

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## **BRIEF FOR PETITIONER STATE OF OREGON**

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### **OPINIONS BELOW**

The Oregon Court of Appeals affirmed respondent's convictions and sentences without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001). The Oregon Supreme Court reversed in a 5-2 decision reported at *State v. Ice*, 343 Or. 248, 170 P.3d 1049 (2007) (reprinted in the appendix to cert. pet. at App. 1 to App. 46).

### **JURISDICTION**

The Oregon Supreme Court issued its opinion on October 11, 2007. The state timely filed its petition for writ of certiorari on January 4, 2008. This Court granted the petition on March 17, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury \* \* \* ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law \* \* \* ."

**STATE STATUTORY PROVISION INVOLVED**

Or. Rev. Stat. § 137.123 identifies the circumstances under which a trial court may impose consecutive sentences:

(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.

### STATEMENT

This case presents a question about the scope of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). In those cases, this Court construed the Sixth Amendment jury-trial guarantee to apply to any factual findings—other than the fact of a prior conviction—that increase the maximum punishment authorized for a discrete criminal offense. The question in this case is whether that rule applies to facts that do not increase the sentence that a defendant receives for any individual crime, but determine only whether the penalties imposed for separate crimes will be served concurrently or consecutively.

#### **1. The underlying facts and convictions**

Respondent managed an apartment complex where the 11-year-old victim lived with her mother and her younger brother. *Ice*, 343 Or. at 250. Respondent twice entered the family's apartment, entered the victim's bedroom, and touched her breasts and then her vagina. *Id.* The state indicted respondent on six charges. J.A. 1-4 (indictment). For each of the two incidents, the state charged respondent with first-degree burglary for entering the victim's apartment with the intent to commit sexual abuse, first-degree sexual abuse for touching the victim's breasts, and first-degree sexual abuse for touching the victim's va-

gina. *Id.* The jury convicted respondent of all six charges.

## **2. The sentencing proceeding**

The parties submitted sentencing memoranda. J.A. 16-34. The state urged the sentencing court to impose consecutive sentences on the two burglary convictions, based on the fact that those offenses arose out of two separate criminal episodes. J.A. 27-28, 30; *see* Or. Rev. Stat. § 137.123(2). For each of the two criminal episodes, the state urged the court to impose the sentence for sexual abuse based on touching the victim's vagina consecutively to the sentence on the burglary conviction. J.A. 28-32; *see* Or. Rev. Stat. § 137.123(4) and (5). The state recommended that the sentences for sexual abuse based on respondent's acts of touching the victim's breasts run concurrently with the sentences for sexual abuse based on his acts of touching the victim's vagina. J.A. 31-32.

Respondent initially pressed only a state constitutional argument about whether the two sexual-abuse convictions within each episode should merge for sentencing. J.A. 19-20. Prior to the sentencing proceeding, however, this Court decided *Apprendi*, and respondent then filed a supplemental memorandum bringing that decision to the sentencing court's attention. Respondent broadly asserted that "it is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute." J.A. 33.

The sentencing court agreed with the state's sentencing recommendations and imposed sentences accordingly. J.A. 39-41 (sentencing transcript), 46-87 (judgment). Or. Rev. Stat. § 137.123 directs that multiple sentences be served concurrently unless the judge: (1) finds that the offenses were not committed in the same course of conduct; or (2) if the offenses were committed in the same course of conduct, find either that one offense was not incidental to the other or that the two offenses resulted in separate harms. The sentencing court "found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of 'separate incident[s]' and, thus, did not 'arise from the same continuous and uninterrupted course of conduct.'" *Ice*, 343 Or. at 255 (quoting Or. Rev. Stat. § 137.123(2)); J.A. 40. That finding permitted the sentencing court to impose consecutive sentences on the two burglary convictions. *Ice*, 343 Or. at 255.

The sentencing court also "implicitly found that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a 'continuous and uninterrupted course of conduct.'" 343 Or. at 255-56 (quoting Or. Rev. Stat. § 137.123(4); footnote omitted). To impose consecutive sentences on the burglary and sexual abuse convictions, the sentencing court found that the convictions for burglary and sexual abuse reflected a "willingness to commit more than one criminal offense" and, alternatively, that the two offenses "caused \* \* \* greater or qualitatively different loss, injury or harm to the victim." *Id.* at 256 (quoting Or. Rev. Stat. §

137.123(5)(a) and (b)). Based on those factual findings, the sentencing court imposed consecutive sentences on the two burglary convictions (80 months and 90 months), consecutive sentences on each conviction for sexual abuse based on touching the victim's vagina (80 months and 90 months), and concurrent sentences for the remaining two sexual-abuse convictions based on touching the victim's breasts (75 months and 75 months), for a total of 340 months. J.A. 46-87.

**3. The Oregon Court of Appeals affirmed without opinion.**

Respondent appealed and the Oregon Court of Appeals affirmed without a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

**4. The Oregon Supreme Court reversed, holding that the imposition of consecutive sentences based on judicial factfinding violated respondent's Sixth Amendment rights.**

The Oregon Supreme Court granted respondent's petition for discretionary review to address his challenges to the consecutive sentences, along with his challenges to upward-departure sentences that the sentencing court also had imposed on four of the six convictions. The court declined to consider respondent's unpreserved challenges to the upward-departure sentences. *Ice*, 343 Or. at 253-54. On the consecutive-sentencing issue, the court first addressed respondent's arguments under the state constitution, which contains a jury-trial guarantee that applies only to "elements" of the crime. *Id.* at 257-60

(discussing caselaw). The court rejected respondent's state constitutional argument because the consecutive-sentencing findings could not be deemed elements of any specific crime. *Id.* at 260-62. Rather, those factual findings “involve a comparison between *two* crimes for which defendant is to be punished[.]” *Id.* at 261 (emphasis in original). On this point, the court was unanimous.

Turning to the federal constitution, however, the court divided 5-2. The state argued that the rule from *Apprendi* and *Blakely* applies only to factual findings that increase the “statutory maximum” punishment for a discrete criminal offense and does not apply to the manner in which sentences for multiple crimes are to be served. The Oregon Supreme Court rejected this argument. In determining the scope of *Apprendi*, the Oregon Supreme Court focused on this Court's statement that “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict.” *Ice*, 343 Or. at 265 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added by Oregon Supreme Court). The Oregon Supreme Court concluded that that was the overarching principle to be gleaned from *Apprendi* and *Blakely*. The court then extended that “greater punishment” principle to *every* sentencing determination that results in a longer total sentencing package based on judicial factfinding, including facts that simply determine whether separate sentences for distinct criminal offenses should be served consecutively or concurrently. *Ice*, 343 Or. at 265-67.

The Oregon Supreme Court thus extended this Court's precedents to apply to judicial factfinding that increases a defendant's aggregate punishment, even if that factfinding does not enhance a specific sentence for a specific conviction. "The *Apprendi*, *Blakely*, and [*United States v.*] *Booker*[, 543 U.S. 220 (2005),] decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage in an adamant refusal to get the message." *Ice*, 343 Or. at 266 (footnote omitted).

The dissent examined the specific issue before this Court in the *Apprendi* line of cases and derived a much narrower set of principles that cannot apply to aggregate sentencing determinations. *Id.* at 269-70 (Kistler, J., dissenting). Because, in each of those cases, this Court was concerned only with identifying the constitutional bounds on defining the elements of a specific offense, the dissent stressed that this Court's references to "greater punishment" could apply only in the context of a discrete conviction and sentence. *Id.*

### **SUMMARY OF ARGUMENT**

In the *Apprendi* and *Blakely* line of cases, this Court shored up the Sixth Amendment jury-trial guarantee by restricting the legislative encroachment on the jury's traditional role of determining whether the government has proved each element of an offense beyond a reasonable doubt. The Oregon Supreme Court mistook the sweeping impact of those cases for a sweeping pronouncement about the role of the jury in deciding all facts related in any way to the

severity of sentencing, including the aggregate sentencing package. Specifically, the state court held that *Apprendi* extends to findings that authorize consecutive sentences because the imposition of consecutive sentences increases the aggregate penalty. But this Court's decisions are grounded in the historic jury function—determining whether the government has proved each element of an offense beyond a reasonable doubt—and have not been applied outside that offense-specific history.

To remain faithful to this Court's reasoning, any expansion of the Sixth Amendment jury-trial guarantee must rest on a similar historic foundation. But the substantial historical record delineating the jury's traditional role in finding each element of an offense stands in stark contrast to the absence of any history suggesting that juries traditionally played a role in imposing multiple punishments for multiple convictions. The former role is well established given that the framers' overriding concern in twice providing for a constitutional guarantee of the jury-trial right was to preserve the jury's role in determining guilt. The latter was a practice apparently unknown to the framers because the jury historically played no role in aggregate sentencing determinations.

The framers of the constitutional jury-trial guarantees would have been quite comfortable with the trial judge in this case deciding how respondent would serve separate sentences for separate convictions. And they would have viewed the effect of consecutive sentencing not as enhancing respondent's punishment in a way that called for additional jury

protections, but as merely giving meaning to the jury's determination that multiple convictions—each calling for its own sentence—were warranted. Because the jury traditionally played no role in aggregate sentencing, Oregon's consecutive-sentencing statute—which authorizes the consecutive sentences in this case based on judicial factfinding—does not encroach on the Sixth Amendment's jury-trial guarantee.

### ARGUMENT

**A. The Oregon Supreme Court misread this Court's precedent. The *Apprendi* rule provides an objective means for determining the constitutionally protected elements of a specific offense.**

Whenever a criminal defendant is convicted of multiple offenses—either in a single proceeding or in separate proceedings—the decision must be made whether the sentences for those multiple offenses will be served consecutively or concurrently. In Oregon, as in most states, the trial judge makes that decision. The judge's role in determining how a criminal defendant will serve multiple sentences for multiple convictions is “[f]irmly rooted in common law.” Arthur W. Campbell, *LAW OF SENTENCING*, § 9.12, 278 (2nd ed. 1991). And it is a firmly rooted tradition in Oregon, where trial judges have long had inherent authority to impose consecutive sentences. *See State v. Jones*, 250 Or. 59, 61, 440 P.2d 371 (1968) (“it is an inherent power of the court to impose sentences, including the choice of concurrent or consecutive terms, when the

occasion demands it”). But Oregon, like many other states, has codified the trial judge’s authority to impose consecutive sentences and has constrained that authority in some respects by requiring the judge to make certain factual findings to impose some consecutive sentences. Or. Rev. Stat. § 137.123.

In this case, the Oregon Supreme Court evaluated that statutory requirement of factual findings for consecutive sentences in light of this Court’s recent Sixth Amendment jury-trial cases. From its review of those cases, the Oregon Supreme Court concluded that the Sixth Amendment limits the State’s ability to require judicial factfinding as a sentencing predicate, not only when the fact authorizes an enhanced sentence for a specific conviction, but also when the fact authorizes a greater total sentencing package than would otherwise be permitted. Under Oregon law, the jury makes every factual finding necessary for each conviction and the sentence on each separate conviction is fully supported by the jury’s finding of guilt. The Oregon Supreme Court nevertheless held that the *Apprendi* rule entitles a defendant to a jury determination on facts required to impose separate, but consecutive, sentences on those separate convictions.

That holding is not compelled by anything in the *Apprendi* line of cases. None of those cases purports to address consecutive sentencing or the aggregate punishment for multiple crimes. In both *Apprendi* and *Blakely*, this Court addressed a narrow question—the validity of an individual sentence that exceeded the statutory maximum for a single offense.

The only discussion about consecutive sentences in *Apprendi* suggests that the *Apprendi* rule does not extend to that determination. The Court began by explaining that the narrow issue involved a particular sentence for a particular offense on a particular count and that the fact that the defendant's sentence fell within the authorized *aggregate* maximum (that could be imposed via consecutive sentences) was irrelevant. *Apprendi*, 530 U.S. at 474.

The Oregon Supreme Court misapplied this Court's precedent by extending it to the consecutive-sentencing context. A close examination of this Court's cases reveals that the pertinent animating principles apply much more narrowly, and apply only to decisions involving a single offense and to the sentence that may be imposed for it. Starting in the 1970s, this Court addressed a legislative trend of transforming the jury's traditional function of determining all the facts necessary for a conviction. By recasting some of those factual determinations as presumptions or as sentencing factors instead of elements of the offense, some legislatures attempted to diminish the jury's traditional role. Through the use of presumptions, the legislatures shifted the burden to prove certain facts to the jury from the government to the defendant. With sentencing factors, legislatures shifted certain factfinding from the jury to the trial judge. In both situations, the jury no longer stood between the defendant and the government to the same extent, and it no longer served its historic role of deciding whether the government had proved each fact necessary for a conviction beyond a reason-

able doubt. In the *Apprendi* and *Blakely* line of cases, this Court articulated constitutional limits on the state's ability to make that shift and established an objective test for identifying the elements of an offense that must be determined by the jury.

Although States are free to define criminal offenses, the elements of those offenses, and the punishment associated with each offense, the Sixth Amendment limits the extent to which States may shift certain factual determinations away from the jury. Any factual determination (other than recidivism) that exposes a defendant to a greater maximum punishment for a conviction for a specific offense must be made by the jury, as was the case when the framers drafted the jury-trial guarantees. But the applicable constitutional rule is tethered to the jury-trial right and is offense-specific. It does not extend to a factual determination that is not functionally an element of a specific offense and that was never within the jury's historic role.

- 1. The pre-*Apprendi* cases established an open-ended, multi-factor test to determine the constitutional elements of a discrete offense that cannot be removed from the jury's consideration. They provide no basis for extending the jury-trial guarantees to factfinding necessary for consecutive-sentencing.**

A useful starting point is *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which this Court has identified as initially recognizing the problem it addressed in the

*Apprendi* line of cases. *Apprendi*, 530 U.S. at 484. In *Mullaney*, the Court struck down a Maine law that shifted the burden on the element of malice from the prosecution to the defendant, through the use of a presumption. *Mullaney*, 421 U.S. at 688. In doing so, this Court applied its holding from *In re Winship*, 397 U.S. 358, 364 (1970), that due process requires the prosecution to establish beyond a reasonable doubt all facts necessary to constitute the crime. Notwithstanding the considerable deference owed to policy choices made by State legislatures in defining the elements of crimes, the Court ruled that the presumption at issue violated the Constitution. To rule otherwise would permit the States to evade the historical protections addressed in *Winship* by shifting a traditional element of an offense from the prosecution to the defendant. *Mullaney*, 421 U.S. at 699. The Court's discussion and holding apply only to offense-specific factual determinations because of the historical foundation on which they are based (*i.e.*, the due process requirement of proving each element of a crime beyond a reasonable doubt).

But the Court refused to extend *Winship* and *Mullaney* to invalidate affirmative defenses. In *Patterson v. New York*, 432 U.S. 197 (1977), the defendant argued that with affirmative defenses, as with presumptions, the legislature shifts the prosecutor's burden to the defendant and impermissibly eliminates the jury's role in determining whether the government has proved a particular fact beyond a reasonable doubt. Again, the Court acknowledged that it is the state legislature's prerogative to define the

elements of a crime and to prescribe the penalties for that crime. Yet so long as the State does not offend “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” shifting the burden for proving a fact from the prosecution to the defendant does not create due process concerns. *Id.* at 202. A defendant may be required to prove affirmative defenses because they do not involve facts necessary to constitute the crime—*viz.*, they are not elements of the crime—which the prosecution must prove to the jury beyond a reasonable doubt. *Id.* at 206. The Court cautioned that State legislatures, while permitted to reallocate some elements of crimes as affirmative defenses, were not entirely free of constitutional restraints in that regard. *Id.* at 210. But beyond the obvious limitation that legislatures cannot declare a person guilty or presumptively guilty, the Court offered little clarification about what those constitutional restrictions were. *Id.* Again, the applicable constitutional rule is offense specific and focuses on identifying the correct demarcation between factual findings that are constitutional elements of an offense that a jury must find beyond a reasonable doubt and facts that can be shifted away from the traditional jury determination. *See also Martin v. Ohio*, 480 U.S. 228 (1987) (upholding Ohio statute that placed the burden of proving self-defense on the defendant).

The Court next addressed the line dividing elements of an offense—which the state must prove to a jury beyond a reasonable doubt—from non-element “sentencing factors” in *McMillan v. Pennsylvania*, 477

U.S. 79 (1986), and in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In each case, the challenged law provided that the sentencing range for a specific offense hinged on facts that the trial judge would find by a preponderance of the evidence. *McMillan* involved a factual finding (visible possession of a weapon during a crime) that triggered a mandatory minimum sentence, whereas *Almendarez-Torres* involved a factual finding (the existence of a prior felony conviction) that increased the statutory maximum sentence. In each case, the issue before this Court was whether the factual finding at issue was a constitutional element of the offense or whether it merely constituted a “sentencing factor” that fell outside the jury-trial guarantee.

To resolve that issue, this Court crafted a loose multi-factor test, which asked, among other things, whether the statute declared the defendant presumptively guilty of a crime or relieved the prosecution of its burden of proving guilt, whether proof of the sentencing factor could increase the defendant’s sentence for that crime “from a nominal fine to a mandatory life sentence,” whether the sentencing factor altered the maximum penalty for the offense, whether the statute “creat[ed] a separate offense calling for a separate penalty,” and whether the provision gave the “impression of having been tailored to permit [the sentencing factor] to be a tail which wags the dog of the substantive offense.” *McMillan*, 477 U.S. at 86-88 (identifying those factors; internal citations omitted); see also *Almendarez-Torres*, 523 U.S. at 242-43 (same). Applying that test, this Court held that the

factual findings at issue in *McMillan* and *Almendarez-Torres* were not constitutional elements of the offenses. Therefore, shifting those factual findings away from the jury to the trial judge did not violate the constitution.

The analysis and holdings in *McMillan* and *Almendarez-Torres* demonstrated that the proper constitutional inquiry is offense-specific—that is, focused on analysis of the particular individual offense for which a sentence is being contemplated. In *McMillan*, the Court noted that the State statute did not alter the definitions of any of the individual offenses. Instead, the legislature “took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm.” *McMillan*, 477 U.S. at 89-90. The state’s “decision to do so has not transformed against its will a sentencing factor into an ‘element’ of some hypothetical ‘offense.’” *Id.* at 90. And because the state was permitted to treat the factor “as a sentencing consideration and not an element of any offense,” the Court rejected the defendants’ Sixth Amendment challenge in short order. “[W]e need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *Id.* at 93 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

Similarly, in *Almendarez-Torres*, the Court framed the issue as whether the sentencing provision defined “a separate crime or simply authorize[d] an enhanced penalty.” 523 U.S. at 226. The Court held that the re-

cidivist penalty provision did not define a separate crime. *Id.* Again, the Court's historical analysis makes clear that the Court's concern was with the elements of the discrete offense at issue and with whether the recidivism finding triggered a penalty in excess of the statutory maximum penalty that otherwise would apply to that particular offense. *Id.* at 244-45. The dissent, foreshadowing the wording used in *Apprendi* and *Blakely*, also framed the constitutional inquiry in offense-specific terms,—“whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury.” *Id.* at 248 (Scalia, J., dissenting).

The Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), even more directly portended the *Apprendi* rule and maintained the offense-specific focus for the Sixth Amendment question. There, in the course of construing a federal statute, the Court focused narrowly on the jury's role in determining guilt and “whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.” *Id.* at 244. Based on “the history bearing on the Framers' understanding of the Sixth Amendment,” the Court stated the principle that was to become the *Apprendi* rule: “under 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.” *Id.* at 243 n. 6, 244. In *Jones* as well, the Court was concerned with preserving the jury’s role in determining guilt, and with preventing legislatures from impermissibly transforming the elements of a crime into “sentencing factors” found by trial judges rather than by juries. *Id.* at 241-44.

**2. *Apprendi* and *Blakely* replaced the prior test with an objective test for determining the constitutional elements of an offense that fall within the jury-trial guarantee, but suggested no broader constitutional limits on judicial factfinding for consecutive sentences.**

In *Apprendi*, this Court jettisoned the multi-factor test and adopted a bright-line test to determine whether a fact that bears on sentencing is, for constitutional purposes, an element of the underlying crime. The Court held that “[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.” *Apprendi*, 530 U.S. at 490. The Court did so, in part, to avoid the subjectivity inherent in the open-ended multi-factor test that it had been applying. Under that multi-factor test, “legislatures may establish legally essential sentencing factors *within limits*” but “the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge.” *Blakely*, 542 U.S. at 307

(emphasis in original). “The subjectivity of this standard is obvious.” *Id.*

In eliminating that subjectivity, this Court did not extend the Sixth Amendment jury-trial guarantee to anything other than factual determinations that a jury must make in deciding a defendant’s guilt for a specific offense. The Court established a bright-line rule, but one that applies only to those facts historically found by the jury as part of the guilt determination—in other words, one that applies only to the elements of an offense. As Justice Kistler explained in dissent below, “[f]ar from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature’s efforts to redefine the elements of a single offense will stay within constitutional bounds.” *Ice*, 343 Or. at 272 (Kistler, J., dissenting).

Under *Apprendi*, the Sixth Amendment jury-trial guarantee necessarily is limited to determinations that pertain to a specific offense and the sentence associated with it. *Apprendi* focused on the constitutional limitations that prohibit a legislature, with respect to a specific offense, from shifting the determination of an element from the jury to the sentencing judge. If this shift creates, in effect, a new aggravated offense, it usurps the jury’s traditional role of determining the defendant’s guilt. *Apprendi*, 530 U.S. at 477-79. Although trial practices are not locked into what existed in 1787 and may evolve over time, “practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all

facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt.” *Id.* at 483-84. Under the *Apprendi* rule, the legislature is deemed to have created the functional equivalent of a “greater” offense, with an additional element, when it provides that a factual finding made at sentencing authorizes a punishment in excess of the statutory maximum that would otherwise be available for the offense. *Id.* at 494 n. 19; *see also id.* at 483 n. 10 (“facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense”).

*Apprendi* is grounded in the jury’s historic role in determining whether the government has proved the elements necessary for a specific conviction and in thereby authorizing punishment within the range established for that particular conviction based on those factual determinations:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

*Id.* at 484.

Although general references to punishment appear in the Court's discussion, the Oregon Supreme Court erred by applying those generally worded passages as broadly as it did. The state court instead should have recognized that this Court's discussion focused entirely on the punishment authorized by the jury's determination of the elements of a specific offense. For example, in reiterating the holding of *McMillan*, the *Apprendi* Court noted that it had not budged "from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute *a criminal offense*, and (2) that a state scheme that keeps from the jury facts that 'expose [defendants] to greater or additional punishment,' may raise serious constitutional concerns." *Apprendi*, 530 U.S. at 486 (emphasis added; citations to *McMillan* omitted).

In *Blakely*, as well, the Court maintained that same narrow focus on the elements required to define a crime. There, the Court characterized the rule from *Apprendi* as reflecting

two long-standing tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is \* \* \* no accusation with

the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1892).

*Blakely*, 542 U.S. at 301-02 (footnote omitted).

Once again, the Court emphasized the constitutional limits on legislative attempts to recast a factual element of a crime as a sentencing factor. Although the Courts’ members disagreed about where to draw the line, nothing in the Court’s discussion encompassed additional issues or suggested a broader application of the Sixth Amendment jury-trial guarantee. *See id.*, 542 U.S. at 302 n. 6 (“It bears repeating that the issue between us is not *whether* the Constitution limits States’ authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or [Justice O’Connor’s], the Constitution draws.”).

In other words, this Court consistently has stated that the Sixth Amendment does not cover all aspects of punishment for criminal convictions. It prohibits interference with the role the jury historically played—that is, with its role in determining whether the elements of the criminal offense have been proved and with its role in setting the stage—by returning a guilty verdict—for the imposition of a punishment within the maximum sentence associated with that verdict. As the Court noted in discussing indeterminate sentencing, while that aspect of sentencing may involve judicial factfinding, “the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar

as judicial impingement upon the traditional role of the jury is concerned.” *Id.* at 309 (emphasis in original).

Finally, it is worth noting that this Court expressly declined to consider consecutive sentencing and the aggregate punishment for multiple crimes in *Apprendi*. The Court explained that the narrow issue involved a particular sentence for a particular offense on a particular count. *Apprendi*, 530 U.S. at 474. And the Court deemed irrelevant the fact that the defendant’s sentence fell within the authorized *aggregate* maximum and the argument that a judge could have imposed a consecutive sentence on two other counts to reach the same sentence imposed on the single count at issue. *Id.* “The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count.” *Id.* This Court considered the sentences on the other counts as having “no more relevance to our disposition than the dismissal of the remaining 18 counts.” *Id.*

Thus, nothing in *Apprendi* and *Blakely* supports the Oregon Supreme Court’s broad conclusion that the principles addressed in those cases apply to *any fact* that exposes a criminal defendant to greater punishment and that they apply even to punishment that does not take the form of an enhanced sentence for a specific offense.

**3. This Court has never extended the *Apprendi* rule beyond its offense-specific context; rather, it has reaffirmed that the rule is focused on the jury’s historic role in finding each element of a specific offense.**

The Court’s own characterization of *Apprendi* and *Blakely* resolves any doubt that the Court’s narrow focus has been solely on the jury’s historic role in deciding each element of a specific offense. In *Booker*, 543 U.S. at 230, the Court summarized the line of cases discussed by repeatedly referring to proof of the facts or elements establishing *the* crime at issue:

It has been settled throughout our history that the Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). It is equally clear 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.” *United States v. Gaudin*, 515 U.S. 506, 511 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

The Court placed the line of cases from *McMillan* forward in the context of the “new trend in the legis-

lative regulation of sentencing” whereby legislatures transformed an element of the offense into a sentencing factor that authorized a heavier sentence “for the underlying crime.” 543 U.S. at 236. The Court noted that, “[a]s the enhancements became greater, the jury’s finding of the underlying crime became less significant.” *Id.* And it was that shift that led to this Court’s decisions.

The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

*Id.* at 237. In articulating “the principles [the Court] sought to vindicate” in these cases, the Court returned to “the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases” and the jury’s role in determining the elements for a conviction. *Id.* at 238-39.

**4. The Oregon Supreme Court failed to appreciate the narrow focus of this Court's cases on preserving the jury's historic role in determining each element of a specific offense.**

Although this Court has, at times, spoken in broad terms of “punishment,” it always has maintained its focus on the jury’s historic role in establishing the elements of the offense, which, in turn, establishes the permissible sentencing range for that specific offense. The *Apprendi* line of cases does not support the Oregon Supreme Court’s expansive holding that any fact that increases the aggregate penalty for multiple convictions must be found by a jury. Far from establishing that broad principle, this Court’s caselaw has consistently confirmed that the focus is on the jury’s historic role—protected by the Sixth Amendment jury-trial guarantee—of determining each element of an offense. Because of the nature of that historic role, this Court’s cases focus solely on the elements of the individual offense. They forbid the legislature from transforming “elements” into “sentencing factors” and from depriving a defendant of the right to have a jury find the required elements of an offense beyond a reasonable doubt. Once the conviction for the offense is properly established, setting the stage for imposition of punishment within the range defined for that conviction and justified by the jury’s factual findings, the Constitution does not mandate that the jury play a further role.

**B. The jury historically had no role in imposing multiple punishments for multiple convictions; that decision was made by the trial court.**

In the end, the cases on which the Oregon Supreme Court relied do provide guidance in answering the question presented in this case. To determine whether the Oregon consecutive-sentencing statute violates the Sixth Amendment jury-trial guarantee by requiring certain judicial factfinding, this Court must examine the historic role of the jury and whether the Constitution's framers would have viewed the jury as playing a critical role in imposing multiple sentences. The history provides no support for viewing the consecutive-sentencing factfinding as within the jury's role. Nothing in the Constitution's text or in the general history surrounding the adoption of the constitutional jury-trial guarantees suggests that the framers intended to protect a role for the jury in the decision whether and how to impose multiple punishments for multiple convictions. Indeed, there was no such role to protect. In both England and America, the jury's role was limited to determining the elements of a specific offense and weighing the criminal defendant's guilt for that specific offense. History demonstrates that the decision to impose multiple punishments has always been understood as a judicial function and not as a jury function. Juries traditionally have played no role in consecutive sentencing, and the historical presumption has been that, when a defendant is convicted of separate offenses, he is subject to a separate penalty for each offense.

**1. Neither the text nor general history surrounding the adoption of the jury-trial guarantees suggests an intent to require juries to play a role in deciding how to impose multiple punishments for multiple convictions.**

The right to a jury trial for criminal offenses appears in two places in the United States Constitution. Article III, section 2, provides that “the trial of all crimes, except in cases of impeachment, shall be by jury.” The Sixth Amendment clarifies that guarantee and provides that “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.”

Although the Sixth Amendment uses the phrase “criminal prosecutions,” as opposed to Article III’s reference to “crimes,” this Court has long since rejected the argument that “the amendment was intended to supplant that part of the third article which relates to trial by jury.” *Callan v. Wilson*, 127 U.S. 540, 549 (1888). “The Sixth Amendment \* \* \* is not to be regarded as modifying or altering [the Article III jury-trial guarantee] \* \* \* [and] fairly may be regarded as reflecting the meaning of the former” and as “mean[ing] substantially the same thing.” *Patton v. United States*, 281 U.S. 276, 298 (1930). Article III provides that jury trials will be conducted “according to the settled rules of the common law” and the “enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as

a declaration of what the rules were.” *Callan*, 127 U.S. at 549.

The Sixth Amendment jury-trial guarantee was a response to objections to the lack of specificity as to the nature of the jury-trial right guaranteed in Article III. See Francis H. Heller, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 25-28 (Kansas 1951) (discussing objections); Frankfurter and Corcoran, *PETTY FEDERAL OFFENSES AND THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY*, 39 *Harv. L. Rev.* 917, 970-71 (1926) (same); *Schick v. United States*, 195 U.S. 65, 78 (1904) (Harlan, J., dissenting) (same). Hence, the Sixth Amendment “dealt with well-defined incidents of a jury trial, which were spelt out in detail and not trusted to the implications of Article III.” Frankfurter and Corcoran, 39 *Harv. L. Rev.* at 970. The historical record demonstrates that, in this context, the term “prosecution” was interchangeable with the word “crime.” See *id.* at 971-75 (detailing history on that point). Thus, the text of the Sixth Amendment, rather than expanding a jury-trial guarantee to encompass all aspects of criminal prosecutions, simply “enumerates the elements of ‘trial by jury’ in Article III” and “does not extend the field of its operation.” *Id.* at 971. The text of the jury-trial guarantee is focused narrowly on protecting the jury’s role in the prosecution of a specific offense.

The history surrounding the constitutional jury-trial guarantees also demonstrates that the framers intended merely to protect the jury’s role in establishing a criminal defendant’s guilt for a specific offense.

As this Court repeatedly has recognized, the Sixth Amendment jury-trial guarantee was largely crafted as a shield for the criminal defendant against arbitrary judges, trusting instead the power of the defendant's peers to determine guilt. The jury provided "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

At the same time, the Sixth Amendment was motivated by what was seen as tension "between judge and jury over the real significance of their respective roles." *Jones*, 526 U.S. at 245. In England, as the jury liberally exercised its power, Parliament began to restrict it. "This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238-39." *Jones*, 526 U.S. at 245. This assertion of jury power led to statutory enactments barring the right to a jury trial for new statutory offenses. *Id.* That legislative practice of eliminating the jury's role "was one of the occasions for the protest in the Declaration of Independence against deprivation of the benefit of jury trial" and led to the creation of the constitutional jury-trial guarantee. *Id.* at 246.

This Court has described the jury-trial right in offense-specific terms—that is, as focused on the jury's role in determining whether the defendant committed a particular offense with which he is charged—in

numerous other cases. For example, in *Williams v. Florida*, 399 U.S. 78, 100 (1970), the Court explained that “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.” In striking down a five-person jury, the Court again described the jury-trial guarantee in terms of the jury role in assessing the defendant’s guilt for a specific offense. *Ballew v. Georgia*, 435 U.S. 223 (1978); see also *Burch v. Louisiana*, 441 U.S. 130 (1979) (again addressing the jury-trial guarantee in terms of the jury’s role in determining guilt for a specific offense). And in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), the Court stated that the jury-trial right includes “as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty,’” and held that “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” In *Gaudin*, 515 U.S. at 510-11, the Court explained that “[t]he right to have a jury make the ultimate determination of guilt has an impressive pedigree”—pointing to Blackstone’s and Justice Story’s commentary on the matter—and stated the basic principle that “[t]he 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.”

In short, this Court’s analysis consistently has emphasized and focused on the jury function of de-

termining the defendant's guilt or innocence. Nothing in the Constitution's text, or in the general history behind the Sixth Amendment jury-trial guarantee, suggests that the framers intended the right to extend to decisions about whether or how to impose multiple punishments for multiple convictions.

**2. English case law establishes that the jury played no role in imposing multiple sentences for multiple convictions.**

Questions surrounding the imposition of multiple sentences for multiple felony convictions did not arise often in England prior to 1787 because the punishment for most felony convictions was death. *See* 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 18-19 (1769) (discussing "melancholy truth" that English law prescribed the death penalty for no fewer than 160 crimes). And when sentence of death was pronounced, the immediate consequence under the common law was attainder, which led to forfeiture of property and corruption of blood. 4 Blackstone 373-82. A defendant convicted of one felony could plead *autrefois attain*t for subsequent felony charges. *See* 1 Joseph Chitty, A PRACTICAL TREATISE ON THE CRIMINAL LAW 464 (1816) (describing the plea as founded upon the principle that "once a felon is attainted he is dead in law, his whole possessions are forfeited, his blood is corrupted, and nothing remains but to put in execution the sentence of death under which he continues, so that any second attainder would be superfluous") (footnote omitted). The consequences that flowed from a single felony conviction generally made subsequent prosecutions superfluous.

The use of lengthy imprisonment as a punishment would not become widespread in England until the early nineteenth century. J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed. 1990). But cumulative punishments for felonies were not unknown. See M. Newark, A. Samuels, S. White, *Sentencing the Multiple Offender: Concurrent and Consecutive Sentences*, 23 N. I. L. Q. 133, 134 (1972) (describing the practice of imposing cumulative punishments of hanging for one offense, being drawn for another, and quartered for a third).

Misdemeanors, however, were not subject to the same punishments or the plea of former attainder and courts could impose consecutive sentences for multiple misdemeanor convictions. The lead, pre-founding English case on the subject was the House of Lords' 1769 decision in *Rex v. Wilkes*, 19 How. St. Tr. 1075, 1132-36. Wilkes was convicted of two misdemeanor offenses and the court ordered him to serve 10-months imprisonment on the first offense and 12 months on the second offense, with the second imprisonment term commencing upon completion of the first. 19 How. St. Tr. at 1125-26. Wilkes appealed, raising the issue "whether a judgment of imprisonment against a Defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?" *Id.* at 1127. Wilkes argued that the judgment was not valid because, although judgments were required to take effect immediately, the subsequent punishment would not take effect until the other pun-

ishment ended (which was an uncertain time). *Id.* at 1132.

The House of Lords held that the consecutive sentences were valid. *Id.* at 1127, 1132-36. The court distinguished trial courts' consecutive-sentencing authority for misdemeanors from that for felonies on the ground that the penalty for felonies was a sentence of death. *Id.* at 1133. "[B]ut in misdemeanors, where punishment is discretionary, the limitation, as to time, seems only to be, that the punishment shall take place before a total dismissal of the party: a punishment shall not hang over a man's head when he has been once discharged." *Id.* "But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former or immediately after the end of it." *Id.*

The court explained that it could not "explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case." *Id.* And the court rejected the notion that the punishment for one offense "varied"—that is, unfairly influenced—the punishment for the other and stressed that the issue arose only because of the party's own guilt for the multiple offenses:

*It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only provided, from the situation of the delinquent, to effectuate the punish-*

*ment the Court thought his crime deserved.* It is shaping the judgment to the peculiar circumstances of the case; and the necessity of postponing the commencement of the imprisonment under the second judgment, arises from the party's own guilt, which had subjected him to a present imprisonment; and therefore the question really is, Whether a man under a sentence of imprisonment for one offense, can be sentenced again for another offence?

*Id.* (emphasis added). The court concluded that a person under a sentence of imprisonment could be sentenced again for another offense, and that “this [was] the only form by which it can be done consistent with justice.” *Id.* at 1134-36.

The House of Lords' *Wilkes* decision—a case frequently relied on by American courts—thus viewed the issue in simple terms. If a person is sentenced for two offenses, the timing of when the second sentence commences falls within the trial court's discretion, so long as the prisoner has not yet been discharged from the first sentence. Each offense carries its own penalty, and the imposition of a penalty for each offense does not “vary” the punishment for the other conviction. Rather, consecutive sentencing is simply the product of the fact that a person has committed, and been convicted of, multiple crimes. And it may be the only meaningful way to sentence a person to prison if that person was already imprisoned. *See also King v. Williams*, 1 Leach 529, 536 (1790) (reflecting the trial

judge's imposition of three consecutive sentences); *Rex v. Robinson*, 1 Mood. 413, 414 (1834) (reversing a judgment imposing a single sentence of two years imprisonment for two convictions and concluding that the trial judge should have imposed two consecutive sentences instead).

Judicial control over the kind of aggregate-sentencing decision at issue in this case also appears to be reflected in multiple sentences of transportation (or exile). In *King v. Bath*, 1 Leach 441 (1788), for example, the defendant was convicted of grand larceny and received a seven-year sentence of transportation from one court. That same year, he was convicted of a felony in a different court and the issue arose whether he could be sentenced a second time, given that he was already under sentence. The defendant ultimately received a seven-year sentence of transportation for the second conviction that ran from the time of the second conviction and, hence, would result in additional time beyond the first sentence. In his 1816 treatise on criminal law, the English legal commentator Joseph Chitty concluded that trial judges had authority to impose consecutive sentences of imprisonment and transportation, relying on *Rex v. Wilkes* and *King v. Bath*. 1 Chitty, at 718 (describing trial judges' discretion to impose consecutive terms of transportation and imprisonment "in their discretion"); see also *id.* at 800 (similarly describing trial judges' discretion to impose consecutive terms of imprisonment).

This clear authority for judges to impose consecutive sentences for multiple misdemeanor convictions

extended to felony convictions no later than 1827, when England expressly authorized judges to exercise the same discretion in sentencing multiple felony convictions. 7 & 8 Geo. 4, c. 28, s. 10. Under the statute, judges could impose consecutive sentences of imprisonment or transportation even when the aggregate sentence exceeded what otherwise could be imposed for any one conviction. See Archbold, PRACTICE, PLEADING AND EVIDENCE IN CRIMINAL CASES § 185-1 (1853) (the court may impose the consecutive sentence “although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.”).

The statute may have been unnecessary. In *Lee v. Walker*, [1985] Q.B. 1191 (1985), the court explained, “[a]s we see it, the position at common law was that before 1827 the court had no power to pass a sentence of imprisonment for felony because the sentence for felony was death, and therefore there was no occasion for passing consecutive sentences for felony.” The court explained that *Wilkes*’ reasoning is “directed throughout not to the form of the proceedings, but to the justice of the sentence and his conclusion is that the imposition of a consecutive sentence of imprisonment is the only form, consistent with justice, whereby a man who is imprisoned already for one offence can be properly punished for another offence, meriting imprisonment.” *Id.* The court concluded “that the High Court has always had inherent jurisdiction to impose consecutive sentences of imprison-

ment in any appropriate case where the court had the power to imprison.” *Id.*

In any event, the practice was unquestioningly accepted. In part, that acceptance turned on the concern that “right and justice require [that] when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence[.]” *Regina v. Cutbush*, 2 Q.B. 479, 10 Cox’s Cr. Case 489 (1867) (Blackburn, J.) (noting that it had been the practice for judges to impose consecutive sentences for multiple felony convictions “so far as living judicial memory goes back”).

The important points are these: Historically, the jury played no role at all in the decision to impose multiple punishments for multiple convictions in England. If consecutive sentences were to be imposed, it fell to the trial judge—and not to a jury—to make that determination. In that regard, English courts had taken the view that each offense authorized its own penalty, and that the imposition of a penalty for each offense did not “vary” the punishment for the other conviction. The necessity of postponing the commencement of the second term of imprisonment arose only because the defendant was guilty of multiple offenses.

For the sake of completeness, the State notes that, at common-law, the English jury *did* play a limited role in resolving certain “collateral issues” that would arise after sentencing, including claims of pregnancy

(which could delay the execution of a death sentence), insanity (a convicted person who became insane after the verdict should not have been executed), and “non-identity” or “diversity of person” (a claim that the person is not the same person who was attained). 4 Blackstone, 24-25, 387-89; *see also Nobles v. Georgia*, 168 U.S. 398 (1897) (concluding that, at common law, use of jury to determine post-verdict claim of insanity was one mode of resolving that issue but was not required). But nothing in that history suggests that English common law required juries to make the consecutive-sentencing determinations or to decide when multiple sentences commenced in relation to each other. Instead, the historical record on consecutive sentencing points squarely in the opposite direction.

Moreover, whatever the contours of the common-law English jury’s role, the American jury generally has not been responsible for the myriad of “downstream” factual determinations that can arise after sentence is imposed, including in the probation, prison and parole settings. Nothing in the *Apprendi* rule would establish otherwise. *See Meachum v. Fano*, 427 U.S. 215, 224 (1976) (“given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him”); *Johnson v. United States*, 529 U.S. 694 (2000) (attributing penalties for revocation of supervised release condition to original conviction).

The historical record demonstrates that, at the time of the Constitution’s founding and into the 1800s, English common law entitled trial judges to impose cumulative sentences for separate convictions,

barring a prior death sentence that would have rendered any additional punishment superfluous. Under English common law, the jury played no role in the kind of decision at issue in this case.

**3. Early American cases similarly assume the trial judge's authority to impose consecutive sentences, with no jury role in the decision.**

At the time of the founding, the punishment for most felony convictions in the colonies was death. Lawrence M. Friedman, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 48, 77-82 (1993); Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 *Stan. L. Rev.* 839, 842 (1999). The use of lengthy imprisonment as a punishment was in its infancy in America and would not become widespread until the early nineteenth century. *Id.* at 151-52. Consequently, as was the case in England, questions about the imposition of multiple sentences for multiple convictions arose infrequently in the years surrounding 1787. When questions about multiple sentences did arise, the questions largely were related to issues of joinder and merger. Nonetheless, the pertinent history demonstrates that the discretion to sentence for multiple convictions remained entirely with the trial judge, and that the jury played no part in the imposition of those multiple sentences. Many appellate courts were sharply critical of challenges to the judge's ability to impose consecutive sentences, and they often noted that consecutive sentences were the

only way to give meaning to a jury's finding of guilt on the multiple convictions.

The majority view in the early American jurisprudence was that trial judges had discretionary authority to impose consecutive sentences. The Virginia Supreme Court recognized that principle as early as 1806 in *Commonwealth v. Leath*, 3 Va. 151 (1806). In *Leath*, the defendants had been sentenced for a felony conviction and subsequently convicted of additional felonies. *Id.* at 151-52. They asserted that, because they already had been sentenced to prison on the prior conviction, they could not be sentenced for the subsequent convictions, arguing that “no law of the land allows a man convicted, to be sentenced to undergo punishment at a far distant day, after he shall have undergone punishment in the meantime, for an offense of the like, or of a different kind.” *Id.* at 152. The court rejected that claim, holding that the trial judge could impose prison for the subsequent convictions, even though the defendants already were serving a sentence of imprisonment, and holding that “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 154-55.

In 1811, the Connecticut Supreme Court reached the same result in *Connecticut v. Smith*, 5 Day 175, 179 (1811), confirming what had “been the usage of our courts, for many years past, in this state”—that the sentencing judge possessed authority to impose consecutive sentences for multiple convictions. The

court recognized the sentencing court's discretionary authority to postpone the commencement of an imprisonment term for an offense until the expiration of an imprisonment term for another offense, explaining that such authority "prevent[s] the previous conviction from operating as an exemption from punishment, for a subsequent offence." *Id.*

The Pennsylvania Supreme Court in 1822 similarly upheld a trial judge's discretionary authority to impose consecutive sentences and observed that it had long been "the common practice in the Courts of this State." *Russell v. Commonwealth*, 7 Serg. & Rawle 489, 490 (1822). The court explained that imposing a term of "imprisonment to commence at a future time \* \* \* [was] warranted by principle, practice, and authority." *Id.* As a practical matter, the court explained that "where a man has been sentenced to imprisonment for one offence, and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offence, commence after the expiration of the first imprisonment." *Id.* As a matter of principle, the court expressed its view in strong terms—"Would it not be absurd, to make one imprisonment, a punishment for two offences? Nay the absurdity does not end there, for unless imprisonment for the last offence is to begin where the imprisonment for the first ends, it would be impossible, under our system, to punish the offender, in certain cases, for the last offence, at all." *Id.*

The Supreme Judicial Court of Massachusetts recognized trial courts' consecutive-sentencing authority in 1846 in *Kite v. Commonwealth*, 52 Mass.

581, 11 Met. 581 (1846). The court held that “it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates.” *Id.* at 585. “It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions.” *Id.*

In the second half of the 19th century, a large number of other state and federal courts also recognized a sentencing judge’s authority to impose consecutive sentences for multiple convictions, and implicitly held that the jury plays no role in a sentencing decision of that nature. For example, the California Supreme Court described the “general rule” that a judgment be certain and definite and complete in itself, but also noted what “seems to have been a common practice in criminal Courts to enter judgments of imprisonment to commence at the expiration of sentences in other cases.” *People v. Forbes*, 22 Cal. 136, 137 (1863). The court upheld this practice, as did a number of other state appellate courts in the ensuing decades. *See Williams v. State of Ohio*, 18 Ohio St. 46, 48 (1868) (“To hold that where there are two convictions and judgments of imprisonment at the same term, both must commence immediately, and be executed concurrently, would clearly be to nullify one of them.”); *In re McCormick*, 24 Wis. 492, 493 (1869) (“It has long been well settled, in cases of this kind, where the prisoner has been convicted of several distinct offenses, that the court may give judgment upon each one of them, and, in doing so, may lawfully direct that the term of imprisonment for one shall

commence at the expiration of that for another, and so on, until all the terms have expired.”); *State v. Carlyle*, 33 Kan. 716, 7 P. 623, 624 (1885) (“The court had the right, and it was its duty, to sentence the defendant separately under each count; and it had the right to impose the maximum punishment under each count.”); *In re Packer*, 18 Colo. 525, 531, 33 P. 578 (1893) (same recognition of judicial authority, and noting that a contrary holding “would have the effect of nullifying all but one of [the sentences], a conclusion to which we cannot give our assent.”); *In re Walsh*, 37 Neb. 454, 55 N.W. 1075 (1893) (stating that “the great weight of authority is in favor of the proposition that upon conviction of several offenses charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences”); *In re Breton*, 93 Me. 39, 44 A. 125 (1899) (“the great weight of authority is undoubtedly” that trial judges have power to impose consecutive sentences without statutory authorization); *Rigor v. State*, 101 Md. 465, 470, 61 A. 631 (1905) (explaining that “[j]urisdiction to inflict cumulative punishment is dependent, not on the accident that the offender has been convicted twice, or oftener, before the same tribunal, but upon the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate, and, therefore cumulative, penalties.”); *New Jersey v. Mahaney*, 73 N.J.L. 53, 56, 62 A. 265 (1905) (noting that “[t]he practice of imposing consecutive sentence has, so far as I am aware, been followed in this state during the entire period of its existence as a state.”).

A recurring theme in those decisions was that a concurrent sentence would effectively nullify the jury's conviction. The Sixth Circuit Court of Appeals, in addressing the authority for consecutive sentences under Tennessee law, was particularly emphatic on that point. *Howard v. United States*, 75 F. 986, 990-91 (6th Cir. 1896).

It is also a recognized method of procedure to consolidate separate indictments and try them at the same time as one case; and it is not an uncommon thing that the same defendant is convicted of more than one offense at the same term, upon separate indictments and trials. *And a rule which denies the court the power to impose cumulative sentences turns the trial and conviction on all the indictments except one into an idle ceremony.* It is hardly necessary to say that a rule which leads to such results as this is unsound in principle, and can be supported by no consistent process of reasoning. Under such a doctrine, a defendant convicted of two or a dozen crimes would suffer no greater punishment than a person convicted of one offense, except such difference as the statutory maximum and minimum limits on the sentence might justify. Such a rule finds no justification in law or morals.

*Id.* at 993 (emphasis added).

While the majority view was that the trial judges had inherent authority to make these aggregate sentencing determinations, a minority of states concluded that statutory authorization was necessary. But even in those states, the issue was not whether the jury had a role to play in the decision. Rather, the courts merely concluded that legislative action was required for the trial judge to exercise what was generally viewed as judicial authority. See *Miller v. Allen*, 11 Ind. 389 (1858); *James v. Ward*, 59 Ky. 271, 2 Met. 271 (1859); *Harris Bloom's Petition*, 53 Mich. 597, 19 N.W. 200 (1884); *In re Lamphere*, 61 Mich. 105, 27 N.W. 882 (1886).

*People ex rel. Tweed v. Liscomb*, 60 N.Y. 559 (1875), held that trial judges lacked the authority to impose consecutive sentences, but it was frequently described by courts and commentators as an outlier. *Tweed* appears largely concerned with the problem of joinder of offenses, and it certainly contains no suggestion that imposition of multiple sentences was a matter for the jury to determine. Judge Rapallo's opinion was motivated by concern that the jury might convict a defendant because of multiple claims against him if multiple offenses were joined in one proceeding. *Id.* at 595. Judge Rapallo noted that "separate and cumulative punishments can only be secured by separate indictments and trials for each offence," *id.* at 604, thus making it clear that the court's disagreement with the overwhelming weight of authority was simply with whether cumulative sentences could arise from a single prosecution. To the extent that other courts read *Tweed* to stand for

the broader proposition that trial judges lacked the authority to impose consecutive sentences, it was widely criticized and was not followed. Indeed, in his treatise on criminal procedure, Bishop described the holding in *Tweed* as “a doctrine elsewhere never heard of before, and generally rejected since,” and he devoted two lengthy footnotes to attacking it. 1 J. Bishop, CRIMINAL PROCEDURE § 1327, 781, 781 n. 6 (3rd ed. 1880).

Significantly, Bishop discussed consecutive sentencing solely in terms of judicial authority. In his criminal law treatise, Bishop expressed no doubt as to a trial court’s authority to impose consecutive sentences, stating: “[W]hen a prisoner, under an expired sentence of imprisonment, is convicted of a second offence; or when there are two or more convictions, on which sentence remains to be pronounced, the judgment may direct, that each succeeding period of imprisonment shall commence on the termination of the period next preceding.” 1 J. Bishop, COMMENTARIES ON CRIMINAL LAW § 636, pp. 649-50 (2nd ed. 1858) (footnote omitted).

Bishop provided a more extensive discussion of consecutive sentencing in his criminal procedure treatise. There, he explained that “at common law, if an imprisonment is to commence on the expiration of another one, the sentence must so state, else the two punishments will be executed simultaneously.” 1 J. Bishop, CRIMINAL PROCEDURE at 773. But that was merely a presumption—founded on the principle that a sentence must be sufficiently certain—that applied when the trial judge had failed to make clear whether

the sentences were to be served concurrently or consecutively. 1 J. Bishop, NEW CRIMINAL PROCEDURE § 1327(2), 813 (4th ed., 1895) (sentence “must in some way be of a certainty enabling the officers of the law to know when they may execute it”). Bishop explained that trial courts that have consecutive sentencing authority should give it that form:

Yet by the common law of England, followed in most of our States, the sentence, at least in misdemeanors, may direct the imprisonment on one count or indictment to commence on the termination of that on another; and *a court having the authority should give it this form.*

*Id.* (emphasis added and footnotes omitted). And Bishop appears to have viewed the fact that offenses arose out of the same transaction *as a matter of mitigation* that could be argued to the trial court’s discretion. He stated that “where the court has a discretion as to the punishment, it will consider in mitigation such a fact as that the several offenses occurred in what was actually or substantially one transaction.” *Id.* at 815 (footnote omitted).

Thus, the American jurisprudence through the 19th century suggests no basis for concluding that the jury played a role in the decision to impose consecutive sentences for multiple convictions. *See State ex rel Meininger v. Brueuer*, 304 Mo. 381, 403, 264 S.W. 1 (1924) (explaining that it “is clear that in 1869 the law was well settled, with no well considered or reasoned case to the contrary, that American and English courts were authorized to impose cumulative sen-

tences and that no statutory authority therefor was required”). Although case law largely focused on defendants’ arguments that the second sentences imposed were void because of the uncertainty as to when they would start, appellate courts accepted without question the authority of trial judges to make the consecutive-sentencing determination.

**4. The necessary historical foundation for extending the *Apprendi* rule to factfinding necessary for consecutive sentences is lacking.**

The historical record discussed above stands in sharp contrast to the historical record that prompted this Court to announce the rule in *Apprendi*. The history underlying the *Apprendi* rule firmly established that juries traditionally determined whether the government had proven each element of a specific offense, and it led this Court to curtail attempts to shift that determination away from the jury. By contrast, history demonstrates that the imposition of consecutive sentences always has been based on consideration of facts by the trial judge, and that the jury has never played a role.

Admittedly, that history—and the early history in particular—is limited by the nature of the sentencing decisions and the punishments that were imposed, which sometimes made cumulative punishments irrelevant. But the question of multiple punishments was not completely foreign to the framers and, to the extent it existed in 1787, it was a decision left to the trial judge. If there is any doubt about the history because of the limited nature of these multiple-

conviction determinations, it nevertheless cuts against the Oregon Supreme Court's holding because the Sixth Amendment encompasses only those historic jury functions that were a critical aspect of the jury role.

This Court has rejected the notion that the framers incorporated every common-law feature of the jury into the Sixth Amendment. *Williams*, 399 U.S. at 99. “[T]here is absolutely no indication in ‘the intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.” *Id.* The Court has focused instead on “the function that the particular feature performs and its relation to the purposes of the jury trial.” *Id.* at 99-100. In *Williams*, the Court rejected the argument that the Sixth Amendment protected a right to a twelve-person jury, even though the history established that it was a common practice very familiar to the framers of the constitution. “To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions.” *Id.* at 102-03. Surely if the Sixth Amendment does not encompass all jury practices common in 1787, the lack of any evidence of a jury role in imposing multiple sentences for multiple convictions is sufficient reason to reject the Oregon Supreme Court's rule in this case.

**C. An offense-specific construction of the constitutional jury-trial guarantee in this case is consistent with this Court’s holding that the determination of whether the Sixth Amendment protection attaches is offense specific.**

The Oregon Supreme Court’s holding also is inconsistent with this Court’s Sixth Amendment jurisprudence in a different context. This Court has rejected an aggregate consideration of the multiple offenses with which a defendant has been charged in determining when the jury-trial right attaches at the outset of a prosecution. In *Lewis v. United States*, 518 U.S. 322 (1996), this Court addressed the distinction for Sixth Amendment purposes between “serious” offenses—to which the Sixth Amendment right to a jury trial attaches—and “petty” offenses—to which it does not. A maximum prison term greater than six months indicates that the legislature considered the offense serious and, therefore, the Sixth Amendment jury-trial right attaches. *Id.* at 326. To determine whether the jury-trial right attaches when a defendant is charged with multiple offenses requires consideration of the maximum penalty for each of the individual offenses, rather than the aggregate maximum penalty faced by a particular defendant. *Id.* at 323-30. This Court held that the “Sixth Amendment’s guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged.” *Id.* at 323-24 (emphasis added).

*Lewis* suggests that the scope of *Apprendi*'s jury-trial right on sentence-enhancement facts also is offense specific and that the authorized aggregate penalties are immaterial. The analysis in both instances is similar as each turns on the maximum authorized sentence. *Lewis* demonstrates that the aggregate penalties in a given case do not transform the individual offenses into aggravated offenses or otherwise implicate the right to a jury trial that is addressed in *Apprendi*. See *Lewis*, 518 U.S. at 327 ("The fact that petitioner was charged with two counts of a petty offense \* \* \* [does not] transform the petty offense into a serious one."). If the aggregate maximum punishment is immaterial for determining whether the Sixth Amendment right to a jury trial attaches at the front of a case, it should also be immaterial at sentencing.

**D. The *Apprendi* rule does not encompass fact-finding necessary for consecutive sentences.**

The Oregon Supreme Court extended the *Apprendi* rule to a factual determination that simply is not encompassed within that rule. The factual findings required by Oregon law to justify consecutive sentences restrict judicial discretion, but they do not remove from the jury any factual determination that the jury traditionally has been responsible for making. The history described above firmly establishes that point. It does not matter for this case that the judicial authority to impose consecutive sentences was inherent in some states and statutorily authorized in other states. Nor does it matter that Oregon has constrained that judicial authority by requiring

factfinding. What matters is that the authority to impose consecutive sentences has always been *judicial* and has never been within the province of the *jury*. If the Oregon statute encroaches on any authority by requiring factfinding, it is a limitation on judicial power and not on jury power. That is the critical distinction between the factfinding at issue here and the factfinding at issue in *Apprendi* and *Blakely*.

To make that same point in a somewhat different way, the key markers of a fact that falls within the constitutional reservation of jury power are whether the factfinding creates an aggravated offense or authorizes an enhanced sentence for an offense. The factfinding for consecutive sentences does neither.

The factfinding necessary for consecutive sentencing cannot fairly be characterized as an element of either offense. Consecutive-sentencing facts involve the relationship *between* the two offenses, for which a jury has convicted the defendant. As the Oregon Supreme Court stressed in rejecting respondent's state constitutional jury-trial claim, consecutive-sentencing "findings involve an assessment of the relationship between two crimes of which defendant is guilty—whether to determine that each crime is a separate incident, was not incidental to the other crime, or caused a different loss than did the other crime." *Ice*, 343 Or. at 261. "Because all three findings involve a comparison between *two* crimes for which [respondent] is to be punished, none of the three can reasonably be deemed to constitute an *element* of either crime." *Id.* (emphasis in original). That common-sense

assessment should apply equally as this Court considers respondent's Sixth Amendment challenge.

Nor does the consecutive-sentence factfinding authorize an enhanced punishment—either an increased loss of liberty or an increased stigma. *See Apprendi*, 530 U.S. at 484, 495 (noting both “the loss of liberty and the stigma attaching to the offense” as concerns underlying the constitutional jury-trial guarantees). To be sure, a trial court's decision whether to impose consecutive sentences has a substantial, practical impact on the total amount of time that a defendant will be required to serve for his crimes. But—for purposes of the constitutional rights at issue—the die is cast when the jury convicts the defendant of multiple offenses. In *Meachum*, 427 U.S. at 224, this Court explained that the “Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause” but that “given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.” The jury verdicts authorize the imposition of the maximum statutorily authorized punishment for each of the offenses.

Put differently, the consecutive-sentencing determination transcends each offense and only becomes relevant when a jury already has convicted a defendant beyond a reasonable doubt of two or more offenses. Consecutive sentences increase a defendant's

aggregate punishment, but they do not increase the statutory maximum for any of the underlying individual offenses. A defendant's consecutive sentences merely reflect that the jury convicted him of committing multiple crimes. In this case, the jury convicted respondent of six separate crimes. Each conviction authorized a separate maximum sentence and the trial judge imposed a separate sentence on each conviction that fell within that authorized maximum sentence.<sup>1</sup> The timing of how those separate sentences are to be served do not increase the punishment on any of the six convictions. Nor does it increase the stigma associated with any of the six convictions. The imposition of consecutive sentences does not influence the evaluation of respondent's criminal history should he face a criminal prosecution in the future. *See* Or. Admin. R. 213-004-0006(2) (the sentencing guidelines promulgated by the Oregon Criminal Justice Commission establish that an "offender's criminal history is based upon the *number* of adult felony and Class A misdemeanor convictions and juvenile adjudications in the offender's criminal history at the time the current crime or crimes of conviction are sentenced") (emphasis added). Nor does the imposition of consecutive sentences brand respondent in

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<sup>1</sup> The trial judge imposed departure sentences on four of the six convictions. J.A. 39-41. Clearly, the factual findings necessary for each departure sentence fall within the *Apprendi* rule. But, as a matter of state law, respondent did not preserve any challenge to those departure sentences. *Ice*, 343 Or. at 253-54. Thus, this Court must treat the departure sentences as authorized by the jury verdict.

the public view as having committed a more serious offense.

Consequently, the Oregon Supreme Court was too quick to deem it “self-evident \* \* \* that a defendant is exposed to greater punishment [for *Apprendi* purposes] if he is required to serve multiple sentences consecutively, rather than concurrently.” *Ice*, 343 Or. at 266 n. 5. To the contrary, as this Court stated in 1901, “[c]umulative sentences are not cumulative punishments[.]” *Carter v. McClaghry*, 183 U.S. 365, 394 (1901). Separate convictions carry separate penalties. And this Court repeatedly has noted that jury sentencing is not constitutionally required. In *Profitt v. Florida*, 428 U.S. 242, 252 (1976), the plurality noted that the Court had “never suggested that jury sentencing is constitutionally required.” The Court later stated the principle more broadly in concluding that “a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.” *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citation omitted). Nothing in the *Apprendi* line of cases changes the basic principle that the Sixth Amendment jury-trial guarantee does not protect a right to jury sentencing. Rather, this Court has confirmed that “there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *McMillan*, 477 U.S. at 93 (citing *Spaziano*, 468 U.S. at 459). That principle applies as well to the consecu-

tive sentences imposed in this case, and to the findings that supported those sentences.

The Oregon Supreme Court thus failed to appreciate that this Court's concern in *Apprendi* was on restoring the Sixth Amendment's protections of the jury's traditional role. The state court instead declared an indefensibly broad rule: that whenever the legislature requires factfinding that has any effect on the aggregate punishment of the defendant, that fact must be found by the jury. But that holding confuses the question. The question in the *Apprendi* line of cases was whether the required fact was within the scope of the historic jury right and, if so, whether the legislature constitutionally could remove that factual determination from the jury's purview. If the factual determination at issue was never a determination that juries historically were responsible for making, it cannot matter that the legislature has authorized the judge to engage in factfinding. That requirement does not encroach on the jury's traditional power and does not usurp the jury's prerogative. That requirement reflects nothing more than legislative restraint on the court's exercise of its traditional discretionary authority. And, as this Court has previously stated, the Sixth Amendment is "not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Blakely*, 542 U.S. at 308. Because the Oregon consecutive-sentencing statute is a limitation on judicial power and because it does not infringe upon the jury's historic role, it does not violate the Sixth Amendment.

**CONCLUSION**

This Court should confirm that the Sixth Amendment jury-trial guarantee protects only the historic role that the jury plays in determining whether the government has proved each factual element of a specific offense. Because the facts required by Oregon law for consecutive sentences are not elements of either offense and were never within the jury's purview, they do not fall within the constitutional jury-trial guarantee. This Court should reverse the Oregon Supreme Court's judgment and remand the case for further proceedings.

Respectfully submitted,  
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