No. 07-901

IN THE
Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

THOMAS EUGENE ICE,
Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF OF INDIANA, ALABAMA, ARIZONA, COLORADO, FLORIDA, HAWAII, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief
ELLEN H. MEILAENDER
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

Counsel for Petitioner

(additional counsel listed inside front cover)

ADDITIONAL COUNSEL

TROY KING
Attorney General
State of Alabama

TERRY GODDARD
Attorney General
State of Arizona

JOHN W. SUTHERS
Attorney General
State of Colorado

BILL MCCOLLUM
Attorney General
State of Florida

MARK J. BENNETT
Attorney General
State of Hawaii

STEPHEN N. SIX
Attorney General
State of Kansas

G. STEVEN ROWE
Attorney General
State of Maine

MARTHA COAKLEY
Attorney General
Commonwealth of
Massachusetts

MICHAEL A. COX
Attorney General
State of Michigan

LORI SWANSON
Attorney General
State of Minnesota

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

HENRY D. MCMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

ROBERT E. COOPER, JR.
Attorney General
State of Tennessee

MARK L. SHURTLEFF
Attorney General
State of Utah

ROBERT M. MCKENNA
Attorney General
State of Washington

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled 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." 530 U.S. at 490. The question here is whether this rule extends to factual findings that are necessary to the imposition of consecutive sentences in some states. As the primary administrators of criminal justice in the United States, the amici States have a substantial interest in their ability to place limits on judicial sentencing discretion. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, … and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.")

The implications of *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), on the criminal justice systems of many states has been profound. Any extensions or alterations of the *Apprendi*/*Blakely* rule necessarily impact considerable state interests. Imposing consecutive sentences has long been a tool used by various states to ensure appropriate punishments for crimes. The rule of the Oregon Supreme Court erroneously extends the Sixth Amendment into this area and is based on a fundamental misunderstanding of *Apprendi* and its progeny.

Regardless of the direct effect that this case may have on any individual state's consecutive sentencing scheme, the amici States all share the broader interest of insuring continued flexibility for their respective legislatures and judiciaries to adjust sentencing procedures to best realize their states' criminal justice policies.

SUMMARY OF THE ARGUMENT

This is a case about limiting a constitutional rule to its original rationale rather than preferring alternative purposes that justify extending it. More specifically, it is about recognizing that *Apprendi* and *Blakely* have limits and do not impose a requirement that *all* facts bearing on sentencing must be found by a jury.

The Court has tightly bound the Sixth Amendment's jury trial right to its common law origins and limited the reach of that right to the historically indispensable components of a fair trial. Indeed, the *Apprendi* and *Blakely* rule is wholly based on the historical understanding of a jury's proper role. But there is no history of requiring jury involvement in consecutive sentencing decisions.

The court below ignored *Apprendi*'s historical justification and expanded its reach to any factual assessment that affects the total "quantum of punishment" that a defendant faces. That constitutional interpretation is not only unprecedented, but also inappropriately restricts the authority of States to define and administer their criminal laws and precludes meaningful experimentation with sentencing reform. Many

states have adopted procedures that limit traditionally unfettered judicial discretion to impose consecutive sentences by restricting such sentences to particular situations. There is no historical impediment to allowing judges to find those facts, even though States are not free to restrict a defendant's right to a jury trial on the elements of an offense.

Moreover, *Apprendi* can be extended to factfinding for consecutive sentencing decisions only by employing a rule—*i.e.*, whether the decision affects the total "quantum of punishment" that a defendant faces—that extends to *any* decision affecting the type and amount of punishment. Thus, *Apprendi* would govern decisions whether to suspend sentences, to impose alternatives to incarceration alternatives, to impose probation, and to require restitution, to name a few. That rule would also call into question the Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), which upheld federal mandatory minimum sentences based on sentencing-phase factfinding from an *Apprendi* challenge.

Finally, the "quantum of punishment" rule divined by the court below also creates practical problems. Prosecutors, defense counsel and courts must construct ways to plead and prove facts relevant to consecutive (and other) sentencing determinations that often are unknown prior to trial and would be prejudicial to a defendant's interest in an unbiased jury and a fair trial.

Absent a compelling historical basis for the Oregon Supreme Court's "quantum of punishment" rule, the Court should decline the invitation to

rewrite *Apprendi* to encompass facts that are not properly considered elements of an offense.

ARGUMENT

I. Absent some historical rationale, the Sixth Amendment should not limit a legislature's authority to cabin judicial sentencing discretion by requiring judicial fact-finding where appropriate

1. The scope of the Sixth Amendment's jury trial right consistently has been tied to its history. *Williams v. Florida*, 399 U.S. 78, 98 (1970). "[T]o turn[ ] to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution" would be to "do violence" to the Amendment. *Id.* Hence, the Court has long held that the scope of the Sixth Amendment's jury trial right is no broader that the right that existed at common law. *Callan v. Wilson*, 127 U.S. 540, 549 (1888). *See also* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial By Jury*, 39 Harv. L. Rev. 917, 970-71 (1926). This is not to say that the Sixth Amendment incorporates every detail of common law jury trials; rather, it protects only the "indispensable components" of the common-law jury trial. *Williams*, 399 U.S. at 99-100.

The English and American legal traditions, however, have not provided the jury with a role in making decisions about aggregate sentencing, as Petitioner has exhaustively recounted. *Br. of Petitioner* at 34-51. This history establishes that

consecutive sentencing has always been considered an appropriate decision for the judiciary, so it undermines any rationale for expanding the *Apprendi* rule to factual predicates for consecutive sentences. *Jones v. United States*, 526 U.S. 227, 244 (1999).

The decision below rests upon the novel understanding that jury trial rights turn upon a change in the "quantum of punishment" (Pet. App. 28)—a notion foreign to the Court's *Apprendi* and *Blakely* holdings. Those cases require jury trials only where a fact increases the statutory maximum punishment for a particular criminal offense. *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 301. This rule vindicates the Sixth Amendment guarantee that a jury, not a judge, is available to adjudicate all facts traditionally considered elements of criminal offenses. *Br. of Petitioner* at 20-25. The Court should decline any invitation to switch now to a broader "quantum of punishment" theory that lacks any foundation in text or history and that will excessively bind state procedures and preclude experimentation with sentencing reform that respects historical constitutional values.

2. The Court has never questioned any aspect of judicial authority to impose consecutive sentences under the Constitution, despite a long history of consecutive sentences. Both legislative and judicial bodies, however, have questioned the wisdom of unguided discretion in sentencing in light of studies showing disparities in sentences from locality to locality, between judges in the same locality, and even by the same judge. 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, CRIMINAL

PROCEDURE § 26.3(b) (3d ed. 2007). Consequently, modern sentencing reform in many jurisdictions has sought to curb the historically broad discretion of judges to impose consecutive sentences for multiple offenses. Some States now require judges to give facts supporting their decisions, *see Smylie v. State*, 823 N.E.2d 679, 686 (Ind.), *cert. denied*, 546 U.S. 976 (2005), and others now prohibit consecutive sentences unless judges find particular enumerated facts. *See* Pet. App. 10-12. In either situation, judges, as the sentencing authority, must make some factual findings before exercising their discretion.

These reform efforts have never targeted defendants' jury trial rights. "[P]ermitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses." *People v. Black*, 113 P.3d 534, 549 (Cal. 2005), *cert. granted and judgment vacated by Black v. California*, 549 U.S. __ (2007), *reaff'd in relevant part by People v. Black*, 161 P.3d 1130 (Cal. 2007), *cert. denied*, 552 U.S. __ (2008). Rather, these developments mark legislative restrictions on inherent judicial authority in order to ensure proportionality between sentences and offenses as well as sentencing parity among offenders. *Blakely*, 542 U.S. at 308. Such restrictions are a legitimate exercise of legislative judgment and reflect valid policy considerations. *Id.*

3. States authorize aggregate sentencing in a number of ways. Amici provide a few examples below.

Indiana

In Indiana, the judiciary has been the driving force in sentencing reform, at least insofar as making policy choices to control sentencing disparities. The Indiana legislature has entrusted the aggregate sentencing decision to the trial judge's sole discretion, Ind. Code § 35-50-1-2(c), but the Indiana Supreme Court has added the requirement that judges find aggravating circumstances before imposing consecutive sentences. *Smylie*, 823 N.E.2d at 686 n.8 (citing *Shippen v. State*, 477 N.E.2d 903, 905 (Ind. 1985), and *Mott v. State*, 402 N.E.2d 986, 988 (Ind. 1980)). A statute provides a non-exhaustive list of aggravating circumstances that can be used in any sentencing decision, but *any* fact, even if not enumerated by statute, may serve as an aggravating circumstance. Ind. Code § 35-38-1-7.1(d); *Evans v. State*, 497 N.E.2d 919, 923-24 (Ind. 1986).

This judicially made requirement ensures that lengthy sentences are not arbitrary or capricious and facilitates appellate review.[1] *Henderson v. State*, 489 N.E.2d 68, 72 (Ind. 1986). The freedom of Indiana's judiciary to fashion appropriate rules to avoid sentencing anomalies enabled by unlimited judicial discretion has proven to be essential for meaningful sentencing policy reform.

---

[1] Indiana provides for robust review of sentences on direct appeal, where courts may revise sentences for mere "inappropriateness." *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

Tennessee

In Tennessee, the judiciary took initial steps to promote sentencing reform, and the legislature followed its lead. The Tennessee legislature permits judges to impose consecutive sentences only if they find, by a preponderance of the evidence, one of seven factual circumstances to exist, such as where the defendant is:

- a "professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;"

- a "dangerous mentally abnormal person" whose "criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;" or

- a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high."

Tenn. Code Ann. § 40-35-115.

The purpose of this statute is to insure that consecutive sentences are not routinely imposed and that aggregate sentences are "reasonably related to the severity of the offenses involved." *Id.*, comments following. It codifies the policy of the Tennessee Supreme Court, which in turn was based on the American Bar Association Project on Standards for Criminal Justice and the Model Penal Code. *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976) (citing

American Bar Association Project on Standards for Criminal Justice, *Sentencing Alternatives and Procedures*, § 3.4(b)(IV) (1968), and Model Penal Code § 7.03 (Proposed Official Draft 1962)); *State v. Taylor*, 739 S.W.2d 227, 228 (Tenn. 1987) (quoting *Gray*, 538 S.W.2d at 393).

Ohio

In Ohio, sentencing reform has been the product of legislative action from the beginning. Prior to 1996, Ohio law provided for classic indeterminate sentencing: judges announced the minimum and maximum terms of a sentence and a parole board later determined the actual release date. *State v. Foster*, 845 N.E.2d 470, 484 (Ohio), *cert. denied*, 549 U.S. __ (2006). In 1996 the legislature enacted a "truth in sentencing" law that permits consecutive sentences only where the trial court finds that "consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public" *and* one of three additional circumstances: (1) "the offender was already under control of the court due to an earlier conviction"; (2) "at least two of the offenses were committed as part of a course of conduct and the harm was so great or unusual that no single prison term adequately reflects the seriousness of the conduct"; or (3) "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public." Ohio Rev. Code § 2929.14(E)(4); *Foster*, 845 N.E.2d at 491.

In *Foster*, however, the Ohio Supreme Court, like the Oregon Supreme Court here, interpreted *Apprendi* and *Blakely* to require a right to a jury trial for the factual findings necessary to justify consecutive sentences. *Id.* at 494.

* * *

There may be as many different approaches to consecutive sentencing as there are states and territories. *See* 6 LaFave, *et al.*, *supra at* _, § 26.3(f) at 732-35 (compiling cases discussing various approaches to aggregate sentencing among the various States). But there is a common need for flexibility to fashion sentencing laws to satisfy parochial policy choices. *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 38-39 (2006) (arguing for greater flexibility and nuance in sentencing jurisprudence because states, "which sentence most defendants, serve as laboratories of democratic experimentation and need room to try novel sentencing arrangements"). And while *Blakely* recognized the legitimacy of real sentencing reform efforts among the states, 542 U.S. at 308, expanding *Blakely*'s reach here would render that recognition meaningless.

II. Expanding *Apprendi* to factfinding in consecutive sentencing decisions has potentially far-reaching consequences and would present many practical difficulties

1. In the Oregon Supreme Court's view, the *Apprendi* rule is triggered by any fact that increases the "quantum of punishment" broadly understood.

Pet. App. 28. The scope of such a rule, however, logically covers all sorts of sentencing determinations that, like consecutive sentencing decisions, have never been left to juries and have no connection to the Sixth Amendment concerns that *Apprendi* targets.

For example, States allow courts to suspend all or part of a sentence and impose probation.[2] Also, in the interests of sentencing reform and fiscal responsibility, States have instituted alternatives to total incarceration, such as community corrections programs, work release programs, and home detention programs.[3] If, as the court below has asserted, it is "self-evident" that consecutive sentences are "greater punishment" than concurrent sentences, *see* Pet. App. 28 n.5, it is hard to see how a fully executed sentence in a prison is not "greater punishment" than a sentence served on home detention or probation. Trial courts necessarily decide whether to utilize these sentencing alternatives based on facts about the commission of the crime and the character of the defendant that are brought to their attention in the sentencing process. *See also, e.g.*, Cal. Penal Code § 1203(b) (requiring that, before a court orders suspension of a sentence to probation, it shall order a probation officer to investigate and report to the court about

---

[2] *See, e.g.*, Alaska Stat. § 12.55.015; Cal. Penal Code § 1203; Colo. Rev. Stat. § 18-1.3-401(11); Ind. Code § 35-50-2-2; Me. Rev. Stat. Ann. tit. 17, § 1152; N.H. Rev. Stat. § 651:20; N.J. Stat. Ann. § 2C:43-2; Tenn. Code Ann. §§ 40-35-103, -303; Tex. Code Crim. Proc. art. 42.12.

[3] *See, e.g.*, Fla. Stat. § 948.01(3); Ind. Code § 35-38-2.6; N.H. Rev. Stat. § 651:19.

the circumstances surrounding the crime and the prior history and record of the offender).

Similar potential problems arise with respect to other aspects of a sentence that may be imposed in addition to an executed term in prison. States allow courts to impose fines and fees and to order payment of restitution as parts of criminal sentences.[4] These terms also increase the quantum of punishment: a person who is both incarcerated and ordered to pay a fine or restitution is exposed to greater punishment than a person who is only incarcerated. Decisions to impose these additional terms of sentence are often based on the court's assessment of specific facts about the nature of the offense or the character of the offender. Restitution, especially, often requires specific factual determinations that lie outside the jury's verdict, such as the amount of the damages and whether those damages are of a type for which restitution may be ordered. *See, e.g.*, Ind. Code § 35-50-5-3(a).

Those decisions bear no relation to the concern that juries should determine all facts that effectively constitute elements of the offense. Should the Court expand *Apprendi* to cover consecutive sentencing decisions, it is hard to see what logical basis could keep it from extending to all factual assessments involved in the sentencing decision.

---

[4] *See, e.g.*, Alaska Stat. §§ 12.55.035, 12.55.045; Cal. Penal Code § 1202.4; Fla. Stat. §§ 775.083, 775.084; Ind. Code §§ 35-50-2-3 through 7, 35-50-5-3; Me. Rev. Stat. Ann. tit. 17, § 1152; N.H. Rev. Stat. §§ 651:2, 651:63; N.J. Stat. Ann. §§ 2C:43-2, 2C:43-3; Tex. Penal Code §§ 12.32, 12.33, 12.34, 12.35.

2. Moreover, by expanding *Apprendi* beyond its historical rationale, the Oregon Supreme Court has called into question *Harris v. United States* and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Those cases held that mandatory minimum sentencing determinations based on predicate facts do not implicate the Sixth Amendment jury trial right. *Harris*, 536 U.S. at 557-68 (plurality opinion); *McMillan*, 477 U.S. at 84-91. This is because the facts that trigger mandatory *minimum* sentences do not increase the statutory maximum sentences to which defendants are subjected. *Harris*, 536 U.S. at 557, 566-67; *McMillan*, 477 U.S. at 87-89. Again, *Apprendi* says that the Sixth Amendment jury trial right applies only to facts that increase the maximum otherwise allowable sentence for a given offense—facts that are, effectively, elements of the offense.

Once the rule is detached from that element/offense-specific focus, however, and tracks instead the quantum of punishment being inflicted, there is no reason to distinguish between minimums and maximums. Mandatory minimums do not increase the potential maximum sentence for an offense, but they do increase the quantum of punishment to which an offender is subject. In the language of the Oregon Supreme Court, a defendant is exposed to greater punishment if he is required to serve a mandatory minimum sentence than he is if his entire sentence is suspended. In other words, the reasoning below alters *Apprendi*'s focus away from the elements of a specific offense but also erodes its limitation to only those facts implicating the "maximum" sentence.

A focus on the quantum of punishment is incompatible with a limitation based on the maximum sentence; many aspects of a sentence can affect the degree to which punishment is inflicted without altering the maximum sentence available. Once the underlying conceptual question is changed from "does this fact increase the maximum sentence available for this discrete offense" to "does this fact increase the amount of punishment to which this offender has been subjected," the inquiry expands to include all sorts of sentencing decisions that the *Apprendi* Court never contemplated it was affecting.

3. Such an expansion of the *Apprendi* rule will also create practical difficulties for the courts, prosecutors, and defense attorneys charged with executing that rule. Facts that fall within *Apprendi*'s reach do not just implicate the right to a jury trial—they also implicate pleading and notice rights. *Apprendi*, 530 U.S. at 499-500 (Thomas, J., concurring).

But some facts that bear on consecutive sentencing decisions will not be known or discovered prior to trial. *See Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting) (recognizing this fact). The more complex the case and the greater the number of charges, the more difficult it will be to ascertain ahead of time all facts potentially relevant to possible consecutive sentences—facts that must be added to an already-complex indictment or information. It is not an overstatement to observe that in such cases, providing adequate notice of all facts that could effect the defendant's sentence will be nearly impossible.

Other facts that bear on consecutive sentencing decisions, such as prior bad acts or criminal history not reduced to convictions, would be irrelevant and highly prejudicial if admitted during the guilt phase of a trial. *See id.* at 318-19. Under Oregon's own system, a defendant's "willingness to commit more than one criminal act," *see* Or. Rev. Stat. § 137.123(5)(a), might well be established by evidence of the defendant's prior antisocial behavior—evidence that would be highly prejudicial during the guilt phase of the trial. Thus, to avoid that prejudice, States will be forced to resort to bifurcated or even trifurcated trials on sentencing facts if they want defendants to be eligible to serve a discrete sentence for each criminal offense committed. When such a result is not required by the defining history of Sixth Amendment, it should not be artificially imposed upon the States in name of *Apprendi*.

* * *

The Court should heed its admonition in *Patterson* that the Sixth Amendment should not be construed beyond its historical bounds to the detriment of the state's responsibility as the primary administrators of criminal justice in our federal system. *Patterson*, 432 U.S. at 201-02. Rather, it should continue to limit application of the Sixth Amendment's right to jury trial to the "indispensable components" of a fair trial. *Williams*, 399 U.S. at 99-100.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief
ELLEN H. MEILAENDER
Deputy Attorney General

**Counsel of Record* *Counsel for Amici Curiae*

Dated: June 9, 2008