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 SENTENCING LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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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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INTEREST OF *AMICI*

Amici curiae Jonathan F. Mitchell, Stephanos Bibas, and Max M. Schanzenbach are law professors who research, write, and teach about this Court's sentencing jurisprudence. *Amici* have a professional interest in illuminating this Court's consideration of the doctrinal, historical, and policy issues involved in the proposed expansion of the holding of *Apprendi* v. *New Jersey*.[1]

Some of *amici*'s scholarly works on judicial fact-finding at sentencing have been cited and discussed by this Court. See *Blakely* v. *Washington*, 542 U.S. 296, 302 n.5, 311-312 (2004) (citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097 (2001)); *id.* at 331, 337 (Breyer, J., dissenting) (same); *Cunningham* v. *California*, 127 S. Ct. 856, 873 (2007) (Kennedy, J., dissenting) (citing Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37 (2006)).

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Thomas Eugene Ice managed an apartment complex where an 11-year-old girl lived with her family. On two different nights, Mr. Ice burglarized the family's apartment, entered the 11-year-old girl's bedroom, and sexually molested her by touching her breasts and then her vagina. A jury convicted Mr. Ice of two counts of first-degree burglary and four counts of first-degree sexual abuse: one count for touching the victim's breasts during the first burglary, another count for touching her vagina during that burglary, and two more counts for repeating those acts during the second burglary. J.A. 16-17.

Oregon law allows judges to impose consecutive sentences for criminal convictions "that do not arise from the same continuous and uninterrupted course of conduct." Or. Rev. Stat. § 137.123(2). But when two or more convictions "aris[e] out of a continuous and uninterrupted course of conduct," Oregon law requires concurrent sentences unless 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.

Or. Rev. Stat. § 137.123(5).

The trial court found that Mr. Ice's two burglaries were "separate incidents" and imposed consecutive sentences of 80 months and 90 months for those burglaries pursuant to section 137.123(2). J.A. 39-40. This finding is incontestable, as the burglaries occurred days apart.

And although Mr. Ice's sexual-abuse convictions arose from the same "continuous and uninterrupted course of conduct" as his burglaries, the trial court found that they reflected a "willingness to commit more than one criminal offense" under Or. Rev. Stat. § 137.123(5)(a), and caused "greater or qualitatively different loss, injury or harm to the victim" under Or. Rev. Stat. § 137.123(5)(b). J.A. 39, 40-41. These conclusions are likewise unassailable. The trial court therefore ordered that Mr. Ice's sentences for sexual abuse run consecutively to his sentences for the burglaries. *Id*.

Finally, the trial court imposed concurrent sentences for the two incidents of sexual abuse that Mr. Ice committed during each burglary, and consecutive sentences for repeating those acts during the second burglary. J.A. 39-41. So Mr. Ice received consecutive

sentences of 80 and 90 months for touching the victim's vagina during the first and second burglaries. J.A. 39, 40. But the consecutive 75-month sentences that the court imposed for touching the victim's breasts during each of the burglaries ran concurrently to the sentences for touching the victim's vagina. J.A. 40, 41. Mr. Ice's cumulative punishment totaled 340 months of imprisonment, which included four consecutive sentences and two concurrent ones.

Mr. Ice appealed. The Oregon Court of Appeals affirmed without written opinion. But the Oregon Supreme Court reversed. It concluded that 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 juries to make factual findings that are necessary to impose consecutive sentences under Or. Rev. Stat. § 137.123. The Oregon Supreme Court insisted that when a defendant is convicted of multiple offenses, *Apprendi* and *Blakely* extend the jury right to any fact that increases a defendant's total punishment "beyond the *aggregate* statutory maximum that the jury's verdict alone would support," even when such facts do not affect the individual sentence that a court imposes for each discrete criminal offense. *State* v. *Ice*, 170 P.3d 1049, 1059 (Or. 2007) (emphasis added). The Oregon Supreme Court never analyzed whether the trial court's failure to submit these questions to a jury was harmless error. It simply "reversed" the trial court's judgment based on this alleged *Apprendi* error and remanded the case "for resentencing." See *id.* at 1059.

This Court granted certiorari. *Oregon* v. *Ice*, 128 S. Ct. 1657 (2008).

SUMMARY OF ARGUMENT

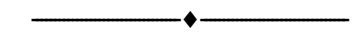
This Court should reverse the Oregon Supreme Court's judgment for three reasons. First, the Oregon Supreme Court's analysis is inconsistent with the offense-specific approach to the Sixth Amendment that this Court established in *Apprendi*. This Court has consistently held that the Sixth Amendment jury right extends to certain facts that increase the "statutory maximum" punishment for a single crime. But this is an offense-specific inquiry. In cases with multiple convictions, *Apprendi* looks to each individual sentence imposed for a specific crime and asks whether it falls within the "statutory maximum" punishment authorized for that offense by the jury's factual findings or the defendant's guilty plea. *Apprendi* expressly rejects the Oregon Supreme Court's approach in this case, which defined the "statutory maximum" punishment as the highest cumulative penalty authorized by the jury's factual findings, and asked whether Mr. Ice's combined sentence exceeded that limit. Indeed, that understanding of "statutory maximum" would have compelled the *Apprendi* Court to affirm Charles Apprendi's sentence, because Mr. Apprendi's overall sentence never exceeded the cumulative penalty authorized for the three crimes that he admitted in his guilty plea.

Second, this Court has consistently rejected the proposition that the Sixth Amendment jury right applies to every factual finding that increases a defendant's maximum allowable punishment. It does not apply to recidivist sentencing enhancements, for example, even when they expose a defendant to a higher maximum penalty. Instead, the jury right applies only to facts that are "elements" or the "functional equivalent[s] of element[s]" of actual criminal "offenses." The case for treating consecutive-sentencing facts as the "functional equivalent[s] of element[s]" is even weaker than the oft-rejected argument that recidivist sentencing facts are "elements" of "offenses." There is no historical pedigree for treating consecutive-sentencing facts as jury facts or as components of substantive crimes, and most courts throughout American history regarded consecutive sentencing as an inherent judicial prerogative. That Oregon has chosen to make the decision between consecutive and concurrent sentences turn on determinative facts is more akin to establishing a mitigating sentencing consideration than to establishing an element of an aggravated criminal offense. Oregon was well within constitutional boundaries when it gave the trial judge exclusive power to make findings that simply aggregate sentences imposed for separate criminal "offenses."

Third, even if the trial court violated the Sixth Amendment by making factual determinations under Or. Rev. Stat. § 137.123, any such error was harmless beyond a reasonable doubt. *Apprendi* errors are

subject to harmless-error review, see, *e.g.*, *Washington* v. *Recuenco*, 548 U.S. 212 (2006), and the Oregon Supreme Court erred by automatically reversing the trial court's judgment and remanding for resentencing on the basis of this perceived *Apprendi* error.

Finally, if this Court decides to affirm the Oregon Supreme Court and extend the Sixth Amendment jury right to the factual findings specified in Or. Rev. Stat. § 137.123, it should not require the state of Oregon to prove such facts beyond a reasonable doubt. Many of this Court's decisions have assumed that the jury right and the proof-beyond-a-reasonable-doubt requirement are co-extensive, but this Court granted certiorari to consider only the Sixth Amendment issue. *Oregon* v. *Ice*, 128 S. Ct. 1657. We respectfully request that this Court avoid ruling on the burden-of-proof issue in this case.



ARGUMENT

I. The Oregon Supreme Court's decision is inconsistent with the offense-specific approach to the Sixth Amendment that this Court established in *Apprendi*.

The Sixth Amendment jury right extends to certain facts that expose a criminal defendant to a penalty beyond the "statutory maximum" punishment. See, *e.g.*, *Apprendi*, 530 U.S. 466. This Court has defined the "statutory maximum" punishment as the highest sentence a judge may impose without any

additional factual findings. See *Blakely*, 542 U.S. at 303-304. For defendants convicted of a single crime, the concept of "statutory maximum" is straightforward: No sentence may exceed the maximum penalty authorized by the facts that a jury finds or that a defendant admits. But when a defendant is convicted of multiple offenses, his "statutory maximum" could refer either to the highest *cumulative* penalty that a court may impose for all the convictions, or else to the maximum *individual* sentences that a court may impose for each specific offense.

Consider a defendant who is convicted of three crimes, each with a 5-year maximum, in a jurisdiction that allows courts to impose consecutive sentences without any additional factual findings. Under the "cumulative-penalty" view, the defendant's "statutory maximum" punishment is 15 years—the total punishment that the court may impose for those three crimes without any additional factual findings. And the Sixth Amendment would require a jury determination of any fact that increases a defendant's cumulative sentence beyond that 15-year maximum. The "offense-specific" view, by contrast, regards the "statutory maximum" as the highest sentence that a court may impose for each individual crime. On that view, the "statutory maximum" for each conviction is 5 years, and the jury right would attach to any fact that increases the sentence for one of those individual crimes beyond the 5-year maximum.

The Oregon Supreme Court adopted the cumulative-penalty understanding of "statutory maximum,"

and overturned Mr. Ice's sentence because the combined imprisonment for all six crimes exceeded the total punishment authorized by the jury's factual findings. See *State* v. *Ice*, 170 P.3d at 1058-1059. This was error. *Apprendi* embraces the offense-specific understanding of "statutory maximum," and explicitly rejects the idea that a defendant's "statutory maximum" punishment is the highest *cumulative* penalty authorized by the facts established in a jury's verdict or a defendant's guilty plea.

The defendant in *Apprendi* had pleaded guilty to three distinct crimes. Two of these were firearms offenses, each with a maximum penalty of 10 years' imprisonment; the other was a bomb-possession offense with a 5-year maximum. The trial court imposed a 12-year sentence for one firearms offense after finding that that Mr. Apprendi acted out of racial basis, and imposed shorter concurrent sentences for the other two crimes. Because New Jersey law gives judges discretion to impose consecutive or concurrent sentences in cases with multiple convictions,[2] the prosecutors argued that Mr. Apprendi's 12-year sentence fell within the "statutory maximum" punishment authorized by the facts established in his guilty plea. In their view, the "statutory maximum" was the 25 years of total imprisonment that the

[2] See N.J. Stat. Ann. 2C:44-5(a) ("When multiple sentences of imprisonment are imposed on a defendant for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence.").

sentencing court could have imposed based on the facts that Mr. Apprendi admitted, and a 12-year sentence (with shorter concurrent penalties on other charges) fell within that range.

But this Court swiftly dispatched that contention, insisting that the constitutional question turns on whether the penalty imposed for *each discrete offense* exceeds the maximum punishment authorized for that offense. The relevant "statutory maxim[a]" were the offense-specific penalties authorized for each of Mr. Apprendi's three crimes, not the 25 years of cumulative punishment that the sentencing court could have imposed based on the facts in Mr. Apprendi's guilty plea:

> Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. *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. . . . *The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts*.

Apprendi, 530 U.S. at 474 (emphasis added) (citation omitted).

This holding forecloses the Oregon Supreme Court's claim that Mr. Ice's sentence exceeded the "statutory maximum" simply because his cumulative penalty exceeded the total punishment authorized by

the jury's verdict. That understanding of "statutory maximum" would have compelled this Court to *affirm* Mr. Apprendi's sentence, because his 12-year penalty (with shorter concurrent sentences on the other charges) never exceeded the 25 years of total punishment authorized by the facts that he admitted. But *Apprendi* rejects this approach and adopts the offense-specific view of "statutory maximum," where the jury right depends on the penalty imposed for each distinct criminal offense, without regard to how a sentencing court might aggregate such penalties.

The Oregon Supreme Court never acknowledged or discussed this holding from *Apprendi*, even though it figures prominently in the many court opinions that reject *Apprendi*'s application to consecutive-sentencing determinations.[3] Instead, the Oregon Supreme Court held that the jury right attaches to factual findings that increase punishment "beyond the *aggregate* statutory maximum that the jury's verdict alone would support." See *State* v. *Ice*, 170 P.3d at 1059 (emphasis added). It based this revisionist view on the "principles underpinning *Apprendi*" rather than the actual holding in that case. See *id.* at

[3] See, *e.g.*, *United States* v. *Chorin*, 322 F.3d 274, 279 (3d Cir. 2003); *United States* v. *McWaine*, 290 F.3d 269, 275-276 (5th Cir. 2002); *United States* v. *White*, 240 F.3d 127, 135 (2d Cir. 2001); *People* v. *Wagener*, 752 N.E.2d 430, 441 (Ill. 2001); *State* v. *Senske*, 692 N.W.2d 743, 747 (Minn. Ct. App. 2005); *State* v. *Keene*, 927 A.2d 398, 405-408 (Me. 2007); *State* v. *Bramlett*, 41 P.3d 796, 797-798 (Kan. 2002); *State* v. *Cubias*, 120 P.3d 929, 931 (Wash. 2005).

1058; see also *id.* at 1059 ("The *Apprendi*, *Blakely*, and *Booker* 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 adamantine refusal to get the message."). But the Oregon Supreme Court must follow this Court's holdings, rather than speculations about the "broad principles" that might "underpin[ ]" those holdings. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002) (refusing to overrule *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), notwithstanding the dissenting opinion's contention that *McMillan* was inconsistent with "the very principles that animated *Apprendi*," *id.* at 572 (Thomas, J., dissenting)). And the Oregon Supreme Court's understanding of "statutory maximum" would overrule the outcome that this Court reached in *Apprendi*, because Mr. Apprendi's sentence never exceeded the "aggregate statutory maximum" authorized by the facts that he admitted.[4]

If this Court chooses to affirm the Oregon Supreme Court's judgment while preserving the outcome in *Apprendi*, then the meaning of "statutory maximum" will fluctuate from case to case. In cases like *Apprendi*, the "statutory maximum" will be the

[4] The Oregon Supreme Court is not alone in adopting an understanding of "statutory maximum" that is flatly inconsistent with *Apprendi*. See, *e.g.*, *United States* v. *Campbell*, 279 F.3d 392, 401 (6th Cir. 2002) ("Thus, the prescribed statutory maximum for *Apprendi* purposes would be the sum of the statutory maximums for each of the counts upon which the defendant was convicted.").

offense-specific maximum punishment for individual crimes. See *Apprendi*, 530 U.S. at 474. And the prosecutor will be unable to argue that the "statutory maximum" should be the maximum aggregate penalty authorized by the jury's factual findings (or the defendant's guilty plea). See *id.* The same result would obtain in other cases where the penalty imposed for a discrete crime exceeds the offense-specific statutory maximum, but the cumulative sentence stays within the aggregate punishment authorized by a jury's factual findings. But in cases such as this one, the courts will instead define the "statutory maximum" as the maximum aggregate penalty allowed by the facts that a jury finds (or that the defendant admits). And the prosecutor will be unable to persuade a court that the relevant "statutory maxim[a]" are the offense-specific maximum penalties authorized for each crime based on the jury's factual findings. The Oregon Supreme Court never offered a rationale that could justify such an asymmetric regime, nor is any rationale apparent, other than a bald preference to stack the deck in favor of criminal defendants. The sounder approach, urged by the petitioners in this case, is to establish a consistent definition of "statutory maximum" as the highest penalty that a Court may impose for a discrete criminal offense, without regard to how a sentencing court might aggregate that penalty with others. See, *e.g.*, *id.* at 490 ("Other 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.")

(emphasis added). That understanding of the jury right will preserve the outcome that this Court reached in *Apprendi* while avoiding the unprincipled asymmetries that the Oregon Supreme Court's approach would produce.

Of course, there are statements in *Apprendi* that, wrenched from their context, might seem to support the Oregon Supreme Court's decision to equate "statutory maximum" with the highest cumulative penalty allowed by a jury's factual findings, rather than the offense-specific maximum punishment authorized for each crime. For example, this Court wrote that "the relevant inquiry is not one of form, but of effect—does the required finding *expose the defendant to a greater punishment* than that authorized by the jury's verdict?" *Id.* at 494 (emphasis added). See also *id.* at 490 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties to which a criminal defendant is exposed*.") (emphasis added). But none of these passages can possibly refer to the *cumulative* punishment authorized by a jury's factual findings, because Mr. Apprendi's sentence never exceeded the total punishment authorized by the facts in his guilty plea. See *id.* at 474. Nor can *Blakely* v. *Washington*'s definition of "statutory maximum" aid the Oregon Supreme Court in this case. See *Blakely*, 542 U.S. at 303-304 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any

additional findings."). If this passage from *Blakely* equates the "relevant 'statutory maximum'" with the maximum *aggregate* sentence that a judge may impose based on facts found by a jury or admitted by the defendant, then *Blakely* overruled *Apprendi sub silentio*. That is an utterly implausible proposition, given that *Apprendi*'s holding provided the foundation for the *Blakely* Court's analysis. See *id.* at 301 ("This case requires us to apply the rule we expressed in *Apprendi* v. *New Jersey* . . . "); *id.* at 305 ("Our commitment to *Apprendi* in this context reflects . . . respect for longstanding precedent . . . ").[5]

[5] Statements in other post-*Apprendi* opinions likewise cannot establish that the Sixth Amendment jury right depends on whether a fact increases a defendant's maximum *cumulative* sentence without overruling the outcome that this Court reached in *Apprendi*. See, *e.g.*, *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); *United States* v. *Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

II. The facts in Or. Rev. Stat. § 137.123 cannot reasonably be characterized as "elements" or "functional equivalent[s] of element[s]" of criminal offenses.

This Court has consistently rejected the notion that the jury right and the reasonable-doubt rule should attach to any factual finding that increases the maximum sentence that a judge can impose. Instead, this Court has extended these constitutional protections to facts that are "elements" or the "functional equivalent[s] of element[s]" of actual criminal offenses. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 230 (2005) ("[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.'") (quoting *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995)). This has led the Court to exclude facts about prior convictions from *Apprendi*'s domain, even when they increase a defendant's maximum allowable punishment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 239-247 (1998); *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007). It should similarly lead this Court to exclude the factual determinations in Or. Rev. Stat. § 137.123, which simply tell courts how to aggregate a defendant's distinct punishments for distinct criminal offenses.

A. Although Joel Prentiss Bishop's treatises say that "every fact which is legally essential to the punishment" should be treated as an ingredient of a substantive crime, this claim has no historical support and the Court has rightly rejected it.

Some nineteenth-century treatise writers urged a theory of "elements" that is broader than the approach in this Court's *Apprendi* jurisprudence. For example, Joel Prentiss Bishop's treatises assert that "every fact which is legally essential to the punishment" must be charged in indictments and treated as an ingredient of substantive criminal offenses. See, *e.g.*, Joel Prentiss Bishop, 1 *Criminal Procedure* § 81 at 51 (Little, Brown, 2d ed. 1872) (stating that nineteenth-century indictments were required to include "every fact which is legally essential to the punishment"); *id.*, § 540 at 330 ("[T]he indictment must . . . contain an averment of every particular thing that enters into the punishment."). This concept of "elements" extends beyond the jury facts that this Court established in *Apprendi* and reaches facts about prior convictions as well as facts that increase a defendant's minimum punishment. See, *e.g.*, Joel Prentiss Bishop, 1 *Criminal Law* §§ 961-963 at 564-565 (Little, Brown, 5th ed. 1872) (arguing that recidivist sentencing enhancements should be alleged in indictments and submitted to juries).

But these statements in Bishop's treatises are demonstrably untrue.[6] Nineteenth-century courts almost uniformly rejected Bishop's views of the indictment, as well as the proposition that any fact that increases a defendant's punishment must be an "element" of a crime. For example, nineteenth-century courts consistently held that murder indictments need not charge the degree of murder, even though a first-degree murder finding increased the defendant's punishment from life imprisonment to death.[7] They also held that first- and second-degree murder were simply sentencing categories within the unitary crime of "murder," rather than "elements" of a substantive criminal offense.[8] All these court

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[6] The discussion in this section borrows from Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 Sup. Ct. Rev. 297, 329-342.

[7] See also *Noles* v. *State*, 24 Ala. 672, 693 (1854); *McAdams* v. *State*, 25 Ark. 405, 416 (1869); *People* v. *Murray*, 10 Cal. 309, 310 (1858); *Garvey* v. *People*, 6 Colo. 559, 563 (1883); *State* v. *Ellington*, 43 P. 60, 61 (Idaho 1895); *State* v. *Verrill*, 54 Me. 408, 415-416 (1867); *Ford* v. *State*, 12 Md. 514, 529-530 (1859); *Green* v. *Commonwealth*, 94 Mass. 155, 170-171 (1866); *People* v. *Doe*, 1 Mich. 451, 457-458 (1850); *State* v. *Lessing*, 16 Minn. 75, 78 (1870); *Territory* v. *Stears*, 2 Mont. 324, 327-328 (1875); *State* v. *Millain*, 3 Nev. 409, 442 (1867); *State* v. *Williams*, 23 N.H. 321, 324 (1851); *Cox* v. *People*, 80 N.Y. 500, 514 (1880); *Mitchell* v. *State*, 16 Tenn. 514, 527 (1835); *id.* at 530-534 (Catron, C.J., concurring); *Hines* v. *State*, 27 Tenn. 597, 598 (1848); *Gehrke* v. *State*, 13 Tex. 568, 573-574 (1855); *Commonwealth* v. *Miller*, 3 Va. 310, 311 (1812); *State* v. *Schnelle*, 24 W. Va. 767, 779 (1884); *Hogan* v. *State*, 30 Wis. 428, 439-442 (1872).

[8] See, *e.g.*, *White* v. *Commonwealth*, 6 Binn. 179, 183 (Pa. 1813) (opinion of Tilghman, J.) ("All that [the statute] does, is to define the different kinds of murder, which shall be ranked in

(Continued on following page)

decisions refute the aspirations in Bishop's treatise, such as his statement that according to "those principles of natural reason and justice which are inherent in the case, . . . the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offence to be in this degree." See Bishop, 2 *Criminal Procedure* § 586 at 308.

Indeed, some nineteenth-century state-court decisions explicitly rejected Bishop's claim that indictments "must contain an allegation of every fact which is legally essential to the punishment to be inflicted." See, *e.g.*, *State* v. *Millain*, 3 Nev. 409, 439,

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different classes, and be subject to different punishments. It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made."); *id.* at 188 (Yeates, J., concurring in part and dissenting in part) (agreeing that the first-degree murder statute "creates no new offense as to willful and deliberate murder. . . . Different degrees of guilt exist under the general crime of murder."); *Titus* v. *State*, 7 A. 621, 623 (N.J. 1886) (stating that New Jersey's first-degree murder statute "did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' . . . [I]t [is] not necessary to set out in the count that the alleged killing was 'willful, deliberate, and premeditated,' [and] it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section.") (quoting *Graves* v. *State*, 45 N.J.L. 347, 358 (N.J. 1883)).

442 (1867) (noting that "Mr. Bishop has labored with zeal and ingenuity to show the distinct nature of the two offenses," but concluding that "it was not the intention of the legislature, in making the distinction in the two classes of murder, to require a distinct indictment for each."). There is simply no historical evidence that can support a constitutional rule requiring every fact that increases a defendant's maximum allowable punishment to be treated as if it were an "element" of a substantive crime. And this Court has rightly rejected that view, opting for a more contextual approach that excludes recidivist sentencing facts from *Apprendi*'s domain along with other factual determinations that cannot reasonably be characterized as "elements" of substantive "crimes." See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002).

B. There is no historical pedigree for treating consecutive-sentencing facts as jury facts or as "elements" of substantive crimes.

In *Almendarez-Torres*, this Court held that facts about prior convictions are not "elements" of substantive crimes, even when they increase a defendant's maximum allowable punishment. Yet *Almendarez-Torres* acknowledged a "tradition" of court decisions that had treated facts about prior convictions as "elements" of a substantive offense. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 246

(1998).[9] This tradition was insufficient to justify a constitutional requirement that recidivist sentencing enhancements be treated as "elements," because the tradition was "not uniform" and did not appear to rest on a federal constitutional guarantee. *Id.* at 246-247.

With consecutive-sentencing facts, by contrast, there is no historical pedigree whatever for treating them as "functional equivalents of elements" of substantive crimes, even when they expose a defendant to a higher aggregate sentence. Sentencing regimes that authorized consecutive prison terms arose in the nineteenth century after state courts divided as to whether they had an inherent prerogative to impose

[9] During the nineteenth and twentieth centuries, state and federal courts repeatedly held that recidivist sentencing enhancements were essential elements of substantive crimes that must be proved to a jury. See, *e.g.*, *People* v. *Reese*, 179 N.E. 305, 307-308 (N.Y. 1932); *State* v. *O'Neill*, 248 P. 215, 217-219 (Mont. 1926); *Green Bay Fish Co.* v. *State*, 202 N.W. 667, 670 (Wis. 1925); *State* v. *Smith*, 106 N.W. 187, 189 (Iowa 1906); *State* v. *Bailey*, 115 So. 613, 616-618 (La. 1928); *State* v. *Compagno*, 51 So. 681, 682 (La. 1910); *Hall* v. *State*, 89 A. 111, 112-113 (Md. 1913); *Osborne* v. *State*, 211 N.W. 179, 180 (Neb. 1926); *State* v. *McGee*, 221 N.W. 556, 558 (Iowa 1928); *State* v. *Schneider*, 29 S.W.2d 698, 700 (Mo. 1930); *Johnston* v. *State*, 287 P. 1068, 1069 (Okla. Cr. 1930); *Tipton* v. *State*, 28 S.W.2d 635, 639 (Tenn. 1930); *State* v. *Beaudoin*, 158 A. 863, 864 (Me. 1932); *State* v. *Furth*, 104 P.2d 925 (Wash. 1940); *Garvey* v. *Commonwealth*, 74 Mass. 382, 383 (1857); *Tuttle* v. *Commonwealth*, 68 Mass. 505, 506 (1854); *Rauch* v. *Commonwealth*, 78 Pa. 490 (1876); *Smith* v. *Commonwealth*, 14 Serg. & Rawle 69 (Pa. 1826); *Long* v. *State*, 36 Tex. 6, 10 (1872). See also *Massey* v. *United States*, 281 F. 293, 297-298 (8th Cir. 1922); *Singer* v. *United States*, 278 F. 415, 420 (3d Cir. 1922).

such sentences. Some jurisdictions allowed their courts to impose a sentence that commenced after the expiration of a previous sentence.[10] Others held that prison sentences could not commence at a future time absent explicit statutory authority.[11] But a few jurisdictions established regimes that allowed for consecutive sentencing only when certain factual predicates existed. And none of these factual predicates was ever treated as an "element" of a substantive crime or as a jury question.

In Missouri, for example, a court could not order consecutive sentences unless two factual predicates existed: (1) The defendant must have been awaiting sentence on each of the multiple convictions; and (2) The convictions must have occurred during the same term of court. See, *e.g.*, *Ex parte Meyers*, 44 Mo. 279, 282 (1869) ("There is no provision anywhere made . . . where separate sentences can be passed upon a prisoner, and he be subjected to more than one term

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[10] See, *e.g.*, *Commonwealth* v. *Leath*, 3 Va. 151 (1806); *State* v. *Smith*, 5 Day 175 (Conn. 1811); *Russel* v. *Commonwealth*, 7 Serg. & Rawle 489 (1822); *Kite* v. *Commonwealth*, 52 Mass. 581 (1846); *People* v. *Forbes*, 22 Cal. 135 (1863); *United States* v. *Blaisdell*, 3 Ben. 132 (S.D.N.Y. 1869); *Petition of McCormick*, 24 Wis. 492 (1869); *Mims* v. *State*, 5 N.W. 374 (Minn. 1880); *State* v. *Carlyle*, 33 Kan. 716 (1885); *State* v. *Robinson*, 5 So. 20 (La. 1888); *In re Packer*, 33 P. 578 (Colo. 1893); *In re Walsh*, 55 N.W. 1075 (Neb. 1893); *In re Greenwald*, 77 F. 590 (N.D. Cal. 1896); *Wallace* v. *State*, 26 So. 713, 725 (Fla. 1899).

[11] See, *e.g.*, *Miller* v. *Allen*, 11 Ind. 389 (1858); *Lamphere's Case*, 27 N.W. 882 (Mich. 1886); *Ex parte Meyers*, 44 Mo. 279 (1869); *Prince* v. *State*, 44 Tex. 480 (1876).

of punishment, unless the different convictions were had at the same term, and both were obtained previous to the sentence."). But the Missouri courts never held or intimated that *juries* should make the crucial findings that a defendant is awaiting sentence for multiple convictions that occurred during the same term of court, even though these factual predicates exposed a defendant to a longer cumulative punishment.

Consider *Ex parte Turner*, 45 Mo. 331 (1870), where the petitioner had been convicted and sentenced for two different crimes during the same term of court. The trial court imposed a three-year sentence for one conviction and a two-year sentence for the other. On petition for writ of *habeas corpus*, the petitioner alleged that the sentences must run concurrently because the trial court never specified the commencement date for the petitioner's second term of imprisonment. The Missouri Supreme Court brushed aside the contention, holding that the sentences must be served consecutively. It rejected the need for *any* formal determination, by judge or jury, as to whether the multiple sentences would be served consecutively or concurrently, even though the question turned on determinate facts. The Court instead treated the issue as a pure question of law: "[W]hen he is convicted and sentenced for two offenses, *the law also expressly decides when* the second term shall begin, *and it is wholly unnecessary for the court to decide it*." See *Turner*, 45 Mo. at 322 (emphasis added).

And in *Meyers*, the defendant had been convicted and sentenced for two different counts of larceny. The first conviction occurred during the trial court's March 1866 term, and the court imposed a sentence of two years' imprisonment. The second conviction was during that court's May 1866 term, and the court imposed an additional three-year sentence. On petition for writ of *habeas corpus*, the Missouri Supreme Court held that the sentences must run concurrently because they had been imposed during different terms of the trial court. But nowhere did the Court's opinion fault the trial court for failing to submit this question to a jury, nor did the Court suggest that this factual determination was an "element" of a substantive crime that prosecutors must charge in indictments. The state supreme court simply decided the factual issue for itself.

Texas established a regime similar to Missouri's, allowing courts to impose consecutive sentences on defendants convicted of multiple offenses at the same term of court. See *Shumaker* v. *State*, 10 Tex. App. 117 (1881).[12] But there was no requirement that juries

[12] *Shumaker* quoted a Texas statute providing that "where the same defendant has been convicted in two or more cases at the same term of the court, and the punishment assessed in each case is confinement in the penitentiary for a term of years, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction has

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find that the defendant's multiple convictions had occurred during the same term of court; to the contrary, the court in *Shumaker* held that "it was competent and proper *for the judge* to direct" that a fifteen-year sentence for stealing a horse commence after the expiration of a sentence imposed in another case during the same term of court. *Id.* at 118 (emphasis added).

These cases show that judges have traditionally made the factual determinations necessary to authorize consecutive sentencing. To our knowledge, there is no authority holding that such facts needed to be alleged in indictments, submitted to juries, or proved beyond a reasonable doubt. Unlike facts about prior convictions, consecutive-sentencing facts appear never to have been treated as "elements" of substantive crimes. So if this Court's jurisprudence continues to exclude facts about prior convictions from the "functional equivalent[s] of element[s]," it is hard to see how it can justify extending the *Apprendi* rule to consecutive-sentencing facts. Indeed, most courts regarded the right to impose consecutive sentences as an inherent prerogative, regardless of whether the judge's ultimate decision turned on disputed factual issues.[13] That Oregon has chosen to make the decision between consecutive and concurrent sentences turn on determinative facts is more akin to establishing a

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ceased to operate, and the sentence and execution thereof shall be accordingly." 10 Tex. App. at 117.

[13] See cases cited in note 10, *supra*.

mitigating sentencing consideration than to establishing an element of an aggravated criminal offense.

III. If the trial court committed *Apprendi* error, it was harmless beyond a reasonable doubt.

Apprendi errors are subject to harmless-error review. See *Washington* v. *Recuenco*, 548 U.S. 212 (2006). Yet the Oregon Supreme Court's opinion failed to apply harmless-error analysis when it reversed the trial court's judgment and remanded "for resentencing." This was error.

If ever there was a case of harmless judicial factual findings, it is this case. The trial court's findings in this case were observable and objective facts. Its conclusion that Mr. Ice's two burglaries were "separate incidents" under Or. Rev. Stat. § 137.123(2) was compelled by the fact that they occurred days apart. And its finding that Mr. Ice sexual-abuse convictions caused "greater or qualitatively different loss, injury or harm to the victim" under Or. Rev. Stat. § 137.123(5)(b) is similarly impossible to doubt. Far from judicial factual findings that probe a defendant's subjective mental state, such as the "deliberate cruelty" enhancement in *Blakely* or the racial-bias issue in *Apprendi*, the trial court's findings in this case are patently obvious and unassailable. Only a jury bent on nullification could conclude otherwise. And if the prospect of jury nullification can defeat a claim of harmless error, then *Recuenco* is a dead letter.

The Oregon Supreme Court's opinion never applied harmless-error analysis. Nor did its remand to the trial court leave any room for harmless-error analysis; it remanded the case "for resentencing," implicitly endorsing the structural-error regime that this Court rejected in *Recuenco*. Even if this Court concludes that the trial court violated the Sixth Amendment by making factual determinations under Or. Rev. Stat. § 137.123, it should still reverse the Oregon Supreme Court for spurning this Court's decision in *Recuenco*. It is clear beyond a reasonable doubt that a jury would have reached the same factual conclusions as the trial court in this case.

IV. If this Court decides to extend the Sixth Amendment jury right to the facts in Or. Rev. Stat. § 137.123, it should not extend the reasonable-doubt rule to these factual findings.

If this Court disagrees with our analysis, and concludes that the Sixth Amendment requires a jury to make the findings specified in Or. Rev. Stat. § 137.123, it does not follow that the reasonable-doubt rule must also attach to such facts. Many of this Court's decisions have assumed that the jury right and the reasonable-doubt rule are co-extensive. See, *e.g.*, *Cabana* v. *Bullock*, 474 U.S. 376 (1986); *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986); see also *Monge* v. *California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting). But this Court granted certiorari to consider only the Sixth Amendment issue. See

Oregon v. *Ice*, 128 S. Ct. 1657 (2008). Whether this Court should maintain its linkage between the jury right and the reasonable-doubt rule is an issue for another day.

CONCLUSION

This Court should reverse the Oregon Supreme Court's judgment.

Respectfully submitted,

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