No. 07-901

In the Supreme Court
of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

REPLY BRIEF FOR THE STATE OF OREGON

On Writ of Certiorari to the
OREGON SUPREME COURT

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REPLY BRIEF FOR THE STATE OF OREGON

This Court's holding in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and related cases is clear: the Sixth Amendment requires that any unadmitted fact (other than a prior conviction) that increases the penalty for a specific crime beyond the statutory maximum be submitted to a jury and proved beyond a reasonable doubt. This Court has applied the rule only in offense-specific cases and has not addressed its application to factfinding necessary for aggregate sentencing determinations. When confronted with that question, the Oregon Supreme Court simply extended the *Apprendi* rule to facts that authorize consecutive sentences—and thus increase the aggregate penalty for multiple crimes—without considering whether it was protecting any aspect of the historic jury role that the Framers meant to incorporate into the Sixth Amendment jury-trial guarantee.

But the *Apprendi* rule is grounded in history and the jury's traditional responsibility for determining whether the government has proven each element of a specific crime. To remain faithful to the Court's reasoning in *Apprendi*, any expansion of the Sixth Amendment jury-trial guarantee to consecutive-sentencing determinations must rest on a similar historic foundation. But there is no historic basis for extending *Apprendi* to the consecutive-sentencing determination, which—as respondent concedes—was entirely a judicial function and never involved the jury. The factfinding required by Oregon law merely constrains traditional judicial power without intruding on the jury's constitutionally protected domain. Consequently, the Sixth Amendment is not offended

when judges, rather than juries, decide whether to impose consecutive sentences for discrete crimes, even when that determination involves factfinding.

A. The parties' disagreement largely centers on whether this Court should extend the offense-specific *Apprendi* rule into aggregate sentencing determinations without first examining whether that result comports with the Framers' understanding of the jury-trial right.

The State began its opening brief with a detailed review of this Court's case law to highlight three main points. Pet. Br. 11-28. First, the Court has applied the *Apprendi* rule only in an offense-specific manner. The Court has not addressed its application to facts that pertain to the overall aggregate sentence or to the manner in which discrete sentences are served. Second, the rule is grounded in the Sixth Amendment right to have the jury determine each element of an offense beyond a reasonable doubt, which strongly suggests that the right is limited to offense-specific factfinding. Third, in analyzing the Sixth Amendment jury-trial guarantee, the Court consistently has focused on protecting the role of the jury as it existed when the Framers established that guarantee. The State then turned to the Constitutional text and history and demonstrated that the jury historically played no role in the consecutive-sentencing determination. Instead, those decisions always have been made by sentencing judges. Pet. Br. 29-52.

It may be helpful to identify the undisputed points before addressing the primary point of disagreement. The jury convicted respondent of six distinct offenses, and the trial court imposed a distinct sentence for each of the six convictions. It is undisputed that each distinct sentence is within the maximum authorized by the jury's guilty verdict on the corresponding offense. The trial court ordered four of those distinct sentences to run consecutively to each other, in accordance with a state statute that constrains inherent judicial consecutive-sentencing authority by requiring predicate factfinding in some circumstances. The question presented is whether the Sixth Amendment jury-trial guarantee required the jury, rather than the court, to find those unadmitted facts.

The parties agree that the jury historically played no role in determining how a defendant who was convicted of multiple offenses would serve the distinct sentences authorized by the jury's guilty verdicts. That determination always has been within the judicial power and not part of the jury's role. Pet. Br. 29-52, Resp. Br. 32. Both sides agree that the state statute requiring factfinding before imposition of consecutive sentences constrains "traditional plenary judicial authority." Resp. Br. 34; Pet. Br. 59. And, notwithstanding respondent's attempts to recast the State's argument as asserting something to the contrary (Resp. Br. 9, 18, 20, 30), both sides agree that this Court consistently has held that how a factfinding requirement is labeled does not control and that merely calling something a "sentencing factor" cannot remove it from the Sixth Amendment jury-trial guar-

antee.[1] *E.g.*, Pet. Br. 22, 24, 28; Resp. Br. 19, 26. Similarly, the State agrees with respondent's assertion that whether findings can be characterized as describing the "offense" or the "offender" does not resolve whether those findings are encompassed within the Sixth Amendment jury-trial guarantee. Resp. Br. 22.

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[1] Respondent quibbles with the State's use of the phrase "constitutional element" to capture the kind of factfinding encompassed in the *Apprendi* rule. Resp. Br. 2, 9, 18, 29-32. But other than a semantic disagreement, there is no real dispute between the parties that this Court's holdings have been directed to facts that function as "elements" of an offense—those facts that increase a defendant's criminal culpability and subject the defendant to a greater punishment for a specific offense. The labeling of those facts—whether as "elements," as "sentencing factors," or as something else—is irrelevant to the analysis. *See Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("[i]f 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"). All that matters is whether the fact *operates* as the functional equivalent of an element of a greater offense. *See id.* at 609 ("[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury"; internal citation omitted).

Where the State and respondent part ways is with the appropriate consideration of history in resolving the issue presented. Respondent does not dispute the accuracy of the State's historical presentation. (*See* Resp. Br. 32, stating that "[r]espondent has no quarrel with the State's chronicle of consecutive sentencing practices through the ages"). Instead, he argues that the absence of any historical jury role in aggregate sentencing determinations is immaterial because *Apprendi* created a "functional" test, one that applies to any factual determination that increases the harshness of a defendant's overall punishment. *E.g.*, Resp. Br. 17, 19. Respondent chides the State for "retreating to historical practice" rather than simply "applying the functional rule of *Apprendi*." Resp. Br. 28. Thus, the disagreement in this case largely reduces to a single dispute: should the Court extend the *Apprendi* rule beyond the offense-specific context in which it previously has been applied to factfinding that affects only the manner in which a defendant will serve multiple discrete sentences, without considering whether that expansion is consistent with the Framers' understanding of the jury-trial right?

B. The *Apprendi* rule protects the jury-trial guarantee as the Framers would have understood that right and must be applied and limited accordingly.

The State looks to constitutional text and history to support its argument that the *Apprendi* rule should not be extended to factfinding related to aggregate sentencing determinations. It is undisputed that the jury's role historically was limited to deter-

mining each fact necessary to establish a conviction for a specific *crime* and that the jury played no role in deciding how multiple sentences would be served. Accordingly, there is no basis for the Oregon Supreme Court's extension of the *Apprendi* rule to factfinding necessary for imposition of consecutive sentences. The state court erred in concluding that *Apprendi* announced a broad "quantum of punishment" rule that applies with equal force to facts that increase the aggregate penalty, without first considering whether such facts historically fell within the jury tradition. *State v. Ice*, 343 Or. 248, 262-67, 170 P.3d 1049 (2007). Respondent endorses the Oregon Supreme Court's sweeping application of the *Apprendi* rule, divorced from any consideration of the jury's historic role.

Both the Oregon Supreme Court and respondent have overlooked this Court's consistent approach that grounds its interpretation of Sixth Amendment rights on a solid historical record. "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925). The *Apprendi* rule is predicated on a defendant's Sixth and Fourteenth Amendment rights to have a jury find, beyond a reasonable doubt, the elements of an offense (*i.e.*, the facts "'necessary to constitute the crime'"). *See Apprendi*, 530 U.S. at 476-78 (identifying those underlying constitutional principles). In *Apprendi*, the Court replaced its previous subjective, multi-factor test for determining the elements of a crime with an examination of the trial

practices that "existed during the years surrounding our Nation's founding," and it stressed the "historical foundation" for the rule. 530 U.S at 477-78. Although trial practices 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. This Court's analysis of those historic principles resulted in the *Apprendi* rule, which is based on the "historic link" between the verdict and the trial court's authority to impose a sentence for a crime. *Id*. at 476-84, 483 n. 10. *See also* 530 U.S. at 499-518, 500 n. 1 (Thomas, J., concurring) (looking to common law to determine what constitutes a "crime" and conducting exhaustive review of early American caselaw and authority to establish historical basis for *Apprendi* rule).

The *Apprendi* rule thus is limited by the Framers' understanding of the jury-trial right and is "rooted in longstanding common-law practice." *Cunningham v. California*, 170 S. Ct. 856, 864 (2007). "The Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring v. Arizona*, 536 U.S. 584, 607 (2002). Rather, the dispositive principle is "the Framers' paradigm for criminal justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). And that paradigm, not a doctrinaire application of the *Apprendi* rule to other types of judicial factfinding, must guide resolution of this case.

Apprendi provides a bright-line test for identifying the constitutionally protected elements of an of-

fense—for identifying, in other words, which factual disputes a jury must resolve. "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict" and "fits squarely within the usual definition of an 'element' of the offense." *Apprendi*, 530 U.S. at 494 n. 19. The Court adopted the *Apprendi* rule to prevent States from disguising an element as a "sentencing factor," and to prevent them from effectively transforming a lesser crime into a greater crime without requiring a jury to find each element of that greater crime.

Adhering to its historic approach to Sixth Amendment questions, this Court has refused to extend the *Apprendi* requirements to circumstances beyond those that the Framers understood the jury-trial right to cover. In *Harris v. United States*, 536 U.S. 545 (2002), the Court addressed whether facts that trigger a mandatory minimum sentence are subject to *Apprendi*. In framing the analysis, the plurality explained that "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights." 536 U.S. at 557. The plurality concluded that the *Apprendi* rule did not apply to factual findings that resulted in a mandatory minimum sentence because those facts did not operate as historic elements that created greater offenses and application of the rule would not protect the jury's traditional role.

Id. at 560-69. And that was so regardless of whether the penalty involved a special stigma and punishment. *See id.* at 560 (if fact does not operate as element, "[i]t does not matter, for the purposes of the constitutional analysis" that the fact gives rise to special stigma and special punishment); *id.* at 566 ("[t]hat a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element").

Hence, the analysis in *Apprendi* and subsequent cases demonstrates that the pertinent question in this case is whether the Framers would have understood the jury-trial right as attaching to facts that determine when a defendant begins to serve his separate sentences for separate offenses, a question the State addressed in its opening brief and discusses further in the next section of this brief. No sound jurisprudential basis exists to expand the jury-trial protections beyond the Framers' understanding. Doing so would constitute an unwarranted encroachment on the State's broad, traditional authority to define crimes and to prescribe and administer the penalties for those crimes. *See McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) ("we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties"); *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[i]t 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"; internal citation

omitted); *cf. Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law").

Moreover, extending the *Apprendi* rule in the manner done by the Oregon Supreme Court and urged by respondent would call into question this Court's grounding of other aspects of the Sixth Amendment guarantee in history. For example, this Court has emphasized that approach in its recent Confrontation Clause cases, including *Crawford*, in which the Court read the clause "as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54; *see Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) (explaining that the *Crawford* Court "relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation"); *see also Giles v. California*, 128 S. Ct. 2678, 2682 (2008) (framing confrontation issue as whether "the theory of forfeiture by wrongdoing [at issue] * * * is a founding-era exception to the confrontation right"). Nothing in the Oregon Supreme Court's analysis or respondent's argument offers a sound theoretical basis for departing from this Court's focus on history as key to construing the constitutional guarantees.

C. The *Apprendi* rule does not extend to consecutive sentencing.

1. The Framers would not have understood the jury-trial right to apply to the consecutive-sentencing determination.

The "Framers' paradigm for criminal justice" did not contemplate or suggest any role for the jury in determining when one sentence for one offense should commence in relation to a second sentence for a different offense. As the State demonstrated in its opening brief (Pet. Br. 29-52), the historical record provides no basis to conclude that the Framers would have understood the jury-trial right as extending to the consecutive-sentencing determination. The text of the Sixth Amendment (read together with the text of Article III) establishes that the jury-trial right attaches only to "crimes," and the general history surrounding the founding demonstrates that the Framers intended merely to enshrine the jury's role in determining a defendant's guilt for a specific crime. In addition, juries historically have played no role in consecutive sentencing. In both England and in this country, the jury's role traditionally was limited to determining all of the facts necessary to establish a single offense. The decision to impose consecutive sentences always was viewed as a judicial function and, in fact, the clear majority view has been that sentencing judges possess inherent authority to impose consecutive sentences. In short, the historical presumption has been that, when a defendant is convicted of separate offenses, he is subject to a separate penalty for each offense, and it is for the judge to de-

termine the manner in which the defendant serves those separate sentences.

It follows that the necessary historical basis to extend *Apprendi* to consecutive sentencing simply does not exist. The New Jersey statute at issue in *Apprendi* was deemed "an unacceptable departure from the jury tradition," *Apprendi*, 530 U.S. at 497, because it gave the court, instead of the jury, responsibility for determining whether the government had proved all the elements that were necessary to establish the maximum penalty for that specific crime. The "jury tradition," however, has never included factfinding to determine the manner in which separate sentences for separate crimes will be served. Rather, sentencing judges traditionally exercised inherent authority to make that determination after the jury has completed its role and found a defendant guilty of multiple crimes. The manner in which the facts of one crime might relate to the facts of another distinct crime historically has not been treated as an "element" of either crime or as creating "aggravated crimes." Indeed, several historical rules *prevented* prosecuting multiple crimes together. *See generally* Martin L. Friedland, DOUBLE JEOPARDY, 170-84 (1969) (discussing four historical impediments to prosecuting crimes together, including the doctrine of election which forced prosecution to elect to proceed on one felony at a time). Furthermore, the United States Constitution does not require separate crimes be tried together. *See United States v. Dixon*, 509 U.S. 688 (1993) (double jeopardy bars subsequent prosecution only if crimes have "same elements"). Given all of those considerations, it is difficult to envision how ju-

dicial factfinding to determine when a defendant begins to serve separate sentences for distinct crimes that happen to have been tried and sentenced together constitutes "an unacceptable departure from the jury tradition." *Apprendi*, 530 U.S. at 497.[2]

Because the Oregon consecutive-sentencing statute does not encroach on the jury's role, it reflects a permissible legislative choice to constrain judicial discretion in imposing consecutive sentences. In the absence of that statute, the judge would have had in-

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[2] Respondent asserts that the State resurrects a history argument that Justice Breyer advanced, and that this Court rejected, in *United States v. Booker*, 543 U.S. 220 (2005). Resp. Br. 20-22. Respondent is mistaken. In *Booker*, Justice Breyer argued that there was no historical foundation for the *Apprendi* rule. *See Booker*, 543 U.S. at 327-29 (Breyer, J., dissenting) (making that argument). The State does not make that argument here. To the contrary, the State embraces the historical basis for the *Apprendi* rule. The historical record identified in *Apprendi* established that facts that increase the maximum sentence for an individual "crime" were historically considered "elements" of the offense and were covered by the jury-trial guarantee. *See Apprendi*, 530 U.S. at 476-84, 483 n. 10 (discussing historical record); *id*. at 501-18 (Thomas J., concurring) (same). The State's point here is that there is no comparable historical record for untethering the *Apprendi* rule from its offense-specific foundation, and for extending that rule to findings that increase the aggregate sentence for multiple crimes.

herent authority to determine whether respondent should serve the six discrete sentences consecutively or concurrently. *See State v. Jones*, 250 Or. 59, 61, 440 P.2d 371 (1968) (in the absence of a statute governing consecutive sentences, Oregon trial courts have inherent authority to impose consecutive sentences). The Sixth Amendment is not offended by a statutory provision like that at issue, which recognizes that inherent judicial authority while simultaneously placing limits upon it. "[B]y its terms," that constitutional provision "is not a limitation on judicial power, but a reservation of jury power." *Blakely*, 542 U.S. at 308. "It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Id*. So, too, the Sixth Amendment limits legislative power only to the extent that the exercise of that power infringes on the province of the jury. Because Oregon's statute does not infringe on the jury's province, it does not implicate the Sixth Amendment jury-trial guarantee.

Consequently, it is the Oregon's Supreme Court's "quantum of punishment" rule—and not Oregon's consecutive-sentencing statute—that constitutes an "unacceptable departure" from "tradition." The state court's rule lacks support in the constitutional text and historical record and threatens to transform into jury issues a wide range of aggregate, collateral and "downstream" sentencing factual determinations (including those made in the probation, parole, and prison contexts) that traditionally have fallen to others. *See State v. Allen*, 2008 Tenn Lexis 419, *50-*52 (Tenn. S.C. 2008) (holding that *Blakely* does not apply to consecutive-sentencing decision and analogizing

consecutive sentencing to decisions about "how and where a defendant serves his sentences: on probation, on community corrections, in split confinement, or in the penitentiary"); *see also* States' *Amici Curiae* Br. 10-14 (exploring various implications for probationary determinations, eligibility for sentence modification programs, and mandatory-minimum statutes). Yet nothing in the historical record demonstrates that the jury must play a role in deciding all facts that increase the "quantum of punishment" or facts that determine when one sentence should commence in relation to another. The Oregon Supreme Court misapplied the *Apprendi* rule in holding otherwise.

2. Consecutive sentences do not increase the penalty for the individual "crime" or create aggravated crimes with additional elements for *Apprendi* purposes.

Respondent carves out a fall-back position. He contends that the imposition of consecutive sentences increases the penalty for each individual crime. Resp. Br. 32-42. He points to language from *Raltson v. Robinson*, 454 U.S. 201, 216 n. 9 (1981), in which this Court noted in a footnote that "a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence." (Emphasis in original). Respondent concludes that the imposition of consecutive sentences thus is subject to the *Apprendi* rule *even if* that rule is offense-specific.[3]

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[3] That was not the basis for the Oregon Supreme Court's decision below. That court clearly concluded that consecutive sentencing *does not* increase the

Respondent's argument fails for the reason that has already been identified—the Framers would not have viewed the decision to impose consecutive sentences as part of the jury-trial right. The State does not dispute that consecutive sentences are "harsher" in the sense that they lead to a longer overall punishment. But that fact is unremarkable and merely frames, rather than answers, the question presented here. The issue is whether the Framers would have viewed consecutive sentencing as increasing the penalty for any individual "crime" by essentially creating an "aggravated crime," one with an additional element that implicates the Sixth Amendment jury-trial right.

For the reasons explained above and in the State's brief on the merits, the Framers would not have viewed it that way. The Framers' understanding of facts that constitute the "crime" simply did not extend to facts that determine when once sentence commences in relation to another. The historical view has been that separate convictions authorize separate penalties, and that a court has inherent authority to impose consecutive sentences. The imposition of a consecutive sentence was not viewed as increasing

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penalty for the individual crimes. The court framed the issue as "[d]oes the *Apprendi* rule apply to * * * factual findings that do not increase the sentence for any individual count but that authorize imposition of consecutive sentences?" *Ice*, 343 Or. at 264. The court held that the rule was "*not* offense specific but that [the] focus, instead, [was] on the quantum of punishment." *Id*. at 265 (emphasis in original).

the punishment for the individual "crime" but simply flowed from the fact that a defendant had committed multiple crimes leading to multiple punishments. *See e.g., Rex v. Wilkes*, 19 How. St. Tr. 1075, 1134 (H.L. 1769) (explaining that consecutive sentences do "not let[] the judgment for the first offense vary the punishment, or influence the quantum of it in the other," but instead "effectuate the punishment the Court thought [the] crime deserved," and explaining that "the necessity of postponing the commencement" of sentence for second crime "arises from the party's own guilt" for first crime that led to first sentence); *Kite v. Commonwealth*, 52 Mass. 581, 585, 11 Met. 581 (1846) ("there is no other mode in which a party may be sentenced on several convictions"). Whether or not consecutive sentences are imposed, the penalty for each individual crime remains the same.

Consecutive sentences historically were viewed as necessary to give meaning to a jury's finding of guilt on multiple crimes. Conversely, concurrent sentences were thought to effectively nullify the jury's guilty verdict on the second charge. *See e.g., Connecticut v. Smith*, 5 Day 175, 179 (1811) (consecutive sentencing "prevent[s] the previous conviction from operating as an exemption from punishment[]for a subsequent offense"); *Russell v. Commonwealth*, 7 Serg. & Rawle 489, 490 (1822) ("Would it not be absurd, to make one imprisonment, a punishment for two offenses?"); *Williams v. State of Ohio*, 18 Ohio St. 46, 48 (1868) (concurrent sentencing would nullify conviction). The fact that offenses arose out of the same transaction was viewed as a matter of discretionary mitigation that could be argued to the trial court in an attempt to in-

fluence the court's exercise of its authority to impose consecutive or concurrent sentences. *See* 1 J. Bishop, NEW CRIMINAL PROCEDURE § 1327(2), 815 (4th ed. 1895) (if court has consecutive-sentencing authority, "it will consider *in mitigation* such a fact as that the several offenses occurred in what was actually or substantially one transaction"; footnote omitted and emphasis supplied).

Accordingly, the historical view has been that, although consecutive sentencing has a substantial, practical impact on the amount of time that a defendant will be required to serve, the die is cast when a jury convicts a defendant of multiple crimes. At that point, in other words, the jury already has authorized the maximum punishment for each of the crimes. As a result, although consecutive sentences increase a defendant's aggregate punishment, they do not exceed the statutory maximum for any of the underlying individual offenses, because the jury convicted him of more than one crime.

The problem in *Apprendi*, *Blakely* and related cases was that the statutes at issue allowed judges to impose a sentence for a *specific* conviction that was greater than the jury's verdict authorized. As the Tennessee Supreme Court recently explained, those sentencing schemes "disguised" elements of crimes as "sentencing factors," with governments "effectively turning a lesser crime into a greater crime not by adding an element that must be charged and put to the jury, but by allowing a judge to find 'sentencing factors' after conviction of the lesser crime." *Allen*, 2008 Tenn Lexis at *40. Oregon's consecutive-

sentencing statute does not raise that concern, however, because the judicial factfinding that it requires does not increase the penalty for the individual "crime" or result in an "aggravated crime." Indeed, as respondent explains, "[a] sentence of imprisonment is punishment for a single offense whether the defendant serves the sentence concurrently with or consecutively to other sentences" and, under Oregon law, a court imposes "a discrete sentence for each count of conviction." Resp. Br. 35, 37.

It bears emphasis that the State's argument maintains the bright-line simplicity of the *Apprendi* rule. The argument merely underscores a critical aspect of that rule and ties it to its historical foundation. Other than the fact of a prior conviction, any fact that increases the penalty for *a crime* beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt. Once the penalty for each crime is established in a manner that fully complies with the *Apprendi* rule, other decisions about how those penalties are to be administered—particularly in relationship to each another—remain within the judicial power and do not involve the jury function. Therefore, state statutes—like the Oregon statute at issue here—that recognize that traditional judicial authority, while simultaneously placing limitations upon it, do not implicate the Sixth Amendment jury-trial guarantee. The rule from *Apprendi* is offense-specific in scope. It does not extend to factfinding required for consecutive-sentencing determinations that govern when one discrete sentence commences in relation to another discrete sentence.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, this Court should reverse the judgment of the Oregon Supreme Court.

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