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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 Supreme Court Of The State Of Oregon

BRIEF FOR RESPONDENT THOMAS EUGENE ICE

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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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SUMMARY OF ARGUMENT

Under Oregon law, a sentencing judge cannot impose a consecutive sentence based solely on a jury's guilty verdict. State law requires a judge to find additional facts about a defendant's offense in order to impose a consecutive sentence. The requirement reflects a legislative policy choice. Specifically, the legislature decided that the appropriate sentence for an offense that is merely incidental to another offense and does not risk or cause greater harm than the other offense is a concurrent sentence. The legislature has distinguished between incidental and non-incidental offenses and authorized different maximum punishments for each. In the absence of the legislatively-identified facts, Oregon law entitles the defendant to a concurrent sentence for each and any offense.

Apprendi instructs that under the Sixth Amendment, a criminal defendant has the right to have a jury find any fact (other than a prior conviction) that increases the maximum punishment for an offense. That bright-line rule ensures that the Sixth Amendment right to trial by jury preserves the core protection intended by the Framers: The judge may impose no greater punishment than the law permits for the facts established by the jury verdict. Consequently, when a legislature conditions an increase in the maximum punishment for a criminal offense upon any factual circumstance, a defendant has the right to have that circumstance passed on by a jury of his peers.

The State contends that the *Apprendi* rule merely "prohibit[s] a legislature, with respect to a specific offense, from shifting the determination of an element from the jury to the sentencing judge." Pet. Br. at 21. According to the State, findings necessary to impose a consecutive sentence simply do not implicate the Sixth Amendment's jury-trial guarantee, because juries *historically* have found only guilt-establishing "elements" and have never played a role in imposing consecutive sentences. Pet. Br. at 54-55.

The State's argument rests on two propositions. First, the Sixth Amendment guarantees a jury finding only as to "constitutional elements" or "constitutionally protected elements" – the State's proposed terms for "factual determinations that a jury must make in deciding a defendant's guilt for a specific offense." Pet. Br. at 11, 20-21. Second, a consecutive sentence is no greater punishment for an offense than a concurrent sentence. Pet. Br. at 55-59.

The State's first proposition is untenable, as this Court has repeatedly rejected labels and a formalistic taxonomy of offense "elements" to construe the scope of the Sixth Amendment's jury-trial guarantee. The term "element" is neither a constitutional term nor the touchstone of the jury trial right. Or to put it differently, for Sixth Amendment purposes, an "element" is nothing more than a label for those facts necessary to impose or increase punishment.

In the Framers' era, the guilt-establishing facts set the maximum sentence because offenses were

sanction specific. In response to novel and evolving legislative criminal law schemes, this Court identified the core procedural guarantee the Framers enshrined in the Sixth Amendment. That guarantee, in plainest terms, is that the jury verdict defines the upper bounds of the judge's authority to punish.

When contemporary legislatures identify *additional* facts necessary to increase punishment, those facts trigger the jury trial right. Irrespective of legislative permutations to substantive and procedural criminal law, the critical inquiry remains *functional*: Did the judge rely on independent factfinding to impose a punishment that exceeded what the law authorized based solely on the facts found by the jury? The State's "constitutional element" rule is incompatible with that functional test.

The State's second claim, that consecutive sentencing does not increase the punishment for an offense, misapprehends the nature of a consecutive sentence. A sentence of incarceration is punishment for an offense, regardless of whether the defendant serves that sentence concurrently with, or consecutively to, other sentences. The imposition of a consecutive sentence increases the punishment for that offense, because consecutiveness delays the commencement and expiration of the sentence. Consequently, the impairment of a defendant's personal liberty attendant to a consecutive sentence differs significantly from that attendant to a concurrent sentence.

A legislature is free to identify the facts necessary for a conviction, and it is also free to identify other facts that set the maximum punishment, but it may not circumvent the jury – whose constitutional role is to check the government's power to both convict and punish – by authorizing a judge to find any of those facts.

ARGUMENT

The Sixth Amendment rule from *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), is direct and concise:

> 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.

Despite its simple elegance, this Court has had to reiterate the rule and reverse lower courts four times since *Apprendi*. *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

Under Oregon law, a guilty verdict, by itself, does not authorize the imposition of a consecutive sentence. When an Oregon jury finds a defendant guilty of multiple offenses, the judge may impose a consecutive sentence for an offense only after finding additional facts about the offense. *State v. Ice*, 343 Or. 248, 265 & n.4, 170 P.3d 1049 (2007) (citing OR. REV. STAT. § 137.123).

In Respondent's case, the judge (not the jury) found the facts that authorized the imposition of three consecutive sentences for three offenses. Thus, the issue presented in this case is whether the Sixth Amendment guarantees a criminal defendant the right to a jury determination on the predicate facts that authorize the imposition of a consecutive sentence under Oregon law. On review in this Court, the

State of Oregon contends that the Sixth Amendment right to trial by jury reaches "only to those facts historically found by the jury as part of the guilt determination – in other words, [the jury-trial guarantee] applies only to the elements of an offense," which the State terms "the constitutional elements of an offense." Pet. Br. at 14, 20, 21.

In the following argument, Respondent notes the origins of the *Apprendi* rule, explains that the rule applies to any fact – regardless of its label – that authorizes increased punishment, demonstrates how *Ring*, *Blakely*, *Booker*, and *Cunningham* specifically reject the argument the State presents here, and explains how imposition of a consecutive sentence under Oregon law increases the punishment for a single offense in violation of the *Apprendi* rule.

A. The *Apprendi* rule originated from the due process requirement that the prosecution prove beyond a reasonable doubt the facts essential to a criminal defendant's culpability and authorized punishment.

As noted in *Apprendi*, the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment's jury-trial guarantee

> *indisputably* entitle a criminal defendant to "a jury determination that [he] is guilty of every *element* of the crime with which he is charged, beyond a reasonable doubt."

Apprendi, 530 U.S. at 477 (emphases added) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Several decades have passed since this Court first confronted the question whether a criminal defendant's Fourteenth Amendment due process right to proof beyond a reasonable doubt "of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970), is limited to "elements."

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court deferred to Maine's interpretation of the "elements" of its homicide statutes but instructed that the establishment of *other* facts bearing on the extent of criminal culpability and punishment must also comport with due process. There, the Maine homicide statutes presumed all intentional killings were committed with malice aforethought and punishable as murder by life imprisonment. *Id.* at 685-87 & nn.3-4. The statutes placed on the defendant the burden to rebut the presumption of malice with proof that he acted in the heat of passion upon sudden provocation, in which case the homicide was reduced to manslaughter and punishable by a maximum 20-year sentence of incarceration. *Id*. Maine's highest court ruled that murder and manslaughter were merely "different degrees of the single generic offense of felonious homicide." *Id.* at 688. As such, neither malice aforethought nor heat of passion were "elements" of homicide; rather, they bore only on the appropriate "punishment category" for that crime. *Id.* at 689 & n.9. In this Court, Maine argued that

presuming malice aforethought and allocating to defendant the burden of disproving that fact did not implicate due process because malice aforethought was not a "general element[ ] of the crime of felonious homicide." *Id.* at 699.

The Court characterized and rejected Maine's argument as a reduction of the *Winship* rule to mere formalism:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . .
>
> *Winship* is concerned with substance rather than this kind of formalism.

Id. at 698-99. To determine whether Maine's scheme ran afoul of the Fourteenth Amendment, the Court focused on the potential consequences attendant to the existence of "malice aforethought":

> [T]he criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract *but also with the degree of criminal culpability*. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]," they are

> subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

Id. at 697-98 (emphasis added) (citation omitted).

Notably, the Court did not (as the State suggests) resort to relabeling malice aforethought a "constitutional element." Pet. Br. at 14. The Court distinguished between *elements* of an offense, which are determined by state law, and *facts* that the Constitution requires the prosecution to prove beyond a reasonable doubt to obtain a conviction and impose punishment. *Mullaney*, 421 U.S. at 691 ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here." (citations omitted)). The Court did not rewrite Maine law to redefine the elements of murder, because defining the elements of a statutory crime is a legislative, and not a judicial, function. Rather, the Court identified a fact that lacked a legislative label but nonetheless had constitutional significance because it reflected greater culpability and resulted in greater punishment.

In subsequent cases, this Court continued to analyze the functional effect of a fact to assess its constitutional significance, rather than rely on its denomination as an "element."

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court considered a New York statute that defined murder as intentional killing. New York law allocated to the defendant the burden to prove *the mitigating fact* that he was under extreme emotional distress, which reduced the homicide to manslaughter. *Id.* at 198-99. New York's statute satisfied due process because the prosecution had the burden to prove *all* the facts that constituted the crime, unlike the statute in *Mullaney*, which presumed that the existence of one fact (intent to kill) established the existence of a different fact (malice aforethought). *Id.* at 205-06.

After *Patterson* and several years before *Apprendi*, the Court cautioned that a legislature's power to identify facts that increase the punishment for an offense had "constitutional limits" that, if exceeded, would make "facts not formally identified as elements of the offense charged" subject to the Due Process Clause and the Sixth Amendment's jury-trial guarantee. *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986). There, the Court considered the due process implications of a Pennsylvania statute that provided for a mandatory minimum sentence if the judge found by a preponderance that the offender visibly possessed a firearm during the commission of certain felonies. *Id*. at 80-81. The Court employed a multifactor test for determining whether a defendant's visible possession of a firearm was a fact that due process required the prosecution to prove beyond a reasonable doubt. The Court considered whether Pennsylvania's scheme presumed the existence of any

fact, relieved the prosecution of its burden of proving guilt, created a separate offense calling for a separate penalty rather than merely limiting the sentencing court's discretion in selecting a sentence within the authorized range, or "tailored" the firearm fact "to be a tail which wags the dog of the substantive offense." *Id.* at 87-88. In reaching its conclusion that Pennsylvania's legislative scheme did not offend due process, the Court emphasized that the firearm fact did not increase the maximum sentence authorized by the jury verdict but merely guided the sentencing judge's imposition of a minimum sentence within the statutory maximum. *Id*. at 87-89.

After determining that the prosecution did not have to prove the firearm fact beyond a reasonable doubt, the Court summarily rebuffed the petitioners' challenge under the Sixth Amendment's jury-trial guarantee. *Id*. at 93. The Court left unanswered whether the jury trial right applies to facts that increase the maximum punishment for a crime.

Mullaney and *Patterson* are Fourteenth Amendment cases that concern the permissible allocation of the burden of proof for facts that establish a defendant's criminal culpability and maximum punishment, regardless of whether the legislature identified those facts as elements when defining the offense. *McMillan* goes further and presages the *Apprendi* line of cases in its observation that legislatures cannot avoid Sixth Amendment requirements by excluding constitutionally-significant sentencing facts from the definition of the offense.

B. *Jones* suggested – and *Apprendi* confirmed – that the Sixth Amendment's jury-trial guarantee applies not only to guilt-establishing elements but to any fact (other than prior convictions) that increases the maximum punishment for an offense.

The concerns that the Court voiced in *McMillan* resurfaced in *Jones v. United States*, 526 U.S. 227 (1999), and were realized in *Apprendi*. At issue in *Jones* was whether facts identified in the federal carjacking statute, which increased the maximum punishment if the offense resulted in serious bodily injury or death, were "elements" that the jury had to find beyond a reasonable doubt or "sentencing factors" that a judge could find by a preponderance of the evidence. *Jones*, 526 U.S. at 229-32. The Court held that the facts were "elements" to avoid unnecessarily deciding an open constitutional question:

> [W]hen a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?

Id. at 242. Foreshadowing *Apprendi*, the Court emphasized that the resolution of that constitutional question would not depend on whether a fact was identified as an "element":

> The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define

> the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis *concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment*; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof.

Id. at 243 n.6 (emphasis added).

During the following Term, *Apprendi* presented the constitutional issue anticipated in *Jones*. *Apprendi* involved New Jersey's anti-hate-crime law, which authorized an increase to the maximum penalty for a firearm offense if the judge found that the defendant committed the offense with the purpose of intimidating others because of their race. 530 U.S. at 491. New Jersey argued that the Sixth Amendment's jury-trial guarantee did not apply because "[t]he required finding of biased purpose [was] not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive." *Id*. at 492. The Court rejected New Jersey's argument, wholly endorsing the principle identified in *Jones*: The Sixth Amendment's jury-trial guarantee is not wedded to "elements" of a particular offense but applies to *any* fact (other than a prior conviction) that exposes the defendant to an increase in the maximum punishment for the offense. *Apprendi*, 530 U.S. at 476, 490 (citing *Jones*, 526 U.S. at 243 n.6

(majority opinion of Souter, J.), 252-53 (Stevens, J., concurring), 253 (Scalia, J., concurring)).[1]

To reach that conclusion, the Court examined the history of the jury trial right to identify the protections guaranteed by the Sixth Amendment. In the Framers' era, the jury-trial guarantee required the prosecution to prove to the jury the "elements" of statutory or common law crimes, which both established guilt and defined the maximum punishment. *Apprendi*, 530 U.S. at 477-83; *see also id.* at 479 ("The

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[1] Justice Thomas observed that the term "element" had no other meaning in the Framers' era; it referred to each factual accusation that combined with other accusations to comprise a core crime, plus any additional factual accusations that increase punishment:

> A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.
>
> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is a form of petit larceny. The aggravating fact is an element of the aggravated crime.

Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

substantive criminal law [of late eighteenth century England] tended to be sanction-specific; it prescribed a particular sentence for each offense.").[2]

The Framers intended the Sixth Amendment's jury-trial guarantee to operate as a particular procedural "bulwark" between the accused and both the prosecuting official and the judicial sanctioner. *Id.* at 477. As Blackstone noted, trial by jury "hold[s] much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the

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[2] Because the substantive criminal law tended to be sanction specific, juries had – and exerted – power over a defendant's sentencing. As the Court recognized in *Jones*, juries would convict defendants of lesser offenses in order to limit the sentence that a judge could impose:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

526 U.S. at 245 (citing 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 238-39 (1769)). "Pious perjury" was used most commonly to defeat attempts to impose the death penalty. John H. Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 57-58 (2003) (citing 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at 239). And, its use was not infrequent. Indeed, juries exercised this power in nearly twenty-five percent of "a sample of London cases from the Old Bailey in the 1750's." *Id.* at 58-59.

violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another[.]" 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769), *quoted in Apprendi*, 530 U.S. at 479 n.6. That "bulwark" ensures that the judge's authority to punish derives solely from the jury's verdict. *Id.* at 482-83; *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1973 (2005) (noting that criminal law required the death penalty for numerous offenses and, for those offenses, "there was no distinction between the trial rights and sentencing rights . . . in both purpose and effect, the trial was the sentencing"). The Court concluded that it had adhered faithfully to that intent, with the sole exception being the fact of a prior conviction. *Apprendi*, 530 U.S. at 484-90.

When a legislature conditions an increase in punishment on facts other than those establishing guilt, limiting the jury-trial guarantee solely to guilt-establishing facts denies a defendant the basic protection the Framers intended:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he

> would receive if punished according to the facts reflected in the jury verdict alone.
>
> . . . If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 482-84 (footnote omitted).

The Court reasoned that affording those protections in the face of novel sentencing schemes requires a *functional* inquiry free from the labels and formalism New Jersey invoked by arguing that the fact was the "non-elemental" sentencing factor of "motive":

> Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Id. at 494.

C. Post-*Apprendi* cases reaffirm that the right to a jury trial applies to all *facts* that establish criminal liability or increase punishment for an offense, regardless of whether the fact is labeled an element, a sentencing enhancement, an aggravating circumstance, an offender-related fact, or anything else.

The State argues that the Sixth Amendment right to a jury trial is offense specific and applies "only to those facts historically found by the jury as part of the guilt determination." Pet. Br. at 21. According to the State, the *Apprendi* rule applies only to "the elements necessary for a specific conviction." Pet. Br. at 22. Those types of facts are "constitutional elements of a discrete offense that cannot be removed from the jury's consideration" and "shifted" to a judge. Pet. Br. at 14, 16. The State argues that guilt-establishing facts implicate the jury-trial right, while historical sentencing facts do not and thus can be found by a judge: "Again, the applicable constitutional rule is offense specific and focuses on identifying the correct demarcation between factual findings that are constitutional elements of an offense that a jury must find and facts that can be shifted away from the traditional jury determination." Pet. Br. at 16.

The State's quest for "constitutional elements" that must be found by a jury and may not be "shifted" to a judge fundamentally misperceives the thrust of *Apprendi*. Far from searching for some Platonic set of elements that can only be found by a jury, *Apprendi*

and subsequent cases explain that the Sixth Amendment is concerned with a functional assessment of the relationship between factfinding and punishment. Facts that expose an individual to a criminal conviction or increase the maximum punishment for an offense have Sixth Amendment significance. Legislative labels such as element, sentencing enhancement, aggravating circumstance, and offender-related fact have no currency in the constitutional analysis. The critical inquiry is whether the existence of the fact underlying the label exposes a criminal defendant to a conviction or increases the maximum punishment for an offense: "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." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83).

The Court has long recognized that "there are obviously constitutional limits beyond which the States may not go" in legislating substantive criminal offenses and sentencing schemes. *Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85, 91 (suggesting that the "constitutionality of statutes" may depend on "differences of degree" but not articulating a "bright-line test").

Apprendi and subsequent cases articulate the bright-line test for determining whether a state has exceeded constitutional limits. The rule is simple, functional, and faithful to the jury's historic role in the criminal justice system: Did the judge impose a

sentence in excess of the sentence authorized solely by the jury verdict? If the answer is yes, the Sixth Amendment was violated. *Blakely*, 542 U.S. at 303; *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 483.

By contrast, the State's proposed "test" for "constitutionally protected elements" evokes the same subjective and elusive multi-factor inquiry that this Court initially suggested in *McMillan* but specifically rejected in *Blakely*. 542 U.S. at 307 ("The subjectivity of [the *McMillan*] standard is obvious."). The State's proposal is especially unhelpful in a federal system in which individual states enact substantive and procedural criminal codes that reflect local policies, interests, and concerns. *McMillan*, 477 U.S. at 90 (rejecting petitioners' argument that the sentencing fact at issue – visible possession of a firearm – was really an element of the crime because many other states had made the same fact an element of various aggravated offenses: "But the fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system[.]").

Similarly, the State's proposed division between elements establishing guilt and facts relevant to sentencing is the precise issue that split the majority and the dissent in *Booker*. As the State does here, the *Booker* dissenters argued that the Court should honor the historic distinction between facts establishing guilt for an offense (which were for the jury) and facts relevant to sentencing (which could be found by a judge). The *Booker* dissenters' criticisms of the

Apprendi rule and the State's argument in this case are fundamentally the same:

> The Court reiterates its view that "the right of trial by jury has been understood to require" a jury trial for determination of "*the truth of every accusation*." This claim makes historical sense insofar as an "*accusation*" encompasses each factual *element* of the crime of which a defendant is accused. But the key question here is whether that word also encompasses *sentencing facts* – facts about the offender (say, recidivism) or about the way in which the offender committed the crime (say, the seriousness of the injury or the amount stolen) that help a sentencing judge determine a convicted offender's specific sentence.
>
> History does not support a "right to jury trial" in respect to sentencing facts. Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing. Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. . . .
>
> The administrative rules at issue here, Federal Sentencing Guidelines, focus on *sentencing facts*. They circumscribe a federal judge's sentencing discretion in respect to such facts, but in doing so, they do not change the nature of those facts. The sentencing courts continue to use those facts, not to convict a person of a crime as a statute

> defines it, but to help determine an appropriate punishment.

Booker, 543 U.S. at 327-29 (Breyer, J., dissenting) (citations and internal quotation marks omitted).

The State's argument in this case channels the *Booker* dissent: "If the factual determination at issue was never a determination that juries historically were responsible for making, it cannot matter that the legislature has authorized the judge to engage in factfinding." Pet. Br. at 59.

But the *Apprendi* rule applies to facts historically relevant only to the judge's sentencing decision, including offender-specific facts. Indeed, in both *Blakely* and *Cunningham*, this Court held that the Sixth Amendment applied to offender-specific facts and facts traditionally considered by a judge *only after* the jury's adjudication of guilt.

The petitioner in *Blakely* pleaded guilty to kidnapping his estranged wife. 542 U.S. at 298. The maximum sentence based on the plea alone was 53 months. *Id.* at 299. Under Washington's sentencing law, if the sentencing court found the existence of an "aggravating factor," it could impose an "exceptional sentence" above the standard sentencing range. *Id.* The judge determined that Blakely had acted with "deliberate cruelty," one of the statutorily enumerated aggravating factors from a non-exhaustive list, and imposed an "exceptional" sentence of 90 months. *Id.* at 300-01. The Court rejected Washington's argument that the sentencing scheme functioned like the

mandatory minimum scheme in *McMillan* and reversed, reasoning that the "judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306.

Curiously, the State fails to address or even cite *Ring* or *Cunningham*, two prominent cases involving the application of *Apprendi* to sentencing schemes that authorized increased punishment based on judicial findings of traditional sentencing facts.

In *Ring*, this Court considered whether Arizona's capital punishment scheme, which required a judge to find one of several enumerated "aggravating factors" in order to impose a sentence of death, violated the jury-trial guarantee. 536 U.S. at 597. Arizona argued that its legislature added the aggravating factor requirement only because this Court held that some form of narrowing mechanism was necessary to comport with Eighth Amendment demands for the non-arbitrary imposition of the death penalty. *Id.* at 605-07; *see also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman* [*v. Georgia*, 408 U.S. 238 (1972) (*per curiam*)], our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

Arizona maintained in this Court that its legislature did not create, nor intend to create, an additional "element" for capital offenses. *Ring*, 536 U.S. at 604. Rather, it merely enacted safeguards to ensure that

the sentencer justifiably exercised its discretion to impose the ultimate punishment on a particular capital defendant. *Id.* at 605-06. The Court rejected Arizona's attempt to distinguish *Apprendi*, emphasizing "the relevant inquiry is one not of form, but of effect." *Id.* at 604 (quoting *Apprendi*, 530 U.S. at 494).

As in *Apprendi*, the *Ring* Court declined to limit the scope of the Sixth Amendment to "traditional" elements and returned, instead, to the controlling principle: "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." *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83).

In *Cunningham*, California's Determinate Sentencing Law (DSL) authorized a judge to impose the upper term of a three-tiered sentencing scheme after identifying any "aggravating circumstance" that, by statutory definition, *could not be* an element of the offense. 127 S. Ct. at 861-62. California Rules provided a "nonexhaustive list of aggravating circumstances, including '[f]acts relating to the crime,' '[f]acts relating to the defendant,' and '[a]ny other facts statutorily declared to be circumstances in aggravation.'" *Id.* at 862 (internal citations to rules omitted).

Using language eerily similar to the language proffered by the State in this case, the California Supreme Court had concluded that the DSL comported with the jury-trial guarantee because it

> [did] not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge). . . . Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

People v. Black, 35 Cal. 4th 1238, 113 P.3d 534, 544 (2005) (footnote omitted), *quoted in Cunningham*, 127 S. Ct. at 868-69.

Ultimately, California's proposed distinction between elements of a crime and sentencing factors proved unpersuasive to the Court:

> Asking whether a defendant's basic jury-trial right is preserved, although some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi*'s "bright-line rule" was designed to exclude.

Cunningham, 127 S. Ct. at 869.

In *Cunningham*, two Justices specifically proposed limiting the *Apprendi* rule to offense-related facts, because offender-related facts "should be taken into account at sentencing but have little if any significance for whether the defendant committed the crime." 127 S. Ct. at 873 (Kennedy, J., dissenting) (citing Berman & Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 55-57 (2006)). The majority declared simply that "*Apprendi* itself, however, leaves no room for [that] bifurcated approach." *Id.* at 869 n.14.

This Court adheres to the functional inquiry articulated in *Apprendi*; it does not defer to legislative labels, employ a formalistic view of historical "elements," or consider whether the legislature impermissibly "shifted" matters historically within the jury's purview to the judge. The core principle remains the same. The Sixth Amendment guarantees a particular fundamental procedure to criminal defendants, namely, the right to jury findings "on all facts essential to imposition of the level of punishment that the defendant receives – whether the legislature calls them elements of the offense, sentencing factors, or Mary Jane." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

By contrast, the State's proposal violates common law principles the jury trial right is intended to preserve. The *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence":

> that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872).

Blakely, 542 U.S. at 301-02.

Although the judge at common law had sentencing discretion and could allow "his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment," the judge's exercise of sentencing discretion was absolutely circumscribed by the allegations contained in the indictment and proven to a jury: "The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner[.]" 1 J. Bishop, CRIMINAL PROCEDURE § 85, p. 54 (2d ed. 1872).

The State's proposal undermines the jury's role "in our constitutional structure." *Blakely*, 542 U.S. at 306. The jury's role is to find the facts that "the law makes essential to the punishment." *Id.* at 304 (quoting 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55). The State's rule would allow precisely what the Sixth

Amendment forbids – an increase in a criminal defendant's maximum punishment based on facts not "proved to his peers beyond a reasonable doubt." *Id.* at 312.

D. Because the statutory maximum punishment for an offense under Oregon law is a concurrent sentence, facts necessary to impose a consecutive sentence must be found by a jury.

The State claims that the *Apprendi* rule does not apply to facts necessary to impose a consecutive sentence because determinations of those facts have never been within the jury's purview, which, in turn, defines the scope of the jury trial right. The State thereby answers the question presented, not by applying the functional rule of *Apprendi*, but by retreating to historical practice. The rule in *Apprendi*, however, was identified to *maintain* the Sixth Amendment's jury-trial guarantee when practices *change* and guilt-determining facts no longer set the maximum punishment.

Moreover, the State asserts that facts necessary to authorize a consecutive sentence do not implicate the *Apprendi* rule because those facts do not "authorize an enhanced punishment" for any single offense. Pet. Br. at 56. But history and practice establish that a consecutive sentence is an aspect of "punishment"

for a single offense and that a consecutive sentence is greater punishment than a concurrent sentence for the same offense. Because Oregon law conditions that greater punishment on facts, a jury must find those facts beyond a reasonable doubt.

1. The *Apprendi* rule precludes the State's "constitutional element" limitation.

The State maintains that it should not be required to prove to a jury facts necessary to authorize a consecutive sentence because (1) "the Sixth Amendment encompasses only those historic jury functions that were a critical aspect of the jury role[,]"and (2) the jury's only role was to "determin[e] whether the government had proven each element of a specific offense." Pet. Br. at 51-52. The State thereby attempts a complete end-run around the rule of *Apprendi* by insisting that, even if the rule was violated on its face, the rule is simply inapplicable here: "Because the facts required by Oregon law for consecutive sentences . . . were never within the jury's purview, they do not fall within the constitutional jury trial guarantee." Pet. Br. at 60. The result is the State's complete rejection of *Apprendi*'s functional test for determining whether a fact implicates a criminal defendant's Sixth Amendment right to trial by jury.

The State's fundamental misunderstanding of this Court's precedents stems from its refusal to acknowledge that the *only* acceptable definition of "element," if one must use that term, is "every fact that is by law a basis for imposing or increasing punishment (in contrast to a fact that mitigates punishment)." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

> [I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment for a crime based on some fact – such as a fine that is proportional to the value of stolen goods – that fact is also an element. . . . *One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element*.

Id. (Thomas, J., concurring) (emphasis added); *see also id.* at 483 n.10 (majority opinion of Stevens, J.) ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense.").

So it is of no consequence that the State argues "[t]he factfinding necessary for consecutive sentencing cannot fairly be characterized as an element of either offense" because the "facts involve the relationship *between* the two offenses[.]" Pet. Br. at 55. Even

accepting for the moment the State's characterization,[3] it does not change the consequence attendant to

[3] Accepting the characterization, however, is far from warranted. Each of the findings required by Or. Rev. Stat. § 137.123 to impose a consecutive sentence directly describes the commission of "*the criminal offense* for which a consecutive sentence is contemplated." OR. REV. STAT. § 137.123(5)(a), (b) (emphasis added). The Oregon Legislature selected facts that reflect a defendant's culpability, including the traditionally "elemental" matters of the defendant's mental state (*i.e.*, "willingness") and the nature and gravity of the harm risked or caused. *Id.* Those findings are more plainly "offense-specific" facts than the "offender-related" facts at issue in *Cunningham*.

Moreover, the State's observation that the consecutive sentencing statute identifies facts about an offense by comparing the offense to other offenses does not mean the identified facts cease being facts about the offense. That reasoning would suggest that the fact that a basketball is bigger than a baseball is not a fact about basketballs.

In any event, this Court has already held that facts concerning the relationship between offenses are subject to the *Apprendi* rule. For example, the aggravating circumstances at issue in *Ring* exposing an Arizona criminal defendant to the death penalty included: (1) "the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered," (2) "the defendant has been convicted of one or more homicides . . . during the commission of the offense," and (3) "the defendant committed the offense while . . . on . . . unauthorized release from the state department of corrections." *Ring*, 536 U.S. at 593 n.1 (quoting ARIZ. REV. STAT. ANN. § 13-703(G)(3), (8), (7) (West Supp. 2001)).

Oregon law virtually mirrors Ariz. Rev. Stat. Ann. § 13-703(G)(3) in that a basis for imposing a consecutive sentence is that "the criminal offense for which a consecutive sentence is contemplated . . . 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[.]" OR. REV. STAT. § 137.123(5)(b).

the facts – exposing the defendant to greater punishment for an offense. For example, the Oregon Legislature could have enacted a consecutive-sentencing scheme based on the anti-hate-crime policy at play in *Apprendi*. The legislature could have provided that a court lacks authority to impose a consecutive sentence for any offense unless the court found that the defendant committed the offense "with a purpose to intimidate an individual or group of individuals because of race[.]" 530 U.S. at 469 (quoting New Jersey anti-hate-crime statute). As this Court observed in *Apprendi*, the "clear 'elemental' nature" of the fact would not change the analysis. *Id.* at 494.

The controlling question is, of course, whether the judge imposed a punishment that exceeded that allowed solely by the facts found by the jury or admitted by the defendant. Respondent now turns to that issue.

2. Consecutiveness and concurrence are aspects of punishment for a single offense.

Respondent has no quarrel with the State's chronicle of consecutive sentencing practices through the ages. Pet. Br. at 29-52. When a jury found a defendant guilty of several offenses, the common law and early American jurisprudence gave the judge plenary authority to impose a consecutive sentence for an offense *based merely on the fact that the jury found him guilty of the offense*. 1 J. Bishop, COMMENTARIES ON CRIMINAL LAW § 636, pp. 649-50 (2d ed. 1858). In most jurisdictions, that tradition holds today. *See*, *e.g.*, *Callanan v. United States*, 364 U.S.

587, 597 (1961) (under federal law a sentencing judge has authority to impose consecutive sentences unless Congress directs otherwise); *see also* Br. in Opp. at 3-10 & n.3 (surveying jurisdictions' statutory or common law grant of plenary authority to judges to impose a consecutive sentence for any offense).

But the Oregon Legislature deviated from tradition by enacting a statutory sentencing scheme that *requires* additional facts to authorize a consecutive sentence as an enhanced punishment for an offense. Under the statute, "with respect to offenses that arise out of the same continuous and uninterrupted course of conduct, the jury's issuance of multiple guilty verdicts will *only* support concurrent sentences, unless the judge makes those required findings." *Ice*, 343 Or. at 265.[4]

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[4] Moreover, Oregon "former jeopardy" law forbids a prosecutor from bringing successive prosecutions against a defendant for offenses arising out of the same criminal episode. Or. Const. art. 1, § 12; *State v. Brown*, 262 Or. 442, 457-58, 497 P.2d 1191 (1972); *see also* OR. REV. STAT. § 131.515(2) (2008) ("No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are known to the appropriate prosecutor at the time of the commencement of the first prosecution and establish proper venue in a single court."); OR. REV. STAT. § 131.505(4) (2008) (defining "criminal episode" to mean "continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed at the accomplishment of a single criminal objective"). Oregon law differs from federal law in that respect. *See United States v. Dixon*, 509 U.S. 688, 704 (1993) (holding that the Fifth Amendment's Double Jeopardy Clause prohibits successive prosecutions only for the same offense).

When Oregon enacted its consecutive-sentencing statute, it supplanted traditional plenary judicial authority to impose a consecutive sentence with limited statutory authority. A mere verdict of guilt does not authorize a consecutive sentence for any offense. Rather, the judge needs to find additional facts about the commission of the offense. This Court must now decide whether Oregon's practice comports with the requirements of the Sixth Amendment's jury-trial guarantee. *See Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004) ("Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption . . . involves some degree of estimation[.]").

This Court has made clear that the jury trial right attaches to facts that authorize or increase "punishment" for an offense and has faced the issue in the context of sentence length. Sentence length, however, is only the most common yardstick for measuring punishment. "Punishment" – the penalty that society authorizes for criminal transgressions – has included fines, whipping (and other corporal punishments), imprisonment, solitary confinement, hard labor, exile, and death. *See*, *e.g.*, 1 J. Archbold, PRACTICE, PLEADING AND EVIDENCE IN CRIMINAL CASES §§ 180 to 185-1 (Thomas W. Waterman ed., 6th ed. 1853). The jury-trial guarantee also applies to facts that change the nature of the punishment, such as from imprisonment to death. *Ring*, 536 U.S. at 609.

A sentence of imprisonment is punishment for a single offense whether the defendant serves the sentence concurrently with or consecutively to other sentences. When a conviction for which the judge imposes a concurrent sentence proves invalid, the concurrent sentence constitutes impermissible punishment that must be vacated along with the invalid conviction. *Rutledge v. United States*, 517 U.S. 292, 301-03 (1996); *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *see also Putnam v. United States*, 162 U.S. 687, 714 (1896) (concurrent sentences are "distinct and separate as to each count"). In *Ball*, quoted with approval in *Rutledge*, the Court held that the remedy for the improper entry of separate convictions and concurrent sentences for "receiving" and "possessing" a firearm when Congress intended but one conviction, was to vacate one conviction and its concurrent sentence, because "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." 470 U.S. at 864. Consequently, a judge's decision to impose a concurrent sentence never amounts to, as the State puts it, a "free crime." Cert. Pet. at 33. Rather, each conviction and sentence provides a separate *legal* justification for the government's infringement on the inmate's freedom.

Similarly, a consecutive sentence is punishment *only* for the offense to which the sentence attaches:

> [Imposing a consecutive sentence] is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only provided, from the situation of the delinquent, to effectuate the punishment the Court thought his crime deserved.

Rex v. Wilkes, 19 How. St. Tr. 1075, 1133 (1769). Imposition of a consecutive sentence reflects a judge's determination of the appropriate punishment for the particular crime of conviction, independent from the appropriateness of the sentences imposed for other crimes of conviction.

As even the State acknowledges, this Court has concluded that a consecutive sentence constitutes punishment for a specific offense and *only* that offense. *Carter v. McClaughry*, 183 U.S. 365, 394 (1901). There, the Court distinguished consecutive sentences, which each constitute punishment for a separate offense, from recidivist sentences, for which the legislature provides enhanced punishment for a repeated offense: "Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute." *Carter*, 183

U.S. at 394, *quoted in part in* Pet. Br. at 58.[5] In other words, a consecutive sentence is the punishment for a *single* offense, rather than augmented punishment because of the defendant's other offenses.

Should any doubt remain, the particularities of Oregon's consecutive sentencing statute clearly make consecutiveness an aspect of a sentence for a single offense. OR. REV. STAT. § 137.123(5)(a) (requiring findings for "*the criminal offense* for which a consecutive sentence is contemplated" (emphasis added)). Under Oregon law, a court does not impose an "aggregate sentence" but a discrete sentence for each count of conviction. Accordingly, the judge in this case made consecutiveness an aspect of the sentence only for counts 2, 4, and 5. J.A. 46-87 (judgment); *see also* J.A. 38-41 (sentencing hearing).

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[5] "Cumulative sentences" and "consecutive sentences" are synonymous terms. Arthur W. Campbell, LAW OF SENTENCING, § 9.20, at 413 & n.1 (3d ed. 2004). A "cumulative *punishment*," in contrast, is the legal term of art used to refer to the enhanced sentence imposed pursuant to a recidivist statute:

> It should be noted that there is a difference between "cumulative sentences," such as are pronounced upon a person under conviction at the same time of several offenses, and "cumulative punishment" which is an increased punishment inflicted for a second or third conviction, under habitual criminal acts.

State v. Hambly, 126 N.C. 1066, 35 S.E. 614, 615 (1900); *see also* BLACK'S LAW DICTIONARY 1398 (4th ed. 1951) (making same distinction when defining "cumulative punishment").

The State is mistaken, then, when it asserts that this Court's discussion of "aggregate punishment" in *Apprendi* implicates this case. Pet. Br. at 25. There, New Jersey argued that, even without the additional finding, state law gave the judge authority to impose consecutive sentences that would equal the aggregate punishment imposed. *Apprendi*, 530 U.S. at 474. The Court rejected that argument: "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* The possibility that the judge could have imposed the same "aggregate punishment" originally or upon resentencing was of no import. Rather, the issue was whether the trial court had imposed a sentence *on any individual count* that exceeded its authority. *See also Greene v. United States*, 358 U.S. 326, 328-29 (1959) (rejecting the Government's argument that distinct consecutive sentences, some for allegedly invalid convictions, were one "gross sentence" supported by other offenses sentenced concurrently, because, as stated in *Hill v. United States*, 298 U.S. 460, 464 (1936), "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court"). Similarly, the constitutional question in this case is

whether the judge exceeded his authority by imposing consecutive sentences on *each* of counts 2, 4, and 5.[6]

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[6] Similar fault inheres in the State's fleeting argument that *Lewis v. United States*, 518 U.S. 322 (1996), favors its position. There, the Court considered the scope of the Sixth Amendment *with respect to severity of the charges*. This Court had long held that the Sixth Amendment's jury-trial guarantee attaches only to "serious" rather than "petty" offenses. *See*, *e.g.*, *Schick v. United States*, 195 U.S. 65, 70 (1904). From the conclusion that a "serious" offense carries a potential penalty of a significant period of confinement (or the requirement to serve hard labor, see *United States v. Moreland*, 258 U.S. 433, 437 (1922)), offenses were "petty" if the maximum potential sentence did not exceed six months. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). *Lewis* presented the question whether the right to trial by jury applied in a prosecution for multiple "petty" offenses that carry a potential *aggregate* penalty exceeding six months. 518 U.S. at 326-27.

The Court decided that it did not:

> The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. . . . [W]e determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.

Id. at 327. The Court merely held that the Sixth Amendment attaches to "serious" offenses and not to "petty" offenses. Here, there is no question that the Sixth Amendment attaches to each of the six felony offenses.

3. A consecutive sentence is greater punishment than a concurrent sentence.

The Oregon Supreme Court held that "[i]t is self-evident" that a consecutive sentence is greater punishment than a concurrent sentence. *Ice*, 343 Or. at 266 n.5. The court's holding is consistent with this Court's observation that a concurrent sentence is imposed "as a *less* severe sanction than a consecutive sentence." *Ralston v. Robinson*, 454 U.S. 201, 216 n.9 (1981). In *Ralston*, the Court considered whether a judge, who was imposing a consecutive adult sentence on an offender already serving a Youth Correction Act (YCA) sentence, had authority to eliminate YCA treatment for the remainder of the YCA sentence. *Id.* at 203. The judge could have eliminated the treatment by imposing a *concurrent* adult sentence. *Id*. at 216-17. The Court reasoned:

> It would be anomalous to permit a concurrent sentence to modify the terms of the remainder of a YCA sentence but not to permit a consecutive term to have that effect, since a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence.

Id. at 216 n.9; *see also* Arthur W. Campbell, LAW OF SENTENCING § 9.20, at 413-14 (3d ed. 2004) ("Consecutive sentences follow one another seriatim. . . . By contrast, concurrent sentences, *regarded as less severe sanctions*, are served simultaneously. . . ." (emphasis added) (footnotes omitted)).

A consecutive sentence constitutes a valid exception to the common law rule "that unless interrupted by fault of the prisoner (an escape, for example) a prison sentence runs continuously from the date on which the defendant surrenders to begin serving it." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (Posner, C.J.) The government generally cannot "delay the expiration of [a] sentence either *by postponing the commencement of the sentence* or by releasing the prisoner for a time and then reimprisoning him" in light of his interests in "the expiation of his debt to society and his reintegration into the free community." *Id.* (emphasis added). A court imposes a consecutive sentence upon its determination that the appropriate punishment for an offense requires the defendant to serve the sentence independently from other sentences, which delays the date the defendant can begin serving, and will be free from, that sentence.

A consecutive sentence also undeniably serves traditional societal goals of sentencing by extending the deprivations of liberty attendant to the term of incarceration. Sentences of incarceration serve various societal goals, including general and specific deterrence, incapacitation, rehabilitation, and retribution. *Ewing v. California*, 538 U.S. 11, 25 (2003); *Jones v. United States*, 463 U.S. 354, 368-69 (1983). A consecutive sentence is a greater deterrent to the defendant and others than a concurrent sentence; incapacitates the defendant longer; allows greater rehabilitative possibility; and pangs the defendant's

liberty interests with greater retribution. Simply put, a defendant who receives a consecutive sentence receives greater punishment *for a single offense* than a defendant who receives a concurrent sentence for the same offense.

4. In Oregon, a consecutive sentence exceeds the maximum punishment authorized by the jury verdict.

To echo this Court's reference to the words of Oliver Wendell Holmes, Jr., Oregon law threatened Respondent with certain pains if he did certain things. *See Apprendi*, 530 U.S. at 476 (quoting O. Holmes, THE COMMON LAW 40 (M. Howe ed. 1963)). It threatened him with a felony conviction and a lengthy sentence of incarceration *if* he committed first-degree sexual abuse.

Oregon law made additional threats regarding how he would serve that sentence *if* additional facts bearing on his culpability were present. It threatened, as an additional penalty, that he could be required to serve the sentence after serving sentences imposed for other offenses *if* he committed the sexual abuse during a separate criminal episode. OR. REV. STAT. § 137.123(1), (2). Even if he committed the sexual abuse during the same criminal episode as other offenses, it made the same threat *if* the commission either (a) indicated his willingness to commit a

second offense, (b) caused or risked causing a more serious harm than the other offense, or (c) harmed a different victim. OR. REV. STAT. § 137.123(4), (5). Under Oregon law, absent those facts, he was "*entitled*" to serve the sentence for sexual abuse at the same time that he served other sentences that the court imposed; in other words, he had "a legal *right* to a lesser sentence" absent the establishment of those additional factual accusations. *Blakely*, 542 U.S. at 309.

Here, the prosecution brought those factual accusations not to the jury, but to the judge. The statutory maximum sentence based solely on the jury verdict was a concurrent sentence for count 5 and for each of Respondent's other offenses. The judge, however, was satisfied that the prosecution had established those facts with respect to count 5, and carried out the law's threats by imposing a consecutive sentence. The judge did the same for counts 2 and 4. Consequently, Respondent must serve the 90-month sentence for count 5 after he has served the sentences on counts 1, 2, and 4. In contravention of his interests in "the expiation of his debt to society and his reintegration into the free community," he will be unable to begin his prison term for count 5 for more than twenty years. *Dunne*, 14 F.3d at 336. Respondent would be in a different place today (figuratively and literally) if the judge had imposed punishment based solely on the facts found by the jury. He would have already served his sentence

for count 5 (and each of the other five sentences in this criminal case) after 90 months.

The requirement of additional factfinding to impose a consecutive sentence implicates the jury's province of finding all facts that expose a defendant to the maximum penalty for an offense. Because Oregon law requires additional facts to authorize a consecutive sentence – thereby increasing the maximum punishment for an offense – the Sixth Amendment guaranteed Respondent the right to have a jury find those facts beyond a reasonable doubt.

CONCLUSION

In Oregon, the presumptive sentence of incarceration for an offense is a concurrent sentence. A consecutive sentence for an offense is an enhanced sentence that requires additional facts to justify its imposition. As in Respondent's case, the jury verdict authorized – at most – a concurrent sentence for each of his offenses. But the judge found additional facts to authorize the heightened penalties imposed on each of counts 2, 4, and 5. The Oregon Supreme Court properly followed the *Apprendi* rule when it concluded that the judge had exceeded his sentencing authority by relying on facts the jury did not find to increase the punishment for counts 2, 4, and 5. This Court should affirm its decision.

Respectfully submitted,

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