IN THE SUPREME COURT OF THE UNITED STATES

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OREGON, :

Petitioner :

v. : No. 07-901

THOMAS EUGENE ICE. :

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Washington, D.C.

Tuesday, October 14, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MARY H. WILLIAMS, ESQ., Solicitor General, Salem, Ore.; on behalf of the Petitioner.

ERNEST G. LANNET, ESQ., Senior Deputy Public Defender, Salem, Ore.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-901, Oregon v. Ice.

Ms. Williams.

ORAL ARGUMENT OF MARY H. WILLIAMS

ON BEHALF OF THE PETITIONER

MS. WILLIAMS: Mr. Chief Justice, and may it please the Court:

The factfinding at issue in this case is significantly different than the factfinding at issue in this Court's recent Sixth Amendment cases, in which the Court struck down changes in sentencing practice that had the effect of removing factfinding from the province of the jury. In those cases, the change in practice meant that a defendant could be convicted by the jury for one offense and then, based on nonjury factfinding, the defendant could be sentenced for what appeared to be an aggravated, more serious offense without the jury having made all the factual determinations necessary for that more serious offense.

That doesn't happen in this case. In this case, the jury convicted Mr. Ice of six counts, and the sentence imposed on each of those six convictions satisfies the Apprendi rule. There's no additional jury

factfinding that alters -- or nonjury factfinding, excuse me, that alters a specific sentence for one of the convictions. Instead, what the factfinding in this case does is to significantly restrain the judge's ability to decide how to administer those multiple sentences for the multiple convictions.

JUSTICE SCALIA: Well, but it -- it, by reason of the unusual law at issue here -- -I think it's unusual, I don't -- I'm unaware of any other State that has one -- the sentences -- the defendant has an entitlement to have the sentences run concurrently unless a certain additional fact exists and that additional fact is to be found by the judge rather than by the jury. So that if you take seriously what -- what we have said in prior cases, namely that any fact which has the effect of lengthening the sentence to which the defendant is entitled must be found by the jury -- if you take that seriously, I don't see why it doesn't apply here.

MS. WILLIAMS: Justice Scalia, first on the point in terms of how unique this statute is, there are other States that have similar requirements, that there is initial a presumption that multiple sentences will be concurrent unless there is additional nonjury factfinding that authorizes the judge to impose

consecutive sentences. So it's not entirely --

JUSTICE SCALIA: How many others? Do you know?

MS. WILLIAMS: It's difficult actually to come up with an exact count, and the numbers vary when you look at how other courts have sort of combined cases, but perhaps as many as 13, but as different States have sort of changed their practice some of those have fallen away. It's clear that there's at least a minority of States that have this kind of limitation on what is otherwise inherent or a discretionary authority of the judge to decide how to administer these multiple sentences.

The difference is that what this Court has been addressing in the Apprendi line of cases has always been a specific sentence imposed on a specific conviction. And what Oregon Supreme Court did was to expand that to say that, in addition to the statutory maximum that this Court described in Blakely, there is in effect a second statutory maximum that you must consider when there are multiple sentences being imposed for multiple convictions, and that's the total period of incarceration that the defendant will serve with and without the additional factfinding.

JUSTICE SCALIA: You know, this fact can --

can turn out to be the most significant fact for the defendant. I mean, it could lengthen his sentence enormously. It's more important than many of the other facts that we leave to the jury.

MS. WILLIAMS: Yes, Your Honor, and in this case, for example, the additional factfinding extends the whole duration of the -- of Mr. Ice's period of incarceration from 90 months to 340 months. But what is significant is that, as this Court said in Blakely, the Sixth Amendment is a reservation of jury power; it's not a limitation on judicial power. And I would submit it's not a limitation on legislative power, except to the extent that that exercise of power removed something from the province of the jury. Historically, it's undisputed that the judge made this decision about how multiple sentences would be administered.

JUSTICE SCALIA: But you could say the same about sentencing in general, and we held that the Sixth Amendment does impose a limitation upon judicial power where at least there is an entitlement by law to a certain lower sentence. And there we said you can't leave it to the judge to decide whether the facts that trigger that law exist or not.

MS. WILLIAMS: I think what's important is the foundation for that holding and the foundation for

the Apprendi rule. It wasn't simply that factfinding in general that exposes the defendant to a harsher punishment is something that should -- would be better served by having it done by the jury. It was that, because of the changes in sentencing practices, because States and Congress have been taking what traditionally had been elements of an offense and relabeling them as something else, as sentencing factors, that the jury was no longer finding what traditionally it would have found for each conviction. It was no longer finding what would have been each element of an offense.

So what the rule does is it provides a bright-line way of testing what is the functional equivalent of an element for a specific offense that would have been within the province of the jury and therefore that can't be removed without violating the Sixth Amendment.

JUSTICE STEVENS: The rule --

JUSTICE KENNEDY: The rule does bear on culpability, and culpability sounds like part of the definition of an offense or a more serious offense.

MS. WILLIAMS: Yes, Your Honor.

And I think the Oregon Supreme Court viewed this case as in terms of -- that it may have simply been happenstance that the Court was looking only at single

convictions and single sentences being imposed on those. But I think that takes away the analysis that the court used in reaching the conclusions that it reached.

JUSTICE KENNEDY: I don't understand why this happenstance is required to do it under the statute. I didn't quite understand that.

MS. WILLIAMS: Well --

JUSTICE KENNEDY: You said it's only happenstance. He has to do it under the statute if he makes the finding.

MS. WILLIAMS: No, what I'm trying to say is that I think the Oregon Supreme Court viewed the fact that so far in this Court's cases you had only been dealing with a single offense and a single sentence, as -- as not foreclosing the possibility that there would be a different statutory maximum when you have multiple sentences being imposed for multiple convictions. And so the supreme court, I think, treated it -- what I was saying was it simply is happenstance that that had been the -- the nature of the cases that this Court has decided, but then drew from this Court's decision and from discussion about punishment a broader meaning that somehow the jury must be involved in any factual determination that relates to the overall quantum of punishment for multiple sentences being imposed.

JUSTICE SOUTER: Well, didn't we furnish the premise for that broader reasoning? Because we pointed out that the traditional role of the jury was standing in effect as the buffer between the power of the State and the individual, and our concern in the Apprendi cases was that the concept of elements was being manipulated in such a way that the jury no longer stood in that -- in effect, that buffer position.

And I guess the question here would be, is there -- is there room for -- in effect, for manipulation by the law in the consecutive sentencing scheme or the potential consecutive sentencing scheme, so that the jury in effect loses control over the length, the ultimate length of time that an individual is going to serve? What is your response to that?

MS. WILLIAMS: That the jury does not lose anything that the jury historically had within its --

JUSTICE SOUTER: No, but isn't the problem with that argument the problem that Justice Scalia raised a moment ago, where you could have made the same argument with respect to a mandatory State guideline, but nonetheless, the change in the law brought to bear on the new law an old concept. And this is a change in the law, to be sure. I agree with you, historically. The judges -- once consecutive sentencing came in at

all, they were free to, in effect, do what they wanted to, subject to some kind of a rule of reason.

But we've got to apply the Apprendi concept and the concern of the jury trial right to this new situation. So I don't think it's an answer to say, well, the judge has never had such a -- such a power.

MS. WILLIAMS: But there's something different here in terms of looking back on history and what we have presently, compared to when you are looking at the offense-specific sentence associated with a specific conviction, because the changes in practice there had the effect of taking away the ability to find an element or something that was the equivalent of an element, of removing that from the jury. And, historically, that is clearly what the jury's job was: To stand in as a buffer between the defendant and the government.

JUSTICE SCALIA: So I gather from your argument that you would -- you would be taking the other side and you would be saying that it has to go to the jury if, instead of being a statute that applies to concurrent sentences from various crimes, there was added to a particular crime, if this crime was committed with the use of a gun, any sentence imposed shall not run concurrently but shall run consecutively with any

other sentence arising out of this same occurrence?

MS. WILLIAMS: I think --

JUSTICE SCALIA: There it's attached to a particular crime. Do you really think that we should have a different result in that case from this one?

MS. WILLIAMS: No, Your Honor, I don't, although I think that makes it a more difficult situation to try to analyze, because there it is -- it is focused on a specific sentence for a specific offense. But what is different is it still goes to not adding to the penalty for that sentence, but adding to how you are going to administer multiple sentences.

And the history here is very different. Because what we have is, even though there wasn't a statute when the Framers would have looked at this issue, the issue did exist. Judges did make the determination about how multiple sentences would be administered. And what they would have considered would have been a wide array of facts and without really limitation other than --

JUSTICE SCALIA: You could say the same thing about the length of the sentence, that it was up to them and they considered a wide array of facts. So what? We said in Apprendi, once you try to narrow it by law and say they can't do more than this, once you do

that, that fact has to be found by the jury. And that's what's going on here.

MS. WILLIAMS: But I think what's different is that the history at issue and underlying Apprendi actually wasn't that the judge could simply make nonjury factfinding and expand the sentence beyond what the sentence was that was associated with the jury's verdict; that, in fact, that was the problem. Because once there was additional factfinding that permitted the judge to add to the penalty, that that had changed by taking something away from what the jury's role was.

And so here we don't have that same sort of situation. I think that -- that that was exactly the argument this Court has rejected in those cases of -- of -- where Faith and others have attempted to suggest that historically judges were able to do this and so it shouldn't matter now that we have changes. But the Court rejected those arguments to say that, no, because the sentencing practices have taken something away from the jury, that is why we have the Sixth Amendment violation.

So if in this circumstance we -- we have constrained judicial power -- and clearly that's what this statute does, is it tells the judge that, instead of being able to make this determination

based on this wide array of factual considerations, the judge now is limited in what the judge must consider to -- to then exercise discretion in administering these sentences. But all of that is legislative restraint of judicial power without touching in any way on the jury's historic role in -- in how to deal with these multiple --

JUSTICE BREYER: Am I right in -- I just want to get the facts right. Am I right, you did this historical research, and if you start with Apprendi we can go all the way back to Nebuchadnezzar and you haven't found a single case ever where it was a jury rather than a judge that made this question of how you put together sentences for two separate crimes committed on the same occasion? Is that right, or is it an overstatement?

MS. WILLIAMS: It is an overstatement only in the sense that I did not go back as far as --

JUSTICE BREYER: I didn't say how far you went back. I said as far as you went back.

MS. WILLIAMS: As far as I went --

JUSTICE BREYER: I don't know what Nebuchadnezzar found, but I take it you did look to see what was true at the time of the writing of the Constitution.

MS. WILLIAMS: Yes, Your Honor.

JUSTICE BREYER: And at the time of the writing of the Constitution, which sometimes some of us feel is relevant, in that instance they did have the judge, not the jury, decide how to create a total sentence where the person had committed two crimes on the same occasion.

MS. WILLIAMS: Yes, exactly. And that difference in terms of the history of showing that this was a judicial determination, that -- and now that the factfinding --

JUSTICE SCALIA: But you could say the same in Apprendi. It was a judicial determination how much of a sentence you were going to get from ten years to life. It wasn't up to the jury. It was up to the judge.

MS. WILLIAMS: But where --

JUSTICE SCALIA: And yet when you constrain the judge and you say, judge, you cannot give more than 20 years unless the crime was committed with a -- with a gun, we said suddenly that that matter can no longer be left to the judge. It's a matter of law, and the facts must be found by the jury. And I don't see any difference here. I mean in both cases it was traditionally done by judges.

MS. WILLIAMS: But what this Court focused on with the Apprendi rule is that, although judges made decisions about sentencing within a range of possible sentences, what judges could not do was to find additional facts that were the functional equivalent of an element of a greater offense. And that's what was happening with those new sentencing --

JUSTICE SOUTER: But we defined in effect what was the functional element of the greater offense in terms of the -- the power or the capacity of the judge to increase the sentence beyond the range that would have been -- that would have established the maximum in the absence of that factfinding, right?

MS. WILLIAMS: Correct.

JUSTICE SOUTER: All right. And aren't we in exactly the same position here? Because the defendant here can correctly say: I cannot be sentenced to the more onerous -- under a more onerous scheme of consecutive sentencing unless some fact is found which has not been found by the jury in coming to verdicts of guilty in any of these crimes; a further fact must be found to expose me to the heavier penalty.

And that is exactly the same as the situation in Apprendi with one possible exception; and that is, do you accept, as I thought you did, the

proposition that consecutive sentencing is the heavier penalty or is a more onerous sentencing alternative. If you accept that, I don't see how you would escape the analogy with Apprendi.

MS. WILLIAMS: Your Honor, I do not accept that it is a -- an enhanced penalty for any of the specific convictions.

JUSTICE SOUTER: Everybody agrees.

MS. WILLIAMS: And it would be --

JUSTICE SOUTER: If you had a choice between two concurrent sentences and two consecutive sentences, you know which one you are going to choose. So we -- we know what is the heavier sentence or the heavier sentencing option.

MS. WILLIAMS: It does have certainly a harsher effect on the defendant than serving each of the sentences beginning at the same time. But I think the same could be said in terms of mandatory minimum sentences and the factfinding required for those.

We obviously have cases where a defendant facing a mandatory minimum sentence is going to be confronted with a harsher sentence than he would face without that additional factor.

JUSTICE SOUTER: But the mandatory minimum is at least within the range of sentencing possibilities

that the judge could impose anyway without any further factfinding by the jury.

MS. WILLIAMS: And depending on how you view this in terms of if you are looking at it with an offense-specific frame, each sentence imposed for each of the six convictions is also within the range of what the judge can impose. This additional piece of when those sentences begin does not take away from the jury's role. It does limit what the judge could otherwise have done, and it does that limitation by requiring factfinding.

JUSTICE BREYER: What about the -- what about restitution, forfeiture, taking a child and having him tried as an adult? What about probation? What about alternative drug programs? What about diversion? I mean, I can think of five or six where there might be a factual finding necessary to proceed to a situation where the total amount of punishment is greater rather than less.

MS. WILLIAMS: Yes, Your Honor, and we are now litigating some of those very questions in light of the Oregon Supreme Court decision about what is the scope when you look beyond the specific sentence imposed for a specific conviction and look at this greater quantum of punishment --

JUSTICE SCALIA: It's a lot easier to limit it to sentence than it is to limit it to sentence for a particular conviction as opposed to sentence for the whole ball of wax, all of the -- all of the horribles that Justice Breyer proposes would -- would be overcome if -- if you just adopted a rule that only applies to sentences.

MS. WILLIAMS: Although, Your Honor, some of these Douse-Greene decisions that are made again by nonjury factfinding do affect what the defendant's period of incarceration is going to be.

JUSTICE BREYER: And doesn't the sentencing -- doesn't the Federal law define a sentence to include restitution, to include what is the equivalent of probation? I mean, there is a broad definition of the word "sentence" in the law which includes some of the things that I mentioned, though not all.

MS. WILLIAMS: Yes, Your Honor, and the same is true for Oregon, that the sentence imposed and if you -- the -- the judgments are set out in the joint appendix in this case, that set out each of the sentences imposed for each of the six convictions, and you will see that there are a number of things in addition to the term of incarceration that are a part of that sentence being imposed.

JUSTICE STEVENS: May I ask you a question that may seem totally irrelevant? Do you think our decision in McMillan v. Pennsylvania was correctly decided?

MS. WILLIAMS: I --

JUSTICE STEVENS: It seems to me under your reasoning in your case you might say that case was wrong. And I think it was wrong. I will be perfectly candid and say so. I think it was a very important decision.

MS. WILLIAMS: No, Your Honor, I don't think that it is necessary to say that that decision is wrong to be consistent with the position I am asserting here or the decision in Harris, because there the Court made a distinction between what the jury traditionally would have been -- been doing and determined that that jury role was limited to deciding facts that increased only the -- the maximum penalty that the defendants faced. And so factfinding tied to imposing a mandatory minimum sentence is different.

JUSTICE STEVENS: No, I understand. But it seems to me it is -- in the old common law tradition, following sort of the reasoning in the case you relied on, McMillan really should have come out the other way, because the jury normally would be finding the facts

that would allow the minimum -- the maximum to go up or the minimum. I forget which it was.

MS. WILLIAMS: And -- and what I have done is to start with the proposition that we have in place the Apprendi rule as it has been construed in McMillan and in Harris, but that this is a -- a very different extension of that rule beyond anything that this Court has addressed in these cases.

And it's an extension that doesn't have the same historic support that the Apprendi rule has. So I don't think that this Court needs to -- certainly this Court doesn't need to consider what impact this would have except for, I think, in accepting the Oregon Supreme Court holding. That to me does raise questions about the ongoing validity of McMillan and Harris. And -- and again, there are ways that you could certainly distinguish that and retain those. But what it does is to focus more on the jury as factfinder instead of focusing on what the jury's historic role was and the Sixth Amendment as a reservation of the power that the jury has, not somehow giving the jury additional power beyond what it has whenever factfinding is involved that is -- is related to a defendant's aggregate punishment.

JUSTICE STEVENS: And, of course, it's part of your position that historically sentences were always

consecutive, if you go way back.

MS. WILLIAMS: But, Your Honor, in the older cases we actually do find that they were -- there was discretion for the judge to have the sentences be served concurrently. It was viewed as in some ways not giving full effect to the jury's verdict of finding the defendant guilty for multiple offenses, which consecutive sentencing did give full effect to that verdict.

And so it was in the nature really of a mitigation that the judge could do to lessen the severity of the punishment based on certain facts that the judge would consider and then in simply exercising the judge's discretion.

But what is important here, I think, is that it was clearly something for the judge to decide. Once there were the multiple convictions, the jury's role was at an end, and it was then up to the judge to make the determination about how to administer those multiple sentences. And so long as we are not changing the jury's role in establishing that sentence for each of the -- the six convictions in this case, then we have not removed from the jury anything that would have been incorporated within the Sixth Amendment.

JUSTICE STEVENS: What happens with

sentences from multiple States? You commit the crime in State A; you flee. You are then tried and found guilty of a second crime in State B. I -- I -- let's assume that the judge in State B has considerable discretion as to whether or not he intends to impose a sentence in B or send back to A, and that he knows that A is going to be concurrent.

Under the theory of the case that's advocated by the Respondents, do you think that a jury trial or some sort of finding would be required?

MS. WILLIAMS: I think that if the -- the law required the sentences be concurrent unless additional factfindings were made, then under the -- the rule announced by the Oregon Supreme Court and advocated by Respondent that question would have to then go to the jury even if it arises in -- basically in separate proceedings.

So as you are sentencing in that separate, second proceeding, it would still be a jury question of whether those facts were -- were there that would allow the judge to impose a consecutive sentence.

The Oregon statute treats that a little bit differently. It appears to give the judge discretion when there is a previously imposed judgment. Other States do it differently, though, and do require

factfinding even in those circumstances when there has been a judgment imposed in an entirely separate proceeding. And if I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Lannet.

ORAL ARGUMENT OF ERNEST G. LANNET

ON BEHALF OF THE RESPONDENT

MR. LANNET: Mr. Chief Justice, and may it please the Court:

This case presents yet another application of the bright-line rule from Apprendi. Oregon law entitles a criminal defendant to a concurrent sentence for each offense unless certain facts are found. Here for three offenses a judge found those facts and imposed a greater penalty of a consecutive sentence. That violated defendant's -- or the Sixth Amendment's jury-trial guarantee that the judge's authority to impose criminal punishment must be limited by the facts solely found by the jury.

JUSTICE GINSBURG: Mr. Lannet, there -- there is one significant difference, I think, between -- the-- in Apprendi it doesn't matter whether the State labels something a "sentencing factor" or an "element." Every one of those questions that goes into determining

the maximum length of a sentence has to go to a jury under Apprendi.

But when it comes to consecutive versus concurrent, it's perfectly okay if a State says, our main rule is consecutive, but the judge, if there are certain mitigating factors, can make it concurrent. Or it leaves the total things to the discretion of the judge.

And if we are looking at it from the point of view of a defendant, the State says, well, we are not going to make it totally discretionary because we want to be more defendant-friendly; that is, we are putting certain restraints on the judge. So it seems -- what seems odd to me about this case is the Sixth Amendment is supposed to protect the defendant's right. And here the State is saying, we want to give the defendant more of a right. And he can say, that's unconstitutional, but if you give me less of a right, it would be perfectly constitutional.

It's that enigma that I think is very disturbing about this case.

MR. LANNET: Well, two points on that. One of them is that historically the jury trial -- the jury found the verdict of guilt. That, in itself, authorized the potential penalty of a very significant consecutive

sentence.

Oregon has made a different policy choice here. And, to understand the full backdrop of it, perhaps the context, that before this Oregon -- before it had this statutory system in place, it had very liberal rules regarding merger. This was part of a series of enactments in which antimerger provisions were enacted so the defendant's criminal history would represent more accurately the number of convictions the jury had found him guilty of.

Therefore, the defendants under -- in Oregon law the defendant must receive a separate sentence for each offense. So the increased number of sentences gave rise to the possibility of longer sentences through consecutive sentencing. Because in Oregon not only does an offense give rise to a discrete sentence, but whether the -- the sentence is concurrent or consecutive is an aspect of punishment for that offense.

JUSTICE BREYER: In Oregon traditionally if a burglar had broken into a house and while he was in the house commits a rape, traditionally in Oregon that would not be considered two crimes?

MR. LANNET: At a certain point in time there were judicial rules in place regarding merger that may have resulted in the entry of one --

JUSTICE BREYER: Can you cite me an Oregon case which says a burglar who breaks in and commits rape is only guilty of one crime?

MR. LANNET: I would be happy to submit some in a memorandum. I would need another day to do so.

JUSTICE SCALIA: Mr. Lannet, in -- in connection with Justice Ginsburg's question, do you think that Apprendi would apply differently to a statute which, instead of imposing a higher penalty for a crime committed with a firearm, said that the penalty will be 30 years for burglary unless the defendant did not commit the crime with a firearm, in which case it will be 15 years?

Do you think if the -- if the statute were framed in that way, that Apprendi would not apply and we would leave it to the judge whether a firearm had been used or not?

MR. LANNET: I certainly it would raise an issue about whether -- a different statutory interpretation, of course, that if the State was merely shifting a burden on a fact to the defendant to disprove, I think that that would run into problems with this Court's due process -- case law.

JUSTICE SCALIA: Well, regardless of who proved it, I mean, the issue is can it be left to the

judge to decide whether the -- the -- the beneficent determination that he did not use a firearm could be left to the judge instead of sending it to the jury?

MR. LANNET: I think it would be very likely if this Court looked at this State's interpretation of the statute and found that the -- that the judge had no authority to impose the greater sentence?

JUSTICE SCALIA: I don't see a dime's worth of difference between that and Apprendi.

JUSTICE BREYER: How are you to prove these? I am always curious as to the defense policy as to why. Stricter and stricter rules here, and I have a hard time figuring out why. If you have an actual case and you have to go to trial, are you prepared to put on all the evidence that although you want to say that your client did neither of these things, that if he did do them, in fact they were just one thing and weren't separate things? I mean are you prepared to go into all that detail in front of the jury?

MR. LANNET: Well, again I think there would be a question about whether that would be proper, if that would be in fact shifting an element over to the defendant to disprove. I think that that would create --

JUSTICE BREYER: No, you are saying that the

standard they use here for a separate sentencing, that it has to be a separate crime and so forth, has to go to the jury.

MR. LANNET: Yes, sure.

JUSTICE BREYER: Okay. So I wonder if you are prepared to put all those facts before the jury, say, in a case where you want to say that it wasn't my defendant who did it.

MR. LANNET: Well, actually, Your Honor, a decision affirming the Oregon Supreme Court at this point would have little impact in Oregon. In response to Blakely, the Oregon legislature enacted a statutory scheme that gave back that enhanced sentence -- gave a procedure by which they go to the jury, and it's either -- and in a bifurcated proceeding that's ---

JUSTICE BREYER: That way, you have to have two --

JUSTICE SCALIA: Booker/Fanfan as well, as adopted, right? I mean that was what the dissenters in Booker/Fanfan would have --

MR. LANNET: Yes. Correct.

JUSTICE KENNEDY: Are you saying it would have to be a bifurcated proceeding?

MR. LANNET: In many instances, just based on --

JUSTICE KENNEDY: Is there historic evidence that bifurcated proceedings were required before Apprendi?

MR. LANNET: No, but I think that this is just a development of changing legislative choices in identifying facts. I think Apprendi articulated the functional path to determine the scope of a jury trial guarantee when the State attempts to relegate a fact to a judge rather than a jury.

CHIEF JUSTICE ROBERTS: Could I get back to the question Justice Scalia asked about Apprendi. Is it -- is it your position that if the offense, based on all facts found by a jury, carried a maximum sentence of 30 years, but there was a provision that the judge could determine that if a firearm was not used in the offense, you would lower it to 10 years, would that pose a problem under Apprendi?

MR. LANNET: In Apprendi I am not sure that -- that -- I mean it's a question of whether all the facts have been found by the -- by the jury authorize the maximum punishment. So --

CHIEF JUSTICE ROBERTS: Then it does. All the facts authorize a punishment of 30 years. And if it's going to be a reduction, that's for the judge. But I would suppose it's not the problem -- we didn't

interpose a jury between the defendant and the State with respect to every element, but only those elements that increase the punishment.

MR. LANNET: Well, the potential penalty the defendant faces -- and I think that if the penalty of whether a gun is present or whether a gun is not present, assuming that that would be enacted by a legislature, I think that as long as -- I mean the core question in Apprendi has been is the judge imposing a penalty within the range authorized by the jury verdict.

JUSTICE SCALIA: The core question is is the defendant entitled, entitled, to get no more than a certain penalty if a particular fact is found.

MR. LANNET: Yes, sir.

JUSTICE SCALIA: And the answer would be, yes, he is entitled if the fact is found that he didn't use a gun to get a lesser penalty. And once you bring in the legal entitlement, as I understand Apprendi, it means that it has to be found by the jury.

MR. LANNET: Yes, Your Honor.

JUSTICE BREYER: And in addition, it must be true too that the defendant is entitled not to pay restitution if the facts show that there was no money taken. And you needn't, by the way, convict the person. You can convict him without finding that.

So the same would be true of restitution. We would have another jury to decide restitution, another thing that has never been done; is that right?

MR. LANNET: Well, if only because the legislative scheme in place doesn't give the court authority to impose restitutions based solely on the jury's verdict.

JUSTICE BREYER: No, couldn't impose restitution without making a finding as to how much money was taken. So I don't -- I don't -- I can't imagine the legislature --

MR. LANNET: The Oregon appellate court doesn't --

JUSTICE BREYER: All right. The Federal courts have not and I guess the same rule would apply. Or what about forfeiture of a car used in the drug -- again, forfeiture, I guess, would take place with another jury being impanelled to try the question of whether there was a car; is that right?

MR. LANNET: If -- if it was a fact that was necessary for the punishment, I think that follows within the rule of Apprendi.

JUSTICE BREYER: It's a punishment.

MR. LANNET: Although in Apprendi there was a concern about elements being shifted from --

JUSTICE BREYER: Maybe not. Maybe it would just be an in rem proceeding. What about the -- what about the proceeding -- what about the determination that a person who is going to trial goes to an adult court rather than a juvenile court, the difference being the extent of the punishment? You are not entitled to -- a complete defense to the punishments that they could impose. Do you see where I am going?

MR. LANNET: I believe --

JUSTICE BREYER: I'm not sure which of these things would actual follow from your rule and which wouldn't.

MR. LANNET: I think legislatively that the general statutes would set the maximum penalty as being punished as an adult and the juvenile system would be a different type of system.

JUSTICE BREYER: But they will say no one can get this lower punishment for the juvenile system unless the person is indeed a juvenile. Who makes that factual finding?

MR. LANNET: Well, Your Honor, the bright-line rule of Apprendi as it applies in the sentencing in this case is a question of what the judge can impose in a proceeding that was initiated --

JUSTICE BREYER: If we are going to depart

from what the Framers did in fact foresee in this kind of case and we do accept Apprendi as something different from what they did apply, does that require us to depart as well in all these other cases which have the kinds of differences that you have listened to?

MR. LANNET: I believe that this Court already has. For instance, in Greene, under common law a defendant who committed a capital offense was subject to the death penalty and it was only upon -- and the trial court would get to exercise discretion whether to impose it. The Arizona legislature identified those facts and said, we are not trying to shift elements to the jury, these were never questions for the jury, but rather we are only merely trying to guide the court's discretion.

JUSTICE STEVENS: May I ask you a rather broad question?

MR. LANNET: Yes, sir.

JUSTICE STEVENS: In Apprendi the opinions were rather lengthy and discussed precedents at great length. Justice Thomas's opinion was quite scholarly and I discussed a lot of old cases. If this case that we have today had arisen before Apprendi was decided, what case would you have supporting your position?

MR. LANNET: I believe I would have Jones v.

the United States and I think that it would be --

JUSTICE STEVENS: I didn't hear that.

MR. LANNET: Jones, where the --

JUSTICE STEVENS: Jones --

MR. LANNET: Jones v. the United States, where this Court interpreted this as a matter of constitutional balance.

JUSTICE STEVENS: What if it had arisen before Jones?

MR. LANNET: Then I think that it would -- that this Court, if it engaged in the historical analysis it did and see that, yes --

JUSTICE STEVENS: And then the historical analysis was to prove citation to what cases?

MR. LANNET: I believe the cases that were cited -- I don't think --

JUSTICE STEVENS: All the cases in Apprendi dealt with elements of the crime and that sort of thing.

MR. LANNET: Yes. But this Court looked at that practice and decided that what was not at issue was the legislative identified elements as being found by the jury, rather the underlying concern, the core concern, the position that this Court thought that the framers wanted to enshrine in the Sixth Amendment is that the judge's authority to punish is both created and

limited by the factual findings of a jury.

CHIEF JUSTICE ROBERTS: What if under the law the judge upon sentencing is supposed to make a determination of where the defendant should be sent, which facility, based on determination of which one has the most room. Is that a determination that has to be made by the jury?

MR. LANNET: I believe that that -- that can be distinguished, because it was would be a determination not based on punishment and not to impose a punishment on defendant. However, if --

CHIEF JUSTICE ROBERTS: Even if one was, you know, the most horrendous prison in history and the other was one of -- a country club?

MR. LANNET: No, I believe this Court has repeatedly stated in -- in downstream like decisions after convictions that whenever someone was convicted of an offense and sentenced to incarceration by executive agency, you are subject to the policies of that agency and there may be certain due process.

CHIEF JUSTICE ROBERTS: Yes, but here in my hypothetical it's something that a judge puts in the sentence. It's just like you've got to, you know, make restitution, you are not eligible for parole, you are going to this place rather than that place.

MR. LANNET: Well, this Court has identified a bright line rule that it's not the particular of the fact whether it would be something that would be historically found by the jury, but rather a fact that functions to increase punishment. I think I have trouble with the hypothetical saying that the different -- the different classification is sent to a different institution is intended as a punishment and not within the operations of the -- of the incarceration institution overall.

JUSTICE GINSBURG: Mr. Lannet, if we agree with your position and let's say you are engaged by the Oregon legislature and they say to you: We don't want to make this just be the judge's discretion alone, what can we do to achieve Constitution of what we were trying to achieve, that is to say encourage as the main rule but -- that is, if we have to leave it to the judge's discretion but we want to rein in that discretion so that you don't have arbitrary differences going from one judge to another?

They want -- they want to say, yeah, we wanted this to be discretionary with the judge, but we want to install certain controls so that the trial judges will be operating more or less uniformly. How could they do that constitutionally?

MR. LANNET: I think they could do as they are doing in what this Court has decided is juries are finding those facts, and that a trial court does not have to impose a consecutive sentence. Rather --

JUSTICE GINSBURG: The juries are find -- that's what is going on now, the juries are part of this trial of guilt?

MR. LANNET: If ordering the bifurcated proceeding much the way the aggravating factors under Oregon's guidelines assumes everything handles in the wake of --

JUSTICE GINSBURG: Which is it? Do they do it in the guilt trial or leave that up to the judge?

MR. LANNET: It falls into the condition of what is defined as offense-related or offender-related factors. I think that these would come in as offense related and probably be in the main trial.

JUSTICE GINSBURG: Where -- where a defense attorney might not want all of that stuff to come out.

MR. LANNET: Well, this Court has observed repeatedly that -- that the right to a jury trial is one that can be waived, and so the defendants have the opportunity to not exercise those rights. This is just that -- it's a right for the defendant but it's a constitutional role that this Court has identified as

being the jury role in our system. It -- it both authorizes, gives the arbiter authority to impose punishment and also sets the maximum.

CHIEF JUSTICE ROBERTS: What if the -- what if the rule were that all sentences should be concurrent unless the defendant has been convicted of a prior federal offense and then the sentence runs consecutive to the federal sentence?

MR. LANNET: Well, if that was -- if the Almendarez-Torres prior conviction exception is a Sixth Amendment issue, which the Court has stated that it is, then I believe that there would not be required a jury finding, much like if the legislature identified facts that would be reflected in the jury's verdict, or reverted back to the common law rule which gave the trial court authority to impose consecutive sentences merely on the basis of if there was a conviction. I think that the facts identified by the Oregon legislature here are quite different than what would qualify as the Almendarez-Torres exception. That exception -- the basis that it has if we rationalize consistence with the rule is that a fact of a prior conviction has already been established in accordance with the defendant's Sixth Amendment rights. These are facts about the offense for which a consecutive sentence

is contemplated. So, these are facts about the event that is being litigated at that moment. And the Oregon legislature has predicated the greater penalty of a consecutive sentence on those facts, and precedence instructs that when the legislature does so, the defendant has a right to have a jury find that fact beyond a unreasonable doubt before the State can rely it on and impose that greater penalty.

JUSTICE SOUTER: Mr. Lannet, one of the -- or perhaps the driving force behind Apprendi was the fear of abuse by a combination of the charging power and the sentencing power. What abuse do you see if -- if you lose this case? What potential abuse?

MR. LANNET: Well, I think that it would send a message to legislatures that they can enact statutory schemes that have -- that allow for many instances where consecutive sentences are authorized based on the facts and that those facts do not implicate a Apprendi role, and therefore is a --

JUSTICE SOUTER: That it would --

MR. LANNET: Yes. I'm sorry.

JUSTICE SOUTER: No, I didn't mean to interrupt.

MR. LANNET: To set maximum punishment based on consecutiveness rather than, as they were doing under

the guideline system, by allowing a range and requiring facts to exceed that range.

JUSTICE SOUTER: They -- they would do by consecutive sentencing the same sort of thing that they were trying to do or some legislatures, Congress was trying to do by the sentencing factors?

MR. LANNET: I believe there's at least a great possibility of that, yes.

JUSTICE STEVENS: Is there any room for harmless error here? I mean, it seems to me patently obvious that both of the statutory conditions were fully satisfied. It was within -- put it within the discretion of the judge.

MR. LANNET: Well, I think this Court should not find those errors harmless beyond a reasonable doubt for several reasons: First, the State has the burden of proof that it's harmless beyond a reasonable doubt, and has not attempted to do before the Oregon courts, the appellate courts; it has not done so before this Court. I think the Oregon Supreme Court necessarily concluded that this --

JUSTICE STEVENS: I mean, is there any doubt that he wanted to commit an offense twice?

MR. LANNET: I think that praises an issue of statutory interpretation. I think that that is one

of the issues --

JUSTICE KENNEDY: But statutory interpretation questions aren't for the jury.

MR. LANNET: You are right, Your Honor, but they are the ones for the Oregon Supreme Court in this instance, and the Oregon Supreme Court narrowly concluded that the findings of the jury found -- did not establish the factual predicate to impose consecutive sentences; however, they did not go into a comprehensive analysis of what precisely those facts are, and in fact the State -- the Petitioner here is actively litigating the meaning of the statutory provisions at this point. So it really is unclear what precisely are the facts meant by this -- by the statutory terms.

I think it would put this Court in a position to interpret the State statute in the first instance, and disagree with the Oregon Supreme Court's implicit conclusion, because it's under a State constitutional requirement and also this Court's requirement that it cannot reverse a lower court unless it concludes that an error is harmless beyond a reasonable doubt.

JUSTICE GINSBURG: It held as far as the State constitution went, this is fine. It's only the Federal Constitution that stops the legislature from

doing this.

MR. LANNET: Yes, I would acknowledge that there is no analysis in the written decision, and that is part of the problem because it didn't identify the particular facts and conduct a harmless error analysis for the benefit of this Court.

However, the court heard this case with a -- in a consolidated argument with State v. Gray, in which it did address the State's harmless error argument and recognized that, in Washington v. Recuenco, this Court had said that a -- is subject to harmless error analysis.

So, I think necessary in the Oregon Supreme Court reversing the lower court's decision is that conclusion that this error was not harmless beyond a reasonable doubt. And subsequent to this case, the Oregon Supreme Court decided State versus Hagburn -- and I have a citation for that, if you like. It's -- and that is identified -- it addresses the State's harmless error question. The citation is 345 Or. 161, and that's regional reporter 190 P.3d 1209. And in that case we had sexual offenses arising out of the same general factual scenario, where a young victim testified that she was abused in two different rooms on two different days, and the Oregon Supreme Court said there is no

factual default in our consecutive sentencing system that let -- the jury was not decided that this occurred during the same criminal episode or during a separate criminal episode. And in light of the vague testimony by the victim, they could not conclude that a jury would have found that.

So I believe that the -- that to the extent that the Oregon court has analyzed the statute, that I think that it would -- it backs up the conclusion that it found this not to be harmless beyond a reasonable doubt.

JUSTICE GINSBURG: One way of -- if you are right about the application of Apprendi -- the Oregon legislature could say as a main rule is we leave it to the judge's discretion. However, before the judge makes a sentence consecutive, the judge should take account of the following factors. That would be okay?

MR. LANNET: I believe so, if that kind of statutory provision was interpreted like you are suggesting, that the court has authority based solely on the jury's verdict and is merely exercising its discretion and there is no requisite factfinding or the -- even the requirement to find a fact to impose a consecutive sentence, then I think it wouldn't praise an Apprendi issue.

JUSTICE SCALIA: No entitlement to a lesser sentence?

MR. LANNET: No entitlement to a lesser sentence, Your Honor. Thank you.

CHIEF JUSTICE ROBERTS: Even if it's subject to judicial review for judicial review for abuse of discretion?

MR. LANNET: I believe so. I think that this Court has --

CHIEF JUSTICE ROBERTS: That doesn't give you an entitlement to that, to the exercise of discretion that isn't abused?

MR. LANNET: Not an entitlement that is based solely on the facts found by the jury's verdict. I don't believe it would.

Ultimately, this case was just an application of the Apprendi rule. The State asked this Court to replace that bright-line functional rule with some yet unidentified criteria for identifying constitutionally protected elements. It hasn't really offered this Court with any suggestion of what those constitutionally protected elements are except to say that that fact at issue in this statute are not those. At a minimum the State asks for an exception to the Apprendi rule based on historical reasoning about an

allegation that this was only meant to control the discretion of the sentencing court and it didn't shift any elements. And that kind of argument was explicitly rejected in Blakely, Booker, and Cunningham. The Oregon Legislature authorized consecutive sentence as greater penalty only for offenses committed under certain factual circumstances. Those facts, not the jury -- not found by the jury -- increase the defendant's penalty from 7-1/2 years to over 28 years.

Affirming the decision below would adhere the bright-line rule in Apprendi and it would preserve the jury's role in finding each fact that authorizes the maximum punishment. Thank you.

JUSTICE BREYER: Counsel, don't -- well, the case that I mentioned on my account. I'm thinking about it -- it's not going to make any difference.

MR. LANNET: Thank you very much.

CHIEF JUSTICE ROBERTS: Ms. Williams. You have four minutes.

REBUTTAL ARGUMENT OF MARY H. WILLIAMS

ON BEHALF OF THE PETITIONER

MS. WILLIAMS: Thank you, Mr. Chief Justice.

What the State is advocating for here is not an abandonment or a modification of the Apprendi rule, but a limitation of the Apprendi rule to the cases in

which this -- the circumstances in which this Court has applied it so far. The Apprendi rule has been applied as a bright-line test for deciding when a sentence for a specific condition has satisfied the Sixth Amendment. And the way it operates is the rule itself tells us what are the necessary facts that the jury must find, and so there doesn't need to be a new rule to determine what are those constitutionally protected facts. The Apprendi rule does that for us by saying that any fact that exposes a defendant in a particular conviction and sentence to a greater penalty based on -- that -- based on a fact that the jury has not found, is the functional equivalent of an element if we had looked historically at what the jury's role was. And so, therefore, that additional factfinding, if it exposes the defendant to a -- a longer penalty, a greater penalty for a specific conviction, it must be found by the jury. And that is how the Court has applied the rule to this point.

So all we are asking is that the Court clarify that that is the full scope of the Apprendi rule. And the reason for that is again, going back to what this Court said in Blakely, that the Sixth Amendment is only a reservation of jury power. And here what we have here is something that is entirely a judicial determination -- that historically has always

been a judicial determination -- and the only overlay we now have is a legislative effort to regulate that judicial authority through the mechanism of requiring factfinding.

It's something that the legislature often does, is to try to regulate judicial discretion by requiring factfinding and by limiting the kinds of facts the judge may consider. And that's what is being done in this case without removing anything from the purview of the jury. And so we would ask that this Court reverse the Oregon Supreme Court. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 1:53 o'clock p.m., the case in the above-entitled matter was submitted.)