Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[1122] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[1123]

Another important distinction that can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. The Court has taken a formalistic approach to this issue, allowing states to designate essentially which facts fall under which of these two categories. For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.[1124]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in *Apprendi v. New Jersey*. In *Apprendi* the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[1125] This led, in turn, to the Court's overruling conflicting prior case law that had held constitutional the use of aggra-

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[1122] 548 U.S. 735 (2006).

[1123] 548 U.S. at 770, 774.

[1124] McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* discussion in "Criminal Proceedings to Which the Guarantee Applies," *supra*.

[1125] 530 U.S. 466, 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that, prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545 (2002).