poses of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[87]

Within the context of a criminal trial, what factual issues are submitted to the jury was traditionally determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[88] Under this approach, the right to a jury had extended to the finding of all facts establishing the elements of a crime, but sentencing factors could be evaluated by a judge.[89] Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[90]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[91] "The relevant inquiry is one not of form, but of effect."[92] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact

---

[87] Ford v. Wainwright, 477 U.S. 399, 416–417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 546 U.S. 6, 7 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra*.

[88] In Washington v. Recuenco, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 548 U.S. 212, 222 (2006).

[89] In James v. United States, 550 U.S. 192 (2007), the Court found no Sixth Amendment issue raised when it considered "the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender." Id. at 202 (emphasis in original). The question before the Court was whether, under federal law, attempted burglary, as defined by Florida law, "presents a serious potential risk of physical injury to another" and therefore constitutes a "violent felony," subjecting the defendant to a longer sentence. Id. at 196. In answering this question, the Court employed the "categorical approach" of looking only to the statutory definition and not considering the "particular facts disclosed by the record of conviction." Id. at 202. Thus, "the Court [was] engaging in statutory interpretation, not judicial factfinding," and "[s]uch analysis raises no Sixth Amendment issue." Id. at 214.

[90] For instance, the Court 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. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in "Proof, Burden of Proof, and Presumptions," *infra*.

[91] 530 U.S. 466, 490 (2000).

[92] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).