mum sentences.[111] The Court has also refused to extend *Apprendi* to a judge's decision to impose sentences for discrete crimes consecutively rather than concurrently.[112] The Court explained that, when a defendant has been convicted of multiple offenses, each involving discrete sentencing prescriptions, the states apply various rules regarding whether a judge may impose the sentences consecutively or concurrently.[113] The Court held that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi's* rule" to preclude judicial factfinding in this situation as well.[114]

In *Rita v. United States*, the Court upheld the application, by federal courts of appeals, of the presumption "that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence."[115] Even if the presumption "increases the likelihood that the judge, not the jury, will find 'sentencing facts,'" the Court wrote, it "does not violate the Sixth Amend-

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[111] Prior to its decision in *Apprendi*, the Court had held that 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, 568–69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi's* reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas' dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress's choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[112] Oregon v. Ice, 129 S. Ct. 711 (2009).

[113] Most states follow the common-law tradition of giving judges unfettered discretion over the matter, while some states presume that sentences will run consecutively but allow judges to order concurrent sentences upon finding cause to do so. "It is undisputed," the Court noted, "that States may proceed on [either of these] two tracks without transgressing the Sixth Amendment." 129 S. Ct. at 714.

[114] 129 S. Ct. at 717. The Court also noted other decisions judges make that are likely to evade the strictures of *Apprendi*, including determining the length of supervised release, attendance at drug rehabilitation programs, terms of community service, and imposition of fines and orders of restitution. Id. at 719. Justice Scalia, joined by Chief Justice Roberts and Justices Souter and Thomas, dissented, finding the majority's applying *Apprendi* "only to the length of a sentence for an individual crime and not to the total sentence for a defendant . . . a strange exception to the treasured right of trial by jury." Id. at 720 (Scalia, J., dissenting).

[115] 551 U.S. 338, 341 (2007). The Court emphasized that it was upholding "an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Id. at 351, quoted in part in Nelson v. United States, 129 S. Ct. 891 (2009) (per curiam), where the Court added, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." Id. at 892 (emphasis in original).