IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. SANTOS CUEVAS, Defendant-Appellant, Respondent on Review.	Malheur County Circuit Court No. 09082394C CA A149668 SC S062464

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Malheur County
Honorable J. BURDETTE PRATT, Judge

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

The Sixth Amendment as interpreted in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), requires a jury to find facts that increase the penalty for an offense beyond the statutory maximum. That rule preserves "the historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice*, 555 US 160, 163, 129 S Ct 711, 172 L Ed 2d 517 (2009). But the *Apprendi* rule applies only to protect that core historic jury function and is not implicated by sentence-reduction provisions. In *Ice*, the Court held that *Apprendi* does not extend to findings that authorize consecutive sentences, because the jury historically played no role in consecutive sentencing, because consecutive-sentencing limitations are mitigating in nature and reduce the aggregate punishment, and because the administration of multiple sentences has long been considered the prerogative of state legislatures.

In this case, the Court of Appeals held that jury findings of a "separate criminal episode" are required before a trial court (1) may not apply the "shift-to-I" rule, which limits the aggregate presumptive sentence when a court imposes consecutive sentences; and (2) may include prior convictions that were sentenced earlier in the same proceeding as part of the defendant's criminal

history score. *State v. Cuevas*, 263 Or App 94, 110-14, 326 P3d 1242 (2014). The state contends that neither determination implicates *Apprendi,* because they involve mitigating rules directed at reducing punishment. This case presents the following questions to which the state proposes the following answers:

> **First question presented:** The "shift-to-I" rule, OAR 213-012-0020(2)(a), requires trial courts to reduce a defendant's aggregate sentence when the court imposes consecutive sentences for crimes arising out of the same criminal episode. May a trial court determine that the rule does not apply without a jury finding that the crimes arose out of separate criminal episodes?
>
> **First proposed answer:** Yes. Under *Ice*, the shift-to-I rule does not require jury findings, because the rule is a consecutive-sentencing limitation that reduces the aggregate sentence
>
> **Second question presented**: In Oregon, a conviction for which a sentence has been pronounced immediately becomes part of the defendant's criminal history *unless* it was part of the same criminal episode as the crime for which the defendant is about to be sentenced. When a trial court sentences a defendant for multiple crimes in the same proceeding, may the court "reconstitute criminal history" by including prior convictions that were sentenced earlier in the proceeding as part of the defendant's criminal history score without a jury finding that the crimes arose out of separate criminal episodes?
>
> **Second proposed answer**: Yes. *Apprendi* applies only to facts that enhance the sentence and does not apply to mitigating facts that reduce punishment. Because a same-criminal-episode finding serves to shorten a sentence by excluding convictions that otherwise would count, a jury finding is not required.

STATEMENT OF FACTS

A. Defendant's crimes and sentences

Defendant was convicted of three counts of first-degree sodomy, one count of second-degree sodomy, five counts of first-degree sexual abuse, and one count of second-degree rape for sexually assaulting two of his stepdaughters. *Cuevas*, 263 Or App at 101. At sentencing, the trial court merged two of the sodomy counts with two of the sexual-abuse counts. *Id*. The court found that defendant's remaining offenses arose out of "separate criminal episodes" from each other and imposed consecutive sentences for an aggregate prison sentence of 569 months. *Id.* at 101-02. The trial court's separate-criminal-episode finding impacted that sentence in two ways.

1. The trial court reconstituted defendant's criminal history.

The first involved the calculation of defendant's criminal history score. The trial court sentenced defendant under the sentencing guidelines, the foundation of which is a 99-block sentencing grid used to determine the presumptive sentence.[1] The vertical axis of the grid contains a crime seriousness scale, which contains eleven categories ranging from the most serious (Crime Seriousness Category 11) to the least serious (Crime Seriousness

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[1] The trial court did not impose mandatory minimum sentences under Measure 11 (ORS 137.000), because the verdicts did not establish that the offenses occurred after the effective date of Measure 11, which was April 1, 1995. (*See* Tr 748-58, 762).

Category 1). OAR 213-004-0002; OAR ch 213, div 17. The horizontal axis contains a criminal history scale, which includes nine categories, "arranged in order of seriousness from the most serious (Criminal History Category A) to the least serious (Criminal History Category I)." OAR 213-004-0006(1). When sentencing, the court locates the appropriate crime seriousness category and the appropriate criminal history category; it then "locates the grid block where the two categories intersect." *State v. Rodriguez/Buck*, 347 Or 46, 86, 217 P3d 659 (2009). "Within that grid block is the presumptive sentence in the form of a range of months of imprisonment or a term of probation." *Id.*

At issue is the trial court's determination of defendant's criminal history score. OAR 213-004-0006(2) provides that criminal history "is based upon * * * the offender's criminal history at the time the current crime or crimes of convictions are sentenced" and that "a conviction is considered to have occurred upon the pronouncement of sentence in open court." Therefore, when calculating criminal history, the trial court considers all previously sentenced convictions, including those sentenced previously in the same hearing. But this court has announced one exception: convictions are excluded if they arose from the same criminal episode as the crime being sentenced. *State v. Bucholz*, 317 Or 309, 317, 855 P2d 1100 (1993). A "criminal episode" is defined as "continuous and uninterrupted conduct that establishes at least one offense and

is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective." ORS 131.505(4).

The trial court first sentenced defendant on Count 7, one of the counts of first-degree sexual abuse, because defendant committed that crime first. (Tr 767, 774-75). The court next sentenced defendant on Count 3, first-degree sodomy. When calculating defendant's criminal history score for the sodomy, the court included defendant's sexual-abuse conviction in his history, noting that the court already had found that "these were all separate criminal episodes." (Tr 776). When the court imposed each remaining sentence, it similarly included as criminal history the crimes for which he had just been sentenced. (Tr 777-79). Defendant objected, arguing that, under *Apprendi*, the court could not "reconstitute" his criminal history—meaning it could not consider his earlier crimes when calculating the score—unless the jury first found that the crimes arose out of separate criminal episodes. (TCF 53-55, Sentencing Memorandum).

2. The trial court did not apply the shift-to-I rule to reduce defendant's consecutive sentences.

The trial court also relied on its separate-criminal-episode finding in determining the length of consecutive sentences. A court has discretion to impose consecutive sentences for crimes that arise from separate criminal episodes. *See* ORS 137.123(2) (court has discretion for offenses that "do not

arise from the same continuous and uninterrupted course of conduct"); *State v. Crotsley*, 308 Or 272, 277 n 5, 779 P2d 600 (1989) (equating same course of conduct with same criminal episode). The court also has discretion to impose consecutive sentences for crimes that arise from the same criminal episode, but only if the court first makes certain findings. ORS 137.123(5). The so-called "shift-to-I" rule, OAR 213-012-0020(2)(a), applies when a trial court imposes consecutive sentences for crimes "arising from a single criminal episode." *State v. Miller*, 317 Or 297, 306, 855 P2d 1093 (1993).

The shift-to-I rule provides:

> [T]he presumptive incarceration term of the consecutive sentences is the sum of:
>
> > (A) The presumptive incarceration term or the prison term defined in OAR 213-008-0005(1) imposed pursuant to a dispositional departure for the primary offense, as defined in OAR 213-003-0001(17); and
> >
> > (B) Up to the maximum incarceration term indicated in the Criminal History I Column for each additional offense imposed consecutively.

OAR 213-012-0020(2)(a).[2] "'Primary offense' means the offense of conviction with the highest crime seriousness ranking. If more than one offense of

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[2] The rule does not apply to offenses involving different victims. OAR 213-12-0020(5). But that exception was adopted in 1997, Or Laws 1997, ch 313, § 27, and, consequently, did not apply to defendant's case. (*See supra* Pet Br 3 n 1). The rule also does apply to mandatory sentences. *State v. Hicks*, 249 Or App 196, 275 P3d 195, *rev den*, 352 Or 341 (2012).

conviction is classified in the same crime category, the sentencing judge shall designate which offense is the primary offense." OAR 213-003-0001(17).

Under the shift-to-I rule, the presumptive aggregate sentence of consecutive sentences for multiple crimes arising out of a single criminal episode is (1) the presumptive incarceration term for the most serious offense, combined with (2) the maximum presumptive incarceration term for each additional offense, calculated as though defendant had no prior criminal history. The rule thus requires the trial court to reduce the aggregate presumptive sentence by using column I for a secondary offense, rather than the column that would accurately reflect criminal history.

Because the trial court found that defendant's crimes did not arise from a single criminal episode, the court did not apply the shift-to-I rule to reduce defendant's total consecutive sentence. (Tr 772-73). Defendant argued that, under *Apprendi*, the court could not deem the shift-to-I rule inapplicable without a jury determination that the crimes arose from separate criminal episodes. (Tr 762-64).

B. The Court of Appeals extended the *Apprendi* rule to both determinations but affirmed on harmless-error grounds.

Defendant appealed, arguing that the trial court violated his jury-trial rights under *Apprendi* by reconstituting his criminal history and by deeming the shift-to-I rule inapplicable without a jury finding that his crimes arose out of

separate criminal episodes. (App Br 37-42). The state responded that the alleged errors would have been harmless and that, regardless, the *Apprendi* rule did not extend to either determination. (Resp Br 28-40). The state argued that *Apprendi* does not apply to the reconstitution of criminal history, because the default is that all convictions count and because the "same criminal episode" finding is a mitigating fact that reduces punishment. And the state argued that *Apprendi* does not apply to the shift-to-I rule, because that is a consecutive-sentencing limitation that is exempt from *Apprendi* under *Oregon v. Ice*, 555 US 160.

The Court of Appeals held that *Apprendi* extends to both determinations, apparently viewing both as enhancing the penalty for the individual offenses. *Cuevas*, 263 Or App at 113. The court summarily rejected the state's reliance on *Ice*, simply noting that defendant did not challenge his consecutive sentences. *Id*.

The court then applied its rule from *State v. Mallory*, 213 Or App 392, 162 P3d 297, *rev den*, 344 Or 110 (2008). *Mallory* held that, although a "separate criminal episode" determination does not categorically fall under the prior-conviction exception to the *Apprendi* rule, trial courts have authority to make that determination to the extent it can be made from the judicial record, which includes the jury instructions. *See generally Shepard v. United States*,

544 US 13, 20, 125 S Ct 1254, 161 L Ed 2d 205 (2005) (explaining concept of judicial record).[3]

Under that rule, the trial court properly made three of the "separate criminal episode" determinations, because the jury was instructed that it had to find that particular offenses occurred while the family was living at a particular address: three crimes at one address, three crimes after the family had moved to a different address, and the remaining crimes after the family had moved to a different town. *Cuevas*, 263 Or App at 113-14. The verdicts thus necessarily reflected that "defendant's crimes were committed during three distinct periods of time, at three different locations." *Id.* at 114. But the court erred by making separate-criminal-episode findings for the crimes that occurred within the same time period and at the same location, because that required additional factfinding beyond what was in the judicial record. *Id*.

The Court of Appeals ultimately affirmed, however. The court held that the trial court's errors were harmless, because no reasonable juror would have found other than that the offenses arose from separate criminal episodes. *Id*. at 114-15; *see also Washington v. Recuenco*, 548 US 212, 126 S Ct 2546, 165 L Ed 2d 466 (2006) (harmless-error doctrine applies to *Apprendi* errors).

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[3] In *Mallory*, the court did not resolve whether *Apprendi* extends to the reconstitution of criminal history. 213 Or App at 398 n 3 (so noting). The court was able to resolve the case based on a combination of the prior-conviction exception and the harmless-error doctrine.

The state sought review on whether the jury-trial right announced in the *Apprendi* decisions extends to the shift-to-I rule and the reconstitution of criminal history. This court granted the state's petition.

SUMMARY OF ARGUMENT

This case requires the court to interpret the Sixth Amendment as construed in the *Apprendi* decisions. Under *Apprendi*, "[o]ther 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." 530 US at 490. The "statutory maximum" for *Apprendi* purposes is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 US 296, 303, 124 S Ct 2531, 159 L Ed 2d 403 (2004) (emphasis omitted). In *Oregon v. Ice*, 555 US 160, the Court clarified that *Apprendi* is offense-specific and held that the rule does not extend to findings that authorize consecutive sentencing and increase the maximum aggregate punishment. The Court emphasized that consecutive-sentencing determinations historically were entrusted to judges, and that consecutive-sentencing limitations are a modern innovation that are mitigating in nature.

Apprendi does not extend to the shift-to-I determination. The statutory maximum for *Apprendi* purposes is the maximum sentence authorized by the verdict for each individual offense standing alone and without regard to

consecutive-sentencing limitations. When a trial court deems the shift-to-I rule inapplicable, that decision does not increase the penalty beyond that maximum. The shift-to-I rule is a consecutive-sentencing limitation that applies only when a court imposes consecutive sentences and that reduces the authorized aggregate punishment. It falls comfortably within the sentencing judge's historical authority to decide whether and how to impose consecutive sentences. It is the type of mitigating aggregate-penalty limitation that *Ice* establishes is not subject to *Apprendi*. The Sixth Amendment does not preclude Oregon from assigning the responsibility for making shift-to-I findings to judges.

The *Apprendi* rule does not extend to the reconstitution-of-criminal-history determination either. *Apprendi* applies only to facts that enhance the sentence and does not apply to mitigating facts that reduce punishment. *Apprendi* does not apply to the "separate criminal episode" determination in reconstituting criminal history, because the default rule is that all convictions count, and because the "same criminal episode" limitation is a narrow exception that operates only to reduce the applicable presumptive sentencing range. Furthermore, and regardless of the default, *Apprendi* does not apply, because

the "same criminal episode" limitation involves a mitigating fact that reduces the sentence.[4]

ARGUMENT

A. The shift-to-I rule does not require jury findings, because the rule is a consecutive-sentencing limitation that reduces the aggregate sentence.

The state begins with the shift-to-I rule, because it presents the simpler of the two issues and because the analysis will inform the analysis for the remaining issue.

The shift-to-I rule is contained in OAR 213-12-0020, which addresses several consecutive-sentencing issues, comprehensively regulates the administration of multiple sentences, and limits the aggregate penalty. (App-1 to App-2, Rule). Under the shift-to-I rule—quoted above (Pet Br 6)—if the

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[4] Even if *Apprendi* applies to the shift-to-I rule or to reconstituting criminal history, sentencing courts sometimes will be able to make the "separate criminal episode" determination under the prior-conviction exception. The *Apprendi* requirements do not apply to "the fact of a prior conviction." 530 US at 490. In *Mallory*, 213 Or App 392, the Oregon Court of Appeals held that, although the "separate criminal episode" determination does not categorically fall under the prior-conviction exception, the exception does allow courts to make that determination to the extent it can be made from the judicial record for the conviction. The content of the judicial record varies depending on whether the prior conviction was obtained through a jury trial, a court trial, or a guilty plea. *See generally Shepard*, 544 US at 20. For example, if there was a jury in the prior case, a court could look to the charging instrument and jury instructions. *Id*. In this case, the jury instructions were such that, under the prior-conviction exception, the trial court properly could make some, but not all, of the "separate criminal episode" determinations that were made.

sentencing court imposes consecutive sentences for offenses that arise from the same criminal episode and the offenses involved the same victim, the court must shift to column I in imposing a guidelines sentence. *See Miller*, 317 Or at 306 (rule applies only if the offenses arise out of the same criminal episode).

The Court of Appeals held that, when a trial court deems the shift-to-I rule inapplicable because the offenses arose from separate criminal episodes, that is an enhancement determination that requires jury findings under *Apprendi*. *Cuevas*, 263 Or App at 113. That understanding is foreclosed by *Ice* and also overlooks the fact that the shift-to-I rule is mitigating in nature and directed at sentence reduction.

1. *Ice* establishes that the jury-trial right does not extend to consecutive-sentencing rules that limit the aggregate sentence.

Ice involved Oregon's statutory scheme for imposing consecutive, rather than concurrent, sentences when a defendant has been convicted of more than one crime. The jury in *Ice* found the defendant guilty of two counts of burglary and four counts of sexual assault, stemming from two occasions in which he broke into an apartment and sexually assaulted a girl. 555 US at 165. Under Oregon's consecutive-sentencing statute, ORS 137.123, a sentencing judge must impose concurrent sentences unless the judge finds certain prescribed facts. The sentencing judge made findings—including that the burglaries arose out of separate incidents—and imposed some of the defendant's sentences

consecutively to each other. 555 US at 165-66. On review, the issue was whether the federal constitutional jury-trial rule recognized in *Apprendi* applied to consecutive sentencing, because the findings increased the maximum authorized aggregate sentence. *Id*. at 166-76. The Court held that *Apprendi* does not apply to consecutive sentencing.

The Court began by emphasizing that the *Apprendi* decisions "are rooted in the historic jury function – determining whether the prosecution has proved each element of an offense beyond a reasonable doubt," and that the Court had "not extended the * * * line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions." *Id*. at 163. In contrast, the defendant in *Ice* was seeking to expand the rule beyond "sentencing for a discrete crime" to sentencing "for multiple offenses different in character or committed at different times." *Id*. at 167. The issue thus was whether the Court should "extend[]" the *Apprendi* rule to the consecutive-sentencing context. *Id*. at 163, 168.

To resolve that issue, the Court looked to the "twin considerations" of "historical practice and respect for state sovereignty." *Id*. at 168. The historical inquiry focused on whether the framers would have viewed the particular factual determination "as within 'the domain of the jury.'" *Id*. The historical record established that "the jury played no role in the decision to impose sentences consecutively or concurrently" and that instead "the choice rested

exclusively with the judge." *Id*. Furthermore, the historical record established that the "prevailing practice" was for judges to impose consecutive rather than concurrent sentences. *Id*. at 169. Accordingly, Oregon's statutory presumption in favor of concurrent sentences, subject to a finding by the judge, did not impinge upon the traditional role of the jury:

> There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

Id.

For the same reasons, the Court rejected the defendant's argument that *Apprendi* necessarily applied, because the statute required findings to authorize consecutive sentences. *Id*. at 170. "[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Id*. Therefore, it is "not the case" that "the federal constitutional right attaches to every contemporary state-law 'entitlement' to predicate findings." *Id*.

The Court also based its decision on principles of federalism and state sovereignty, including "the authority of States over the administration of their criminal justice system." *Id*. The Court had "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Id*. at 171. The Court explained that Oregon's innovative approach to consecutive

sentencing sought "to rein in the discretion judges possessed at common law to impose consecutive sentences at will." *Id*. The Court expressed concerns over "straightjacketing" the States from pursuing the "'salutary objectives'" of proportionality and uniformity in sentencing. *Id*. The Court noted that it would make "scant sense" to hold that a State could make consecutive sentences the rule and concurrent sentences the exception but could not make consecutive sentences the exception and assign the associated factfinding to the judge. *Id*. The Court also voiced reluctance to unnecessarily "burden" the nation's trial courts with added administrative difficulties that a more expansive view of *Apprendi* would entail. *Id*. at 172.

In closing, the Court stressed that the *Apprendi* rule should not be extended any further than necessary to preserve the jury's historic function. *Id*. Because consecutive sentencing was an area that traditionally did not involve juries, the Sixth Amendment did not preclude Oregon from requiring factfinding but allocating that responsibility to the sentencing judge. *Id*.

2. The shift-to-I rule is a consecutive-sentencing rule that limits the aggregate sentence.

Ice thus held that the *Apprendi* rule is offense-specific and does not extend to the consecutive-sentencing context or to findings that limit the authorized aggregate punishment. *Ice* establishes that the "statutory maximum"

under *Apprendi* is the maximum sentence authorized for each individual offense standing alone and irrespective of consecutive-sentencing limitations.

That holding and analysis provide a complete answer here. By its terms, the shift-to-I rule is a limit on the "presumptive incarceration term of *the consecutive sentences*." OAR 213-012-0002(2)(a) (emphasis added). The rule is a consecutive-sentencing rule that limits the authorized aggregate sentence: the rule is implicated only when a sentencing court imposes consecutive sentences, and it limits the court's authority to do so. A finding that the shift-to-I rule does not apply does not increase the penalty beyond that authorized for the individual offense standing alone and without regard to consecutive sentencing. Under a straightforward application of *Ice*, the jury-trial right does not apply.

Moreover, the same historical and state-sovereignty considerations that drove the Court's decision in *Ice* apply with equal force to the shift-to-I rule. At common law, the jury played no role in consecutive sentences whatsoever, much less a role in determining whether the total sentence achieved through consecutive sentences must be reduced, because the offenses were too closely related. The prevailing rule at common law was for consecutive sentences, and consecutive-sentencing limitations, like the rule here, simply did not exist. The shift-to-I rule is a modern legislative innovation—like the requirement in ORS 137.123 for consecutive-sentencing findings—that is mitigating in nature

and that protects against the imposition of lengthy consecutive sentences. It is precisely the type of rule "for administering multiple sentences [that] has long been considered the prerogative of state legislatures," 555 US at 168, and which remains so after *Ice*. The Sixth Amendment does not prohibit Oregon's approach of utilizing judicial factfinding in limiting the aggregate sentence achieved through consecutive sentencing.

Furthermore—as discussed in the next section—the *Apprendi* rule applies only to sentence-enhancement provisions and does not apply to mitigating provisions directed at reducing punishment. The shift-to-I rule is not an enhancement provision but instead governs when a defendant can have his aggregate sentence shortened by requiring the use of a lower presumptive sentence for consecutive sentencing. The rule requires the trial court to ignore the person's true criminal history and treat him as if he had none. That approach to sentence reduction simply does not implicate the "historical jury function" underlying the *Apprendi* rule.

It would be no answer that the shift-to I-rule operates by reducing the presumptive sentence of the secondary sentence and, in that sense, impacts the sentence for a particular offense. The fact that a consecutive-sentencing limitation is attached to a sentence for a particular offense is unremarkable and does not transform the issue into one that requires jury involvement. Were it otherwise, consecutive sentences would be subject to *Apprendi*, because an

order to serve a sentence consecutively is part of the penalty that attaches to a particular offense.

Rather, the dominant consideration is that the shift-to-I rule applies *only* when consecutive sentences are imposed and operates to *limit* the authorized aggregate sentence. *Ice* undoubtedly establishes that states are free to enact provisions that resemble the shift-to-I rule but require sentencing courts to reduce the aggregate sentence by imposing a portion of the secondary sentence concurrently rather than consecutively. It makes no difference that Oregon's rule achieves the identical aggregate reduction by requiring the length of the secondary sentence to be reduced. Both approaches pass constitutional muster, because consecutive-sentencing-related limitations do not implicate *Apprendi*.[5]

The statutory maximum is the maximum sentence authorized by the verdict for each individual offense standing alone and without regard to

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[5] The illusory nature of any distinction is laid bare by the so-called "200-percent" rule, which is another consecutive-sentencing limitation in the same administrative rule that contains the shift-to-I rule. Under OAR 213-012-0002(b), when a trial court imposes consecutive guidelines sentences for offenses that arise out of the same criminal episode and involve the same victims, the aggregate of the presumptive incarceration terms may not exceed twice ("200 percent of") the presumptive incarceration term for the primary offense except by departure sentence. *State v. Davis*, 315 Or 484, 847 P2d 834 (1993). When the rule is implicated, trial courts may bring the sentence into compliance *either* by imposing the excess portion concurrently or by reducing the incarceration terms. *See State v. Langdon*, 330 Or 72, 82 n 6, 999 P2d 1127 (2000) (recognizing as much). The distinction between those approaches to sentence reduction is immaterial. Neither approach triggers the Sixth Amendment jury-trial right.

consecutive sentencing. A finding rendering the shift-to-I rule inapplicable does not result in a sentence in excess of that maximum but instead merely results in the use of the offender's true gridblock. For example here, the trial court imposed a 115-month consecutive sentence for count 3 and in doing so used gridblock 10C—which carries a presumptive sentence of 111 to 115 months—rather than "shifting to I" and using gridblock 10I, which carries a presumptive sentence of 58 to 60 months. The statutory maximum for *Apprendi* purposes was 115 months, because that was the maximum authorized by the verdict without regard to consecutive-sentencing limitations.

It would be different if the shift-to-I rule resulted in a sentence that exceeded the maximum authorized for an individual offense standing alone and without consecutive sentencing. But that is not how the rule operates: when a trial court finds separate criminal episodes, the court simply continues to use the gridblock which accurately reflects criminal history. The rule thus operates solely within the statutory maximum.

In sum, the *Apprendi* rule is offense specific and does not extend to findings that authorize consecutive sentencing and bear on the authorized aggregate punishment. *Ice* recognized that the "specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures," and that "legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted [the]

decision in *Apprendi*." 555 US at 168-69. Nothing in the Sixth Amendment, or in any of the *Apprendi* decisions, precludes Oregon from adopting the shift-to-I rule but assigning the associated factfinding to the judge.

B. The "same criminal episode" limitation in reconstituting criminal history does not require jury findings, because that involves a narrow mitigating exception that reduces punishment.

Nor does *Apprendi* extend to the decision whether to reconstitute criminal history. *Apprendi* applies only to facts that enhance the sentence and does not apply to mitigating facts that reduce punishment. *Apprendi* does not apply to the "same criminal episode" limitation in reconstituting criminal history, because that is a narrow exception to the "default" rule that all convictions count as criminal history. Beyond that, and regardless of the default, the *Apprendi* rule does not apply, because the "same criminal episode" limitation is a mitigating fact that reduces the sentence.

1. The "same criminal episode" limitation involves a narrow exception to the default rule.

It is axiomatic that the rule from *Apprendi* applies only to sentence-enhancement provisions: it applies to a "fact that *increases* the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 US at 490 (emphasis added); *see also Alleyne v. United States*, 570 US __, 133 S Ct 2151, 2160, 186 L Ed 2d 314 (2013) (rule applies to facts that increase the statutory maximum or minimum penalty). But the "same criminal episode" limitation at issue is not a sentence-enhancement determination, because it does not result in

a longer sentence. Instead, that determination governs when a defendant's sentence is shortened by exempting convictions that otherwise would count in his criminal history. Hence, it is a sentence-reduction determination that operates within the statutory maximum and that falls outside the scope of *Apprendi*.

A critical fact is that the default rule is that all previously sentenced convictions must be counted—including those that were sentenced previously in the same hearing—and that the "same criminal episode" limitation operates as a specific and narrow exception to that general rule. OAR 213-004-0006(2) governs the determination and, in pertinent part, provides:

> An offender's criminal history is based upon the number of adult felony and Class A misdemeanor convictions and juvenile adjudications in the offender's criminal history at the time the current crime or crimes of conviction are sentenced. For crimes committed on or after November 1, 1989 a conviction is considered to have occurred upon the pronouncement of sentence in open court.

The rule—by its terms—requires the trial court without qualification to count *all* previously-sentenced convictions regardless of whether the court sentenced the conviction in the same proceeding. *See State v. Bucholz*, 317 Or 309, 314, 855 P2d 1100 (1993) ("[n]othing in the wording of the criminal history rule excludes consideration of the conviction for a separately occurring crime merely because the two separate crimes are sentenced on the same day and in the same session of court"). But caselaw yields a narrow *exception* and requires

that the offenses arise from separate criminal episodes. *Bucholz*, 317 Or at 312-19; *State v. Miller*, 317 Or 297, 300-02, 855 P2d 1093 (1993); *State v. Allen*, 151 Or App 281, 285-91, 948 P2d 745 (1997).

The net result is that OAR 213-004-0006(2) creates a presumption that any previously-sentenced conviction must be counted unless it is determined that the defendant committed the crimes during the same criminal episode. Consequently, in the absence of a stipulation, agreement, or specific finding that a defendant committed the crimes as part of the same criminal episode, OAR 213-004-0006(2) requires the court to count each conviction. It follows that the "same criminal episode" limitation is an exception to the default rule that all convictions count, and that that determination operates only to reduce the applicable presumptive sentencing range. As a result, that determination does not implicate *Apprendi*.

The Washington Supreme Court tackled a similar question in *In Re Markel*, 154 Wash 2d 262, 111 P3d 249 (2005). There, the petitioners argued that the rule from *Apprendi* applied to a somewhat similar sentencing provision under which all prior convictions counted separately in calculating a defendant's "offender score" *unless* it had been found that they arose from the same criminal conduct, in which case the offenses counted as one offense. 111 P3d at 254. The Washington Supreme Court rejected that claim, reasoning that

the "default" was that all convictions counted separately and that the "same conduct" finding only operated to reduce punishment:

> Under this sentencing scheme, a "same criminal conduct" finding is an exception to the default rule that all convictions must count separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range. The jury determined that the [petitioners] were guilty of [] separate counts, and no aggravating factors were considered by the judge. Accordingly, *Apprendi* and *Blakely* [were] not implicated * * * because the "same criminal conduct" finding could only have lowered [the petitioners'] applicable sentencing range[.]

Id. (emphasis in original). Because the "same criminal conduct" finding triggered only the exception and thus effectively triggered a lesser sentence, the finding was not subject to the jury rule from *Apprendi*.

The Idaho Supreme Court reached a similar result in *State v. Peregrina*, 151 Idaho 538, 261 P3d 815 (2011). In that case, the defendant argued that *Apprendi* applied to a sentencing provision that precluded the imposition of more than one firearm-enhancement penalty for "'crimes [that] arose out of the same indivisible course of conduct.'" *Peregrina*, 261 P3d at 817. The court rejected that argument, concluding that the indivisibility determination, in fact, was a mitigating determination under a sentence-reduction provision. The court explained that, "[b]ecause [the finding] operates to limit the otherwise mandatory nature of the increase, finding divisibility or indivisibility is not a fact that increases the penalty for the crime" but "[r]ather [a] finding of indivisibility * * * is a mitigating factor that acts to reduce the penalty for the

crime." *Id*. "As such, it is not subject to *Apprendi* and is a fact that can be found by the court." *Id*.

It must be stressed that the "same criminal episode" determination involves a narrow exception in determining criminal history that rarely comes into play. Every time a conviction is used for criminal-history purposes, that conviction will have arisen out of a separate criminal episode. In most cases, the conviction will have been prosecuted and sentenced in a separate prior proceeding, and "separateness" is guaranteed by procedural protections (specifically, double-jeopardy protections). But in a much smaller subset of cases, the conviction is prosecuted and sentenced in the same proceeding as another offense, and separateness is mandated by the sentencing guidelines (*i.e*., OAR 213-004-0006(2)).[6] The key point is that the "separate criminal episode"

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[6] The sentencing guidelines do not require a "separate criminal episode" determination when including as criminal history convictions that were sentenced in a previous proceeding (as opposed to reconstituting criminal history). OAR 213-004-0006(2) provides that "a conviction is considered to have occurred upon the pronouncement of sentence in open court" and that an offender's criminal history "is based upon * * * the offender's criminal history *at the time the current crime or crimes of convictions are sentenced*." (Emphasis added). The only possible textual hook for the "separate criminal episode" limit in reconstituting criminal history appears to be the "at the time the current * * * crimes of conviction are sentenced" language. *See Allen*, 151 Or App at 284 (the rule "permit[s] consideration only of convictions on crimes other than 'the crime or crimes of conviction' for which [a defendant] currently is being sentenced"). A conviction may be part of the "current * * * crimes of conviction [being] sentenced" if it arose out of the same criminal episode and is sentenced in the same proceeding. It makes sense to require a separateness

Footnote continued…

requirement is one that comes into play, in one way or another, every time that a conviction is used for criminal-history purposes yet seldom is it actually a disputed issue. The overarching default is that all convictions that already have been sentenced are prior convictions for any yet-to-be sentenced convictions, and the "same criminal episode" determination involves a narrow, infrequent exception that can be reserved for sentencing judges.

2. The "same criminal episode" limitation is a mitigating factor that reduces punishment.

The same result follows regardless of the statutory "default." The "same criminal episode" limitation does not implicate *Apprendi*, because the fact that offenses were so intertwined that they arose from the same criminal episode is a mitigating fact that reduces punishment.

The United States Supreme Court long has recognized a distinction between aggravating and mitigating provisions in distinguishing elements from affirmative defenses. The Court has held that a state cannot create an aggravated offense and place the burden of proof for an element on the

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(…continued)
determination only in the reconstitution-of-criminal-history context. Double-jeopardy protections will all but guarantee that a separately prosecuted and sentenced offense did, in fact, arise out of a separate criminal episode. In all events, if the conviction was sentenced in a previous proceeding, it necessarily is not one of the "current * * * crimes of conviction [being] sentenced" and may be used without a separate-criminal-episode finding. This court should clarify that point in its decision.

defendant. *See Mullaney v. Wilbur*, 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975) (absence of the heat of passion was essentially element of murder). Yet, the Court also has held that a state can create an affirmative defense and allocate the burden of proof to the defendant. *See Leland v. Oregon*, 343 US 790, 72 S Ct 1002, 96 L Ed 1302 (1952) (insanity defense); *Patterson v. New York*, 432 US 197, 97 S Ct 2319, 53 L Ed 2d 281 (1977) (extreme emotional disturbance defense); *Martin v. Ohio*, 480 US 228, 107 S Ct 1098, 94 L Ed 2d 267 (1987) (self-defense). In doing so, the Court has explained that a state does not have to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." *Patterson*, 432 US at 207.

Consequently, long before *Apprendi*, the Court recognized that a state can create a mitigating—as opposed to an enhancing—provision without effectively creating a greater offense. *See McMillian v. Pennsylvania*, 477 US 79, 99, 106 S Ct 2411, 91 L Ed 2d 67 (1986) (Stevens, J., dissenting) ("the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendant to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties"). And, that is so regardless of the "default" under the provision. *See id*. at 99, 99 n 3 (Stevens, J., dissenting) (noting that, within limits, sentencing-reduction provisions can be

"conditioned on a prosecutor's failure to prove a fact by a preponderance of the evidence or on proof supplied by the criminal defendant"; footnote omitted). In *Apprendi*, the Court noted that it "has often recognized" a distinction "between facts in aggravation of punishment and facts in mitigation," and cited as an example its decision in *Martin v. Ohio*, 480 US 228, in which the Court upheld a statute that required the defendant to carry the burden of proving self-defense. *Apprendi*, 530 US at 490 n 16.

The application of *Apprendi* to sentence-reduction provisions cannot logically be squared with the "elemental" nature of the *Apprendi* approach. Under *Apprendi*, the legislature is deemed to have defined a "greater" offense, with the functional equivalent of an additional element, when it requires a factual finding to impose an enhanced punishment. 530 US at 494, 494 n 19. That analysis does not logically apply to sentence-reduction determinations. The legislature does not create aggravated offenses merely by adopting rules that reduce punishment, and that is so regardless of what the default position is.

Perhaps the best explanation of why *Apprendi* does not extend to mitigating, sentence-reduction determinations is that the state is under no obligation to offer sentence reduction at all. Once a defendant is convicted of an offense, the state has the power to incarcerate him up to the maximum sentence. *See Meachum v. Fano*, 427 US 215, 224, 96 S Ct 2532, 49 L Ed 2d 451 (1976) ("given a valid conviction, the criminal defendant has been

constitutionally deprived of his liberty to the extent that the State may confine him"). A defendant does not have a constitutional right to sentence reduction.

It follows that, if a state chooses to offer sentence reduction as a possibility, it should be able to control the processes under which the benefit is dispensed. *See Patterson*, 432 US at 207 (rejecting the notion that "a State must prove a reasonable doubt every fact, the existence or non-existence of which, it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment"); *id*. at 207-08 ("[t]he Due Process Clause * * * does not put [a State] to the choice of abandoning [affirmative defenses that a defendant has to prove] or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional power to sanction by substantial punishment). And that is so even if—indeed, particularly if—the state enacts a provision with a default that benefits defendants.[7]

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[7] An example of such a provision is ORS 137.750, which requires a trial court to authorize eligibility for sentence-modification and reduction programs unless the court finds substantial and compelling reasons to deny eligibility. That is a quintessential sentence-reduction provision that will not implicate *Apprendi* even though the default under the rule is eligibility for programming. *See People v. Lara*, 54 Cal 4th 896, 901, 905-06, 144 Cal Rptr 3d 169, 281 P3d 72 (2012) (facts that limit ability to earn conduct credits not subject to *Apprendi*); *cf. State v. Rice*, 401 SC 330, 333-35, 737 SE 2d 485 (2013) (decision whether youths are tried as juveniles or adults not subject to *Apprendi*).

The analysis from *Oregon v. Ice* provides further support for the state's argument. As discussed, the *Ice* Court flatly rejected the view that "the federal constitutional [jury-trial] right attaches to every contemporary state-law 'entitlement' to predicate findings," stressing that the *Apprendi* rule was designed to preserve the jury's historical role and is not implicated by statutory protections that temper harsh historical defaults. 555 US at 169-71. The Court held that the *Apprendi* rule does not apply to the consecutive-sentencing determination, regardless of the statutory default. In doing so, the Court emphasized the lack of any historical support for a jury role in consecutive sentencing and also that, because consecutive sentences was the prevailing practice at common law, statutory provisions that limit consecutive sentencing by requiring findings are mitigating in nature. 555 US at 167-72.[8]

That reasoning carries force here. As discussed, this involves a narrow mitigating determination that reduces punishment. And the historical record suggests that judges would review the record to make similar "separateness"

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[8] This court relied on similar reasoning long ago in holding that, in statutory-rape prosecutions, the state did not have to plead and prove as an element the fact that the defendant was over the age of 16. *State v. Knighten*, 39 Or 63, 64-65, 64 P 866 (1901); *State v. Nesmith*, 136 Or 593, 595-96, 300 P 356 (1931); *State v. Cole*, 244 Or 455, 456-57, 418 P2d 844 (1966). This court reasoned that the rape statute raised the common law age of capacity from 14 to 16 (at common law, a boy under 14 was conclusively presumed to be physically incapable of committing rape), and that it was a "mere" matter of defense if the defendant was under 16 years of age.

determinations in determining whether offenses would merge. In his late 19th century treatise on criminal procedure, the legal scholar Joel Bishop explains that, in cases in which the verdict did not demonstrate whether the offenses were distinct offenses or the same offense charged in different ways, "the judge pronouncing the sentence should inform himself of the facts from his minutes of the trial, and when necessary from testimony" to make that determination. 1 J. Bishop, NEW CRIMINAL PROCEDURE § 1325 p. 811-12 (4th ed. 1895). The determination here is similar: the sentencing judge reviews the record to determine whether the offenses were so intertwined under Oregon's "single criminal episode" test—which is broader than the historical "same elements" test (*Blockburger v. United States*, 284 US 299, 52 S Ct 180, 76 L Ed 306 (1932))—such that they should be treated as the same offense for criminal history purposes. That type of narrow, mitigating determination does not implicate the core historic jury function and can be allocated to the court.

In sum, the "same criminal episode" limitation does not implicate *Apprendi*, because the default rule is that all convictions count and because, regardless, the fact that the offenses arose from the same criminal episode is a mitigating fact that reduces punishment. Consequently, the trial court properly made the determination itself in determining criminal history.

CONCLUSION

The Court has cautioned against a "'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.'" *Ice*, 555 US at 172. "The jury-trial right is best honored through a 'principled rationale' that applies the rule of the *Apprendi* cases 'within the central sphere of their concern.'" *Id.* The Court of Appeals lost sight of that aim by extending the *Apprendi* rule to a pair of determinations—the shift-to-I rule and reconstituting criminal history—that do not resemble those traditionally entrusted to the jury. This court should hold that the Sixth Amendment jury-trial right does not attach to either determination and—with that correction—affirm the Court of Appeals' decision and the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 20, 2014, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jesse Wm. Barton, attorney for appellant; and served upon Peter Gartlan, attorney for amicus curiae; by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,674 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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