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1 P R O C E E D I N G S

2 (1:00 p.m.)

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

5 Ms. Williams.

6 ORAL ARGUMENT OF MARY H. WILLIAMS

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

1 consecutive sentences. So it's not entirely --

2 JUSTICE SCALIA: How many others? Do you
3 know?

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

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

25 JUSTICE SCALIA: You know, this fact can --

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

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

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

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

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

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

18 JUSTICE STEVENS: The rule --

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

22 MS. WILLIAMS: Yes, Your Honor.

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

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

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

7 MS. WILLIAMS: Well --

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

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

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

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

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

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

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

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

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

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

1 other sentence arising out of this same occurrence?

2 MS. WILLIAMS: I think --

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

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

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

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

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

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

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

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

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

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

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

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

21 MS. WILLIAMS: As far as I went --

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

1 MS. WILLIAMS: Yes, Your Honor.

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

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

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

17 MS. WILLIAMS: But where --

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

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

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

14 MS. WILLIAMS: Correct.

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

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

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

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

8 JUSTICE SOUTER: Everybody agrees.

9 MS. WILLIAMS: And it would be --

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MS. WILLIAMS: I --

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

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

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

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

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

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

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

1 consecutive, if you go way back.

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

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

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

25 JUSTICE STEVENS: What happens with

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

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Lannet.

7 ORAL ARGUMENT OF ERNEST G. LANNET
8 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

1 sentence.

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

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

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

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

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

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

6 JUSTICE SCALIA: Mr. Lannet, in -- in
7 connection with Justice Ginsburg's question, do you
8 think that Apprendi would apply differently to a statute
9 which, instead of imposing a higher penalty for a crime
10 committed with a firearm, said that the penalty will be
11 30 years for burglary unless the defendant did not
12 commit the crime with a firearm, in which case it will
13 be 15 years?

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: No, you are saying that the

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

4 MR. LANNET: Yes, sure.

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

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

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

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

21 MR. LANNET: Yes. Correct.

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Could I get back to
11 the question Justice Scalia asked about Apprendi. Is it
12 -- is it your position that if the offense, based on all
13 facts found by a jury, carried a maximum sentence of
14 30 years, but there was a provision that the judge could
15 determine that if a firearm was not used in the offense,
16 you would lower it to 10 years, would that pose a
17 problem under Apprendi?

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

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

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

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

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

14 MR. LANNET: Yes, sir.

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

20 MR. LANNET: Yes, Your Honor.

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

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

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

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

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

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

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

23 JUSTICE BREYER: It's a punishment.

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

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

9 MR. LANNET: I believe --

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

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

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

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

25 JUSTICE BREYER: If we are going to depart

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

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

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

18 MR. LANNET: Yes, sir.

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

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

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

2 JUSTICE STEVENS: I didn't hear that.

3 MR. LANNET: Jones, where the --

4 JUSTICE STEVENS: Jones --

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

8 JUSTICE STEVENS: What if it had arisen
9 before Jones?

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

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

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

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

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

1 limited by the factual findings of a jury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE SOUTER: That it would --

21 MR. LANNET: Yes. I'm sorry.

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

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

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

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

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

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

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

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

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

1 of the issues --

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

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

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

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

1 doing this.

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

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

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

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

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

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

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

1 JUSTICE SCALIA: No entitlement to a lesser
2 sentence?

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

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

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

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

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

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

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

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

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

17 MR. LANNET: Thank you very much.

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

20 REBUTTAL ARGUMENT OF MARY H. WILLIAMS

21 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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