

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHARLES C. APPRENDI, JR., Petitioner v. NEW
JERSEY

CASE NO: 99-478 C-2

PLACE: Washington, D.C.

DATE: Tuesday, March 28, 2000

PAGES: 1-57

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

MAY 11 2000

Supreme Court U.S.A.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

2000 MAY 11 A 9:21

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. APPRENDI, JR.,

Petitioner :

v. : No. 99-478

NEW JERSEY

Washington, D.C.

Tuesday, March 28, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:10 a.m.

13 APPEARANCES:

14 JOSEPH D. O'NEILL, ESQ., Vineland, New Jersey; on behalf
15 of the Petitioner.

16 LISA S. GOCHMAN, ESQ., Deputy Attorney General, Trenton,
17 New Jersey; on behalf of the Respondent.

18 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

1

C O N T E N T S

		PAGE
2	ORAL ARGUMENT OF	
3	JOSEPH D. O'NEILL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	LISA S. GOCHMAN, ESQ.	
7	On behalf of the Respondent	28
8	ORAL ARGUMENT OF	
9	EDWARD C. DuMONT, ESQ.	
10	On behalf of the United States, as amicus	
11	curiae, supporting the Respondent	47
12	REBUTTAL ARGUMENT OF	
13	JOSEPH D. O'NEILL, ESQ.	
14	On behalf of the Petitioner	56
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

PROCEEDINGS

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-478, Charles C. Apprendi, Jr. v. New Jersey.

Mr. O'Neill.

ORAL ARGUMENT OF JOSEPH D. O'NEILL

ON BEHALF OF THE PETITIONER

9 MR. O'NEILL: Mr. Chief Justice, and may it
10 please the Court:

11 This case is about the erosion of the jury by
12 the New Jersey legislature. The statute at issue in this
13 case violates the Fourteenth and Sixth Amendments by
14 permitting the judge to consider or assess a defendant's
15 mental state by a preponderance of the evidence and
16 sentence that person to a term of up to double the time
17 permitted upon conviction of the predicate crime.

18 Here, petitioner pled guilty to three crimes,
19 but was sentenced on four. In Jones v. the United States,
20 this Court constructed a proposed test for
21 constitutionality of the statute as to determine whether
22 the statue creates a separate element of a crime or a
23 sentencing factor. Any fact, other than prior conviction,
24 which increases the maximum sentence, implicates
25 constitutional protections of beyond a reasonable doubt,

1 notice by --

2 QUESTION: Well, what do you do with the capital
3 sentencing schemes in a State like Arizona, for example,
4 where a person can be convicted of first degree murder and
5 then the judge does the sentencing and is allowed to
6 increase the sentence to a death penalty, set it at death,
7 if it was done for, let's say, pecuniary gain, some factor
8 that the judge determines, and this Court has upheld that
9 kind of a scheme.

10 Now, under your theory that, too, would be
11 invalid if we were to accept what you've just been saying.

12 MR. O'NEILL: I suggest not, Justice O'Connor,
13 because my understanding of the statutes extant is that
14 they -- some of them provide for the death penalty, but
15 that's the maximum, so in States such as those -- I'm not
16 intimately familiar with Arizona, but it is the States
17 with which I am familiar, those penalties would be within
18 the maximum and call for proof beyond a reasonable doubt
19 to a jury before the judge sentences.

20 QUESTION: But in Arizona the jury simply finds
21 a person guilty of first degree murder and leaves the
22 option of life imprisonment, or death, to the judge, so
23 that clearly the judge is imposing a sentence that was
24 perhaps within the range the jury -- but it could just as
25 easily have been life.

1 MR. O'NEILL: I agree with that, Mr. Chief
2 Justice. However, again, it's within the maximum provided
3 by the statute that the jury knew about, presumably,
4 before they found the defendant guilty beyond a reasonable
5 doubt.

6 QUESTION: The jury is told and instructed,
7 don't consider the sentence. That's not your job. It's
8 up to the judge. Don't consider that. You just determine
9 whether this person convicted -- should be convicted of
10 first degree murder.

11 MR. O'NEILL: Yes, Justice O'Connor. However,
12 it's my understanding that a statute does provide for not
13 only life, of course, but also, as you point out, death,
14 but within the maximum sentence.

15 QUESTION: Mr. O'Neill, of course, until our
16 death penalty cases in the 1960's, had not the traditional
17 practice been that a judge in a case where the sentence
18 was up to and including death had the discretion to impose
19 the death penalty or not, or the jury had the discretion
20 to impose it or not?

21 MR. O'NEILL: Justice Scalia --

22 QUESTION: Wasn't that the traditional rule
23 against which the Sixth Amendment was adopted?

24 MR. O'NEILL: It is, sir.

25 QUESTION: And it was our jurisprudence that

1 created the new factor that you could not impose the death
2 penalty unless there were some special facts which had to
3 be found, either by the judge or by the jury, that would
4 justify it, so this is all a creation of this Court. It
5 has nothing to do with what the Sixth Amendment meant when
6 it was adopted, does it?

7 MR. O'NEILL: I agree with that, Justice Scalia.

8 QUESTION: Maybe I can get at the same question
9 that Justice O'Connor and the Chief Justice had in a
10 slightly different way. Imagine that I'm in Congress and,
11 as Member of Congress, I tell you the following. You're
12 my drafter.

13 I say, here's what I'd like to do. I'd like to
14 write this criminal statute for bank robbery so that the
15 sentencing works as follows, so that where the gun is
16 loaded, there's a higher sentence. Where the gun isn't
17 loaded, there's a lower sentence. That's how I want the
18 sentencing to work.

19 The crime is bank robbery, but I want these
20 judges to be pretty uniform, and I want them all to
21 give -- you know, they have a bigger range where the
22 gun's -- you see, where the gun is loaded, and a lower
23 range where it's not loaded.

24 How do I draft it? Can I do it?

25 MR. O'NEILL: Justice Breyer, yes, that would

1 constitutional so long as --

2 QUESTION: How do I draft it? What do the words
3 say? Let's imagine, you know, I want them to have up to 3
4 years if the gun isn't loaded, but up to 5 years if it is
5 loaded.

6 MR. O'NEILL: The sentence -- the drafting goes
7 something like this, in crude language, that the maximum
8 penalty for commission of such-and-such crime is 5 years.
9 However, if he then is convicted only of such-and-such, it
10 is a maximum of 3 years.

11 QUESTION: All right. Then if I can do that,
12 then what will happen if you win this case is all that has
13 to happen is that Congress goes back, redrafts all the
14 drug laws, and in the meantime I guess we have new trials
15 of everybody who's been convicted, but they just -- it's
16 just a drafting matter, is that right, that all they have
17 to do is write the same thing, but instead of saying the
18 thing goes from 3 to 5 years, 3-year max unloaded and 5-
19 year max loaded, what they do is, they write 5-year max,
20 period, but no more than 3 if it's unloaded. It's just
21 drafting. Is that what it is?

22 MR. O'NEILL: Well, Justice Breyer, I think that
23 Winship spoke in terms of formalism but prescribed against
24 that, so --

25 QUESTION: Excuse me. Are you saying that in

1 that case, with that kind of a statute, you would concede
2 that in order to get 5 years, in order to impose 5 years,
3 you would not need a jury finding that the gun was loaded?

4 MR. O'NEILL: No, I would not concede that,
5 Justice Scalia. I would concede only --

6 QUESTION: But that's the premise of the
7 question, I thought.

8 QUESTION: Yes, it is.

9 MR. O'NEILL: Well then, I would --

10 QUESTION: I didn't think you were --

11 MR. O'NEILL: I would say only, Justice Scalia
12 and Justice Breyer, that there would have to be the
13 constitutional protections of proof beyond a reasonable
14 doubt as to a jury.

15 QUESTION: Okay, so what you're saying is, I
16 can't -- if I'm Congress, I can't --

17 MR. O'NEILL: You can't, under those --

18 QUESTION: Fine.

19 MR. O'NEILL: -- prescribed circumstances.

20 QUESTION: Fine. If I can't, my question would
21 be, why not?

22 MR. O'NEILL: Because the constitutional
23 safeguards of beyond a reasonable doubt, and to a jury,
24 are paramount.

25 QUESTION: I've got that point. Now my -- I'm

1 trying to get you down a little line of questioning here,
2 and then I'd say if that's true, then I guess exactly the
3 same thing is true of the Sentencing Commission does the
4 3-5 year business, and again I'd say exactly the same is
5 true if a judge does it, which brings us back to Justice
6 O'Connor.

7 Now, how -- I mean, on that line that you've
8 just taken, if I agree with you, I guess I'm holding the
9 Sentencing Commission unconstitutional and, indeed, I
10 guess I'm holding as well unconstitutional the situation
11 where a judge says, defendant, I've looked at the
12 presentence report. It says your gun was loaded. You can
13 dispute it, but if the gun is loaded, 5 years. If it
14 isn't, three.

15 So you have three situations, judge, Sentencing
16 Commission, Congress. You've said Congress can do it --
17 cannot do it. Can the commission? Can a judge?

18 MR. O'NEILL: Well, Justice Breyer, in response
19 to that question, I would say this. If I can use the
20 analogy in the Federal statutes in reference to drug --
21 drugs as to quantity and quality.

22 Now, I have a fallback position, and that is
23 this, that if the test were something like this, if the
24 maximum sentence is increased and there is required an
25 assessment of the mental state of the defendant, then I

1 think the quality and quantity problems with the drug
2 statute would not be affected. I respectfully suggest,
3 Justice Breyer, that the Federal sentencing guidelines
4 would not be impacted by the proposed standard, proposed
5 by this Court in Jones.

6 QUESTION: Mr. O'Neill, I assume you're saying
7 that as long as it's within the upper range that is
8 specified by the legislature, but if you will, instead of
9 engaging in things that you may be less familiar with,
10 let's look at the very statute that you're dealing with,
11 and there are seven factors that would lead to this
12 doubling of the penalty, and the racial/gender animus is
13 just one of them.

14 In that list of seven, which ones are not
15 encompassed within your constitutional objection? Which
16 one -- even if you won this case, which one, if any, could
17 remain as the New Jersey legislature set it up?

18 MR. O'NEILL: Justice Ginsburg, I would say that
19 the way it's set up, all of them would remain.

20 QUESTION: Well, not this one.

21 MR. O'NEILL: Not this one.

22 QUESTION: Wait, I don't understand. All of
23 them -- they're all valid except this one?

24 MR. O'NEILL: Well, if we're saying in terms of
25 the question, Justice Ginsburg and Justice Scalia, that if

1 we're talking about race, color, gender, handicap,
2 religion, sexual orientation, or ethnicity, then I think
3 all of them require the same constitutional guidelines.

4 QUESTION: Well then, but what about another one
5 that operates in the same way, is used or was in
6 possession of a stolen motor vehicle? That would be found
7 by the judge on a preponderance, not beyond a reasonable
8 doubt, and yield for the defendant the same thing.

9 MR. O'NEILL: If there's a presumption that the
10 underlying crime was found to be violated by the defendant
11 beyond a reasonable doubt to a jury, yes, because it would
12 be within the maximum sentence.

13 QUESTION: I don't understand that. I don't
14 understand your answer. Would a jury have to find beyond .
15 a reasonable doubt that a car was used?

16 MR. O'NEILL: Yes, Justice Scalia.

17 QUESTION: But not under the statute. The
18 statute sets it up the jury finds assault or whatever is
19 the underlying crime, and then the judge, under subsection
20 (f), the one immediately following subsection (e), your
21 subsection, the judge is instructed that if this crime,
22 this assault was committed and the defendant was at the
23 time in possession of a stolen motor vehicle, then we get
24 kicked up from 5 to 10, to 10 to 20.

25 So I'm asking you to concentrate on the very

1 next section of the same statute and tell me, you said --
2 you said there was a distinction between the two, and I
3 don't understand why the one would have to go to the jury
4 and the other would not.

5 MR. O'NEILL: Well, perhaps I didn't state my
6 position clearly enough. My position is this, Justice
7 Ginsburg, that whenever there is a question of fact which
8 raises the maximum sentence the defendant faces, that
9 requires a constitutional safeguards of beyond a
10 reasonable doubt, and prove to a jury, as well as fair
11 notice.

12 QUESTION: Well, suppose that the question of
13 fact is whether the defendant used or was in possession of
14 a stolen motor vehicle?

15 MR. O'NEILL: I would say that it's a fact
16 that's a jury question.

17 QUESTION: Well, what about McMillan v.
18 Pennsylvania, where you're talking about crime done with
19 possession of a gun?

20 MR. O'NEILL: Well, that's a question, Chief
21 Justice, that's easily ascertainable as it is the issue of
22 prior conviction, Almendarez-Torres.

23 QUESTION: Well, and wouldn't possession of a
24 motor vehicle, a stolen motor -- be equally easily found
25 out?

1 MR. O'NEILL: Most respectfully, Chief Justice,
2 I don't think so. I think the issue as to whether
3 possession of a stolen motor vehicle occurred or not is
4 subject to some variables to which the possession of a
5 firearm for an unlawful purpose is not.

6 Also --

7 QUESTION: Why not? I mean, that's a fact
8 question, possession of a firearm for an unlawful purpose.

9 MR. O'NEILL: Well --

10 QUESTION: There you are.

11 MR. O'NEILL: Justice O'Connor -- I'm sorry.

12 QUESTION: Total fact-based issue.

13 MR. O'NEILL: Justice O'Connor, it seems to me
14 that in McMillan, it was simple. It was objective. There
15 was no question. There was a shooting of a couple of
16 people involved --

17 QUESTION: But there's no logical distinction.

18 I don't see how you can draw that distinction at all.

19 QUESTION: Well, McMillan, they didn't raise the
20 maximum sentence, either. It was within the maximum.

21 MR. O'NEILL: They did not raise the maximum
22 sentence --

23 QUESTION: Yes.

24 MR. O'NEILL: -- in McMillan.

25 QUESTION: Yes.

1 QUESTION: Right, but --

2 MR. O'NEILL: They required only a sentence
3 within the minimum.

4 QUESTION: But that gets you right back to
5 Justice Breyer's drafting question. If the legislature
6 were to start with the higher sentence and then say, but
7 if no gun is used, 3 years, otherwise, 5, that ought to be
8 all right. I mean, that's the way you're articulating the
9 test.

10 MR. O'NEILL: Yes. I agree with that, Justice
11 O'Connor.

12 QUESTION: But I think, Mr. O'Neill --

13 QUESTION: You said it was not all right.

14 MR. O'NEILL: But I --

15 QUESTION: Are you going back on that now?

16 MR. O'NEILL: I say this, Justice Scalia, that
17 all of these requirements must be within the
18 constitutional limits as set forth in cases like Patterson
19 v. New York. There is a limit to which the legislatures
20 can go.

21 QUESTION: Well, what's your answer to Justice
22 Breyer's question? Just switching it from an affirmative
23 to a negative, does that make the difference? Not -- if
24 you find the fact you get more, but if you don't find the
25 fact you get less. Does that make the difference?

1 MR. O'NEILL: Yes. There's a question of
2 formalism, I think, implied in Justice Breyer's question.
3 I think that that's been prescribed by this Court
4 previously.

5 QUESTION: Oh, well, we're not really arguing
6 about very much, then. I --

7 QUESTION: Of course, how would that example
8 apply to a case like this? I mean, we're talking about
9 all sorts of different cases, but here the extra fact to
10 be proved was a specific kind of intent. How can you
11 write a statute that would make that a defense? I didn't
12 have that intent? I mean, those examples just don't fit
13 this case.

14 MR. O'NEILL: Yes.

15 QUESTION: We should really try to decide what
16 to do with this case, it seems to me.

17 MR. O'NEILL: I agree with that, Justice
18 Stevens. I do.

19 QUESTION: Well, I'd like to ask one
20 hypothetical. Just tell me what the rule was at the
21 common law. Two people tried with kidnapping. One of the
22 kidnappers tormented the victims, threatened them, pushed
23 them around. The other was rather passive. They're both
24 simply tried with kidnapping.

25 At sentencing, the judge said, now, you,

1 defendant A, caused much more torment and grief and
2 suffering. I'm giving you life. You, defendant B, were
3 rather passive. I'm giving you 20 years. Anything wrong
4 with that at common law?

5 MR. O'NEILL: If life is within the maximum
6 sentence, no, there's nothing wrong with it.

7 QUESTION: Okay. Now, suppose the legislature
8 specifies that if torment is called -- is caused, it would
9 be life, and if not, 20 years, then there's a
10 constitutional requirement?

11 MR. O'NEILL: I think so. I think the jury --

12 QUESTION: But then you can't say, as you did at
13 the outset, that Congress is eroding the jury sentencing.
14 It seems hard to erode the jury sentencing when all
15 Congress has done is provide some -- or the legislature
16 has done is to provide some guidance to its judgment --
17 judges in sentencing.

18 MR. O'NEILL: Well, it seems to me that the
19 statute at issue does violate the Fourteenth and Sixth
20 Amendments because, by a mere preponderance of the
21 evidence, and I suggest it should be by proof beyond a
22 reasonable doubt, it permits a defendant to assess a
23 mental state of the defendant and submit that person to a
24 sentence of up to double that required in the predicate
25 crime.

1 QUESTION: What if it were proof beyond a
2 reasonable doubt, but to be -- the fact to be found by a
3 judge, rather than a jury?

4 MR. O'NEILL: That might very well be found by
5 your Court to be constitutional. However, I really
6 believe that that's not enough. A jury question is
7 involved here.

8 QUESTION: Why would that be okay? I don't
9 understand that.

10 MR. O'NEILL: Well, because --

11 QUESTION: I mean --

12 MR. O'NEILL: -- it satisfies the constitutional
13 test of --

14 QUESTION: Because we're illogical or something?
15 I mean --

16 (Laughter.)

17 QUESTION: No, aren't you resting on the
18 distinction that is inherent in McMillan?

19 MR. O'NEILL: I am.

20 QUESTION: Yes, because --

21 MR. O'NEILL: Yes, Justice Souter.

22 QUESTION: -- you -- depending on whether you
23 are raising the jury issue or the due process
24 notice/reasonable doubt issue, you may get different
25 results in different cases, and McMillan is an example, I

1 suppose.

2 MR. O'NEILL: Yes. As long as it's within the
3 maximum, not outside the maximum.

4 QUESTION: Is -- when you said mental state,
5 isn't this motive a mental state that is primarily --
6 motive is a mental state that's primarily used for
7 sentencing. I couldn't think of a single statute where
8 motive is actually an element of the crime.

9 Intent is a motive of the crime. Sometimes
10 intent does give you a motive, but motive itself, he did
11 it out of hatred, he did it out of revenge, he did it out
12 of race hatred, he did it because the person killed his
13 father, all those are backward-looking, or emotional
14 motives. I've never -- can't think of a single statute
15 where that's an element of a crime.

16 I mean, of course, there are other States that
17 have made it in this instance, but isn't it a
18 traditionally sentencing factor?

19 MR. O'NEILL: It is, Justice Breyer. However,
20 there are cases -- there have been cases arising out of
21 this Court, like Haupt v. United States, where motive was
22 found to be a necessary ingredient of a crime charged, but
23 traditionally I agree with Your -- Justice Breyer that
24 traditionally motive is a sentencing factor.

25 QUESTION: It's a discretionary sentencing

1 factor, though, traditionally, isn't it?

2 MR. O'NEILL: Yes, Justice Scalia.

3 QUESTION: It's up to the judge. If he wants to
4 take motive into account, he may, and if he doesn't want
5 to, he need not, and the defendant who has the motive is
6 subject to up to 50 years, and the defendant who does not
7 have the motive is subject up to 50 years. Isn't that
8 correct?

9 MR. O'NEILL: It certainly is, Justice Scalia.

10 QUESTION: So why -- what -- I don't -- what
11 difference does it make whether it's a traditional
12 sentencing factor?

13 MR. O'NEILL: Well, I don't think it makes any
14 difference, because I think while a lot cases have
15 distinguished between motive as opposed to purpose,
16 intent, mens rea, mental state --

17 QUESTION: But may I stop you there, Mr.
18 O'Neill, because you seem to be conceding that this is a
19 sentencing factor, and then not traditional, but I'm
20 looking at the words of the statute. It doesn't say
21 motive. It says, with a purpose to intimidate, and it
22 seems to me there are many criminal statutes, burglary
23 statutes, for example, that use those words, with a
24 purpose to, and the jury has to find that purpose.

25 So why are you conceding that this is ordinarily

1 for the judge and with a purpose -- in answer to Justice
2 Breyer, who said there are no statutes that make this --
3 that this is extraordinary, but with a purpose to, it
4 seems to me is in a number of statutes.

5 QUESTION: Justice Ginsburg, I'm not, most
6 respectfully, conceding that. All I'm saying is this,
7 that while the statute in New Jersey uses the term,
8 purpose, it could have used motive. It did not. It used
9 the term, purpose. To me, they are -- they should be
10 considered, whether it's motive, purpose, in this
11 particular statute the same, although traditionally I
12 agree that we're talking about modus, motive, we're
13 talking about mens rea, we're talking about intent, mental
14 state -- they're all the same.

15 Some people have said in their opinion, some
16 jurists, that motive is different, but here I don't think
17 it makes a difference. What's important here is that
18 there is a sentence to a much -- or a -- an exposure to a
19 much higher or stiffer sentence if there is proof that a
20 person committed a crime with a purpose to intimidate
21 because of race. That requires --

22 QUESTION: How about for the purpose of
23 pecuniary gain? That's another one on this laundry list
24 that kicks you up into the next sentencing --

25 MR. O'NEILL: Yes, against person or property I

1 think the statute says, Justice Ginsburg.

2 QUESTION: Yes. But isn't that -- wouldn't at
3 least that one have to be decided the same way as this
4 one?

5 MR. O'NEILL: Oh, I think so, yes.

6 QUESTION: I thought you told me that all the
7 other ones would stand except this one, on your argument.

8 MR. O'NEILL: Well, I did say that, but I guess
9 I was confining my consideration to the facts and the law
10 in this case, which have to do with purpose to intimidate
11 an individual because of race.

12 QUESTION: So I take it now, on rethinking, you
13 have concluded that some on this list would have to go the
14 same way, and that maybe for pecuniary gain is one of
15 them.

16 MR. O'NEILL: I think so. I think so.

17 QUESTION: In terms of the basic fairness of
18 it -- and I think Justice Ginsburg had a good point,
19 actually. This is written in terms of purpose, so whether
20 it's intent, or purpose, or motive, treat them the same.

21 But you've represented clients, I take it, where
22 sometimes perhaps in your career you had a tough choice.
23 You wanted to say, well, the client was in Chicago, but
24 just in case he wasn't, I want to tell you it was only 300
25 grams of drugs and not 400.

1 Now, that -- the client sometimes is in an
2 awkward situation with that kind of -- and why is it
3 fundamentally unfair for Congress, or a legislature, to
4 say, look, race hatred is very emotional -- very
5 emotional -- and you inject that into the trial, and
6 suddenly you'll discover people being very emotional about
7 the conclusion. We think it's fairer for defendants, as
8 well as for victims, to take that issue out and make it a
9 sentencing factor for the judge. Is that fundamentally
10 unfair to make that decision?

11 MR. O'NEILL: Yes, Justice Breyer.

12 QUESTION: Because?

13 MR. O'NEILL: Absolutely.

14 QUESTION: And if it is fundamentally unfair, I
15 guess it's just as fundamentally unfair if the Sentencing
16 Commission makes it. In fact, it's worse, because it's
17 not just a maximum, it's a minimum, or the sentence you're
18 really going to get, and I guess it's even worse when a
19 judge does it, on his own.

20 MR. O'NEILL: Well, so long as the statute does
21 not provide for an increase in the maximum sentence, then
22 I think it's okay to have a mandatory minimum sentence, as
23 in McMillan.

24 QUESTION: You should actually be grateful for
25 this --

1 QUESTION: You see, that's what's actually
2 bothering me, because a mandatory minimum is much worse
3 for defendants than an increase in the maximum. It's much
4 worse, and a sentencing guideline which says, do it in the
5 ordinary case, is much tougher on defendants than just
6 increasing the statutory maximum. We both know that.

7 And therefore, why, in terms of fairness, do you
8 say the Constitution prevents the increase of the
9 statutory max, not the minimum mandatory, which is much
10 worse, and not the sentencing guideline, and not the judge
11 doing it on his own?

12 MR. O'NEILL: Justice Breyer, I say this, that I
13 don't concede that it's necessarily worse to have a
14 mandatory minimum. I think it's -- it can be, it cannot
15 be, but I think really it's much worse to be exposed to a
16 term of imprisonment significantly greater than that which
17 you faced at the time you pleaded to the indictment.

18 QUESTION: Mr. O'Neill, I thought we were
19 discussing the meaning of the Sixth Amendment, not the
20 philosophical question of which is worse than something
21 else, and I thought you were resting primarily upon the
22 unbroken tradition of the Sixth Amendment that if you are
23 liable for an increased penalty, the fact that makes you
24 liable for that increased penalty has to be found by the
25 jury.

1 MR. O'NEILL: That's precisely my position.

2 QUESTION: So --

3 MR. O'NEILL: That's my bedrock position,

4 Justice --

5 QUESTION: -- whatever the philosophical pros
6 and cons of that may be, your argument is, that's what the
7 Sixth Amendment meant. That's what its tradition has been
8 throughout its history.

9 MR. O'NEILL: Well put. That's exactly my
10 position, Justice Scalia.

11 (Laughter.)

12 MR. O'NEILL: Thank you.

13 QUESTION: But you agreed --

14 QUESTION: Shall we charge Justice Scalia's
15 question to your time?

16 (Laughter.)

17 QUESTION: But you agreed with me that under the
18 common law and the kidnapping hypothetical the judge would
19 have the discretion to sentence the defendant who caused
20 torment to the victims much more severely than the other
21 defendant. You agreed with that.

22 MR. O'NEILL: So long as it's within the
23 maximum, not extended beyond the maximum, Justice --

24 QUESTION: So all you're doing --

25 QUESTION: You wouldn't agree if there was --

1 QUESTION: All you're doing is saying that the
2 legislature cannot prescribe what judges will do. That's
3 what you're saying.

4 MR. O'NEILL: Well, within constitutional limits
5 they can. That's the State's rights, to define crimes and
6 punishments, but only within constitutional limits.

7 (Pause.)

8 QUESTION: You can argue all by yourself,
9 without any questions.

10 (Laughter.)

11 MR. O'NEILL: Well, it would seem to me, Mr.
12 Chief Justice, that the words of the statute, with purpose
13 to intimidate, are the very essence of the statute in
14 question here, and purpose intent has to be an ingredient
15 of the crime, and when purpose or intent is an ingredient
16 of a crime, its existence is a question of fact. That is
17 a jury question.

18 A purpose, a question of purpose or intent can
19 never be ruled as a question of law, but it always must be
20 submitted to the jury, and the jury -- the New Jersey
21 statute here is unconstitutional because it takes from the
22 defendant the constitutional rights to proof beyond a
23 reasonable doubt to a jury after fair notice, and it takes
24 from the jury the very essence of its existence, which is
25 that as a fact-finder and, finally, it seems to me that if

1 a person is stigmatized by conviction as a racist, that
2 should be rendered by the broadest cross-section of the
3 community, which is the jury.

4 QUESTION: I take it, Mr. O'Neill, that you
5 would, on your reasoning, also find New Jersey's
6 harassment statute unconstitutional because it does the
7 same thing. It says a person who commits this crime, if
8 he acted with a purpose to intimidate because of race,
9 color, religion, et cetera.

10 MR. O'NEILL: Well, Justice Ginsburg, it's
11 interesting to me to note that for that lesser crime in
12 New Jersey, either sexual harassment involving race or
13 racial assault, that the stringent requirements are much
14 more severe, because it -- the statute requires proof
15 beyond a reasonable doubt to a jury on those minor crimes,
16 whereas this major crime, this very serious crime, it
17 doesn't.

18 QUESTION: I don't see that. The section that
19 I'm looking at is set up -- uses the same words as the
20 section that we're dealing with here.

21 QUESTION: Where is this? Is this in the papers
22 somewhere?

23 QUESTION: This is the racial harassment statute
24 for which this person was indicted, but he didn't plead to
25 that, is that correct?

1 MR. O'NEILL: Yes, Justice Ginsburg.

2 QUESTION: I don't know what we're talking about
3 here.

4 QUESTION: There's another statute in New
5 Jersey -- I'll give this to Justice Scalia.

6 MR. O'NEILL: Do you want me to address that,
7 Justice Scalia?

8 QUESTION: I haven't read it before.

9 QUESTION: It -- I assume it would go the same
10 way because the words are the same, but --

11 MR. O'NEILL: Yes.

12 QUESTION: But who has to make the finding of
13 harassment under that other statute, the jury?

14 MR. O'NEILL: The jury -- the jury, Justice
15 Stevens.

16 QUESTION: Well then, that's totally consistent
17 with your position.

18 MR. O'NEILL: It certainly is, Justice Stevens.

19 QUESTION: That's not what the statute says.

20 MR. O'NEILL: Well, my point here, to respond to
21 Justice Scalia's point last, is that when you have a
22 charge, indictable charge in New Jersey for racial assault
23 or racial harassment, the proofs required are beyond a
24 reasonable doubt to a jury, unlike in the case at bar in
25 Apprendi, where you'd have a situation where you only have

1 to prove by a preponderance to a sentencing judge that
2 there's a violation of purpose with intent to intimidate
3 because of race. That's the difference.

4 They have a higher standard of proof for a
5 lesser crime in New Jersey than they have for the much
6 stiffer crime, lesser proof, preponderance. That's
7 unconstitutional, I respectfully suggest.

8 QUESTION: Do you wish to reserve the balance --

9 MR. O'NEILL: I would --

10 QUESTION: -- of your time?

11 MR. O'NEILL: Thank you, Mr. Chief Justice.

12 QUESTION: Very well, Mr. O'Neill.

13 Mr. -- Ms. Gochman, we'll hear from you.

14 ORAL ARGUMENT OF LISA S. GOCHMAN

15 ON BEHALF OF THE RESPONDENT

16 MS. GOCHMAN: Mr. Chief Justice, and may it
17 please the Court:

18 The New Jersey legislature has made clear, and
19 the New Jersey supreme court has confirmed, that the
20 extended term provision of the hate crime statute which
21 addresses motive is a sentencing factor, and not an
22 element of the predicate offense. Motive, as this Court
23 has recognized over 100 years ago, may be probative of
24 guilt, but it is not essential to a conviction unless the
25 legislature chooses to include it as an element of a

1 particular offense.

2 QUESTION: So I suppose that means that the New
3 Jersey legislature could provide for first degree murder
4 is murder with malice aforethought, and could provide the
5 death penalty for that crime, and could leave it up to a
6 judge to decide whether there was malice aforethought, and
7 to decide that just by a preponderance of the evidence?

8 MS. GOCHMAN: Respectfully, malice aforethought
9 is not the same as motive. Malice aforethought is that
10 yes, you intended to commit this crime, but even with
11 malice aforethought, the prosecution does not need to
12 prove the defendant's motive, why did he want to commit
13 the crime. He may have wanted to kill somebody because he
14 owed him money, because he made some sort of unwarranted
15 advances.

16 But malice aforethought has always been deemed
17 intention, and part of mens rea, and it's different from
18 motive. Motive goes to the underlying reason. In this
19 case, for example, the defense, by its plea of guilty,
20 satisfied the elements of New Jersey's possession of a
21 weapon for an unlawful purpose.

22 QUESTION: Traditionally, as I understand the
23 common law, there was no inquiry into motive. It was just
24 intent.

25 MS. GOCHMAN: That's correct.

1 QUESTION: The motive didn't make any
2 difference.

3 MS. GOCHMAN: That's correct, so malice --

4 QUESTION: What about an espionage prosecution?
5 Someone has stolen papers, highly secret papers from the
6 Defense Department. It is treason punishable by death if
7 the reason they were taken was to give them over to a
8 foreign power --

9 MS. GOCHMAN: If Congress --

10 QUESTION: -- that is hostile to the United
11 States.

12 MS. GOCHMAN: If Congress chose to make that
13 motive an element of that particular crime, then yes, that
14 would have to go to the jury.

15 QUESTION: No, if -- Congress -- no, I --
16 Congress chooses not to make it an element. Congress just
17 says, anyone who takes papers from the Defense Department
18 that are classified secret is guilty of an offense, 10
19 years in prison. However, if the purpose of taking them
20 is to give them over to a foreign power hostile to the
21 United States, the death penalty, and the latter question
22 will be decided by a judge on the basis of whether it's
23 more likely than not.

24 You know, it's a close question, but on balance
25 I think it's more likely than not that he should get the

1 death penalty.

2 MS. GOCHMAN: Under this Court's capital --

3 QUESTION: That would be okay?

4 MS. GOCHMAN: Under this Court's capital
5 jurisprudence, that would be permissible --

6 QUESTION: Well --

7 MS. GOCHMAN: -- so long as the jury finds
8 beyond a reasonable doubt the elements of the predicate
9 offense.

10 It then goes to the judge to determine the
11 aggravating factors, including --

12 QUESTION: That doesn't shock you, that outcome
13 at all? I mean, that seems to you in accord with our
14 traditions of jury trial and proof beyond a reasonable
15 doubt?

16 MS. GOCHMAN: That's in accord with this Court's
17 jurisprudence on death penalty cases.

18 QUESTION: Death penalty cases are cases apart.
19 I mean, death penalty cases are not in accord with our
20 jurisprudence on anything else, and to -- you know, to
21 decide this case on the basis of death penalty cases would
22 be extraordinary.

23 MS. GOCHMAN: Well, respectfully, Your Honor, if
24 a judge can increase a defendant's sentence from life
25 imprisonment to death based on aggravating factors, and

1 that's constitutional under the Sixth and Fourteenth
2 Amendments, then certainly it would be constitutional to
3 increase the petitioner's sentence by a mere 2 years on a
4 noncapital offense. It's the same -- we're dealing with
5 the same constitutional amendments and the same clauses.

6 QUESTION: No, but the difference is, as Justice
7 Scalia, I guess, has already pointed out, that in the one
8 case the legislature has authorized the death penalty for
9 the facts found by the jury, not in his case.

10 MS. GOCHMAN: Well, it would be the same thing.
11 The legislature has authorized a higher sentence when the
12 judge makes a --

13 QUESTION: But only -- but in his example, if
14 the additional fact is found by a preponderance of the
15 evidence by a judge, and that can make the difference, in
16 your view, between a 10-year sentence and a life sentence.

17 MS. GOCHMAN: It may be disproportionate under
18 another constitutional framework, but it's not
19 unconstitutional within this particular framework of the
20 Sixth Amendment that we're dealing with here. Perhaps
21 it's disproportionate, but this Court said --

22 QUESTION: What if a legislature had a statute
23 that authorized a crime called wrongdoing, just prove
24 anything wrong, and then it had a -- and the jury has to
25 find the wrong, but then the judge is directed to impose a

1 whole range of sentences, depending on what the wrong is,
2 and he has to do it just by a preponderance of the
3 evidence. I suppose that would be perfectly okay.

4 MS. GOCHMAN: No. That would probably go way
5 too far. That would be too extreme. It's very vague.
6 It's very overbroad. It wouldn't give notice to criminal
7 defendants of exactly what their conduct was, what the
8 requisite mens rea was.

9 QUESTION: Well, they could perhaps have a
10 checklist of 95 different things that would qualify as
11 wrongdoing. Any one of those is found, then you turn over
12 the matter to the judge, and from there on it's up to the
13 judge on the basis of the preponderance of the evidence,
14 and no jury required.

15 MS. GOCHMAN: Well, we're not suggesting at all
16 that we can take away from the prosecutor's burden to
17 prove mens rea beyond a reasonable doubt, or any of the
18 traditional elements of traditional offenses. That's not
19 at all what we're arguing here, so that that hypothetical
20 would, of course --

21 QUESTION: Well, what is the constitutional
22 line, in your view, about what can be an element, and what
23 can be a sentencing factor? What's the line?

24 MS. GOCHMAN: Well, in common law, elements of
25 the offense had to be the mens rea, the actus reis, and

1 the causation, and at least in New Jersey grading
2 provisions are by legislative grace, not by constitutional
3 prerogative, so that you look to the common law, see what
4 the bedrock elements of those particular crimes were, and
5 when the prosecution starts to shift the burden of proof
6 to the defendant, or when the legislature crafts a statute
7 that includes presumptions of guilt, then, of course,
8 we're going too far, but that's --

9 QUESTION: But there were all sorts of mens rea.
10 You speak of mens rea as though it's one single, narrow
11 thing. There were different mens rea for different
12 crimes, and all that is going on here is that the New
13 Jersey legislature has defined a special mens rea for this
14 crime that gets a higher penalty, namely, among the other
15 mental dispositions, there has to be the mental
16 disposition of committing this crime because of hostility
17 on the basis of race, or whatever the other factors are.
18 That's mens rea.

19 MS. GOCHMAN: The crime to which defendant
20 pleaded guilty is possession of a weapon for an unlawful
21 purpose, and it already has a mens rea element and that
22 is, petitioner's purpose, or conscious objective, was to
23 use the firearm against the person or property of another,
24 and he satisfied that element of the offense when he
25 pledged guilty and said that he fired his rifle into the

1 house of the Fowlkes family in order to scare them. That
2 was all that the prosecution had to prove in order to find
3 this defendant guilty of --

4 QUESTION: And then New Jersey has added an
5 additional mens rea element and it says, if there's this
6 additional one, this additional mental disposition, we're
7 going to give you a higher penalty, but this second one,
8 we're not going to let it go to the jury. We're going to
9 let the judge find it by a preponderance.

10 MS. GOCHMAN: Well, our position --

11 QUESTION: It's still mens rea. I don't see how
12 you can, you know, single out some things that you can
13 play with this way and other ones that you can't on the
14 basis of some distinction between mens rea and other
15 things.

16 MS. GOCHMAN: Two answers to that, Your Honor.
17 First of all, our position is, is that it's not mens rea.
18 Motive is a sentencing factor that does not have to be
19 proved to the jury beyond a reasonable doubt in any
20 prosecution unless the legislature chooses to make it an
21 element of the offense.

22 QUESTION: And if it makes it an element of
23 defense, its mens rea.

24 MS. GOCHMAN: No, it's not mens rea.

25 QUESTION: Oh, it's still a --

1 MS. GOCHMAN: It's an additional aggravating
2 factor that, by legislative grace, the legislature has
3 required the prosecution to prove.

4 QUESTION: Would you call it actus reus?

5 MS. GOCHMAN: It's not actus reus, it's --

6 QUESTION: It's neither actus reus, nor mens
7 rea, it's some --

8 MS. GOCHMAN: Well, even to the extent, if this
9 Court wants --

10 QUESTION: -- some third thing that we never
11 heard of before.

12 MS. GOCHMAN: If this Court wants -- well, Your
13 Honor, in Pointer v. United States back in 1894, I believe
14 it was, this Court held that motive is never an essential
15 element of the crime, and that was murder in that
16 particular case.

17 QUESTION: Well, it has, but hasn't it also been
18 the case traditionally that motive -- and let's just stick
19 to motive for a minute -- has never had the significance
20 that it has under the New Jersey statute.

21 The motive, so far as I know, has never
22 traditionally been the difference between 10 and 20 years
23 and if, therefore, the motive is not part of the
24 definition of the crime, and it does not go to the
25 permissible sentence, the law in effect sort of shrugged

1 and said, so what, it's not that important to anything
2 that is essential in the constitutional structure.

3 But New Jersey has chosen to give it a very
4 different role, and therefore I don't see why the
5 traditional shrug about motive has any relevance today.

6 MS. GOCHMAN: There are several types of motive
7 that are used in capital juris -- in capital sentencing
8 schemes, including --

9 QUESTION: Well, may I interrupt you just --
10 your answer just for a second. Is -- am I correct that
11 this tradition of shrugging at the motive grows out of a
12 tradition in which the motive does not determine the
13 maximum sentence? Is that historically true? I've been
14 assuming it is.

15 MS. GOCHMAN: But under death penalty schemes it
16 can be used to increase the sentence to death.

17 QUESTION: You said traditionally. Death
18 penalty schemes are a creation of the last 20 years.

19 MS. GOCHMAN: Well --

20 QUESTION: I don't consider that much of a
21 tradition.

22 MS. GOCHMAN: If the tradition is that
23 sentencing judges had wide discretion in a wide range of
24 statutory -- or not statutory, but maximum sentences, then
25 certainly motive --

1 QUESTION: Within maximum sentences set by the
2 legislature, or, in an earlier day, under common law
3 crimes. We don't have common law crimes any more, so that
4 to the extent that we have a traditional analogy, I have
5 been assuming that that analogy involved cases in which
6 the motive did not affect the maximum penalty, and I'm
7 right about that, am I not?

8 MS. GOCHMAN: I believe that you are.

9 QUESTION: Okay.

10 MS. GOCHMAN: But at that point also judges had
11 wide ranges and couldn't impose a sentence up to life
12 imprisonment based on a person's bad motive, just as the
13 same that a judge could give a lesser sentence --

14 QUESTION: Well, they had whatever range the
15 legislature specified, but the range did not increase
16 depending on whether there was a finding of motive or not
17 a finding of motive. The judge simply exercised
18 discretion within the range.

19 MS. GOCHMAN: Right, and now what the
20 legislature is doing is simply giving greater guidance to
21 sentencing courts in how to --

22 QUESTION: Well, it's doing a lot more than
23 giving guidance. It's increasing the penalty.

24 MS. GOCHMAN: When you look at the New Jersey
25 sentencing code -- elements of the offenses and the

1 substantive crimes are found in the first part of the New
2 Jersey Criminal Code. Sentencing provisions are in the
3 latter part, so that when a defendant is charged in an
4 indictment and he's given a -- he's told what particular
5 offense he has -- he's charged with, he then has to go to
6 the sentencing section to find out what types of sentences
7 he may be eligible for.

8 He may be eligible for mandatory minimum
9 sentences, mandatory increases, or extended terms, so
10 it's -- you have to look --

11 QUESTION: What is -- I'm not getting the drift
12 of the argument. What difference does this make?

13 MS. GOCHMAN: That when defendant was charged
14 with possession of a weapon for an unlawful purpose, it
15 was not necessarily under the New Jersey code that all he
16 was going to get at the end of this prosecution was a
17 maximum of 10 years.

18 QUESTION: He knows that. He says, I might get
19 20 years, depending on a certain finding, and that's why I
20 have a right to a jury trial. That's his point.

21 MS. GOCHMAN: But there are other facts as well
22 that a sentencing court can take into consideration. For
23 example --

24 QUESTION: He recognizes that, too, but he says,
25 those facts do not increase the range of permissible

1 sentence from 10 to 20 years, and therefore I accept the
2 fact that under the traditional scheme, which we assume to
3 be constitutional, the judge may find those facts within
4 the range if they are not defined as elements.

5 MS. GOCHMAN: In this Court's opinion in
6 Almendarez-Torres v. United States, this Court held that
7 an increase in sentence based on a traditional sentencing
8 factor, there it was recidivism, was constitutionally
9 permissible.

10 QUESTION: It sure did, and the Court also
11 emphasized about a half-a-dozen times that recidivism was
12 in a unique place in sentencing jurisprudence.
13 Almendarez-Torres did not purport to create a rule for
14 nonrecidivism factors.

15 MS. GOCHMAN: Well, of course, it did not have
16 to. It was only addressing that particular statute.

17 QUESTION: Well, it didn't have to, but it
18 didn't have to emphasize the uniqueness of recidivism,
19 either. Whether the distinction is a good one or not, it
20 seems to me the point is you can't rely upon Almendarez-
21 Torres for your position because the Court wrote very
22 narrowly in Almendarez-Torres.

23 QUESTION: Ms. Gochman, now, in my day as a
24 sentencing judge it was not uncommon to have statutes
25 making a crime, let's say of robbery, punishable for

1 anything from 1 year to life. Let the judge decide.

2 And within that range, it was not uncommon for
3 judges to consider such things as the motive of the crime,
4 or the lack of remorse, if that was the case, by the
5 defendant, or, if you had a defendant that just appeared
6 to be absolutely without remorse, and intending to create
7 as much trouble as he could for black citizens, the judge
8 could take that into consideration and impose the life
9 sentence rather than the 1 year. Now, that was
10 traditional, wasn't it --

11 MS. GOCHMAN: Yes.

12 QUESTION: -- for a long time around the
13 country.

14 MS. GOCHMAN: Yes.

15 QUESTION: And what we see today is a series of
16 sentencing schemes that have imposed greater restrictions
17 on the sentencing judge, given them narrower options, is
18 that correct?

19 MS. GOCHMAN: That's correct.

20 QUESTION: And within that, the legislative
21 branch has tried to say, well, if there really is lack of
22 remorse or a bad purpose here, you can increase the
23 sentence. Is that what's happening?

24 MS. GOCHMAN: That's correct and, indeed, in
25 this particular instance the defendant has probably been

1 given more due process than was given under a --

2 QUESTION: Let me just interrupt you right

3 there.

4 MS. GOCHMAN: -- more discretionary scheme.

5 QUESTION: If we go back to the general

6 discretion that Justice O'Connor described, and you apply
7 that in this case, it would be permissible for this
8 additional sentence to be imposed on the basis of a report
9 made by the parole officer in the pre -- in the post -- in
10 the presentence report, wouldn't it?

11 MS. GOCHMAN: Not under the New Jersey statute,

12 which requires --

13 QUESTION: No, but I mean, constitutionally it

14 would be permissible. You'd have everything the same,
15 except you don't need preponderance of the evidence. All
16 you need, the parole officer's recommendation, and the
17 judge could rely on that and increase the sentence by
18 10 years, if you want to go back to the old way of
19 sentencing.

20 MS. GOCHMAN: So long as the defendant had the

21 opportunity to rebut that.

22 QUESTION: Well, he didn't even need the

23 opportunity to rebut it in the traditional, old days.

24 MS. GOCHMAN: Well, we've come very far from

25 there, and --

1 QUESTION: Well, let me ask this about the
2 traditional old days. Suppose -- did the defendant in the
3 traditional old days have an entitlement not to get more
4 than 1 year if he was shown to be really remorseful?

5 MS. GOCHMAN: I'm not sure, Your Honor. I don't
6 know if that sentencing scheme was fit within a particular
7 crime, or --

8 QUESTION: Gee, you were very familiar with the
9 traditional scheme when Justice O'Connor described it,
10 and --

11 MS. GOCHMAN: Well, I'm not sure about --

12 QUESTION: -- all of a sudden it's not clear.

13 It's a traditional statute for this crime,
14 1 year to life.

15 MS. GOCHMAN: Okay.

16 QUESTION: Now, if the defendant showed enormous
17 remorse, would he be entitled -- entitled -- to get only
18 1 year, or only 20, or only 30? He had no entitlement
19 whatever, did he?

20 MS. GOCHMAN: That's correct.

21 QUESTION: If he did the crime, he knew he got
22 life, and if he got any less than life it was a matter of
23 grace and good luck, and if he got a hanging judge, too
24 bad. You did the crime. That's the risk you took.
25 Wasn't that the system?

1 MS. GOCHMAN: That --

2 QUESTION: Now, there are no risks here. Here
3 there is an entitlement to get a lesser sentence. Isn't
4 there an absolute entitlement unless you are found to have
5 this state of mind?

6 MS. GOCHMAN: Not if it's a sentencing factor,
7 because it's not a state of mind. State of mind goes to
8 the underlying --

9 QUESTION: You're saying he's not entitled even
10 if --

11 QUESTION: Let her answer.

12 QUESTION: She's answering the wrong question,
13 Chief Justice.

14 Assuming that the judge does not find by a
15 preponderance of the evidence that this mental state
16 existed, is he not entitled to get the lower sentence?

17 MS. GOCHMAN: Yes.

18 QUESTION: All right, and there was --

19 MS. GOCHMAN: But he is -- it's not an
20 entitlement. It's by statutory prerogative that he must
21 get that letter sentence. The judge must make a finding
22 by a preponderance of the evidence. So yes --

23 QUESTION: But if --

24 MS. GOCHMAN: -- the same words. Entitlement
25 or --

1 QUESTION: Okay.

2 MS. GOCHMAN: Or by statute.

3 QUESTION: And there was no such entitlement
4 under the traditional 1 year to life system. There was
5 nothing you were entitled to.

6 MS. GOCHMAN: Well then, we've given defendant
7 more due process than an older system.

8 QUESTION: Well, that's true, but when you give
9 entitlements, what go along with the entitlements are
10 certain requirements, including the requirement of the
11 Sixth Amendment.

12 QUESTION: May I ask you, Ms. Gochman, a
13 defendant says, I don't understand this because my buddy
14 committed a crime. It was called burglary, and that
15 statute said, with a purpose to, and he went to a jury,
16 and they had to find beyond a reasonable doubt, and I'm
17 being charged with a statute that also says, with a
18 purpose to, and the jury falls away, beyond a reasonable
19 doubt falls away.

20 Explain to me why the legislature, using the
21 very same words, with a purpose to, in the one case can
22 say, oh, this is just for the judge and the other must, as
23 a matter of constitutional right, give it to the jury.

24 MS. GOCHMAN: The New Jersey supreme court has
25 interpreted the phrase, with a purpose to, in its proper

1 context and that is motive, and this Court is, of course,
2 bound by that court's --

3 QUESTION: It's not motive when it appears in
4 the burglary statute?

5 MS. GOCHMAN: It's not the ultimate motive, not
6 at all, in the burglary statute, if a defendant has
7 burglarized a house with a purpose to commit a felony
8 within, but again the prosecution doesn't have to prove
9 why that person wanted to commit the felony.

10 Did he want to commit a robbery because he had a
11 claim of right to that money? Did he want to commit a
12 robbery because he wants to feed his drug habit? Did he
13 want to commit a robbery because he wanted to feed his
14 hungry family? That is motive, and that the prosecution
15 does not have to prove.

16 Yes, we have to show that he entered that
17 residence or business with the purpose to commit another
18 offense, but we don't have to prove why he wanted to do
19 so. That part is motive, and that's distinct from the
20 intent, which is the purpose to in the burglary statute,
21 and when read in its proper context, as the New Jersey
22 supreme court has interpreted it, with a purpose to equals
23 by its motivation, and that is a sentencing factor,
24 because we did not have to prove that to prove --

25 QUESTION: Thank you, Ms. Gochman.

1 MS. GOCHMAN: Thank you.

2 QUESTION: Mr. DuMont, we'll hear from you.

3 ORAL ARGUMENT OF EDWARD C. DuMONT

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MR. DuMONT: Thank you, Mr. Chief Justice, and

7 may it please the Court:

8 In this case, what New Jersey did was to convict
9 petitioner of a very traditional, conventional crime,
10 possession of a weapon for an unlawful purpose. It's a
11 crime with a long common law tradition. It seeks to
12 punish him more severely than it otherwise would for that
13 crime for an equally conventional reason, that he acted
14 with a particularly bad purpose.

15 Now, that sentencing policy decision does not,
16 in our view, become unconstitutional simply because the
17 State specified the bad motive factor in a statute and
18 required the judge to find it by a preponderance of the
19 evidence before he was permitted to go over a certain
20 level in the sentence.

21 Now, we all agree, I think, that a legislature
22 normally may define the elements of a crime and fix the
23 minimum and maximum punishments for that crime. What the
24 legislature does in these cases is to make a subsidiary
25 decision that a particular factor is not sufficiently

1 central to guilt or innocence, or perhaps it would be so
2 cumbersome or unfair to present at trial that it should
3 not be sent to the jury as an element of the offense, but
4 that it is important enough, in the legislature's view, to
5 the proper punishment for the offense that the judge
6 should be constrained in his sentencing decisions in that
7 finding this factor by a preponderance -- not by
8 reasonable doubt, but by a preponderance -- should be
9 necessary before the judge may go over a certain level in
10 sentencing.

11 QUESTION: Mr. DuMont, that's just the problem.
12 You agree that if it's an element of the offense it goes
13 to the jury.

14 MR. DuMONT: Yes.

15 QUESTION: You agree that if it's an enhancement
16 it can go to the judge.

17 MR. DuMONT: Yes.

18 QUESTION: As a sentencing factor.

19 The difficulty I have is that nowhere have we
20 defined what the distinction is between an element of the
21 offense and an enhancement factor, and if you could do
22 that in your few minutes it would be very helpful.

23 MR. DuMONT: Well, it is a tall order.

24 What the Court has said -- I think I can give
25 you parameters. The Court has said, on the one hand, that

1 it is almost always the legislature's prerogative to
2 define the elements of the offense. The Court has also
3 said, made very clear in this series of cases, that there
4 are limits past which the legislature may not go
5 consistent with due process and the jury right.

6 An example we would be willing to give, if a
7 legislature tried to define double parking as a petty
8 offense subject to a fine, but then said, if the judge
9 finds that you were double-parked because you were going
10 to escape from a bank robbery, then it's life
11 imprisonment, we think that would be so contrary to our
12 traditions and so obviously abusive, that it would be on
13 the other side of the line.

14 But that line has to be drawn very far out in
15 order to give proper due to the legislature's prerogative.

16 QUESTION: What's the criterion for the drawing
17 of the line? Now, do you agree with the State of New
18 Jersey?

19 As I understand the State's position, it's that
20 anything can be made a sentencing factor which was not a
21 traditional element, that if it's a traditional element,
22 it has to remain an element. If it's a traditional
23 sentencing factor, it can be made a sentencing factor.
24 Is -- do you agree with that line? That's how I
25 understand the State's argument.

1 MR. DuMONT: We think tradition and common
2 practice are helpful guides in looking at a particular
3 statute, but no, they don't define a particular line. I
4 guess I would have two answers to the question of what is
5 the line.

6 At the furthest doctrinal level, I think that
7 the best answer I can give you is that if the Court
8 becomes convinced beyond, if I may use the phrase, a
9 constitutional doubt, that a legislature is punishing a
10 defendant for something other than the crime described by
11 the elements of the crime of which he was convicted, then
12 there is reason for grave concern, and possibly that
13 statute is unconstitutional.

14 But it must be remembered that a legislature has
15 wide right to define crimes and to punish them very
16 severely, so the question to be asked, to take Justice
17 Scalia's hypothetical, for instance, from his dissent in
18 Monge, of the statute that says, any intentional causing
19 of harm is a crime, and everything else is a sentencing
20 factor, you have to start with the supposition that the
21 legislature could not enact that offense just as a crime
22 and then say, it is a crime, and the sentence is up to
23 life imprisonment or death in appropriate cases, and the
24 judge decides.

25 Now, if that is constitutionally problematic,

1 which we think it probably would be, it's probably the
2 same constitutional problem that we can see here.

3 QUESTION: Do you think it's a problem for a
4 legislature to say robbery is punishable by anything from
5 a year to life?

6 MR. DuMONT: No. No, not at all. My point is
7 only that at some extreme there may be a due process or a
8 jury trial when the -- on even just imposing a crime and
9 imposing a punishment of up to life imprisonment or death.

10 Now --

11 QUESTION: How about a narrower example?
12 Instead of saying, all wrongdoing, let's say all theft.
13 All theft is punishable from zero to life.

14 MR. DuMONT: On its face, the statute is
15 constitutional.

16 QUESTION: Then you basically, in the real
17 world, are saying the legislature is going to determine
18 when there is a jury right and when there isn't. I mean,
19 I don't see how you can escape that conclusion.

20 MR. DuMONT: I think that's correct, and I think
21 that's the way it's always been except for common law
22 crimes, and common law crimes were crimes that were
23 defined by courts, and they were always understood to be
24 at the pleasure of the legislature if the legislature
25 chose to make a different disposition.

1 Now --

2 QUESTION: Why do you say that's the way it's
3 always been? I don't understand what you mean by that. I
4 don't --

5 MR. DuMONT: Well, take the Federal system.

6 Congress is the only body that can define a crime, so if
7 you don't have a congressional enactment, you don't have a
8 statute, you don't know what the elements are and, in
9 fact, there are no elements. There is no crime. So, of
10 course, whether you get a jury trial right always depends
11 on what the legislature has defined to be a crime.

12 Now, if I can just address for a moment the
13 Jones rule, because I think -- we have two points to make
14 about the proposed Jones rule. One is that it would cut
15 out a lot of legislative conduct that to us is perfectly
16 legitimate and even laudable, and if you take the
17 traditional robbery, or, say, a kidnapping statute that
18 says -- the Federal one says zero to death, actually, and
19 that's what the statute says now.

20 Suppose Congress says, well, we'd like to bring
21 a little more order to the sentencing process, so we think
22 it's going to be presumptively 25 years, but if a child is
23 involved, or there was bodily injury, then it's going to
24 be 25 to 40, and if someone was killed, if the victim was
25 killed, then it ought to be from 40 to life.

1 Now, you can look at that statute and say, this
2 is terrible for defendants because now they've been
3 deprived of their jury right, or you can look at it and
4 say, that's terrific for defendants, because two-thirds of
5 the defendants now have a 25-year cap on their sentence,
6 so we don't see the fundamental fairness argument here.

7 The second point to be made about the Jones
8 rule --

9 QUESTION: Excuse me. In those cases I assume
10 the judge must impose 20 years if a certain factor is
11 found, and must impose 40 years if a certain factor is
12 found. Isn't that right?

13 MR. DuMONT: It can be written either way.

14 QUESTION: It can be written --

15 MR. DuMONT: It can be written either as a
16 mandatory minimum of 20 and then up to 40, or it can be
17 written as, that the range increases to 40 years if
18 somebody was injured, because --

19 QUESTION: But in any event, even on that
20 answer, he may not impose the higher sentence unless the
21 fact is found.

22 MR. DuMONT: That's correct, but what the --

23 QUESTION: So there is a limitation on the judge
24 which creates in Justice Scalia's question to your friend
25 a moment ago an entitlement which didn't exist before.

1 MR. DuMONT: But the entitlement is only to have
2 the judge make that determination by a preponderance of
3 the evidence.

4 QUESTION: Well, that's a way of defining the
5 problem out of existence. The entitlement is an
6 entitlement not to get a sentence beyond a certain point
7 unless a fact is found. What consequence follows for a
8 judge/jury is another question, but there's an entitlement
9 not to have a sentence beyond a certain point.

10 MR. DuMONT: That is true, but the question you
11 have to face is why you should erect a flat constitutional
12 bar to the legislature making that choice, and that is
13 informed by this analysis, I believe.

14 If the legislature knows it has only two
15 choices, zero to life, or make these into elements of the
16 offense and require proof beyond a reasonable doubt, it
17 may decide they're not important enough for that, and that
18 is not very protective of defendants.

19 If the legislature has the option of saying,
20 well, these intermediate steps we think are important
21 enough to be serious sentencing factors but they're not
22 important enough for us to make them elements of the
23 offense, we think constitutionally they ought to have that
24 choice, and that that is not going to be unfair to
25 defendants. In fact, it's going to be fairer to

1 defendants.

2 QUESTION: So long as you have a reasonable
3 legislature. The problem is, you don't give me any basis
4 for stopping a legislature that wants to make theft a
5 crime and leave, you know, anything from zero to 100 years
6 hang upon whether some judge finds more likely than not
7 that the type of theft was one thing or another.

8 MR. DuMONT: Justice Scalia, all I can leave you
9 with is --

10 QUESTION: And it seems to me the Constitution
11 should not presume a beneficent, well-meaning legislature.
12 You have to give me some way to protect citizens from a
13 legislature that does not like juries.

14 MR. DuMONT: The Constitution first of all --

15 QUESTION: From an executive that does not like
16 juries.

17 MR. DuMONT: What we know is, the Constitution
18 presumes that legislatures act within the constitutional
19 bounds of their power, and there ought to be a high burden
20 on one who suggests that they have not, and our suggestion
21 is that the rule suggested here, although it has an
22 attractive superficial clarity, will cut out a wide
23 variety of appropriate legislative conduct like the
24 conduct here, and there's no justification for doing that
25 in order to prevent the outlier case.

1 We agree that there can be outlier cases. The
2 Court has always made that clear. It hasn't found one
3 yet.

4 QUESTION: But why isn't this an outlier case?

5 MR. DuMONT: Maybe it will.

6 QUESTION: Why isn't this an outlier case?
7 There's no precedent for this particular statute, is
8 there?

9 MR. DuMONT: It's not an outlier case because
10 all New Jersey did was to decide that something bad,
11 particularly bad purpose which is traditional --

12 QUESTION: Ups the sentence by 10 years.

13 MR. DuMONT: Thank you.

14 QUESTION: Thank you, Mr. DuMont.

15 Mr. O'Neill, you have 2 minutes remaining.

16 REBUTTAL ARGUMENT OF JOSEPH D. O'NEILL

17 ON BEHALF OF THE PETITIONER

18 MR. O'NEILL: Mr. Chief Justice, I would like,
19 unless the Court has additional questions, to limit my
20 rebuttal to a question posed by Justice Thomas concerning
21 the distinction between element of a crime and a
22 sentencing factor.

23 As we know, the statute in question says the
24 defendant, in committing the crime, acted with a purpose
25 to intimidate because of race. That seems to me that

1 the -- if we want to address what the legislature in New
2 Jersey used by choice, the word purpose instead of the
3 word motive, it seems that where purpose or intent is an
4 ingredient of the statute, as it is here, that's a
5 question as to the existence of that motive or intent, and
6 that has to be a jury question, and I think that's the
7 difference.

8 There is a denial by the New Jersey legislature
9 of the defendant's right to have a jury decide this issue
10 of purpose in intimidating a person because of race.

11 If there are no further questions, I would --

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. O'Neill. The case is submitted.

14 (Whereupon, at 11:09 a.m., the case in the
15 above-entitled matter was submitted.)

16

17

18

19

20

21

22

23

24

25