No. 99-478

In the Supreme Court of the United States

CHARLES C. APPRENDI, JR., PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state statute may constitutionally increase the maximum authorized penalty for a crime on the basis of a finding made by the sentencing court, by a preponderance of the evidence, that in committing the crime the defendant acted "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

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INTEREST OF THE UNITED STATES

This case presents the question whether a statutory sentencing factor may constitutionally increase the maximum authorized penalty for certain crimes based on proof to a judge, by the preponderance of the evidence, of the defendant's purpose to intimidate because of race. Because various federal criminal laws authorize the imposition of enhanced sentences on the basis of facts found by the court at sentencing, see, *e.g.*, 21 U.S.C. 841(b) (drug type and quantity), the United States has a strong interest in the outcome of this case.

STATEMENT

1. Early in the morning on December 22, 1994, petitioner fired eight rifle shots into the home of Michael and Mattie Fowlkes and their three children—the only black family living in his neighborhood in Vineland, New Jersey. Pet. App. 2a-3a, 101a-102a, 107a. The shots shattered the glass in the Fowlkes's front french doors and caused other damage. *Id.* at 107a-109a. It was the fourth time the Fowlkes home had been hit by

gunfire in the five months they had lived there. *Id.* at 2a-3a.

After the December 22 shooting, a neighbor recognized petitioner's truck driving away. Pet. App. 3a. When police officers arrested petitioner a short time later, he admitted that he had fired shots into the house. *Ibid.* Petitioner later told the police that although he did not know the residents of the house personally, he "d[id] not want them in the neighborhood" because they were black, and was "just giving them a message that they were in his neighborhood." *Id.* at 3a, 175a-180a. When officers executed a search warrant at petitioner's house they found a number of weapons, including a .22-caliber rifle with a laser sight and silencer and an anti-personnel bomb. *Id.* at 3a.

2. A state grand jury charged petitioner with a number of offenses, ranging from harassment to attempted murder. Pet. App. 3a; J.A. 2-12. Petitioner agreed to plead guilty to one count of possession of a destructive device, in violation of N.J. Stat. Ann. § 2C:39-3(a) (West 1995), and two counts of possession of a firearm for an unlawful purpose, in violation of N.J. Stat. Ann. § 2C:39-4(a) (West 1995). Pet. App. 3a. Under the latter provision, "[a]ny person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." N.J. Stat. Ann. § 2C:39-4(a) (West 1995). New Jersey's general sentencing statute specifies that "[e]xcept as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, * * * [i]n the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years." *Id.* § 2C:43-6(a).

Petitioner's plea agreement recited that the ordinary maximum sentence for each of the firearms counts was

ten years' imprisonment, but that the State reserved the right to seek a longer term on one count on the authority of N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999), which provides that a sentencing court

> shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime * * * to an extended term if it finds, by a preponderance of the evidence, [that] * * * [t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

See Pet. App. 4a; Plea Agreement 1. Where Section 2C:44-3 authorizes the imposition of an "extended term," Section 2C:43-7 provides that the defendant shall be imprisoned "[i]n the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years." N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 1999). Petitioner, in turn, reserved the right to challenge the constitutionality of Section 2C:44-3(e). Pet. App. 4a.

Before accepting petitioner's plea, the state court assured itself that petitioner personally understood that even without an "extended" sentence, he faced a maximum prison term of 20 years, with no possibility of parole for the first 10 years (if his two firearms sentences were run consecutively); and that if his challenge to the "extended sentence" provision was rejected, he faced a maximum total sentence of 30 years' imprisonment, with no parole eligibility during the first 15 years. J.A. 19-24.

At a hearing held before sentencing, petitioner testified that he had been drinking and had taken medication on the night of the December shooting, and that he had fired at the Fowlkes's house after the glass and the

color of the door "caught [his] eye." Pet. App. 251a; see *id.* at 236a-239a. A defense psychologist also testified that petitioner had a history of psychological disorders. *Id.* at 4a-5a, 213a-219a. At sentencing, the court rejected these explanations, found that the December shooting was motivated by racial bias, and held that petitioner was subject to an "extended" sentence under Section 2C:44-3(e). Pet. App. 5a, 141a-145a. The court accordingly sentenced petitioner to 12 years' imprisonment on the count related to the December shooting, and to concurrent terms of seven and three years' imprisonment on the remaining charges. J.A. 45-46; Pet. App. 5a, 161a.

3. The Appellate Division of the New Jersey Superior Court affirmed petitioner's convictions and sentence, with one judge dissenting. Pet. App. 68a-94a. As relevant here, the court rejected petitioner's argument that the sentence imposed on him under Section 2C:44-3(e) violated the federal Constitution because it was based on the trial court's finding, by a preponderance of the evidence, of racial motivation, rather than on an admission obtained as part of his guilty plea or on a finding made by a jury beyond a reasonable doubt. Pet. App. 86a-94a. The court held that Section 2C:44-3(e) treats racial bias as a sentencing factor, not as an element of any offense, Pet. App. 87a, and that such treatment of a traditional sentencing factor, such as motive, is constitutional. *Id.* at 89a.

4. The Supreme Court of New Jersey affirmed. Pet. App. 1a-28a. The court agreed with the Appellate Division that a defendant's racial motivation did not become "an element of the weapons possession charge" by reason of Section 2C:44-3(e), and that the state legislature's reasons for "provid[ing] that the actor's biased purpose be treated as a sentencing factor" were "not constitutionally suspect." Pet. App. 25a. Applying this

Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986), the court concluded that Section 2C:44-3(e)

> simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor.

Pet. App. 22a.[1] The court also observed that requiring juries to determine whether crimes were motivated by bias would "create[] an added risk of prejudice for defendants" by "open[ing] trials to evidence of former acts of bias" and "inject[ing] * * * issues of racial or ethnic bias that have a potential to inflame a jury." *Id.* at 24a.

Justices Stein and Handler dissented. Pet. App. 29a-66a. They reasoned that the finding of racial motivation required by Section 2C:44-3(e) "necessarily involves a finding so integral to the charged offense," and so significantly increases the range of authorized sentences, "that it must be characterized as an element" of the underlying offense with which the defendant is

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[1] The court acknowledged that this Court's later decision in *Jones* v. *United States*, 526 U.S. 227 (1999), had suggested that increasing the maximum statutory sentence on the basis of a sentencing factor could "pose 'grave and doubtful constitutional questions.'" Pet. App. 18a-19a (quoting *Jones*, 526 U.S. at 239). Noting, however, that "the language in *Jones* was not essential to its holding" and that this Court "did not expressly overrule the *Almendarez-Torres* formulation," the court determined that *Almendarez-Torres* continued to provide the proper framework for constitutional analysis. *Id.* at 19a-20a.

charged. Pet. App. 30a. They concluded, accordingly, that Section 2C:44-3(e) is unconstitutional because it permits the finding of racial motivation to be made by the sentencing court by a preponderance of the evidence. *Ibid.*

SUMMARY OF ARGUMENT

A. The definition of the elements of a criminal offense is essentially entrusted to the legislature. There is no constitutional requirement that all matters that mitigate or aggravate a particular offense must be made elements of a crime, to be proved to a jury beyond a reasonable doubt. Rather, having defined a crime, legislatures have a variety of options in structuring a system of sentencing. Legislatures may fix the penalty themselves; they may define broad ranges for sentencing courts; or they may constrain the discretion of sentencing courts within those ranges, either through binding sentencing guidelines or through other directives. They may also require judges to sentence based on the fullest possible information about the offense and offender, generally finding relevant facts by a preponderance of the evidence.

B. In light of those principles, the proposed constitutional rule suggested in *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)—that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"—should be rejected. Such a rule would not be deeply rooted in this country's traditions. Rather, it would impinge on the recognized legislative prerogative to guide the administration of sentencing by designating the weight to be accorded to traditional sentencing factors. A legislature may prescribe determinate sentences, or set wide sentencing ranges with the understanding that

judges will exercise appropriate discretion. A sentence that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature.

C. The rule proposed in *Jones* also conflicts with the rationale of three lines of this Court's precedent. The Court has upheld the legislature's designation of sentencing factors that mandate a *minimum* sentence within a pre-existing range; it has sustained the federal sentencing guidelines system, under which binding sentencing ranges, within statutory maximum and minimum terms, turn on judicial findings at sentencing, made under the preponderance-of-the-evidence standard; and it has endorsed capital punishment schemes in which aggravating factors, necessary to make a defendant eligible for a capital sentence, are found by the judge at sentencing, rather than by the jury at trial. If judicial findings can justify mandatory minimum terms, guidelines sentences within a range of punishment, and increases in a defendant's sentencing exposure from life to death, there is no reason to bar legislatures from specifying judicial findings that will operate to increase the maximum authorized term of imprisonment.

D. The rule proposed in *Jones* would serve no overriding constitutional purpose. The Constitution requires proof beyond a reasonable doubt, and the interposition of the jury between the State and the defendant, in order to protect against the conviction of innocent persons and to prevent arbitrary exercises of government power. Once a defendant is found guilty of a properly defined criminal offense, however, the State's interest validly shifts to the question of determining an appropriate punishment. In that inquiry, the

rigorous formality of criminal trials gives way to a practical and commonsense effort to select a sentence that fairly punishes the individual offender and protects the community. Sentencing enhancement factors fit logically into that framework. A legislature's provision for increased maximum terms of punishment based on judicial findings does not erode or depreciate the jury's function. There are significant constitutional limits on the sentencing process. Neither our constitutional tradition nor fundamental fairness, however, requires that all the protections of a criminal trial be afforded in determining the existence of factors that the legislature deems relevant only to sentencing.

ARGUMENT

A STATE MAY CONSTITUTIONALLY PROVIDE THAT BIASED PURPOSE IS A SENTENCING FACTOR THAT INCREASES THE OTHERWISE APPLICABLE SENTENCING RANGE FOR AN OFFENSE

The New Jersey legislature has defined the offense at issue in this case to be "possession [of] any firearm with a purpose to use it unlawfully against the person or property of another." N.J. Stat. Ann. § 2C:39-4(a) (West 1995). It has also determined that enhanced punishment for that offense should be available when the offense is committed with a racially biased purpose. *Id.* § 2C:44-3(e). Like other facts that are germane to the proper punishment of a defendant found guilty of a crime, but that are not made elements of the underlying crime, that enhancing circumstance is to be found by the court, at sentencing, by a preponderance of the evidence. The New Jersey Supreme Court has concluded that state law creates this division between guilt and sentencing determinations, and that conclusion is binding in this Court. See, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 483 (1993). The question here is whether

the State's decision complies with the federal Constitution.

"[T]he Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge* v. *California*, 524 U.S. 721, 729 (1998) (citing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)). But in *Jones* v. *United States*, 526 U.S. 227, 239-252 (1999), the Court suggested that there is a serious unresolved question whether, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. The Court should resolve that question by holding that there is no such requirement. Once a defendant has been found guilty of a crime, after being afforded his Fifth and Sixth Amendment rights, the Constitution does not prevent the State from entrusting to the sentencing process the determination of facts that may enhance the range of appropriate punishment.

A. A State Has A Wide Range Of Options For Structuring The Sentencing Process

The Court's cases have settled several basic propositions that properly frame the question presented here.

First, the Court has repeatedly made clear that, within broad constitutional limits, definition of the elements of criminal offenses is a matter for state legislatures or for Congress, not for the federal courts. *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.");

McMillan v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("the state legislature's definition of the elements of the offense is usually dispositive"). In defining a criminal offense, the Constitution does not require the State to include as "elements" all matters of defense, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987), mitigation, *Patterson* v. *New York*, 432 U.S. 197, 201 (1977), or aggravation, *McMillan*, 477 U.S. at 84-91. Rather, the State has considerable latitude to define such matters as affirmative defenses or sentencing considerations.

Second, having defined a crime, the legislature may prescribe the punishment to be imposed on the offender. It may do so by itself prescribing a fixed penalty (other than capital punishment). See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion."). Or it may specify that the court must impose a sentence falling within a defined range, which may be either narrow or broad. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989); *United States* v. *Grayson*, 438 U.S. 41, 45-48 (1978); compare, *e.g.*, 18 U.S.C. 1301 (authorizing imprisonment for not more than two years for importing lottery tickets) with 18 U.S.C. 1201(a) (making kidnapping punishable by "imprisonment for any term of years or for life").

Third, once a sentencing range has been set by statute, "the scope of judicial discretion with respect to a sentence is subject to [legislative] control." *Mistretta*, 488 U.S. at 364. The legislature may vest the sentencing court with essentially "unfettered discretion." *Ibid.* Or, at the other end of the spectrum, it may cabin the exercise of that discretion with legislatively adopted guidelines. See *Miller* v. *Florida*, 482 U.S. 423 (1987) (state indeterminate sentencing scheme subject to presumptive sentencing ranges under sentencing guide-

lines); compare N.J. Stat. Ann. § 2C:44-1 (West 1995) (establishing presumptions with respect to imposition and appropriate length of prison sentences for various types of crimes). It may specify considerations that a court must take into account at sentencing. See 18 U.S.C. 3553(a) (setting out seven factors to be considered in imposing sentence). It may set mandatory minimum sentences, within the range otherwise prescribed, that a court must impose if it finds the existence of specified facts or circumstances. See *McMillan*, *supra* (possession of a firearm during commission of the offense required mandatory minimum sentence). And it may require adherence to administratively promulgated sentencing guidelines that establish presumptive sentencing ranges. See, *e.g.*, *Mistretta*, *supra*; *Edwards* v. *United States*, 523 U.S. 511 (1998); *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (per curiam). All of these approaches regulate sentencing, within the range otherwise prescribed by statute, on the basis of findings made by the court about the nature of the offense and the character of the offender.

Fourth, whether the sentencing court retains plenary discretion or is limited by mandatory minimums or a guidelines system, it is generally entitled, and by tradition expected, to receive and consider an essentially unlimited range of potentially relevant information, in order to make an individualized sentencing determination based on the particular circumstances of the case. See, *e.g.*, 18 U.S.C. 3661; *Witte* v. *United States*, 515 U.S. 389, 397-398 (1995); *Nichols* v. *United States*, 511 U.S. 738, 747 (1994); *Williams* v. *New York*, 337 U.S. 241, 246 (1949). In conducting that inquiry, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91. This Court has repeatedly approved the finding of sentencing facts by a pre-

ponderance of the evidence. *Id.* at 91-93; *Watts*, 519 U.S. at 155-157.[2]

B. The Specification Of Sentencing Factors That Increase The Authorized Sentence Is Consistent With Constitutional Principles And Practice

Against this background, the proposed rule articulated in *Jones*—that "any fact (other than prior conviction) that increases the maximum penalty for a crime" must be treated as an element of the crime (526 U.S. at 243 n.6)—is unwarranted. Such a rule would prohibit the entire class of legislation that specifies statutory "sentencing factors" (other than recidivism) that may enhance the range of punishment beyond an otherwise applicable range, unless those factors are designated as offense elements that must be proved to a jury beyond a reasonable doubt. The defendant does have the right to have a jury determine guilt of a criminal offense beyond a reasonable doubt. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993). But such a rule has never been applied at sentencing. Nor would application of such a rule find support in "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202.

1. The proposed rule in *Jones* could be understood to require only that a legislature make clear, in defining a crime, that the "maximum penalty" is the highest that will be authorized for that crime under any circum-

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[2] The Court has also noted the existence of a divergence of opinion among the courts of appeals on whether a higher standard might be required, in "extreme" circumstances, in making findings under the federal Sentencing Guidelines. *Watts*, 519 U.S. at 156 & n.2; *Almendarez-Torres*, 523 U.S. at 247-248. That question is presented by the government's pending petition for a writ of certiorari in *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999).

stances. As applied to the carjacking statute at issue in *Jones*, for example, the proposed rule would have been satisfied if Congress had provided: "Carjacking, as defined in 18 U.S.C. 2119, is punishable by up to life imprisonment; provided that the court may not impose a sentence in excess of 15 years' imprisonment unless it finds that serious bodily injury resulted from the carjacking." If that formulation were sufficient to satisfy the Court's proposed constitutional test, the test would turn on formalities of legislative drafting. See 526 U.S. at 267 (Kennedy, J., dissenting). We therefore assume, for present purposes, that the *Jones* Court intended to suggest a substantially broader constitutional rule. See *Monge*, 524 U.S. at 741 (Scalia, J., dissenting) (advocating similar rule that would apply "[h]owever [a State] chooses to divide and label its criminal code").

That broader rule, however, would impinge on the prerogative of legislatures to guide the administration of their criminal justice systems, without affording any offsetting benefit in the form of protection of constitutional values. Criminal laws and their accompanying sentencing provisions, taken as a whole, reflect a variety of interrelated legislative judgments, based on policy choices relating to both crime and punishment. In defining criminal conduct, the legislature identifies those acts that are sufficiently harmful or invasive of the rights of society as to merit application of the social stigma of a criminal conviction and the deprivation of liberty that may be imposed as a punishment. Anyone who is found, after a trial conducted in accordance with constitutional protections, to have committed the proscribed acts may be convicted and branded as a criminal.

Within that class of offenders, the legislature may also identify certain characteristics of the crime and the

offender that make the defendant more or less culpable than other individuals who have engaged in the same criminal conduct. The legislature may legitimately determine that those factors, though not essential to criminality, are highly germane to the precise punishment to be meted out in the particular case. Here, for example, New Jersey has defined the offense in question as possession of a firearm for the purpose of using it unlawfully against the person or property of another. The State has also made clear that a particular offender is worthy of more serious punishment when his *motive* for committing that offense is racial bias. Bad motive is a traditional sentencing factor, *i.e.*, a factor that makes an offender who has committed a particular crime worthy of more serious punishment, and it may be taken into account in sentencing for a particular offense. *Wisconsin* v. *Mitchell*, 508 U.S. at 485; see *Barclay* v. *Florida*, 463 U.S. 939 (1983) (per curiam).

By explicitly designating motive as a sentencing factor that enhances the otherwise-applicable punishment, the New Jersey legislature has expressed a particular judgment about how severely offenders of a particular class should be punished. There is nothing suspect in that determination. Once the presumption of innocence has been overcome by the jury's finding of guilt, see *Taylor* v. *Kentucky*, 436 U.S. 478, 483-486 (1978), the legislature's interest shifts from defining prohibited conduct to ensuring that society obtains a fair and adequate sentence, calibrated to the nature of the offender and the details of the particular offense. The procedures of sentencing, which courts generally conduct with a view towards assembling the most complete picture possible of the offense and the offender, are far better suited to the determination of an accurate punishment than are the formal procedures and evidentiary constraints of a criminal trial.

By the same token, deferring exploration of some of the details of the offense—why it was committed, and in what precise manner—until sentencing may serve compelling interests of fairness and practicality. The legislature may conclude, for example, that in a jury trial the government should not be required to prove, or an accused to defend against, formal allegations of "bias," when those allegations are important to punishment but not central to the crime itself. See Pet. App. 24a (requiring proof of racial bias at trial could "create[] an added risk of prejudice for defendants" and "inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury"). The legislature may also conclude that a jury trial should not be unduly prolonged or complicated by a requirement that every detail of the defendant's offense be determined with precision and documented by a special verdict.

Legislatures have made judgments of that character in framing any number of criminal offenses and related sentencing schemes. The primary federal drug statute, for example, 21 U.S.C. 841 (1994 & Supp. IV 1998), defines, in subsection (a), an offense of knowingly or intentionally manufacturing, distributing, or dispensing any controlled substance. It then sets out, in subsection (b), a set of statutory sentencing factors relating primarily to the type and quantity of drugs involved in a given offense, as well as to the defendant's criminal history and whether the particular crime resulted in special harm, such as bodily injury or death. The sentence varies considerably based on the circumstances of the crime. Those circumstances, however, are not encompassed in the determination of guilt. See *Mitchell* v. *United States*, 119 S. Ct. 1307, 1314 (1999) (after a valid plea of guilty under federal drug statutes, "[p]etitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime").

Like the state law at issue here, Section 841 reflects a legislative judgment that certain elements are necessary to constitute a criminal "offense," without proof of which no punishment is warranted, while other factors are highly relevant to setting an appropriate sentence. Congress's very separation of those factors, such as type and quantity of particular drugs, into separate sentencing provisions demonstrates a judgment that they are not essential to the finding of criminality. It also furthers legitimate aims of practicality and fairness. There is no reason to require protracted proceedings before the jury to make detailed factual determinations that are important to sentencing, but collateral to guilt. And "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge*, 524 U.S. at 729.[3] The legislative judgments reflected in statutes that differentiate between elements and sentencing factors are thus legitimate and important, and should not be lightly set aside.

2. There is, moreover, no evident reason to hold that statutes embodying such judgments are constitutionally different from statutes that define an offense and then specify only the maximum penalty that the

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[3] It has been suggested that courts could deal with any risk of unfairness by "bifurcating" trials into "guilt" and "appropriate sentence" phases. See *Monge*, 524 U.S. at 739 n.1 (Scalia, J., dissenting). Routine bifurcation of non-capital trials, however, would be an extraordinarily cumbersome way to conduct the criminal process. In a complex multi-defendant drug conspiracy case, sentencing proceedings in which a jury would be asked to allocate to each co-conspirator particular types and quantities of drugs would not only be burdensome, they would risk jury confusion that would ill serve society's interest in determining a fair punishment for each individual defendant.

legislature believes appropriate for the worst offenses and offenders, while allowing judges plenary discretion within that range. When a legislature sets forth a broad range of possible punishment, it does not necessarily expect that judges will impose sentences at or near the maximum term of imprisonment in ordinary cases. Rather, the legislature can reasonably assume that sentencing judges will take into account typical factors bearing on the crime and offender, selecting harsher sentences for those offenders whose conduct and character are marked by greater social evil, and milder sentences for others.[4] If a particular judge openly declared that he or she imposed longer sentences only when offenders committed their crimes under particularly egregious circumstances, such as

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[4] Occasionally, that assumption is made explicit in a statute. See 27 U.S.C. 91 (Supp. III 1929) (setting penalty range for illicit transactions in liquor, "*Provided*, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law."). See *Husty* v. *United States*, 282 U.S. 694, 702-703 (1931). More commonly, "[s]entencing and parole release decisions * * * have largely been left to the unfettered discretion of the officials involved. Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. * * * In effect, sentencing policymaking has traditionally been delegated to a multitude of independent judges to be exercised in the context of individual cases. There has been no attempt to separate policymaking from individual sentencing determinations. * * * [W]hich factors should be considered, under what circumstances, and how they are to be weighted are decisions left solely to the unfettered discretion of the individual decisionmakers." *Bullington* v. *Missouri*, 451 U.S. 430, 443 n.16 (1981) (quoting Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89, 96 (1978) (footnotes omitted)).

because of racial hatred, it would not change the underlying criminal offense by adding an element of "racial bias." Rather, it would embody the sort of reasoned judgment that legislatures ordinarily expect sentencing courts to make.

The result should not be different where, to mirror or standardize existing practice, the legislature imposes explicit statutory constraints on the discretion otherwise accorded sentencing courts. See *Witte*, 515 U.S. at 401-402; *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."). The specification of a sentencing enhancement does not alter the inherent nature of the underlying crime, regardless of whether the factor is identified in a sentencing proceeding by a judge or in a statute by the legislature. And it is difficult to see why a sentence that is constitutionally permissible if selected by a judge exercising unlimited discretion becomes constitutionally impermissible because the judge was permitted to select it only after making a statutorily specified threshold finding.

We agree with the observation that this Court's constitutional analysis should not turn on mere formalities in the way a legislature frames or organizes its criminal statutes. See, *e.g.*, *Jones*, 526 U.S. at 267 (Kennedy, J. dissenting); *Monge*, 524 U.S. at 741 (Scalia, J., dissenting). Constitutional rights should not be controlled by labels. For essentially that reason, however, it should not matter whether a legislature has provided a high overall statutory maximum, with the expectation that implicit "sentencing factors" will determine where in the range the judge will fix the punishment, or has itself provided graduated penalties for an offense that escalate incrementally depending on specified findings

made at sentencing. Indeed, the most significant difference between the two schemes is a feature of the former that works *against* the defendant: in a system of pure discretion, the sentencing judge always has the power to impose the greatest sentence available, even if the legislature intended that maximum term to be reserved for the worst offenders. It is not reasonable to hold that the Constitution requires legislatures to expose all offenders to the same maximum penalty, to be imposed or not at the discretion of the sentencing judge, rather than specifying for the judge *which* classes of offenders who commit a particular crime may receive the harshest treatment.

C. A Rule Requiring Jury Determination, Beyond A Reasonable Doubt, Of All Sentencing Factors That Raise The Maximum Authorized Term Does Not Accord With This Court's Cases

The rule proposed in *Jones* would also be at odds with the logic underlying this Court's previous holdings in closely related areas.

1. In *McMillan* v. *Pennsylvania*, this Court held that statutes may prescribe mandatory *minimum* sentences to be imposed on the basis of findings made by a judge at sentencing. There is a fundamental parallel between the judgment exercised by a legislature in prescribing a minimum sentence that *must* be imposed *if* the judge makes a specified finding, and the judgment exercised by a legislature in prescribing one or more upper ranges of sentences that *may not* be imposed *unless* the judge makes such a finding. In each case, the legislature identifies a particular factor and specifies sentencing consequences that flow from its existence. If a legislature may require a mandatory minimum sentence based on a fact proved at sentencing, it should also be entitled to preclude sentences in excess of a

particular length absent proof of a fact at sentencing. To hold otherwise would allow legislatures to constrain judicial sentencing discretion to the invariable *detriment* of criminal defendants, while forbidding them from constraining it in a manner that may *benefit* some defendants. That would be an odd manner of protecting the constitutional rights of the accused.

In *Almendarez-Torres*, the Court correctly observed that mandatory minimum sentences are generally more onerous in their effect on criminal defendants than are provisions that raise the maximum sentence available based on a particular finding at sentencing. 523 U.S. at 244-245. The Court relied on that observation and other factors in holding that increasing the maximum term based on the sentencing factor of recidivism does not violate the Constitution. *Id.* at 239-247.[5] Adoption of the *Jones* rule for all other types of sentencing factors than recidivism, however, could lead legislatures to eliminate intermediate sentencing ranges—which benefit some defendants—from their criminal statutes, contenting themselves instead with simple offense definitions, wide sentencing ranges, mandatory minimums,

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[5] In *Jones*, the Court suggested that the factor of recidivism could be distinguished from all other sentencing factors because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. at 249. That distinction overlooks that the defendant on trial may dispute that the prior conviction is *his*. When identity is controverted, the vital factual question is whether the defendant *is*, in fact, a recidivist and thus subject to enhanced punishment. That finding, like all other determinations relevant to sentencing, will be made by a judge under the preponderance standard. It is true that disputes over the identity of a felon will seldom be difficult to resolve, but the proposed constitutional rule in *Jones* presumably does not turn on the ease or difficulty of proving a particular factor. Many sentencing factors may be present beyond rational dispute in a given case.

and the discretion of sentencing judges. See, *e.g.*, 18 U.S.C. 924(c) (Supp. IV 1998) (replacing former provisions that specified graduated determinate sentences based on various criteria with new provisions in which the same criteria define mandatory *minimum* sentences, with a maximum of life imprisonment for *any* version of the offense). Alternatively, a State might elect to set the greatest maximum penalty for all persons who commit a particular offense, while providing for affirmative defenses (or mitigating factors) to be proved by the defendant in order to obtain a lesser penalty. Cf. *Patterson* v. *New York*, *supra* (State may provide for an affirmative defense of extreme emotional disturbance that mitigates murder to manslaughter to be proved by the preponderance of the evidence).[6] It is doubtful that such regimes would benefit criminal defendants as a class, or advance the goals of rational and reasonably uniform sentencing.

2. As noted above, the Court has upheld the use and operation of the federal Sentencing Guidelines. *Mistretta* v. *United States*, 488 U.S. 361 (1989). Cases under the Guidelines make clear that so long as the minimum and maximum sentences prescribed by statute are observed, it is constitutionally permissible for the Guidelines to guide and channel the discretion exercised by sentencing courts—and to do so on the basis of factual findings made by the sentencing judge by a

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[6] Under *Patterson*, New Jersey could have provided for a 20-year sentence for all firearms offenses, subject to an affirmative defense that lowered the maximum term to ten years where the use of the firearm was not motived by racial bias, did not result in bodily injury, was not stolen, did not function automatically, and so forth. A State that adopted such a regime of affirmative defenses could put the burden of persuasion on the defendant, in contrast to New Jersey's current requirement that the State bear the burden of proof.

preponderance of the evidence. See, *e.g.*, *Edwards*, 523 U.S. at 513-514; *Watts*, 519 U.S. at 155-156; *Witte*, 515 U.S. at 400-404; see also note 2, *supra*. The sentencing ranges set by the Guidelines operate as legal constraints on the sentencing court. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). The judge is ordinarily limited to the maximum term set by the applicable Guidelines range, unless the range exceeds the statutory maximum term or there are grounds to depart upward. See *Koon* v. *United States*, 518 U.S. 81, 92-93 (1996); *United States* v. *R.L.C.*, 503 U.S. 291, 306-307 (1992).

The Constitution thus permits legislatures to set determinate sentences; to set only broad sentencing ranges, leaving all subsidiary determinations to the unguided discretion of the sentencing judge; or to set overall maximum and minimum sentences, and then require judges to abide by intermediate sentencing ranges established by a sentencing commission (subject to departures in extraordinary cases). The *Jones* rule, however, would essentially forbid the legislature from mandating sentencing ranges within an overall maximum term, with no departures from those ranges allowed, unless the court treated each fact that made a defendant eligible for a higher range as if it were an element of an aggravated offense. The constitutional principle that would require those distinctions is elusive at best.

3. Finally, as *Jones* acknowledges, 526 U.S. at 251, the proposed rule is in at least considerable tension with the Court's consistent holdings in capital cases that the aggravating factors necessary to impose a death sentence need not be made "elements" of the capital offenses in question, and may be found by sentencing judges (or even by an appellate court). See, *e.g.*, *Walton* v. *Arizona*, 497 U.S. 639, 645, 647-649

(1990); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam); *Cabana* v. *Bullock*, 474 U.S. 376, 385-386 & n.3 (1986) ("while the Eighth Amendment prohibits the execution of * * * defendants [in the absence of predicate findings], it does not supply a new element of the crime of capital murder that must be found by the jury"; rather, it places "a substantive limitation on sentencing" that "need not be enforced by the jury."); *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984).[7]

Such findings are not simply factors that guide the "choice between a greater and a lesser penalty." *Jones*, 526 U.S. at 251. They are mandatory matters necessary to increase the sentencing range from life to death.[8]

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[7] The Court reaffirmed that principle in *Hopkins* v. *Reeves*, 524 U.S. 88, 100 (1998), with respect to the intent findings required for a capital sentence. The Court explained that the Eighth Amendment rule requiring a "culpable mental state" for a capital sentence "does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury . . . and does not affect the state's definition of any substantive offense." *Id.* at 100 (quoting *Cabana*, 474 U.S. at 385). A State may therefore comply with the mental-state requirement "at sentencing or even on appeal." 524 U.S. at 100.

[8] See *Lowenfield* v. *Phelps*, 484 U.S. 231, 244-246 (1988). *Jones* based its analysis (526 U.S. at 251) on language in *Walton*, 497 U.S. at 648, which stated: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Walton*, however, does not support the analysis in *Jones*. *Walton* quoted *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986), which in turn quoted the phrase "standards to guide the making of [the] choice" from *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981). Both *Poland* and *Bullington* make clear that the finding of at least one aggravating circumstances is a prerequisite to a capital sentence. See *Poland*, 476 U.S. at 156 (in Arizona "the sentencer must find some aggravating circumstances before the death penalty may be imposed'); *Bullington*, 451 U.S. at 439, 441 n.15 (noting that the jury was required, after finding guilt, to find

See *Jones* v. *United States*, 119 S. Ct. 2090, 2097-2098 (1999) (describing the intent and aggravating factors in the Federal Death Penalty Act, 18 U.S.C. 3591 *et seq.*, that made the defendant "death-eligible," and distinguishing those prerequisites from the process of "weighing" aggravating and mitigating factors in the "selection decision" between life and death). Judges, rather than juries, may therefore make findings that are legislatively and constitutionally essential before a defendant may be sentenced to death. It would be a strange constitutional regime that permitted that process, yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment.

D. There Is No Justification For Adopting The Constitutional Rule Proposed In *Jones*

All of these considerations might be overborne if there were a compelling reason for adopting the rule suggested in *Jones*. No showing has been made, however, of any danger to liberty that would justify it.

1. The constitutional concerns voiced in *Jones* relate to the due process requirement of proof beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 364 (1970), and the Sixth Amendment right to trial by jury. See 526 U.S. at 242. With respect to due process, the Court noted a concern that unlimited legislative control over sentencing factors that raise the maximum term could permit a State "to manipulate its way out of *Winship*," *id.* at 243, by permitting guilt to be found on

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"additional facts in order to justify the particular sentence," and distinguishing *Stroud* v. *United States*, 251 U.S. 15 (1919), on the ground that "Stroud's jury was not required to find any facts in addition to those necessary for a conviction for first-degree murder in order to sentence him to death.").

less than proof beyond a reasonable doubt. See *id.* at 240-241 (characterizing *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), as resting in part on this view). The *Jones* Court also observed that *Patterson* v. *New York*, 432 U.S. 197, 210 (1977), while rejecting a *Winship* challenge, had nonetheless recognized that there is a constitutional "limit on state authority to reallocate traditional burdens of proof." 526 U.S. at 243. Neither the cited cases nor their underlying principles, however, support a constitutional rule as broadly defined as the one advanced in *Jones*.

In *Mullaney* v. *Wilbur*, the Court held only that a State that defines a particular fact as an element of an offense may not then dispense with proving that element to the jury by relying wholly on a presumption arising from proof of other facts. In *Patterson*, where the Court upheld the treatment of extreme emotional disturbance as an "affirmative defense" that reduced murder to manslaughter, the Court took pains to indicate that the reach of *Mullaney* went no farther than its ban on conclusive presumptions. *Patterson* declined to "disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." 432 U.S. at 210. The Court then observed that "there are obviously constitutional limits beyond which the States may not go." *Ibid.* But the limits that the Court had in mind involved abrogation of the presumption of innocence.[9]

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[9] Immediately after its reference to "constitutional limits," *Patterson* stated: "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. The legislature cannot validly command that the finding of an indictment, or mere proof of the identity of the accused, should

See *McMillan*, 477 U.S. at 86-87 (*Patterson*, in responding to the concern that its holding would enable a State to have "unbridled power to redefine crimes to the detriment of criminal defendants," reaffirmed "the unremarkable proposition that the Due Process Clause precludes States from discarding the presumption of innocence.").

The presumption of innocence has not been discarded in this case. "Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears." *Delo* v. *Lashley*, 507 U.S. 272, 278 (1993) (per curiam). Petitioner was found guilty based on his plea acknowledging commission of the elements of the offense; had he not so pleaded, he would have been exposed to sentencing (including any enhancement for biased motive) only if he were found guilty beyond a reasonable doubt of the charged offense. "Once the reasonable doubt standard has been applied to obtain a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him." *McMillan*, 477 U.S. at 92 n.8.

2. With respect to the defendant's right to a jury trial, *Jones* expressed concern about the "practical implications" of allowing legislatures to enact statutory enhancement factors. 526 U.S. at 243. Noting that enhancement factors may significantly increase the

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create a presumption of the existence of all the facts essential to guilt." 432 U.S. at 210 (citations omitted). The Court has adhered to the principle that a State may not erect a conclusive presumption that a particular element of a crime may be presumed from proof of another element. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Carella* v. *California*, 491 U.S. 263, 265 (1989) (per curiam). That principle, however, is not implicated by a State's explicit determination that a particular fact, though germane to sentencing, is not relevant to guilt at all.

range of available punishment, the Court raised the question "whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244. Reliance on statutory sentencing factors to enhance a range does make a particular sentence turn on nonjury determinations. But that does not distinguish such a case from any other in which a range of sentences is authorized. Neither approach impairs the defendant's right to a jury trial. A defendant who pleads not guilty, and who exercises his right to a jury trial, may not be sentenced unless he is found guilty by a jury. While additional facts proved at sentencing may enhance his punishment, "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93.

The situation of a defendant exposed to an enhanced maximum sentence based on a statutory sentencing factor is functionally identical to the situation of a defendant exposed to a particular sentence based on factors that a court must find, under binding sentencing guidelines, within the same overall statutory range. The situation also resembles a scheme involving the same overall range and traditional discretionary sentencing carried out by the judge alone. The jury's finding of guilt in all of these regimes "open[s] the door" to a long prison sentence, up to and including life imprisonment, based on facts found at sentencing; but the jury finding that authorizes such sentencing cannot be described in any of them as "low-level gatekeeping." *Jones*, 526 U.S. at 244.

Nothing in this analysis detracts from the historical and contemporary importance of the right to trial by jury. That history, however, does not directly illumi-

nate the present issue, as the *Jones* Court acknowledged. 526 U.S. at 244. Rather, the significant historical lesson is found in the long-accepted and fundamental divide in our criminal justice system between the adjudication of guilt and the fixing of an appropriate punishment. The rigorous safeguards that the Constitution provides for the determination of guilt serve to protect the innocent, even at the expense of sometimes freeing the guilty, and to prevent arbitrary exercises of power by government. See *Winship*, 397 U.S. at 372 (Harlan, J., concurring) (discussing the reasonable-doubt principle); *Douglas* v. *Louisiana*, 391 U.S. 145, 151-154 (1968) (discussing purpose of the jury guarantee). Those same protections do not, however, apply at sentencing.

That is not because sentencing is not a serious matter. Rather, it is because sentencing implicates society's compelling interest in fashioning an appropriate punishment for the guilty that is consistent with the protection of the community. The government has complied with the core procedures required to attach social stigma to the defendant's acts and to deprive him of liberty; the question then becomes one of the *degree* of that deprivation. In making that determination, there is no longer the risk of punishing an innocent person, and the paramount consideration becomes society's interest in making the sentencing decision based on full and complete information, as assessed by a judge with whatever guidance the legislature chooses to provide.

The sentencing process does not take place in a constitutional vacuum. The Due Process Clause protects a defendant against being sentenced based on "misinformation of a constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-743 (1948). The Fifth Amendment protects against drawing an adverse inference about

the facts of an offense based on a defendant's silence at sentencing. *Mitchell* v. *United States*, 119 S. Ct. 1307, 1316 (1990). The First Amendment protects against imposing sentence based on a defendant's "abstract beliefs." *Dawson* v. *Delaware*, 503 U.S. 159, 167 (1992). And the Eighth Amendment provides a proportionality check that serves to prevent the imposition of a sentence grossly disproportionate to the offender's crime. *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (plurality opinion); cf. *United States* v. *Bajakajian*, 524 U.S. 321 (1998) (excessive fines).

In light of that background, a legislature's decision to specify factors that will raise the authorized level of punishment in some cases, as compared to others, does not risk eroding constitutional rights to a point "against which a line must necessarily be drawn." 526 U.S. at 244. Rather, it provides a mechanism for society to obtain a fair and proper punishment for an individual found guilty of crime. As the Court has reiterated in the context of Double Jeopardy challenges to applications of the federal Sentencing Guidelines, a defendant is properly punished only for an offense of which he has been convicted—no matter what other conduct or character factors may be taken into account in setting a sentence within the range authorized for that offense. See *Watts*, *supra*; *Witte*, *supra*; see also, *e.g.*, *Williams* v. *New York*, 337 U.S. 241 (1949). There are limits to the State's authority to define conduct as criminal in the first place. See *Robinson* v. *California*, 370 U.S. 660 (1962). Those limits include the requirement that citizens must have fair notice that specified conduct is against the law. See, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). And, although a State need not conform its definition of crimes to the common law, there may also be limits on a State's power radically to redefine certain crimes. See *Jones*, 526 U.S. at 240-

241 (suggesting that State may "lack[] the discretion to omit 'traditional' elements from the definition of crimes"); cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 246 (1998) (noting that provisions at issue did not "change a pre-existing definition of a well-established crime"); *McMillan*, 477 U.S. at 90 (similar).

If, however, a defendant has been properly charged with a valid offense defined by the legislature, and has pleaded guilty to that offense or been found guilty by a jury, the Constitution permits the sentencing court to take account of any relevant information it has available concerning the defendant's conduct or character, and to impose any sentence authorized by law. It also permits a legislature to guide and limit the judge's sentencing discretion by specifying a fixed sentence, or through mandatory guidelines. It should make no constitutional difference if a statute instead specifies facts that, if found by the sentencing court, will increase the maximum authorized sentence.

CONCLUSION

The judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted.

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