No. 07-901

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakeley* v. *Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by that defendant.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal sentences are imposed in accordance with the Constitution, and are based on consideration of the defendant as an individual presenting a "unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall* v. *United States*, 128 S. Ct. 586, 598 (2007).

The ineluctable consequences of post-verdict judicial factfinding are that the sentence increases and that the judge can no longer exercise his sense of justice and mercy when sentencing an individual defendant. NACDL's membership has long relied

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have been given timely notice of the filing of this brief, and letters of consent have been filed with the Clerk.

upon the jury's factfinding role as one of the vital means of ensuring the balance between these principles of justice and mercy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

SUMMARY OF ARGUMENT

This case presents a straight-forward question under this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and related cases. An Oregon jury convicted Respondent of multiple crimes. At sentencing, the judge made additional findings of fact by a preponderance of the evidence about the offenses and what they reflected about the defendant's state of mind. *See State* v. *Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008); Or. Rev. Stat. Ann. § 137.123(2), (5). The judge then imposed consecutive sentences for certain of Respondent's convictions. Does the fact that the judge considered facts, other than a prior conviction, exposing Respondent to a sentence beyond the statutory maximum violate the Sixth Amendment? That is the question before this Court.

A criminal defendant in Oregon is entitled to concurrent sentences *unless* the judge makes certain factual findings. Or. Rev. Stat. Ann. § 137.123. The jury's verdict alone plainly does not sanction consecutive sentencing. Oregon law authorizes a court to impose consecutive sentences after judicial factfinding, regardless of whether this increases a term of incarceration beyond the maximum authorized for any single offense for which a defendant was convicted. This violates the Sixth Amendment, as the court below found.

Moreover, Oregon's sentencing statute reflects a dramatic departure from historical practices, one

taken by only a few other states. At common law, judges generally were vested with full discretion to order that multiple sentences be served consecutively or concurrently. As a result, all criminal offenses incorporated the possibility of consecutive sentencing as part of the potential maximum punishment, and so consecutive sentencing was authorized by the jury's verdict alone. This practice comports with the Sixth Amendment and this Court's *Apprendi* line of cases. Today, nearly every state employs a sentencing practice grounded on this historical practice of judicial discretion. Therefore, affirming the ruling below will affect at most the handful of states that have dramatically departed from this practice. Finally, many states have revised their sentencing schemes in ways that conform to the Constitution, and so affirming the ruling below will not prevent states from engaging in appropriate sentencing reform.

ARGUMENT

I. THE OREGON SUPREME COURT'S DECISION ACCORDS WITH THIS COURT'S DECISIONS.

This Court's case law states that any fact that exposes the defendant to a punishment beyond the prescribed statutory maximum must be proved beyond a reasonable doubt to the jury. Under Oregon's consecutive sentencing statute, the court may impose a consecutive sentence only if it finds certain facts about the offenses and what they reflect about the defendant's state of mind. *See* Or. Rev. Stat. Ann. § 137.123(2), (5); *State* v. *Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008). The Oregon Supreme Court overturned Respondent's sentence on the ground that Oregon's consecutive sentence statute violated the Sixth Amendment and

this Court's decisions in *Apprendi* and *Blakely* v. *Washington*, 542 U.S. 296 (2004). This Court should affirm the judgment below.

a. The "rule" articulated in *Apprendi* is that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490). This Court clarified in *Blakely* that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original).

The Oregon statute at issue here plainly violates this rule. Sentencing regimes such as Oregon's impermissibly encroach upon the jury's fact-finding function, as the Oregon Supreme Court rightly recognized. Under Oregon's sentencing statute, "[a] sentence *shall* be deemed to be a concurrent term *unless* the judgment expressly provides for consecutive sentences" and is accompanied by specific statutorily-required findings of fact. Or. Rev. Stat. Ann. § 137.123(1) (emphasis added). Because the court must find that the defendant's actions indicated a "willingness to commit more than one criminal offense," or "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim . . . than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct," *id.* § 137.123(5)(a)-(b), imposing consecutive sentences is "contingent on the finding" of an aggravating factor. *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002).

The existence of such aggravating factors is precisely the type of finding that a jury must make beyond a reasonable doubt under *Apprendi*. Oregon's

statute, however, requires a judge to make such findings under a preponderance of the evidence standard, even though these facts expose defendants to significantly increased punishment.[2] Or. Rev. Stat. Ann. § 137.123. The Oregon Supreme Court correctly determined that a consecutive sentence "necessarily expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Ice*, 170 P.3d at 1058 (quoting *Apprendi*, 530 U.S. at 494), "and thereby violates the principles discussed in *Apprendi* and *Blakely*." *Id.*

A finding of "willingness to commit more than one criminal offense," Or. Rev. Stat. Ann. §137.123(5)(a), reflects the defendant's intent or state of mind, which this Court recognized in *Apprendi* as "perhaps as close as one might hope to come to a core criminal offense 'element.'" 530 U.S. at 493. The fact that Oregon's system strips defendants of basic constitutional protections is particularly troubling where, as here, the required findings involve the defendant's *mens rea.*

In response to this reading, the State reverts to a re-labeling defense, characterizing the Oregon sentencing statutes as setting forth sentencing "factors" rather than "elements" of a substantive crime.[3]

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[2] In Respondent's case, the consecutive sentences imposed by the trial judge more than tripled his sentence, from 90 months (the longest sentence, imposed on count 5) to more than twenty years. *See* App. 26, 38-45.

[3] The Petitioner and *amici* Sentencing Law Scholars also attempt to distinguish the elements of an offense and maximum sentencing from aggregate maximum sentencing. *See* Pet'r's. Br. This argument fails. There is a qualitative difference between an aggregate sentence for multiple offenses and the maximum sentence for a single offense. The jury's verdict qualifies a defendant for the aggregate *total*. Thus, the facts as

Pet'r's. Br. at 20-25, 28. As the Oregon Supreme Court recognized, this distinction cannot bear scrutiny. *Ice*, 170 P.3d at 1056; *see also Blakely*, 542 U.S. at 306; 6 Wayne R. LaFave et al., *Criminal Procedure* § 26.4(i) (3d ed. 2007). For illustration, compare *Ice* with *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). *Almendarez-Torres* held that recidivism, "as typical a sentencing factor as one might imagine," is not an element of the crime of unlawful reentry after deportation under 8 U.S.C. § 1326.[4] 523 U.S. at 230. Furthermore, defendants rarely contest recidivism and doing so might create unfair prejudice with the jury. But in finding a defendant guilty of more than one offense, the jury will invariably determine the defendant's willingness to commit those offenses, which the defendant frequently contests.

Instead, the relevant inquiry is, as the Oregon Supreme Court correctly stated, "one not of form, but of effect," *Apprendi*, 530 U.S. at 494 (footnote omitted); namely, does "the required finding expose the defendant to a greater punishment than that authorized by

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found only serve to set the punishment within that total. But such a system cannot be distinguished from *United States* v. *Booker*, 543 U.S. 220 (2005)—as the federal Sentencing Guidelines also account for multiple crimes. *U.S. Sentencing Guidelines Manual* §§ 3D1.1-3D1.5, 5G1.2 (2007) ("U.S.S.G."); *see also Blakely*, 542 U.S. at 305 & n.9 ("Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid."). Here, as in *Booker*, the problem is both the mandatory nature of the factfinding and the type and kind of the facts being found. *Apprendi*, 530 U.S. at 490. The Oregon court correctly read this Court's precedent and concluded that "[i]t would be wrong for us to engage in an adamantine refusal to get the message." *Ice*, 170 P.3d at 1059.

[4] A prior conviction, of course, "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones* v. *United States*, 526 U.S. 227, 249 (1999).

the jury's guilty verdict"? *Id.* Here, the answer is unequivocally "yes." The court's finding of the statutory aggravating factors exposed Respondent to a sentence greater than the statutory maximum sentence – in this case, concurrent sentences – that he would have faced without such findings. As the Oregon Supreme Court held, the consecutive sentencing regime violated Respondent's Sixth Amendment rights.

c. Oregon can remedy its unconstitutional statute easily. As several states have done already, Oregon could sever the offending mandatory statutory provision and make its sentencing regime purely advisory, thus resorting to the judicial discretion practiced historically in this area of the law. Alternatively, the State could amend the statute to require that aggravating factors be tried to the jury. A third possibility may be to require that *all* sentences (or none) be served concurrently, or that particular offenses always (or never) are to be served concurrently. Any of these approaches would remedy the Sixth Amendment violation of the statute as written. *See, e.g., Kimbrough* v. *United States*, 128 S. Ct. 558, 577 (2007) (Thomas, J., dissenting) (severing "unconstitutional applications of statutory provisions . . . would have achieved compliance with the Sixth Amendment while doing the least amount of violence to the . . . sentencing regime" the legislature enacted).

This Court should affirm the decision of the Oregon Supreme Court. That court correctly held that Oregon's consecutive sentencing statute violates the Sixth Amendment as construed in this Court's decisions in *Apprendi* and related decisions. Affirming the State court will have minimal impact on the State but will bring the State into compliance with *Blakely*.

II. AFFIRMING THE OREGON SUPREME COURT WILL AFFECT ONLY A HANDFUL OF STATES, AND WILL NOT UNDERMINE SENTENCING REFORM EFFORTS.

Contrary to the implications of the *amici* States, *Amici* States Br. at 4-15, affirming the court below will affect the statutes only of a handful of states and will not restrict states' latitude to engage in substantive sentencing reform that conforms to the Constitution. Only a handful of states substantially deviate from the longstanding historical practice of vesting judges with wide discretion to determine whether multiple criminal sentences are to be served consecutively. As the historical practice conforms to the Sixth Amendment's requirement that maximum criminal penalties be authorized by jury verdicts, affirming the Oregon Supreme Court's Sixth Amendment analysis would affect the statutes only of the handful of States that *require* specific judicial fact-finding before ordering consecutive sentencing.

a. *Amicus* substantially adopts Petitioner's description of historical sentencing practices at common law. Pet'r's. Br. at 29-52. Put simply, petit juries long have determined guilt for offenses, and sentences generally were specified at law for each such offense at common law. *Id.* at 40-42. Judges merely ordered the appropriate, defined sentence, and determined, where appropriate, whether the sentences for multiple offenses should be served concurrently or consecutively. *Id.* Thus, judges in most common law jurisdictions possessed unfettered authority to order that multiple sentences be served consecutively or concurrently. *Id.* at 42-51. Looked at another way, criminal offenses historically incorporated consecutive sentencing as part of their maximum potential sentence.

Most of the States (and the federal government[5]) have not substantially deviated from historical practices regarding consecutive and concurrent sentences. In forty-seven states, courts are authorized to order that multiple criminal sentences be served consecutively (except where consecutive sentencing is expressly barred) *without* finding additional facts not found by a jury.

A large group of forty-four states generally leave it to the judge's discretion to determine whether multiple criminal sentences should be served consecutively or concurrently. More specifically, judges in thirteen of these states essentially have unfettered discretion to order that sentences be served consecutively or concurrently.[6] The remaining 31 states modify only slightly the historical role of judges in determining the type of sentence to be served. Three states preserve judicial discretion but provide that consecutive sentences are the default choice[7] unless the judge

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[5] U.S.S.G. § 5G1.2 (establishing advisory scheme to determine whether to impose multiple sentences consecutively). *See also* U.C.M.J. arts. 57, 57a (establishing judicial discretion for determining whether to suspend or defer sentences); R.C.M. 1101(c), 1107(d)(3) (establishing judicial discretion for determining whether to impose consecutive sentences in courts-martial); R.M.C. 1101(c), 1107(d)(3) (same for military commissions).

[6] Connecticut (Conn. Gen. Stat. Ann. § 53a-37); Idaho (Idaho Code Ann. § 18-308); Nebraska (Neb. Rev. Stat. § 29-2204); New Mexico (*State* v. *Lopez*, 661 P.2d 890 (N.M. Ct. App. 1983)); Ohio (*State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006)); Oklahoma (Okla. Stat. Ann. tit. 22, § 976); Pennsylvania (42 Pa. Cons. Stat. Ann. § 9721); South Carolina (S.C. Code Ann. § 16-23-490); South Dakota (S.D. Codified Laws § 22-6-6.1); Vermont (13 Vt. Stat. Ann. § 7032); Washington (Wash. Rev. Code Ann. §§ 9.94A.535, 9.94A.589(1)(2)); and Wyoming (Wyo. R. Crim. Proc. 32).

[7] Generally, these "default" choices do not circumscribe judicial discretion, but merely create a presumption where the court

orders the sentences to be served concurrently,[8] and three other states provide concurrent sentencing as the default option.[9] Twenty-two states require consecutive sentencing in certain well-defined circumstances – most commonly where the second or subsequent offense occurred in prison or otherwise was committed while an outstanding sentence remained undischarged – and provide for judicial discretion to issue consecutive sentencing in other circumstances.[10] Two states provide for a "split default" in

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passes on the question of consecutive or concurrent sentencing in silence. *See People* v. *Black*, 161 P.3d 1130, 1145 (Cal. 2007), *cert. denied* (128 S. Ct. 1063 (2008) (in interpreting California law, noting that "California's statute does not establish a presumption in favor of concurrent sentences; its requirement that concurrent sentences be imposed if the court does not specify how the terms must run merely provides for a default in the event the court fails to exercise its discretion.").

[8] Alabama (Ala. Code § 14-4-9); Virginia (Va. Code Ann. § 19.2-308); and West Virginia (W. Va. Code Ann. § 61-11-21).

[9] California (Cal. Penal Code § 669); Georgia (Ga. Code Ann. § 17-10-10); and Minnesota (*State* v. *Murphy*, 545 N.W.2d 909 (Minn. 1996) (en banc) (per curiam)).

[10] Alaska (Alaska Stat. Ann. § 12.55.127) (default concurrent); Arkansas (Ark. Code Ann. § 5-4-403) (default concurrent, and authorizing juries to suggest consecutive sentencing); Arizona (Ariz. Rev. Stat. Ann. § 13-708) (default consecutive); Colorado (Col. Rev. Stat. Ann. § 18-1.2-406); Florida (Fla. Stat. Ann. § 921.16) (default concurrent); Idaho (Idaho Code Ann. § 18-308); Illinois (730 Ill. Comp. Stat. Ann. 5/5-8-4) (mandating consecutive sentencing for certain offenses, and otherwise requiring court to review certain factors before ordering multiple sentences to run consecutively); Kansas (Kan. Stat. Ann. § 21-4608); Kentucky (Ken. Rev. Stat. Ann. § 532.110); Maryland (Md. Rules 4-351; Md. Code Ann., Corr. Servs. § 9-201); Massachusetts (Mass. Gen. Laws Ann. ch. 90, § 24V); Mississippi (Miss. Code Ann. § 99-19-21); Missouri (Mo. Ann. Stat. § 558.026) (default concurrent); Montana (Mont. Code Ann. § 46-18-401) (default consecutive); Nevada (Nev. Rev. Stat. Ann.

sentencing – retaining judicial discretion but providing that consecutive sentencing is the default option if the offenses arise from different transactions or at different times, and that concurrent sentencing is the default when the offenses arise from the same set of facts and circumstances.[11] Finally, one state – Indiana – has amended its sentencing scheme to incorporate "advisory" sentences, which require judges to make certain legislatively-denoted findings as to aggravating and mitigating factors, but authorizing judges to order that sentences be served concurrently or consecutively regardless of their findings. Ind. Code Ann. §§ 35-50-1-2(c), 35-38-1-7.1(d)(1); *Howell v. State*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006).

In addition to the forty-four states discussed above, a smaller group of three states have devised statutory schemes restricting judicial discretion to issue consecutive or concurrent sentencing in ways that do not depend on judicial fact-finding. Two states – Michigan and New York – mandate concurrent sentencing in certain well-defined circumstances, but do not base this determination on judicial factfinding.[12] Mean-

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§ 176.035) (default concurrent); New Jersey (N.J. Stat. Ann. § 2C:44-5); North Carolina (N.C. Gen. Stat. Ann. § 15A-1354) (default concurrent); North Dakota (N.D. Cent. Code Ann. § 12.1-32-11 (default concurrent); Rhode Island (R.I. Gen. Laws § 12-19-5); Texas (Tex. Code Crim. Proc. Ann. art. 42.08); Utah (Utah Code Ann. § 76-3-401); and Wisconsin (Wis. Stat. Ann. § 973.15).

[11] Hawai'i (Haw. Rev. Stat. Ann. § 706-668.5); Louisiana (La. Code Crim. Proc. Ann. art. 883).

[12] Michigan (Mich. Comp. Laws Ann. § 768.7b) (mandating concurrent sentencing except where statute expressly provides otherwise); New York (N.Y. Penal Law § 70.25) (default concurrent with mandatory concurrent sentencing in certain circumstances).

while, Delaware restricts judicial discretion by requiring consecutive sentencing in all circumstances.[13]

The historical practice of determining consecutive or concurrent sentencing broadly conforms to the Sixth Amendment. Where judges are vested with the discretion to issue consecutive or concurrent sentences, the possibility of consecutive sentencing is incorporated into every eligible criminal offense, and so consecutive sentencing is authorized by the jury's verdict alone. The fact that many states have expressly required consecutive sentencing for particular offenses does not affect this analysis, for in those circumstances the eligibility *vel non* of consecutive sentencing is expressly incorporated into particular statutes or particular offenses, and is authorized by the jury's verdict alone. *See also* LaFave, *supra*, § 26.4(i) (discussing state sentencing regimes). Therefore the current laws of forty-seven states largely would be unaffected should the Court affirm the Oregon Supreme Court's ruling.

b. By contrast, today there are only three states – Maine and Tennessee,[14] in addition to Oregon – whose sentencing statutes strongly deviate from historical practice by predicating the authority to order consecutive sentencing on judicial factfinding beyond the jury verdict.[15] In each of those states,

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[13] Delaware (Del. Code Ann. § 3901(d)).

[14] In addition to Oregon's Supreme Court, the courts of Ohio and Washington have held unconstitutional sentencing statutes requiring judicial factfinding before consecutive sentences may be ordered. *In re Personal Restraint of VanDelft*, 147 P.3d 573 (Wash. 2006), *cert. denied*, 127 S. Ct. 2876 (2007); *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006).

[15] Indiana (Ind. Code Ann. §§ 35-38-1-7.1, 35-50-1-1.3); Maine (Me. Rev. Stat. Ann. tit. 17-A, § 1256; *State* v. *Keene*, 927 A.2d

judges *may not* order that multiple sentences be served consecutively *unless* the judge makes certain legislatively-mandated findings of fact regarding the nature of the criminal offense which were *not* found by a jury.

Not surprisingly, the concurrent/consecutive sentencing schemes of these states bear a strong resemblance to the pre-*Booker* mandatory Sentencing Guidelines. For instance, Tennessee law expressly allows a judge to order sentences to run consecutively in most instances only

> if the court finds by a preponderance of the evidence that: (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood; (2) The defendant is an offender whose record of criminal activity is extensive; (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences; (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's

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398 (Me. 2007)); Tennessee (Tenn. Code Ann. § 40-35-115; *State* v. *Allen*, __ S.W.3d __, 2008 WL 2497001 (Tenn. June 24, 2008)).

> undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims; (6) The defendant is sentenced for an offense committed while on probation; or (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7). Tennessee's Supreme Court recently affirmed the constitutionality of this provision by asserting that *Apprendi* applied only to individual sentencing, and that Tennessee's consecutive sentencing law does not implicate the statutory maximum sentence for any given offense. *State* v. *Allen*, __ S.W.3d __, 2008 WL 2497001, at *17-18 (Tenn. June 24, 2008) (relying on *State* v. *Keene*, 927 A.2d 398, 407-08 (Me. 2007) and the dissenting opinion below, *Ice*, 170 P.3d at 1059, 1062). However, Tennessee's Supreme Court noted that the issue would be decided ultimately by this Court's decision in the present case. *Allen*, ___ S.W.3d ___, 2008 WL 2497001, at *17.

Similarly, Maine's legislature forbids courts to order consecutive sentencing unless, *inter alia*, "the convictions are for offenses based on different conduct or arising from different criminal episodes," and courts may not issue consecutive sentencing "for crimes arising out of the same criminal episode when," *inter alia*, "[i]nconsistent findings of fact are required the establish the commission of the crimes." Me. Rev. Stat. Ann. tit. 17-A, § 1256(2)-(3). Maine's law differs from those of states that have merely established defaults because Maine's scheme prohibits consecutive sentencing without further judicial fact-finding, while the "default" states do not circumscribe judicial discretion to impose consecutive sentencing. *Compare id.*, *with* Haw. Rev. Stat. Ann. § 706-668.5, *and* La. Code Crim. Proc. Ann. art. 883.

Thus, the laws of Maine and Tennessee require courts to engage in judicial factfinding outside of the jury before they are authorized to order consecutive sentencing. Put another way, criminal sentences authorized by jury verdicts in these states do not incorporate consecutive sentencing as part of the statutory maximum penalty because a court may order that multiple sentences be served consecutively only through additional judicial fact-finding. But it is clear that consecutive sentencing could well exceed the statutory maximum penalty for any individual offense of which the defendant was convicted.

Moreover, the factfinding required in Tennessee and Maine goes far beyond the simple prior criminal history factfinding that *Apprendi* authorizes. *Apprendi*, 530 U.S. at 490. Consequently, the sentencing schemes of Maine and Tennessee strongly resemble the Oregon statute at issue here, and the sentencing regimes of all three states would be affected directly if the court below is affirmed.

c. Contrary to the arguments of the *amici* States, *Amici* States Br. at 4-6, affirming the Oregon Supreme Court's decision would not substantially limit a legislature's authority to enact sentencing reform in conformity with the Constitution, nor would it overturn traditional sentencing practices or require states to submit facts relevant to consecutive or concurrent sentencing to the jury. As this Court has made clear with respect to the federal Sentencing Guidelines, courts may consider legislatively-enumerated factors when determining appropriate criminal sentences without submitting the facts to the jury where the jury's verdict itself authorizes sentences up to the statutory maximum. *See, e.g., United States* v. *Booker*, 543 U.S. 220, 243-44, 258-67 (2005).

Just as the federal Sentencing Guidelines are advisory post-*Booker*, and federal judges are required to apply the Guidelines correctly but may issue any reasonable sentence within the prescribed range up to the statutory maximum, so too there would be little difficulty in allowing states to enumerate factors that courts must consider when determining whether to order multiple sentences to be served consecutively. Indeed, as the State *amici* themselves admit, Indiana already operates such a system. States *Amici* Br. at 7. *See also* Ind. Code Ann. §§ 35-50-1-2(c), 35-38-1-7.1(d).

Furthermore, a policy preference for greater predictability and uniformity of sentencing would not be impaired by affirming the Oregon Supreme Court. In fact, some states already restrict judicial discretion to issue consecutive or concurrent sentences in particular circumstances without mandating the sort of judicial fact-finding prohibited by *Apprendi*. For instance, Delaware requires that all multiple sentences be served consecutively, Del. Code Ann. § 901(d), while states such as Kentucky, North Dakota, and Vermont have placed restrictions on the maximum aggregate sentence that may be imposed if consecutive sentencing is ordered. *See* Ky. Rev. Stat. Ann. § 532.110 (limits on certain aggregate consecutive sentences); N.D. Cent. Code Ann. § 12.1-32-11 (establishing cap on aggregate consecutive sentences for misdemeanors); 13 Vt. Stat. Ann. § 7032 (establishing minimum and maximum terms for concurrent and consecutive sentencing). Consequently, the states would retain significant latitude to conduct sentencing reform in conformance with the Constitution if the decision below is affirmed.

Moreover, the traditional sentencing practice that most states continue to follow provides broad judicial

discretion to order consecutive or concurrent sentencing, except where specific sentencing is mandated for particular offenses. The existence of such judicial discretion indicates that every offense (except those for which the state legislature mandates concurrent sentencing) incorporates consecutive sentencing for multiple convictions as part of the statutory maximum sentence. Consequently, affirming the Oregon Supreme Court's decision would not undermine the traditional practice of allowing judges the discretion to determine whether multiple sentences should be served consecutively or concurrently.

d. In short, affirming the Oregon Supreme Court would directly affect only the three states (including Oregon) that have enacted sentencing schemes that radically depart from historical practice. The sentencing laws of the other forty-seven states would not be affected in a material way by affirming the decision below, and all of the states would retain sufficient and substantial latitude to enact meaningful sentencing reform within the bounds of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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