No. 99-478

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. APPRENDI, JR.,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

BRIEF OF *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE, IN SUPPORT OF RESPONDENT

Filed February 14, 2000

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I. STATEMENT OF *AMICUS CURIAE* INTEREST

The Anti-Defamation League ("ADL"),[1] one of the nation's oldest civil rights/human relations organizations, was founded in 1913 "to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all.

ADL has long been in the forefront on national and state efforts to deter and counter hate-motivated crimes. In 1981, after three years in which there was an alarming, nationwide increase in anti-Semitic violence, the ADL drafted and published model legislation dealing with all hate-motivated crimes. The model calls for penalty enhancement for hate-motivated crimes. Currently, forty states and the District of Columbia have enacted laws based on, or similar to, the ADL model. There is also a federal sentencing counterpart. ADL has successfully defended the constitutionality of the penalty-enhancement approach in *amicus* briefs filed nationwide, including before this Court in *Wisconsin v. Mitchell*. ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty-enhancement legislation to combat hate-motivated crime.

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[1] ADL files this brief with the consent of counsel for both parties. Counsel for ADL authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than ADL, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue here — N.J. STAT. ANN. § 2C:44-3(e) (West 1995), part of New Jersey's Ethnic Intimidation Act — responds to the legitimate concern that hate-motivated crimes should be subject to additional punishment because they cause distinctive and greater societal harm. When a court is sentencing a defendant convicted of pre-existing crimes, Section 2C:44-3(e) permits a court to impose an enhanced sentence if the judge finds that the State has proven that the crime was committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *State v. Apprendi,* 731 A.2d 485, 486, 487-88 (N.J. 1999) (quoting N.J. STAT. ANN. § 2C:44-3(e), as interpreted at the time of Petitioner's sentencing, and as amended).

Section 2C:44-3(e) does not diminish the role of the jury because it goes only to sentencing, does not create any new crime, or even outlaw or punish any new conduct. It applies only after a defendant is convicted of otherwise-illegal conduct. Then — just like a pecuniary-gain purpose, just like recidivism, and just like any of the other statutory factors — a defendant's hate-motivated purpose in committing a crime is treated as an aggravating factor that makes the defendant eligible for the more severe of two degrees of punishment that were already available within New Jersey's existing sentencing statutes. In this case, Petitioner fired a rifle into the home of his only African-American neighbors, Michael and Mattie Fowlkes and their three children, on multiple occasions in 1994. Upon his arrest, police discovered a number of weapons in Petitioner's home, including a rifle with laser sights and an anti-personnel bomb. Petitioner ultimately pled guilty to three of twenty-two counts of a criminal indictment: two counts of possession of a firearm for the unlawful purpose of using it against the person or property of

another; and one count of unlawful possession of a prohibited weapon, the anti-personnel bomb.

There is no dispute that criminal defendants have the right to a jury trial and proof beyond a reasonable doubt of the elements of a crime. That concern simply is not implicated here because Petitioner had such a right as to all elements of the crimes charged, including a crime with a demanding "specific intent" element. Having thus provided Petitioner with a full jury-trial right, New Jersey could properly treat a judicial finding of a hate-motivated purpose as a sentencing factor. Section 2C:44-3(e) is well supported by prior decisions of this Court that allow judges to find similar sentencing factors, including factors in capital-sentencing cases that are necessary for the imposition of the death penalty.

III. ARGUMENT

A. Our Federal System Of Government Permits New Jersey To Determine That Hate-Motivated Crimes Should Be Subject To Additional Punishment, Without Having To Create New Crimes

There is no dispute that "the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). Nor can there be any genuine dispute that although *Winship* thus requires a jury trial and proof beyond a reasonable doubt for all elements of a crime, sentencing factors can properly be decided by a judge based on a preponderance of the evidence. *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). In that regard, federalism dictates that defining and punishing crimes is much more the business of the States than the federal government, and the application of *Winship* has therefore

turned in the first instance on how the State defined the elements of the crime charged. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). There is no basis for departing from that rule here.

1. Hate-Motivated Crimes Are A Serious Problem And Cause Distinctive Societal Harm

ADL has closely tracked one type of hate-motivated incidents — anti-Semitic violence and vandalism — since 1960. In 1979, ADL began publishing an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. During just one year, 1998, 42 states and the District of Columbia reported 1,611 anti-Semitic incidents. This marked an increase of more than 2 percent in anti-Jewish activity over the prior year. In 1998, New Jersey was among the ten states with the highest incidence of reported anti-Semitic harassment, threats, and assaults. ADL statistics show that those incidents continued to rise last year.

Even standing alone, those numbers reveal a compelling national problem because of the personal and community costs behind each statistic. Of course, other groups unfortunately also are the victims of hate-motivated crimes. The FBI's most recent Hate Crime Statistics Act Report, for 1998, documented 7,775 hate-motivated crimes across the country. The majority were race-based (58%) followed by religion, sexual orientation and ethnicity. Experts argue that hate-motivated crimes are under-reported. Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 166 (Winter 1992-1993).

As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." *Wisconsin v. Mitchell*, 508 U.S. 476,

488 (1993) (quoting Blackstone, 4 W. Blackstone, Commentaries *16). Hate-motivated crimes are among the most destructive of the public safety and happiness. Such crimes have a distinctively greater societal impact than other crimes because an attack on an individual is also an attack on a larger group or community, with the purpose of harming both. They are more likely than others to cause an entire community to feel concerned for their safety, isolated and unprotected by the justice system. This results in fear, anger and suspicion — and even to crimes of retaliation. Levin, *supra*, at 167-68. "One need look no further than the recent social unrest in the nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 433 (1992) (Stevens, J., concurring).

2. New Jersey's Response To Hate-Motivated Crime Creates No New Crimes And Preserves The Right To Jury Trial On All Elements Of The Crime Charged, Including *Mens Rea*

Petitioner characterizes the statute at issue here as a "Hate-Crimes" statute and asserts that it deprived him of a jury trial on the *mens rea* element of that "crime." *Petitioner's Brief* at 3, 17, 34, 37. Although the "Hate Crimes" label might be a convenient reference, it is a misnomer here because it leads Petitioner to sidestep the central issue of this case: whether a hate-motivated purpose is a necessary element of the crime charged, such that it must be proven to a jury, even though the legislature specifically enacted it as a sentencing factor. *Petitioner's Brief* at 18 ("The 'hate' element of a hate crime cannot reasonably be characterized as a

mere sentencing consideration; it is the essence of the crime itself.")[2]

As discussed below, Petitioner's label and syllogism both are false. Section 2C:44-3(e) does not establish a "hate crime." It does not criminalize hate, racism or bigotry. Indeed, it does not create any new crime, alter the definition of any existing crime, or prohibit any new conduct. It applies only to the sentencing of a defendant that has been convicted (or, as with Petitioner, pled guilty) of otherwise-illegal conduct. As to sentencing, Section 2C:44-3(e) does not establish a new sentencing regime or a new sentencing range; it merely adds a hate-motivated purpose to the list of factors in New Jersey's pre-existing judicial sentencing regime. It therefore has no effect on the role of the jury.

Petitioner pled guilty to (among other things), violating Section 2C:39-4(a) of the New Jersey Code of Criminal Justice, possession of a firearm for an unlawful purpose. Had he not pled guilty, Petitioner would have had a full jury trial: "In order to sustain a conviction under N.J.S.A. 2C:39-4(a), the State must prove beyond a reasonable doubt the following four facts: (1) the item possessed was a 'firearm' within the meaning of N.J.S.A. 2C:39-1(f); (2) the defendant

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[2] *See also Petitioner's Brief* at 35 (Citing cases that hold as a matter of statutory interpretation that the fact in question was an element of the crime.). The fallacy that results from Petitioner's tendency to "skip" this essential part of the analysis is demonstrated by its reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), a case he asserts is "intriguingly on point." *Petitioner's Brief* at 32. However, in that case the government conceded that the fact in question, materiality, was an element of the crime. *Gaudin*, 515 U.S. at 509. As Chief Justice Rehnquist observed, that concession allowed the Court to resolve the case by syllogism; but without the concession, the outcome might have been very different. *Id.* at 524 (Rehnquist, C.J., concurring).

'possessed' it, which under N.J.S.A. 2C:2-1(c) requires knowledge or awareness of his control over the item; (3) the defendant's purpose or conscious objective was to use it against the person or property of another; and (4) the defendant intended to use it in a manner that was proscribed by law." *State v. Harmon*, 516 A.2d 1047, 1059 (N.J. 1986).

New Jersey thus afforded Petitioner a right to a jury-trial on all elements of the crime, including *mens rea*.[3] Indeed, a finding of "general intent" would not have been sufficient: the State could not convict unless the jury found proof beyond a reasonable doubt of "specific intent." *Harmon*, 516 A.2d at 1054 (The mental state required is the "pre-Code concept of 'specific intent,'. . . refine[d]. . . in a manner that sought to 'dispel the obscurity' that surrounded such concepts at common law."). By his guilty plea, Petitioner established each element and admitted to possession — on two separate occasions — of a firearm (his laser-sighted rifle) with the specific intent of using it unlawfully against the person or property of another (his only African-American neighbors, Michael and Mattie Fowlkes and their three children).[4] *Peti-*

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[3] The cases cited by Petitioner regarding mental state are therefore irrelevant. *Petitioner's Brief* at 33, 37. Those cases show no more than: (1) criminal penalties may not be imposed without some element of culpable intent; and (2) that *mens rea* element of the crime must be decided by the jury and cannot be presumed. *See Morissette v. United States*, 342 U.S. 246, 274 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978). Because Petitioner had a right to a jury trial and proof beyond a reasonable doubt of the *mens rea* element of the crime, those cases are inapplicable here. They do not support Petitioner's contention that the Constitution requires that each and every issue bearing on mental state be treated as an element of the crime. As discussed below, issues going to mental state can appropriately be treated as sentencing factors.

[4] Petitioner appears to contend that the purpose of the sentencing hearing was to determine his *mens rea* and suggests that there is genuine

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tioner's App. at 175a, 252; *State v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999) At the plea hearing, Petitioner also admitted that his unlawful purpose for shooting at the Fowlkes' house was to frighten or harass the family. Joint App. at 40-41. Thus, Petitioner cannot complain that Section 2C:44-3(e) denied him a jury trial on any element of the crime with which he was charged.

3. Section 2C:44-3(e) Merely Adds One Factor To New Jersey's Pre-existing Sentencing Scheme, Does Not Diminish The Jury's Role In Sentencing, And Does Not Alter The Scope Of Statutorily-Available Punishment

As noted, New Jersey can properly entrust sentencing to the court. *See Almendarez-Torres*, 523 U.S. at 226. The statutes that Petitioner violated do not themselves specify the punishment. For example, the statute outlawing possession of a firearm for an unlawful purpose merely states that a violation constitutes a "crime of the second degree."[5] The appropriate sentence is determined by reference to other sections of the New Jersey Code of Criminal Justice, with two alternative sentencing ranges available. First, a court may impose a sentence within the range provided in Section 2C:43-6. That range is between five and ten years for a second-degree crime. N.J. STAT. ANN. § 2C:43-6 (a)(2) (West 1995). Second, Section 2C:43-7 authorizes an "extended sentence." For a second-degree crime, the range is between ten and twenty years. N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995).

This sentencing regime is functionally identical to judicial capital-sentencing procedures that have been approved by this Court. Under such procedures, the jury determines whether the prosecution has proven beyond a reasonable doubt all of the elements of first-degree murder and, thus, guilt or innocence. Upon conviction, the jury's role ends and two degrees of punishment (life imprisonment or death) are available to the sentencing judge. The more severe penalty is available only if the judge finds one or more statutory "aggravating factors," such as where the crime was committed for pecuniary gain, or was particularly "depraved" because the defendant relished the murder. *See e.g., Walton v. Arizona*, 497 U.S. 639 (1990) (approving such a sentencing procedure).

Here, the jury's role similarly ended when Petitioner pled guilty. Of the two alternative sentencing ranges that could apply to a second-degree crime, the "enhanced" range was available if the judge found one or more aggravating factors pursuant to N.J. STAT. ANN. § 2C:44-3 (West 1995) and after a plenary hearing.[6] Thus, for example, the court

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doubt as to whether he had the capacity to form a hate-motivated purpose. *Petitioner's Brief* at 6, 22. However, Petitioner's guilty plea established the requisite *mens rea* and his present contention that he lacked mental capacity cannot stand in light of his guilty plea to a crime requiring a "specific intent" to use a firearm for an unlawful purpose against the person or property of another.

[5] That statute provides that "Any 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).

[6] Petitioner acknowledges both notice and a plenary hearing, discussing at great length the evidence he was permitted to present. *Petitioner's Brief* at 5, 6-11. Thus, *Specht v. Patterson*, 386 U.S. 605 (1967), relied on by *amicus curiae* the Rutherford Institute, is inapplicable because that case held only that notice and an opportunity to be heard (and not a jury trial) was required on sentencing issues for which a "magnified sentence" could be imposed." *Id.* at 609-610.

could have sentenced a defendant convicted of the same offense as Petitioner to imprisonment of between ten and twenty years if it found by a preponderance of the evidence that the crime had been committed for pecuniary gain; that the defendant was a persistent offender or professional criminal; or that defendant had used a firearm in committing a prior offense.[7] N.J. STAT. ANN. §§ 2C:43-7(a)(3), 2C:44-3. Those are facts that this Court has held need not be treated as elements, even if they trigger more severe punishment. *See Almendarez-Torres*, 523 U.S. 224 (1998) (recidivism); *Monge v. California*, 524 U.S. 721 (1998) (use of a deadly weapon in the commission of a prior offense where such use was not a finding necessary to the prior conviction because it could be proven by introduction of the defendant's criminal record).

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[7] Thus, Petitioner is incorrect in repeatedly suggesting that, but for the Ethnic Intimidation Act, the maximum sentence for possession of a firearm for an unlawful purpose was ten years. *Petitioner's Brief* at 5 n.1, 18, 18 n.7, 24 n.9. In pertinent part, N.J. STAT. ANN. § 2C:43-6(a) reads: "(a) Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows: . . . (2) In 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 5 years and 10 years." The "otherwise provided" includes Section 2C:43-7(a), which states in pertinent part that "In the cases designated in section 2C:44-3, . . . a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows: . . . (3) In 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(3). A hate-motivated purpose is just one of seven sentencing factors listed in Section 2C:44-3. As discussed below, those factors function "as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available" for purposes of this Court's *Winship* analysis. *See Jones v. United States*, 526 U.S. 227, 331 (1999). Thus, even prior to the Ethnic Intimidation Act, the relevant maximum sentence for the

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Thus, the Ethnic Intimidation Act did not restrict the role of the jury in sentencing, nor does it change the maximum sentence for any crime. It merely added a hate-motivated purpose to the pre-existing list of sentencing factors necessary to impose a sentence from within the more severe of two pre-existing sentencing ranges. N.J. STAT. ANN. § 2C:44-3(e).

4. The U.S. Constitution Does Not Override New Jersey's Decision To Treat A Hate-Motivated Purpose As A Sentencing Factor That Makes A Defendant Eligible For Additional Punishment Within The Pre-Existing Scope Of Statutorily-Available Punishments

a) This Court's Winship Jurisprudence Is Tempered By Respect For Competing Federalism Concerns

As discussed above, New Jersey has afforded Petitioner a right to a full jury trial and proof beyond a reasonable doubt of all elements of the crime charged. Thus, *Winship* is *prima facie* inapplicable here because it does not apply to sentencing factors. *Almendarez-Torres*, 523 U.S. at 228. By its terms — and as definitively interpreted by the New Jersey Supreme Court — Section 2C:44-3(e) is solely a sentencing statute, and not a separate crime; nor is it an element of any crime. *Apprendi*, 731 A.2d at 496. *Winship* does not invalidate New Jersey's decision to treat a hate-motivated purpose as a sentencing factor.

While *Winship* and its progeny demonstrate this Court's very appropriate vigilance against genuine intrusions

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second-degree crime of possession of a firearm for an unlawful purpose was 20 years.

into a criminal defendant's right to a jury determination "of every fact necessary to constitute the crime with which he is charged," that Constitutional concern has never been applied in a vacuum. Instead, this Court has always interpreted *Winship* in light of competing federalism concerns, recognizing that it "goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (citation omitted). *Accord McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986) (courts should "hesitate to conclude that due process bars a State from pursuing its chosen course in the area of defining crimes and prescribing penalties.")

Of course, this Court will not allow a State to evade its burden as to the elements of the crime by defining away the elements of the crime as sentencing factors in order to reallocate burdens of proof. *See Patterson*, 432 U.S. at 215 ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). With that caveat, however, the administration of justice is for the individual States, and a State's decision "in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* 432 U.S. at 201 (citations omitted).

b) New Jersey Has Not Sought To Evade *Winship*

Even looking beyond the State's usually-dispositive definition of N.J. STAT. ANN. § 2C:44-3(e) as sentencing

factor, there is no basis here for intruding on New Jersey's long-recognized priority in defining and punishing crimes. New Jersey's use of a hate-motivated purpose as a sentencing factor evidences neither an intent, nor does it have the effect, of evading its burden of proving all elements of a crime to a jury and beyond a reasonable doubt.

As discussed above, the role of the jury is undisturbed by Section 2C:44-3(e), which does not create any new crime, redefine the elements of any crime, or reallocate any burden of proof. Section 2C:44-3(e) applies only after a defendant has been found guilty (with the right to a full jury trial on all elements) of a pre-existing crime. Thus, an affirmance here would in no way undermine *Winship*. It would not permit the States to define elements out of crimes, remove *mens rea* requirements, or abolish traditional distinctions between crimes. *See Mullaney*, 421 U.S. at 698; *Patterson v. New York*, 432 U.S. 197, 215 (1977). "There should be no mistake that the Court would not permit the Legislature (even were it so inclined) to remove traditional *mens rea* or grading factors (such as the absence of passion/provocation in murder) from the substantive definition of a crime to be determined by a jury and reallocate them for determination by a judge as part of the sentencing process."[8] *Apprendi*, 731 A.2d at 495.

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[8] Because this Court will retain the power under *Winship, Mullaney, Patterson, McMillan* and *Almendarez-Torres* to prevent any genuine incursion into the province of the jury, this Court should not accept the invitation to decide this case on the basis extreme hypotheticals. *Brief of Amici Nat'l Ass'n Of Criminal Defense Lawyers, et al.* at 7, 10-11. This case should instead be decided, as the New Jersey Supreme Court has done, based on the facts here, which do not offend *Winship*. Because of the significant federalism costs of an intrusion by the federal judiciary into the long-recognized priority of the States in defining and punishing crimes, Section 2C:44-3(e) should not be invalidated on the basis of the

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Nor would an affirmance allow sentencing to become the "tail that wags the dog" of a substantive offense that effectively outlaws new conduct by treating it as a sentencing factor. *See McMillan*, 477 U.S. at 88; *Almendarez-Torres*, 523 U.S. at 243. The fact that Section 2C:44-3(e) does not outlaw any new conduct confirms that New Jersey's use of a hate-motivated purpose as a sentencing factor was not an attempt to evade the requirements of *Winship*, and would also prevent this case from acting as a precedent for any legislature so inclined.

c) New Jersey Has A Constitutionally-Significant Reason For Treating A Hate-Motivated Purpose As A Sentencing Factor

As the New Jersey Supreme Court observed, crafting legislation to combat hate-motivated criminal activity requires careful balancing of competing Constitutionally-significant interests. *Apprendi*, 731 A.2d 485, 496 (N.J. 1999). Because Section 2C:44-3(e) does not create any new crimes and instead goes only to the sentencing of conduct that is independently unlawful by pre-existing statute, the New Jersey Legislature has made clear to its citizens that it is not punishing thought and is a partner with the courts in protecting all possible First Amendment values.[9] *See Apprendi*, 731 A.2d at 494, 496 (Observing that "the statute does not create a separate offense calling for a separate penalty" and stating that "We do not punish thought.") At the same time, the imposition of additional punishment where pre-existing criminal statutes were violated for a hate-motivated purpose is necessary to address the legitimate concern that hate-motivated crimes injure broad communities and cause distinctive societal harms.

Such balancing of competing values is for the New Jersey legislature, especially where, as here, the statute in question does not have the intent or effect of diminishing the role of the jury. "Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch."[10] *Patterson v. New York*, 432 U.S. 197, 210 (1977).

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mere possibility that a hypothetical legislature might one day be tempted to evade *Winship*. *See Patterson*, 432 U.S. at 211 ("Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecutor's burden that a new constitutional rule was required. This was not the problem to which *Winship* was addressed.").

[9] As he must in light of *Mitchell*, Petitioner concedes that this case turns solely on whether the Constitution requires different procedures than those used here; neither the First Amendment, nor the general constitutionality of statutes that address hate-motivated crime, are at issue here. *Petitioner's Brief* at 4.

[10] New Jersey is free, within the broad limits imposed by the Constitution, to craft its own unique response to criminal justice problems. Thus, although New Jersey's approach differs from the ADL model statute in not making the hate-motivated purpose an element of the crime, federalism requires '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement." *McMillan*, 477 U.S. at 90 (citation omitted). For the same reason, Petitioner's purported survey of various statutes dealing with hate-motivated crimes is constitutionally irrelevant. *See McMillan*, 477 U.S. at 90 ("That Pennsylvania's particular approach [to punishing armed felons] does not render Pennsylvania's choice unconstitutional."); *Patterson*, 432 U.S. at 211 (The fact that a majority of States have assumed the burden of disproving affirmative

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5. This Court's Prior Decisions Confirm That A Hate-Motivated Purpose Is A Permissible Sentencing Factor

A hate-motivated purpose is an appropriate sentencing factor. A despicable motive and societal impact are traditional factors used in judicial sentencing. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) ("The defendant's motive for committing the offense is one important factor" traditionally considered by judges in sentencing.); *Apprendi*, 731 A.2d at 495 ("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" and New Jersey law has long permitted the sentencer to take the gravity of the harm inflicted into account.); *State v. Apprendi*, 698 A.2d 1265, 1269 (N.J. Super. App. Div. 1997) (In "New Jersey, 'motive traditionally has been an important factor for judges to consider at sentencing.'") (citation omitted); 1 W. LeFave & A. Scott, *Substantive Criminal Law* § 3.6(b), p. 324 (1986) ("Motives are most relevant when the trial judge set's the defendant's sentence, and it is not uncommon for a defendant to receive. . . a rather high sentence because of his bad motives.").

Contrary to Petitioner's assertion (*Petitioner's Brief* at 23, 33), a sentencing judge may also consider a defendant's "purpose" or "mental state." *Walton v. Arizona*, 497 U.S. 639, 645-47 (1990) (Factors considered in imposing death penalty included sentencing judge's finding that the defendant's committed the crime for pecuniary gain, and that the

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defenses does not "mean that States that strike a different balance are in violation of the Constitution."). ADL agrees, however, that the specific issues in this case do not implicate the Constitutionality of such statutes generally.

crime was especially "depraved," which was defined to mean that the defendant "relished the murder."). It is also appropriate to consider facts bound up with the commission of the crime and its impact. *Id.* (Considerations in imposing death penalty included sentencing judge's finding that crime was "especially cruel," which was defined to mean that the defendant "inflict[ed] mental anguish or physical abuse before the victim's death.").

Petitioner's contention that *Winship* prohibits the use of a sentencing factor to impose an increased sentence is similarly contrary to precedent. *Petitioner's Brief* at 16-17. This Court has expressly rejected the argument that any fact that affects the "degree of criminal culpability" or the "severity of punishment" must be treated as an element of the crime. *Patterson v. New York*, 432 U.S. at 215 n.15; *McMillan*, 477 U.S. at 84. Even if a sentencing factor (recidivism) results in a ten-fold increase in the available sentence, it is not thereby converted into an element of the crime. *Almendarez-Torres*, 523 U.S. at 226.

The analysis of *Almendarez-Torres* applies here. Like the statute at issue in that case, Section 2C:44-3(e) requires the imposition of specific sentence within a relatively narrow range and does not presume guilt or the existence of any element of a crime, create a separate offense, change the definition of any crime, or outlaw any new conduct. *See Almendarez-Torres*, 523 U.S. at 243. Moreover, as discussed above, motive and societal harm are, like recidivism, traditional sentencing factors. *Id.*

Petitioner's attempts to limit *Almendarez-Torres* to recidivism must fail in light of this Court's contrary holdings in the capital-sentencing context. *Petitioner's Brief* at 24-25, 35. *Almendarez-Torres* cited those cases in rejecting the same argument that Petitioner makes here: that "any signifi-

cant increase in a statutory maximum sentence would trigger a Constitutional 'elements' requirement." *Almendarez-Torres*, 523 U.S. at 246. Such "a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Id.*

Indeed, there can be no more severe increase in punishment than a decision to impose the death penalty. "The sentence of death differs absolutely, not in degree, from any other sentence . . ." *Spaziano v. Florida*, 468 U.S. 447, 473 (1984) (Stevens, J., dissenting) (citation omitted). Nor can there be a stronger expression of "disapprobation" than a decision to impose the death penalty. The "calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity" and "an expression of the community's outrage — its sense that an individual has lost his moral entitlement to live." *Id.* at 469, 469 n.3 (citation omitted). While the ADL does not take a position for or against the imposition of the death penalty generally, the point here is simple: if the facts which are required for the imposition of the death penalty, instead of life imprisonment, can be decided by a judge rather than a jury, New Jersey is also permitted to use a judge's finding of a hate-motivated purpose to apply the higher of two statutorily-available sentencing ranges.

As noted above, the capital-sentencing procedures approved in *Walton* track the procedures used here. "Under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved." *Walton*, 497 U.S. at 709 (Stevens, J., dissenting). Yet, this Court rejected the argument that a jury, rather than the judge, was required to find the existence of such aggravating factors. *Id.* at 647. "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* (emphasis added and citation omitted).

B. *Jones v. United States* Does Not Support A Contrary Result

Jones v. United States, 526 U.S. 227 (1999), does not change the analysis for three reasons. First, that case was decided on statutory-interpretation grounds, and the Constitutional discussion was by way of identifying an issue of "Constitutional doubt" that would have arisen had the statute been interpreted in another way. *Jones*, 526 U.S. at 324. The Court was careful to characterize that discussion as an expression of "Constitutional doubt" and not a holding. *Jones*, 526 U.S. at 326 n.6, 331 n.11. Unlike *Jones*, this is not a case of statutory interpretation. Further, principles of federalism must be considered in this case because the States have the primary responsibility for defining and punishing crimes. *See Patterson*, 432 U.S. at 201. That concern was not present in *Jones*, which involved a federal statute. Thus, *Jones* is not controlling.

Second, although *Jones* articulated — as an expression of "Constitutional doubt" — the proposition that a sentencing factor that increased the maximum could thereby be considered an element of the crime (526 U.S. at 326 n.6), that opinion's discussion of *Walton* also demonstrates that the sentencing scheme at issue here does not "increase the maximum" for purposes of the Court's analysis. In the capital-sentencing scheme at issue in *Walton*, Arizona law provided two alternative degrees of punishment for a defendant convicted of first-degree murder: life imprisonment or death. A defendant became eligible for the more severe of the two statutorily-available degrees of punishment if the judge found

one or more aggravating factors. *Walton*, 497 U.S. at 644. Even though a judicial finding of at least one aggravating factor was necessary to actually impose the death penalty, that punishment was within the scope of punishments available once the jury convicted a defendant of first-degree murder. On that basis, *Jones* indicated that the judge's findings of aggravating factors could properly be characterized "as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *Jones*, 526 U.S. at 331.

The same is true here. New Jersey law provides two alternative degrees of punishment for second-degree crimes: the sentence range specified in Section 2C:43-6(a)(2), or the more severe sentencing range provided in 2C:43-7(a)(3). As with *Walton*, a judge must find one or more of the aggravating factors listed in Section 2C:44-3 in order to apply the more severe sentencing range. *Id.* However, because the more severe range is within the scope of statutorily-available punishments for a defendant convicted of a second-degree crime, the aggravating factors do not "raise the maximum" for purposes of the *Jones* analysis. It is properly characterized as "a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *See Jones*, 526 at 331.

Third, if the procedures here and in *Walton* are viewed as "raising the maximum," the rationale of *Jones* is so undercut that it cannot be viewed as anything more than an accommodation to articulating a "Constitutional doubt." If *Jones* is interpreted to apply here, it could not be reconciled with either *Almendarez-Torres* or with capital-sentencing cases such as *Walton*.

For example, *Jones* suggested that *Almendarez-Torres* cannot be applied to sentencing factors other than recidivism

because, unlike other sentencing factors, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. at 330. However, despite *Almendarez-Torres*' repeated discussion of recidivism, the aspect cited by *Jones* as a basis for limiting that case to recidivism was not discussed. Instead, *Almendarez-Torres* emphasized a characteristic that recidivism shares with the sentencing factor at issue here — traditional use as a sentencing factor. *Almendarez-Torres*, 523 U.S. at 230.

Nor does *Jones* (if read to apply here) provide a convincing rationale for distinguishing the capital-sentencing cases cited by *Almendarez-Torres* that permit a judge to impose the death penalty on the basis of findings other than recidivism. *Walton*, 497 U.S. 639 (finding that the crime was heinous, cruel or depraved and committed for pecuniary gain); *Hildwin v. Florida*, 490 U.S. 638 (1989) (same); *Spaziano*, 468 U.S. 447 (crime was heinous and atrocious). *Jones* merely suggests that those cases did not raise the issue of whether a jury must find the facts requisite to imposing a more severe punishment because the factors at issue merely were "standards to guide the choice between the alternative verdicts of death and life imprisonment." *Jones*, 526 U.S. at 331. But as discussed above, this contradicts the clear language of *Walton*: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."[11]

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[11] The *Jones* Court's assertion that *Walton* addressed sentencing factors that were merely "standards to guide the choice between the alternative verdicts of death and life imprisonment," rather than a finding of fact that triggers the availability of a more severe sentence, apparently stems from language quoted in *Walton* from *Poland v. Arizona*, 476 U.S. 147 (1986). However, both *Walton* and *Poland* make clear that a defendant is eligible

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Walton, 497 U.S. at 647 (emphasis added and citation omitted). The *Walton* court reached that holding over Mr. Justice Stevens' dissent, which not only made clear that "under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved," but also cited *McMillan* in arguing that the aggravating factors therefore "operate as statutory 'elements' of capital murder under Arizona law because in their absence, that sentence is unavailable . . . ."[12] *Walton*, 497 U.S. at 709, 709 n.1.

Thus, as in *Almendarez-Torres,* the capital-sentencing cases demonstrate that New Jersey may properly treat a hate-motivated purpose as a sentencing factor, rather than an element of the crime, even if the result is to increase the maximum sentence faced by Petitioner.[13] Especially in light of the significantly higher stakes involved in capital sentencing, any suggestion that a higher standard or a different definition of "element" should apply here should be rejected. As observed by this Court in *McMillan*, "[t]here is, after all, only one Due Process Clause in the Fourteenth Amendment." 477 U.S. at 91.

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for the death penalty only if the judge finds at least one aggravating factor. *Walton*, 497 U.S. at 709, 709 n.1 (Stevens, J., dissenting); *Poland*, 476 U.S. at 1755.

[12] This Court also analyzed *McMillan* in upholding a Florida capital-sentencing statute that permitted the judge to override a jury recommendation and required the judge to find at least one aggravating factor in order to impose the death penalty. *Spaziano*, 468 U.S. at 459 (1984) (Upholding a statute permitting a judge to impose the death penalty even though the jury had recommended only life imprisonment and stating that "[t]he Sixth Amendment has never been thought to guarantee a right to jury determination of [the appropriate punishment to be imposed on an individual]."); *Hildwin v. Florida*, 490 U.S. 638, 639, 640 (1989) (Upholding the same statute even though the finding of at least one aggravating factor by the judge was necessary to impose the death penalty. "Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor that comes into play only after the defendant has been found guilty.' Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.") (citation omitted).

[13] Any argument by Petitioner that a judge can decide the existence of a hate-motivated purpose, but must use a higher standard than preponderance of the evidence, is without merit. The line of cases cited by Petitioner involving civil commitment, deportation, denaturalization and the termination of parental rights are inapplicable. *Petitioner's Brief* at 19. Those cases do not involve the burden of proof required for sentencing following a conviction of crime where the defendant had a right to a trial by jury and proof beyond a reasonable doubt. Petitioner neglects to advise this Court that *McMillan* distinguished the two cases upon which he principally relies on precisely that ground. *McMillan*, 477 U.S. at 92 n.8 (Distinguishing *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Addington v. Texas*, 441 U.S. 418 (1979), on the ground that "sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. 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.'"). Thus, *McMillan* rejected the argument that sentencing facts must be proven by more than a preponderance of the evidence. *McMillan*, 477 U.S. at 91. Another case cited by Petitioner actually undercuts his argument. *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999) is a federal sentencing guidelines case in which the court held that the sentencing judge's departure, not just from the sentencing range, but from the usually-applicable guidelines — and seven- and four-level enhancements of the defendants' sentences — was not such an "extremely disproportionate effect" as to alter the general rule stated in *McMillan*, 477 U.S. at 92 n.8, and *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991), "that due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines." *See Hopper*, 177 F.3d at 832-33.

IV. CONCLUSION

Section 2C:44-3(e) had neither the intent, nor the effect, of diminishing the role of the jury in the conviction and sentencing of Petitioner. He pled guilty to pre-existing crimes for which he had a right to a full jury trial and proof beyond a reasonable doubt of each element. New Jersey has not sought to evade its burden of proving guilt beyond a reasonable doubt by redefining elements out of a crime or reallocating burdens of proof. Section 2C:44-3(e) does not create any new crime, does not alter the definition of any existing crime, and does not outlaw or punish any new conduct.

As for sentencing, a judicial finding under Section 2C:44-3(e) is just one of seven aggravating factors that make a defendant eligible for a sentence within the more severe of two pre-existing sentence ranges. Thus, even in the absence of Section 2C:44-3(e), a defendant that pled guilty to the same crimes as Petitioner did could have been sentenced to up to twenty years imprisonment based on factors (recidivism or the use of a firearm in a prior offense) that this Court has already determined need not be treated as elements of the crime even if they result in a sentence enhancement.

In short, Section 2C:44-3(e) does not diminish the role of the jury and thus presents no threat to the concerns of *Winship*. Indeed, the sentencing factors and procedures at issue here are functionally identical to in those in capital-sentencing cases in which this Court rejected arguments that a jury trial was required for facts requisite to the ultimate sentence enhancement: the death penalty. A different outcome here could be explained only by the most tortured reading of those precedents that could not justify an intrusion on these facts into the long-recognized priority of the States

in defining and punishing crimes. The decision of the New Jersey Supreme Court should be affirmed.

Respectfully Submitted,

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