GRANTED

No. 99-478

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether New Jersey violates Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from ten to twenty years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a "hate" crime.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case.

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The opinion of the New Jersey Supreme Court and the dissent thereto (Pet. App. 1a-66a) were entered on June 24, 1999, and are reported at 159 N.J. 7, 731 A.2d 485 (1999). The opinion of the Superior Court of New Jersey, Appellate Division and the dissent and concurrence thereto (Pet. App. 67a-94a) were entered on August 19, 1997, and are reported at 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997). The oral opinion of Superior Court, Law Division, Judge Rushton Ridgway and transcript of motion and sentencing are attached in the Appendix hereto at Pet. App. 95a to 163a.

JURISDICTION

The New Jersey Supreme Court entered its judgment on June 24, 1999. Petitioner Charles C. Apprendi, Jr. timely filed a petition for certiorari on September 17, 1999. This Court granted the petition on November 29, 1999. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

N.J. Stat. Ann. § 2C:44-3. Criteria for Sentence of Extended Term of Imprisonment.

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S.A. 2C:12-1a., N.J.S.A. 2C:33-4, or a violation of N.J.S.A. 2C:14-2 or 2C:14-3 if the grounds

for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .

. . . .

e. The 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.

STATEMENT OF THE CASE

This case squarely presents constitutional issues addressed, but not conclusively resolved, in *Jones* v. *United States*, 119 S.Ct. 1215 (1999): the constitutional limitations upon legislative authority to specify how, and by whom, critical facts are determined in a criminal case. The specific issue here is whether a state legislature can require that a judge will decide, by a mere preponderance of the evidence, a defendant's mental state during the conduct at issue, and thereby dramatically increase his or her maximum sentence. The New Jersey statute in question here, N.J. Stat. Ann. § 2C:44-3e., expressly provides that the judge, not the jury, shall decide whether the hate crime statute applies by assessing the evidence under a preponderance of the evidence standard rather than the beyond a reasonable doubt standard. This statute requires the judge to determine the purpose or mental state with which the defendant committed the predicate

act. In this case, such a finding doubled the maximum sentence exposure from ten to twenty years.

It is equally important to emphasize what issues are not addressed in this case. This case is not a challenge to New Jersey's ability to make criminally liable those persons who engage in hate crimes. Nor is it a challenge to the State's ability to define the facts whose proof is essential in order to obtain convictions of those whose conduct constitutes what the State defines as a "hate crime." Instead, this case concerns the constitutionality of the procedures used to establish such liability. Put simply, it is about whether, as the United States Constitution demands, the facts which constitute such crimes are to be determined, after fair notice and beyond a reasonable doubt, by the fact-finding judgment of a jury or, as was the case here, a state may relegate that question to the individual discretion of a judge using the minimum possible standard of proof.

In 1990 the New Jersey Legislature enacted the "Ethnic Intimidation Act," L. 1990, c. 282 ("the Act"), to expand the State's preexisting hate crime statute, L. 1981, c. 282. The Act created aggravated forms of assault and harassment where a defendant acts with a biased purpose in selecting a victim (elevating a disorderly persons offense for assault and a petty disorderly persons offense for harassment to crimes of the fourth degree). See N.J. Stat. Ann. § 2C:12-1e., 33-4d. More importantly, the Act added a blanket provision, N.J. Stat. Ann. § 2C:44-3e., requiring an extended term of imprisonment for other crimes of the first, second, or third degree where "the 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." This has the effect in Petitioner's case, and in many other cases, of doubling the maximum sentence for the primary offense.[1] N.J. Stat. Ann. § 2C:44-3e. effectively gives to the judge, rather than the jury, the responsibility to determine whether an individual committed a hate crime, and it directs the judge to make that determination based on a mere preponderance of the evidence.

On December 22, 1994, Petitioner Charles Apprendi, Jr. ("Petitioner"), a thirty-seven year old pharmacist and first-time offender, was arrested for shooting at the home of one of his neighbors. Mr. Apprendi is white; the neighbors are black. He ultimately negotiated a plea agreement whereby he pled guilty to two counts of possession of a firearm for an unlawful purpose (for the December 22 incident and one previous incident), a second degree crime, N.J. Stat. Ann. § 2C:39-4a., and to one count of unlawful possession of a prohibited weapon, N.J. Stat. Ann. § 2C:39-3a., a third degree crime. Under the terms of the plea agreement, the State reserved the right to seek an extended sentence under N.J. Stat. Ann. § 2C:44-3e. for the December 22 shooting incident, and Petitioner reserved the right to challenge the constitutionality of that section.

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[1] Petitioner's primary crime (possession of a weapon for an unlawful purpose) would ordinarily be subject to a prison term of between 5 and 10 years. *See* N.J. Stat. Ann. § 2C:39-4a., 43-6a.(2). Under N.J. Stat. Ann. § 2C:44-3e., the maximum and minimum sentence for Petitioner's second degree offense doubles to between 10 and 20 years. *Compare id. with* N.J. Stat. Ann. § 2C:43-7a.(3).

The shooting at issue occurred at approximately 2:04 a.m. on December 22, 1994. At approximately 3:05 a.m. that same morning Petitioner confessed to Vineland Police that he had fired approximately four or five rounds from a .22 caliber rifle at the house. No written or recorded oral statement was given by Petitioner, but an officer did testify at a plenary hearing before the trial court that at approximately 6:04 a.m. Petitioner "told me he fired shots at the home because there were black people living there." (Pet. App. 175a, 250a.) Defendant's psychological infirmities were explored in a September 5, 1995 plenary hearing, at which time Judge Rushton Ridgway heard testimony from Clinical and Forensic Psychologist Gerald Cooke, character witnesses, and Defendant Charles Apprendi. Dr. Cooke opined that the Petitioner shot at the house because he suffered from an impulsive destructive disorder brought about when the front door of the house caught his attention because it was purple with a big pane of glass.

Petitioner appeared at a plenary hearing before Judge Ridgway on September 5, 1995 to determine his state of mind at the time of the shooting. (Pet. App. 164a-301a.) At the hearing, Petitioner presented evidence to suggest that he did not have the requisite purpose or intent necessary to support a finding that he had violated the hate crime statute. He presented the testimony and affidavits of several character witnesses, black and white, who testified that Mr. Apprendi regularly interacted with and socialized with African-Americans and did not have a reputation among his family, friends, and acquaintances for racially prejudiced attitudes, statements, or actions. (Pet. App. 183a-205a.)

Petitioner denied that he had acted out of racial bias (Pet. App. 242a) or that he harbored any racist views. (Pet. App. 245a.) He testified that he had had several vodka and tonic drinks in the hours prior to the shooting incident and that he had taken a number of prescription medications earlier that day and evening: "a couple" of Lomotil (a prescription medication for stomach problems), one Dilaudid (an opiate), and several Ativans (tranquilizers). (Pet. App. 238a-239a.) He testified that the combined effects of the drugs, alcohol and physical exhaustion left him "dizzy" and "out of it," "like a – a stoned drunk," intoxicated, even if he did not appear so. (Pet. App. 249a.) Immediately after the shooting incident he felt "strange," as if he were "in a cloud somewhere." (Pet. App. 237a.)

Mr. Apprendi testified that the interrogating officer first mentioned race during the interrogation (Pet. App. 241a) and that he gave a false confession to the officer because he was irrational and scared. (Pet. App. 242a.) He testified that the interrogating officer tried to intimidate him by telling him that there were "a lot of homosexuals and AIDS in jail" and a large prison population of blacks who would assault him when they discovered the nature of his crime. Petitioner testified that the officer promised that if he (Apprendi) cooperated, the officer would try to make it easier on him. (Pet. App. 242a-243a.) As to the shooting, Mr. Apprendi testified that he fired at his neighbors' front door because the glass and purple door attracted his attention, sparking an urge to destroy it. (Pet. App. 251a.)

The defense presented the unrebutted testimony of Dr. Cooke, who had examined Mr. Apprendi on February 15, 1995 and given him a battery of personality and psychological tests. Dr. Cooke testified that Petitioner told him that he shot at the door because he was drunk and drug-intoxicated, and the door caught his attention because it was purple and had a large plate of glass. (Pet. App. at 210a-211a.) Dr. Cooke opined that this type of behavior was consistent with Petitioner's obsessive-compulsive personality disorder and alcohol abuse. (Pet. App. 216a, 234a.)

Dr. Cooke diagnosed that Petitioner suffers from an obsessive compulsive disorder, which includes anxiety, gastrointestinal symptoms, kleptomania, loss of control of anger impulses, depression, and drug and alcohol abuse. (Pet. App. 216a-217a.) Dr. Cooke suggested that the impulse disorder of kleptomania explained Mr. Apprendi's accumulation of guns, ammunition, and various other tools and metal objects. *Id.*

Dr. Cooke further testified that his clinical examination of Petitioner revealed that he also suffered from a cyclothymic condition, similar to a bipolar disorder, where "the individual's moods go from being excited and hypomanic and elated to being depressed and lethargic." *Id.* On direct examination, Dr. Cooke testified that in the fall and winter of 1994 the Petitioner's psychological disorders and the drugs and alcohol produced a synergistic effect: "You've got the combination with an individual who is anxious and over-controlled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really

combine into fear of [sic] judgment and reasoning and impulse control."[2] (Pet. App. 218a.)

With respect to Mr. Apprendi's purported confession during the interrogation that he shot at the house because a black family was living there, Dr. Cooke testified as follows:

> Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.
>
> Q. Even tell a lie?
>
> A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation. . . . I'm only saying that he has the kind of personality of an individual who would do that to get out of this kind of situation. (Pet. App. 219a.)[3]

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[2] There appears to be an error in the transcript here. To make sense, the sentence should read: "So all three factors really combine *to interfere with* judgment and reasoning and impulse control."

[3] Later, during cross examination, Dr. Cooke explained further that "his personality is consistent with an individual who is an interrogation situation where his anxiety would be aroused in the kind of person that would just – you know, in his own mind he'd be saying to himself, 'I've got to tell them whatever they want to hear so I can get out of this.' " (Pet. App. 224a-225a.)

At the plenary hearing and sentencing,[4] the prosecution submitted the following evidence to the court: the testimony of the officer who interrogated Mr. Apprendi immediately following his arrest (who testified that the police did not attempt to coerce Mr. Apprendi or to suggest to him the racial bias motive (Pet. App. 286a), that Mr. Apprendi appeared lucid during the interrogation (Pet. App. 284a), and that he orally admitted shooting at the house on two instances because black people lived there (Pet. App. 176a)); and the testimony of Mr. Michael Fowlkes (the homeowner). Mr. Fowlkes testified that his family was the only black family that lived in the immediate neighborhood (Pet. App. 102a), that the home had been struck by bullets on four occasions (Pet. App. 104a-105a), and that his front door was constructed of clear glass with a six-inch burgundy border. (Pet. App. 108a.)

After hearing all the evidence, Judge Ridgway noted that the issue of racial motivation "is one which the legislature has left to the discretion of the Court" to be determined by a "preponderance of the evidence." (Pet. App. 139a.) As to Petitioner's particular mental state, Judge Ridgway declared:

> And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias, would not have manifested itself, except for the psychiatric problem that he has. (Pet. App. 160a.)

[4] At the request of the prosecutor, the court permitted the owner of the home to testify at Petitioner's sentencing on September 29, 1997.

This statement makes unclear whether Judge Ridgway would have found Petitioner guilty of the hate crime had the standard of proof been beyond a reasonable doubt. What is clear is that Judge Ridgway invoked this enhanced penalty by a standard of mere preponderance of the evidence. After summarizing the evidence for and against a finding of a racially biased purpose, (Pet. App. 139a-144a), Judge Ridgway ultimately concluded that the standard of proof had been met. (Pet. App. 144a.) Accordingly, he applied the hate crime enhancement and sentenced Petitioner to twelve years of incarceration on the first firearm count, with a four-year period of parole ineligibility; seven years on the remaining firearm count; and three years on the prohibited weapons count, with the sentences to run concurrently. (Pet. App. 161a.)

Mr. Apprendi appealed his enhanced sentence under N.J. Stat. Ann. § 2C:44-3e., on the grounds that it was unconstitutionally vague and violated his constitutional right to due process by permitting a judge to determine his state of mind based on a preponderance of the evidence. (Pet. App. 82a.) The Superior Court of New Jersey, Appellate Division, affirmed the enhanced sentence. *New Jersey* v. *Charles Apprendi, Jr.*, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997) (Pet. App. 67a-94a). The Appellate Division held that since the New Jersey legislature had not defined the "purpose to intimidate" as an element of the crime, the State did not have to prove it beyond a reasonable doubt. (Pet. App 87a.) The Appellate Division drew a substantive distinction between "motive" and "intent" and concluded that N.J. Stat. Ann. § 2C:44-3e.

merely addressed motive – a traditional sentencing element under New Jersey law.[5] (Pet. App. 89a-93a.)

In a dissenting opinion, Judge Wecker observed that the definition of "element" in the New Jersey Code of Criminal Conduct itself, as well as the historical treatment of a defendant's mental state, dictated that the "purpose to intimidate" described in N.J. Stat. Ann. § 2C:44-3e. be treated as an "element" subject to the constitutional requirements of a jury determination and proof beyond a reasonable doubt. (Pet. App. 71a-75a.) She concluded that "[t]he State's power to define away the elements of the crime cannot extend . . . to defining away the actor's culpable purpose as an element of the crime – a crime for which this defendant received a sentence beyond the ordinary term for a second degree offense." (Pet. App. 70a.)

The Supreme Court of New Jersey affirmed the decision of the Appellate Division in *New Jersey* v. *Charles Apprendi, Jr.*, 304 N.J. Super. 147, 731 A.2d 485 (N.J. 1999) (Pet. App. 1a-66a.) The court applied the five-factor test culled from *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and concluded that the "hate-crime enhancer" in N.J. Stat. Ann. § 2C:44-3e. approximates the "visible possession of a firearm" sentencing factor in *McMillan* in all respects except that it alters the maximum penalty for the underlying crime. (Pet. App. 20a-21a). The court did not find the increase in the maximum penalty significant in

[5] The Court rejected the vagueness argument based on prior precedent and recent amendments to the statute, made prior to Apprendi's sentence, that remedied the alleged vagueness.

light of this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which it believed to be controlling. (Pet. App. 19a-20a, 22a.) The court suggested that N.J. Stat. Ann. § 2C:44-3e. actually *helped* criminal defendants by excluding evidence of bias that would otherwise inflame the jury. (Pet. App. 24a.) Nevertheless, the court recognized that its holding was necessarily tentative because "the final word on this subject will have to come from the United States Supreme Court." *Id.*

Two Justices dissented, concluding that the determination that "a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof." (Pet. App. 30a.) The dissent emphasized that N.J. Stat. Ann. § 2C:44-3e., unlike the recidivism at issue in *Almendarez-Torres* and the serious bodily harm at issue in *Jones*, involves the conduct of a criminal defendant, specifically, his or her purpose in committing the charged offense. (See Pet. App. 60a (citing *Jones*, 119 S.Ct. at 1238 (Kennedy, J., dissenting)).) The dissent further noted that *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), which upheld the visible possession of a firearm as a sentencing factor, did not "require[ ] the sentencer to make findings of fact, such as are required by N.J. Stat. Ann. § 2C:44-3e., about the mental state of a defendant when he committed the subject offense." (Pet. App. 64a.). Finally, the dissent noted that the majority's concern about inflaming the jury could be readily addressed by bifurcating the charges, a practice followed in New Jersey in other instances, such as capital cases.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court erred when it concluded that the "penalty enhancement" provision in N.J. Stat. Ann. § 2C:44-3e. does not offend the Constitution. The decision should be reversed. Where, as here, the determination of a criminal defendant's mental state can increase the maximum penalty for a crime, the Constitution requires that the determination be made by a jury and proven beyond a reasonable doubt. New Jersey cannot avoid the requirements of the Fifth and Sixth Amendments by merely defining the fundamental element of its hate crime statute as a sentencing factor.

ARGUMENT

I. BEFORE DOUBLING A STATUTORY MAXIMUM SENTENCE FROM TEN YEARS TO TWENTY YEARS ON THE BASIS OF A DEFENDANT'S MENTAL STATE, THE PROSECUTION MUST PROVE THE EXISTENCE OF THAT MENTAL STATE BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism) Including A Defendant's Mental State, That Increases The Maximum Penalty For A Crime Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The New Jersey statute at issue here imposes upon the defendant charged with a "racially biased crime"[6] both a substantially lengthened imprisonment and the stigma of bigotry on the slimmest burden of proof recognized in American jurisprudence – a preponderance of the evidence. This is not sustainable.

N.J. Stat. Ann. § 2C:44-3e. violates the due process protections guaranteed by the Fifth Amendment. The Due Process Clause "protects the accused against conviction except upon 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). The justification for this principle is clear:

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[6] Primarily for purposes of convenience, but also because the case before the Court involves alleged racial bias, we will refer to the *mens rea* involved as "racial bias," although the reach of the statute includes other prejudicial purposes as well.

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, [156 U.S. 432, 453 (1895)]. . . .
>
> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt without utmost certainty.

Id.

N.J. Stat. Ann. § 2C:44-3e. violates both the spirit and letter of *Winship*. It threatens to "dilute the force of the criminal law" by subjecting defendants to harsh criminal penalties, over and above those imposed for the underlying offense, without affording them the protections of the reasonable doubt standard. It does so by labeling the essential element of the New Jersey hate crime law – the "purpose to intimidate . . . because of race" – a penalty enhancement provision rather than an element of an

aggravated crime. This places a crucial factual determination, the defendant's state of mind at the time of the offense, in the hands of a judge to be determined by a mere preponderance of the evidence. The decisive issue in this case is whether, in so doing, New Jersey can avoid the constitutional requirements that would otherwise attach to a determination of a defendant's mental state. It cannot.

Although states generally have the authority to define crimes and prescribe penalties, see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986), requirements of due process may not be evaded by merely redefining "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *accord Patterson* v. *New York*, 432 U.S. 197, 210 (1977) (recognizing that there are "obviously constitutional limits beyond which the States may not go" in reallocating burdens of proof by labeling elements of crimes as affirmative defenses).

Recently, the Court stated the following principle: "[U]nder 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 the indictment, submitted to a jury, and proven beyond a reasonable doubt.*" *Jones* v. *United States*, 119 S.Ct. 1215, 1224, n. 6 (emphasis added). Although the Court articulated this standard as a means of casting doubt on the Government's proposed interpretation of the carjacking statute, it reflects the Court's most recent pronouncement on the issues squarely presented by this appeal, and it

reiterates the Court's commitment to the principles established in *Winship*.

Under the standard articulated in *Jones*, N.J. Stat. Ann. § 2C:44-3e. cannot pass constitutional muster, as it manifestly "increases the maximum penalty for a crime" based on a judge's determination of a crucial fact under a mere preponderance of the evidence standard. New Jersey's statute, even more clearly than the statute in *Jones*, includes language that this Court held to constitute elements of an offense rather than mere sentencing considerations. *Id.* at 1218-1222. N.J. Stat. Ann. § 2C:44-3e. "not only provide[s] for steeply higher penalties, but condition[s] them on further facts that seem quite as important as the elements in the [principal offense]." *Id.* at 1218. The "hate" element of a hate crime cannot reasonably be characterized as a mere sentencing consideration; it is the essence of the crime itself.

The additional penalty imposed by N.J. Stat. Ann. § 2C:44-3e. is two-pronged: a criminal defendant can be branded as a racist and be imprisoned for twice as long as otherwise permitted by law.[7] Thus, the determination of a defendant's mental state greatly increases both the stigma

[7] This statute permits the judge to effectively increase the degree of a particular offense. Thus, Petitioner, who pled guilty to a second degree offense (with a 10-year maximum sentence), could have been sentenced at the first degree level (up to 20 years). If he had been convicted of a first degree offense, his maximum sentence would have increased from 20 years to life imprisonment. *Accord Jones*, 119 S.Ct. at 1224 ("[A] jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.").

associated with the crime and the maximum length of incarceration. Such a determination should not be made without the protections afforded by the reasonable doubt standard. See *McMillan*, 477 U.S. at 103 ("[I]f a State provides that a specific component of a prohibited transaction give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*.") (Stevens, J., dissenting).

Ever since its decision in *Winship*, this Court has repeatedly held that a higher standard of proof than that "necessary to award money damages in an ordinary civil action," *Santosky* v. *Kramer*, 455 U.S. 745, 747 (1982), must be applied in situations creating grave and permanent injury to a citizen. Since *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) the Court has held that a higher standard than preponderance (the "clear and convincing" standard) must be applied in proceedings involving civil commitment, deportation, denaturalization, and the termination of parental rights. See, *e.g.*, *Addington* v. *Texas*, 441 U.S. 418, 427 (1979) (civil commitment proceedings); *Woodby* v. *INS*, 385 U.S. 276, 286 (1966) (deportation proceedings); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960) (denaturalization proceedings); *Santosky* v. *Kramer*, 455 U.S. 745, 769 (1982) (termination of parental rights). See also *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999). If a preponderance of evidence standard was inadequate to protect the interests at stake in these civil proceedings, then a preponderance standard clearly is inadequate here, where a defendant faces doubled criminal sanctions. The application of each of the *Mathews* factors would, at a minimum, require the application of something more

than a preponderance of evidence where a defendant is subjected to both a greater stigma and a greater maximum sentence. Under *Mathews* and its progeny, N.J. Stat. Ann. § 2C:44-3e. plainly is inadequate.[8]

This Court explained in *Rivera* v. *Minich*, 483 U.S. 574, 581 (1987), why a higher standard is appropriate: "[B]ecause an adverse ruling in a criminal, civil commitment or termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings." See also *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) ("In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.").

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[8] Petitioner has identified only one other state statute that increased a maximum sentence based upon a finding by a court of a defendant's purpose, and that statute was held unconstitutional by the state's highest court. In *People* v. *Hernandez*, 757 P.2d 1013 (Cal. 1988) the defendant was charged with kidnapping. The trial court, at sentencing, imposed a three-year additional sentence pursuant to § 667.8 of the California Penal Code, which allowed such an increase if the kidnapping was "for the purpose of committing a sexual offense." The California Supreme Court held the additional sentence unconstitutional because the statute had not been pled or proven at trial. The Court declared: "[T]he reference to mere motive . . . downgrades the importance of the mental element required by the statute and would be inconsistent with the construction given to similar language in other penal statutes." *Id.* at 1016.

B. Assessing A Defendant's Mental State Presents A Task Fraught With Uncertainty; The Risk Of Error Requires Proof Beyond A Reasonable Doubt.

The uncertainty inherent in assessing a criminal defendant's "purpose" or intent necessitates a higher standard of proof. This Court has recently reaffirmed the centrality of mental state – and of mental states generally – to the criminal law. In *Staples* v. *United States*, 511 U.S. 600, 605-06 (1994), and again in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994), the Court explained that the *mens rea* element is so firmly rooted in our traditions that it is presumed where a statute, by its terms, does not include it.

The primary function of a standard of proof is "to minimize the risk of erroneous decisions." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979). As the Court explained in *Addington*, the purpose of a standard of proof is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of the factual conclusions for a particular type of adjudication." 441 U.S. at 423; see also *Mathews*, 424 U.S. at 344. Thus, the reasonable doubt standard reflects society's desire to minimize error in assigning criminal guilt. As Justice Harlan stated in his concurring opinion in *Winship*, the reasonable doubt standard in criminal cases is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." 397 U.S. at 372.

The facts of this case exemplify the difficulties inherent in – and the risks of error associated with – determining a defendant's mental state. It is undisputed that Mr. Apprendi was intoxicated when he fired his gun at his neighbors' purple door. Moreover, substantial evidence was submitted at the sentencing hearing to suggest that he suffered from psychological difficulties. Judge Ridgway conceded as much during the hearing:

> I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias would not have manifested itself except for the psychiatric problem that he has. . . . I'm satisfied that [these acts] represent an aberration. (Pet. App. 160a-161a.)

This declaration by the trial judge who sentenced the petitioner shows that his acts were undoubted affected by his psychiatric turmoil. These circumstances suggest the difficulty of the factual inquiry into Petitioner's state of mind. Judge Ridgway was required to subjectively weigh competing evidence and to balance facts and inferences against each other:

> THE COURT: Very well. Gentlemen, as you're very well aware the statute which we're talking about, 2C:44-3, provides for an enhanced penalty when the Court is satisfied by a preponderance of the evidence that the actions of a defendant are motivated by racial bias. (Pet. App. 138a.)

Because Judge Ridgway utilized the preponderance of evidence standard of proof, he may well have reached

a different conclusion had he been required to determine the defendant's "purpose" beyond a reasonable doubt.

We submit that had the trial judge required the State to show racial bias beyond a reasonable doubt, the Court might well have concluded that the State had failed to carry its burden that Mr. Apprendi's actions were motivated by racial bias, and not by other mental infirmities. We do know that the trial court decided the mental state of the petitioner by the civil standard of mere preponderance of the evidence.

Petitioner respectfully contends that ascertaining any defendant's mental state, particularly one like Mr. Apprendi, who was mentally disabled by an obsessive compulsive disorder and drug and alcohol abuse at the time he committed the predicate crimes, is rife with peril and should be decided by a jury upon proof beyond a reasonable doubt.

In *Culombe* v. *Connecticut*, this Court wrote:

> [D]etermination of how the accused reacted to the external facts, and of the legal significance of how he reacted – although distinct as a matter of abstract analysis, become[s] in practical operation inextricably interwoven. This is so, in part, because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise, and the margin of error which is thus introduced into the finding of "fact" must be accounted for in the formulation and application of the "rule" designed to cope with such classes of facts.

367 U.S. 568, 604 (1961).

This uncertainty in the factual determination distinguishes N.J. Stat. Ann. § 2C:44-3e. from the sentencing provisions at issue in *McMillan* and *Almendarez-Torres*, 523 U.S. 224 (1998). The Pennsylvania statute at issue in *McMillan* provided an enhanced minimum sentence (the maximum sentence remained unchanged) for certain enumerated felonies where the sentencing judge determined by a preponderance that the defendant "visibly possessed a firearm." 477 U.S. at 81. In upholding this statutory scheme, the Court was careful to observe that "the risk of error in the context of a 9712 proceeding is comparatively slight – visible possession is a simple, straightforward issue susceptible of objective proof." *Id.* at 84.[9] Similarly, in *Almendarez-Torres*, the risk of error in ascertaining whether a defendant has a prior criminal record was remote, and the Court repeatedly emphasized the unique nature of recidivism as a sentencing factor. 523 U.S. at 243-244. Unlike the determination of a defendant's mental state, recidivism involves the mechanistic determination of whether a criminal defendant had any prior convictions by simply reading the criminal record or rap sheet. It involves no discretion or measured judgment, careful weighing of the facts and inferences (roles typically assigned to a jury rather than a judge), and it is

[9] *McMillan* is distinguishable on other grounds as well. In *McMillan*, the Court emphasized that the case did not transgress constitutional limits because it did not "alter the maximum penalty for a crime" but merely "limit[ed] the sentencing court's discretion in selecting a penalty within the range already available to it . . . ." *Id.* at 87-88. By contrast here, N.J. Stat. Ann. § 2C:44-3e. doubles the possible maximum penalty for a crime, greatly increasing the range of possible sentences.

objectively verifiable. The Court also qualified its holding with the telling statement that (because defendant admitted his recidivism and would have received a sentence enhancement regardless of the burden of proof): "[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence." *Id.* at 248. See also *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999) (holding that whenever there is an extreme increase in a sentence, even within the sentencing guidelines, the standard of proof should not be preponderance); cf. *United States* v. *Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (employing a clear and convincing evidence standard when the sentence was increased from three years to thirty, still within the maximum).

C. New Jersey's Approach Is Unusual And Extreme.

1. Only New Jersey Expressly Uses A Preponderance Of The Evidence Determination Of A Defendant's Mental State To Effectively Double The Maximum Punishment.

In determining whether a higher standard of proof should be required, this Court has looked to the practice in other states. See, *e.g.*, *Rivera* v. *Minnich*, 483 U.S. 574, 578-79 (1987). In Appendix A, petitioner has included a survey of all state statutes that appear to be relevant to the issue of "hate" crimes and the requisite procedural protections.[10]

[10] Petitioners include in Appendix A all state statutes which appear to be relevant to this issue. In the vast majority of

Appendix A identifies fifty-four statutes from forty-two states (including the District of Columbia) which

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statutes, (*e.g.*) the statute clearly enunciates a separate crime, which requires proof beyond a reasonable doubt of the racial intent. In a number of other instances, the statute is not clear whether the racial intent must be proved by such a standard. Petitioners note that the Wisconsin statute involved in *Mitchell* v. *Wisconsin* expressly declares that the finder of fact is to determine racial bias beyond a reasonable doubt in a special verdict. Thus, even if Wisconsin's statute creates a "sentence enhancer," rather than an "element," that state has expressly addressed this issue, and resolved it consonant with the long-standing history discussed in the text. Moreover, the Wisconsin statute is the one used by the Anti Defamation League as its model for proposed legislation. *See* B'Nai B'Rith Anti-Defamation League 1999 *Hate Crimes*, p. 19. Finally, while some statutes appear to address the issue as a "sentence enhancer", these statutes are ambiguous on the standard of care to be applied. Petitioner's Appendix, attached to this brief, describes all relevant state racial bias statutes. Petitioners have located over two hundred statutes that might be considered "hate crime" statutes. Many of these, however, are aimed at conduct targeting specific places, without regard to the specific mental state impelling the act (*e.g.*, desecration of religious buildings, cemeteries, etc). (For example, Oklahoma Statutes Annotated, § 1765 states as follows: "Any person who willfully breaks, defaces or otherwise injures any house of worship or any part thereof, any appurtenance thereto, or any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship shall be guilty of a felony.") Moreover, none of these statutes specifies that the purpose for which the desecration is done is relevant in any way. While one might easily speculate that desecration of a mosque or synagogue implies religious bias, the statutes do not make such bias relevant. We have, therefore, not included these statutes in our survey. Many states provide generally that anyone intentionally interfering with the civil rights of another, or assaulting them because of their

seem to use racial (or religious or gender or sexual) bias as a relevant factor. (Several states have each kind of

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exercise of their civil rights, commits a crime. We have also not included these statutes in the survey, although they also would seem to require proof beyond a reasonable doubt of the intent to act because of the civil rights of the victim.

The free standing statutes establish a new crime with a new penalty for a specific conduct and mental state. A variation on this theme establishes a new crime of "assault" or "harassment" or some other conduct "because of bias" and increases the penalty for the predicate crime. New Jersey itself has two of these statutes, N.J. Stat. Ann. § 2C:12-1e. and N.J. Stat. Ann. § 2C:33-4d.

We have assumed that the free standing statutes would require the prosecutor to prove, beyond a reasonable doubt to a jury, the specific *mens rea* indicated in the statute. In a few instances, there is case law so indicating, but most of the statutes are silent on this point, and there is no case law one way or the other.

The case before the Court involves the other kind of statute – an enhancement statute. These statutes allow increased punishment based upon bias motivation. We have found twenty-four statutes that appear to qualify under this label. Of these, eight permit racial bias to allow an increase only within the maximum sentence. One of these – Kansas – expressly uses a "clear and convincing evidence" standard. Sixteen allow an increase in the maximum sentence. Of the remaining 16, however, five (D.C., Florida, Mississippi, Rhode Island and Wisconsin) expressly require proof beyond a reasonable doubt of that motivation, and case law in another two (California and Pennsylvania) seems to require such a standard. The rest are silent on the standard of proof to be invoked, but few allow an increase anywhere near the magnitude of New Jersey. Vermont, for example, allows an increase of crimes punished by less than 5 years imprisonment, but if the underlying offense is itself punishable by more than five years, racial bias may not increase the maximum sentence.

statute, or, in some instances, several separate free standing statutes. See California, Connecticut, Illinois, Montana, Nevada, New Jersey, Rhode Island and West Virginia.) These statutes are fairly separated into two categories: (1) free stand and (2) enhancement.

The free standing statutes establish a new crime with a new penalty for a specific conduct and mental state. (For example, Idaho Code § 18-7902 states that a person is guilty of . . . "malicious harassment" if that person "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry or national origin," harms or threatens to harm him. Malicious harassment is punishable by up to five years imprisonment. § 18-7903.) A variation on this theme establishes a new crime of "assault" or "harassment" or some other conduct "because of bias" and increases the penalty for the predicate crime. New Jersey itself has two of these statutes, N.J. Stat. Ann. §§ 2C:12-1e. and 2C:33-4d.[11]

Only three states, North Carolina, Texas and New Jersey, expressly invoke a standard less than beyond a reasonable doubt. North Carolina's increase applies only *within* the maximum sentence, and Texas' statute applies only to lesser misdemeanors, not to felonies. Even then, the Texas statute requires "an affirmative finding" of racial bias, which has been interpreted as requiring "relevant and reliable" evidence. *Martinez* v. *State*, 980 S.W. 2d 662, 667 (Tex. App. 1998).

Thus, no state except New Jersey expressly allows an increase of double the sentence (or more) based upon a standard less than beyond a reasonable doubt, whether that finding is made by judge or jury.

[11] Presumably, free standing statutes would require the prosecutor to prove, beyond a reasonable doubt to a jury, the

The instant case involves the other category of statute – "enhancements." These statutes allow increased punishment based upon bias motivation. Twenty-four state statutes appear to fit within this category. Of these, eight permit racial bias to allow an increase only within the maximum sentence. One of these – Kansas – expressly uses a "clear and convincing evidence" standard. Sixteen allow an increase in the maximum sentence. Five of these sixteen (D.C., Florida, Mississippi, Rhode Island and Wisconsin), expressly require proof beyond a reasonable doubt of that motivation, and case law in another two (California and Pennsylvania) seems to require such a standard. Six of the nine remaining are silent on the standard of proof to be invoked, but few allow an increase anywhere near the magnitude of New Jersey. Vermont, for example, allows an increase in the maximum sentence only for crimes punished by less than 5 years imprisonment, but if the underlying offense is itself punishable by more than five years, racial bias may not increase the maximum sentence.

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specific *mens rea* indicated in the statute. In a few instances, there is case law so indicating, but most of the statutes are silent on this point, and there is no case law one way or the other.

662, 667 (Tex. App. 1998). Thus, no state except New Jersey expressly allows an increase of double the sentence (or more) based upon a standard less than beyond a reasonable doubt, whether that finding is made by judge or jury.

Ironically, New Jersey itself appears to recognize the need for proof beyond a reasonable doubt in charges of racial bias. New Jersey's Code of Criminal Justice defines two specific offenses – one involving racial harassment (N.J. Stat. Ann. § 2C:33-4d.), the other racial assault (N.J. Stat. Ann. § 2C:12-1e.) – that require proof of racial bias beyond a reasonable doubt. In stark contrast to N.J. Stat. Ann. § 2C:44-3e., conviction for one of these aggravated offenses far less seriously increases the possible punishment (from either thirty days or six months to eighteen months under N.J. Stat. Ann. § 2C:43-6). Thus, New Jersey seems to have it backwards: it requires a stringent burden of proof for moderate penalties and a moderate burden of proof for stringent penalties.

2. The Federal Sentencing Guidelines Recognize That The Determination Of A Biased Purpose In The Commission Of A Crime Calls For The Highest Standard Of Proof.

That racial bias is strikingly different from virtually every factor that increases a sentence has been recognized not only by the vast majority of states, but also by Congress. In 1994 Congress enacted Pub. L. 103-322, § 280003 of which instructed the Federal Sentencing Commission to increase the base offense level three levels (essentially an increase, within the maximum statutory sentence, of

1½-2 years), but only if "the finder of fact at trial determines beyond a reasonable doubt" that the crime is a hate crime. See 28 U.S.C.A. § 994, Historical and Statutory Notes. This appears to be the only time that Congress has instructed the Sentencing Commission on the standard of proof, and the only time that it has expressly required proof beyond a reasonable doubt of a factor that will not increase the statutory maximum.

II. ANY FACT THAT RESULTS IN AN INCREASE OF THE MAXIMUM SENTENCE (EXCEPT RECIDIVISM) MUST BE RESOLVED BY A JURY.

A. The Question Of Intent Can Never Be Ruled As A Question Of Law, But Must Always Be Submitted To The Jury.

N.J. Stat. Ann. § 2C:44-3e. runs afoul of this Court's pronouncement in *Jones* that the Fifth and Sixth Amendments require 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." 119 S.Ct. at 1223, fn. 6. This pronouncement is merely the culmination of a long line of cases protecting and expanding the right to a jury trial. From the moment of its creation by Athena on the Areopagus,[12] the jury has served as a bulwark against overzealous prosecutors and jaded judges. As this Court has stated, the "essential feature of a jury . . . [is] the interposition between the accused and his accuser of the common sense judgment of a group of laymen . . . . " *Williams*

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[12] Aeschylus, *The Eumenides.*

v. *Florida*, 399 U.S. 78, 100 (1970). The jury has been the embodiment of community norms – and community judgment – since at least its restoration in the England of Henry II.

Development of the role of the jury in this country – recited by this Court most recently in *Jones* – illustrates the critical role that juries play in American law. This Court has played no small role in that development. While many countries have restricted or eliminated the role of juries in their legal systems, this Court has repeatedly defended the integrity of our jury system.[13]

This Court has recently reaffirmed that juries, and not judges, must decide critical issues in a criminal case. See *United States* v. *Gaudin*, 515 U.S. 506 (1995). Indeed, *Gaudin* is intriguingly on point. In that case, the government sought to avoid a jury determination of the issue of materiality by simply labeling it as something else (just as N.J. Stat. Ann. § 2C:44-3e. seeks to remove the determination of a defendant's purpose from the jury by labeling it as a sentencing factor). In rejecting this semantic argument, the Court declared:

> The existence of a unique historical exception to this principle [trial by jury] – and an exception that reduces the power of the jury precisely when it is most important . . . would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so.

Id. at 515.

[13] For example, over the past thirty years this Court has reinvigorated both the petit jury and the grand jury, even when others have argued that these institutions have become relics of the past. *See, e.g., Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

The question of mental state – whether characterized as motive, purpose, or specific intent – has long been the province of juries. As this Court explained in *Morissette* v. *United States*, "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." 342 U.S. 246, 274 (1952). The Court in *Morissette* relied heavily on this principle to reverse the lower court's removal of intent from those questions to be resolved by the jury. In support, the *Morissette* Court cited *People* v. *Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (N.Y. 1891): "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury."

This Court has continued to reject the presumptive intent argument, acknowledging the need for a jury to determine whether the defendant had the requisite mental state to be punished under the statute. In the antitrust context, the Court in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978), concluded that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices."

New Jersey, however, seeks to take from the defendant his protection by that jury, and from the jury the

very essence of its function. As the Court said in *Jones*, New Jersey seeks to relegate the jury to a "gatekeeping" role, permitting it to decide some important facts while reserving other equally important facts to be decided by a judge. The role of the jury as the embodiment of community norms is severely compromised when a single judge – rather than a cross-section of the community in which the defendant lives – is permitted to decide whether a defendant committed a "hate crime." The Sixth Amendment's protection of a jury right cannot be so easily overridden, particularly when the statute doubles the sentence and brands a defendant with the stigma of being a bigot in the process.

As one of the leading treatises on jury selection has stated: "[T]he Court has established extraordinarily stringent standards aimed at guaranteeing jury representativeness. This is nowhere clearer than in recent discrimination cases regarding other non-jury areas in which the Court has explicitly excepted jury challenges from its emphasis on discriminatory intent as opposed to impact." National Jury Project, *Jurywork* 5-7 (1990) (Citing *Washington* v. *Davis*, 426 U.S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dept. Corp.*, 429 U.S. 252 (1977); *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Duren* v. *Missouri*, 439 U.S. 1357 (1979); and *Batson* v. *Kentucky*, 476 U.S. 79 (1986)).

Richard G. Singer and Mark D. Knoll have observed that, prior to the mid-1980s, federal courts universally held any factor that increased the maximum sentence for a crime constituted an element of the offense that should be resolved by a jury. *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v.

Pennsylvania, 22 Seattle Univ. L. Rev. 1057 (1999). The accepted standard was that any issue of value (as in larceny cases) or quantity (as in Prohibition cases) was a jury question. See, *e.g.*, *Pace* v. *Aderhold*, 2 F. Supp. 261, 263 (N.D. Ga.), aff'd 65 F.2d 790 (5th Cir. 1932); *Olivito* v. *United States*, 67 F.2d 564, 565 (9th Cir. 1933); *United States* v. *Wilson*, 284 F.2d 407, 408 (4th Cir. 1960). In *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961), the Second Circuit thought the label irrelevant. Instead, Judge Henry Friendly eloquently declared that, whatever name is given the factor, when it deeply affects the defendant, it should be resolved by the jury:

> We assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than the sentencing judge. There is, of course a certain incongruity in asking a jury to exercise such expertise in the ways of the underworld as to determine the "value" of money orders that can be or have been forged; but the omniscience of the jury extends to harder questions than that.

Id. at 921.

The traditional stance of the federal courts – and of most state courts as well – has been that any factor that increases the maximum sentence must be submitted to the jury. Even in the one major exception to this rule, recidivism, the vast majority of states still requires that the issue be submitted to a jury, as both the majority and dissenting opinions in *Almendarez-Torres* recognized.

Another commentator recently concluded that the standard proffered by this Court in *Jones* – that any factor that increases the maximum sentence (except recidivism)

must be proved to the jury – best comports with prior precedent and with the requirements of the Sixth Amendment. See Benjamin J. Priester, *Further Developments on Previous Symposia: Sentenced for a Crime The Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 Law and Contemp. Prob. 249 (1998). Priester concludes:

> The maximum sentences position is a sound constitutional test. . . . This position generally provides great deference to the legislature. . . . The only matter about which the maximum sentences position is not deferential is the definition of the "maximum sentence" for each crime. . . . In addition, the maximum sentences position adopts the distinction between generative statutes and sentencing regulations. The Sentencing Guidelines . . . do not define any new "crimes" . . . the maximum possible sentence is always restricted to that of the underlying statutory offense of conviction.[14]

Id. at 292.

The "increase of maximum sentence" standard establishes a bright line test for determining whether an issue

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[14] A potential increase in the maximum sentence has also shaped other decisions in this Court. Thus, for example, in *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954), the Court held that where a prior conviction increased the maximum penalty, the Sixth Amendment right to counsel was activated. *Accord Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Specht* v. *Patterson*, 386 U.S. 605 (1967). While these cases may be distinguished from the case at bar, the underlying premise, that changes in the maximum sentence and stigma require greater protection than that afforded a party in a tort action, has remained unchanged.

goes to the jury. Courts would not have to grapple with whether a factor was "part of the crime" with a more cumbersome "factors" or "totality" approach. Moreover, as Priester notes, factors that increased punishment within the maximum (for example, the Pennsylvania statute at issue in *McMillan, supra*), would be unaffected. In short, this position protects those 25 states (as well as the federal government) that have adopted some form of sentencing guidelines.

B. N.J. Stat. Ann. § 2C:44-3e. Imposes A Significant Societal Stigma That Should Be Imposed Only By A Jury, As A Jury Best Represents The Collective Judgment Of The Community.

The idea that mental state is necessary for criminal conviction "is no provincial or transient notion." *Morisette*, 342 U.S. at 250. "What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition." Henry Hart, The Aims of the Criminal Law, 23 Law and Contemp. Probs. 401, 404 (1958); see also Gardner, *Bailey* v. *Richardson and the Constitution of the United States*, 33 B.U.L. Rev. 176, 193 (1953) ("The essence of punishment for moral delinquency lies in the criminal conviction itself. . . . It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.")

These ideas animated the Court's conclusion in *In re Winship* that the highest standard of proof must be applied in a criminal case "because of the *possibility* that

[the defendant] may lose his liberty upon conviction and because of the *certainty* that he would be stigmatized by the conviction." [emphasis added] 397 U.S. 358, 364 (1970). That statement recognizes the central truth of the criminal law – every criminal conviction, even those which do not, or cannot, result in imprisonment, brands the defendant as an immoral actor. As Justice Brennan concluded: "A society that values the good name . . . of every individual should not condemn a man . . . when there is reasonable doubt about his guilt." *Id.*

That condemnation should come from the jury. As Justice Thomas recently wrote for the majority in *Jones* v. *United States*, 527 U.S. 373, 383 (1999), the jury "express[es] the conscience of the community. . . . " 527 U.S. at 383 (quoting *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988)). The New Jersey statute rejects the history and understanding behind these conclusions and imposes upon the defendant charged with a "racially biased crime" the stigma of bigotry on the slimmest burden of proof, really a mere civil burden of proof, and without permitting the community itself to play a significant role in that determination. Judge Ridgway, moreover, acknowledged the collateral consequences of the stigma bestowed upon the defendant when he stated: " . . . and if there is difficulty . . . with the type of crime and his safety in prison, that's something he'll have to wrestle with." (Pet. App. 161a.)

In contemporary American society, few epithets betray more condemnation than that of "racist". A judgment that a defendant is a racist, particularly when the legislature has decided that such a judgment entails a substantially longer prison sentence, should be rendered

by the broadest cross-section of the community our legal system recognizes – the jury.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, Petitioner's twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged "with purpose to intimidate" on account of race.

Respectfully submitted,

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