Fordham Urban Law Journal

Volume 23 | Number 3 Article 12

1996

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Cover Page Footnote
The author would like to thank Thomas A. Tormey for his thoughtful contributions throughout the drafting of this Note. The author is also grateful to Professor Daniel C. Richman for his comments and suggestions and to her family for their encouragement and support.

MULTIPLE PETTY OFFENSES WITH SERIOUS PENALTIES: A CASE FOR THE RIGHT TO TRIAL BY JURY

*Christine E. Pardo**

> "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." - Thomas Jefferson**

Introduction

The Sixth Amendment to the United States Constitution provides that "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."[1] The Supreme Court has interpreted this language to apply only to "serious," as opposed to "petty," offenses.[2]

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** Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian Boyd ed., 1958).

1. U.S. CONST. amend. VI.

2. Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (citing Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904)). This Note will refer to the concept of exempting certain offenses from the constitutional requirement of jury trial as the "petty offense exception." Commentators have argued vigorously about the very existence of the petty offense exception. *See, e.g.*, Felix Frankfurter & Thomas G. Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 *passim* (1926) (supporting the argument that courts should determine the right to jury trial based on which offenses received trial by jury at common law); George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 *passim* (1959) (interpreting the Constitution as including all criminal prosecutions within the jury trial guarantee); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL'Y 7, 11-12 (1994) (arguing that the petty offense doctrine is "an unjustified departure from both the letter and the underlying philosophy of the Constitution" and proposing that the serious versus petty distinction "loses much of its appeal" in the context of the Sixth Amendment because the distinction does not apply to "the right to a speedy trial," "the right to a public trial," "the right to be informed of the nature and the cause of the accusation," "the right to confront adverse witnesses," "the right to compulsory process for obtaining favorable witnesses," or "the right to counsel").

In *Baldwin v. New York*,[3] the Court articulated a bright-line methodology for distinguishing "serious" from "petty" offenses. In order to determine whether an accused has a right to a jury trial, the Court directed lower courts to assess the maximum statutorily allowable penalty for a charged offense. Offenses for which the legislature has authorized a maximum sentence greater than six months' imprisonment are considered "serious" and therefore give the accused the right to choose trial by jury.[4]

The *Baldwin* standard is relatively straightforward: an offense carrying a maximum prison sentence of greater than six months is considered "serious," and any defendant accused of such an offense is constitutionally entitled to a jury trial. The greater-than-six-month standard, however, does not provide guidance in cases where an accused is charged with multiple petty offenses that, when tried in the aggregate, threaten the defendant with a term of incarceration in excess of six months. Circuit Courts that have addressed this issue have reached divergent results.[5] The Supreme

3. 399 U.S. 66, 69 (1970).

4. A criminal defendant may waive the right to jury trial. FED R. CRIM. P. 23(a). The defendant must express the waiver voluntarily, knowingly and intelligently. United States v. Systems Architects, Inc., 757 F.2d 373, 375 (1st Cir. 1985), *cert. denied*, 474 U.S. 847 (1985). A criminal defendant has no absolute constitutional right to a nonjury trial. Singer v. United States, 380 U.S. 24, 34-35 (1965) (holding that a rule requiring that the court and the government consent to a defendant's waiver of jury trial in a criminal case was valid where the government refused to consent and the defendant gave no reason for wanting to forego a jury trial other than to save time and noting that "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right"); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989) (holding that a defendant cannot override the government's request for a jury trial absent "compelling" circumstances which "may render impossible or unlikely an impartial trial by jury" (quoting Singer v. United States, 380 U.S. 24, 37-38 (1965))); United States v. Parker, 742 F.2d 127, 128 n.1 (4th Cir. 1984) (holding that the defendants had no right to a nonjury trial for perjury when the judge, who presided at the trial in which the alleged perjury occurred, insisted on a jury trial for impartiality), *cert. denied*, 469 U.S. 1076 (1984); United States ex rel Williams v. DeRobertis, 715 F.2d 1174, 1178 (7th Cir. 1983) (dictum) (stating that a court or a prosecutor can veto a defendant's request for a nonjury trial), *cert. denied*, 464 U.S. 1072 (1984). *See also* Walter Pincus, *Weinberger Waives Right to Iran-Contra Jury Trial*, WASH. POST, Oct. 9, 1992, at A23 (explaining the dilemma of a defendant required to face trial by jury when he would rather have a bench trial); Cynthia M. McKnight, *Right to Jury Trial*, 82 GEO. L.J. 1033 (1993) (outlining various courts' approaches, during 1992 and 1993, to the question of whether a defendant has an absolute right to jury trial).

5. For example, the Second Circuit has refused to extend jury trial protection to a defendant charged with multiple petty offenses whose aggregate sentence exposure totaled over six months' incarceration. United States v. Lewis, 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996). Courts have not coined consistent terms for their approaches to the aggregation issue. This Note will adopt the term

Court, however, will speak on the issue this term when it decides *Lewis v. United States*.[6]

Circuit Courts diverge on two fundamental questions: (i) whether a defendant charged with multiple petty offenses is entitled to a jury trial when the maximum potential prison sentence for the charged offenses is greater than six months, and, if so, (ii) whether such a defendant may be denied that right if the presiding judge makes a pre-trial commitment that the aggregate sentence will not exceed six months. This Note addresses and attempts to resolve each of these questions. Part I outlines the history and development of the petty offense exception and the Supreme Court's jury trial entitlement jurisprudence. In particular, this Part discusses the fundamental principle of gauging criminal seriousness by the length of a penalty as authorized by statute. In Part II, this Note sets out the Circuit split and explains why the courts are divided on the aggregation issue. Part III argues that courts must aggregate maximum penalties for multiple petty offenses charged together to accurately reflect legislative determinations of criminal seriousness. This Part also criticizes the use of pre-trial sentencing stipulations to circumvent trial by jury when it would otherwise be required.

I. History and Development of Jury Entitlement Jurisprudence

The right to a jury trial is one of the few rights specifically enumerated in the original Articles of the United States Constitution.[7] Article III, Section 2 provides that, "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[8] This right was

created recently by one commentator—the "individual penalty" approach—to describe the Second Circuit's method of applying the *Baldwin* six-month standard to the penalty for each petty offense charged. Jeff E. Butler, Note, *Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial*, 94 MICH. L. REV. 872, 883 (1995). The Fourth Circuit has granted a jury trial to a petty offense defendant facing aggregate penalties that potentially exceed six months' imprisonment. United States v. Coppins, 953 F.2d 86 (4th Cir. 1991). This Note will refer to the *Coppins* standard as "simple aggregation." The Tenth Circuit has also held that courts must aggregate multiple petty offense penalties to determine whether a defendant has the right to a jury trial. United States v. Bencheck, 926 F.2d 1517 (10th Cir. 1991). The *Bencheck* court, however, limited this right by providing that a trial judge may obviate the need for jury trial by making a pre-trial commitment that the aggregate sentence imposed will not exceed six months. Hereinafter, this Note will refer to the *Bencheck* standard as "limited aggregation."

6. *Lewis*, 65 F.3d 252.

7. Lynch, *supra* note 2, at 8.

8. U.S. CONST. art. III, § 2. The rest of the jury trial provision reads: "and such Trial shall be held in the State where the said Crimes shall have been committed; but

further secured by the Sixth Amendment to the Constitution, which guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[9]

Although the language of the Sixth Amendment expressly states that "*all* criminal prosecutions"[10] should be undertaken before a jury, the Supreme Court has concluded that the Framers "tacitly excluded petty offenses from the ambit of the jury clauses in Article III and the Sixth Amendment . . . ."[11] Indeed, in the Framers' era, offenses which were considered "petty" were commonly adjudicated before a justice of the peace without a jury and with no right to an appeal.[12]

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when not committed within any State, the Trial shall be at such Place or Places as the Congress by law may have directed."

9. The rest of the amendment reads: "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 at his request." U.S. CONST. amend. VI. The right to jury trial applies to state criminal proceedings through the Due Process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

10. U.S. CONST. amend. VI (emphasis added).

11. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989); *Duncan*, 391 U.S. at 158. *See also* Stephen C. Larson, Comment, *United States v. Bencheck: Aggregate Penalties and Jury Entitlement in Multiple Petty Offense Cases*, 69 DENV. U. L. REV. 763, 764 (1992).

12. *See* Frankfurter & Corcoran, *supra* note 2 at 963-64. Example of offenses which were adjudicated by a justice of the peace or a magistrate for which "the penalties were not severe" include

> Laws concerning liquor selling, highways, waterways and ferries, currency, Indians, peddling, . . . tobacco, flour and beef trades[,] . . . seamen, hunting and fishing . . . . On the whole, the penalties were not severe, although fifty shillings could be imposed for illegal hunting, five pounds each was extracted from mutinous seamen, sellers of corn at extortionate prices, unlicensed peddlers, shipmasters carrying tobacco in bulk, those taking tobacco from a warehouse, or packing it in undersized barrels, and twenty pounds was the penalty for harboring a deserter.

Id. However, at the time of the ratification of the Constitution, jury trials in criminal cases had already existed in England for several centuries and "carried impressive credentials traced by many to the Magna Carta." *Duncan*, 391 U.S. at 151 (citing W. Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 349 (Cooley ed. 1899)). There is much evidence to show that the right to jury trial was considered a fundamental right carried over from England by the settlers who brought the right with them "as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." J. Story, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779.

A. Early Benchmarks of Seriousness: The Origins and Evolution of the Criteria for Distinguishing Petty and Serious Offenses

Before 1970,[13] courts distinguished serious offenses from petty ones by looking to common law indictability and the moral quality of offenses.

1. Indictability at Common Law

In *Callan v. Wilson*,[14] the Court reversed an 1888 conspiracy conviction and granted a jury trial based on the common law principle that a person accused of conspiracy "was entitled to be tried by jury." The Court acknowledged that the jury trial guarantee does not encompass "petty offenses,"[15] but rejected the government's contention that conspiracy was a petty offense.[16] Based on a finding that conspiracy was indictable at common law,[17] the Court declared it to be a serious offense. The Court went on to state that offenses "which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose" are considered "petty."[18] Thus, after *Callan*, courts used common law indictability as a fundamental test for distinguishing serious offenses from petty ones.

2. The Moral Nature of the Offense.

In the 1904 case of *Schick v. United States*,[19] the Supreme Court established that the moral quality of an offense can also be an indication of its seriousness.[20] The defendant in *Schick*, a retail butter dealer, was convicted of buying oleomargarine that had not been

13. Baldwin v. New York, 399 U.S. 66 (1970). In *Baldwin*, the Supreme Court established a benchmark standard for distinguishing "serious" offenses from "petty" offenses. Specifically, the Court held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69. *See infra* Part II.B.

14. 127 U.S. 540, 549 (1888).

15. *Id.* at 557. In an often-cited law review article, the future Justice Frankfurter argued that the jury trial provisions must be interpreted in terms of common law jury trial entitlement. *See* Frankfurter & Corcoran, *supra* note 2, at 971.

16. *Id.*

17. *Id.* The court concluded that, at common law, conspiracy was an "infamous crime" and hence indictable at grand jury.

18. *Id.* at 557.

19. 195 U.S. 65 (1904).

20. *Id.* at 67-68. The *Schick* court also considered the severity of the punishment under the statute which was a fifty dollar fine. *Id.* This analysis foreshadowed the Court's use of maximum penalties as the primary criteria for determining jury entitlement. *See infra* Part II.B.

stamped in accordance with a tax statute.[21] Based on its finding that the crime was "not necessarily one involving any moral delinquency,"[22] the Court concluded that it was petty, and therefore did not require trial by jury.

By contrast, in *District of Columbia v. Colts*,[23] the Court found the crime of "reckless driving so as to endanger property and individuals" to be a *malum in se* offense—wrong in itself because of its inherently evil nature.[24] Such a crime was "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[25] Accordingly, the Court concluded that the defendant in *Colts* deserved a jury trial.

B. The Modern Test for Seriousness: Maximum Sentence Exposure

The traditional approach of gauging seriousness in terms of common law indictability and moral nature, however, "proved nettlesome and yielded incongruous results."[26] Consequently, the Court "sought more objective indications of the seriousness with which society regards [an] offense."[27]

In 1968, in *Duncan v. Louisiana*,[28] the Supreme Court considered whether a defendant convicted of simple battery, a misdemeanor punishable by a maximum of two years' imprisonment and

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21. *Id.* at 67-68.

22. *Id.* at 67.

23. 282 U.S. 63 (1930). The Court further developed the moral nature test in *District of Columbia v. Clawans*, 300 U.S. 617 (1937). In *Clawans*, the Court found that selling second-hand goods without a license was not a serious crime, but merely a petty offense because it was only "an infringement of local police regulations and its moral quality is relatively inoffensive." *Id.* at 625.

24. *Colts*, 282 U.S. at 73. *See* BLACK'S LAW DICTIONARY 959 (6th ed. 1990). "An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." The Court also determined that the offense was indictable at common law. *Colts*, 282 U.S. at 73.

25. *Id.*

26. Brief for Appellee at 7, United States v. Lewis, 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996)(citing Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989)) (brief prepared by Assistant United States Attorneys Susan Corkery and James Walden of the United States Attorney's Office for the Eastern District of New York).

27. *Blanton*, 489 U.S. at 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)). The *Blanton* Court noted that "[the Court's] adherence to a common-law approach has been undermined by the substantial number of statutory offenses lacking common law antecedents." *Id.* at n.5 (citing Landry v. Hoepfner, 840 F.2d 1201, 1209-1210 (5th Cir. 1988)(en banc), *cert. denied*, 489 U.S. 1083 (1989)).

28. 391 U.S. 145 (1968).

a $300 fine, was improperly denied a jury trial. Upon conviction, the defendant was sentenced to serve sixty days in prison and pay a $150 fine.[29]

The *Duncan* Court looked to the maximum authorized legislative penalty for simple battery in order to determine its level of seriousness.[30] Recognizing that the "boundaries of the petty offense category have always been ill-defined," the Court sought to establish more "objective criteria" to aid in jury trial determinations.[31] Thus, the Court looked to "the penalty authorized by the law of the locality . . . 'as a gauge of its social and ethical judgments . . . .' "[32] While the Court declined to designate a specific term of imprisonment to distinguish petty offenses from serious ones, it did determine that, in the specific circumstances before the court, "a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."[33] The *Duncan* opinion clearly establishes that potential sentence exposure, not the sentence actually imposed, is the proper measure of an offense's seriousness.

In 1970, in *Baldwin v. New York*,[34] the Supreme Court established that an offense carrying a potential sentence of more than six months is "serious" and thus triggers the right to a jury trial.[35] The Supreme Court held that a potential one-year sentence for "jostling," a misdemeanor offense, (neither indictable at common law nor a crime of moral depravity,) was enough in itself to trigger the

29. *Id.* at 146. Justice White, writing for the majority, noted that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the government." *Id.* at 155. The Court further interpreted this feature of the jury trial right to provide "an accused with the right to be tried by a jury of his peers . . . an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Id.* at 156. Based on a determination that the right is fundamental to our system of justice, the Court's holding made the Sixth Amendment jury trial guarantee binding on the States through the Due Process Clause. *Id.*

30. *Id.* at 159. Although the trial court had sentenced the defendant to sixty days' imprisonment, the court focused on the authorized legislative penalty which was two years. The Supreme Court affirmed the appellate court's rejection of the actual sentence as an indicator of the crime's severity. *Id.*

31. *Id.* at 161 (citing District of Columbia v. Clawans, 300 U.S. 617 (1937)).

32. *Id.* at 160 (quoting *Clawans*, 300 U.S. at 628).

33. Duncan v. Louisiana, 391 U.S. 145, 162 (1968).

34. 399 U.S. 66 (1970).

35. *Id.* at 69 n.6 ("A potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.' "). In *Baldwin*, the New York City Criminal Court, in a non-jury trial, convicted the defendant of a misdemeanor punishable by a maximum term of twelve months' imprisonment. The New York Court of Appeals rejected Baldwin's argument that he was unconstitutionally denied a jury trial and affirmed the conviction. *Id.*

defendant's right to a jury trial.[36] The Court's landmark holding was that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."[37]

The *Baldwin* Court rejected the prosecutor's suggestion that the distinction between misdemeanors and felonies should dictate what are petty or serious offenses.[38] Instead, the Court noted the "near uniform judgment" of the states that a potential prison sentence of six months marked the appropriate distinction between petty and serious offenses.[39] Accordingly, the court held that "some misdemeanors . . . are also 'serious' offenses."[40]

The Court acknowledged the tension between two competing goals: the need to efficiently allocate limited judicial resources and the need to fulfill the Sixth Amendment's fundamental purpose of protecting defendants from government oppression.[41] The Court recognized that the prospect of imprisonment for any amount of time "will seldom be viewed by the accused as a trivial or 'petty' matter, and may well result in quite serious repercussions affecting [the defendant's] career and his reputation."[42] Nevertheless, in some circumstances, "these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications."[43] The *Baldwin* Court thus held that the potential length of the statutory penalty for an

36. *Id.* at 74.

37. *Id.* Justice Black, joined by Justice Douglas in his concurrence, agreed that the defendant deserved a jury trial, but rejected the entire concept of the petty offense exception. Black favored a strict interpretation of the constitutional provisions which would grant jury trial "in all criminal prosecutions" and for "all crimes." For Black, any attempt to balance the interests of defendants with administrative efficiency was "judicial mutilation of our written Constitution." *Id.* at 75. He reasoned that the Framers completed all of the balancing necessary in deciding that "the value of a jury trial far outweighed its costs for 'all crimes' and '[i]n all criminal prosecutions.' " *Id.*

38. *Id.* at 70.

39. The Court noted that on a federal level, 18 U.S.C. § 1 defined petty offenses as those punishable by no more than six months in prison and a $500 fine. Looking to recent history on the state level, the Court found that the category of offenses in the states triable without a jury had been reduced to one: the New York City statute at issue in the case. Baldwin v. New York, 399 U.S. 66, 70 (1970). The Court relied upon "the existing laws and practices of the nation" and followed the over-six-month standard employed in state and federal practice. *Id.*

40. *Id.*

41. *Id.* at 73.

42. *Id.*

43. *Id.* Compelled to draw a line, the *Baldwin* Court concluded that "administrative conveniences" cannot "justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment." *Id.*

offense, and not the penalty actually imposed, is the proper indicator of criminal seriousness.[44] In other words, if a defendant is accused of a crime for which the penalty may exceed six months' imprisonment, that defendant is entitled to a jury trial, even if the prosecution does not intend to seek the full potential penalty and the judge has no intention of imposing it.

C. Post-Baldwin "Seriousness"

Baldwin left open the question whether an offense carrying a maximum sentence of less than six months could be deemed serious for the purpose of requiring trial by jury.[45] In the twenty years following *Baldwin*, courts generally accepted that the length of an offense's potential punishment is the best measure of its seriousness.[46] In some circumstances, however, courts were reluctant to apply maximum sentence exposure as the exclusive consideration.[47] In 1989, the Supreme Court refined the *Baldwin* standard in

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44. Baldwin v. New York, 399 U.S. 66, 73 (1970). However, where the legislature has not determined a maximum sentence for a particular offense, courts evaluate the penalty actually imposed as a measure of seriousness. *See* Duncan v. Louisiana, 391 U.S. 145, 161-62 & n.35 (1968); Blanton v. City of North Las Vegas, 489 U.S. 538, 542 n.6 (1989); Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974); Frank v. United States, 395 U.S. 147, 149 (1969); Bloom v. Illinois, 391 U.S. 194, 211 (1968).

45. *Baldwin*, 399 U.S. at 68-69 & n.6.

46. *See, e.g.*, United States v. Craner, 652 F.2d 23 (9th Cir. 1981). "An offense is not 'serious' because it is severely punished; it is severely punished because it is 'serious.' The severity of prescribed sanctions is regarded as the best objective indication of the general normative judgment of the seriousness of an offense." *Id.* at 24.

47. After *Baldwin*, some courts, perhaps in response to equity considerations, tended to grant jury trials even where the maximum authorized penalty was not greater than six months. *See, e.g.*, *Craner*, 652 F.2d 23, 26 (1981) (ruling that the potential revocation of the defendant's driver's license was a "collateral effect" of conviction raising the offense to the level of serious and thus warranting trial by jury). This tendency was particularly apparent where substantial monetary fines were imposed as part of a particular sentence. *See also* United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977) (finding a fine in excess of $500 to be a "serious" punishment for an offense with a maximum prison term of six months and distinguishing between individual and non-individual defendants, noting that "it is not unrealistic to treat any fine in excess of $500 as a serious matter to all individuals"); Rife v. Godbehere, 814 F.2d 563, 565 (1987) (granting a jury trial because the $1,000 fine imposed upon the defendant exceeded what the court found to be to be the minimum potential amount necessary to trigger an individual's right to jury trial under *Hamdan*: $500); Muniz v. Hoffman, 422 U.S. 454 (1975) (acknowledging that fines alone could be sufficiently severe to trigger the right to jury trial, yet holding that a $10,000 fine imposed on a labor union, charged on a per capita basis to the 13,000 union members, did not have a "serious" effect on any one individual and thus did not warrant a jury trial); United States v. McAlister, 630 F.2d 772, 774-75 (10th Cir. 1980) (granting a defendant charged with trespass on a nuclear plant site the right to jury trial because the possible imposition of a $1,000 fine exceeded the statutory definition of a petty offense).

Blanton v. City of North Las Vegas,[48] where the Court held that offenses carrying a maximum penalty of six months' imprisonment or less are presumptively petty.[49] In *Blanton*, the consolidated defendants had been convicted, without a jury trial, of driving under the influence of alcohol ("DUI").[50] Each defendant faced a maximum penalty of six months' incarceration or, alternatively, forty-eight hours' community service while identifiably dressed as a DUI offender.[51] In addition, the defendants faced up to $1,000 in fines, mandatory attendance at an alcohol abuse education course, and loss of a driver's license for ninety days.[52]

The *Blanton* Court reiterated the accepted principle that legislative penalties are the best indicators of criminal seriousness, stating that the "primary emphasis . . . must be placed on the maximum authorized period of incarceration."[53] Nonetheless, the Court noted that in "rare situation[s]," a defendant accused of a presumptively petty offense has a right to jury trial if he can show that "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."[54] The defendants in *Blanton* were unable to meet this standard and consequently did not receive a jury trial.[55] Accordingly, after *Blanton*, offenses carrying a maximum prison term of less than six months are presumptively "petty,"[56] but courts can consider additional penalties that significantly infringe upon personal freedom.[57]

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48. 489 U.S. 538 (1989).

49. *Id.* at 543.

50. *Id.* at 538.

51. *Id.* at 539-40.

52. *Id.* For a detailed discussion of the double jeopardy implications of prosecuting a driver for DUI after a 90-day license suspension, *see* Carlos F. Ramirez, Note, Administrative License Suspension, Criminal Prosecutions and the Double Jeopardy Clause, 23 FORDHAM URB. L.J. 923 (1996).

53. Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989).

54. *Id.* at 543.

55. *Id.*

56. *Id.*

57. This standard is imprecise at best and its application has proven uneven. For example, in United States v. Nachtigal, 507 U.S. 1, 5 (1993), the Court denied a jury trial to DWI defendants faced with penalties harsher than those in *Blanton*. The Court determined that the combined maximum penalties of six months' incarceration or five years' probation, and a $5,000 fine was not sufficiently serious. *Id.* at 4-5. Furthermore, according to the applicable regulations, the *Nachtigal* defendant faced the possible attachment of twenty-one conditions to probation, including restitution, in-house alcohol program attendance, night and weekend custody in the care of the Bureau of Prisons, in-house arrest when not working, and residence in, or services for, a

Today, courts separate petty offenses from serious offenses according to the *Baldwin-Blanton* standard: an offense carrying a maximum penalty exceeding six months' imprisonment is "serious," and triggers the right to jury trial; an offense having a maximum authorized sentence of less than six months is presumptively "petty," but a defendant can overcome this presumption by showing that additional ancillary penalties are sufficiently severe to transform the charge into a "serious" offense.

II. The Circuit Split: Are Aggregated Petty Offenses "Serious"?

A defendant charged with an offense punishable by more than six months in prison is clearly entitled to a jury trial. When a defendant is charged with multiple petty offenses, however, none of which would individually trigger jury trial entitlement, *Baldwin* and its progeny do not provide direction to lower courts. A defendant charged with multiple petty offenses can face prison time of several years, which would seem to weigh heavily toward a determination of "seriousness." Prosecutors, however, in these cases always have the option of pursuing each petty charge separately, thus nullifying a defendant's claim to jury trial entitlement.

This term, in deciding *Lewis v. United States*,[58] the Supreme Court will consider whether defendants, charged with multiple petty offenses arising from one incident, and facing a potential prison sentence exceeding six months are entitled to a jury trial.[59] In addition, the Court will decide whether a judge's pre-trial commitment not to sentence the defendant to a prison term of more than six months could obviate such a right.[60]

This Part will describe the diverging views of the lower courts. Some courts have applied the "individual penalty approach" and considered the maximum statutory penalty for each separate misdemeanor offense in relation to the greater-than-six-months standard. Consequently, these courts have refused to extend jury trial protection to any defendant charged with multiple petty offenses regardless of whether his aggregate sentence totaled more than six

community correctional facility. *Id.* at 5. In contrast, some courts have provided jury trials for drunk driving offenders because they have found that the potential punishments were "serious." *See, e.g.*, Richter v. Fairbanks, 903 F.2d 1202, 1208 (8th Cir. 1990) (granting a jury trial even though the maximum prison term was only six months because the additional fifteen-year drivers' license revocation indicated a legislative determination that the offense was serious).

58. 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996).

59. *Id.*

60. *Id.*

months.[61] Other courts have employed "limited aggregation." These courts have aggregated penalties for related offenses but limited the jury trial right by holding that a judge may obviate the need for jury trial by making a pre-trial commitment not to impose a sentence exceeding six months or by reducing a sentence on appeal.[62] Finally, some courts have employed "simple aggregation" and made jury trials available to defendants facing multiple petty offense charges carrying aggregate penalty exposure exceeding six months.[63]

A. The Individual Penalty Approach

The Second and Eleventh Circuits have denied jury trials to defendants charged with multiple petty offense counts who faced aggregate penalties of over six months in prison. In 1995, the Second Circuit, in *United States v. Lewis*,[64] ruled that an individual charged and convicted of two petty offenses, each carrying a maximum sentence of six months' imprisonment,[65] was not entitled to a jury trial.[66]

A magistrate judge sentenced the defendant in *Lewis* to three years' probation for each of the two counts, to run concurrently.[67] The defendant argued that the *Baldwin-Blanton* standard afforded him the right to a jury trial because his potential punishment exceeded six months' imprisonment.[68] The Second Circuit recognized that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"[69] and agreed that "any defendant facing in excess of six months' incarceration for a single offense is entitled to a jury trial."[70]

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61. *Id.*; United States v. Brown, 71 F.3d 845 (11th Cir. 1996).

62. United States v. Bencheck, 926 F.2d 1512, 1518 (10th Cir. 1991); Rife v. Godbehere, 814 F.2d 563 (9th Cir. 1987).

63. *See* United States v. Coppins, 953 F.2d 86 (4th Cir. 1991); United States v. Potvin, 481 F.2d 380 (10th Cir. 1973); United States v. Musgrave, 695 F. Supp. 231, 232-33 (W.D. Va. 1988); United States v. Coleman, 664 F. Supp. 548, 549 (D.D.C. 1985).

64. 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996).

65. *Id.* at 253. Each charge was also punishable by a $100 fine. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. United States v. Lewis, 65 F.3d 252, 254 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996) (quoting Baldwin v. New York, 399 U.S. 66, 69 (1970)).

70. *Id.*

While acknowledging that maximum legislative penalties are the best indicia of the seriousness of an offense, however, the court held that when a defendant is charged with multiple petty offenses, the interests of judicial economy prevail over that defendant's right to jury trial.[71] The *Lewis* court observed that if the government severed the two charges and prosecuted them separately, "the question of [the defendant's] right to a jury trial could have been obviated altogether."[72] According to the court, judicial efficiency, when "imposed at no greater risk to the defendant[,] should not change the standard for determining whether the defendant is given a jury trial."[73]

The Second Circuit bolstered its decision by reference to legislative intent. "While [the other circuits] that have previously addressed the question have focused upon the *defendant's* view as to the seriousness of facing over six months' imprisonment for aggregate sentences, the appropriate inquiry is how seriously *Congress* views the offenses . . . ."[74] Federal law dictates that multiple terms of imprisonment imposed simultaneously for petty offenses run concurrently[75] unless the judge or applicable law provides otherwise. The Second Circuit interpreted this law to reflect a Congressional recognition that "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction."[76] The court thus held that while multiple petty counts tried together may expose a defendant to an aggregate sentence of more than six months in prison, Congress did not intend that these counts, by their multiplicity, become "serious" offenses that mandate jury trial.[77]

The Eleventh Circuit, in *United States v. Brown*,[78] considered facts similar to those in *Lewis*, and reached the same conclusion. The *Brown* defendant was charged with two petty offenses arising from one incident, each count carrying a maximum penalty of six

71. *Id.* at 255.

72. *Id.*

73. *Id.* (citing United States v. Coppins, 953 F.2d 86, 92 (Niemeyer, J., dissenting)). The *Baldwin* Court further stated, "[t]he mere fact that the government chose to consolidate the charges [to purportedly conserve judicial resources] provides no greater justification for a jury trial than if the charges were tried separately." *Id.*

74. United States v. Lewis, 65 F.3d 252, 254 (2d. Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996).

75. 18 U.S.C. § 3584(a)(1985). Terms run concurrently unless the judge exerts his power to impose consecutive terms or the statute mandates otherwise. § 3584(a).

76. *Lewis*, 65 F.3d at 255.

77. *Id.*

78. 71 F.3d 845 (11th Cir. 1996).

months' imprisonment.[79] A magistrate judge, sitting without a jury, found the defendant guilty of one count and imposed a sentence of three months' unsupervised probation.[80] The defendant appealed, arguing that he had been entitled to a jury trial because he had faced a potential sentence of twelve months' imprisonment.[81]

Following the Second Circuit's reasoning in *Lewis*,[82] the Eleventh Circuit affirmed Brown's conviction.[83] The court acknowledged that legislatively authorized maximum penalties are the ultimate indicator of criminal seriousness, but held that a court should evaluate each charge independently.[84] In the interest of judicial efficiency, the court held that consolidation of charges should not render a group of petty offenses "serious."[85] The defendant in *Brown*, charged with two six-month counts, had been charged with "no serious offense."[86] "This is the case," the Eleventh Circuit concluded, "where multiple zeros still add up to zero."[87]

B. The Limited Aggregation Approach

The Tenth Circuit, in *United States v. Bencheck*, held that a trial judge may obviate a defendant's right to a jury trial by making a pre-trial commitment not to sentence the defendant to an aggre-

79. *Id.* at 846. Each charge also carried a potential $5,000 fine which could be imposed in addition to incarceration. *Id.*

80. *Id.* The Magistrate also imposed a fine of $140, and a special assessment of ten dollars. *Id.*

81. *Id.*

82. The Eleventh Circuit, following the Second Circuit in *Lewis*, relied on the reasoning of Judge Niemeyer in his dissent in *Coppins*, and held that "multiple petty offenses should not be aggregated . . . . " *Id.* at 847 (quoting United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting)).

83. United States v. Brown, 71 F.3d 845, 847 (11th Cir. 1996). The court noted that "concerns for judicial economy [that] may motivate the joinder of multiple charges in one trial does not affect the constitutional entitlement to a trial by jury." *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (quoting United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991)). In his dissent in *Coppins*, Circuit Judge Niemeyer argued that multiple petty offenses should not be aggregated, and thus would have found no right to jury trial. *Id.* He found that "[s]imply because the offenses were tried together or on one charging document is . . . irrelevant to the constitutional inquiry." For Niemeyer, because only misdemeanor offenses were charged, the defendant was not entitled to the protection of a jury trial. Niemeyer reasoned that the government's decision to consolidate the charges provided no greater justification for granting a jury trial than if the charges had been addressed separately. "Judicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Id.*

gate sentence exceeding six months.[88] The court reasoned that the penalty the defendant actually faces, not the maximum potential penalty under the statute, is "of primary importance to the defendant."[89] Because the defendant in *Bencheck* "was not at risk of serving more than six months when he was tried on the four petty charges stemming from a single occurrence," the court denied him the right to a jury trial.[90]

The *Bencheck* court recognized the danger that prosecutors could bring multiple petty offense charges separately, specifically to threaten the defendant with the consequences of a serious offense while denying him the opportunity for jury trial.[91] The government could sever charges even when a given set of offenses arise from a discrete criminal act, transaction, or occurrence simply to prosecute the defendant without a jury. While the court acknowledged that the potential for prosecutorial abuse of this nature is limited, it observed that such a "risk is not zero."[92] To prevent such abuse, the court held that a defendant who "demonstrates . . . that there is a reasonable probability the state is undertaking the prosecution of the petty charge, or charges, out of spite or vindictiveness" is entitled to a jury trial.[93]

Judge Ebel, dissenting in *Bencheck*, would have applied simple aggregation to determine whether a jury trial was appropriate.[94] Basing a defendant's Sixth Amendment rights on the pre-trial pronouncements of a trial judge, according to Ebel, invites the judiciary to violate the Supreme Court's clear mandate to look to "*objective indications* of the seriousness with which society regards the offense."[95] As a consequence, reliance upon a judicially imposed sentence for the purpose of determining criminal seriousness is improper because it only considers the subjective sentiments of that particular judge rather than the level of seriousness with which society views the offense.[96]

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88. United States v. Bencheck, 926 F.2d 1512, 1513 (10th Cir. 1991).

89. *Id.* at 1518 (quoting Haar v. Hanrahan, 708 F.2d 1547, 1550 (10th Cir. 1983)).

90. *Id.* at 1520.

91. *Id.* at 1519.

92. United States v. Bencheck, 926 F.2d 1512, 1519 (10th Cir. 1991).

93. *Id.*

94. For Ebel, *Blanton* mandated "in no uncertain terms" that a court must apply an objective standard when considering defendants' Sixth Amendment claims. *Id.* at 1521 (Ebel, J., dissenting).

95. *Id.* (quoting Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989)).

96. *Id.* (quoting *Blanton*, 489 U.S. at 541). Particularly problematic for Judge Ebel was the majority's reliance on Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983). In *Haar*, the Tenth Circuit favored subjective penalties over objective ones in determin-

The Ninth Circuit also applied the aggregation principle exclusively to the penalties actually imposed for multiple petty charges arising from one incident.[97] An improper denial of a jury trial in the Ninth Circuit, however, may be "remedied" by a judge's subsequent reduction of the actual sentence imposed.[98] In *Rife v. Godbehere*, after denying a jury trial, a state court convicted the defendant of three separate counts of a misdemeanor, each punishable by six months' imprisonment and sentenced him to two consecutive six-month terms.[99] After the case was appealed and remanded twice, the state court reduced Rife's sentence to six months' imprisonment.[100] The Ninth Circuit did not apply the aggregation principle, but rather made an analogy between the imposition of consecutive sentences to the imposition of a sentence when the legislature has not authorized a maximum sentence.[101] Consequently, the court looked to the judge's actual exercise of discretion—the imposition of consecutive sentences exceeding six months.[102] Thus, the court found that under *Baldwin*, the defendant in *Rife* was entitled to jury trial "because he was sentenced to a total of more than six months."[103]

Because the actual penalty facing the defendant at the time of the appeal was exactly six months in prison, however, the *Rife* court did not reverse.[104] The defendant's sentence had been reduced by the judge, which led the Ninth Circuit to conclude that

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ing criminal seriousness. The *Bencheck* majority cited *Haar* in deeming jury trial appropriate only when a defendant *actually faces* potential incarceration of six months. Judge Ebel pointed out that the Supreme Court in *Blanton* overruled *Haar*, by mandating that courts look to "objective indications." The *Haar* approach, after *Blanton*, is no longer good law. Therefore, for Ebel, only the legislative maximum penalty, rather then any prior determination by the trial judge, is the proper standard for gauging criminal seriousness. *Bencheck*, 926 F.2d at 1521-22. It is noteworthy that the Second Circuit in *Lewis* declined to resolve the question of whether the magistrate judge's pre-trial assurance obviated the need for jury trial. In dicta, however, the *Lewis* court concluded that such a promise before trial could not serve as the basis for denying jury trial. "Self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to jury trial." United States v. Lewis, 65 F.3d 252, 256 (2d Cir. 1995).

97. Rife v. Godbehere, 814 F.2d 563, 565 (9th Cir. 1987).

98. *Id.*

99. *Id.* at 563.

100. *Id.*

101. *Id.*

102. Rife v. Godbehere, 814 F.2d 563, 565 (9th Cir. 1987).

103. *Id.*

104. *Id.*

the constitutional violation was "remedied" and the right to jury trial did not attach.[105]

C. The Simple Aggregation Approach

The Fourth, Ninth and Tenth Circuits have held that defendants charged with multiple petty offenses carrying aggregate sentences of more than six months are entitled to trial by jury. For example, in *United States v. Coppins*,[106] the defendant faced three petty offense charges that exposed her to an aggregate potential sentence of fifteen months in prison.[107] At a bench trial, she was convicted of two counts and fined $170.[108] On appeal, the defendant argued that she deserved the right to a jury trial based on the severity of the aggregate maximum authorized penalty.[109]

The Fourth Circuit vacated and remanded the lower court's decision, holding that when petty offenses stemming from a single incident are joined for trial, criminal seriousness is properly determined by aggregating the maximum sentences legislatively authorized.[110] Thus, because the aggregate potential punishment she faced exceeded six months' imprisonment, the *Coppins* defendant deserved the option of trial by jury.

Invoking the fundamental principle that the Sixth Amendment is intended to protect individuals from government oppression, the *Coppins* court focused on the defendant's perception of the proceedings, and reasoned that "defendants can view as no less serious a possible penalty of [over six months] in prison, when charged with [multiple] offenses . . . than if charged with one offense having a potential penalty of [greater than six months] . . . . Nor should a court view the offenses any less seriously."[111] The court

105. *Id.* The court reasoned that "although a sentence in excess of six months' incarceration denied Rife his constitutional right to a jury trial, this violation has been [retroactively] 'remedied' by the state court's ultimate imposition of a sentence not exceeding six months." *Id.*

106. 953 F.2d 86 (4th Cir. 1991). The predecessor to *Coppins* was United States v. Potvin, in which the Tenth Circuit developed the "same act, transaction or occurrence" test. 481 F.2d 380, 383-84 (10th Cir. 1973). In *Potvin*, the Tenth Circuit held that a person charged with two or more petty offenses arising out of the same act, transaction or occurrence is entitled to a trial by jury when the potential aggregate penalty on all counts exceeds six months' imprisonment. *Id.*

107. *Coppins*, 953 F.2d at 86. The defendant also faced a potential $1,300 in fines. *Id.* at 87-88.

108. *Id.* at 87.

109. *Id.*

110. *Id.*

111. *Coppins*, 953 F.2d at 90 (quoting United States v. Potvin, 481 F.2d 380, 382 (10th Cir. 1973)).

noted that "a criminal prosecution can threaten the defendant with the consequences of a serious offense, even though the defendant is not charged with an offense deemed serious . . . "[112] and recognized the need to protect the defendant from such a risk.

The court also stated that the prime indicator of seriousness is the "legislative judgment expressed in any maximum sentence of imprisonment authorized by statute,"[113] rather than any subjective standard. Accordingly, the Fourth Circuit rejected the government's argument that the sentence "actually imposed" in any case determined the right to a jury trial.[114]

Although the *Coppins* court declined to decide whether a judge's pre-trial commitment not to impose a prison sentence in excess of six months obviated the need for jury trial, it did shed some light on the issue.[115] The court rejected the government's contention that the jury trial challenge had been mooted by the court's actual sentence of less than six months and concluded that "[a]n arguably unconstitutionally obtained conviction cannot be immunized from challenge by finding the challenge mooted by the sentence imposed."[116] Presumably because the fundamental purpose of the Sixth Amendment is to protect the defendant from government oppression, the court looked to the defendant's perspective. From the defendant's point of view, "[w]hat is being asserted on appeal is the right not to be convicted in the first place except by a jury."[117]

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112. *Coppins*, 953 F.2d at 90 (quoting United States v. Musgrave, 695 F.Supp. 231, 232 (W.D. Va. 1988)).

113. *Coppins*, 953 F.2d at 89.

114. *Id.*

115. "Some courts . . . have held that a court may, by pre-trial formal commitment not to impose a sentence of imprisonment in excess of six months, remove any right to jury trial that otherwise would obtain . . . . We express no opinion on this alternative, noting that the *Bencheck* panel was divided on the issue whether such an alternative survived *Blanton*'s emphasis on the primacy of objective indicators." *Id.* at 89 n.2 (citations omitted).

116. *Id.* at 88.

117. United States v. Coppins, 953 F.2d 86, 88 (4th Cir. 1991). Similarly, in United States v. Bencheck, the defendant was charged with four petty offenses that individually did not carry a possibility of more than six months' incarceration, but carried "an aggregate potential penalty of greater than six months' imprisonment." 926 F.2d 1512 (10th Cir. 1991). The potential statutory sentence totaled two years in prison. *Id.* at 1513. The court held that a defendant is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction, or occurrence . . . if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months' imprisonment." *Id.*

III. Defendants Charged With Petty Offenses, Facing an Aggregate Sentence of Over Six Months, are Charged with Serious Offenses That Merit Trial by Jury

The right to jury trial is an individual's safeguard against arbitrary and oppressive government power.[118] The right has been described as "inestimable,"[119] "sacred,"[120] and "one of the greatest securities of the lives, liberties and estates of the people."[121] Accordingly, the Supreme Court has held that the Constitutional jury trial provisions "reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[122] Juries represent the practical manifestation of the Framers' fundamental commitment to "community participation in the determination of guilt or innocence."[123]

Ideally, the right to jury trial should attach in "all criminal prosecutions."[124] Due to limited judicial resources, however, the Court has carved out an exception to the Sixth Amendment's broad guarantee. Focusing on the consequences to the defendant, the Court has excepted those offenses punishable by less than six months' imprisonment from the requirement of trial by jury. The petty offense exception is predicated on achieving an appropriate balance between two competing goals: to protect individuals from government oppression and to efficiently allocate limited judicial time and resources. Because the Sixth Amendment is fundamentally designed to protect individuals from overbroad government power, the right to jury trial is properly determined with regard to the potential effects of conviction facing an accused.

A. Problems with the Individual Penalty Approach

The individual penalty approach advanced by the Second Circuit is flawed because it does not properly determine criminal serious-

118. *See* Duncan v. Louisiana, 391 U.S. 145, 155 (1968); Baldwin v. New York, 399 U.S. 66, 72 (1970).

119. Kaye, *supra* note 2, at 262 (quoting N.J. CONST. § 22 (1776)); *See also Duncan*, 391 U.S. at 156.

120. Kaye, *supra* note 2, at 262 (quoting MASS. DECLARATION OF RIGHTS Art. XV (1780); N.C. DECLARATION OF RIGHTS § 14 (1776); N.H. BILL OF RIGHTS Art. 20 (1784); VA. DECLARATION OF RIGHTS § 11 (1776)).

121. *Id.* (citing DEL. DECLARATION OF RIGHTS § 13 (1776); MD. DECLARATION OF RIGHTS § 18 (1776)).

122. *Duncan*, 391 U.S. at 156.

123. *Id.*

124. U.S. CONST. amend. VI.

ness with regard to the consequences facing an accused. The approach fails to account for the circumstance where a court has the power to impose either concurrent or consecutive sentences for a given offense. Under 18 U.S.C. § 3584(a), a court can sentence petty offenders to concurrent terms of imprisonment to be served simultaneously. The imposition of two concurrent six-month sentences would result in a six-month prison term. A court can also impose consecutive terms under § 3584(a) that, in the same example, would result in twelve months' imprisonment. It is inappropriate for a court to deny a jury trial based on a judge's actual imposition of concurrent sentences[125] rather than the potential for consecutive sentences because the Supreme Court has mandated that courts determine seriousness according to *ex ante* objective criteria. By granting courts the power to sentence a defendant to consecutive sentences totaling more than six months when imposing multiple terms of imprisonment at the same time, Congress revealed with certainty that the commission of several offenses is more serious than the commission of a single crime. "Only if § 3584(a) forbade consecutive sentences would the Second Circuit's reading of the statute be justified."[126] When a court evaluates seriousness based on the fact that consecutive sentences were not imposed when they were in fact possible, that court fails to accurately reflect the legislature's and thus society's view of a criminal act.

The Second Circuit in *Lewis* concluded that because 18 U.S.C. § 3584(a) presumes concurrent sentencing, it reflects Congress's judgment that the commission of two separate offenses, arising from the same incident, is no more serious than the commission of a single offense.[127] This analysis simply ignores a judge's power to impose consecutive terms of imprisonment. Under the applicable

125. *See* United States v. O'Connor, 660 F.Supp. 955, 955 (N.D. Ga. 1987) (holding two petty offenses tried together to be a serious offense based on the magistrate's authority to impose consecutive sentences pursuant to § 3584(a), exposing the defendant to a potential penalty of one year's imprisonment).

126. United States v. Lewis, Cert. Petition at 8, 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996). Likewise, looking to the actual imposition of consecutive sentences is an improper method for determining criminal seriousness. The Ninth Circuit has noted that the imposition of consecutive sentences in excess of six months for conviction of multiple petty offenses accorded a defendant the right to trial by jury. Rife v. Godbehere, 814 F.2d 563, 565 (9th Cir. 1987). This analysis is flawed because it is only relevant that the possibility of consecutive sentencing exists and that more than six months' imprisonment is at stake. The penalty actually imposed should play no part in the analysis. *See supra* notes 97-105 and accompanying text.

127. *Lewis*, 65 F.3d at 255.

statute, the defendant in *Lewis* faced the possibility of twelve months in jail. That the judge decided not to impose the maximum term is irrelevant to the determination of whether the charged offenses were "serious."

Likewise, the defendant in *Bencheck* faced a potential two years' imprisonment because that consecutive sentencing was authorized.[128] The *Bencheck* court reasoned that the possibility of consecutive sentencing was irrelevant because the government was not "corrupt or overzealous"[129] in charging the defendant and the trial court had promised not to sentence the defendant to more than six months' imprisonment.[130] The *Bencheck* court substituted a subjective standard for the objective standard mandated by Supreme Court precedent for assessing criminal seriousness.[131]

The individual penalty approach is further flawed because it is inherently susceptible to prosecutorial abuse.[132] Specifically, a prosecutor can break down a serious offense into multiple petty charges for the explicit purpose of obliterating a defendant's right to jury trial. For example, rather than charging a defendant with larceny, a serious offense, based on allegations of stealing repeatedly from the same person, a prosecutor can charge the defendant with multiple petty theft counts. By breaking down a criminal incident into separate petty offenses, a prosecutor is able to threaten the defendant with over six months in prison, yet avoid jury trial. The government should not be able to circumvent the requirements of the Sixth Amendment merely by manipulating the criminal statutes.[133]

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128. United States v. Bencheck, 926 F.2d 1512, 1514 (10th Cir. 1991).

129. *Id.* at 1519 (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

130. *Id.*

131. Larson, *supra* note 11, at 775.

132. The Supreme Court has recognized, on many occasions, that the jury trial right was intended to guard against excessive prosecutorial power. *See, e.g.*, *Duncan*, 391 U.S. at 156 (noting that

> [p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); Baldwin v. New York, 399 U.S. 66, 72 (1970) (noting that "the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him").

133. The Fourth Circuit correctly observed that "modern criminal codes permit multiple charges to flow from a single discrete act of criminality . . . ." United States v. Coppins, 953 F.2d 86, 90 (citing Haar v. Hanrahan, 708 F.2d 1547, 1551 (10th Cir. 1983).

B. Problems with Pre-trial Sentencing Stipulations

Because the Supreme Court has directed courts to assess *potential* statutory penalties, as opposed to actual sentences, in determining seriousness, a judge's pre-trial sentencing stipulation is an improper basis for a determination of jury trial entitlement.[134] Such an arrangement fails to reflect the objective societal judgment of an offense's seriousness.

The Supreme Court has had several opportunities to endorse judicially imposed penalties as proper gauges of criminal seriousness but has never done so.[135] Instead, the Court has favored other measures, the modern one being legislative penalties.[136] The Court has held that "doubts must be resolved . . . by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."[137] Further, the Court has reasoned that legislative penalties best measure criminal seriousness because they are the most "objective criteria reflecting the seriousness with which society regards the offense."[138] Moreover, the Court has indicated that the legislature is the proper body to determine these community judgments. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and

134. Blanton v. City of North Las Vegas, 489 U.S. 538 (1989); Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937).

135. *See, e.g.*, *Duncan*, 391 U.S. 145 (1968) (establishing authorized legislative penalties as the best indicator of criminal seriousness); *Clawans*, 300 U.S. 617 (1937) (holding that the legislative penalty at issue expressed a social judgment of the seriousness of the offense); Schick v. United States, 195 U.S. 65 (1904) (looking to the moral nature of an offense to determine its level of seriousness); Callan v. Wilson, 127 U.S. 540 (1888) (determining seriousness based on common law indictability as opposed to a judicially imposed sentence). *See supra* part I.A.

136. *See supra* part I.B.

137. *See, e.g.*, *Duncan*, 391 U.S. at 160 (quoting *Clawans*, 300 U.S. at 628) (noting that "[t]he penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' " of the offense in question). *See also* United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981) (concluding that "[a]n offense is not 'serious' because it is severely punished; it is severely punished because it is 'serious.' The severity of prescribed sanctions is regarded as the best objective indication of the general normative judgment of the seriousness of an offense.").

138. *Baldwin*, 399 U.S. at 68 (citing *Clawans*, 300 U.S. at 628). The Court adopted an approach of the future Justice Frankfurter which evaluated jury trial entitlement primarily on the basis of the opprobrium with which society views the offense, as measured in part by the potential legislatively authorized penalty. *See* Frankfurter & Corcoran, *supra* note 2 at 980-81.

more amenable to the recognition and correction of their misperceptions in this respect.' "[139]

Because the Sixth Amendment is primarily a tool to protect individuals, criminal seriousness for purposes of jury trial entitlement is properly determined by reference to the consequences facing a defendant. Measurement of criminal seriousness by judicially reduced sentences underestimates the gravity of the consequences facing an accused.[140] But even if we consider the concept from the prosecutor's perspective, joined offenses are more serious than non-joined offenses. It can be argued that joinder evinces a heightened prosecutorial desire to dispose of a case. At the least, both joinder and severance show special prosecutorial interest. Such procedural decisions often reflect the government's position that a criminal incident is particularly interesting and worthy of special attention to ensure conviction.

Conviction of multiple charges could result in a lengthy prison sentence and its attendant social stigma. But there are other fundamental indications that a multiple petty offense prosecution is serious as well. Indeed, the very reasons *why* prosecutors choose to bring charges together reveal that multiple petty offenses tried together are more serious than each individual offense tried alone.

The government's decision to join charges indicates that something more than prison time is involved. The prosecutor's decision to join is based on a desire to enhance criminal seriousness. As a practical matter, the defendant is forced to fight on more fronts at once. The typical petty offense defendant will have scant resources to adequately defend himself against a lengthy, complicated charging instrument. Conceivably, this is the very type of oppression the Framers feared.

Notwithstanding that pre-trial sentencing stipulations are improper, the government's willingness to commit to such an arrangement reflects a prosecutorial belief that the offenses are serious. The decision to stipulate a sentence reflects the magnitude of a prosecutor's desire to convict. If a prosecutor is willing to bargain, it is likely that he regards a criminal incident as serious because he wants a conviction even at the sacrifice of his ability to ask for the maximum authorized penalty. That the government is willing to agree to a maximum sentence before trial illustrates that multiple

139. Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 (1989) (quoting Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988)(en banc) *cert. denied*, 840 F.2d 1201 (1989)).

140. Larson, *supra* note 11, at 775.

misdemeanors tried together are different from and regarded as more serious than each misdemeanor tried individually.

Furthermore, a prosecutor may also join multiple petty charges in order to bring evidence of other offenses before the decision maker in an attempt to influence that judge or jury's decision. By virtue of their multiplicity, charges brought together influence a decision maker to take a case more seriously. In fact, one empirical study revealed that joining charges within a realistic trial setting actually increases the likelihood of conviction.[141]

C. Simple Aggregation: A Transactional Approach to Jury Entitlement

In *Baldwin*, the Supreme Court interpreted the Constitution to guarantee the right to jury trial when "what is *at stake* is the deprivation of individual liberty for a period exceeding six months."[142] This emphasis on the consequences facing a defendant is consistent with the Sixth Amendment's fundamental purpose of protecting defendants from the possibility of oppression by the government. Six months' incarceration is the benchmark standard for determining whether an individual offense is serious.[143] In circumstances where multiple offenses arising out of the same incident are tried together, however, legislators have not spoken as to whether the incident itself is serious; they have merely expressed their perception of seriousness with regard to each individual criminal offense. Because the Supreme Court interprets criminal seriousness in terms of "stakes,"[144] lower courts must approach jury entitlement on that basis as well. Thus, if the maximum penalty in the prosecution of related criminal acts threatens a defendant's individual liberty for more than six months, that defendant has a fundamental right to jury trial.

A defendant suffers a Sixth Amendment violation when convicted without a jury, not because the legislature did not intend similar offenses to be tried together, but because only juries should send people to prison for terms beyond six months. It is noteworthy that the plain language of the Sixth Amendment guarantees jury trial to criminal "prosecutions," rather than individual criminal

141. *See* Sarah Tanford, *Decision Making Processes in Joined Criminal Trials*, 12 CRIMINAL JUSTICE AND BEHAVIOR 367 (1985) (explaining the results of a study which indicated that "a defendant was more likely to be convicted on a particular charge in a joined trial than on the same charges tried by itself").

142. Baldwin v. New York, 399 U.S. 66, 72 (1970) (emphasis added).

143. *Id.*

144. *Id.*

"offenses."[145] *Blanton* directs courts to assess seriousness according to maximum authorized legislative penalties to ensure that no defendant is convicted without a jury for an offense punishable by more than six months' incarceration. The individual penalty approach runs contrary to this goal by allowing a defendant to face multiple "petty" charges, with "serious" criminal sanctions, without the constitutional protection of a jury trial.

Although the text of the Constitution appears to guarantee jury trial to *all* criminal defendants, the petty offense doctrine is an exception, primarily designed to conserve judicial resources. History shows that the jury trial guarantee has always excluded some offenses for other reasons such as lack of common law indictability or a low degree of moral offensiveness.[146] To properly apply the petty offense exception, courts must balance the need to protect defendants from oppressive prosecutions with the goal of conserving judicial resources.

Indeed, a system allowing for aggregation of penalties for criminal acts that are completely unrelated would be unmanageable. But simple aggregation does not require that courts grant a jury trial in every single case where a defendant is charged with multiple petty offenses. Courts employing the simple aggregation method have clearly guarded against this potential threat to judicial economy. Virtually every court that has granted jury trial based on the aggregation of maximum penalties for multiple petty offenses has specifically noted that the charges all arose from a single act, transaction or occurrence.[147]

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145. Brief for Petitioner at 5, United States v. Lewis, 65 F.3d 252 (2d Cir. 1995), *cert. granted*, 116 S.Ct. 807 (Jan. 19, 1996).

146. *See supra* part I.A.

147. A prime example is the seminal aggregation case, United States v. Potvin, 481 F.2d 380 (10th Cir. 1973), which concerned the joint prosecution of separate petty charges stemming from multiple related acts. The Tenth Circuit granted a jury trial because the charges arose from the same "act, transaction, or occurrence" and the aggregate maximum term of incarceration exceeded six months. *Id.* at 382. In *Potvin*, the government charged the defendants in a two count indictment with cutting and chopping timber, and commencing to build a structure on public lands, without the necessary permit or approval. *Id.* According to the record, the defendants first committed the act of making an illegal settlement, and later committed the act of cutting timber and commencing to build a structure. *Id.* The court found these events to be sufficiently related to constitute one criminal incident and warrant aggregation of the offenses' penalties. *See also* United States v. FMC Corp., 428 F. Supp. 615 (1977), *aff'd*, 572 F.2d 902 (1978); United States v. Musgrave, 695 F. Supp. 231 (W.D.Va. 1988). Joinder of claims rules provide guidance to courts in these situations. *See* FED. RULE CRIM. P. 8, and *infra* note 148 and accompanying text.

The principles of joinder provide guidance to courts for drawing proper lines as to which offenses' penalties should be aggregated because they reflect society's judgment that charges flowing from the same act, transaction or occurrence are so closely related that they should be considered together. For example, Rule 8(a) of the Federal Rules of Criminal Procedure allows for the joinder of counts in one indictment when they are "of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[148] When a prosecutor claims that two or more acts are similar enough to join and a trial court agrees, both evince a belief that although the defendant has committed several distinct offenses, a court should consider these separate entities together. Accordingly, in these cases, a court should determine seriousness based on the entire criminal episode.[149] It is illogical to consider charges as closely related for the purposes of trial but as unrelated offenses for the purposes of determining the seriousness of the punishment.[150]

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148. FED. R. CRIM. P. 8(a).

149. The Fourth and the Tenth Circuits have employed this approach. *See supra* Part II.C.

150. Critics of simple aggregation point out that it only triggers the right to jury trial for those sets of offenses that have been joined for trial, resulting in unfair treatment for those defendants whose charges have not been joined. In the case where related charges are severed, however, courts can police oppressive prosecutions. One solution is compulsory joinder. Courts should require joinder when the defendant can show that the charges have been severed in bad faith. When the prosecution opts to try related charges separately, and the defendant faces a serious aggregate sentence, that defendant should have the opportunity to invoke the aggregation principle by petitioning the court that his charges be joined for trial. Under this approach, the defendant would have the burden of proving that the charges against him were severed in bad faith. The defendant could then make a motion to join charges by arguing that the prosecution severed the charges for the explicit purpose of avoiding trial by jury in the hope of making a conviction more likely.

The ABA Model Code suggests that a defendant prosecuted in separate trials be allowed to make a timely motion for joinder of offenses. *See* MODEL PENAL CODE § 1.3. Under this approach, the motion should be granted "unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted." *ABA Project on Standards for Criminal Justice, Standards Relating to Joinder and Severance* at 18 (1968). The purpose of the section is to protect defendants from "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' on a person after he has been sentenced to imprisonment, or to simply harass by multiplicity of trials." *Id.* at 19 (quoting MODEL PENAL CODE § 1.08, Comment (Tent. Draft No. 5 1956)). To further this goal, the Model Penal Code provides that in such a case the court should

It can also be argued that simple aggregation might encourage prosecutors to sever related charges to avoid conducting a jury trial. That risk, however, is minimal. Practical concerns guard against the possibility of prosecutors employing such a strategy. The Supreme Court has noted in the double jeopardy context that "the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources."[151]

Critics of simple aggregation also claim that if legislators regarded multiple offenses arising from the same incident to be more serious than each individual offense, they would create statutory categories of offenses to reflect this belief.[152] Legislatures indeed have indirectly accounted for "some situations"[153] where sets of related offenses are more serious than each individual offense considered alone. For example, the legislature determined that the act of killing while committing a felony is more serious than either act alone. Thus, it created the offense of felony murder which provides for harsher sentencing. One critic has asserted, that "[s]ince legislatures do respond to community preferences in some cases by fashioning 'serious' penalties for multiple petty offenses, courts should assume that legislatures are also responding to community preferences when they decline to create 'serious' penalties for other sets of offenses."[154]

Certain combinations of offenses are indeed more serious than those same offenses committed separately. For example, driving

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have the authority to join charges or order separate trials, on the prosecuting attorney's or the defendant's application.

> A defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

MODEL PENAL CODE § 1.3(2). At least one circuit court has suggested an analogous standard for protecting defendants from oppressive prosecutions. *See* United States v. Bencheck, 926 F.2d 1512, 1519 (10th Cir. 1989) (proposing that a court should grant a jury trial "where the defendant demonstrates to the trial judge that there is a reasonable probability the state is undertaking the prosecution of the petty charge, or charges, out of spite or vindictiveness" and predicting that "it will be obvious to the trial judge when the state is acting from a motive driven by the constitutionally impermissible desire to oppress the defendant"). Even if the Court rejects the notion of compulsory joinder, as it has in the past, the likelihood of this becoming a serious risk is minimal. *See infra* note 152 and accompanying text.

151. United States v. Dixon, — U.S. —, 113 S.Ct. 2849, 2863 at n.15 (1993).

152. *See* Butler, *supra* note 5, at 887.

153. *Id.*

154. *Id.* at 894.

through a red light while speeding is arguably more serious than either running a red light or speeding alone because the risk of harm to the community is heightened. However, the permutations of petty offenses are endless. Thus, creating new categories of offenses to account for every instance in which two or more related offenses are more serious together than each is alone is entirely impracticable. Courts must interpret legislative approximations of seriousness in the next best way.

Reference to the maximum aggregated penalty provides the best available estimate of society's view concerning related petty offenses joined for trial. "If a set of petty offenses, considered as a whole, generally is more serious than any one of the offenses making up the set, the aggregate penalty approach [simple aggregation], though imperfect, may be the best available method for estimating the difference between the seriousness of an individual petty offense and the seriousness of a set of petty offenses."[155] Because it is the best way to discern seriousness for related petty offenses, courts must employ the simple aggregation method to accurately comply with the Sixth Amendment.

Conclusion

The success of the petty offense exception depends on striking an appropriate balance between two competing goals: the reasonable allocation of judicial resources and the protection of individuals from government oppression. Because the individual penalty approach subverts the Supreme Court's mandate to evaluate criminal seriousness based on objective penalties, it fails to adequately protect defendants charged with multiple petty offenses. The limited aggregation method also fails by placing arbitrary power in the hands of the judiciary—a result the Framers sought to avoid. Simple aggregation, however, complies with Supreme Court precedent by granting the right to jury trial to defendants who face over six months' imprisonment. In the case of related petty offenses, only simple aggregation properly fulfills the Sixth Amendment's fundamental purpose: to protect individuals from government oppression.

155. *Id.* at 890.