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Peter J. Schmidt

MR. LEWIS GOES TO WASHINGTON (AND GETS HIS CONSTITUTIONAL RIGHTS STEPPED ON): A CRITICISM OF THE SUPREME COURT DECISION IN *LEWIS V. UNITED STATES*

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> Providing 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.[1]

INTRODUCTION

The Sixth Amendment guarantees criminal defendants the right to trial by jury.[2] This right has never been accorded to all those tried in the criminal courts of this country.[3] The United States Supreme Court has laid down rules, through several decisions, that effectively guarantee that no criminal defendant can be sentenced to more than six-months imprisonment without having the right to a jury trial.[4] While these decisions are somewhat recent, they reflect the Court's long-standing belief that minimal sentences do not require the right to

1. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

2. U.S. CONST. amend. VI.

3. *Compare Duncan*, 391 U.S. at 160 (removing petty offenses as a crime needing a jury trial), *and* District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (explaining instances when a trial by jury is not extended), *with* Alan L. Adelstein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 393 (1994) (presenting the argument that the framers, due to their fear of centralized government, intended to provide a jury trial for all federal criminal offenses created by Congress).

4. Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974) (holding that a defendant sentenced to a total greater than six months imprisonment for multiple criminal contempts had a right to a jury trial); Taylor v. Hayes, 418 U.S. 488, 496 (1974) (holding that a defendant charged with multiple counts of criminal contempt, where there was no set maximum punishment, had no jury trial right because he faced no more than six months total imprisonment); Baldwin v. New York, 399 U.S. 66, 69 (1970) (establishing a bright-line rule that six months authorized imprisonment for an offense gives the accused the right to a jury trial); *Duncan*, 391 U.S. at 162 (holding that a crime punishable by two years is serious, requiring a jury trial).

a jury trial, while more serious intrusions into the liberty of an accused do.[5]

This application of the Sixth Amendment's guarantees by the courts of this country, which has stood for nearly two hundred years, has been placed on very unsteady ground by the Supreme Court in its recent decision in *Lewis v. United States*.[6] In *Lewis*, the Court held that a criminal defendant facing charges for multiple petty offenses has no constitutional right to trial by jury, regardless of the aggregate sentence facing such a defendant.[7] The fate of all future such defendants, therefore, shall rest entirely in one swing of a judge's gavel. Justice Kennedy, in his concurring opinion, called the majority's holding, "one of the most serious incursions on the right to jury trial in the Court's history."[8]

In the Supreme Court's decision in *District of Columbia v. Clawans*,[9] where the Court first ruled that the maximum sentence authorized by the criminal statutes would influence the right to jury trial,[10] Justice McReynolds stated in a separate opinion: "Constitutional guarantees ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning."[11] While this statement was without majority support, it is clearly in line with the history of the Supreme Court's decisions. It is doubtful anyone well-versed in the history of constitutional jurisprudence in this country would disagree. This Note will demonstrate that the Court's decision in *Lewis* ignored all three of Justice McReynolds' warnings and is unjustifiable on other grounds as well.

Part I of this Note discusses the Supreme Court decisions leading up to *Lewis* and gives a review of how lower courts have dealt with this issue.[12] Part II reviews the various opinions of the Supreme Court in its decision in *Lewis v. United States*.[13] Part III analyzes the Court's treatment of this issue and offers several grounds on which the deci-

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5. *See generally Baldwin*, 399 U.S. at 73; *Duncan*, 391 U.S. at 159-160; Romualdo P. Eclavea, Annotation, *Right to Jury Trial Under Federal Constitution Where Two or More Petty Offenses, Each Having Panelty of Less Than 6 Months' Imprisonment, Have Potential Aggregate Penalty in Excess of 6 Months When Tried Together*, 26 A.L.R. FED. 736 (1976).

6. 116 S.Ct. 2163 (1996).

7. *Id.* at 2168.

8. *Id.* at 2169 (Kennedy, J., concurring). Justice Kennedy found the majority holding objectionable "both in its doctrinal formulation and in its practical effect." *Id.*

9. 300 U.S. 617 (1937).

10. *Id.* at 625.

11. *Id.* at 634 (McReynolds, J., concurring).

12. *See infra* Part I.

13. *See infra* Part II.

sion is in error.[14] Part IV will discuss the likely impact of the Court's decision in *Lewis*.[15]

I. A Short History of Sixth Amendment Jurisprudence

Article III, Section 2, Clause 3 of the United States Constitution states: "The trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ."[16] This guarantee to the citizens of the United States was further supported by the Bill of Rights. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[17] This reemphasis on jury trial protection shows the primacy the framers of the Constitution placed upon the jury trial as a tool for the protection of the citizenry against tyrannical government.[18]

A. Drawing the Line Between Petty and Serious

Despite the seemingly unequivocal language of the Constitution, it was clear early on that the courts did not intend to read these phrases literally, as requiring jury trials in *all* criminal prosecutions. "The right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury. . . ."[19] These petty offenses, though covering a wide range of unlawful behavior, had in common the fact that they were crimes which carried the least intrusive sentence, either in terms of prison time or fine.[20] For some time after the Constitution was ratified, the courts, in determining whether a certain charge warranted a right to trial by jury, would look to whether the crime carried such a right at common law.[21] In *District of Columbia v. Clawans*,[22] the

14. *See infra* Part III.

15. *See infra* Part IV.

16. U.S. Const. art. III, § 2, cl. 3.

17. U.S. Const. amend. VI.

18. *See* Duncan v. Louisiana, 391 U.S. 145, 152-56 (1968) (summarizing the nation's efforts to protect its people's rights by promoting jury trials).

19. District of Columbia v. Clawans, 300 U.S. 617, 624 (1937).

20. *Id.* at 624; *see* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 969-70 (1926) (commenting on how the framers of the Constitution took the common law and colonial pratice for granted when drafting the Sixth Amendment and intended to exclude petty offenses from trial by jury).

21. *See* Callan v. Wilson, 127 U.S. 540, 555-56 (1888) (looking to the common law practice to find that the offense of conspiracy was one of serious character, had detrimental consequences for the public and was triable only before a jury). Though this Note will show that the practice of looking to the common law is no longer the favored approach, it still exists. *See* Landry v. Hoepfner, 840 F.2d 1201, 1210 (5th Cir. 1988) (stating that there is no right to a jury trial for driving while intoxicated (DWI) because the offense was not indictable at common law); Frank-

Supreme Court held for the first time that in determining whether a charge was petty or serious for jury trial consideration, a court should consider the severity of the maximum penalty authorized by statute.[23] It appears the Court felt that the judiciary should not make subjective judgements as to the seriousness of the offense. Rather, the court stated that the focus should be on objective standards, such as the legislative determination of the length of imprisonment of one convicted of such a crime, which is viewed as a reflection of the people's wishes.[24] As will be seen, this desire for an objective standard repeatedly shaped the Court's subsequent decisions.

In the latter half of this century, the Supreme Court continued this trend, moving toward a strict focus on the legislatively authorized penalty as the sole basis for a determination of "petty" or "serious."[25] The Court identified the basis behind this focus and laid out standards for determining whether a right to trial by jury existed.[26]

In two cases decided two years apart, the Supreme Court laid out rough parameters of what length of sentence would be sufficient to consider a crime serious.[27] In *Cheff v. Schnackenburg*,[28] the Court decided that an offense carrying a maximum penalty of six months imprisonment was petty and, therefore, invoked no right to trial by jury.[29] This decision stopped short, however, of setting a clear line separating serious from petty.[30] Two years later, in *Duncan v. Louisiana*,[31] the Court held that a crime punishable by two years imprisonment is a serious offense, giving the accused a right to trial by jury.[32] Again, no clear dividing line was set.[33]

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furter & Corcoran, *supra* note 20, at 917 (discussing the exclusion of petty offenses from the protection of the Sixth Amendment's right to a trial by jury).

22. 300 U.S. 617 (1937).

23. *Id.* at 625.

24. *Id.* at 624-25. Though significant for the trend it began, the Court made only a small step away from adherence to common law standards. The court stated that a jury trial would be awarded for an offense considered trivial at common law if the current penalty would make it comparable with serious crimes at common law. *Id.*

25. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 379-80 (1966).

26. *Supra* note 25.

27. *Supra* note 25.

28. 384 U.S. 373.

29. *Id.* at 379-80.

30. *Id.*

31. 391 U.S. 145.

32. *Id.* at 160 (quoting the call in *Clawans* to use the legislative penalty "as a guage of [the locality's] social and ethical judgments" of the offense).

33. *Id.* at 162.

The decision in *Duncan* picked up where *Clawans* left off. The Court again raised the use of the legislatively authorized penalty as a basis for determining the question of seriousness[34] and stated that this maximum authorized penalty was to be the major factor in making the determination.[35] Again, the Court wished to have objective criteria for determining the right to jury trial, (stating, in fact, that the decision in *Clawans* demanded it), and found such in the laws of the nation.[36] Also, the Court explicitly rejected the claim that its prior decisions focused the analysis on the sentence actually imposed by the courts.[37] Where the legislature has set a maximum penalty for an offense, that should be the basis of the decision on the right to jury trial, regardless of the sentence actually imposed.[38]

In *Baldwin v. New York*,[39] the Court held, in a plurality opinion, that a defendant facing a possible one year sentence for a misdemeanor offense was entitled to a trial by jury.[40] In the first attempt at judicial demarcation in this area, three Justices called for a sentence of six months to be the line between petty and serious.[41] Any offense punishable by more than six months in jail would qualify as serious and would invoke the right to a jury trial.[42] These Justices again called for the use of legislative maximum sentence as the best objective criteria for finding the seriousness of an offense.[43] In a concurring opinion, Justices Black and Douglas provided the plurality support, calling for a literal reading of the Sixth Amendment, with a right to a jury trial in all criminal prosecutions.[44]

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34. *Id.* at 161.

35. *Id.*

36. *Id.*

37. *Id.* at 162 n.35 (distinguishing the decision in Cheff v. Schnackenburg, 384 U.S. 373 (1966), which focused on the sentence actually imposed, on the grounds that the offense in question was for criminal contempt, which has no legislative maximum penalty).

38. As this Note will discuss, this statement is important in the case of multiple petty offenses, for some courts have responded by focusing on the sentence imposed in such cases.

39. 399 U.S. 66 (1970).

40. *Id.* at 69.

41. *Id.* Justices White, Brennan, and Marshall rejected the argument that the barrier should accord with the felony/misdemeanor distinction, which would result in the denial of jury trial to defendants facing up to one year in prison. *Id.* Though only three Justices agreed on this dividing line, it has since gained majority support and is the rule used by the Court in such cases. *See* Lewis v. United States, 116 S. Ct. 2163, 2166 (1996); Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974).

42. *Baldwin*, 399 U.S. at 69.

43. *Id.* at 70.

44. *Id.* at 74-75 (Black, J., concurring).

B. Creating a New Standard for Criminal Contempt

The Supreme Court had to fashion a new rule for cases concerning criminal contempt prosecutions because most jurisdictions have no maximum penalty proscribed by statute for such offenses.[45] These contempt cases are the precedent that the Court has abandoned in *Lewis* and they are the basis of much of the dissension expressed by the lower courts.

In *Taylor v. Hayes*,[46] the defendant was charged with nine counts of criminal contempt and was tried without a jury.[47] The Court quickly denied the claim by the petitioner that any criminal contempt charge must be heard by a jury. It stated that when the legislature has set no maximum sentence for criminal contempt, there is no right to jury trial if the sentence actually imposed by the court is six months imprisonment or less.[48] A more severe sentence, it seems, would render the contempt serious and invoke the jury trial right. As to the multiple counts facing the petitioner, the Court held that although the original order was for the sentences to run consecutively, which totaled more than four years, the sentence was later reduced to concurrent sentences, none greater than six months.[49] Therefore, the Supreme Court held that "[t]he eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required."[50] The Court agreed with the Kentucky Court of Appeals that the concurrent sentences were the equivalent to a single sentence of six months.[51] The Court expressly approved the use of pre-trial determinations by judges hearing contempt cases as a proper method of deciding the issue of the right to a jury trial.[52]

In the same year as the *Taylor* decision, the Court again faced the right of a jury trial for multiple criminal contempt charges in *Codispoti v. Pennsylvania*.[53] In *Codispoti*, the defendant was convicted on seven counts of criminal contempt.[54] He received six months for each of six

45. Duncan v. Louisiana, 391 U.S. 145, 162 n.35 (1968).

46. 418 U.S. 488 (1974).

47. *Id.* at 490.

48. *Id.* at 495 (citing Bloom v. Illinois, 391 U.S. 194 (1968), Cheff v. Schnackenburg, 384 U.S. 373 (1966) and others, for the proposition that an actual sentence of six months or less renders the contempt petty).

49. *Id.* at 495-96.

50. *Id.* at 496.

51. *Id.* The Court failed to state definitively that had the Kentucky Court of Appeals not amended the original sentence, the aggregate of the petty contempts would have invoked a jury trial, though that is the apparent implication.

52. *Id.* at 495-96.

53. 418 U.S. 506 (1974).

54. *Id.* at 507.

counts and three months for the seventh count, with all sentences to run consecutively and, therefore, faced a total sentence of over three years.[55] Unlike the sentence in *Taylor*, Codispoti's lengthy sentence was not amended and was still in place when the case came before the Supreme Court.[56] The Court followed its decision in *Taylor* and earlier criminal contempt cases[57] and focused on the penalty actually imposed by the trial court since there was no maximum penalty set for this offense by the legislature.[58] While the language in *Taylor* implied that there might have been a different result had the multi-year sentence not been reduced by the lower court,[59] the Court's decision in *Codispoti* seemed to make this point clear.[60] The Court expressly rejected the claim that since no more than six months was imposed for any single count, each contempt was a petty offense, triable without a jury.[61] The majority found that since the multiple counts were tried in one proceeding and the aggregate sentence faced by the defendant was "several times more than six months, each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury trial."[62]

C. *Multiple Petty Offenses in the Lower Courts*

Prior to the aforementioned cases, as well as in the years following, many lower courts faced the issue of whether multiple petty offenses charged in one proceeding, with an aggregate potential penalty of greater than six months, invoked a right to trial by jury. All of these cases were outside the context of criminal contempt. Prior to *United States v. Lewis*, most courts read the Supreme Court's decisions as endorsing one of two approaches. Some courts aggregated the maximum penalties authorized by the legislature for the multiple charges and granted the defendant a jury trial if they totaled greater than six months imprisonment.[63] Other courts, relying on *Taylor* and *Codispoti*, held that the sentence actually imposed by the court was the

55. *Id.* at 509.

56. *Id.* at 511.

57. *See, e.g.*, Bloom v. Illinois, 391 U.S. 194, 211 (1968) (holding that looking to the penalty actually imposed is the best indicator of the seriousness of the offense).

58. *Codispoti*, 418 U.S. at 511.

59. Taylor v. Hayes, 418 U.S. 488, 495-96 (1974).

60. *Codispoti*, 418 U.S. at 516-17.

61. *Id.* at 517.

62. *Id.*

63. *See infra* notes 65-70 and accompanying text.

point of focus and only those defendants actually receiving a sentence of greater than six months were granted a jury trial.[64]

The Ninth Circuit faced the issue of multiple petty offenses in *Rife v. Godbehere*.[65] In *Rife*, the defendant was charged with multiple petty offenses and was originally sentenced to one year in jail before the sentence was lowered to six months.[66] In deciding whether the defendant had a right to trial by jury, the Ninth Circuit likened such a case to the imposition of a sentence when no statutory maximum exists:

> [W]here the judge has discretion to impose [imprisonment of] more than six months by imposing consecutive sentences, just as where he has discretion to impose more than six months because there is no statutory maximum, it is the judge's [actual] exercise of his discretion, not the mere fact that he has discretion, that determines whether the offense is "petty."[67]

Therefore, the approach taken by this court is similar to that of the Supreme Court in *Taylor*.[68] The defendant was eventually sentenced to less than six months, so the fact that he could have been sentenced to more and, in fact, initially was sentenced to more, was irrelevant. All that mattered was that the defendant did not ultimately face more than six months imprisonment absent a jury trial.[69] Perhaps most important to this decision was the fact that the appellate court looked to the aggregate of the sentences actually imposed, rather than whether the sentence for any one individual sentence exceeded six months. This focus on the aggregate penalty actually imposed upon these defendants was also adopted by other courts.[70]

The second approach taken by many courts prior to *Lewis* was to aggregate the maximum statutory penalties actually faced by the defendant.[71] If that aggregate was greater than six months, the defendant had a right to a trial by jury regardless of whether any of the

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64. *See infra* notes 73-79 and accompanying text.

65. 814 F.2d 563 (9th Cir. 1987).

66. *Id.* at 564.

67. *Id.* at 564-65 (citing Maita v. Whitmore, 508 F.2d 143, 146 (9th Cir. 1974)).

68. *See supra* notes 46-52 and accompanying text.

69. For a ruling on what would happen if an actual sentence imposed exceeded six months, see State v. Owens, 254 A.2d 97, 102 (N.J. 1969), where the New Jersey Supreme Court amended the sentence imposed by the trial court, changing it from consecutive to concurrent sentences.

70. *See* United States v. Bencheck, 926 F.2d 1512, 1519 (10th Cir. 1991) (adopting the *Taylor* approach); State v. Goering, Nos. A-93-1128, A-93-1129, A-93-1130, A-93-1133, 1994 Neb. App. LEXIS 309, at *7-8 (Ct. App. Oct. 25, 1994) (adopting the *Taylor* approach for Nebraska's state courts); Bruce v. State, 614 P.2d 813, 815 (Ariz. 1980) (discussing the Arizona Supreme Court's adoption of the *Taylor* approach).

71. *See infra* notes 73-79 and accompanying text.

multiple offenses was serious individually.[72] These courts usually rejected the claim that there was no jury trial right in such a case when the sentence actually imposed did not exceed six months.

In *United States v. Coppins*,[73] the Fourth Circuit faced a case where the defendant was charged with three offenses, with maximum penalties of six, six, and three months.[74] The defendant was convicted on two counts and ultimately was sentenced to no time in jail.[75] The court, however, focused only upon the maximum penalty authorized, rather than upon the sentence actually imposed.[76] The court ruled that in such a case, the aggregate of the maximum penalties authorized for the multiple petty offenses should be the basis for the determination of the right to a trial by jury.[77] The court cited *Codispoti* in support of this decision, reasoning that if the consecutive sentences of imprisonment actually imposed for multiple counts of criminal contempt should be aggregated for this determination, so too should there be such an aggregation when the legislature has set maximum penalties.[78] The Fourth Circuit in *Coppins* also found support for its position in the decisions of other courts.[79]

A small number of courts which follow the objective approach add a caveat which affects the defendant's right to jury trial.[80] An example is *United States v. Bencheck*,[81] in which the Tenth Circuit stated that "where the trial judge announced that the sentence, in the event of conviction, would be no more than six months' [sic] incarceration . . . no jury was constitutionally required."[82] The court supported this approach by looking to the Federal Rules of Criminal Procedure, which allow a judge to make a pre-trial determination that the sentence will be limited and to decide whether to use the Rules based on that determination.[83]

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72. *Id.*

73. 953 F.2d 86 (4th Cir. 1991).

74. *Id.* at 87-88.

75. *Id.* at 88.

76. *Id.* at 89-90.

77. *Id.* at 90.

78. *Id.*

79. *Id.* (citing United States v. Potvin, 481 F.2d 380, 382 (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)); *see also* State v. Sanchez, 786 P.2d 42 (N.M. 1990).

80. *See* United States v. Stenzel, 49 F.3d 658, 660 (10th Cir. 1995); Nat'l Maritime Union v. Aquaslide 'N' Dive Corp., 737 F.2d 1395, 1400 (5th Cir. 1984).

81. 926 F.2d 1512 (10th Cir. 1991).

82. *Id.* at 1519; *see Stenzel*, 49 F.3d at 660; *Nat'l Maritime Union*, 737 F.2d at 1400.

83. *Bencheck*, 926 F.2d at 1519. Federal Rule of Criminal Procedure 58(a)(2) states "[i]n proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the

Though judicial support for the use of either of these two approaches has been overwhelming, it has not been unanimous. Two jurisdictions flatly rejected both of these approaches.[84] In *City of Monroe v. Wilhite*, the Supreme Court of Louisiana held, in a pre-*Taylor* decision, that consolidation of multiple petty offenses is merely a procedural device and does not alter the fact that these are petty offenses for which there is no right to a jury trial.[85] Similarly, the New York Supreme Court, Appellate Division, held in *People v. Foy*, that "the administrative convenience of litigating these multiple charges in one trial did not serve to enhance the ultimate risk faced by the defendant or to somehow transform the 'petty' offenses alleged to the level of a 'serious' crime."[86] These two exceptions, however, should not be viewed as in any way defeating the persuasiveness of the uniformity of all the other jurisdictions and the effect that uniformity should have on the Supreme Court. In fact, decisions of these same two jurisdictions were struck down by the Supreme Court in cases involving the right to a jury trial precisely because they were the exception to a nationwide uniformity.[87]

II. THE SUPREME COURT DECISION IN *LEWIS V. UNITED STATES*

The preceding review of case law shows that most of this nation's courts, and every one of the federal appellate courts that have considered the issue of multiple petty offenses tried in one proceeding, have followed one of the two approaches outlined above. Though their reasonings may be different, the end result of this jurisprudence is that no defendant tried in one proceeding for multiple petty offenses may be sentenced to greater than six months imprisonment without being

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court may follow such provisions of these rules as it deems appropriate." FED. R. CRIM. P. 58(a)(2).

84. *See* City of Monroe v. Wilhite, 233 So. 2d 535 (La. 1970); People v. Foy, 636 N.Y.S.2d 559 (App. Div. 1995).

85. *Wilhite*, 233 So. 2d at 536.

86. *Foy*, 636 N.Y.S.2d at 559. However, after *Codispoti* was decided, the Louisiana Supreme Court overruled *Wilhite*, because of the ruling in *Codispoti*, in State v. McCarrol, 337 So. 2d 475, 480 (La. 1976). Therefore, New York was the only jurisdiction supporting the Second Circuit when the Supreme Court decided *Lewis*.

87. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court reversed a decision where the state of Louisiana tried a defendant without a jury on a charge of battery, which was punishable by up to two years imprisonment. *Id.* at 160. The Court stated that Louisiana was the only state in which crimes subject to trial without a jury are punishable by more than one year in jail. *Id.* at 161 n.33. In Baldwin v. New York, 399 U.S. 66 (1970), the Court reversed a conviction for "jostling," a crime punishable in New York by one year in prison, because the accused was denied a jury trial. *Id.* at 67-68. The Court stated that New York was the lone jurisdiction in the nation that denied an accused facing potential imprisonment of greater than six months the right to trial by jury. *Id.* at 71-72.

accorded the right of trial by a jury of his peers. The decision in *Lewis* presented the first serious departure from this standard.

A. Just the Facts (and Procedural History)

In 1994, Ray Lewis, a postal worker, was charged with two counts of obstructing the mail, in violation of Section 1701 of the United States Code.[88] Both counts were petty offenses, under the Supreme Court's *Baldwin* standard, each punishable by a maximum sentence of six months imprisonment.[89] When the government moved to have Lewis tried without a jury, the magistrate granted the motion, stating that she had already decided that regardless of the court's finding as to his guilt on the charges, she would not sentence Lewis to more than six months imprisonment.[90] Lewis was convicted on both counts and was sentenced to three years probation on each count, with the sentences to run concurrently.[91]

Following his conviction, the defendant appealed the denial of a jury trial to the district court.[92] The district court affirmed the magistrate's decision, stating that the right to a jury trial was determined by the severity of the sentence for each individual charge, without regard to the aggregate of the potential sentences.[93]

Lewis appealed this decision to the Court of Appeals for the Second Circuit.[94] The Second Circuit reviewed the Supreme Court decisions on the right to a jury trial and then examined treatment of the issue of multiple petty offenses and the right to a jury trial by other courts.[95] The opinion stated, "those courts which have addressed this question to date are in agreement that potential sentences must be aggregated to determine the right to a jury trial."[96]

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88. Lewis v. United States, 116 S. Ct. 2163, 2165 (1996). Section 1701 states: "Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months, or both." 18 U.S.C. § 1701 (1994). For a discussion of whether the charges against Lewis, as federal crimes, should receive different treatment by the courts on the petty offense exception, see Frankfurter & Corcoran, *supra* note 20.

89. *Lewis*, 116 S. Ct. at 2165; *see supra* Part I for the *Baldwin* standard.

90. *Lewis*, 116 S. Ct. at 2165. This is the limited aggregation approach embraced by some lower courts confronted with the issue of multiple petty offenses. *See supra* note 82.

91. United States v. Lewis, 65 F.3d 252, 253 (2nd Cir. 1995).

92. *Lewis*, 116 S. Ct. at 2166. Lewis had argued to the district court that because the aggregate maximum potential exceeded six months, his request for jury trial had been improperly denied by the magistrate. *Lewis*, 65 F.3d at 253.

93. *Lewis*, 116 S. Ct. at 2166.

94. *Id.*

95. *Lewis*, 65 F.3d at 254.

96. *Id.* (citing decisions from three different circuit courts and district courts of four different states). The Second Circuit cited: United States v. Coppins, 953 F.2d 86, 90 (4th Cir. 1991);

Despite this unanimous approach by other courts, the Second Circuit decided to reject this approach. It held that the proper focus was on the objective standard of the legislative determination, as instructed by Supreme Court precedent, and for that reason, potential sentences should not be aggregated in order to make multiple petty offenses warrant a jury trial.[97] The decision of the district court was affirmed.[98] As to the government's contention that, aggregation notwithstanding, the defendant was not entitled to a jury trial because of the magistrate's pre-trial promise of leniency in sentencing, the court said that "self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial."[99] The defendant appealed to the Supreme Court, which granted certiorari in order to resolve what it termed a "conflict in the Courts of Appeals. . . ."[100]

B. The Majority Speaks

Justice O'Connor delivered the majority opinion.[101] She found that the following two issues faced the Court in this case: 1) Does a de-

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United States v. Bencheck, 926 F.2d 1512, 1518 (10th Cir. 1991); Rife v. Godbehere, 814 F.2d 563, 565 (9th Cir. 1987); United States v. Musgrave, 695 F. Supp. 231, 233 (W.D. Va. 1988); United States v. O'Connor, 660 F. Supp. 955, 956 (N.D. Ga. 1987); United States v. Coleman, 664 F. Supp. 548, 549 (D.D.C. 1985); United States v. FMC Corp., 428 F. Supp. 615, 620 (W.D.N.Y. 1977). The fact that the Second Circuit did not even consider the few courts that have held similarly to their position in *Lewis* renders their decision that much more ill-advised.

97. *Lewis*, 65 F.3d at 254. The Second Circuit, in focusing on objective criteria, stated that the previous courts to consider this issue focused instead on the viewpoint of the defendant as to the seriousness of facing greater than six months imprisonment for aggregate sentences. *See infra* Part III.B.1 for a discussion of why the court's reasoning fails.

98. *Lewis*, 65 F.3d at 256.

99. *Id.* at 255-56. The Second Circuit stated, "while we need not resolve this question, in light of the discussion above it is clear that" the pre-trial determination cannot stand. *Id.* at 255. The majority opinion in *Lewis* stated that this language by the Second Circuit was dicta. *Lewis*, 116 S.Ct. at 2164. As will be seen, the Supreme Court offers no guidance on this issue either.

100. *Lewis*, 116 S. Ct. at 2166. In giving this reason for their grant of certiorari, the Court cited *Coppins*, *Bencheck* and *Rife*. *Id.* While these decisions vary in the approach taken, they all reject the conclusion reached by the Second Circuit in *Lewis*, that a defendant can be sentenced to greater than six months imprisonment for multiple petty offenses in one proceeding, without benefit of a jury trial. *See generally Coppins*, 953 F.2d 86 (holding that an actual sentence of less than six months did not preclude a jury trial where a potential aggregate of multiple petty offenses was greater than six months); *Bencheck*, 926 F.2d 1512 (requiring no jury trial if the trial judge predetermines that the sentence will be no more than six months); *Rife*, 814 F.2d 563 (holding that where the defendant actually faced less than six months in prison, a jury trial was not required).

101. *Lewis*, 116 S. Ct. at 2165. Justice O'Connor's opinion carried a bare majority of five justices. She was joined by Rehnquist, C.J., Scalia, Souter, and Thomas, JJ. *Id.* Justice Kennedy composed a concurring opinion, which was joined by Justice Breyer. *Id.* at 2169 (Kennedy, J., concurring). Justice Stevens wrote in dissent, joined by Justice Ginsburg. *Id.* at 2173 (Stevens, J., dissenting).

fendant prosecuted in a single proceeding for multiple petty offenses have a constitutional right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months? and 2) Can a defendant, who otherwise has a right to a jury trial, be denied that right when the magistrate makes a pre-trial finding that the aggregate sentence will not exceed six months imprisonment?[102] Writing for the majority, Justice O'Connor stated at the outset that because the majority had decided that no right to a jury trial exists for a defendant facing a sentence for multiple petty offenses, the Court would not reach the issue of whether judicial pre-trial sentencing parameters can affect the right to a jury trial.[103]

The majority began with a summary of the facts and procedural history of the case.[104] Then, the Court reviewed the relevant precedent, stating: that petty offenses are not within the scope of the Sixth Amendment right to a jury trial; that the court has sought objective indications of the seriousness with which society regards the offenses; and that the maximum penalty authorized by statute for an offense is the proper standard for that determination.[105] The majority reinforced the presumption that an offense punishable by imprisonment of six months or less is petty in nature and bears no jury-trial right.[106]

The majority held that the fact that a defendant faces multiple charges and a potential prison sentence of greater than six months does not invoke a right to trial by jury when none of the charged offenses would give such a right individually.[107] Lewis was charged with obstructing the mail, an offense punishable by six months imprison-

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102. *Id.* at 2165.

103. *Id.*

104. *Id.* at 2165-66. The opinion stated that Lewis was observed pocketing mail on two occasions but it is unclear if Lewis was charged for two distinct acts at different times or for two acts arising out of the same occurrence. This issue was also not addressed by the lower courts. It is not immediately relevant, for the Supreme Court makes no consideration of it in its reasoning. However, some courts that have addressed the issue of aggregation of potential sentences expressely state that aggregation is allowed for multiple petty offenses arising from the same transaction or occurrence. *Compare* State v. Owens, 254 A.2d 97, 102 (N.J. 1969) (allowing for aggregation of multiple petty offenses arising out of a single event), *with* People v. Foy, 636 N.Y.S.2d 559, 562 (App. Div. 1995) (denying aggregation of potential sentences to a defendant charged with multiple petty offenses arising from the same incident because New York Penal Law requires concurrent sentences for multiple convictions arising from a single incident).

105. *Lewis*, 116 S. Ct. at 2166; *see supra* Part I for a discussion of the precedents cited by the Court here.

106. *Lewis*, 116 S. Ct. at 2166-67.

107. *Id.* at 2167. The Court was implying that if one of the multiple counts were for a serious offense, a jury trial would be awarded. This is a common theme among those courts that reject aggregation. *See supra* notes 69-70. The Court failed to answer Lewis' argument that this focus on the nature of the offense should properly result in an impractical result for a defendant who is tried jointly for a petty and a serious offense. Such a defendant should receive a jury verdict on

ment.[108] By setting that maximum sentence, the legislature demonstrated that it considered this to be a petty offense.[109] The fact that Lewis was charged with two such offenses did not change the fact that the legislature considered obstructing the mail to be a petty offense.[110] According to the majority, multiple charges do not transform the nature of the offense from petty to serious:[111] "Where we have a judgment by the legislature that an *offense* is 'petty', we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense."[112]

The majority rejected Lewis' claim that the holding in *Codispoti*[113] required a finding that he had a right to a jury trial.[114] *Codispoti* is distinguishable from *Lewis*, the Court found, because in *Codispoti* the defendants were charged with criminal contempt, for which there was no legislatively determined maximum penalty.[115] In such a case, the court looks to the sentence actually imposed by the lower court in determining the right to a jury trial.[116] Further, special considerations as to judicial propriety in the contempt context warrant the neutrality of a jury.[117] Therefore, the Court held that the charges in *Codispoti*

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the serious offense and a judicial determination on the petty offense. Petitioner's Reply Brief at 5-6, Lewis v. United States, 116 S. Ct. 2163 (1996) (No. 95-6465) (1996 WL 191055).

108. *Lewis*, 116 S. Ct. at 2165.

109. *Id.* at 2167.

110. *Id.*

111. *Id.* Lewis argued to the Court that the Sixth Amendment right to trial by jury attaches to the prosecution as a whole and not to any one offense. Petitioner's Reply Brief at 1, *Lewis* (No. 95-6465). This argument was embraced by the dissent. *Lewis*, 116 S. Ct. at 2173 (Stevens, J., dissenting).

112. *Lewis*, 116 S. Ct. at 2167. The Court focused on the desire for an objective determination of seriousness, which is what led to the use of legislative determination in the first place. *Id.* at 2166. However, the Court here is incorrectly viewing aggregation as a subjective focus on a particular defendant. Lewis represents an entire class of defendants who face a single prosecution for multiple petty offenses. Looking at the potential sentence for multiple petty offenses is no less objective than doing so for one. The legislature does not pass a law and name a certain offense petty or serious. The Court should look at the maximum sentence available for the charged offense and label it petty or serious according to the *Baldwin* standard. It could just as easily do so for two or more offenses. Aggregation is not a break from the traditional desire for objective means. However, the Court's mistake is a common one. *See* Lewis v. United States, 65 F.3d 252, 254 (2nd. Cir. 1995); Jeff E. Butler, *Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial*, 94 MICH. L. REV. 872, 875 (1995) (arguing that aggregation focuses on individual defendants, which violates the principle that community preferences should dictate the seriousness of the offense).

113. 418 U.S. 506 (1974).

114. *Lewis*, 116 S. Ct. at 2167.

115. *Id.* at 2167-68.

116. *Id.* at 2168.

117. *Id.* The Court's mention of this concern over judicial impropriety in contempt cases seems misplaced in a discussion of the decision to aggregate. If the fear of judicial misconduct was so great, it seems Codispoti would have received a jury trial without the necessity of aggre-

were properly aggregated.[118] By comparison, the majority looked to *Taylor* where no jury trial was required because the sentence actually imposed for the multiple criminal contempts was less than six months.[119]

Finally, the majority pointed to the fact that even if Lewis had a right to a jury trial due to the aggregation of his potential sentences, the government would have had the authority to bypass the jury trial right by prosecuting the petitioner for the two charges separately.[120] The Court seemed to think that this makes Lewis' argument moot because one prosecution for both offenses carries no greater burden for the defendant than does two prosecutions for one count each.[121]

C. Justice Kennedy Agrees, Sort Of

Justice Kennedy, joined by Justice Breyer, concurred with the majority in affirming the decision of the Circuit Court.[122] The stance of the concurring opinion, however, was drastically at odds with the majority opinion. The concurrence disagreed with the majority on the issue of whether multiple petty offenses should be aggregated for purposes of a jury trial, affirming instead on the issue not reached by the majority, that of pre-trial determination of maximum sentence.[123] Because it was settled from the outset that Lewis could not be sentenced to more than six months imprisonment for the combined petty offenses, Justice Kennedy wrote at the start of his concurrence that Lewis never had a right to a trial by jury.[124] The rest of the opinion, however, attacked the majority's decision.[125]

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gation of the sentences imposed. Further, in *Taylor*, which also concerned criminal contempt, the fear of judicial misconduct failed to necessitate a jury trial when the aggregate imposed sentences did not exceed six months imprisonment. See *infra* Part III.B.2 for a discussion of the value of *Codispoti* and *Taylor* as precedents for the majority decision in *Lewis*.

118. *Lewis*, 116 S. Ct. at 2168.

119. *Id.*

120. *Id. But see* Christine E. Pardo, *Multiple Petty Offenses with Serious Penalties: A Case for the Right to Trial by Jury*, 23 FORDHAM URB. L.J. 895, 922 & n.150 (1996) (arguing that the trial judge should require joinder when related charges are severed in bad faith). The author also cites the MODEL PENAL CODE § 1.3(2), which states that a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or incident. *Id.*

121. *Lewis*, 116 S. Ct. at 2168.

122. *Id.* at 2169 (Kennedy, J., concurring).

123. *Id.* In fact, Justice Kennedy's concurrence was completely at odds with that of the Second Circuit. Kennedy argued that the multiple counts should have been aggregated but that there was no right to jury trial because of the magistrate's pre-trial determination. *Id.* The Second Circuit held that the pre-trial determination was unconstitutional but that there was no right to jury trial because aggregation of the potential sentences was not proper. United States v. Lewis, 65 F.3d 252, 255-56 (2nd Cir. 1995).

124. *Lewis*, 116 S. Ct. at 2169.

125. *Id.*

The concurrence examined the *Codispoti* and *Taylor* decisions and found that they established the proposition that the right to a trial by jury exists for any defendant sentenced to greater than six months imprisonment in one proceeding.[126] If multiple petty offenses threaten a defendant with greater than six months imprisonment, "taken together, the crimes then are considered serious for constitutional purposes, even if each is petty by itself."[127] The concurrence rejected the majority's claim that these cases are distinguishable because their holdings rested on the absence of legislative determinations of maximum penalties.[128] The absence of statutory maximum penalty, Justice Kennedy wrote, has nothing to do with the decision of the Court in *Codispoti* to award the jury trial.[129] The only effect it had was to cause the Court to look at the penalty actually imposed.[130] Justice Kennedy finds support for this assertion in *Taylor*, in which the defendant, charged with the same type of offense, was given no right to jury trial because the aggregate penalty facing him was not greater than six months.[131]

Aside from these precedents, Justice Kennedy based his opinion on more basic grounds. He looked to the purpose of the jury trial—to protect the accused from improper use of the power of the state.[132] Justice Kennedy understood this fear of state power to be a concern anytime a single judge sentences a defendant to greater than six months imprisonment.[133] This is so whether the sentence is the result of conviction on one serious offense or several petty ones.[134] Justice Kennedy rejected the majority's implication that a defendant without a right to jury trial, facing separate prosecutions, faces no greater threat of tyranny by the state than does one facing a single prosecution on several counts.[135] Justice Kennedy was confident that there is adequate protection for the defendant who is tried individually on each count because the witnesses and the prosecution's theory of the case will be tested repeatedly and because the defendant may be tried by different judges or will benefit from collateral estoppel in his later trials.[136]

126. *Id.* at 2169-70.
127. *Id.* at 2169.
128. *Id.* at 2170.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 2171.
133. *Id.*
134. *Id.*
135. *Id.* at 2171-72.
136. *Id.*

D. Justice Stevens Dissents

Justice Stevens, joined by Justice Ginsburg, dissented from the majority opinion.[137] The dissent disagreed with both the majority and concurrence on their alternate theories for affirming the appellate court decision. Justice Stevens, writing for the dissent, agreed with the concurrence that the potential sentences of multiple petty offenses charged in one proceeding should be aggregated in determining the right to a jury trial.[138] Justice Stevens looked to the language of the Sixth Amendment, which refers to "criminal prosecutions," to support his position that the objective determination of the penalty authorized by statute should be measured by the sentence authorized for the entire prosecution, not any specific charge within the prosecution.[139] He explained that the use of "offense" rather than "prosecution" in past Supreme Court cases was due to the fact that those prior cases dealt with prosecutions for only one offense and so, according to the dissent, the terms "offense" and "prosecution" were interchangeable.[140]

The dissent disagreed with the majority's reading of *Codispoti*.[141] While the majority distinguished that case because it dealt with criminal contempt, Justice Stevens argued that the unique nature of criminal contempt prosecutions (the absence of statutory maximum penalty) is not relevant to the question of aggregation.[142] This specific element is of significance only in determining whether the reviewing court must look to a subjective standard, namely the sentence imposed, when there is no objective standard to guide them.[143] The dissent noted that since the defendants in *Codispoti* were given no individual sentence of greater than six months, the holding of the majority in *Lewis* would require a finding that no jury trial was necessary for the *Codispoti* defendants.[144] That implied result is at odds with the actual decision.[145] The Court held in *Codispoti* that the defendants were in fact entitled to a trial by jury.[146]

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137. *Id.* at 2173 (Stevens, J., dissenting).

138. *Id.* Stevens argued that the majority took a rule fashioned solely by cases involving single offenses and blindly applied it to the dissimilar circumstances of multiple petty offenses. *Id.*; *see supra* note 107 (showing that Petitioner's Reply Brief contains the same argument).

139. *Lewis*, 116 S. Ct. at 2173 (Stevens, J., dissenting).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (citing Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974)).

The dissent also disagreed with the concurrence's analysis of the second issue brought by *Lewis*—can a judge make a pre-trial promise of a limited sentence, thus thwarting the jury-trial right of the accused?[147] Justice Kennedy reasoned for the concurrence that *Taylor* supported such a power of the trial judge.[148] The dissent argued that, since a judge could not strip the right to a jury trial in a prosecution for a serious offense, no such license should be given when the prosecution is for multiple petty offenses.[149] The "opprobrium" that attaches in each instance is the same.[150] Justice Stevens argued that the right to a jury trial attaches at the moment of prosecution and, therefore, no such pre-trial decision can affect that right.[151]

III. Analysis and Criticism of *Lewis*

This Part of the Note provides criticism of the majority decision, as well as a discussion of the merits of the concurrence and the dissent. Section A will briefly discuss the issue of judicial pre-trial determination. Section B will scrutinize the Court's decision, using Justice McReynold's quote from *Clawans* as a guide.[152] Section C will criticize the Court for ignoring the overwhelming rejection by the lower courts of the approach taken by the majority.

A. The Question of Pre-trial Determinations

Because the Court decided that there should be no aggregation of the potential penalties facing Lewis, and therefore there was no right to a jury trial, the majority did not reach the issue of whether the magistrate could properly void a defendant's right to a jury trial by vowing before the trial that the total sentence for the multiple petty offenses would not exceed six months.

While the majority did not reach this issue, the concurrence and dissent did. Justice Kennedy based his affirmance of the appellate court decision on his view that the magistrate acted properly in mak-

147. *Id.* at 2172.

148. *Id.*

149. *Id.* at 2174.

150. *Id.* The majority disagreed with this argument, stating that the fact that Lewis was tried for two offenses does not "transform the petty offense into a serious one. . . ." *Id.* at 2167. The Second Circuit stated the same in its decision. United Stated v. Lewis, 65 F.3d 252, 253-54 (2nd Cir. 1995). The legislative maximum sentence was chosen as a reflection of the community's judgements. Duncan v. Louisiana, 391 U.S. 145, 160 (1968). Thus, the majority and the Second Circuit are putting themselves in the seemingly indefensible position of saying that the community regards two offenses as no more objectionable than one.

151. *Lewis*, 116 S. Ct. at 2174 (Stevens, J., dissenting).

152. *See supra* note 11 and accompanying text.

ing a pre-trial promise not to sentence Lewis to greater than six months in jail, effectively voiding the right to a jury trial given by the multiple petty offenses.[153] Justice Stevens in his dissent disagreed, arguing that the jury trial right attaches at the moment of prosecution and cannot be affected by any pre-trial judicial promise.[154] When the Second Circuit decided that Lewis had no right to a jury trial, the court expressly rejected the claim that the magistrate's assurance of less than six months imprisonment could overcome the right to jury trial even if aggregation of the sentences was allowed.[155] "Self-imposed limitations on sentencing by the Court cannot deprive a defendant of his constitutionally protected right to a jury trial."[156] However, the Second Circuit noted that the Tenth Circuit had ruled differently.[157] In *United States v. Bencheck*,[158] the Tenth Circuit held that when a judge determines that upon conviction for multiple petty offenses the sentence would be no more than six months imprisonment, there is no right to trial by jury.[159]

There are numerous justifications given for allowing such a pre-trial statement to determine whether the defendant has a right to a jury trial. The Tenth Circuit argued in *Bencheck* that the Federal Rules for Criminal Procedure supported its approach:

> [T]he trial judge is free to announce before trial how the sentence will be limited in the event of conviction, and then may determine based on that announcement whether to use the Rules. The same logic applies here, where the trial judge announced that the sentence, in the event of conviction, would be no more than six months' [sic] incarceration and because of that limitation no jury was constitutionally required.[160]

This logic seems flawed, however, for the procedure allowed under the Federal Rules is being transferred over to a case where its application could infringe upon constitutional rights. It is questionable whether judges can override the use of the Constitution as easily as they can the use of the Federal Rules of Criminal Procedure.

The court in *Bencheck* also found support for its approach in *Taylor v. Hayes*,[161] where it is said that the state may try a criminal contempt prosecution without a jury "where . . . the state 'determines not to

153. *Lewis*, 116 S. Ct. at 2169 (Kennedy, J., concurring).
154. *Id.* at 2174 (Stevens, J., dissenting).
155. United States v. Lewis, 65 F.3d 252, 255 (2nd Cir. 1995).
156. *Id.* at 256.
157. *Id.*
158. 926 F.2d 1512 (10th Cir. 1991).
159. *Id.* at 1519.
160. *Id.*
161. 418 U.S. 488 (1974).

impose a sentence longer than six months.'"[162] This language seems too ambiguous to support the approach taken in *Bencheck*. The Court's statement in *Taylor* likely meant only that when the sentence actually given by the judge is less than six months, there is no right to a jury trial. That was the thrust of the *Taylor* decision and nowhere in its criminal contempt precedents does the Court advocate the use of pre-trial sentence limitations to decide the issue of a jury trial right. This is clear by the fact that none of the opinions in *Lewis* cite any precedent for such a proposition and that the majority feels it should not even reach the issue.[163] The court in *Bencheck* seems to be twisting language, which is ambiguous standing alone, to fit its needs.

Justice Kennedy's concurring opinion in *Lewis* argues for the use of pre-trial statements by the judge in deciding on the right to trial by jury.[164] Justice Kennedy cites the Federal Rules of Criminal Procedure for support but he looks to Supreme Court precedent as well.[165] He claims that the Court approved such a practice in *Scott v. Illinois*,[166] in which the court ruled that a judge is not required by the Sixth Amendment to appoint an attorney for an accused in a misdemeanor case if the judge will not sentence him to any jail time.[167] Once again, this seems to be an inappropriate judicial extension of precedent, though not as erroneous as that in *Bencheck*. The decision in *Scott* was for a case where the defendant faced no jail time.[168] Supreme Court precedent impliedly holds that there is a great difference in severity between a penalty involving no jail time and one involving six months incarceration.[169] The situation in *Lewis* was far more serious than that which faced the defendant in *Scott*.

These arguments for the pre-trial sentence propositions notwithstanding, it seems that allowing the judge to make these decisions before even hearing the evidence of the case goes against public policy. This public policy view holds that such judicial decisions may be improperly lenient to criminal defendants. Allowing a judge to state before trial that a sentence will be limited in some way precludes the

162. *Bencheck*, 926 F.2d at 1519 (citing *Taylor*, 418 U.S. at 496).

163. Lewis v. United States, 116 S. Ct. 2163, 2172 (1996).

164. *Id.* (Kennedy, J., concurring).

165. *Id.*

166. 440 U.S. 367 (1979).

167. *Lewis*, 116 S. Ct. at 2172 (citing Scott v. Illinois, 440 U.S. 367 (1979)).

168. *Scott*, 440 U.S. at 374.

169. *See generally* Baldwin v. New York, 399 U.S. 66 (1970) (holding that a defendant sentenced to one year in prison was entitled to a jury trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that a sentence of two years required a jury trial); District of Columbia v. Clawans, 300 U.S. 617 (1937) (holding that a defendant sentenced to only 60 days in jail did not require a jury trial).

possibility that evidence heard at trial, that would convince the judge that the maximum sentence is warranted, will be given its proper effect. Once judges promise to limit sentences, they are bound to those vows and criminal defendants may escape their deserved punishments. Granted, since this only applies to petty offenses, this procedure would obviously not result in murderers going free prematurely. Nevertheless, it is an age-old adage that the penalty should fit the crime. How can the proper penalty be determined before the judge has heard the specifics of the crime charged at trial?

Despite the arguments made against the use of pre-trial sentencing determinations, this practice should be allowed to continue for it fits with the main argument against the decision in *Lewis*: no criminal defendant should be ultimately sentenced to greater than six months without being afforded the opportunity to be tried by a jury. For that reason, it is unobjectionable, absent a Supreme Court ruling against the use of this approach, to allow this approach to stand for the purpose of states' experimentation.

B. The Court Rejects the Lessons of Justice McReynolds

In a separate opinion in the Supreme Court case of *District of Columbia v. Clawans*,[170] in which the Court first looked to a statutory maximum penalty in deciding the right to a jury trial, Justice McReynolds stated, "[c]onstitutional guarantees ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning."[171] This is a fundamental view of the role of the Supreme Court as interpreter of the Constitution. Though Justice McReynolds' statement was not part of a majority opinion, it is without question an argument that would face little challenge. This remark stands as an excellent framework for the analysis of the majority's decision in *Lewis*, for that opinion clearly violated all three of Justice McReynolds' cautionary instructions.

1. The Erroneous Reasoning of the Court

The majority holding in *Lewis* is not based upon sound reasoning. The Court blindly followed the letter of a standard laid out in prior cases and ignored the reasoning and logic that led to the adoption of the standard in the first place. The primary focus of the entire Constitution is the protection of the individual from improper exercise of state power. The Sixth Amendment guarantee of the right to trial by

170. 300 U.S. 617 (1937).
171. *Id.* at 634.

jury is paramount to this protection, for the ability to label a person a "criminal" and deprive that individual of liberty is one of the most dangerous powers of the state, if used improperly. The right to trial by jury has consistently been viewed by the courts as one of the most important protections for the individual.[172] As stated at the beginning of this Note: "Providing 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."[173]

At common law, there has always been a group of offenses for which the right of jury trial was exempt.[174] The Supreme Court has labeled these "petty offenses" and they are generally those offenses which carry lower infringement of liberties for the convicted defendant.[175] The basis for the differential treatment of this group of offenses is that the penalty faced by the defendant, even if the system fails, is not so great. The Court stated that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to . . . simplified judicial administration resulting from . . . nonjury adjudications."[176] The ordinary fear of oppression by the state was not so great because the penalty to the individual, while not negligible, was not unbearable given the benefit to the system.[177]

In its decisions in *Baldwin*, *Duncan*, and *Clawans*, the Supreme Court reaffirmed the idea that some offenses, because of the relatively minimal intrusion on the liberty interests of the individual, fall outside of Sixth Amendment considerations.[178] The Court used these opinions to try to set a standard for determining which offenses are petty, therefore giving no right to a jury trial, and which are serious, according the accused full Sixth Amendment rights.[179]

In *Clawans*, the Court rejected the approach of simply looking to whether the charged offense was indictable at common law.[180] Things had changed significantly since the time of the drafting of the Constitution and some crimes were viewed differently and punished more or

172. *Duncan*, 391 U.S. at 156; *see supra* text accompanying note 1.

173. *Supra* note 172.

174. *Clawans*, 300 U.S. at 624.

175. *Duncan*, 391 U.S. at 159-60.

176. *Id.* at 160.

177. *Id.*

178. *See* Baldwin v. New York, 399 U.S. 66, 68 (1970); *Duncan*, 391 U.S. at 159; *Clawans*, 300 U.S. at 624-25.

179. *Supra* note 178.

180. *Clawans*, 300 U.S. at 625.

less strictly.[181] Therefore, a court could not merely say, for example, that one charged with assault cannot have a jury trial because one hundred years ago the courts at common law did not give such an accused a jury trial, if the penalty for such an offense had changed from three months at common law to one year under the state statutes. The Court stated in *Clawans* that some consideration needs to be given to the maximum penalty authorized by statute.[182]

The Court continued this trend in *Duncan*, which called for the use of the statutory maximum penalty as the primary focus in determining whether an offense is petty or serious.[183] The Court wished to have an objective standard to guide the lower courts in this area and it felt that the decision of the legislature, expressing the feelings of the people as to the seriousness of the offense, is the best indicator.[184]

It is important to understand the steps in logic taken by the Court in making this decision. The jury trial exists to protect the accused. When the penalty faced by the accused is minimal that right is not necessary but for more serious penalties the right is inviolate. The Court merely labels these petty or serious for convenience. The focus on the legislative penalty allows the courts to regard an offense as "petty" or "serious," rather than merely calling a sentence minor or major.

That was the approach used by the courts at common law.[185] The defendant's right to a jury trial depended on the penalty accompanying the charge.[186] The Court is merely continuing that tradition, looking to the authorized penalty for an offense to determine whether that offense will be considered a petty or a serious offense. The Court is focusing on the objective determination by the legislature of what type of penalty will be placed on one guilty of a certain offense.

The focus throughout this opinion was on how much jail time a defendant can face in a prosecution without being granted the right of a jury trial. The standard announced by the Court in *Duncan* essentially asked if the offense was petty or serious, as determined by the legislature's penalty determination.[187] The logic behind such a standard would seem to be saying that we do not want an individual to be faced

181. *Id.* at 627.

182. *Id.* at 625.

183. *Duncan*, 391 U.S. at 159.

184. *Baldwin*, 399 U.S. at 68.

185. *See Clawans*, 300 U.S. at 624-25.

186. *Baldwin*, 399 U.S. at 68-70.

187. *Duncan*, 391 U.S. at 160.

with too much jail time without being accorded the right guaranteed by the Sixth Amendment.

In *Baldwin*, the Court came closer to setting the dividing line between serious and petty at six months imprisonment. Again, the Court called for the use of the objective standard of statutory maximum penalty as the method for determining when the penalty facing the accused is sufficient enough to warrant a jury trial.[188] Perhaps the most telling element of the *Clawans*, *Duncan*, and *Baldwin* decisions is that in each one the Supreme Court underwent a detailed analysis of the right to trial by jury, its purpose of protecting the individual from the tyranny of the state and the need for that right when a criminal charge threatens one with a major infringement of one's liberty.[189] After this standard was declared however, the Court began looking exclusively at what label applies to a given offense, petty or serious, seemingly forgetting why the standard was applied in the first place and failing to see if the original reasoning behind the standard would bear out the result in the new situation. After *Baldwin*, the Court no longer examined in detail the purpose behind the right to jury trial and the reason why the legislative determination of maximum penalty was adopted as the standard.[190]

The decision announced by the Court in *Lewis* shows that the Court has turned its back on the reasoning behind the differential treatment of petty and serious crimes. The majority rigidly applied the test of *Baldwin*, looking at the statutory maximum penalty for obstruction of the mail, determining that obstruction of the mail is a petty crime and effectively ending the analysis right there.[191] However, the term

188. *Baldwin*, 399 U.S. at 68. The Tenth Circuit has argued that aggregation is the best objective standard. *See* Haar v. Hanrahan, 708 F.2d 1547, 1552 (10th Cir. 1983) ("The aggregate of the statutorily prescribed penalties provides the objective indicia of the opprobrium that society attaches to the entire criminal act and is thus the appropriate measure of the act's seriousness").

189. *Baldwin*, 399 U.S. at 68-73; *Duncan*, 319 U.S. at 153-61; *Clawans*, 300 U.S. at 624-30.

190. *See* Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Taylor v. Hayes, 418 U.S. 488 (1974).

191. Lewis v. United States, 116 S. Ct. 2163, 2167 (1996). There is evidence that the legislature is more inclined toward aggregation than the Court. Title 18, Section 3584(c) of the United States Code states that "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. § 3584(c) (1994). This attitude from Congress is especially important given the emphasis the Court places on deference to the legislative judgement in this area. *See* CAL. PENAL CODE § 1203a (West 1982) (stating a similar approach by a state legislature). The Tenth Circuit has viewed aggregation of potential sentences as a much more flexible, and proper, approach to this issue. *Haar*, 708 F.2d at 1552. In *Haar*, the court stated that "aggrega[tion] of the statutorily prescribed penalties imparts a pragmatic temper to the Supreme Court's concept of a 'serious offense'.... [T]he approach comports with both the realities of multiple-crime charging and the language of the Sixth Amendment, which guarantees the right to a jury trial in the context of 'criminal prosecutions.'" *Id.*

"petty" is not the test itself but merely a convenient label placed on a type of crime by the court. The legislature did not determine that this was a petty offense. It merely decided that the maximum penalty imposable for one count of obstructing the mail is six months imprisonment.[192]

The true test that the Court needs to apply here is whether the potential penalty faced by this defendant in this prosecution is so great as to arouse the fears of the people against judicial or prosecutorial misconduct. Granted, the Court wants an objective standard and will not look at the special circumstances facing each defendant. However, the situation faced by Lewis—charges of multiple petty offenses in one proceeding—was different than any considered by the Court when it set the standard in *Duncan*. In this new situation, the Court should not merely stick rigidly to its standard. It should go back to the reasoning behind the standard and the purpose for the jury trial in the first place to see if a new approach is warranted by the circumstances.

The Court failed entirely to use this approach. The majority opinion in *Lewis* at no time reviewed the basis behind its standard. It merely held that the charged offenses were petty and declared outright that the numerous offenses in no way combined to form a serious offense.[193] The question it should have asked is whether the multiple offenses charged against Lewis threatened him with a sentence of such severity that the danger of impropriety by the State became a concern, thus warranting a jury trial.

The majority stated that if the defendant had a right to a jury trial in this prosecution, then the government could bypass that right by charging the counts separately.[194] The majority seemed to think that under such separate charging of offenses, the defendant would be in the same position, under the same danger of tyranny by the state, as

192. 18 U.S.C. § 1701 (1994). *Cf. Lewis*, 116 S. Ct. at 2167 (stating that "[w]here we have a judgment by the legislature that an *offense* is 'petty,' we do not look to the potential prison term faced by a *particular defendant*" (emphasis in original)). The Court seems to be transferring the determination of "petty" or "serious" and the corresponding decision as to jury trial, from the judiciary to the legislature. However, the legislature simply makes the penalty determination. The courts use that to label an offense petty or serious and they carry the burden of evaluating the efficacy of the standard in all situations. They cannot simply wash their hands of meaningful scrutiny, as the Supreme Court is attempting to do here.

193. *Lewis*, 116 S. Ct. at 2167.

194. *Id.* at 2168. The Court's language here implies that the justices see no harm to defendants from this decision. Others have similarly argued that these issues are mere procedural alternatives. *See* City of Monroe v. Wilhite, 233 So. 2d 535, 536 (La. 1970) (holding that consolidation for trial is merely a procedural device which has no effect upon the right to jury trial); Petitioner's Reply Brief at 10, Lewis v. United States, 116 S. Ct. 2163 (1996) (No. 95-6465) (1996 WL 191055) (denouncing the government's claim that the choice between a jury trial and a non-jury trial is merely an issue of procedural alternatives).

he is under the majority's ruling in *Lewis*. This is erroneous. The right to trial by jury is aimed at protection not from the system as a whole, so much as it is aimed at protection from the arbitrary decisions of a judge or the actions of a prosecutor in a specific case. It does not matter that "the system" would be able to convict the defendant on both counts without a jury trial. What matters, and what a defendant fears, is that one judge or one prosecutor could punish him for both sentences.

As Justice Kennedy states in his *Lewis* concurrence, separate trials for individual counts would provide defendants with several added safeguards: possibly different judges or prosecutors would hear the individual counts; the charges might be heard on different days, so the mood of the courtroom players on any specific day would not determine the petitioner's fate; the strength of the prosecutor's case and the probative value of witnesses and evidence would be tested more than once.[195] Thus, the majority cannot escape the issue merely by saying that the right to a jury trial could be avoided anyway.

Even if one ignores the central purpose behind the Sixth Amendment right to a jury trial, as the Court has done here, its reasoning in denying Lewis his jury trial is in error. As noted, the majority rigidly looked to the legislative determination of the maximum sentence in deciding whether there is a right to a jury trial.[196] The Court looked at the statute criminalizing obstruction of the mail, found a maximum sentence of six months imprisonment, and stopped there.[197] However, the Court stopped looking too soon. Title 18, section 3584 of the United States Code is entitled "Multiple sentences of imprisonment."[198] In this section, Congress has decided that "if multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively. . . ."[199] This is a clear determination by the legislature, acting as a guage for the judgements

195. *Lewis*, 116 S. Ct. at 2171-72.

196. *See supra* note 192 and accompanying text.

197. *Id.*

198. 18 U.S.C. § 3584 (1994).

199. *Id.* § 3584(a). The Second Circuit, in its decision in *Lewis*, actually cited this section of the Code as support for its decision. United States v. Lewis, 65 F.3d 252, 255 (2nd Cir. 1995). That court cited the section of part (a) which states that if multiple sentences are imposed at one time, they will run concurrently, unless the court orders otherwise. *Id.* The Second Circuit read that to mean that Congress does not consider multiple petty offenses any more serious than a single petty offense. *Id.* However, the fact that the legislature explicitly approved the use of consecutive sentences for multiple petty offenses exhibits that multiple offenses are not the equal of single offenses when tried jointly. Also, the fact that the court can overcome that presumption and give consecutive sentences is of special relevance when the primary concern behind the jury trial is the fear of judicial misconduct.

of the people, that multiple offenses, be they petty or serious, can result in greater lengths of imprisonment than single offenses. Therefore, under the Court's decisions dating back to *Duncan*, multiple petty offenses are considered more serious by the legislature.

This type of legislation is not limited to the Federal Code. Most states have similar sections in their codes.[200] It is clear that even under the Court's rigid application of the petty offense distinction, Lewis deserved a jury trial. In *Blanton*, the Court said "[t]he judiciary should not substitute its judgement . . . for that of a legislature, which is 'far better equipped to perform the task. . . .'"[201] By ignoring the dictates of the United States Code as to multiple sentences, the Court has done just that.

2. *The Court Turns Its Back on Precedent*

The majority's holding in *Lewis* fails to satisfy Justice McReynolds' second precaution, for its decision is not supported by precedent. The cases cited by the Court are questionable precedents for its decision. In fact, precedent clearly compelled a different result. The Court incorrectly distinguished its prior decisions and found no modern support for its holding in this case.

The only support the majority found for its position that a jury trial is not a right of defendants who are charged with multiple petty offenses is two common law English cases from the eighteenth century.[202] Clearly, this is questionable precedent for the Court's decision. After making these archaic references, the majority went on to a tortured and incorrect reading of the relevant, modern cases of *Taylor* and *Codispoti*. The crime charged in these two cases, criminal

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200. *See* ARIZ. REV. STAT. § 13-708 (1996) (stating that multiple sentences imposed at one time are presumed to run consecutively); ARK. CODE ANN. § 5-4-403 (Michie 1995) (stating that a court may order multiple sentences to run consecutively); CAL. PENAL CODE § 669 (West 1996) (stating that sentences can run consecutively); CONN. GEN. STAT. § 53a-37 (1994) (stating that the court decides whether multiple sentences are to run consecutively or concurrently); 730 ILL. COMP. STAT. 5/5-8-4 (West 1996) (stating that multiple sentences imposed at the same time may run concurrently or consecutively as the court orders).

201. Blanton v. North Las Vegas, 489 U.S. 538, 541 (1989) (citing Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988)). The majority in *Lewis* even quoted this passage before going on to ignore its message by overruling the clear intent of the legislature. *Lewis*, 116 S. Ct. at 2166.

202. *Lewis*, 116 S. Ct. at 2167 (citing King v. Swallow, 101 Eng. Rep. 1392 (K.B. 1799); Queen v. Matthews, 88 Eng. Rep. 609 (Q.B. 1712)). Lewis argued the merits of these precedents to the Court in Petitioner's Reply Brief at n.1, Lewis v. United States, 116 S. Ct. 2163 (1996) (No. 95-6465) (1996 WL 191055). Lewis claimed that the two English cases stood only for the joinder of two petty offenses in a single proceeding and cited a contemporaneous case, The King v. Salolom, 1 T.R. 249-252 (K.B. 1786), which held that two distinct charges could not be joined in one conviction. Petitioner's Reply Brief at note 1, *Lewis* (No. 95-6465).

contempt, carries no statutory maximum penalty,[203] whereas the offense charged in the present case had a legislative determination of the maximum sentence.[204] The majority in effect hung its hat on this factual difference between these cases, rather than applying the intent of the earlier rulings.

The majority misplaced the proper focus with its analysis of the criminal contempt cases. The fact that there was no statutory maximum penalty for criminal contempt was the reason why the court focused on the penalty actually assessed upon the defendants in *Taylor* and *Codispoti*.[205] In *Lewis*, since there was a maximum penalty authorized by statute for the offense of obstructing the mail, the Court focused on that potential sentence rather than the sentence actually imposed.[206] This difference in focus is the only disparate treatment justified by this factual distinction between the cases. In determining whether the defendants in *Codispoti* and *Taylor* were entitled to jury trials, the Court aggregated the penalties faced by the defendants.[207] In *Taylor*, the multiple sentences were for six months each, running concurrently, and so the defendant ultimately faced no more than six months imprisonment.[208] Similarly, in *Codispoti*, the Court aggregated the imposed sentences to a total of three years and three months and held that the defendant was therefore entitled to a jury trial.[209] The Court so held despite the fact that no single count of contempt was punished by greater than six months imprisonment.[210]

As Justice Stevens stated in his dissent in *Lewis*, the application of the majority's holding in *Lewis* to a factual situation identical to that in *Codispoti* would require a finding that no jury trial is warranted—the opposite of the Court's actual holding in *Codispoti*.[211] The Court has thus broken with precedent while claiming to follow it.

The factual difference in the presence or absence of a statutory maximum sentence cannot explain the differential treatment accorded

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203. *Lewis*, 116 S. Ct. at 2167-68.

204. *Id.* at 2167.

205. *Id.* at 2167-68; *see* Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974); Taylor v. Hayes, 418 U.S. 488, 495 (1974). *Cf. Codispoti*, 418 U.S. at 516-17 (deciding to aggregate the sentences and never mentioning the fact that the charged offenses carry no legislative maximum sentence). The Court stated that the focus should be on the sentence actually imposed apparently due to the absence of a maximum penalty. *Id.* However, the Court never again mentioned this absence of authorized penalty as a basis for its holding. *Id.*

206. *Lewis*, 116 S. Ct. at 2167.

207. *Codispoti*, 418 U.S. at 517; *Taylor*, 418 U.S. at 495-96.

208. *Taylor*, 418 U.S. at 495-96.

209. *Codispoti*, 418 U.S. at 516-17.

210. *Id.* at 517.

211. *Lewis*, 116 S. Ct. at 2173 (Stevens, J., dissenting).

these two cases by the Court. The majority in *Lewis* argued that there are special considerations in criminal contempt cases.[212] Criminal contempt often represents a rejection of the authority of the judge in his courtroom, presenting a heated context in which the judge has ultimate power to charge, convict, and sentence the accused.[213] The majority in *Codispoti* saw in the contempt situation the "very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate."[214] The majority in *Lewis* claims that these considerations, combined with the absence of statutory maximum penalty, were the impetus behind the aggregating of sentences in that case.[215] However, it seems that these worries bear little relevance to aggregation of sentences. Besides, if these concerns were truly of such importance to the Court, the sentences need not be aggregated. The likelihood of judicial misconduct overcomes the presumption of propriety that allows the imposition of bench trials for petty offenses and therefore all criminal contempt trials should be heard before a jury, regardless of the length of sentence imposed. If the chance of judicial misconduct is that significant, then any penalty is too great to be justified by judicial convenience. The Court, however, expressly rejected the claim in *Taylor* that all criminal contempt cases should be tried before the jury.[216]

If there is any doubt that these precedents call for a result different than that reached by the Court in *Lewis*, the language of the decision in *Codispoti* makes clear that the Court's recent decision is erroneous. The *Codispoti* Court stated that, given the aggregate penalty of greater than six months, the defendant "was tried for what was equivalent to a serious offense and was entitled to a jury trial."[217] Contrast that to the statement by the majority in *Lewis*, that "[t]he fact that the petitioner was charged with two counts of a petty offense does not . . . transform the petty offense into a serious one, to which the jury-trial right would apply."[218] The respondent in *Codispoti* argued that the contempts were separate offenses, each petty in nature because of the six month sentences, and that therefore there was no right to a jury trial.[219] The Court rejected that argument on the basis that "the contempts arose from a single trial, were charged by a single

212. *Id.* at 2168.
213. *Id.*
214. *Codispoti*, 418 U.S. at 515.
215. *Lewis*, 116 S. Ct. at 2168.
216. Taylor v. Hayes, 418 U.S. 488, 495 (1974).
217. *Codispoti*, 418 U.S. at 517.
218. *Lewis*, 116 S. Ct. at 2167.
219. *Codispoti*, 418 U.S. at 517.

judge, and were tried in a single proceeding."[220] The Court was clearly focusing on the nature of the prosecution, not the nature of the individual offense.

3. *The Court Swaps Constitutional Rights for Convenience*

So far it has been shown that Lewis' constitutional right to a jury trial was denied by the Court upon both questionable precedents and uncertain reasoning—two of the actions denounced by Justice McReynolds in his *Clawans* opinion. McReynolds' third admonition, that constitutional guarantees ought not be subordinated to convenience,[221] is also ignored by the *Lewis* decision. Justice Black, in his concurrence in *Baldwin*, had this opinion of the Court's decision that a potential penalty of six months imprisonment gives no right to trial by jury:

> This decision is reached by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial. . . . [This] amounts in every case to little more than judicial mutilation of our written Constitution. Those who wrote and adopted our Constitution . . . decided that the value of a jury trial far outweighed its costs "for all crimes" and "[i]n all criminal prosecutions."[222]

While this may be considered an extreme position and has never gained majority support, it exhibits the principle that administrative efficiency is a minor consideration in comparison to constitutional rights, a principle that is present in much Supreme Court adjudication.[223]

It is well settled in Supreme Court jurisprudence that the consequences to defendants of convictions for petty offenses, absent the right to jury trial, are minimal in comparison to the burden that would be placed upon the judicial system if every minor infraction required a jury trial.[224] The Supreme Court claims that this is no slight to the guarantees of the Sixth Amendment because the relatively minor intrusions upon personal freedom affected by petty offense convictions

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220. *Id.*

221. District of Columbia v. Clawans, 300 U.S. 617, 634 (1937); *see supra* note 171 and accompanying text.

222. Baldwin v. New York, 399 U.S. 66, 75 (1970).

223. Duncan v. Louisiana, 391 U.S. 145, 160 (1968).

224. *Id.* For an opposing view on this issue, see generally *Aggregation of Sentences: Obtaining Jury Trials for Petty Offenders*, 59 IOWA L. REV. 614 (1974). In presenting the argument that providing jury trials for all offenses, petty or not, is workable, the author cited the practice by California and Alaska of granting jury trials to all criminal defendants who request them. *Id.* at 618.

were never intended by the framers to invoke a right to a jury trial.[225] As the correctness of this decision is not at issue here, this determination is accepted. The majority opinion in *Lewis*, however, undertook a whole new standard of balancing judicial efficiency against individual rights, one that has no foundation in the Court's history of limited, justifiable intrusions on individual rights. Though it did not say so outright, the Court clearly feels that it would be too burdensome on the system to require prosecutors to bring separate proceedings for each of multiple counts any time the government wants to avoid the defendant's constitutional guarantee of a jury trial. This is plainly evident from the fact that the majority went out of its way to state that if the Court found for the petitioner on the issue of right to a jury trial, the government could bypass the jury trial right by trying the counts separately.[226] Therefore, the denial of a jury trial in this case is a minor infringement, easily justified by the State's interest in preserving judicial efficiency by combining offenses into one prosecution.

No matter how the majority misread its precedent and how muddled is its reasoning, one fact is inescapably clear: all previous Sixth Amendment cases, whether decided with a focus on potential sentence or actual sentence, have stood for the proposition that no judge could sentence a defendant to a term of imprisonment of greater than six months without awarding a jury trial.[227] The Court's decision in *Lewis* broke that chain in dramatic fashion by explicitly allowing imposition of any length of sentence upon a defendant in a single prosecution, without granting a right to trial by jury so long as the charged offenses are all petty in nature. The majority's confusing justification for its decision failed to address this unprecedented proposition, which led Justice Kennedy to call the majority holding "one of the most serious incursions on the right to jury trial in the Court's history. . . ."[228]

Since the exception for petty offenses had support in the law at the time of the Constitution's drafting and the six-month line was supported by the decisions of numerous courts throughout the country, it can be argued that no constitutional guarantees were subordinated by those decisions. Here, the majority made an encroachment upon individual liberty not supportable by any precedent and, solely for the cause of judicial convenience, has stripped away a layer of constitutional protection.

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225. *Duncan*, 391 U.S. at 160.
226. Lewis v. United States, 116 S. Ct. 2163, 2168 (1996).
227. *See supra* note 4.
228. *Lewis*, 116 S. Ct. at 2169.

C. *The Voices of the Lower Courts Fall on Deaf Ears in Washington*

The majority opinion, therefore, violated all three of Justice McReynolds' cautionary instructions. The opinion can also be attacked, however, on other grounds.

While the Supreme Court is not bound to follow the decisions of any of the lower courts, previous cases deciding the right to a trial by jury demonstrate that, in this area, the Court has always strongly considered the position of other courts throughout the nation in formulating rules regarding the Sixth Amendment. Once again, the decision in *Lewis* breaks with Supreme Court tradition.

In *Clawans*, the Court, in determining whether there was a right to a jury trial for an offense punishable by ninety days incarceration, looked to the practices of the state courts in trying petty offenses without a jury.[229] The Court expressly stated that this record of judicial decision and statutory interpretation by the states compelled its finding that generally accepted standards of punishment permit a sentence of ninety days in jail without a jury trial.[230] In *Duncan*, the Court closely surveyed the laws and cases of the states and their courts when ruling on a Louisiana law that gave no right to a jury trial for serious offenses.[231] The Court found that a jury trial was a closely guarded right in most states and, in part, based its decision on this evidence.[232] In *Baldwin*, the Court surveyed the decisions of state and lower federal courts, finding that New York stood alone in denying a right to a jury trial to a defendant facing a possible prison term of greater than six months.[233] The Court stated, "[t]his near-uniform judgment of the nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone" between serious and petty offenses.[234] Thus, it appears the Court derived its bright-line rule from the decisions of these lower courts.

The Court lost its way in *Lewis*, not once looking to the approach taken by the many lower courts which have faced this exact issue. The majority stated that it granted certiorari to resolve a dispute among the courts of appeals.[235] The majority implied that all of the appellate

229. District of Columbia v. Clawans, 300 U.S. 617, 626 (1937).

230. *Id.* at 626-27.

231. Duncan v. Louisiana, 391 U.S. 145, 154 (1968).

232. *Id.* at 161-62.

233. Baldwin v. New York, 399 U.S. 66, 71-72 (1970).

234. *Id.* at 72.

235. Lewis v. United States, 116 S. Ct. 2163, 2166 (1996). However, the Court may not have been entirely ignoring the lower courts. In United States v. Stenzel, 49 F.3d 658, 660 (10th Cir. 1995), the Tenth Circuit held that a defendant had no constitutional right to a jury trial when he

courts had considered this issue, except for the Second Circuit decision which brought *Lewis* before the Court, and had ruled that a defendant charged with multiple petty offenses who faces an aggregate possible penalty of greater than six months has a constitutional right to a jury trial.[236] The Second Circuit, in its decision in *Lewis*, even admitted that it was rejecting the consensus opinion of all the other appellate courts.[237] Given this uniformity of approach among the lower courts, it seems erroneous that the Court would feel compelled to rule differently, especially given the Court's traditional use of the lower courts as a barometer for the feelings of the country. The majority failed to even address this element in its opinion.

IV. The Effect of the Court's Decision

In the short run, it seems that the lower courts are falling in line with *Lewis*. While the Court was considering this case, the Eleventh Circuit gave its ruling in *United States v. Brown*.[238] The Eleventh Circuit followed the approach adopted by the Second Circuit in *Lewis* and refused to aggregate the potential sentences of a defendant charged with multiple petty offenses.[239] Since the Court decided *Lewis*, two appellate courts have followed the *Lewis* decision. In *Burgess v. United States*,[240] the defendant was charged with two petty offenses and faced a potential sentence of one year in prison.[241] The District of Columbia Court of Appeals held the case pending the outcome of *Lewis* and then followed the Court's holding in that case by refusing to grant a jury trial based on the potential aggregate sentences.[242] In *United States v. Sherman*,[243] the Fourth Circuit considered the case of a defendant charged with three petty offenses, with a potential aggregate sentence of eighteen months imprisonment.[244]

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was charged with multiple petty offenses but was informed by the judge in a pre-trial determination that he would not be sentenced to greater than six months. Stenzel appealed to the Supreme Court but the Court denied certiorari, 116 S. Ct. 123 (1995), three months before it granted certiorari to Lewis, 116 S. Ct. 807 (1996).

Since the Tenth Circuit's decision clearly favored aggregation in the absence of a pre-trial determination, it is arguable that the Court denied certiorari because it did not want to create this new limit on Sixth Amendment rights without having any support from the federal appellate courts.

236. *See supra* notes 62, 69 and 71.

237. United States v. Lewis, 65 F.3d 252, 254 (2nd Cir. 1995).

238. 71 F.3d 845 (11th Cir. 1996).

239. *Id.* at 847.

240. 681 A.2d 1090 (D.C. 1996).

241. *Id.* at 1091.

242. Burgess v. United States, 680 A.2d 1033, 1034 (D.C. 1996) (en banc).

243. No. 95-5801, 1996 U.S. App. LEXIS 24953 (4th Cir. Sept. 25, 1996).

244. *Id.* at *2.

The Fourth Circuit, which had ruled in favor of aggregation of potential sentences for the purpose of a jury trial in *Coppins*,[245] noted that *Lewis* overruled *Coppins* and therefore refused to grant the defendant a jury trial.[246] These cases show that the lower courts do not intend to try to find a way around the Court's ruling in *Lewis*.

One could argue that *Lewis* will have little or no negative impact on criminal defendants. As the Second Circuit stated in *Lewis*, Title 18, Section 3584 of the United States Code allows consecutive sentencing but presumes that multiple terms of imprisonment imposed at the same time will run concurrently, unless the court orders otherwise.[247] Section 3584 also presumes that multiple terms of imprisonment imposed at different times will run consecutively, unless the court orders otherwise.[248] Therefore, if aggregation of potential sentences was allowed by *Lewis* and if prosecutors were able to properly avoid this jury trial right by trying the charges separately,[249] criminal defendants would suddenly find themselves on the short end of the sentencing presumption stick.

Another argument that will likely be made by supporters of the decision in *Lewis* is that no court addressing this issue, either before or after the Court's ruling in *Lewis*, has ever sentenced a criminal defendant to greater than six months imprisonment for multiple petty offenses without granting a right to a jury trial.[250] It may be argued that this whole issue is an academic argument; that the courts have neither the predisposition nor the jail room to levy lengthy sentences for multiple petty offenders.

Such an argument ignores the underlying purpose of the jury trial. This right was included in the Sixth Amendment out of a fear of government oppression, corrupt prosecutors, and unethical judges.[251] No one would argue that most criminal cases in this country are decided fairly by the governmental players and, thus, the lack of lengthy sentences imposed on multiple petty offenders so far is not surprising. However, the Supreme Court has squarely held that a criminal de-

245. United States v. Coppins, 953 F.2d 86 (4th Cir. 1991); *see supra* Part I.C. for a discussion of *Coppins*.

246. *Sherman*, 1996 U.S. App. LEXIS 24953 at *3.

247. Lewis v. United States, 65 F.3d 252, 255 (2nd Cir. 1995).

248. 18 U.S.C. § 3584 (1994).

249. *See supra* note 112.

250. The courts in *Sherman* and *Burgess* were essentially given free reign by the Court's decision in *Lewis* and yet the sentences imposed were minor. Burgess was sentenced to concurrent terms of six months imprisonment for his two convictions. Burgess v. United States, 680 A.2d 1033, 1034 (D.C. 1996) (en banc). Sherman received only a one year probation and $300 fine for three misdemeanor convictions. *Sherman*, 1996 U.S. App. LEXIS 24953 at *2.

251. *See supra* Introduction.

fendant may be sentenced in a single proceeding to greater than six months imprisonment for multiple petty offenses, without the right to trial by jury. The Court indicated no ceiling on the length of sentence that may be imposed. The opportunity is present for just the type of governmental oppression that was feared by the framers of the United States Constitution. Any judge in this country has the ability to sentence a criminal defendant to a year in jail, or two, or five, for committing crimes that the government itself considers petty. Any judge who makes such a sentence now has the full support of the highest court in the land. The Court's decision in *Lewis* is dangerous not for what likely will happen but instead for what possibly could.

CONCLUSION

In *Lewis v. United States*,[252] the Supreme Court ruled that a defendant charged in one proceeding with multiple petty offenses has no right to trial by jury, regardless of the potential aggregate sentence. This decision is an unacknowledged departure from precedent. It is based upon faulty reasoning which ignores the underlying purpose of the jury trial right and it makes an unjustified concession to judicial convenience and efficiency. The Court's holding also ignores the rulings of the lower courts of the nation, which overwhelmingly reject the approach adopted by the Court in *Lewis*. This decision sets a poor precedent, not only for the effect it could have on future criminal defendants, but also for the superficial review that the Court applied to this case.

252. 116 S. Ct. 2163 (1996).