

January 2011

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Recommended Citation

Robert Hardaway, Sixth Amendment Rising: The Newly Emerging Constitutional Case for Trial by Jury in Criminal Sentencing, 1 U. Denv. Crim. L. Rev. 52 (2011)

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SIXTH AMENDMENT RISING: THE NEWLY EMERGING CONSTITUTIONAL CASE FOR TRIAL BY JURY IN CRIMINAL SENTENCING

Robert Hardaway¹

"(We must) remain true to the principles that emerged from the framer's 'fears' that the jury right could be lost not only by gross denial, but by erosion...(A jury must try) all facts necessary to constitute a statutory offense..."

-Justice Stevens writing for the majority in *Apprendi v. New Jersey* (2000)²

I. INTRODUCTION

The right to trial by jury in criminal cases is enshrined in Article III, Section 2, Clause 3 of the U.S. Constitution which provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."³ Although this appears to render superfluous the Sixth Amendment guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a...trial by an impartial jury,"⁴ the repeat of this right in the Bill of Rights serves to highlight its importance in the minds of the framers.

Likewise, in civil suits at common law where the amount in controversy exceeds twenty dollars, the Seventh Amendment provides that "the right to trial by jury shall be preserved..."⁵

The Seventh Amendment, unlike the Sixth,⁶ has never been found to be an essential element of due process, and thus has never been applied to the states via incorporation into the Due Process Clause of the Fourteenth Amendment.⁷ Nevertheless, the Supreme Court has been meticulous in enforcing its provisions to the letter in the federal courts, holding that civil

¹ Professor of Law, University of Denver Sturm College of Law. The views expressed herein are my own and do not necessarily reflect the views of any of my colleagues at the Sturm College of Law. I also wish to acknowledge and give credit to Judge Morris B. Hoffman, District Judge for the Second Judicial District of Colorado. I have borrowed liberally from his excellent article in the *Duke Law Journal* which was published in 2003 and entitled *The Case for Jury Sentencing*, 52 *DUKE L.J.* 951 (2003). Although that article focused primarily on the historical, empirical and policy case for jury sentencing, his seven page constitutional case for jury sentencing set forth the most articulate constitutional case for jury sentencing in the aftermath of *Apprendi*, and provided the seeds and basis for what is essentially my 2003-2010 update to his constitutional case.

² *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000).

³ U.S. CONST. art. III § 2, cl.3. However, unlike the 6th amendment, art. III § 2, cl. 3 does not state that it applies to "all criminal prosecutions." U.S. CONST. amend. VI.

⁴ U.S. CONST. amend. VI; *Skilling v. U.S.*, 130 S. Ct. 2896, 2912-13 (2010); *Berghuis v. Smith*, 130 S. Ct. 1382, 1396 (2010) (Thomas, J. concurring); *Ring v. Arizona*, 536 U.S. 584, 597 n. 3 (2002); *Harris v. U.S.*, 536 U.S. 545, 549 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); *U.S. v. Rodriguez- Moreno*, 526 U.S. 275, 278 (1999); *Lewis v. U.S.*, 518 U.S. 322, 325 (1996); *U.S. v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

⁵ U.S. CONST. amend. VII; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 445 (2001) (Ginsburg, J. dissenting); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 n.22 (1999); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999).

⁶ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁷ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citing *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876)); *Id.* at n. 14; See also Morris B. Hoffman, *The Case for Jury Sentencing*, 52 *DUKE L.J.* 951, n. 72 (2003).

litigants in suits at common law have a right to a jury in both phases of the civil trial. Specifically, civil litigants have a right to have a jury determine both the defendant's liability, as well as the amount of damages to which a plaintiff is entitled if liability is determined.⁸

Given the court's scrupulous upholding and enforcement of the Seventh Amendment's right to a jury in all phases of civil cases involving complaints for money, it is all the more surprising that in criminal cases, where an accused faces loss of liberty or even death, many courts -- indeed, most courts -- routinely deny an accused the right to jury in the most critical phase of the criminal trial, namely the sentencing phase.⁹ While courts routinely accord an accused a right to a jury in the guilt or innocence phase,¹⁰ an accused's actual sentence is routinely left to the mercy of an individual judge who, depending on his mood or predilection, has the broadest discretion in imposing a sentence. Not surprisingly, such a sentence may range anywhere from no punishment at all, punishment that is suspended along with probation, to life imprisonment.¹¹

Inexplicably, most legislative attempts to address this kind of unbridled judicial discretion have come not in the form of simply requiring judicial adherence to the Sixth Amendment, but rather by promulgating so-called "sentencing guidelines."¹² The success of such guidelines is unclear however; specifically such success is unclear in light of judicial attempts in some lower courts to undermine or bypass this type of limitation on judicial discretion.¹³ In fact, higher courts have also attempted to bypass these limitations; leading these courts into thickets of legal obfuscation so dense that one senses desperation on their part in later cases to somehow find a way out of them.¹⁴

Interestingly, if a federal court today held that the right to a jury in civil cases extended only to the *first half* of a civil trial and then denied the right of a plaintiff to have his damages determined by a jury, there would be an explosion of outrage. Such outrage would reflect a blatant denial of the rights guaranteed by the Seventh Amendment, not only on the part of the trial bar, but by the general citizenry—and rightly so. What is the explanation, then, for such general acquiescence to the right of men and women being marched into captivity based on

⁸ See, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); *Chauffeurs v. Terry*, 494 U.S. 558 (1990); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Katchen v. Landy*, 382 U.S. 323 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *I.L.C. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978). Judge Morris Hoffman, in his Duke Law Review article "The Case for Jury Sentencing" has set forth in comprehensive detail the high court cases which have attempted to distinguish the Sixth and Seventh Amendments and explain why a civil litigant is accorded a right to jury in both phases of a civil trial, but an accused only has a right to jury in the first phase of a criminal trial. See e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003). Accordingly, no attempt is made to treat that subject here.

⁹ Hoffman, *supra* note 7, at 4; Ark. Code Ann. § 5-4-103 (1987); Mo. Ann. Stat. § 557.036 (West 1999); Okla. Stat. Ann. tit. 22, §§ 926.1, 927.1 (West Supp. 2003); Tex. Code Crim. Proc. Ann. art. 37.07(2)(b) (West 2006); Va. Code Ann. § 19.2-295 (West 2007).

¹⁰ *Libretti v. United States*, 516 U.S. 29, 49 (1995); *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

¹¹ Hoffman, *supra* note 7, at 987, 994-95; *U.S. v. Booker*, 543 U.S. 220, 233 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Williams v. New York*, 337 U.S. 241, 246 (1949)); See also *Apprendi*, 530 U.S. 466, 547-48 (2000) (O'Connor, J. dissenting).

¹² 18 U.S.C.A. § 3553; USSG; 28 U.S.C.A. § 994 (describing Sentencing Commission's duties); *Booker* 543 U.S. at 245; Jackson Jones, *The United States Sentencing Guidelines are not Law!: Establishing the reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be used in the Same Sentence*, 32 U. La Verne L. Rev. 7, 14-17 (2010) (describing the history and purposes of the federal sentencing guidelines).

¹³ See e.g. *United States v. Carty*, 520 F.3d 984, 994-95 (9th Cir. 2008); *United States v. Bowers*, 242 Fed. Appx. 558, 559-60 (10th Cir. 2007); *United States v. Burdax*, 100 F.3d 882, 884-86 (10th Cir. 1996).

¹⁴ See e.g. *Cunningham v. California*, 549 U.S. 270 (2007); *Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Walton v. Arizona*, 497 U.S. 639 (1990); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977).

the decision of a single man or woman? More pointedly, was this what the framers had in mind when they promulgated the Sixth Amendment command to provide an accused the right to a trial by jury in all criminal cases? And if it was not, what is the explanation for how the Sixth Amendment right to a jury trial came to be so diluted during the same period of American judicial history when the Seventh Amendment came to be so meticulously and scrupulously adhered to?

The public policy arguments in favor of jury sentencing can already be found in scholarly literature. Notably, Chief Justice William Rehnquist has remarked that "[i]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."¹⁵

Standing in stark contrast to the current sentencing norms, military courts feature a court panel (analogous to the jury in civilian courts) which decides both guilt as well as punishment, if necessary. As a JAG officer, I practiced in these latter courts and I was always impressed by the fairness of sentences imposed by the jury. Also impressive was the procedure under which an accused was able to present his own extenuation and mitigation evidence without fear that a heavily bureaucratized probation department would attempt to influence the court with reports featuring hearsay and other uncross-examined sources.¹⁶

Currently a handful of states provide its accused with the right to a jury trial during sentencing.¹⁷ However, following the lead of Chief Justice Rehnquist, there have been a number of scholars who have made an empirical and public policy case for jury sentencing in criminal cases.¹⁸ In fact, one of the more persuasive and eloquent public policy cases for jury sentencing has been recently set forth by Yale law student Adriana Lamni in a Note in the *Yale Law Journal*¹⁹ -- which garnered praise from Denver District Court Judge Morris Hoffman as the "first article in eighty-one years to call for a return to jury sentencing."²⁰

With the Chief Justice's public policy case for jury sentencing foundationally in mind, along with the 2000 Supreme Court decision in *Apprendi v. New Jersey*,²¹ and also Judge Hoffman's remarkable article²² in the *Duke Law Journal*, this article will focus on the constitutional case for jury sentencing in criminal cases.

¹⁵ *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, J. dissenting).

¹⁶ See 57 C.J.S. *Generally* § 580 (2010); 57 C.J.S. *Deliberations and Voting* § 585 (2010)

¹⁷ ARK. CODE ANN. § 5-4-103 (West 1997); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. tit. 22, §§ 926.1, 927.1 (West 2011); TEX. CODE CRIM. PROC. CODE ANN. art. 37.07(2)(b) (Vernon 1981); VA. CODE ANN. § 19.2-295 (West 2000) (as cited in Hoffman, *supra* note 7, at 953 n.1 as the only five states that allow for jury sentencing for noncapital offenses); Hoffman, *supra* note 7, at 954 n.4 ("Of the thirty-eight states with capital punishment, twenty-nine leave the sentencing decision to the jury. At least before *Ring v. Arizona*, 536 U.S. 584 (2002), only five states--Arizona, Colorado, Idaho, Montana, and Nebraska--gave the trial court judge, or a panel of judges, the exclusive power to decide the capital punishment issue.").

¹⁸ Hoffman, *supra* note 7; Adriann Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

¹⁹ Lanni, *supra* note 18.

²⁰ Hoffman, *supra* note 7, at 951 n.d1.

²¹ *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000).

²² Hoffman, *supra* note 7, at 968-85.

II. HISTORY

Although the phrase "shall be preserved" regarding the right to jury trial is found only in the Seventh Amendment,²³ and not the Sixth, it follows that the right to jury trial in criminal cases was likewise meant to preserve the right to jury in criminal cases as it existed at the time that both Section III and the Sixth Amendment were ratified. As Judge Hoffman has noted, judges at common law had almost no discretion in imposing sentences at the relevant time since "[m]ost offenses had mandatorily set punishments."²⁴ Accordingly, the judge's role in sentencing was largely perfunctory and formalistic, and was, therefore, "simply to announce the mandatory punishment."²⁵ Because these juries effectively imposed punishment by the simple expedient of deciding what crime the accused was guilty of, it was inconceivable at that time that the judge would in any way interfere with the jury's constitutional power to impose a sentence.

Although "judges sentenced in name only,"²⁶ an illusion was nevertheless created in the minds of future jurists that judges had actually been imposing sentences all along rather than simply ritualistically announcing the sentence for the record. As the common law practice of jury sentencing as it existed at ratification receded in the collective judicial memory, judges began a gradual usurpation of the traditional common law jury function of imposing sentences in criminal cases.²⁷ Such gradual usurpations were created, in large part, by the muddling of the waters by legislative promulgations that created the "indeterminate sentence."²⁸ Such legislative promulgations created an indisputably visible spectacle of a present day judge confidently announcing a sentence -- even mechanistically -- from the bench and would eventually have far reaching consequences for constitutional analysis.

It was not long before the common law practice in effect at the time of constitutional ratification became totally lost in the collective judicial memory. As a consequence of such memory loss, judges began a lengthy and effective usurpation of the constitutional function of the criminal jury without serious constitutional challenge.²⁹ In fact, it was not until the modern era that serious constitutional challenges to the usurpation of the jury function in criminal cases were raised, a number of which arose in death penalty cases.³⁰ In 1984, *Spaziano v. Florida*,³¹ for

²³*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citing *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958)); *Markman v. Westview*, 517 U.S. 370, 376 (1996); *Tull v. U.S.*, 481 U.S. 412, 425-26 (1987) (quoting *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)); *Colgrove*, 413 U.S. at 153 (1973); *id.* at 171 (Marshall, J., dissenting).

²⁴ Hoffman, *supra* note 7, at 962.

²⁵ *Apprendi*, 530 U.S. at 479 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900*, pp. 36-37 (Antonio Padoa Schioppa ed. 1987)) ("Thus, with respect to the criminal law of felonious conduct, 'the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence'"); Hoffman, *supra* note 7, at 962.

²⁶ Hoffman, *supra* note 7, at 963.

²⁷ See Hoffman, *supra* note 7, at 964-65; John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL'Y 119, 119-21 (1992); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 95-96 (2006); Ronald Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1374-75 (1999) ("Enthusiasm for sentencing juries grew out of an American passion for juries as the institution that best enabled citizens to participate in their own government. This conviction was never stronger than during the early nineteenth century. It was early in the twentieth century when states started to limit or abandon jury sentencing and to give judges the power to set the initial sentence in every case.").

²⁸ Hoffman, *supra* note 7, at 1001.

²⁹ See sources cited *supra* n. 26.

³⁰ *Ring v. Arizona*, 536 U.S. 584 (2002); *Walton v. Arizona*, 497 U.S. 639 (1990); *Spaziano v. Florida*, 468 U.S. 447 (1984). See also such non death penalty cases as *Blakely v. Washington*, 542 U.S. 296

example, featured an accused who was sentenced to death by a judge despite a jury recommendation of a life sentence. Although the accused appealed his sentence primarily on Eighth Amendment grounds, the court was blindsided by a secondary claim that the judge had violated the accused's Sixth Amendment rights by usurping the jury sentence. In addressing this claim, an apparently non-plussed majority could not muster a single case in support of its dictum that "[t]he Sixth amendment has never been *thought* to guarantee a right to a jury determination of that [death penalty] issue."³²

The court's tentative dictum that the right to a jury trial in criminal sentencing has not been "thought" to be a Sixth Amendment right appears far removed from an outright assertion, with authority, that there is no Sixth Amendment right to a jury in the second phase of a criminal trial. Additionally, it should be kept in mind that *Spaziano*, and presumably its feeble dictum, was undermined by a 2002 decision, *Ring v. Arizona*, in which the Court held that it was a violation of the Sixth Amendment for a judge to decide whether there were aggravating factors justifying execution.³³ In fact, the concurring opinion in *Ring* went even further, concluding that the Constitution requires "jury sentencing in capital cases..."³⁴

Judicial resistance to acknowledgment of a Sixth Amendment right to jury sentencing however still exists and is often attributed to dictum in such cases as the 1986 case, *McMillan v. Pennsylvania* ("There is no Sixth Amendment right to jury sentencing..."),³⁵ though *Ring* could muster only the later discredited *Spaziano* case in support of this contention.

In any case, any dictum regarding a Sixth Amendment right to sentencing which was handed down prior to 2000 must now be reevaluated in the aftermath of *Apprendi* and its progeny, initiating an evolution in Sixth Amendment jurisprudence comparable in scope to the evolution of Fifth Amendment jurisprudence which occurred in the aftermath of *Miranda v. Arizona*.³⁶

III. APPRENDI V. NEW JERSEY

In the 2000 Supreme Court case *Apprendi v. New Jersey*,³⁷ the accused fired several shots into the home of an African American couple and was subsequently charged with second degree possession of a weapon for an unlawful purpose which carried a 5-10 year term, but was notably not charged with violation of a separate hate crime statute. After the defendant pled guilty to the firearms charge, however, the judge found by a preponderance of the evidence that the shooting was racially motivated, a factor which if found enhanced punishment under the statute, and sentenced the accused to a 12-year term. The accused appealed on grounds

(2004) (kidnapping); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (possession of firearm and antipersonnel bomb); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (possession of firearm during commission of enumerated felony).

³¹ *Spaziano*, 468 U.S. at 449.

³² *Id.* at 459 (emphasis added).

³³ *Ring*, 536 U.S. at 609.

³⁴ *Id.* at 614 (Breyer, J. concurring). Interestingly, this assertion of a constitutional right to sentencing in capital cases was based on the Eighth rather than Sixth Amendment. This is somewhat curious as the Eighth Amendment has generally been applied in the context of the nature of the punishment itself rather than the procedures under which the punishment was imposed. See, e.g., *Ring*, 536 U.S. at 610 (Scalia, J. concurring) (quoting *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J. dissenting) "[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed").

³⁵ *McMillan v. Pennsylvania*, 477 U.S. 79, 80 (1986).

³⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966). See also cases that came after *Miranda*, such as *Maryland v. Shatzer*, 130 S.C. 1213 (2010); *U.S. v. Patane*, 542 U.S. 630 (2004); *Dickerson v. U.S.*, 530 U.S. 428 (2000); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Rhode Island v. Innis*, 446 U.S. 291 (1980).

³⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

that the Due Process clause requires that any fact that increases the penalty for the crime beyond the statutory minimum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.³⁸

Because the trial judge had enhanced the punishment of the defendant based on his own personal factual finding of racial motivation rather than on any jury finding of racial motivation, the Court held that New Jersey's practice violated the accused's due process rights. Specifically, the Court held that, except for the fact of a prior conviction: "... any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."³⁹ The Court went on to make clear that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."⁴⁰ It cited with approval a common law doctrine which holds that:

[w]here a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only."⁴¹

Thus, with one fell swoop, the Court cast away many of the fine distinctions that theretofore had been made between the need for jury determination of facts which were "elements" of a crime, and facts which were merely "factors" in determining mitigation of punishment⁴², holding that, regardless of classification as an element or "sentencing factor," "[o]ther than the fact of a prior conviction, any [emphasis added] fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. . . ." ⁴³The

³⁸*Id.* at 476-77 (quoting *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995)).

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt [citations omitted]."

³⁹ *Id.* at 490 (emphasis added).

⁴⁰ *Id.* (quoting *Jones v. U.S.*, 526 U.S. 227, 252-53 (1999) (Stevens, J. concurring); see also *Jones*, 526 U.S. at 253 (Scalia, J. concurring)).

⁴¹ *Apprendi*, 530 U.S. at 480-81 (quoting 2 M. Hale, *Pleas of the Crown*, in turn cited in J. Archbold, *Pleading and Evidence in Criminal Cases*, 15th ed. 44, 51 (1862)).

⁴² See, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977).

We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously limits beyond which the States may not go in this regard.

⁴³ *Apprendi*, 530 U.S. at 490.

dissent in *Apprendi*, transparently horrified at the implications of the majority opinion, noted that while "all facts necessary to constitute a statutory offense"⁴⁴ must be tried by a jury – the majority opinion "casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder."⁴⁵ Uncontrovertibly, the dissent recognized that the Court had set forth an "extraordinary rule."⁴⁶

But just how extraordinary?

If the only implication of the majority decision was to set forth yet another judicial guideline for applying the legislature's federal sentencing guidelines, there would be little cause for alarm on the part of those who fear its logical extension—namely, that the accused has a Sixth Amendment right to a jury not just in the first phase of a criminal trial, but also in the second, and more critical phase, of sentencing.

IV. BREAKING THE DOCTRINAL DEADLOCK

As early as 2003, Judge Hoffman made the case that in a pair of post-*Apprendi* cases, *Ring v. Arizona*⁴⁷ and *Harris v. U.S.*,⁴⁸ the Court appeared to have dug itself into a doctrinal conundrum from which the only escape was recognition of the original premise of the Sixth Amendment: to provide to an accused the right of trial by jury in all phases of the criminal trial.⁴⁹

Hoffman's constitutional case for jury sentencing began by recalling that while *Apprendi* required that "any fact other than a prior conviction that increases the maximum penalty for a crime" must be tried by jury, it left open the question of whether the Sixth Amendment also required that any fact that increased the minimum requirement also be tried by a jury.⁵⁰

Hoffman noted that in the 2002 case of *Ring v. Arizona*,⁵¹ the Court cleanly applied the *Apprendi* doctrine in striking down, on Sixth Amendment grounds, an Arizona statute which permitted a judge to determine the aggravating factors for imposition of the death penalty. In *Harris v. U.S.*,⁵² however, decided the same day as *Ring*, the Court upheld a statute which mandated a seven-year minimum sentence upon a judicial finding that the accused had brandished a gun. This pair of cases, taken together, therefore appeared to answer the question left open by *Apprendi* by holding that judicial findings of facts that might increase a *maximum* sentence are necessarily to be considered as "elements" of a crime regardless of whether they are labeled as elements or sentencing factors by a legislature, and must be decided by a jury; but those judicial findings which required imposition of a *minimum* sentence, and legislatively determined to be mere "sentencing factors," pass Sixth Amendment muster if decided by a judge alone.

Judge Hoffman recognized the conundrum posed by these two cases, pointing out that they have created an "impossibly difficult saddle point:"

If the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to jury trial by the simple artifice of labeling elements as "sentencing factors"; yet there seems to be no principled basis upon which to distinguish elements from sentencing factors. This dilemma is so sharp that the slightest change of

⁴⁴*Id.* at 483.

⁴⁵ *Id.* at 525.

⁴⁶ *Id.*

⁴⁷ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁴⁸ *Harris v. U.S.*, 536 U.S. 545 (2002).

⁴⁹ Hoffman, *supra* note 7, at 982.

⁵⁰ *Id.* at 981.

⁵¹ Hoffman, *supra* note 7, at 980 (describing *Ring v. Arizona*, 536 U.S. 584 (2002)).

⁵² *Harris*, 536 U.S. at 552.

perspective or wording by one or two Justices seems to have a magnified effect on outcomes in these cases.⁵³

Contrary to Judge Hoffman's observation, however, the *Ring-Harris*⁵⁴ pair did provide a basis for distinguishing between "elements" which must be decided by a jury, and "sentencing factors" which may be tried by a judge—namely, that factors which increase the maximum must be treated as "elements" regardless of legislative labeling, while factors which increase the minimum may be treated as sentencing factors if labeled as such legislatively.

The conundrum, therefore, is not to be found in any ambiguity in the setting forth of the principle, but rather in the doctrinal soundness of the principle itself, and perhaps this is what Judge Hoffman meant in his assertion that *Ring-Harris* set forth no "principled" basis for distinguishing between elements and sentencing factors. It should also be noted, however, that Hoffman's claim that legislatures now have a free path to bypass *Apprendi* by the simple expedient of "increasing maximum sentences to accommodate what would otherwise have been an enhanced sentence and then imposing higher and/or mandatory minimum sentences to reflect the enhancement" was thoroughly addressed in *Apprendi* by Justice Stevens who opined that if legislatures attempted any such course, the Court would consider whether it was constitutional by falling back on such pre-*Apprendi* decisions as *Patterson*⁵⁵ and *Mullaney*.^{56 57}

Nevertheless, the post-*Apprendi* cases decided up to and including those decided through 2010 which have attempted to tread the ultimately hapless doctrinal path through the *Ring-Harris* thicket⁵⁸ do support Judge Hoffman's conclusion, first articulated in 2003 in the aftermath of that pair of cases, that the only principled way for the court to escape the current doctrinal morass is to hold that under the Sixth Amendment "judges will not ... be able to impose any sentences."⁵⁹

⁵³ Hoffman, *supra* note 7, at 982.

⁵⁴ See 536 U.S. 584, 604-06 n.5, 609 (2002); 536 U.S. 545, 557-561 (2002).

⁵⁵ *Patterson v. New York*, 432 U.S. 197 (1977).

⁵⁶ *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

⁵⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) ("The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 2388-2390. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 2389—extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range—this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. *Patterson v. New York*, 432 U.S., at 228-229, n. 13, (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." *Ibid*. In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 2390), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson*, 432 U.S., at 210, 97 S.Ct. 2319; *Mullaney v. Wilbur*, 421 U.S. 684, 698-702, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)").

⁵⁸ See, e.g., *Dillion v. United States*, 130 S.Ct. 2683, 2692 (2010); *United States v. O'Brien*, 130 S.Ct. 2169, 2173-2175 (2010); *Oregon v. Ice*, 129 S.Ct. 711, 716-18 (2009); *Rita v. United States*, 551 U.S. 338, 352-55 (2007); *Cunningham v. California*, 549 U.S. 270, 282-89 (2007); *United States v. Booker*, 543 U.S. 220, 230-38 (2005); *Shepard v. United States*, 544 U.S. 13, 24-27 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-06 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 353-56 (2004).

⁵⁹ Hoffman, *supra* note 7, at 985.

V. CONCLUSION

The central holding of *Apprendi* that the Sixth Amendment requires that "all facts necessary to constitute a statutory offense" must be "tr(ied) to a jury"⁶⁰ has laid the foundation for establishing the principle originally envisioned by the framers of establishing a wide barrier between an accused and the vast power of the state.⁶¹ The gradual judicial usurpation of the accused's right to a jury during the second critical phase of the criminal trial confirms the Sixth Amendment framers' fear "that the jury right could be lost not only by gross denial, but by erosion."⁶² Such judicial usurpation also stands in dire contrast to the continued and meticulous judicial recognition of the right to a jury in all phases of the civil trial under the Seventh Amendment.⁶³

There exists no precedential or *stare decisis* barriers to recognition of a Sixth Amendment guarantee to an accused's right of trial by jury in the most critical sentencing phase of his trial, either in the unsupported dictum of the pre-*Apprendi* cases⁶⁴ or in dictum in post-*Apprendi* cases referring to pre-*Apprendi* cases.

Only a full recognition of the rights guaranteed by the Sixth Amendment can resolve the current doctrinal mass of cases, particularly those cases that have become entangled in attempting to reconcile both state and federal cases applying sentencing guidelines.⁶⁵

Although the doctrinal leap from the *Apprendi* holding to one recognizing a Sixth Amendment right to jury sentencing would be a relatively small one, the practical implications would be significant for the criminal justice system. Notably though, the court in recent years has not hesitated to make similar dramatic doctrinal expansions in the criminal justice field. For example, in the 2004 case of *Crawford v. Washington*,⁶⁶ the Supreme Court did not hesitate to abandon the holding of *Roberts v. Ohio*, which had held that the Sixth Amendment Confrontation clause could be satisfied without physical confrontation of a witness in court by a showing that a witness was unavailable and that his out of court statement satisfied a "firmly rooted" hearsay exception.⁶⁷ In that case, the court discarded many decades of judicial precedent, and instead relied upon common law practice as it existed in 1791.⁶⁸

Additionally, and as recently as June of 2010, the Supreme Court, examining practice and legislative history from 1791, overturned 70 years of precedent and a consensus of circuit cases⁶⁹ to hold that the Second Amendment was an individual rather than collective right.⁷⁰

⁶⁰ *Apprendi*, 530 U.S. at 483.

⁶¹ *Id.* at 477 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

⁶² *Id.* at 483 (quoting *Jones v. United States*, 526 U.S. 227, 248 (1999)).

⁶³ See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376-83 (1996); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-67 (1990); *Colgrove v. Battin*, 413 U.S. 149, 152-64 (1973); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471-79 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978).

⁶⁴ *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984). Discussed *supra* p. 6.

⁶⁵ See, e.g., *Dillon v. United States*, 130 S. Ct. 2683 (2010); *United States v. O'Brien*, 130 S. Ct. 2169 (2010); *Oregon v. Ice*, 555 U.S. 160 (2009); *Rita v. United States*, 551 U.S. 338 (2007); *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

⁶⁶ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁶⁷ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁶⁸ 541 U.S. at 54-59.

⁶⁹ See, e.g., *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("The second amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'") (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)); *United States v. Chavez*, 204 F.3d 1305, 1313 n.5 (11th Cir. 2000); *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124-25 (9th Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996); *Quilici v. Morton Grove*, 695 F.2d 261, 270-71 (7th Cir. 1982); *United States v.*

Nevertheless, any future judicial attempts to make such a doctrinal leap will doubtless become mired in the conceptual sinkholes opened up by such post-*Apprendi* cases as *U.S. v. Booker* (which can be read as requiring application of *Apprendi* only in the context of mandatory sentencing guidelines, and leaves open the possibility of judge sentencing in a non-mandatory sentencing regime)⁷¹, and *Oregon v. Ice*⁷² (which held that the Sixth Amendment does not inhibit a judge from finding facts relevant to whether consecutive rather than concurrent sentences should be imposed.)

It is therefore submitted that only a clean doctrinal leap in the form of a clear cut holding that a defendant in a criminal case has a Sixth Amendment right to have his sentence determined by a jury can extricate the courts from the current doctrinal morass while at the same time serving both the spirit and letter of the constitutional right to jury in both phases of the criminal trial.

As has already occurred in Fifth Amendment⁷³ and Confrontation⁷⁴ jurisprudence, half a loaf, and even three quarters of a loaf, must inevitably give way to a full one.

Oakes, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wilbur*, 545 F.2d 764, 767 (1st Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942); see also Robert Hardaway, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 43 n.12 (2002) (providing a more extensive list of supporting cases).

⁷⁰ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2010).

⁷¹ *Booker*, 543 U.S. at 334 (Breyer, J. dissenting)

Thus, as far as the federal *statutes* are concerned, the federal system, unlike the state system at issue in *Blakely*, provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by *statute*-regardless of the applicable Guidelines range. Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely*.

⁷² *ICE*, 129 S.Ct. at 718

In light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant-who historically may have faced consecutive sentences by default-has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

⁷³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).