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United States v. Bencheck: Aggregate Penalties and Jury Entitlement in Multiple Petty Offense Cases

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UNITED STATES V. BENCHECK: AGGREGATE PENALTIES AND JURY ENTITLEMENT IN MULTIPLE PETTY OFFENSE CASES

I. INTRODUCTION

For over a century, the United States Supreme Court has interpreted the constitutional right to jury trial[1] to extend only to the prosecution of serious criminal offenses.[2] The task of distinguishing serious from petty offenses has, through the years, proven formidable. Today the Court considers maximum statutory penalties the most accurate index of criminal seriousness.[3] In single offense cases, crimes authorizing incarceration exceeding six months are deemed serious, while those authorizing incarceration of six months or less are presumed petty.[4]

In *United States v. Bencheck*,[5] the Tenth Circuit Court of Appeals faced an issue not yet addressed by the Supreme Court: jury entitlement in the prosecution of multiple petty offenses. In *Bencheck*, the defendant was tried without a jury on four petty offense charges arising from one incident. The charges carried an aggregate statutory incarceration period greater than eighteen months.[6] Consecutive sentencing was legislatively authorized, and consolidation of offenses was not required.[7] However, due to a pretrial sentencing stipulation, the defendant actually faced a maximum incarceration of only six months.[8] In assessing the seriousness of the defendant's criminality to determine jury entitlement, the court declined to consider the aggregate statutory penalty and instead based its assessment upon the judicially reduced penalty the defendant actually faced.[9]

This Comment will trace the history of the petty offense exception to the constitutional right to jury trial through English common law, United States Supreme Court interpretations, and, finally, Tenth Circuit opinions. It will then explore and analyze the reasoning of the majority and the dissenting opinions in *Bencheck*. Finally, this Comment will argue that the majority based its jury entitlement determination upon a

1. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI.

2. Callan v. Wilson, 127 U.S. 540, 552, 555, 557 (1888). *Callan* was the first Supreme Court case to make this interpretation. *See infra* note 20 and accompanying text, and text accompanying notes 21-22.

3. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989). The statutory or "authorized" penalty includes the authorized period of incarceration as well as other statutory punishment. *Id.* at 543 & n.8.

4. *Id.* at 543; *see infra* text accompanying note 55. Because the case central to this Comment is primarily concerned with incarceration periods and does not involve fines, this Comment does not discuss statutory fines.

5. 926 F.2d 1512 (10th Cir. 1991).

6. Appellant's Reply Brief at 4 n.1, United States v. Bencheck, 926 F.2d 1512 (10th Cir. 1991) (No. 90-6072).

7. *See infra* note 118.

8. *Bencheck*, 926 F.2d at 1514.

9. *Id.* at 1520.

method of ascertaining criminal seriousness that facially contradicted the Supreme Court's traditional method and that was constitutionally inappropriate because it abandoned substantive interests that the traditional method had evolved to serve.

II. BACKGROUND

A. *The History of the Petty Offense Exception*

In England, in the early fourteenth century, juries decided all criminal cases.[10] This practice became infeasible as Parliament's prolific enactment of penal statutes overburdened the system with prosecutions.[11] In 1362, to accommodate the increasing volume of jury trials, England's traveling justices began holding sessions at quarterly intervals,[12] but in time even the quarter session courts became overburdened with jury trials.[13] Thus, in the sixteenth century, statutes creating minor, or "petty," offenses authorized prosecutions without juries.[14] To further ease the burden, justices began hearing the new class of summarily triable cases out of sessions whenever necessary.[15] Penal statutes continued to multiply, and by the eighteenth century summarily triable offenses greatly dominated England's criminal code.[16] The English colonists brought summary proceedings to America, eventually adopting the practice in state constitutions.[17] Yet, in America the class of offenses excluded from the jury process was considerably smaller than that found in England at the time.[18] At the writing of the United States Constitution, summary proceedings for petty offenses were well-entrenched.[19] That the framers tacitly excluded petty offenses from the ambit of the jury clauses in Article III and the Sixth Amendment is a widely held belief.[20]

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10. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 923-24 (1926); *see also* GEOFFREY R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM, 67 (Lord Cross of Chelsea & G.J. Hand eds., 5th ed. 1971) (Cases were decided by juries by the 1300's.). "Presenting juries," precursors to modern grand juries, were established about a century and a half earlier. *See* 1 SIR FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW 151 (2d ed. reissued 1968).

11. *See* Frankfurter & Corcoran, *supra* note 10, at 924-27.

12. *See* RADCLIFFE & CROSS, *supra* note 10, at 73.

13. Frankfurter & Corcoran, *supra* note 10, at 925.

14. *Id.* at 924-27.

15. *Id.* at 925. These latter tribunals became known as "petty sessions." RADCLIFFE & CROSS, *supra* note 10, at 76, 204.

16. *See* 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 159-60 (1938); Frankfurter & Corcoran, *supra*, note 10 at 930-33. Today, the vast majority of English criminal cases are still tried without a jury. *See* MARCUS GLEISSER, JURIES AND JUSTICE 46 (1968); LLOYD E. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY 127 (1973); GLANVILLE WILLIAMS, THE PROOF OF GUILT 302 (3d ed. 1963).

17. Frankfurter & Corcoran, *supra* note 10, at 937.

18. *Id.* at 936. In fact, the colonists perceived the Crown's extensive use of summary proceedings as oppressive. *See* THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776); SOURCES OF OUR LIBERTIES 267-70 (Richard L. Perry ed. 1959).

19. Frankfurter & Corcoran, *supra* note 10, at 962-69.

20. *Id.* at 937-69; *see, e.g.*, Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989). Article III states: "The trial of all Crimes, except in Cases of Impeachment, shall

In 1888, *Callan v. Wilson*[21] was the first United States Supreme Court case to examine the constitutional limits of the right to jury trial. The Court reversed a conspiracy conviction tried without a jury, interpreting the jury clauses of the Constitution in light of colonial common law. The Court recognized a class of petty offenses the prosecutions of which did not fall within the jury trial guarantee.[22] Because conspiracy was indictable at common law, it was not of this class of petty offense.[23] Therefore, the Court reasoned that prosecution of conspiracy commanded the right to a jury. Evaluation of the common law indictability of the offense became the first of two common law tests employed to distinguish petty from serious offenses.[24]

Sixteen years later, the second common law test was born. In *Schick v. United States*,[25] the majority looked to the moral quality of the offense in finding a violation of the Oleomargarine Act of 1886[26] petty for jury trial purposes.[27] In making its assessment, the Court also considered the harshness of the prescribed punishment,[28] thereby presaging use of

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be by Jury . . . ." U.S. CONST. art. III, § 2, cl. 3. The framers originally chose the words "trial of all criminal offenses." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 187 (Max Farrand ed., rev. ed. 1937). Prior to adoption of the constitution, the framers amended the wording to read "all crimes." *Id.* at 434, 438, 576, 601. The United States Supreme Court has interpreted the eighteenth century understanding of the word "crimes" to mean serious offenses only. *See, e.g.*, Schick v. United States, 195 U.S. 65, 69-70 (1904). Hence, the Court has concluded that the change from "all criminal offenses" to "all Crimes" expresses an intent to exclude petty offenses from the jury trial right. *Id.* at 70.

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. That the phrasing of this clause differs from the "all Crimes" language in Article III is immaterial. *See* Frankfurter & Corcoran, *supra* note 10, at 971. The Sixth Amendment was intended to enumerate the common law features of jury trials guaranteed in Article III, not to expand the class of offenses to which that guarantee applied. *Id.*; *see also* Johnson v. Louisiana, 406 U.S. 356, 371 (1972) (Powell, J., concurring); Callan v. Wilson, 127 U.S. 540, 549 (1888); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662 (Boston, Hillard, Grey & Co. 1833).

A significant minority of jurists and commentators interpret the Constitution as including all criminal prosecutions within the scope of the jury trial guarantee. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 74-76 (1970) (Black and Douglas, JJ., concurring); *Schick*, 195 U.S. at 83, 98-100 (Harlan, J., dissenting); George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 *passim* (1959).

21. 127 U.S. 540 (1888).

22. *Id.* at 549, 555.

23. *Id.* at 555, 557.

24. *But see* Robert P. Connolly, Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 FORDHAM L. REVIEW 205, 213-14 (1979); Kenneth C. Picton, Note, *Jury Trials for Petty Offenses: Time to Drop the Common Law Tests?*, 12 STETSON L. REV. 191, 201-02 (1984). These authors divide the common law tests into three. They distinguish the moral quality test employed in Schick v. United States, 195 U.S. 65 (1904), from the *malum in se* test employed in District of Columbia v. Colts, 282 U.S. 63, 73 (1930). These tests (*see infra* text accompanying notes 25-31) are more appropriately classed together, as *malum in se* designates acts that are inherently immoral. BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

25. 195 U.S. 65 (1904).

26. Oleomargarine Act of 1886, ch. 840, § 11, 24 Stat. 209 (repealed 1950) (act taxing oleomargarine).

27. *Schick*, 195 U.S. at 67. In part, the Court based its decision that the jury right constitutionally could be waived on the pettiness of the offense. *See* Patton v. United States, 281 U.S. 276, 312 (1930) for the modern standard for jury trial waiver.

28. *Schick*, 195 U.S. at 67-68. The penalty was a fifty dollar fine.

a criterion on which later decisions would rely heavily. In 1930, the moral quality test was further developed by *District of Columbia v. Colts*.[29] Writing for a unanimous court, Justice Sutherland found reckless automobile driving to be a *malum in se* offense and an indictable offense by common law standards.[30] These findings led the Court to conclude that the infraction was serious enough to secure the right to jury trial.[31]

After *Colts*, the Supreme Court moved away from tests that evaluated the nature of criminal offenses in light of common law standards and began judging criminal seriousness in light of current normative standards objectively expressed by statutory penalties.[32] In the 1937 case of *District of Columbia v. Clawans*,[33] the Court took the first significant step in this direction. Justice Stone, writing for the majority, first applied both common law tests and found that dealing in second-hand personal property without a license was not a serious crime.[34] Yet the majority, uneasy with the judicial subjectivity involved in applying the common law tests and seeking a more objective measure of criminal seriousness, went on to pursue the analysis touched upon in *Schick*.[35] Justice Stone looked to the legislative penalty as an objective embodiment of social and ethical judgments attaching to the crime and found that an authorized imprisonment of ninety days expressed a social judgment that the crime was not serious.[36]

In 1968, *Duncan v. Louisiana*[37] extended the use of objective criteria found in *Clawans*. The defendant was convicted of simple battery and sentenced to sixty days' imprisonment.[38] In assessing the seriousness of the crime, the Court focused exclusively on the severity of the legislatively authorized penalty of two years' imprisonment.[39] To aid its evaluation, the majority looked to the federal definition of petty offense[40] and to the punishment most often accompanying petty offenses at common law.[41] The Court, declining to establish a specific quantum of punish-

29. 282 U.S. 63 (1930).

30. *Id.* at 73. (When horses constituted the motive power, the offense amounted to a public nuisance.)

31. *Id.* at 74.

32. That the severity of the statutory penalty expresses the crime's seriousness is supported by both retributive and utilitarian theories of punishment. *Compare* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238 (1979) (classical retributive theory of repayment) *with* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. XIV (J.H. Burns & H.L.A. Hart eds., 1970) (classical utilitarian theory).

33. 300 U.S. 617 (1937).

34. *Id.* at 625.

35. *Id.* at 625-28; *see* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 n.5 (1989).

36. *Id.* at 625-30.

37. 391 U.S. 145 (1968).

38. *Id.* at 146; LA. REV. STAT. ANN. § 14:35 (West 1950) (maximum imprisonment, two years) (current version at LA. REV. STAT. ANN. § 14:35 (West 1986)).

39. *Id.* at 159-62.

40. *Id.* at 161 (citing 18 U.S.C. § 1 (1964)) (current version at 18 U.S.C. § 19 (1988)). This section defines the term "petty offense" as a Class B or Class C misdemeanor. 18 U.S.C. § 3559(a)(7) (1988) sets the maximum imprisonment for Class B misdemeanors at six months or less.

41. At colonial common law, petty offenses generally carried no more than six months' imprisonment. *Duncan*, 391 U.S. at 161; *see* District of Columbia v. Clawans, 300

ment distinguishing serious from petty crimes, decided only that a crime carrying a maximum authorized penalty of two years' imprisonment was serious by common law and contemporary standards of punishment.[42] Writing for the majority, Justice White rejected the State of Louisiana's argument[43] that under *Cheff v. Schnackenberg*[44] the proper measure of a crime's seriousness is the penalty actually imposed. The Court emphasized that *Cheff* involved a criminal contempt statute that did not authorize a maximum penalty.[45] The opinion is clear that, where it exists, the maximum statutory penalty, not the penalty actually imposed, is the proper objective measure of the crime's seriousness.[46]

In the 1970 Supreme Court case *Baldwin v. New York*,[47] the plurality reiterated that the severity of the authorized penalty provides the proper and most objective standard for ascertaining society's view of criminal seriousness.[48] The defendant received the maximum sentence for violating a pickpocketing statute, which authorized a one-year imprisonment.[49] The plurality concluded only that a crime carrying a maximum sentence of more than six months was serious, but did not address whether a crime carrying a maximum sentence of six months or less was serious.[50]

The most recent Supreme Court case to address the petty offense exception was *Blanton v. City of North Las Vegas*.[51] The issue was whether prosecution of an offense carrying a six-month sentence required jury trial. Justice Marshall, writing for a unanimous Court, confirmed the *Duncan-Baldwin* mandate: criminal seriousness is to be ascertained by evaluating the severity of the statutory penalty.[52] Justice Marshall explained that because the legislature is best positioned to respond to society's ethical judgments, statutory penalties best express society's view of criminal seriousness; therefore, jury entitlement must turn on statu-

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U.S. 617, 626 nn.2-3 (1937); Frankfurter & Corcoran, *supra* note 10, at 934 & apps. A-D (summary of colonial petty offenses).

42. *Duncan*, 391 U.S. at 161-62.

43. *See* Brief for Appellee at 7-9, Duncan v. Louisiana, 391 U.S. 145 (1968) (No. 410).

44. 384 U.S. 373 (1966).

45. *Duncan*, 391 U.S. at 161-62 & n.35.

46. *See id.* However, where the legislature has not spoken as to the seriousness of a crime by authorizing a maximum sentence, the penalty imposed substitutes as a measure of that seriousness. *See id.* at 162 n.35; Blanton v. City of North Las Vegas, 489 U.S. 538, 542 n.6 (1989); Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974); Frank v. United States, 395 U.S. 147, 149 (1969); Bloom v. Illinois, 391 U.S. 194, 211 (1968).

47. 399 U.S. 66 (1970).

48. *Id.* at 68 (citing District of Columbia v. Clawans, 300 U.S. 617, 628 (1937); *Frank*, 395 U.S. at 148).

49. Defendant was convicted of "jostling", in violation of N.Y. PENAL LAW sec. 165.25 (McKinney 1988 & Supp. 1991). *Baldwin*, 399 U.S. at 67 & n.1.

50. *See id.* at 68-69 & n.6. Justices White, Brennan and Marshall reached this conclusion. Justices Black and Douglas concurred in the result, but disagreed that the Constitution exempts petty offenses from the jury right. *Id.* at 74 (Black and Douglas, JJ., concurring).

51. 489 U.S. 538 (1989). The defendant was convicted, without a jury, of driving under the influence of alcohol, in violation of NEV. REV. STAT. § 484.379(1) (1990). *Id.* at 539.

52. *Id.* at 541 & n.5; *see supra* text accompanying notes 39-50 (discussing the *Duncan-Baldwin* mandate).

tory, not judicial, expressions of criminal seriousness.[53] Emphasizing this point, Justice Marshall stated that, in jury entitlement determinations, it is "not constitutionally determinative" that a particular defendant may actually receive a sentence less than the statutory maximum.[54] The Court edged closer to establishing a lower limit for serious offenses in holding that a crime carrying a maximum penalty of six months or less incarceration is presumed petty for jury trial purposes and that the presumption is rebutted only by showing that "additional statutory penalties," when combined with the maximum authorized incarceration, clearly indicate a "legislative determination" that the offense is serious.[55]

B. *Multiple Petty Offenses in the Tenth Circuit*

On four occasions since *Duncan*, the Tenth Circuit Court of Appeals has addressed an aspect of jury entitlement that the United States Supreme Court has not faced. This issue is whether a defendant accused of multiple petty offenses resulting from one act is entitled to jury trial when the aggregate statutory penalty exceeds the *Baldwin* six-month threshold.

In 1973 *United States v. Potvin*[56] was the first Tenth Circuit case to address this issue. The defendants were charged with two Forest Service violations, each carrying a maximum prison term of less than six months, with the aggregate penalty exceeding six months.[57] Tried without a jury, the defendants were sentenced to ninety days in prison and placed on six months' probation.[58] On appeal, the Tenth Circuit held that since the charged offenses arose from the same act, transaction, or occurrence and the aggregate maximum incarceration exceeded six months, under *Baldwin* the defendants were entitled to jury trial even though their actual sentence was less than six months.[59]

In *United States v. Smyer*,[60] the defendants were charged with eleven counts of violating the Antiquities Act,[61] which charges arose from their excavation of ruins at two adjacent archaeological sites.[62] The aggregate maximum statutory penalty for each defendant was 990 days' imprisonment, but the penalty actually imposed was eleven concurrent ninety-day sentences.[63] Because a jury would not have been available in Las Cruces, New Mexico and the defendants wanted trial there, they

53. *Id.* at 541-42.
54. *Id.* at 544.
55. *Id.* at 543; *see also infra* note 133 (discussing meaning and severity of "additional statutory penalties").
56. 481 F.2d 380 (10th Cir. 1973).
57. *Id.* at 381.
58. *Id.*
59. *Id.* at 381, 383.
60. 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).
61. 16 U.S.C. § 433 (1988).
62. *Smyer*, 596 F.2d at 940.
63. *Id.* at 942.

waived their right to a jury.[64] On appeal, the defendants contested the validity of their jury waivers. Although the court found the waivers valid,[65] in dictum it addressed the defendants' argument that they were entitled to jury trial based on the aggregated authorized sentences. Directly contradicting *Potvin* and without referring to that case, Judge Breitenstein concluded that there is no right to jury trial where the actual sentence for multiple petty offenses is less than six months, even where the aggregate statutory penalty exceeds six months.[66]

The Tenth Circuit again addressed multiple petty offenses and jury entitlement in the 1983 case *Haar v. Hanrahan*.[67] In a New Mexico magistrate court, the defendant was convicted of simple battery and criminal damage to property and received two consecutive ninety-day sentences.[68] New Mexico law provided for de novo trial in district court upon appeal from magistrate court, but did not allow the district court to impose a greater sentence on appeal than that imposed below. Thus the defendant faced maximum incarceration of 180 days upon appeal.[69] At the de novo trial, the district court denied the defendant a jury.[70] The district court affirmed the conviction, and the Tenth Circuit accepted jurisdiction on the defendant's habeas corpus petition, which reasserted his claim that he was entitled to a jury trial in the district court.[71] The State argued that even though the defendant was charged with two offenses in the district court, each carrying a potential sentence of six months' imprisonment, a jury trial was not required since the district court could not have imposed a sentence exceeding six months.[72]

Judge McKay, writing the *Haar* opinion for a unanimous court, acknowledged that *Potvin* guarantees jury trial where the aggregate of the possible penalties exceeds the *Baldwin* six-month limit.[73] The court recognized, however, that *Potvin* does not reveal whether the aggregate statutory penalties or the aggregate penalties actually facing the defendant at the commencement of the trial determine the right to jury trial.[74] Because in *Potvin* the sentence was not limited before trial, the *Potvin*

64. *Id.*

65. *Id.*; *see* Patton v. United States, 281 U.S. 276, 312 (1930) (articulating the constitutional standard for jury waiver).

66. *Id. Contra United States v. Potvin*, 481 F.2d 380, 381, 383 (10th Cir. 1973). The *Smyer* court found support in criminal contempt and right to counsel cases. *See* 596 F.2d at 942. However, criminal contempt cases have little precedential value where, as here, statutory penalties exist. *See supra* notes 45-46 and accompanying text. Also, right to counsel cases have been sharply distinguished from right to jury trial cases. *See* James v. Headley, 410 F.2d 325, 331-33 & n.9 (5th Cir. 1969). For further analysis of why *Smyer*'s conclusion regarding aggregation of penalties is dictum, see Appellant's Reply Brief at 2-3, United States v. Bencheck, 926 F.2d 1215 (10th Cir. 1991) (No. 90-6072).

67. 708 F.2d 1547 (10th Cir. 1983).

68. The defendant violated N.M. STAT. ANN. §§ 30-1-6(c), 30-3-4, 30-15-1 (1978). 708 F.2d at 1547-48.

69. *Id.* Current New Mexico law does not limit the district court to sentence imposed by the magistrate. *See* State v. Sanchez, 786 P.2d 42, 45 (N.M. 1990).

70. *Haar*, 708 F.2d at 1548.

71. *Id.*

72. *Id.* at 1551.

73. *Id.*

74. *Id.* at 1552; *see* United States v. Potvin, 481 F.2d 380, 381-83 (10th Cir. 1973).

court had not faced this issue. Judge McKay thus found that *Potvin* left the court to choose between two measures of criminal seriousness: the "objective" penalty provided by the aggregate statutory incarceration or the "subjective" penalty actually facing the defendant.[75] The court found that the objective approach would "[broaden] the concept of a serious offense, looking beyond the particular offenses charged to the actual criminal activity that the aggregated charges represent."[76] Expressing its desire not to expand the serious offense concept, the *Haar* court dispensed with use of objective criteria, favoring the subjective approach.[77]

III. *UNITED STATES V. BENCHECK*

A. *Facts*

On June 19, 1989, military police officers stopped defendant Bencheck at Fort Sill, Oklahoma, for operating his motorcycle without face protection.[78] As a result of the ensuing exchange, Bencheck was charged with assault and battery of a police officer, malicious injury to property, operating a motor vehicle without a valid operator's license, failure to obey the lawful order of a police officer, and operating a motorcycle without face protection.[79] Each offense carried a maximum incarceration of six months.[80] Consecutive sentencing was legislatively authorized, and consolidation of offenses was not required.[81] Before trial, the malicious injury to property charge was dismissed.[82]

On the day of the trial, over the defendant's objection, the court announced that it would not impanel a jury, but should the defendant be convicted, it would not impose a sentence exceeding six months.[83] Bencheck was acquitted of operating a motor vehicle without a valid license, but was found guilty of the remaining three charges.[84] He was sentenced to concurrent six-month sentences on two charges, all but ten days of which was suspended and the balance served on probation.[85] The court imposed an additional, concurrent ten-day sentence for the

75. *Haar*, 708 F.2d at 1552.
76. *Id.* at 1553.
77. *See id.*
78. *Bencheck*, 926 F.2d at 1513.
79. The defendant violated, in order, OKLA. STAT. ANN. tit. 21, §§ 649, 1760; tit. 47, § 6-101 (West 1988 & Supp. 1991); tit. 47 §§ 11-102, 40-105(B) (West 1988). *Bencheck*, 926 F.2d at 1513.
80. *Id.* at 1514 & n.8. All offenses were assimilated into federal law under the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13 (1988). *Id.* at 1513; *see also* United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986) ("The purpose of the Assimilative Crimes Act is to provide a method of punishing a crime committed on [federal] government reservations in the way and to the extent it would have been punishable if committed within the surrounding [state] jurisdiction.").
81. *See infra* note 118.
82. *Bencheck*, 926 F.2d at 1514 & n.8. The charge was dismissed for the state's violation of the Speedy Trial Act, 18 U.S.C. § 3161 (1988). Appellant's Opening Brief at 3 n.2, 926 F.2d 1512 (10th Cir. 1991) (No. 90-6072).
83. Appellant's Opening Brief at 3-4, 925 F.2d 1512 (10th Cir. 1991) (No. 90-6072).
84. *Id* at 4.
85. *Id.*

remaining charge.[86]

The issue on appeal was whether Bencheck was denied jury trial unconstitutionally. Bencheck asserted that *Potvin*, in light of Supreme Court precedent as reinforced by *Blanton*, guarantees a jury trial when one act gives rise to potential aggregate statutory penalty exceeding six months.[87] Bencheck claimed that *Blanton* implicitly overruled *Haar*,[88] which held that jury entitlement in multiple petty offense cases exists only when the penalty actually facing the defendant at the commencement of trial exceeds six months.

B. *Majority Opinion*

Writing for the majority, Judge Brorby acknowledged that *Blanton* affirmed maximum statutory penalties as the relevant criteria for determining whether an offense is petty.[89] He stated that the Tenth Circuit, however, recognized that the penalty actually imposed is most important to the accused.[90] Judge Brorby found these positions consistent, followed Tenth Circuit precedent, and denied jury trial. In its analysis, the majority noted that *Haar*, like *Baldwin*,[91] recognized six months as the threshold quantum of incarceration which, when exceeded, classifies a crime as serious.[92] The court noted that the *Haar* threshold, unlike the *Baldwin* threshold, is not exceeded by the statutory penalty, but by the penalty actually facing the defendant at the start of trial. The court characterized the *Haar* threshold as "corollary" to the Supreme Court's approach in *Baldwin*.[93]

Although the *Haar* court described its method of determining the seriousness of a crime as "subjective," the *Bencheck* court disagreed, stating that because *Haar*'s method asks whether a discrete quantum of incarceration exists, the approach was actually objective.[94] In fact, the court implied that the approach of *Duncan*, *Baldwin*, and *Blanton* was objective, not because it evaluated the *authorized* penalty, but because it evaluated *some* penalty. That is, according to the majority, the Supreme Court approach is objective because it is "penalty-oriented."[95] Thus, the court found that *Haar*'s approach, being also penalty-oriented, was objective and fully consistent with Supreme Court precedent.[96] Following *Haar*, the majority held that only penalties actually facing the defendant should be considered when assessing the criminal seriousness of multiple petty offenses.[97] Applying the *Blanton* presumption, the court

86. *Id.*
87. *See id.* at 5-7.
88. *Bencheck*, 926 F.2d at 1514.
89. *Id.* at 1515.
90. *Id.* at 1518.
91. *Baldwin* is discussed *supra* in text accompanying notes 47-50.
92. *Bencheck*, 926 F.2d at 1518.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1518, 1520.

concluded that since the penalty threatening Bencheck did not exceed six months' incarceration, his criminality was presumptively petty.[98] The court found the presumption was not overcome and accordingly found no jury entitlement.[99]

Buttressing the holding, the majority found its penalty-oriented approach consistent with the approach taken in criminal contempt cases.[100] It noted that in *Taylor v. Hayes*,[101] a criminal contempt conviction obtained without a jury was upheld where, absent a legislatively established penalty, a sentence of less than six months was imposed.[102] For further support, Judge Brorby observed that Rule 58(a)(3) of the Federal Rules of Criminal Procedure provides that adherence to the rules is not required in petty offense cases where the judge stipulates before trial that no sentence will be imposed.[103] The majority apparently thought that determining jury entitlement by the severity of a pretrial sentencing stipulation was analogous to relaxing procedural rules where no sentence is to be imposed.[104] The majority cited statistics illustrating the impracticability of administering jury trials for all petty offense prosecutions and juxtaposed these statistics with certain fair trial interests promoted by the use of juries.[105] The court did not engage in a balancing analysis, but impliedly found support for its holding in the practical concerns of judicial efficiency suggested by the statistics.[106]

C. *Dissenting Opinion*

In his dissenting opinion, Judge Ebel maintained that *Blanton* overruled *Haar*.[107] The dissent, echoing *Haar*, recognized that although *Potvin* required aggregation of petty offense penalties for jury trial purposes, it did not reveal which penalties to aggregate: statutory penalties or those actually threatening the defendant. However, Judge Ebel read *Blanton* as unequivocally mandating that statutory penalties be aggregated.[108] The dissent concluded that since the aggregated statutory penalties exceeded six months Bencheck was entitled to a jury.[109] Ac-

98. *Id.* at 1516-17, 1519-20. In applying the presumption to the judicially stipulated sentence, the court did not address the fact that the presumption in *Blanton* was applied to the "maximum authorized period of incarceration." *Compare Bencheck*, 926 F.2d at 1516-17, 1519-20 *with* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989).

99. *Bencheck*, 926 F.2d at 1520.

100. *Id.* at 1519.

101. 418 U.S. 488 (1974).

102. *Bencheck*, 926 F.2d at 1519.

103. *Id.*

104. *Id.*

105. The Court stated, "Among the concerns is the time involved in administering a jury system. For example, 83,092 petty offenses, 56,763 of which were traffic offenses, were disposed of by the United States Magistrates in 1987." *Id.* at 1515 (citing *Administrative Office of the United States Courts, Annual Report of Director*, Tables M-1A, M-2, at 393, 397 (1987)).

106. *Bencheck*, 926 F.2d at 1515. ("The practical necessity of limiting the number of jury trials . . . is obvious.").

107. *Id.* at 1521 (Ebel, J., dissenting).

108. *Id.* at 1522.

109. *Id.*

knowledging the majority's concern with judicial administration, Judge Ebel argued that under present law, pretrial sentencing stipulations cannot preclude jury trials and that the majority's administrative concerns could be addressed either by limiting the number of offenses charged or by changing the law to prohibit offense aggregation.[110]

IV. ANALYSIS

A. *Facial Conflict*

The United States Supreme Court, by exclusively relying on statutory penalties to gauge criminal seriousness, provided specific guidance for determining jury entitlement.[111] Because it rejected evaluation of statutory penalties, the *Bencheck* opinion is facially at odds with this guidance and is unconvincing in its attempt to show otherwise. Construing *Haar* as consistent with *Blanton* and its predecessors was crucial to the court's reasoning, as the court ultimately followed *Haar*'s approach. In trying to reconcile these cases, the *Bencheck* majority stated that the Supreme Court's objectivity mandate required only that the petty-seriousness inquiry be "penalty-oriented."[112] Since *Haar*'s inquiry was penalty-oriented, the *Bencheck* majority found *Haar* consistent with *Blanton* and its predecessors.[113]

The majority's rationale does not harmonize *Haar* with Supreme Court precedent. Just because a method is "penalty-oriented" does not mean that it satisfies the Supreme Court's requirement of objectivity.[114] In single offense cases, where a maximum statutory penalty exists, the court must ascertain criminal seriousness by evaluating the severity of the statutory penalty.[115] Although "penalty-oriented," an evaluation of the severity of the penalty actually imposed will not suffice.[116] Therefore, finding the Supreme Court method penalty-oriented does not, in itself, justify *Haar*'s and *Bencheck*'s particular penalty-oriented method.

The majority's attempt to justify its penalty-oriented method on the basis of its harmony with criminal contempt precedent is similarly flawed. Because criminal contempt statutes do not specify maximum penalties, the Supreme Court has specifically rejected criminal contempt cases as precedent for evaluating criminal seriousness where statutory penalties exist.[117] In stating that its approach exactly followed the criminal contempt cases, the majority ignored the substantial difference between criminal contempt cases and the instant case: in the former, the

110. *Id.*
111. *See supra* text accompanying notes 33-55.
112. *Bencheck*, 926 F.2d at 1518.
113. *Id.*
114. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162 n.35 (1968).
115. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 & n.6 (1989); cases cited *supra* note 46.
116. *See, e.g., Blanton*, 489 U.S. at 541-42 & n.6; *Duncan*, 391 U.S. at 161-62 & n.35.
117. *See Duncan*, 391 U.S. at 161-62 & n.35; *cf.* United States v. FMC Corp., 428 F. Supp. 615, 620 (W.D.N.Y. 1977) (criminal contempt cases involve unique principles of legal sanction).

legislature has not spoken on the seriousness of the criminal act, while in the latter, the legislature has determined statutory penalties, has authorized consecutive sentencing and has not required mandatory consolidation of offenses.[118] The legislature thus had expressed its view that an incident generating the multiple offenses was, in society's eyes, more serious than an incident generating fewer of the offenses.[119] In such a situation, the aggregate statutory penalty provides, under Supreme Court standards, the only acceptable measure of criminal seriousness.[120]

B. *Substantive Conflict*

The Supreme Court has established a method for objectively determining when the stakes facing criminal defendants are too high to exempt prosecutions from the jury trial guarantee.[121] The Court has had several opportunities to allow judicially imposed penalties to measure criminal seriousness in non-contempt cases.[122] In each instance it has refused to do so, favoring some other measure, the modern measure being legislative penalties.[123] The Court has reasoned that legislative penalties best express criminal seriousness because they are the truest measure of the consequences at stake in criminal prosecutions.[124] The Court believes that social and moral judgments attaching to crimes largely define their seriousness[125] and that legislatures are far better equipped to capture community judgments than the judiciary.[126] The Court has thus reasoned that community judgments represented within statutory penalties are important components of the potential consequences facing criminal defendants.

If legislatures alone can reach these judgments, measuring criminal seriousness by judicially reduced sentences underestimates the gravity of the consequences facing the accused. Such a method might therefore deny jury trial when, under Supreme Court standards, conviction carries sufficiently severe potential consequences to secure the constitutional

118. *See Bencheck*, 926 F.2d at 1514, 1519. Also, federal sentencing guidelines, mandatory in federal prosecutions under 18 U.S.C. § 3553(a)(4) (1988), are not applicable to petty offense convictions. 28 U.S.C. § 994(w) (Supp. 1991); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 1B1.9 (1990). However, where the guidelines do require offense consolidation, the charges subsumed still operate as "aggravating factors," thereby expressing the heightened severity of the act. *See id.* at § 3D1.2 cmt. 5.

119. *See* United States v. O'Connor, 660 F. Supp. 955, 956 (N.D. Ga. 1987); State v. Sanchez, 786 P.2d 42, 46 (N.M. 1990); *see also* Codispoti v. Pennsylvania, 418 U.S. 506, 519-20 (1974) (Marshall, J., concurring in part) (applying the principle to multiple criminal contempt charges).

120. *O'Connor*, 660 F. Supp. at 956; *Sanchez*, 786 P.2d at 46.

121. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 (1988).

122. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (judicially imposed sentence of sixty days); District of Columbia v. Clawans, 300 U.S. 617 (1937) (sentence of ninety days); Callan v. Wilson, 127 U.S. 540 (1888) (sentence of thirty days).

123. *See supra* text accompanying notes 36-55.

124. *See, e.g., Duncan*, 391 U.S. at 160.

125. *See, e.g., id.* at 159-60; *Blanton*, 489 U.S. at 541.

126. *See Blanton*, 489 U.S. at 541-42; *see also* Cheff v. Schnackenberg, 384 U.S. 373, 390-91 (1966) (Douglas, J., dissenting).

right. Therefore measuring criminal seriousness in jury entitlement determinations by legislative rather than judicial penalties is constitutionally significant in that legislative penalties most objectively and accurately measure the one variable—criminal seriousness—upon which the constitutional right turns.

Furthermore, juries are intended to provide defendants accused of serious crimes a protection of fairness commensurate with the consequences at stake.[127] Thus, it is appropriate that the Supreme Court, following common law tradition,[128] has accounted for social judgments in determining whether the protection of a jury trial is warranted. Aside from the length of the sentence imposed, the fact of conviction itself has far-reaching social consequences significantly impacting the wrongdoer's life.[129] Social judgments attaching to conviction of petty offenses are manifested in a plethora of collateral statutory consequences. Regardless of the penalty actually imposed, conviction of crimes authorizing sentences of six months' imprisonment can collaterally result in removal from public office,[130] revocation of professional licenses,[131] or, upon conviction of a later offense, enhanced punishment.[132] Possibly *Blanton*'s pettiness presumption would be rebutted by proof of such sanctions.[133]

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127. *See, e.g., Duncan*, 391 U.S. at 156; WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 354 (James A. Morgan, ed., 2d ed. 1875). *But see, e.g.*, Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Andrew J. Gildea, *The Right to Trial By Jury*, 26 AM. CRIM. L. REV. 1507, 1536-37 & nn.164-66 (1989); J.C. McWhorter, *Abolish the Jury*, 57 AM. L. REV. 42, 45-47 (1923).

There are three often-cited equitable functions of the jury. First, the jury acts as a buffer between the defendant on one hand, and the government or a vindictive community on the other. STORY, *supra* note 20, at 653. Second, group deliberation reduces error. *See generally* CHARLES W. JOINER, THE JURY SYSTEM IN AMERICA 147 (Rita J. Simon, ed., 1975); Dean C. Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. ABNORMAL AND SOC. PSYCHOL. 55 (1959); Herbert Gurnee, *A Comparison of Collective and Individual Judgments of Facts*, 21 J. EXPERIMENTAL PSYCHOL. 106 (1937); Janet A. Sniezek & Rebecca A. Henry, *Revision, Weighting, and Commitment in Consensus Group Judgment*, 45 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESS 66, 80-83 (1990). Third, juries occasionally facilitate justice by refusing to enforce harsh laws. *Duncan*, 391 U.S. at 188 (1968) (Harlan and Stewart, JJ., dissenting). *See* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 494-95 (1966).

128. *See* Frankfurter & Corcoran, *supra* note 10, at 980-81 (at common law, moral judgments and the stigma of authorized punishment were important factors in jury entitlement determinations).

129. The stigma of conviction dominates the spectrum of social consequences. *See* Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 505, 512 (1967); George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176, 193 (1953) (the essence of punishment lies in the conviction itself); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 app. I (1960); Henry M. Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-06, 436-40 (1958).

130. *See, e.g.*, MISS. CONST. art. VI, § 175.

131. This is particularly true of misdemeanors involving moral turpitude. *See, e.g.*, MD. BUS. OCC. & PROF. CODE ANN. § 16-322(24)(ii) (1989) (revocation of real estate license); OR. REV. STAT. § 9.527(2) (1988) (attorney disbarment); S.C. CODE ANN. § 40-47-200(2) (1986 & Supp. 1990) (revocation of physician's license).

132. *See* OKLA. STAT. ANN. tit. 21, sec. 51(A) (1983).

133. *See Blanton*, 489 U.S. at 543-45 & n.8. The Court left open the possibility that enhanced punishment facing a repeat offender could rebut the presumption. *Id.* at 545 n.12. However, it is not clear whether *Blanton*'s rebuttal standard contemplates collateral

The mere fact of conviction has less visible consequences as well. Individual employers often will not hire persons with criminal records.[134] Several research services facilitate this practice by furnishing employers with information about the criminal history of their applicants.[135] Imposed sentence notwithstanding, a conviction for multiple offenses (even if arising from one incident) will impair employment opportunities substantially more than a conviction for a single offense. Also, regardless of the sentences actually imposed, a convicted person becomes an object of moral condemnation and collective hostility.[136] For example, conviction of petty crimes involving moral turpitude provides fertile ground for witness impeachment.[137] Multiple convictions make an impeachment more effective by intensifying the jury's moral condemnation of the witness.

The Supreme Court, following common law tradition, has objectively accounted for social judgments when assessing jury entitlement.[138] It has done so by requiring courts to determine criminal seriousness by the severity of maximum statutory penalties—those penalties the Court describes as the best embodiment of social judgments.[139] In the prosecution of multiple petty offenses where the legislature has authorized consecutive sentencing, the *Bencheck* method does not accurately assess criminal seriousness under Supreme Court standards. Because the court's assessment did not evaluate the severity of the maximum authorized penalty, it did not account for the social judgments attaching to conviction. The resulting underestimation of criminal seriousness unconstitutionally deprived the defendant of jury trial.

V. CONCLUSION

Under the United States Constitution, as interpreted by the

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statutory sanctions. Nor is it clear what constitutes "serious" consequences in this arena. The Court has decided only that a $1,000 fine and a ninety day license suspension are not severe enough to rebut the pettiness presumption. *Id.* at 543-45.

134. *See* Goldstein, *supra* note 129, app. I at 590.

135. Stanley J. Fenvessy, *What Info Are Employers Entitled To*, DM NEWS, Mar. 4, 1991, at 20.

136. *See* MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW 460 (1952) (Society is aggressive toward wrongdoers.); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 406-07 (1976) (Conviction imparts moral condemnation.); *cf.* Johannes Andrenaes, *The Moral or Educative Influence of Criminal Law*, *in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 50, 51-54 (Felice J. Levine & June L. Tapp eds., 1977) (The criminal justice system conforms behavior through messages of social disapproval.); J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, *in* PHILOSOPHY OF LAW 622, 629 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) (Punishable acts are those which give rise to cooperative hostility toward the wrongdoer.).

137. *See, e.g.*, Meyers v. United States, 377 F.2d 412, 423 (5th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968); FED. R. EVID. 609(a)(2).

138. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 160 (1968). The Court has recognized the futility of *subjectively* evaluating the social consequences of conviction. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 n.8. (1989); District of Columbia v. Clawans, 300 U.S. 617, 663 (1937).

139. *See Blanton*, 489 U.S. at 541.

Supreme Court, dispensing with jury trial in criminal cases is justified only where prosecution presents nominal consequences.[140] Over the past 104 years, the Supreme Court has struggled to develop a method for objectively determining when the consequences are minor enough to except prosecutions from the jury trial guarantee. The Court believes these consequences are a function of the seriousness with which society regards specific offenses and has decided that maximum statutory penalties are the most reliable index of these social judgments. Hence, the maximum statutory penalty is the most accurate and objective measure of criminal seriousness in jury entitlement determinations. Consequently, the Court has insisted that the judiciary not second-guess the legislative determination of criminal seriousness.[141]

With this history as a backdrop, the *Bencheck* court was faced with applying constitutional policy to novel circumstances. In the prosecution of multiple petty offenses where consecutive sentencing was legislatively authorized, the majority chose to base jury entitlement on the severity of a judicially stipulated sentence rather than on the maximum penalty authorized by law. This decision departs both methodologically and substantively from Supreme Court precedent.

Stephen C. Larson

140. *See Duncan*, 391 U.S. at 160 (The consequences of petty offense convictions are insufficient to outweigh efficiency benefits of bench trials.).

141. *See Blanton*, 489 U.S. at 541; Landry v. Hoepfner, 840 F.2d 1201, 1210 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989).