No. _____

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM R. VANDELFT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to consecutive sentences where each sentence, standing alone, was authorized by the jury's verdict?

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PETITION FOR A WRIT OF CERTIORARI

The Spokane County Prosecuting Attorney, on behalf of the people of the State of Washington, respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *In re Personal Restraint Petition of William R. VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (Wash. 2006). *See* Appendix (App.) at 1-17. The decision by the Court of Appeals Chief Judge is not reported, and is reproduced at App. 18-20.

JURISDICTION

The Washington Supreme Court's judgment was entered on November 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents questions under the Sixth and Fourteenth Amendments of the Federal Constitution.

STATEMENT OF THE CASE

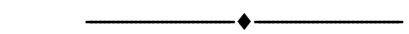
Respondent/defendant William VanDelft was charged in Spokane County (Washington) Superior Court with six

different crimes: one count of Second-Degree Kidnapping, two counts of Communication with a Minor for Immoral Purposes, two counts of Attempted First-Degree Kidnapping, and one count of Intimidation with a Dangerous Weapon. The crimes encompassed five different incidents over a four month period wherein VanDelft tried to lure or capture young boys in public locations in Spokane. The three kidnappings, which are classified as felonies under Washington law, were alleged to have been committed with sexual motivation. The remaining charges are gross misdemeanors. The jury convicted on all counts as charged.

The trial judge imposed consecutive standard range sentences on all counts, declaring an exceptional sentence in order to run the Second-Degree Kidnapping charge consecutive to the two other kidnapping charges. In his view, a concurrent term on the Second-Degree Kidnapping would leave that count unpunished. *See* App. at 21-22. On appeal, the defendant challenged only his convictions; there was no challenge to the exceptional sentence. The Washington Court of Appeals, Division Three, affirmed the convictions in an unpublished opinion, and the Washington Supreme Court denied review. *State v. VanDelft*, 118 Wn. App. 1071, 2003 Wash. App. LEXIS 3221 (2003), *review denied* 151 Wn.2d 1026, 94 P.3d 960 (Wash. 2004). This Court denied a petition for *certiorari*. *VanDelft v. Washington*, 543 U.S. 960 (2004).

VanDelft *pro se* then filed a personal restraint petition pursuant to Rules of Appellate Procedure (RAP) 16.3, challenging the exceptional sentence on the second degree kidnapping count based on *Blakely v. Washington,* 542 U.S. 296 (2004). The Chief Judge dismissed the case as untimely without giving notice to the prosecution. *See* App.

at 18-20. The Washington Supreme Court granted review, appointed counsel for VanDelft, and reversed the dismissal by a seven-to-two vote. The majority concluded that under *Blakely v. Washington* only a jury could determine whether a "free crime" resulted in a sentence that was "clearly too lenient." To the majority, it was the nature of the fact-finding, not the sentence, which required application of *Blakely*. *See* App. at 7-13. The dissenting justices contended that whether *Blakely v. Washington* applied "is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences." *See* App. at 16.



REASONS FOR GRANTING THE PETITION

This Court has never decided whether *Apprendi v. New Jersey* or *Blakely v. Washington* prohibits a judge from imposing consecutive sentences where the sentence imposed on each individual count was a sentence authorized by the jury's verdict on that count. There is a significant conflict among state and federal appellate courts on this question. Indeed, the majority and dissenting opinions of the Washington Supreme Court in this case mirror the fundamental split of views in the state and federal appellate courts. The question was squarely raised and resolved by the Washington Supreme Court, and there is no independent state grounds – statutory or constitutional – for the court's decision. Thus, this case is an appropriate vehicle for deciding this important question under the Sixth Amendment as interpreted in *Apprendi*. Supreme Court Rule 10(b) and (c).

This Court in *Apprendi v. New Jersey* held that the Sixth Amendment requires that no sentence may be imposed unless the jury has found the facts which authorize the sentence. This Court rejected an argument by the prosecution that the enhanced sentence at issue in *Apprendi* was permissible because the trial court could have achieved the same sentence by running two other sentences consecutively, thus making the enhanced sentence within the range authorized by statute. This Court held that the proper focus was, instead, on whether the sentence imposed on the individual count was authorized by the jury's verdict.

> The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what was otherwise a maximum 10-year sentence on that count into a minimum sentence. The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

530 U.S. at 474.

After *Apprendi*, state and federal appellate courts consistently read this passage to mean that the rule of *Apprendi* does not apply to findings that authorized consecutive sentences. *United States v. McWaine*, 290 F.3d 269, 274 (5th Cir. 2002), *cert. denied* 537 U.S. 921 (2002); *United States v. Parolin,* 239 F.3d 922, 930 (7th Cir. 2001), *cert. denied* 537 U.S. 921 (2001); *United States v. Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003), *cert. denied* 541 U.S.

904 (2003); *United States v. Diaz*, 296 F.3d 680, 684 (8th Cir. 2002), *cert. denied sub nom. Lohr v. United States,* 537 U.S. 1095 (2002); *United States v. Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States v. Buckland*, 289 F.3d 558, 572 (9th Cir. 2002), *cert. denied* 535 U.S. 1105 (2002); *United States v. Chorin*, 322 F.3d 274, 278-279 (9th Cir. 2003), *cert. denied sub nom. Caden v. United States,* 540 U.S. 857 (2003); *United States v. Lott,* 310 F.3d 1231, 1242-1243 (10th Cir. 2002), *cert. denied* 538 U.S. 936 (2003); *United States v. Ramsey*, 329 F.3d 1250, 1254-1255 (11th Cir. 2003), *cert. denied sub nom. Davis v. United States*, 540 U.S. 925 (2003); *United States v. Lafayette,* 337 F.3d 1043, 1049 n. 11 (D.C. Cir. 2003); *State v. Bramlett*, 237 Kan. 67, 41 P.3d 796 (Kan. 2002); *State v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430 (Ill. 2001), *cert. denied* 534 U.S. 1011 (2001); *State v. Jacobs*, 644 N.W.2d 695, 699 (Iowa 2001); *State v. Higgins*, 149 N.H. 290, 821 A.2d 964, 975-976 (N.H. 2003).

The question of *Apprendi's* application to multiple sentences arose again after *Blakely v. Washington*. The majority of the states that looked at the issue concluded that *Blakely* had not changed *Apprendi* on this point. *State v. Abdullah,* 184 N. J. 497, 514, 878 A.2d 746 (N. J. 2005); *People v. Black,* 25 Cal. 4th 1238, 1261-1264, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (Cal. 2005); *Smylie v. State,* 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied* 126 S. Ct. 545 (2005) [*Blakely* did not affect decision to impose consecutive rather than concurrent sentences even where judge must find aggravating factor]; *Marrow v. State,* 169 S.W.3d 328, 330-331 (Tex. App. 2005), *cert. denied* 126 S. Ct. 1147 (2006); *State v. Senske*, 692 N.W.2d 743, 748-749 (Minn. App. 2005), *review denied* 2005 Minn. LEXIS 302 (2005) [*Blakely* did not apply to permissive consecutive terms];

Vandegriff v. State, 125 P.3d 360, 361-363 (Alaska App. 2005); *State v. Tanner,* ___ P.3d ___, 2006 Ore. App. LEXIS 1965 (Ore. App., December 20, 2006). The Third Circuit likewise revisited the issue after *Blakely* and determined that the *Apprendi* rule still did not apply to aggregate sentences. *United States v. Dees*, 467 F.3d 847, 854 (3rd Cir. 2006). Indeed, even the Washington Supreme Court appeared to have ruled that *Blakely* and *Apprendi* had no application to the ordering of multiple sentences when considering a challenge to a different section of Washington's Sentencing Reform Act. *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (Wash. 2005); *State v. Louis,* 155 Wn.2d 563, 120 P.3d 936 (Wash. 2005).

The majority of the Washington Supreme Court in this case looked to the factual nature of the finding that had to be made – the effect of the free crime was to result in a sentence that was clearly "too lenient" – and decided that the *Blakely* factual test governed even in the situation of the ordering of multiple sentences. App. A at 12. The Ohio Supreme Court reasoned similarly in *State v. Foster,* 109 Ohio St. 3d 1, 21-22, 845 N.E.2d 470 (Oh. 2006), ruling that the factual finding required to impose consecutive sentences violated *Blakely*.

The Ohio and Washington Supreme Court rulings conflict with the rulings of the Supreme Courts of California, Illinois, Indiana, Iowa, Kansas, and New Jersey in applying *Apprendi* and *Blakely.* Washington and Ohio also are in conflict with the noted decisions of the Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits. Unlike some other post-*Apprendi* issues, the uncertainty in the law on this question will persist, as a number of federal and state courts continue to permit judges to impose consecutive sentences. And, if the

law is not clarified, some states – like Washington – will be forced to amend their sentencing laws and empanel juries where not constitutionally required. Thus, this Court should take review to resolve the conflicts. Review is therefore appropriate pursuant to Rule 10(b) and (c).

CONCLUSION

The ordering of consecutive sentences does not fall within the scope of *Apprendi v. New Jersey* and *Blakely v. Washington*. This Court should grant review to answer the important federal question presented concerning the scope of those cases and to resolve conflicts among the state courts. Rule 10(b) and (c).

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of William Raymond VanDelft, Petitioner.	NO. 77733-1 filed November 30, 2006

Bridge, J. – William VanDelft was convicted of six crimes arising from five incidents in which he initiated contact with different boys and propositioned them for sex, using varying degrees of threats or violence. In this personal restraint petition, his second, VanDelft argues that the trial court's sentencing violated *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), by requiring VanDelft's sentence for kidnapping in the second degree with sexual motivation (count 1) to be served consecutively to his sentences for all other counts pursuant to RCW 9.94A.589(1)(a). We hold that since VanDelft's judgment and sentence became final after *Blakely* was decided and the principles announced in *Blakely* apply to consecutive sentences imposed under RCW 9.94A.589(1)(a), the trial court erred when it imposed count 1 consecutively because the trial judge, not the jury, found that a concurrent sentence would be clearly too lenient.

I

Statement of Facts and Procedural History

VanDelft was convicted by a jury on April 3, 2002 in Spokane County Superior Court of one count of kidnapping in the second degree with sexual motivation (count 1),

two counts of attempted kidnapping in the first degree with sexual motivation (counts 3 and 6), two counts of communication with a minor for immoral purposes (counts 2 and 4), and one count of intimidation with a dangerous weapon (count 5). The kidnapping and attempted kidnapping convictions were felonies, while the others were gross misdemeanors. RCW 9.41.270; RCW 9.68A.090; RCW 9A.40.020, .030; RCW 9A.28.020. The jury returned special findings of sexual motivation on the kidnapping and attempted kidnapping charges. The jury also returned special verdicts finding VanDelft used a deadly weapon other than a firearm when committing the second degree kidnapping and one of the attempted first degree kidnappings.

The convictions were based on five separate incidents that occurred between June 13 and September 12, 2001. *State v. VanDelft,* noted at 118 Wn. App. 1071, 2003 Wash. App. LEXIS 2364, at *2, *review denied,* 151 Wn.2d 1026, *cert. denied,* 543 U.S. 960 (2004).[1] The incidents involved five boys, 11 to 14 years old, and took place at various locations around Spokane. In the only incident at issue here, VanDelft struck up a conversation with an 11-year-old and offered him a ride. VanDelft then grabbed the boy and pulled out a knife, but the boy was able to run away. VanDelft chased the boy and managed to pin him down, but the boy escaped again. For this incident, VanDelft was

[1] In each incident, VanDelft engaged the boy in conversation and then attempted to lure or threaten the boy into his car. In some cases he explicitly asked for or demanded sexual favors, and in some cases he used a knife or gun to threaten violence if the boy refused to comply. *VanDelft,* 2003 Wash. App. LEXIS 2364, at *1-4 n.1-n.4.

convicted of kidnapping in the second degree with sexual motivation (count 1).

VanDelft was sentenced on July 12, 2002. The sentence for each individual crime was within its standard sentencing range. RCW 9.94A.589(1)(b) expressly required the court to run the sentences for the two attempted first degree kidnapping counts consecutively because they are statutorily defined as serious violent offenses. The court also ordered the sentences for the second degree kidnapping (96 months for count 1) and the three gross misdemeanors to run consecutively to each other and to all other charges. The result was that each sentence would be served consecutively for a total of 315 months.

To support its conclusion that count 1 would be served consecutively to the other felony sentences even though it was not a serious violent offense, the trial judge entered findings of fact and conclusions of law. The judge found that the jury returned special verdicts finding sexual motivation on each of counts 2, 3, and 6 and deadly weapon enhancements on counts 1 and 6. He found that the defendant had an offender score of 15 on each of the three felony convictions. He found the sentences in the two attempted first degree kidnapping convictions would necessarily run consecutive to each other by operation of RCW 9.94A.589(1)(b). Finally, he found

> [t]hat given the defendant's offender score and that the crimes involved several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offenses in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

Findings of Fact and Conclusions of Law at 2. The court then ruled that a concurrent sentence on count 1 would result in a sentence that was "clearly too lenient" and determined that the sentence for count 1 would run consecutive to all other counts in this case. *Id.* at 3.

VanDelft appealed his convictions but not his sentence. *VanDelft*, 2003 Wash. App. LEXIS 2364, at *1. The Court of Appeals affirmed VanDelft's convictions in an unpublished opinion on October 16, 2003, and this court denied his petition for review on June 2, 2004. *Id.*; *State v. VanDelft,* 151 Wn.2d 1026, 94 P.3d 960 (2004). The Court of Appeals issued its mandate terminating review on June 16, 2004. In the meantime, in February 2004, VanDelft filed his first personal restraint petition in the Court of Appeals. That petition was dismissed on July 1, 2004. In his direct appeal, VanDelft had also filed a petition for writ of certiorari in the United States Supreme Court on June 25, 2004, which was ultimately denied on November 1, 2004. *VanDelft v. Washington,* 543 U.S. 960, 125 S. Ct. 417, 160 L. Ed. 2d 325 (2004).

VanDelft, acting pro se, filed his second personal restraint petition at the Court of Appeals in February 2005, arguing his sentence violated *Blakely.* The Chief Judge of the Court of Appeals dismissed this personal restraint petition, relying on *State v. Evans,* 154 Wn.2d 438, 448-49, 114 P.3d 627, *cert. denied,* 126 S. Ct. 560 (2005), in which we held that *Blakely* does not apply retroactively to convictions already final when *Blakely* was decided. VanDelft then filed a motion for discretionary review in this court seeking review of the order dismissing his petition, which was granted.

II

Analysis

VanDelft argues that his convictions were still pending on review and not yet final when *Blakely* was decided. He asserts that the principles set forth in *Blakely* must be applied to his sentence, and he contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates *Blakely.* The State asserts that after this court's decision in *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005), *Blakely* does not apply to consecutive sentences that are otherwise within the standard range. The State also argues that VanDelft's petition should be barred because it is successive.

Finality: We have held that Blakely introduced a new rule of criminal procedure. *Evans,* 154 Wn.2d at 448. We apply a new rule for the conduct of criminal prosecutions retroactively "to all cases, state or federal, pending on direct review or not yet final." *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). The Court of Appeals dismissed this personal restraint petition because the mandate on VanDelft's direct appeal was issued on June 16, 2004, but *Blakely* was not decided until June 24, 2004. Yet under Washington law, a judgment becomes final on the last of the following dates: when the judgment is filed with the clerk of the trial court, when the appellate court issues its mandate terminating direct review, *or* when "the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." RCW 10.73.090(3); *see also Griffith,* 479 U.S. at 321 n.6. The United States Supreme Court denied VanDelft's petition for writ of certiorari on November 1, 2004,

more than four months after *Blakely* was decided, so VanDelft's direct appeal was still pending and not yet final when *Blakely* was decided. The Court of Appeals erred when it dismissed VanDelft's petition.

Successive Petition: In its answer to VanDelft's motion for discretionary review, the State contends that the Court of Appeals correctly dismissed this petition, VanDelft's second, because it is successive. Under either RCW 10.73.140 (which applies only to the Court of Appeals) or RAP 16.4(d) (which applies to this court), a successive petition for similar relief must be dismissed absent good cause shown. *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001). Yet this is true only where the relevant issue was previously heard and determined on the merits. *Id.* at 263. In addition, a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier. RCW 10.73.140.[2]

When VanDelft filed his first personal restraint petition in February 2004, *Blakely* had not yet been decided. An intervening change in the law material to the petitioner's case can amount to good cause for a successive petition, and as noted above, *Blakely* announced a new rule. *Evans,* 154 Wn.2d at 448; *In re Pers. Restraint of Crabtree,* 141 Wn.2d 577, 583, 9 P.3d 814 (2000). Thus, Van Delft's personal restraint petition cannot be dismissed

[2] New issues in successive petitions are barred in this court by way of the abuse of the writ doctrine, which applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In addition, the doctrine does not apply where the new issue is based on an intervening change in the law. *In re Pers. Restraint of Stenson,* 153 Wn.2d 137, 144-45, 102 P.3d 151 (2004).

as successive because it raised a new issue not previously heard and determined on the merits, and there was good cause for not raising the issue previously. We therefore proceed to consider the merits of VanDelft's petition.

Blakely *Challenge to the Consecutive Sentence for Count 1*: VanDelft contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates the principles set forth in *Blakely.* RCW 9.94A.589 determines whether multiple felony convictions are sentenced concurrently or consecutively. Under RCW 9.94A.589(1)(b) (hereinafter (1)(b)), sentences for separate and distinct serious violent offenses, including attempted first degree kidnapping, "shall be served consecutively to each other and concurrently with sentences [for other felonies] imposed under (a) of this subsection." *See also* RCW 9.94A.030(41). Felonies that are not serious violent offenses "shall be served concurrently" under RCW 9.94A.589(1)(a) (hereinafter (1)(a)). Consecutive sentences for (1)(a) crimes may be imposed only "under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).[3] Second degree kidnapping, the offense at issue here, is not a serious violent offense, and therefore (1)(a) governs sentencing for that crime. RCW 9.94A.030(41).

RCW 9.94A.535 reiterates that a departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. At the time

[3] Ordinarily, the multiplicity of separate and distinct nonserious violent felonies is accounted for under (1)(a) when each count is considered as criminal history with respect to the others, increasing the offender score for each count for purposes of calculating the standard range for each offense. RCW 9.94A.589(1)(a); *State v. Batista,* 116 Wn.2d 777, 783, 808 P.2d 1141 (1991).

that VanDelft was sentenced, the illustrative factors listed in RCW 9.94A.535 that could support an exceptional sentence without additional jury findings included "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Former RCW 9.94A.535(2)(i) (2002).

In this case, counts 3 and 6 (attempted first degree kidnapping with sexual motivation) were properly classified as separate and distinct serious violent offenses, and VanDelft concedes that they were appropriately sentenced consecutively under (1)(b). Pet'r's Suppl. Br. at 7-8. VanDelft also concedes that the statutory presumption of concurrent sentencing contained in (1)(a) does not apply to gross misdemeanors, and he does not challenge the consecutive sentencing for the three gross misdemeanors in this case.[4] *Id.* The consecutive sentence for count 1 (96 months for second degree kidnapping with sexual motivation) is the only portion of VanDelft's sentence affected by his current petition. *Id.* at 8.

The trial court imposed an exceptional consecutive sentence pursuant to (1)(a) for count 1 based on its conclusion that concurrent sentencing would "fail to hold [VanDelft] accountable for all of the crimes for which he was convicted." Findings of Fact and Conclusions of Law at 2. VanDelft's offender score was at least 15 based on his

[4] The maximum imprisonment for gross misdemeanors is one year where the punishment is not otherwise fixed by statute. RCW 9.92.020. The Sentencing Reform Act of 1981 (chapter 9.94A RCW), including RCW 9.94A.589, does not apply to misdemeanors. RCW 9.94A.010; *State v. Snedden,* 149 Wn.2d 914, 922, 73 P.3d 995 (2003); *State v. Whitney,* 78 Wn. App. 506, 517, 897 P.2d 374 (1995).

criminal history and the multiple current offenses, but the maximum offender score accounted for on the sentencing grid was 9. Report of Proceedings at 409; RCW 9.94A.510. As a result, VanDelft would receive no additional punishment for count 1 if it were served concurrently to the others. The trial judge concluded that concurrent sentencing for count 1 was therefore "clearly too lenient." Findings of Fact and Conclusions of Law at 3.

In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than 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." In *Blakely,* the Court explained that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely,* 542 U.S. at 303. In other words, the "statutory maximum" is the maximum that a judge may impose "*without* any additional findings." *Id.* at 304.

In *Cubias,* this court discussed the impact of *Apprendi* and *Blakely* on consecutive sentencing determinations made pursuant to (1)(b). 155 Wn.2d at 550. In that case, the jury found Cubias guilty of three counts of attempted murder in the first degree. *Id.* Because the three counts were charged based on three different victims, the trial court imposed consecutive sentences for each count pursuant to (1)(b), which presumes consecutive sentences for serious violent offenses so long as the charges arose out of "'separate and distinct criminal conduct.'" *Id.* (quoting (1)(b)). Cubias argued the imposition of consecutive sentences in his case violated *Apprendi* and *Blakely* because

the trial judge, not the jury, found that the three counts of attempted murder constituted separate and distinct criminal conduct. *Id.* at 550-51. We held that the principle set forth in *Apprendi* and *Blakely* did not apply and upheld the sentences imposed by the trial court. *Id.* at 551.

We explained that "in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge." *Id.* at 553. Because the *Apprendi* Court contemplated only whether the sentence for a single count exceeded the statutory maximum, we reasoned that "*Apprendi* does not have any application to consecutive sentences; to conclude otherwise would extend *Apprendi's* holding beyond the narrow grounds upon which it rested." *Id.* at 554. We similarly reasoned that the *Blakely* Court was not concerned with consecutive sentences. *Id.* (citing *Blakely,* 542 U.S. at 299 n.2). Even so, we also emphasized that Cubias had no entitlement under (1)(b) to serve concurrent sentences for multiple serious violent offenses. *Id.* at 554-55. Furthermore, in discussing a similar Court of Appeals case, we noted that the imposition of consecutive sentences under (1)(b) does not operate to elevate crimes to the equivalent of a greater offense. *Cubias,* 155 Wn.2d at 555 (discussing *State v. Kinney,* 125 Wn. App. 778, 106 P.3d 274 (2005)). We concluded that a trial court's imposition of consecutive sentences under (1)(b) "does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely*." *Id.* at 556.

Then, in *State v. Louis,* 155 Wn.2d 563, 572, 120 P.3d 936 (2005), the companion case to *Cubias* and another (1)(b) case, we reiterated:

> the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense.

VanDelft argues that the *Cubias* rule should not apply to charges sentenced under (1)(a) because (1)(a) presumes sentences will be served concurrently and the presumption can be overcome only by a finding of an aggravating factor under RCW 9.94A.535. VanDelft is correct that the operative distinction between (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not. In *Cubias* we emphasized that "[a] defendant has no right to serve concurrent sentences for committing multiple serious violent offenses [under (1)(b)]," but here VanDelft did enjoy a presumption of a concurrent sentence for count 1. 155 Wn. 2d at 555. Indeed, the *Blakely* Court spoke in terms of the sentencing limits which a defendant is entitled to expect based on the jury verdict. *See Blakely,* 542 U.S. at 309. Unlike *Cubias,* the facts found by the trial judge in this case went beyond the jury verdict and changed the nature of the sentence that the defendant was entitled to expect for count 1 from concurrent to consecutive. The trial judge's findings operated to elevate the punishment for a nonserious violent offense to the realm of punishment for serious violent offenses based on facts not reflected in the jury's verdict. *See Blakely,* 542 U.S. at 303; *Apprendi,* 530 U.S. at 494; *Kinney,* 125 Wn. App. at 783.

More importantly, there is no dispute that the legislature has characterized consecutive sentences imposed under (1)(a) as exceptional, requiring a finding of an aggravating factor for support. RCW 9.94A.535. In fact, in

order to overcome the presumption of concurrent sentencing in (1)(a), the sentencing judge in this case employed the very exceptional sentencing scheme at issue in *Blakely*. *Blakely,* 542 U.S. at 299; RCW 9.94A.535. Moreover, there is no dispute that in *State v. Hughes,* 154 Wn.2d 118, 140, 110 P.3d 192 (2005), we held "[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following *Blakely*."

Given (1)(a)'s presumption of concurrent offenses and the exceptional nature of a consecutive sentence imposed for a nonserious violent felony, we conclude that the rule announced in *Cubias* applies only to consecutive sentences imposed under (1)(b). We hold that because (1)(a) requires the trial court to look to the exceptional sentencing scheme in RCW 9.94A.535 in order to impose a consecutive sentence for a nonserious violent felony, *Blakely* and *Hughes* squarely apply to consecutive sentencing decisions under (1)(a). Here the trial judge found that a concurrent sentence for count 1 would be clearly too lenient, a fact not reflected in the jury verdict, in violation of *Blakely* and *Hughes*. We reverse the Court of Appeals, grant the petition, and remand to the trial court for resentencing of count 1 concurrent with the other counts. *See Hughes,* 154 Wn.2d at 156 (remanding for resentencing within the standard range).[5]

[5] The United States Supreme Court recently held that *Blakely* error can be subject to harmless error analysis. *Washington v. Recuenco,* 548 U.S. ___, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006). However, because the State has never argued harmless error in this case, we decline to address that issue here.

III

Conclusion

Because VanDelft's appeal was still pending and not yet final when *Blakely* was decided, his petition asserting a *Blakely* violation was improperly dismissed by the Court of Appeals. His petition is not successive. The trial court here imposed an exceptional sentence when it ordered VanDelft's sentence for count 1 to be served consecutively, and thus *Cubias* is inapplicable. The exceptional consecutive sentence for count 1 was based on facts found by the trial judge and not reflected in the jury verdict, in violation of *Blakely* and *Hughes*. We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.

AUTHOR:

Justice Bobbe J. Bridge

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Susan Owens

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Richard B. Sanders

No. 77733-1

ALEXANDER, C.J. (dissenting) – The majority holds that the "*Cubias* rule" should not apply in this case. *See State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005). In reaching its decision, it observes, "[William] VanDelft is correct that the operative distinction between [RCW 9.94A.589] (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. Because I am unable to find an "operative distinction" between RCW 9.94A.589(1)(a) and (1)(b), I see no reason why our decision in *Cubias* does not control our review of VanDelft's sentence. Accordingly, I dissent.

In *Cubias,* we held that a trial court could impose consecutive sentences without a separate finding by a jury as to whether each count was separate and distinct. Majority at 10 (citing *Cubias,* 155 Wn.2d at 550). In affirming Cubias's sentence, we held that both *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) did not have any application to consecutive sentences. *Cubias,* 155 Wn.2d at 554. As the majority correctly observes, the imposition of consecutive sentences "'does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 556).

In *Cubias,* we held that when a trial judge imposes consecutive sentences under (1)(b), he or she does not run afoul of *Blakely.* Here, we are faced with the question of whether a trial judge may impose consecutive sentences instead of a concurrent sentence under (1)(a). Thus, any departure from *Cubias* to invoke *Blakely* for sentences issued under (1)(a) depends upon finding a substantial difference between (1)(a) and (1)(b).

I am unable to find any difference between (1)(a) and (1)(b) that surmounts their similarities. The majority finds such a difference, indicating that "under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. It derives this presumption from the language of the two subsections. Concurrent sentences are "presumed" under (1)(a) because that provision says that consecutive sentences "may" be imposed, while concurrent sentences are *not* "presumed" under (1)(b) because that provision says that consecutive sentences "shall" be imposed.

For the majority, the difference between the two subsections, distilled to its essence, is a presumption of concurrent sentencing. Where the statute has a presumption of concurrent sentences under (1)(a), imposing consecutive sentences triggers *Blakely.* But, where the statute is *without* a presumption of concurrent sentencing under (1)(b), that is, where it allows for either a concurrent or consecutive sentence, imposing consecutive sentences does *not* trigger *Blakely.*

The flaw in the majority's reasoning is that our decision in *Cubias* did not turn upon what presumptions were found in (1)(b). It was not a critical factor. As noted above, *Cubias* turned upon a narrow reading of *Blakely.*

There, we affirmed the imposition of consecutive sentences because *Blakely* gave instructions as to the range of only *individual* sentences. As the majority noted, we said in *Cubias* that "'in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge.'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 553).

I fail to understand how the presence of a presumption for concurrent sentences somehow reverses the analysis we used in *Cubias.* This point is underscored by the dissent in *Cubias.* In it, Justice Madsen took specific issue with our emphasis on the singular nature of the sentences involved in *Blakely* and *Apprendi. See Cubias,* 155 Wn.2d. at 558 (Madsen, J., dissenting) ("For Sixth Amendment purposes, there is no difference between an exceptional sentence that increases the length of a sentence for one count beyond the presumptive range and an exceptional *consecutive* sentence that increases the presumptive length of incarceration."). Her argument demonstrates the axis upon which *Cubias* turned: whether *Blakely* applies is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences. Because *Cubias* did not turn upon the lack of a presumption of concurrent sentences, I fail to see how our analysis in it is reversed by the presence of such a presumption. I respectfully dissent.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice James M. Johnson

The Court of Appeals
of the
State of Washington
Division III

In the Matter of the Personal Restraint of:	)	**No. 23788-5-III**
WILLIAM RAYMOND VAN DELFT,	)	**ORDER LIFTING STAY AND DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	(Filed Sep. 26, 2005)

William Raymond Van Delft seeks relief from personal restraint imposed following his July 19, 2002 Spokane County convictions for two counts of attempted kidnapping in the first degree and one count of kidnapping in the second degree, all with sexual motivation, two counts of communication with a minor for immoral purposes, and one count of intimidation with a dangerous weapon. The sentencing court ordered the sentences to run consecutively, resulting in an exceptional sentence of 315 months. Mr. Van Delft's convictions became final on June 16, 2004, when his direct appeal was mandated.

Relying on *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 2536-37, 159 L. Ed. 2d 403 (2004) (jury must determine beyond a reasonable doubt the existence of aggravating factors used to increase sentence above presumptive maximum set by legislature), Mr. Van Delft claims the sentencing procedure violated his Sixth Amendment right to trial by jury because a jury did not make the factual determinations supporting his exceptional sentence beyond a reasonable doubt.

After *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), every fact (other than the fact of a prior conviction) that increases the defendant's sentence beyond the statutory maximum may be used only if it was either proved beyond a reasonable doubt to the trier of fact at trial or admitted by the defendant. In *Blakely,* the Supreme Court clarified that "statutory maximum" does not refer to the maximum sentence authorized by the legislature, but for purposes of Washington's Sentencing Reform Act means the top of the standard sentencing range. *Blakely*, 124 S. Ct. at 2538.

We stayed this petition pending the Washington Supreme Court's decision in *State v. Evans,* 154 Wn.2d 438, 114 P.3d 627 (2005), as to whether *Apprendi* and/or *Blakely* applies retroactively to personal restraint petitioners whose convictions were final before the United States Supreme Court decided *Blakely* on June 24, 2004.

The Washington Supreme Court issued its decision in *Evans* on June 16, 2005, and a certificate of finality issued on August 25, 2005. This court therefore now lifts the stay in this petition.

The court in *Evans* held that neither *Apprendi* nor *Blakely* applies retroactively on collateral review to convictions that were final when those decisions were announced. *Evans,* 154 Wn.2d at 448-49. The holding in *Evans* forecloses Mr. Van Delft's challenge to his exceptional sentence.

Accordingly, the petition is dismissed pursuant to RAP 16.11(b). The court also denies Mr. Van Delft's request for appointed counsel. *See In re Pers. Restraint of Gentry,* 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).

Costs will not be awarded to either party.

DATED: September 26, 2005

/s/ Kenneth H. Kato
KENNETH H. KATO
CHIEF JUDGE

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. WILLIAM R. VAN DELFT, Defendant(s)	)	No.01-1-02317-0 FINDINGS OF FACT & CONCLUSIONS OF LAW ON EXCEPTIONAL SENTENCE (Filed Jul. 29, 2002)

THIS MATTER came on for sentencing on July 12, 2002, before the Honorable Richard Schroeder, the defendant was present as well as counsel for defendant, Jeff Compton, and counsel for the State of Washington, Dawn C. Cortez, Deputy Prosecuting Attorney. The court having in mind the testimony at trial, the exhibits admitted at trial, and having read the memorandum submitted by both parties, and having heard from Detective William Marshall, and representatives of the victims, as well as argument from both counsel, the Court now makes the following:

I. FINDINGS

1. The defendant was convicted of two counts of Attempted First Degree Kidnapping, one count of Second Degree Kidnapping, two counts of Communication with a Minor for Immoral Purposes and one count of Unlawful Display of a Weapon (also referenced in the materials as Intimidation with a Weapon);

2. The jury returned special verdicts finding sexual motivation on Counts I, III and VI and deadly

weapon, other than a firearm, enhancements on Counts I and VI;

3. That the defendant has an offender score of 15 on each of the three felony convictions;

4. That the sentences in the two Attempted First Degree Kidnapping conviction necessarily run consecutive to each other by operation of RCW 9.94A.589;

5. That given the defendant's offender score and that the crimes involved several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offences in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

FROM the foregoing findings of fact, the Court makes the following conclusions of law:

III. CONCLUSIONS OF LAW

1. That a concurrent sentence on Count I to the other felony convictions would result in a sentence that is clearly too lenient

2. Therefore, the sentence in Count I shall run consecutive to all other counts in this case.

DATED this 26 day of July, 2002.

/s/ R.J. Schroeder
JUDGE
Richard J. Schroeder

Presented by:	As to Form Only:
/s/ Dawn C. Cortez	/s/ Jeff Compton
DAWN C. CORTEZ	Jeff Compton
Deputy Prosecuting Attorney	Attorney for the Defendant
WSBA # 27124	WSBA # 24082