NO. 06-1081

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

STATE OF WASHINGTON,

Petitioner,

vs.

William R. VanDelft,

Respondent.

On Petition for Writ of Certiorari to
The Supreme Court of Washington

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do *Apprendi v. New Jersey*[1] and its progeny apply to factual findings that were made by the judge – under certain circumstances in Washington's former sentencing system, in contrast to nearly ever other jurisdiction's – to increase a defendant's prison sentence by imposing consecutive sentences?

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASE

FEDERAL STATUTES

STATE STATUTES

RULES

MISCELLANEOUS

JURISDICTION

The Washington Supreme Court issued its opinion on November 30, 2006. The state's petition was timely filed under 28 U.S.C. § 1254(1). The case is not final.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

RCW 9.94A.589(1)(a) states:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection *shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.* ….

RCW 9.94A.589(1)(a) (emphasis added).

RCW 9.94A.589(1)(b) and (c) provide:

> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this

> subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.
>
> (c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

Given the length of the other relevant statutory and constitutional provisions, they are included in the Appendix. *See* App. 01-15.

STATEMENT OF THE CASE

A. MR. VANDELFT WAS CONVICTED OF BOTH SERIOUS VIOLENT OFFENSES, WHICH PRESUMPTIVELY RUN CONSECUTIVELY, AND A NON-SERIOUS VIOLENT OFFENSE, WHICH PRESUMPTIVELY RUNS CONCURRENTLY

Mr. VanDelft was convicted of three gross misdemeanors and three felonies following a jury trial.[2] There were also special verdicts entered for

[2] The convictions were for: Count 1, kidnapping second degree with sexual motivation, in violation of RCW 9A.40.030; Count 2, communicating with a minor for immoral purposes, in violation of RCW 9.68A.090; Count 3, attempted kidnapping first degree with sexual motivation, in violation of RCW 9A.40.020(1)(b); Count 4, the gross misdemeanor of communicating with a minor as above; Count 5, intimidation with a dangerous weapon, in violation of RCW 9.41.270; Count 6, attempted kidnapping first degree with sexual motivation, in violation of 9A.40.020(1)(b).

use of a deadly weapon other than a firearm on Counts I and VI (per RCW 9.94A.125, .130).

The state sought consecutive sentences on each of the counts. On the gross misdemeanors, Counts 2, 4, and 5, it supported its request for consecutive sentences with argument about the severity of the crimes – since it did not need to provide any additional legal basis or factual finding prior to running those sentences consecutively. With regard to Counts 3 and 6, both for attempted kidnapping in the first degree, those are "serious violent" crimes under RCW 9.94A.030(40) (then subsection (37)) against different victims, so RCW 9.94A.589(1)(b) mandated that they run consecutively.[3]

But both parties recognized that Count 1, kidnapping in the second degree, was a non-"serious violent" offense and, hence, that it could not be run consecutively unless an "exceptional" sentence outside the statutory standard sentence range were imposed. That is what the dispute at sentencing was all about.

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[3] *Id.* ("Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level … shall be determined [as follows] …. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. *All sentences imposed under (b) of this subsection shall be served consecutively to each other* and concurrently with sentences imposed under (a) of this subsection.") (emphasis added).

B. THE TRIAL COURT AGREED WITH THE STATE THAT ADDITIONAL FACTS SUPPORTED AN EXCEPTIONAL SENTENCE, MADE FACTUAL FINDINGS SUPPORTING AN EXCEPTIONAL SENTENCE, AND RAN COUNT 1 CONSECUTIVELY

At sentencing on July 12, 2002, the state asked the court to run the sentence on Count 1 consecutively, as an exceptional sentence. It offered the following ground: "he's already committed so many crimes and done so much before and during this case that it [the standard range sentence] is clearly too lenient. The standard range is *clearly too lenient* to not have an exceptional imposed." (Emphasis added.)

The state Supreme Court in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled in part on other grounds*, *Washington v. Recuenco*, 126 S.Ct. 2456 (2006), confirmed that a sentence above the standard range based on just such a finding that the standard range was "clearly too lenient" was indeed an exceptional sentence based on a factual finding subject to the protections of *Apprendi* and *Blakely*[4]. *Id*., 154 Wn.2d at 136-37 ("This court has held that a judge may rely on the aggravating factor that the presumptive sentence is too lenient when 'there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range.' … We have

[4] *Blakely v. Washington*, 542 U.S. 296 (2004).

further defined that inquiry *to require a court to find one of two factual bases* to support the too lenient conclusion: '(1) "egregious effects" of defendant's multiple offenses [or] (2) the level of defendant's culpability resulting from the multiple offenses."'") (footnotes and citations omitted) (brackets in *Hughes*) (emphasis added).

The defense opposed this request but the court agreed with the state and ran Count 1 consecutively, as an exceptional sentence, after making the necessary "clearly too lenient" factual finding.

C. MR. VANDELFT'S CONVICTION WAS NOT YET FINAL WHEN *BLAKELY* WAS DECIDED, SO HE FILED A *PRO SE* PETITION FOR POST-CONVICTION RELIEF

The sentencing issue was not raised on direct appeal.

Mr. VanDelft, however, filed a *pro se* post-conviction petition – a personal restraint petition or PRP – arguing that imposition of this exceptional sentence on Count 1 triggered the protections of *Apprendi* and *Blakely*. Following a stay, the state appellate court dismissed because it said that his conviction was final before *Blakely* was decided. Order Lifting Stay and Dismissing Personal Restraint Petition (Sept. 26, 2005).

But the appellate court had its dates wrong, as Mr. VanDelft pointed out shortly after receipt of the appellate court's dismissal, in his Motion for Discretionary Review to the state Supreme Court (filed Oct. 3, 2005).

The state agreed with Mr. VanDelft on this procedural point. It acknowledged that "The defendant's facts and dates appear correct." Answer to Motion for Discretionary Review, p. 2. It conceded that this procedural grounds for dismissal of the PRP was wrong, stating: "The dismissal by the Court of Appeals was correct, even if not for the correct reasons." *Id.*

D. THE STATE SUPREME COURT GRANTED THE PRP AND REMANDED FOR RESENTENCING; THAT HAS NOT YET OCCURRED

The Washington Supreme Court granted the PRP. It ruled that the consecutive sentence at issue here was subject to *Apprendi* and *Blakely*. It remanded for resentencing. *In re the Personal Restraint of VanDelft*, 158 Wn.2d 731, 743, 147 P.3d 573 (2006) ("We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.").

Resentencing has not yet occurred. On the date set for resentencing, the state moved the Superior Court for a stay of sentencing pending the outcome of this petition for writ of certiorari. The trial court granted this motion; resentencing is stayed and no resentencing date is set.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this case because there is no final judgment. The Washington Supreme Court "remanded for resentencing," and that has no yet occurred. The "remand[]" to a lower court means the case is

not final within the meaning of 28 U.S.C. § 1257. *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Section A.

Even if the Washington Supreme Court's decision is final, it was based upon a statute that is somewhat unique. The only analog we have found is in Ohio. In those two jurisdictions, a statute mandates concurrent sentences for certain crimes and permits consecutive sentencing, as an exception, only if additional aggravating factors, over and above the facts inherent in the verdict or guilty plea, are found. In fact, the Washington Supreme Court has ruled that although *Apprendi/Blakely* protections apply to consecutive sentencing under the statute at issue here, they do not apply to consecutive sentencing under other state statutes – thus underscoring the peculiarity of RCW 9.94A.589(1)(a), the statutory subsection at issue here. Section B.

Given the somewhat unique nature of this statute, petitioner has greatly overstated the extent of the conflict. Most of the cases it cites are based on completely different sentencing statutes – statutes giving judges complete discretion to impose concurrent or consecutive sentences without any additional factfinding. Section C.

The state does present a total of four states that have entered arguably conflicting decisions on the actual issue presented here – Washington and Ohio, on the one hand, and Indiana and Oregon, on the other. But all four

states – including Washington – have now changed their sentencing laws. They have either *Blakely*-ized (required jury determination of aggravating sentencing factors) or *Booker*[5]-ized (given judges unfettered discretion to increase sentences without additional factfinding) to cure any potential problems. The question presented thus lack ongoing significance. Section D.

In fact, the conflict presented by the Oregon case might go away with time. The defendant in that intermediate appellate court case has petitioned for state Supreme Court review. If review is granted, the perceived conflict might disappear completely. Section E.

REASONS FOR DENYING THE WRIT

A. THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THERE IS NO FINAL JUDGMENT.

The state seeks review of a sentencing issue. The Washington Supreme Court, however, "remanded for resentencing" on Count 1 and resentencing has not yet occurred. In fact, at the scheduled resentencing hearing, the state moved for a stay of sentencing pending the outcome of this petition – and it was granted.

[5] *United States v. Booker*, 543 U.S. 220 (2005).

Since the case was remanded for resentencing and resentencing has not occurred, the case is not final.[6] The applicable state rule calls for issuance of a Certificate of Finality when a PRP is finally decided, and none has issued in this case.[7]

A judgment is not "final" under § 1257 (review by this Court of state-court decisions) if it "remand[s]" from a higher to a lower state court. *See, e.g., O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*) (dismissing for want of jurisdiction because Colorado Supreme Court remanded wrongful death case for trial). The Washington Supreme Court remanded this case for resentencing; hence it is not final.

There are exceptions to this rule of finality. For example, if all that is left on remand is a "ministerial" action that could not affect the issues on appeal, or if the "collateral order" doctrine's elements are satisfied, the case might still be considered final. *See Cox Broadcasting Corp. v. Cohn*, 420

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[6] The mandate issued in this PRP case on January 2, 2007, but no Certificate of Finality has issued.

[7] RAP 16.15(e), entitled "Certificate of Finality," provides, "The clerk of the Supreme Court issues the certificate of finality twenty days after the written opinion or order disposing of the petition is filed unless a motion for reconsideration of the decision is filed. If a motion for reconsideration is timely filed, the certificate of finality shall issue upon entry of an order denying the motion for reconsideration." No motion for reconsideration is pending, yet no Certificate of Finality has issued in this case (although the mandate has).

U.S. 469, 477-85 (1975); *Abood v. Detroit Board of Educ*., 431 U.S. 209, 216 n.8 (1977).

None of those exceptions apply here. The resentencing is not merely ministerial. As discussed in more detail in Section D, below, much has changed since the date of the first *VanDelft* sentencing. Washington enacted a new set of sentencing laws responsive to *Blakely* on April 15, 2005, authorizing trial courts to convene juries to determine aggravating sentencing factors; the state Supreme Court ruled that those new sentencing laws applied retrospectively to many cases arising before the effective date of that act (*State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007)); and the state legislature immediately thereafter enacted an amendment to the earlier *Blakely*-responsive legislation that purports to apply those new sentencing laws, retrospectively, to an even broader category of criminal defendants. It is therefore anything but a foregone conclusion what arguments the state might raise at a new *VanDelft* sentencing. If it takes the position that it can seek consecutive sentences now anyway – and prevails – then the whole issue presented to this Court here would disappear.

Interpreting the state Supreme Court's remand for resentencing as a non-final order is also consistent with the general rule is that, "Final judgment in a criminal case means sentence. The sentence is the judgment."

Berman v. United States, 302 U.S. 211, 212 (1937). *Accord Burton v. Stewart*, 127 S.Ct. 793, 798-99 (2007) ("'Final judgment in a criminal case means sentence. The sentence is the judgment.' … Accordingly, Burton's limitations period did not begin until both his conviction *and* sentence 'became final by the conclusion of direct review or the expiration of the time for seeking such review' which occurred well *after* Burton filed his 1998 petition.'") (citing *Berman*).

Since there is no final sentence, there is no final judgment in this state court case, and this Court lacks jurisdiction under § 1257. At the every least, this Court should decline the invitation to exercise jurisdiction because of the significant question presented about whether the state high court's decision on VanDelft's post-conviction petition was final, or not.

B. THE STATE SUPREME COURT PROPERLY HELD THAT *BLAKELY* APLIED HERE, BASED ON A STATUTE PECULIAR TO WASHINGTON

1. ***Blakely*** **Applies To "Exceptional" Sentences Above The Standard Range**

In *Blakely*, this Court ruled that its decision in *Apprendi* applied to exceptional sentences above the standard sentence range under Washington's Sentencing Reform Act (SRA): "'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 (citations omitted).

2. RCW 9.94A.589(1)(a), Which Makes Imposition of a Consecutive Sentence for a Non-Serious Violent Offense "Exceptional" And Requires that it Be Based on Factual Findings, Applies Only to Certain Washington Consecutive Sentences

Under the somewhat unique sentencing statute applied to Mr. VanDelft, RCW 9.94A.589(1)(a), running Count 1 consecutively in Mr. VanDelft's case was an exceptional sentence. That statute provides that the sentence for a non-"serious violent" offense like the one in Count 1 "shall" run concurrently with other current sentences unless the "exceptional" sentence provisions of cross-referenced RCW 9.94A.535 are satisfied:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection *shall be served concurrently*. *Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.* ….

RCW 9.94A.589(1)(a) (emphasis added).

The cross-referenced RCW 9.94A.535 did not provide for a jury determination of the triggering factor by the beyond a reasonable doubt (as it, combined with new RCW 9.94A.537, does now). Instead, this sentence

over the *Blakely* statutory maximum – that is, the maximum imposed by RCW 9.94A.589(1)(a) – was based on additional factfinding done by the judge at sentencing under the then-applicable preponderance of evidence standard.

Since *Blakely* bars imposition of such exceptional sentences without the jury-trial and beyond-a-reasonable-doubt standard of proof mandated by *Apprendi*, the conclusion seems inescapable that Mr. VanDelft's sentence violated those controlling cases. The reason his sentence violates those cases, however, is because of RCW 9.94A.589(1)(a) – a statute peculiar to Washington, which makes consecutive sentences for specified offenses "exceptional" sentences that require additional factfinding, over and above the jury verdict (or guilty plea).

In fact, the peculiar nature of the statute at issue in this case is evident from the fact that the Washington Supreme Court does not treat all consecutive sentences as "exceptional" or subject to the protections of *Apprendi* and *Blakely* – only those imposed under this particular statutory subsection.

This is clear from the Washington Supreme Court's decisions in

Cubias[8] and *Louis*.[9] The state cites those cases as examples of Washington decisions which conflict with *VanDelft* because they decline to apply *Blakely* to consecutive sentences. But those cases interpreted a different statutory subsection, RCW 9.94A.589(1)(b), which mandates that sentences for "serious violent" offenses (as defined RCW 9.94A.030(40), formerly subsection (37)) that do not constitute "same criminal conduct" (as defined by RCW 9.94A.589(1)(a)[10]), "shall" run consecutively without any additional judicial factfinding. *VanDelft* held only that *Cubias* does not extend to consecutive sentences for non-"serious violent" felonies, because additional factfinding is a necessary prerequisite to imposition of those sentences under RCW 9.94A.589(1)(a).

Thus, RCW 9.94A.589(1)(a), which requires additional factfinding before a consecutive sentence can be imposed for a non-"serious violent" felony, is unique even in Washington. Its factfinding prerequisite applies to only certain Washington consecutive sentences.

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[8] *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005).

[9] *State v. Louis*, 155 Wn.2d 563, 572, 120 P.3d 936 (2005).

[10] RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

3. RCW 9.94A.589(1)(a), Which Makes Imposition of Consecutive Sentences for a Non-Serious Violent Offense "Exceptional," Is Virtually Unique Among the States

RCW 9.94A.589(1)(a), which makes imposition of certain consecutive sentences "exceptional," is also virtually unique among the states. It seems to be similar to one Ohio statute – but the Ohio courts have characterized that statute as "unique in having a rule that sentences of imprisonment shall be served concurrently." *State v. Foster*, 109 Ohio St.3d 1, 21, 845 N.E.2d 470, *cert. denied*, 127 S.Ct. 442 (2006) ("While other state courts have held that their statutes on consecutive sentences do not violate *Blakely*, Ohio appears to be unique in having a rule that sentences of imprisonment shall be served concurrently. … Thus, except for certain enumerated statutes imposing nondiscretionary consecutive terms, judicial fact-finding must occur before consecutive sentences may be imposed under R.C. 2929.14(E)(4). … [B]ecause the total punishment increases through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant, R.C. 2929.14(E)(4) violates principles announced in *Blakely*.") (citations omitted); *State v. Sells*, 2006 Ohio 1859, 2006 Ohio App. LEXIS 1702 (Ohio Ct. App.) at **11-12, ¶¶18 -19 (same holding); *State v. Ballard*, 2006 Ohio 1863, 2006 Ohio App. LEXIS 1712 (Ohio Ct. App.), at **11-12, ¶ 23 (same holding).

Again, RCW 9.94A.589(1)(a) is somewhat unique among the states and it has no analog in the federal system. Its limitations apply only to certain Washington consecutive sentences.

C. PETITIONER OVERSTATES THE EXTENT OF THE CONFLICT – MOST OF THE CASES IT CITES DEALT WITH A COMPLETELY DIFFERENT SENTENCING STATUTE

The state claims that, "[t]here is a significant conflict among state and federal appellate courts on this question" of whether *Apprendi* or *Blakely* apply to consecutive sentences. Petition, p. 3. The state cites two categories of decisions as supposed evidence of the significant conflict posed by *VanDelft*.

First, the state cites a host of post-*Apprendi*, pre-*Blakely*, cases, as supposed evidence of the significant conflict between the Washington Supreme Court's decision in VanDelft and the decisions of other jurisdictions. Petition, pp. 4-5. However, post-*Apprendi* but pre-*Blakely*, most courts had ruled that *Apprendi* did not even apply to exceptional, or departure, sentences outside of a prescribed Guideline range; post-*Apprendi* but pre-*Booker*, the federal courts did not apply *Apprendi* to the federal Sentencing Guidelines at all. Thus, all of the pre-*Blakely* and pre-*Booker* decisions cited by the state (Petition, pp. 4-5) as evidence of the fact that the Washington Supreme Court's decision creates a significant conflict are irrelevant. They did not, and could not, resolve the same issue differently than did the Washington Supreme

Court; they did not even address that issue, because neither *Blakely* nor *Booker* had yet been decided.

Second, the state cites to state and federal decisions entered after *Blakely* as evidence of this supposedly significant conflict. It even cites to other decisions of the Washington Supreme Court (*Cubias* and *Louis*) as supposed evidence of this conflict. But most of those cases are inapposite, because they do not deal with a statute (like Washington's RCW 9.94A.589(1)(a)) that makes concurrent sentences the norm and consecutive sentences dependent on additional factfinding.

The state, for example, cites *State v. Senske*, 692 N.W.2d 743, 748-49 (Minn. App. 2005), *review denied*, 2005 Minn Lexis 302 (2005), for the supposed holding that *Blakely* never applies to consecutive sentences. But *Senske* was just like the Washington Supreme Court's holding in *Cubias*, so there is not conflict between the Minnesota Supreme Court and the Washington Supreme Court. In *Senske*, the defendant/appellant argued that the use of consecutive sentencing, based on a judicial finding that consecutive sentences were permissible because either current or prior offenses were "crimes against persons," violated his right to a jury trial under *Blakely*. But in Minnesota, under the applicable sentencing guideline, consecutive sentences are permitted whenever there are *prior felonies*

against a person – and the existence of prior convictions is not a matter covered by *Apprendi* and *Blakely* – or whenever there are multiple current felonies *against a person.* As the *Senske* court explained, this formed the basis for the challenge to the exceptional sentence there:

> Under the sentencing guidelines, consecutive sentencing is permissive when the court is sentencing on "[m]ultiple current felony convictions for crimes against persons," or when there is a prior felony sentence for a "crime against a person" that has not been discharged. Minn. Sent. Guidelines II.F.1., 2. Appellant argues that because the determination whether a crime is a "crime against a person" is made by the sentencing judge rather than a jury, consecutive sentencing under this provision violates his right to a jury trial under *Blakely*.

Senske, 692 N.W.2d at 746.

As the Washington Supreme Court recognized in *Cubias*, however, whether the crimes were against persons – or, in *Cubias*, against separate persons – is something that the jury itself determines. It can be gleaned directly from the charging instrument (which lists the crime and the victim) and the verdict (whether the defendant is guilty of that charged crime or not). There is nothing additional that the judge has to decide. In the *Senske* case itself, the defendant pled guilty to two violations of Minn. Stat. § 609.342, subd. (1)(g) (2002). Since that statute criminalizes sexual penetration of a child under the age of 16 with whom the actor has a "significant relationship," there is really no plausible argument that the

statute does not by its terms define a crime against a person.

Thus, Minnesota's *Senske* is virtually identical to Washington's *Cubias*. It construes a statute that allows consecutive sentences without additional factfinding by the court over and above what is established by a jury verdict or plea of guilty – that is, whether the crime was one against a person (as opposed to, say, property). The *Senske* court, like the *Cubias* court, ruled that where the statute makes such consecutive sentences available without additional factfinding, then *Blakely* protections are not triggered. (The *Senske* court, like the *Cubias* court, also made some broad statements about *Blakely* being inapplicable to consecutive sentences – but as the facts of that case show, such statements were dicta.)

In Mr. VanDelft's case, in contrast, the statute expressly prohibits consecutive sentences unless additional factfinding is done by the judge, to support an "exceptional" sentence above the standard range.

The state therefore errs in claiming that *Cubias* and *Senske* present a conflict with the holding of *VanDelft*. All they present is a different result because they are based on different statutory sentencing rules for imposing consecutive sentences.

Most of the other decisions cited by the state do not involve mandatory statutes like the one at issue here, which requires concurrent

sentences absent factfinding that makes the defendant consecutive-eligible, either. In *Marrow v. State*, 169 S.W.3d 328, 330-31 (Tex. App. 2005), *cert. denied*, 126 S.Ct. 1147 (2006), the court held that no *Blakely* concerns were implicated by consecutive sentencing. But the court said nothing about whether the trial court had been given complete discretion by the state legislature to impose consecutive sentences, or whether consecutive sentences instead depended on judicial factfinding as they did in Mr. VanDelft's case. This Texas case therefore presents no conflict with the Washington Supreme Court's decision – the Washington Supreme Court decision holds that *Blakely* is just as inapplicable to consecutive sentencing, when the underlying sentencing statute makes it so.

In fact *Vandegriff v. State*, 125 P.3d 360 (Alaska App. 2005), also cited by the state, actually supports the *VanDelft* decision. In this Alaska case, the trial judge had complete discretion to impose concurrent or consecutive sentences. That was the reason why the state Supreme Court ruled that *Blakely* did not apply there: "But under former AS 12.55.025(e) and (g), a sentencing judge's authority to impose consecutive sentences did not require proof of aggravating factors or other special factual circumstances." *Id.*, 125 P.3d at 361.[11] The natural corollary is that if the

[11] *See also id.*, 125 P.3d at 362 ("Except for prior convictions, *Blakely*

judge's authority to impose consecutive sentences did require proof of additional "aggravating factors or other special factual circumstances," then *Blakely* might apply. And that is all that the *VanDelft* court held.

The federal case cited by the state is similar. The state claims that *United States v. Dees*, 467 F.3d 847, 854 (3d Cir. 2006), came to a conclusion contrary to the conclusion reached in *VanDelft*. But in *Dees*, the Third Circuit simply held that the decision whether to impose consecutive or concurrent sentences upon revocation of probation is purely discretionary following *Booker*. Since it is discretionary, *Blakely* does not apply. That is consistent with *VanDelft*, and with the distinction that the *VanDelft* court drew between *VanDelft* and *Cubias*.

The state's citation to *State v. Abdullah*, 184 N.J. 497, 514, 878 A.2d 746 (N.J. 2005), does not help it establish a conflict, either. The court in that case noted that there was no statutory presumption in favor of either concurrent or consecutive sentences, instead leaving that in the discretion of

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declares that when a judge's sentencing authority rests on facts not established by a guilty verdict or by the defendant's plea or by the defendant's express concession, the facts must be proved to a jury beyond a reasonable doubt. But Judge Thompson's authority to impose consecutive sentences did not depend on proof of additional facts. His authority to impose consecutive sentences was governed by former AS 12.55.025(e) and (g). Except for exceptions not applicable here, those subsections gave Judge Thompson the discretion to impose the sentences consecutively or concurrently.").

the court. Since there was no statutory maximum exceeded by the consecutive sentences in that case, there was no Sixth Amendment or *Blakely* issue.[12] That is just the opposite of what occurred in *VanDelft*, where the RCW 9.94A.589(1)(a)'s statutory maximum was exceeded.

The state then cites *People v. Black*, 35 Cal.4th 1238, 1261-64, 29 Cal. Rptr.3d 740, 113 P.3d 534 (Cal. 2005), as a case directly conflicting with *VanDelft*. The short answer to this is that the decision in *VanDelft* was vacated and remanded for further proceedings in light of *Cunningham v. California*, 127 S.Ct. 856 (Jan. 22, 2007), a decision applying *Blakely*. *Black v. California*, 127 S.Ct. 1210 (Feb. 20, 2007). The California Supreme Court has asked the parties on remand to brief whether the consecutive sentence holding in *Black* survives this Court's decision in *Cunningham*.[13]

In any event, California statutes, like the vast majority of state statutes, appear to give trial courts unlimited discretion to impose consecutive sentences, regardless of whether they find any facts beyond those encompassed in the guilty verdict. The California statute at issue in

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[12] There are judicially imposed limitations on running sentences consecutively but, according to *Abdullah*, no legislative limits.

[13] Order entered Feb. 21, 2007, *People v. Black* (Cal. S.Ct. No. S126182).

Black simply directs courts to consider whether any aggravating or mitigating factors are present before imposing consecutive sentences; it does not, in contrast to the statute at issue in *Cunningham*, require courts to find an aggravating fact in order to impose consecutive sentences; it leaves discretion in the hands of the judge. *Black*, 35 Cal.4th 1238, 1261-62; Cal. Penal Code § 669.

The state gets closer to presenting a conflict with the Indiana and Oregon cases it cites, but even here, the conflict is not full blown. In *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 126 S.Ct. 545 (2005), cited by the state, the court ruled that imposition of consecutive sentences did not trigger *Blakely* protections. But the prerequisite to imposition of consecutive sentences there was not legislatively imposed, but judicially imposed.[14]

The only case cited by the state presenting a direct conflict with *VanDelft* appears to be the decision of the Oregon Court of Appeals in *State v. Tanner*, 210 Or. App. 70, 150 P.3d 31 (Ore. App. 2006). This is far from

[14] *Id.*, 823 N.E.2d at 686 n.8 ("Ind. Code. Ann. § 35-50-1-2(c) (West 2004) provides that aggravating and mitigating circumstances may be a consideration in imposing concurrent or consecutive sentences. Indiana's caselaw has developed to make an aggravating circumstance a requirement before a consecutive sentence may be imposed. *See Shippen v. State*, 477 N.E.2d 903, 905 (Ind. 1985); *Mott v. State*, 273 Ind. 216, 220, 402 N.E.2d 986, 988 (1980).").

the "significant conflict among state and federal appellate courts on this question" that the petition promised.

D. THE QUESTION PRESENTED HAS NO ONGOING SIGNIFICANCE, BECAUSE WASHINGTON, OREGON, OHIO AND INDIANA – THE ONLY STATES WITH DECISIONS THAT ARGUABLY CONFLICT – HAVE ALL CHANGED THEIR SENTENCING LAWS.

Further, any potential conflict identified by the state has little ongoing significance. The only decisions close to presenting a direct conflict, based on the summary in Section C above, are the decisions from Washington and Ohio on the one hand, and the decisions from Oregon and Indiana on the other hand.

This issue is unlikely to recur in Oregon for two reasons. First, in 2005, after the *Tanner* defendant was sentenced, the Oregon legislature enacted SB 528[15]. It amended Oregon's sentencing laws in response to *Blakely* by requiring judicial factfinding beyond a reasonable doubt of any "enhancement fact" triggering a sentence above a statutory maximum; it did not exempt consecutive-sentence findings under ORS 137.123(5).[16] Second,

[15] http://www.leg.state.or.us/05reg/measpdf/sb0500.dir/sb0528.en.pdf

[16] "Under SB 528, an 'enhancement fact' is a 'fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime.' … An enhancement fact that relates to a charged offense, must be submitted to a jury, unless a defendant waives a jury determination of that fact." *State v. Upton*, 339 Or. 673, 677, 125

in that same year, the Oregon Supreme Court ruled that sentencing statutes previously on the books as well as new SB 528 authorized trial courts to empanel juries to determine "enhancement facts." *State v. Upton*, 399 Or. 673, 677; *State v. Sawatzky*, 339 Or. 689, 125 P.3d 722 (Or. 2005). Hence, the issue of the legality of judicial determinations "enhancement facts" triggering consecutive sentences might never arise again in Oregon.

The conflict should not arise again in Indiana, either – the other state identified in the petition as arguably presenting a direct conflict with Washington. "Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. *See* Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3." *State v. Howell*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006). Since judges now have complete discretion to impose consecutive or concurrent sentences, any conflict posed by the *Smylie* decision (cited by the state) has likely disappeared now.

On the other hand, the Ohio Supreme Court's decision on this issue was in harmony with *VanDelft*. But that decision will have limited effect in Ohio. When *State v. Foster*, 109 Ohio St.3d 1, ruled that *Blakely* applied to consecutive sentences where state statute made prior factfinding a prerequisite to the consecutive sentence, it also imposed a remedy; the

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P.3d 713 (Or. 2005) (citing Or. Laws 2005, ch. 463, § 1(2) and 3).

Foster decision adopted a *Booker*-type remedy for Ohio. Ohio judges now have absolute discretion to sentence anywhere up to the statutory maximum, and to sentence concurrently or consecutively, without any additional findings. Since prior factfinding is no longer a statutory prerequisite to imposition of exceptional or consecutive sentences in Ohio, no *Blakely* issue concerning consecutive sentences will arise again there. *Id*., 845 N.E.2d at 497 ("The following sections, because they either create presumptive minimum or concurrent terms or require judicial fact-finding to overcome the presumption, have no meaning now that judicial findings are unconstitutional: R.C. 2929.14(B), 2929.19(B)(2), and 2929.41. These sections are severed and excised in their entirety, as is R.C. 2929.14(C), which requires judicial fact-finding for maximum prison terms, and 2929.14(E)(4), which requires judicial findings for consecutive terms. R.C. 2953.08(G), which refers to review of statutory findings for consecutive sentences in the appellate record, no longer applies.").

The *VanDelft* decision itself will likely have little further significance in Washington. Following *Blakely*, Washington also amended its sentencing laws. Of note to this case, on April 15, 2005, it enacted RCW 9.94A.537 and amended RCW 9.94A.535 – which is cross-referenced by RCW 9.94A.589(1)(a) – to require jury factfinding beyond a reasonable doubt

(rather than judicial factfinding by a preponderance of the evidence, as the statute on the books at the time of the *VanDelft* case required) of any fact used to impose an exceptional sentence. If VanDelft were sentenced for the first time today, he would likely be subject to those beyond-a-reasonable-doubt and judicial decisionmaker protections, even without application of the *Blakely* decision.

Further, on January 25, 2007, the state Supreme Court decided *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). *Pillatos* held that before the enactment of the legislation responsive to *Blakely*, trial courts lacked statutory authorization to structure their own jury-sentencing procedures; but the new *Blakely*-compliant legislation could now be applied even to some crimes occurring before the date of its enactment (as long as other statutory, procedural, prerequisites to aggravating factor sentencing, such as notice, had been observed), and if neither trials nor guilty pleas had occurred before April 15, 2005.

Then, on April 19, 2007, the legislature covered a matter left open after *Pillatos*. It passed a EHB 2070[17], a bill stating that it will permit a sentencing court to empanel a jury to find certain aggravating facts, on remand, "[i]n any case where an exceptional sentence above the standard

[17] http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/House%20Passed%20Legislature/2070.PL.pdf

range was imposed and where a new sentencing hearing is required." The state would likely argue that this makes Washington's *Blakely*-responsive legislation (enacted two years earlier) applicable even to cases where the trial or plea occurred before the effective date of that act (4/15/05).

New legislation or court decisions therefore strip this issue of ongoing significance in the only four states arguably presenting conflicting decisions on this issue.

E. THE SUPPOSED CONFLICT WITH OREGON MAY DISAPPEAR BECAUSE THE DEFENDANT IN THAT CASE HAS ASKED THE OREGON SUPREME COURT FOR REVIEW.

Finally, any potential conflict might disappear completely in Oregon. The defendant in *Tanner* – identified by the state as presenting a direct conflict with *VanDelft* – has asked the Oregon Supreme Court to review his case. *State v. Tanner*, 210 Or. App. 70, 150 P.3d 31 (2006), *petition for review filed*, S 054471 (Jan. 19, 2007). If that court agrees with the Washington and Ohio Supreme Courts that factual findings necessary to impose consecutive sentences trigger *Blakely*, then the state courts will be in harmony on this issue.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of April, 2007.

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