No. 07-901

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner,

vs.

THOMAS EUGENE ICE,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Oregon

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and again in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), this Court declared 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." Because *Oregon law* authorizes a sentencing court to increase the penalty for an offense by imposing a consecutive sentence *only after* the court finds facts additional to those established by the jury verdict, the Oregon Supreme Court held that respondent's sentences violated the *Apprendi* rule. *State v. Ice*, 343 Or. 248, 170 P.3d 1049, 1059 (2007). The State of Oregon has asked this court to grant its petition for a writ of certiorari to review that decision.

This Court should deny the petition because the federal question identified by the State lacks significance. A state appellate court has faced and conclusively decided the issue in only three jurisdictions. That number is unlikely to increase as the overwhelming majority of jurisdictions follow the common law rule that a sentencing court has unfettered discretion to impose consecutive sentences. Of the three jurisdictions that continue to face the issue, Oregon is the *lone* jurisdiction to hold that federal law requires jury factfinding prior to the imposition of consecutive sentences.

Moreover, an Oregon jury must make those findings in only the most limited of circumstances: *i.e.*, when a defendant proceeds by jury trial (which is less than 5% of misdemeanor and felony cases) *and* is found guilty of multiple offenses alleged to

have been committed on the same day, against the same victim. In all other circumstances, an Oregon court may impose consecutive sentences based either solely on the findings reflected in the jury verdict or on its own findings with a defendant's jury waiver. The practical significance of the question presented diminishes with each level of scrutiny.

Finally, not only does the State ask this Court to exercise discretion to decide an issue of trifling impact, it is actively asserting new arguments in the Oregon appellate courts that directly undermine its position before this Court. The State is arguing that the proper *statutory* interpretation of Oregon's consecutive sentencing provision, Or. Rev. Stat. § 137.123 (2007), allows for the imposition of consecutive sentences based only on legal determinations without additional factfinding. Thus, the State is asking the Oregon Supreme Court to reinterpret state law in a manner that would eliminate the federal issue altogether. Consequently, any decision from this Court on the issue would be both practically insignificant and premature.

ARGUMENT FOR DENYING A WRIT

The State of Oregon is the latest party to ask this Court to decide this sporting federal question of ever-diminishing significance: Does a statutory scheme that requires a sentencing court to engage in by-a-preponderance factfinding before imposing a consecutive sentence violate the *Apprendi* rule? As this Court has

concluded in similar cases,[1] there are no compelling reasons to grant a petition for a writ of certiorari to decide that issue.

A. THERE IS NO SIGNIFICANT CONFLICT – NOR WILL THERE BE – AMONG THE STATE COURTS OF LAST RESORT ON THE FEDERAL QUESTION PRESENTED.

The State asserts that a vigorous dispute exists among eleven jurisdictions as to the application of the *Apprendi* rule to consecutive sentencing. It pits eight jurisdictions, which it claims "have concluded that the principles of *Apprendi* and *Blakely* do not apply to findings required for imposition of consecutive sentences," against a minority of three jurisdictions – including Oregon – that "have broadly construed *Apprendi* and *Blakely* to apply to the factual determinations necessary for imposition of consecutive sentences." Pet., pp. 16, 24, 37 n.7 (naming Alaska, California, Colorado, Illinois, Indiana, Maine, Minnesota, and Tennessee as comprising the former group and Ohio, Oregon, and Washington as the latter).

In fact, very few jurisdictions require a judge to engage in factfinding beyond the jury verdict for authority to impose consecutive sentences. That is no surprise because most states observe the common law norm granting sentencing judges complete discretion to order consecutive sentences. *See* ARTHUR W. CAMPBELL, LAW OF

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[1] *People v. Black*, 41 Cal. 4th 799, 161 P.3d 1130 (2007), *cert. den. sub nom. Black v. California*, ___ S. Ct. ___ (Jan. 14, 2008); *Alameda v. State*, 235 S.W.3d 218 (Tex. Crim. App.), *cert. den.*, 128 S. Ct. 629 (2007); *State v. Keene*, 2007 ME 84, 927 A.2d 398 (Me.), *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007); *Gould v. State*, 2006 WY 157, 151 P.3d 261 (2006), *cert. den. sub nom. Gould v. Wyoming*, 128 S. Ct. 125 (2007); *In re VanDelft*, 158 Wn. 2d 731, 147 P.3d 573 (2006), *cert. den. sub nom. Washington v. VanDelft*, 127 S. Ct. 2876 (2007); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004), *cert. den. sub nom. Lehmkuhl v. People*, 2005 WL 1864138 (Colo. 2005), *cert. den. sub nom. Lehmkuhl v. Colorado*, 546 U.S. 1109 (2006); *Smylie v. State*, 823 N.E.2d 679 (Ind.), *cert. den. sub nom. Smylie v. Indiana*, 546 U.S. 976 (2005); *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, *cert. den. sub nom. Wagener v. Illinois*, 534 U.S. 1011 (2001).

SENTENCING § 9:22, p. 425 (3d ed. 2004) ("Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges."). Only three jurisdictions (Illinois, Maine, and Oregon) have passed legislation that countermands the common law rule and face the federal question presented.[2]

The State of Oregon overstates the extent of any conflict by including seven jurisdictions (California, Minnesota, Alaska, Indiana, Colorado, Ohio, and Washington) in which a sentencing court has authority to impose a consecutive sentence without additional factfinding. In those seven jurisdictions, there is no abrogation of the common law rule that gives judges discretion to order consecutive sentences merely on the basis of the jury verdict.

For example, the California Supreme Court interpreted its consecutive sentencing statute as not altering a sentencing court's plenary authority under common law to impose consecutive sentences when a defendant is convicted of multiple offenses:

> California's statute does not establish a presumption in favor of concurrent sentences; its requirement that concurrent sentences be imposed if the court does not specify how the terms must run merely provides for a default in the event the court fails to exercise its discretion.

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[2] Tennessee intermediate appellate courts' recently-issued and as-yet unpublished decisions holding the *Apprendi* rule inapplicable to consecutive sentences are currently pending before the Tennessee Supreme Court. *State v. Davis*, 2007 WL 2051446 (Tenn. Crim. App. July 19, 2007), *perm. to appeal granted* (Tenn. Dec. 17, 2007); *State v. Allen*, 2007 WL 1836175 (Tenn. Crim. App. June 25, 2007), *perm. to appeal granted* (Tenn. Oct. 15, 2007). Another recent decision (and the one most extensively quoted by the State) gratuitously addressed the issue *sua sponte*. *State v. Higgins*, 2007 WL 2792938, at *14 (Tenn. Crim. App. Sept. 27, 2007). The other cited Tennessee authorities are of questionable pedigree, as they predate this Court's rejection of the Tennessee Supreme Court's determination that its sentencing scheme did not violate the *Apprendi* rule. *Gomez v. Tennessee*, 127 S. Ct. 1209 (2007), *on remand sub nom. State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).

People v. Black, 161 P.3d at 1145 (interpreting CAL. PENAL CODE § 669 (West 1999)). As the State concedes, the *Apprendi* rule is inapplicable when a judge imposes consecutive sentences as punishment within the applicable statutory range. Pet., pp. 16 n.3, 37.

Similarly, and contrary to the State's claims, Minnesota does not require a judge to find additional facts to impose a consecutive sentence. The State accurately reports that a defendant convicted of multiple offenses in Minnesota presumptively receives concurrent sentences. Pet., p. 22. The State fails to acknowledge, however, that the statutory exceptions to that presumption allow a judge to impose consecutive sentences without finding any facts beyond those established by the jury verdict.

Under Minnesota law, a judge may impose consecutive sentences when the judge "finds" that a defendant has been convicted of multiple "crimes against persons." *See State v. Senske*, 692 N.W.2d 743, 746 (Minn. App.) (citing Minn. Sent. Guidelines II.F.1., 2.), *review denied* (Minn. May 17, 2005). The State cites an intermediate appellate court's conclusion in *Senske* that the "finding" does not violate the *Apprendi* rule. Pet., p. 22. The reason, however, that the "finding" does not implicate the *Apprendi* rule is that, under Minnesota law, a judge can determine whether a defendant has been convicted of multiple "crimes against persons" without finding additional facts not already established by the jury verdict.

In *Senske*, the defendant pleaded guilty to two violations of sexual penetration of a child under the age of 16. 692 N.W.2d at 745 (citing MINN. STAT. § 609.342, subd. (1)(g) (2002)). The judge determined that the defendant committed multiple

"crimes against persons" merely by noting that the jury had returned guilty verdicts on allegations that the defendant had repeatedly sexually penetrated a child. Such a determination comports with the *Apprendi* rule because it does not require a judge to find any fact beyond those established by the jury verdict.

Alaska's sentencing scheme falls into the same category as California's and Minnesota's. An Alaska judge has complete discretion to impose consecutive sentences without additional legislatively-required factfinding. ALASKA STAT. § 12.55.127 (2006); *see also Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005) (citing for same proposition ALASKA STAT. § 12.55.025(e), (g) (2003) (repealed 2004)). To promote the legislature's mandate to eliminate disparity in sentencing and to enable appellate review, the Alaska Supreme Court announced "a common-law sentencing rule" that a judge must state that consecutive sentences are "necessary to protect the public" if the sentences' aggregate length exceeds the maximum sentence for the most serious offense. *Vandergriff*, 125 P.3d at 362.

The Alaska Court of Appeals concluded that that *judicially*-created guide to the exercise of sentencing discretion

> does not increase the potential sentence a defendant may receive beyond the statutory range of potential sentences *already specified by the legislature*. Instead, the rule announces that trial judges operating within the range of potential penalties *specified by the legislature* should exercise their discretion to impose consecutive sentencing beyond the maximum penalty for the most serious offense only after a careful examination of the sentencing criteria.

125 P.3d at 363 (emphases added). Thus, as a matter of Alaska law, consecutive sentencing is within the statutory range of punishment that a judge may impose based solely on the jury verdict.

The same is true under Indiana's former and current consecutive sentencing schemes. The former scheme provided only that "aggravating and mitigating circumstances *may* be a consideration in imposing concurrent or consecutive sentences." *Smylie v. State*, 823 N.E.2d at 686 n.8 (citing IND. CODE ANN. § 35-50-1-2 (West 2004)) (emphasis added)). As in Alaska, the Indiana Supreme Court had announced a *judicial* policy that sentencing judges should note an aggravating factor or circumstance when choosing to impose a consecutive sentence. *Id.* (citing authorities). When considering that *judicial* policy, however, the Indiana Supreme Court affirmed that a judge's authority to impose consecutive sentences arose solely from the jury verdict:

> [O]ur statutes do not erect any target or presumption concerning concurrent or consecutive sentences. Where the criminal law leaves sentencing to the *unguided discretion of the judge* there is no "judicial impingement of upon the traditional role of the jury."

823 N.E.2d at 686 (quoting *Blakely*, 542 U.S. at 309) (emphasis added); *see also*, *e.g.*, *Mott v. State*, 273 Ind. 216, 402 N.E.2d 986, 988 (1980) ("The court may, upon consideration of relevant facts and information, . . . impose consecutive sentences . . . . The determination of whether sentences are to be served concurrently or consecutively is within the discretion of the trial court . . . ." (citation omitted)).

Moreover, the Indiana legislature amended its sentencing scheme in 2005 to incorporate "advisory" sentences. *State v. Howell*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006) (citing IND. CODE ANN. §§ 35-38-1-7.1, 35-50-2-1.3 (West 2005)). An Indiana trial court may now impose any statutorily authorized sentence that is permissible under the state constitution "regardless of the presence or absence of

aggravating circumstances or mitigating circumstances." IND. CODE ANN. § 35-38-1-7.1(d)(1) (LexisNexis Supp. 2007). Thus, Indiana is not properly considered part of a "significant split among the state courts." Pet., p. 14.

The State also cites inapposite cases from Colorado. Pet., p. 23-24 (citing *People v. Lehmkuhl*, 117 P.3d 98 and *People v. Clifton*, 69 P.3d 81 (Colo. App. 2001), *reaff'd in part*, 74 P.3d 519 (Colo. App. 2003)). In each of those cases, the defendants unsuccessfully argued that the sentencing courts violated the *Apprendi* rule when the judges imposed mandatory consecutive sentences after finding that the crimes arose from the same incident. *Clifton*, 69 P.3d at 83-86; *see also Lehmkuhl*, 117 P.3d at 106-08 (addressing same argument post-*Blakely*). Colorado law, however, gave the sentencing courts authority to impose consecutive sentences without the challenged factfinding.

Colorado law *requires* that a judge impose consecutive sentences when a defendant commits more than one "crime of violence" arising out of the same incident. *Clifton*, 69 P.3d at 84 (quoting COLO. REV. STAT. § 16-11-309(1)(a) (2001)); *see also Lehmkuhl*, 117 P.3d at 106 (citing COLO. REV. STAT. § 18-1.3-406(1)(a) (2004)). In each case, although the jury verdict established that the defendant committed multiple "crimes of violence," the verdict did not establish (as the judge found) that the offenses arose out of the *same* incident. *Lehmkuhl*, 117 P.3d at 107; *Clifton*, 69 P.3d at 84. Colorado judges *always* have discretion to impose consecutive sentences, however, for offenses arising out of *separate* incidents. *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007); *Clifton*, 69 P.3d at 84.

In other words, the Colorado judges did not impose punishments that *exceeded* the ranges of punishment authorized solely by the jury verdicts. The consecutive sentences were essentially *mandatory minimum sentences*. That type of factfinding does not implicate the *Apprendi* rule because it requires that the sentencing court impose some *minimum punishment within the otherwise authorized range*. *Blakely*, 542 U.S. at 304-05 (citing plurality opinion in *Harris v. United States*, 536 U.S. 545, 567, (2002) ("Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.")).

Finally, the State also erroneously includes Ohio and Washington as jurisdictions that would benefit from this Court's intervention in this case. In those jurisdictions, however, judges may now impose consecutive sentences without implicating the *Apprendi* rule due to changes in the sentencing schemes. Those state law amendments take those jurisdictions out of the reach of any decision from this Court on the federal question presented.

The Ohio Supreme Court annulled any statutory requirement that a trial court engage in factfinding before imposing consecutive sentences. *Ohio v. Foster*, 845 N.E.2d 470, 497, 109 Ohio St. 3d 1, 2006 Ohio 856 (following remedy applied in *United States v. Booker*, 543 U.S. 220 (2005)), *cert. den. sub nom. Foster v. Ohio*, 127 S. Ct. 442 (2006). Accordingly, Ohio judges now have absolute discretion to impose consecutive sentences without any additional factfinding. It is of little consequence that the Ohio Supreme Court eliminated those requirements based on its conclusion that consecutive sentencing implicated the *Apprendi* rule. The fact remains that, as

a matter of current Ohio state law, a judge need not engage in any independent factfinding to impose consecutive sentences.

Similarly, the Washington legislature has effectively reduced the matter to an issue of state law through its recent enactments. Previously, the Washington Supreme Court concluded that this Court's decision in *Blakely* applied to a narrow class of consecutive sentences because those consecutive sentences were also "exceptional sentences." *In re VanDelft*, 147 P.3d at 578-79; *see also Blakely*, 542 U.S. at 303-05 (sentencing court could not impose "exceptional sentence" based on judicially-found aggravating factor). In response to *Blakely*, however, the Washington legislature revised the sentencing scheme to require a jury to find beyond a reasonable doubt the aggravating factors to support any "exceptional sentence" – including that subset of consecutive sentences addressed in *VanDelft*. WASH. REV. CODE ANN. § 9.94A.535 (West Supp. 2008); WASH. REV. CODE ANN. § 9.94A.537 (West Supp. 2008); WASH. REV. CODE ANN. § 9.94A.589(1)(a) (West 2003). Therefore, a decision from this Court on the question presented would not have any effect in Washington, where the issue is now squarely addressed by state law.

In the aforementioned seven jurisdictions, the *Apprendi* rule is inapplicable to consecutive sentencing because either (1) the state appellate courts have interpreted state law to allow for consecutive sentencing based solely on the facts established by the jury verdict or (2) the state legislatures have amended their sentencing schemes to that effect. This Court is bound to accept those resolutions of the matter as conclusive determinations on state law grounds. *See Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound

to accept the interpretation of [a state's] law by the highest court of the State."). Consequently, those jurisdictions do not face the federal question presented.

When properly accounting for the application of state law, the State identifies a dispute among a mere three jurisdictions (Illinois, Maine, and Oregon). Of those three jurisdictions, *only* Oregon requires the jury to find facts for consecutive sentencing beyond a reasonable doubt. *Ice*, 170 P.3d 1059. In other words, factual issues related to consecutive sentencing are being submitted to a jury rather than a judge as a matter of *federal* law in only one jurisdiction. Furthermore, a survey of all the other state jurisdictions reveals that Oregon will remain a *rara avis*.[3] A

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[3] The jurisdictions that the State does not include in the division fall into two categories:

Thirty-five jurisdictions have either codified the common law rule or confirmed its continuing force in case law: Alabama, see ALA. CODE § 14-4-9(a) (LexisNexis 1995); Arizona, see ARIZ. REV. STAT. § 13-708 (Supp. 2007); Arkansas, see ARK. CODE ANN. § 5-4-403 (Michie 2006); Connecticut, see CONN. GEN. STAT. ANN. § 53a-37 (West 2007); Florida, see FLA. STAT. ANN. § 921.16 (West Supp. 2007); Georgia, see GA. CODE ANN. § 17-10-10 (2004); Hawaii, see HAW. REV. STAT. § 706-668.5 (1993); Idaho, see IDAHO CODE § 18-308 (Michie 2004); Iowa, see IOWA CODE § 901.8 (2003); Kansas, see KAN. STAT. ANN. § 21-4608 (1995); Kentucky, see KY. REV. STAT. ANN. § 532.110(1) (LexisNexis Supp. 2007); Louisiana, see LA. CODE CRIM. PROC. ANN. Art. 883 (1997); Maryland, see *State v. Parker*, 334 Md. 576, 640 A.2d 1104, 1112 (1994); Massachusetts, see *Commonwealth v. Lykus*, 406 Mass. 135, 546 N.E.2d 159, 166 (1989); Mississippi, see MISS. CODE ANN. § 99-19-21 (2007); Missouri, see MO. ANN. STAT. § 558.026 (West 1999); Montana, see MONT. CODE ANN. § 46-18-401(4) (2007); Nevada, see NEV. REV. STAT. 176.035 (2007); New Hampshire, see *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 919 A.2d 767, 771-73 (2007); New Jersey, see N.J. STAT. ANN. § 2C:44-5 (West 2005); New Mexico, see *State v. Padilla*, 85 N.M. 140, 509 P.2d 1335, 1338 (1973); North Carolina, see N.C. GEN. STAT. § 15A-1354 (2005); North Dakota, see N.D. CENT. CODE § 12.1-32-11(1) (1997); Oklahoma, see OKLA. STAT. ANN. tit. 22, § 976 (West 2003); Pennsylvania, see *Commonwealth v. Rickabaugh*, 706 A.2d 826, 847 (Pa. Super. Ct. 1997); Rhode Island, see R.I. GEN. LAWS § 12-19-5 (2002); South Carolina, see *Treece v. State*, 365 S.C. 134, 616 S.E.2d 424, 425 (2005); South Dakota, see S.D. CODIFIED LAWS § 22-6-6.1 (Supp. 2003); Texas, see TEX. CODE CRIM. PROC. ANN. Art. 42.08 (Vernon 2006); Utah, see UTAH CODE ANN. § 76-3-401 (2003); Vermont, see VT. STAT. ANN. tit. 13, § 7032 (1998); Virginia, see VA. CODE ANN. § 19.2-308 (2004); West Virginia, see W. VA. CODE ANN. § 61-11-21 (LexisNexis 2005); Wisconsin, see WIS. STAT. ANN. § 973.15 (West 2007); and Wyoming, see *Tilley v. State*, 912 P.2d 1140, 1142 (Wyo. 1996).

Four jurisdictions dictate the imposition of consecutive or concurrent sentencing based on the verdict alone, without resorting to any additional factfinding: Delaware, see DEL. CODE ANN. tit. 11, § 3901(d) (2001) (authorizing only consecutive sentences); Michigan, see *People v. Brown*, 220 Mich. App. 680, 560 N.W.2d 80, 81 (1996) (authorizing only concurrent sentences absent specific authorization by statute); *see also* MICH. COMP. LAWS ANN. § 768.7b (West 2000) (authorizing consecutive sentences if defendant charged with a felony, pending disposition, commits another felony); MICH. COMP. LAWS ANN. § 333.7401 (West Supp. 2007) (authorizing consecutive sentences if defendant is convicted of a drug offense and another felony); Nebraska, see *State v. Nelson*, 235 Neb.

decision to settle any disagreement on the question presented among the three relevant jurisdictions would amount to an extravagant expenditure of this Court's resources for little practical impact.

B. EVEN IN OREGON, THE DECISION BELOW IS ALMOST INCONSEQUENTIAL TO CONSECUTIVE SENTENCING.

The State complains that "Oregon judges have now lost their traditional role in [the] critical area" of consecutive sentencing. Pet., p. 36. That observation is either a misunderstanding or careless overstatement of the effect and scope of the decision below. The decision below has no application to the vast majority of Oregon prosecutions that result in multiple convictions. And even in the rare case that falls under the decision, the judge's traditional authority to decide whether circumstances justify imposition of a consecutive sentence remains unadulterated.

The State fails to note the paucity of case types in which Oregon prosecutors seeking consecutive sentences will "suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *See Blakely*, 542 U.S. at 313 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). Due to post-*Blakely* enactments by the Oregon Legislature and the particularities of the consecutive sentencing provision, the class

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15, 453 N.W.2d 454, 460 (1990) (approving of common law rule generally, but presuming concurrent sentences for crimes arising out of same transaction unless "offense charged in one count involved any different elements than an offense charged in another count"); and New York, see N.Y. PENAL LAW § 70.25 (McKinney Supp. 2008) (codifying common law rule with exception of mandatory concurrent sentences for "offenses committed through single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other"); *see also People v. Azaz*, 41 A.D.3d 610, 611-12, 837 N.Y.S.2d 339 (N.Y. App. Div.) (separate and distinct act determination presents legal question based on facts already found by the jury), *appeal denied*, 9 N.Y.3d 920, 875 N.E.2d 894, 844 N.Y.S.2d 175 (2007); *People v. Grady*, 40 A.D. 3d 1368, 1375, 838 N.Y.S.2d 207 (N.Y. App. Div.) (same), *appeal denied*, 9 N.Y.3d 923, 875 N.E.2d 897, 844 N.Y.S.2d 178 (2007).

of cases in which consecutive sentencing facts must be submitted to a jury is exceedingly small. The decision below will not have any application to cases in which a defendant: pleads guilty or no contest; waives the right to a jury trial in the guilt or sentencing phases; is convicted of only one offense; is convicted of offenses that occurred on different days; or is convicted of offenses against different victims.

In response to *Blakely*, the 2005 Oregon legislature enacted statutory provisions governing the proof of facts in criminal trials that implicate the *Apprendi* rule. 2005 Or. Laws, ch. 463 (codified at Or. Rev. Stat. §§ 136.760–.792 (2007)). Those provisions apply to "enhancement facts," *i.e.*, "[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." OR. REV. STAT. § 136.760(2).[4] Now, a defendant who waives the right to have a jury determine guilt or innocence also waives the right to a jury trial on all enhancement facts. OR. REV. STAT. § 136.776. Thus, the prosecution will not be called upon to prove consecutive sentencing facts to a jury in any case in which the defendant waives jury rights. Unsurprisingly, the Oregon Judicial Department's statistics demonstrate that the portion of criminal cases that proceed to a jury trial comprises *less than 5% of felony and misdemeanor cases*. OFFICE OF THE STATE COURT ADM'R, SUP. CT. OF OR., STATISTICAL REPORT RELATING TO THE CIRCUIT

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[4] In doing so, the legislature demonstrated an adroit ability to respond to sentencing developments that flow from *Apprendi*. A future legislative response could revert Oregon's consecutive sentencing scheme to the common law norm that predated the 1987 enactment of Or. Rev. Stat. § 137.123. *See State v. Jones*, 250 Or. 59, 440 P.2d 371, 372 (1968) ("It is an inherent power of the court to impose sentences, including the choice of concurrent or consecutive terms when the occasion demands it. Accordingly, the legislature would have recognized that no legislation was needed to authorize the courts to exercise a power already in existence to impose either consecutive or concurrent sentences." (citation omitted)). Such an amendment would eliminate the question presented in Oregon altogether.

COURTS OF THE STATE OF OREGON: FIRST HALF 2007, tbl. 6, at 83 (2007), *accessible at* http://www.ojd.state.or.us/osca/2007Statistics.htm.

The small number of affected Oregon cases is further reduced, because Oregon law authorizes a sentencing court to impose consecutive sentences without additional factfinding when multiple offenses did not arise "from the same continuous and uninterrupted conduct." OR. REV. STAT. § 137.123(2). Thus, when a jury returns guilty verdicts for offenses alleged to have occurred on different dates, a trial court would have authority to impose consecutive sentences, because the requisite factual determination is inherent in the jury verdict. *Cf. Ice*, 170 P.3 at 1059 n.7 (choosing not to analyze the case that way "given that the indictment did not specify particular dates or otherwise distinguish between" the counts). Similarly, a sentencing court could impose consecutive sentences after determining, based solely on the jury verdict, that the offenses harmed, or risked harming, different victims. OR. REV. STAT. § 137.123(5)(b).

Accordingly, the decision below requires jury findings for a consecutive sentence *only when* a defendant exercises the right to a jury trial throughout the prosecution *and* a jury returns guilty verdicts on more than one criminal offense *and* the offenses occurred on the same date *and* the offenses injured the same victim. It would be unwarranted to grant the State's petition to decide whether the Constitution requires a jury finding on consecutive sentencing facts in those extremely limited circumstances for the benefit of a single jurisdiction.

Finally, even in the narrow circumstances where the decision below will require additional jury factfinding, that requirement will not undermine an Oregon

judge's ultimate determination as to whether a consecutive sentence is "warranted" for a specific offense to "impose meaningful punishment for each separate conviction." Pet., p. 35. When a consecutive sentence for an offense is authorized by the jury, the sentencing judge retains the ultimate *discretion* to impose a concurrent or consecutive sentence. OR. REV. STAT. § 137.123(1), (2), (4), and (5) (each providing that the trial court "may" impose a consecutive or concurrent sentence upon satisfaction of factual predicate); *see also Callahan v. United States*, 364 U.S. 587, 597 (1961) ("It was therefore within the discretion of the trial judge to fix [consecutive] sentences, *even though Congress has seen fit to authorize for each of these two offenses what may seem to some to be harsh punishment*." (emphasis added)). Only now, the facts authorizing the greater punishment for that offense must be found by a jury beyond a reasonable doubt. *Ice*, 170 P.3d at 1059.

As a matter of Oregon law, though, an aspect of punishment *for a single offense* is whether a sentence for that offense is consecutive to or concurrent with another sentence. *See* OR. REV. STAT. § 137.123(5)(a) (authorizing consecutive sentence for a "criminal offense"). The decision below merely stays true to this Court's admonition that a jury – and not a judge – must find every fact beyond a reasonable doubt "which the law makes essential to the punishment" for an offense. *Blakely*, 542 U.S. at 304 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872)).

C. THIS CASE IS NOT A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED BECAUSE THE STATE OF OREGON CONTINUES TO CAST DOUBT AS TO THE PROPER INTERPRETATION OF OR. REV. STAT. § 137.123.

Finally, this case is not a good vehicle to decide the question presented because the statutory interpretation of Or. Rev. Stat. § 137.123 remains unsettled – *at the State's behest*. This Court will not decide a case if a change in law eliminates the significance of the federal issue that the case purportedly presents. *Cook v. Hudson*, 429 U.S. 165 (1976). Indeed, if a case will not "reach to a problem beyond the academic or the episodic," this Court avoids deciding federal constitutional questions. *Rice v. Sioux City Cemetery*, 349 US 70, 74 (1955). The cloud over Or. Rev. Stat. § 137.123 is ironically cast by the State of Oregon – the very party asking for a writ of certiorari in this case – which is actively litigating statutory issues that question the interpretation that was relied on below to reach the federal issue. *See*, *e.g.*, Resp. to Pet. for Review, *State v. Hagberg*, S054997 (Nov. 29, 2007), *review allowed*, ___ Or. ___, ___ P.3d ___ (Jan. 16, 2008).[5]

No Oregon appellate opinion has addressed the State's new statutory arguments, and the State failed to raise them below in this case. The Oregon appellate courts could issue decisions in pending cases that alter the interpretation of the consecutive sentencing statute. That, in turn, could change, further reduce, or entirely eliminate the federal question identified by the State in its petition. The

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[5] *See also* Resp't's Resp. to Appellant's Pet. for Recons., *State v. Miller*, ___ Or. App. ___, ___ P.3d ___ (Jan. 30, 2008) (A126149), *modifying on recons.*, 214 Or. App. 494, 166 P.3d 591 (2007); Resp't's Supplemental Mem., *State v. Loftin*, A132948 (Or. Ct. App. Nov. 21, 2007); Resp't's Supplemental Mem., *State v. Nguyen*, A127563 (Or. Ct. App. Nov. 21, 2007); Resp't's Supplemental Br., *State v. Agee*, A128672 (Or. Ct. App. Jan. 16, 2008).

import of this case will be *de minimus*, or nonexistent, if the State prevails on its new statutory arguments.

The decision below is the first published opinion in which the Oregon Supreme Court addressed whether Or. Rev. Stat. § 137.123 requires additional factfinding before a sentencing judge could impose consecutive sentences for offenses that occurred during the same range of dates. First, the majority held that a determination as to whether the offenses arose out of the same criminal episode required additional factfinding beyond the jury verdict. *Ice*, 170 P.3d at 1059 & n.7 (discussing OR. REV. STAT. § 137.123(2)). Second, the court held that, if offenses arose out of the same conduct, the sentencing court must impose concurrent sentences unless the judge "finds one of two facts" set out in Or. Rev. Stat. § 137.123(5)(a) and (b). *Ice*, 170 P.3d at 1053, 1056-57; *see also id*. 170 P.3d at 1060 (Kistler, J., dissenting) (interpreting statute in same manner). The majority held that the required factfinding implicated the *Apprendi* rule. *Id*. at 1059. It is of note that the sections of the majority and dissenting opinions that interpret the statute do not contain a single case citation. *Ice*, 170 P.3d at 1053, 1056-57, 1060.

In numerous pending direct appeals, the State advocates for an interpretation of Or. Rev. Stat. § 137.123 at odds with the decision below. In cases before both of the Oregon appellate courts, the State now argues that subsections (2), (5)(a), and (5)(b) of Or. Rev. Stat. § 137.123 each allow for multiple alternative determinations of law, rather than findings of fact. The State contends that, when the statute is properly interpreted, the imposition of consecutive sentences will rarely if ever implicate the *Apprendi* rule.

At *the State's* request, the Oregon Supreme Court recently allowed the defendant's petition for review in *Hagberg* to entertain arguments that Or. Rev. Stat. § 137.123 contemplates the imposition of consecutive sentences as a matter of law without additional factfinding. Press Release, Oregon Supreme Court (Jan. 23, 2008).[6] As having occurred below in this case, when the defendant in *Hagberg* was convicted of multiple sexual offenses against the same victim during the same range of dates, the sentencing court imposed a consecutive sentence after finding that the offenses arose out of different criminal episodes. Press Release (citing OR. REV. STAT. § 137.123(2)). In *Hagberg*, however, the sentencing court was of the opinion that that finding was reflected in the jury verdict because the jury had been instructed to find that each count was "separate and distinct." Press Release. After the Oregon Supreme Court released the decision below,

> *the state* requested that the Oregon Supreme Court grant defendant's petition for review, limited to the consecutive sentencing issue. The state asked this court to affirm the Oregon Court of Appeals, which upheld the trial court's imposition of a consecutive sentence, *on a basis that was not considered or decided in* State v. Ice. *Specifically, the state asked this court to "explore whether and under what circumstances a court may impose a consecutive sentence pursuant to Or. Rev. Stat. § 137.123 based solely on those facts necessarily established by the verdict or guilty plea* – i.e.*, without undertaking any additional factfinding*."

Press Release (emphases added).

As noted, the Oregon Supreme Court allowed the petition for review in *Hagberg* and the parties are currently briefing the case. *Id.* Although the State has

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[6] The Oregon Supreme Court press release is accessible on the Internet. http://www.ojd.state.or.us/mediareleases (follow "view '-- All News Releases --'"; then follow "Supreme Court Media Releases – January 23, 2008 – Supreme Court Conference summary").

not yet filed its brief to defend the sentencing court's determination that Or. Rev. Stat. § 137.123(2) does not require additional factfinding, it is certainly on record in other pending appeals contesting the conclusion below that Or. Rev. Stat. § 137.123(5)(a) and (b) each require additional factfinding.

The State now argues that Or. Rev. Stat. § 137.123(5)(a) contains three separate inquiries, the first being a purely legal question for the judge:

> Properly construed, Or. Rev. Stat. § 137.123(5)(a) prescribes a three-step process when a court wants to impose consecutive sentences on separate convictions entered in a single sentencing proceeding:
>
> First, the court has unlimited discretion to impose consecutive sentences on the convictions if they are based on crimes that are equally "serious."
>
> Second, if the crimes are not equally serious, the court may impose a consecutive sentence on the conviction for a lesser offense if that offense was not, in fact, "incidental" to the defendant's commission of the greater offense.
>
> And third, if the conviction is for a lesser offense that was incidental to the greater offense, the court may impose a consecutive sentence on the lesser offense only if that offense was not "merely incidental" to the greater crime "but rather" demonstrated the defendant's willingness to commit more than one criminal offense.
>
> . . . .
>
> Therefore, based solely on the nature and relative rankings of the convictions entered – *i.e.* without any further factfinding that would be subject to *Blakely* – the sentencing court [in this case] had authority under Or. Rev. Stat. § 137.123(5)(a) to impose consecutive sentences on defendant's two convictions because, a matter of law, neither is "more serious" than the other.

Resp't's Supplemental Mem. at 15-17, *Loftin*, A132948.

The State also argues that Or. Rev. Stat. § 137.123(5)(b) contains two inquiries that present only legal determinations in almost all circumstances.

According to the State, that subsection requires the court to make two determinations: (1) whether the two crimes involved a different victim; and (2) even if they involved the same victim, whether they "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim." *Id.* at 18. Moreover, the State argues that "different harms" *legally* result from the violation of different criminal statutes:

> The question is thus presented whether the "greater or qualitatively different" determination under subsection (5)(b) is one that necessarily requires factfinding beyond the nature of the convictions themselves, in which case *Blakely* and *Ice* may require the issue to be decided by the jury. Although there may be some cases at the margin, in many cases a court will be able to find *as a matter of law* – without any additional factfinding – that the injuries that the defendant inflicted on the victim by two separate crimes of conviction were "greater or qualitatively different."

Id. (emphasis in original).

Contrary to the basis of the decision below that each subsection of Or. Rev. Stat. § 137.123(5) call for at least one factual inquiry, the State now argues that each subsection contains multiple inquiries. The State further argues that most of those inquiries are legal questions for the trial court that do not implicate the *Apprendi* rule. A jury would need to make consecutive sentencing findings under subsection (5)(b) only when the defendant is convicted of multiple violations of the *same* criminal statute against the *same* victim during the *same* criminal episode. Keeping in mind the State's position that a jury need not make additional findings to authorize consecutive sentences when the offenses are equally serious (pursuant to subsection (5)(a)), it is hard to imagine an instance when jury findings would be required at all. If the State's new position proves correct, the Oregon Supreme

Court erroneously interpreted Or. Rev. Stat. § 137.123 in this case, and it may have reached the federal question unnecessarily.

This Court has no assurances that the State's new statutory arguments will not prevail. The Oregon Supreme Court conducted only a cursory statutory interpretation below. The litigation focused primarily on the constitutional issues. Thus, when presented with the State's new arguments, the Oregon Supreme Court could be persuaded that it misinterpreted Or. Rev. Stat. § 137.123 below. At a minimum, the State's most recent arguments presage renewed litigation over the meaning of Or. Rev. Stat. § 137.123. The unsettled meaning of Or. Rev. Stat. § 137.123 renders this case a poor vehicle to decide the federal question presented.

CONCLUSION

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

Respectfully submitted,

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