No. 07-901

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

REPLY BRIEF

Petition for Writ of Certiorari to the Oregon Supreme Court

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REPLY BRIEF

Petitioner, the State of Oregon, asks this Court to review the Oregon Supreme Court's holding that the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), applies not only to sentences imposed for individual convictions, but also to findings required under state law for the imposition of consecutive sentences. The State urges review because state courts are deeply divided over this issue and because the Oregon Supreme Court's holding is an unwarranted extension of *Apprendi* and *Blakely* beyond what this Court's reasoning and holdings support.

In opposition, respondent contends that the state-court split on the question presented is not as great as the State asserted in the petition. Respondent also downplays the significance of the Oregon Supreme Court's holding, characterizing the impact as "inconsequential" and "trivial" and focusing on the possibility that the State may be able to limit the impact in some cases or that the Oregon Legislative Assembly may respond to the court's ruling. Respondent's labored efforts to minimize the extent of the split and the impact of the Oregon Supreme Court's decision are unavailing. Moreover, respondent largely ignores the importance of the federal constitutional question presented in the petition. None of respondent's reasons for denying the petition should prove persuasive.

A. Respondent is alone in contending that a significant split does not exist on this recurring issue of federal constitutional law.

Respondent maintains that the split among state courts is not as large as the 7-to-3 split the State described in its petition. Br. in Opp. 3-10. According to respondent's assessment of the state caselaw, only a 2-to-1 split exists, with the Maine Supreme Court and Illinois Supreme Court reaching a conclusion opposite to that reached by the Oregon Supreme Court. Br. in Opp. 9. Respondent stands alone in taking such a restrictive view of the extent of the split.

Both the majority and dissent for the Oregon Supreme Court in this case fully recognized that the majority's decision conflicted with the weight of authority from numerous other jurisdictions that have resolved this issue. The majority "acknowledge[d] that most other courts that have considered this question have reached a different conclusion" than the decision that it reached. Pet. App. 30 (discussing holdings in Washington, California and Illinois). The dissent similarly explained that "[a]lmost every court that has considered this question has held that *Apprendi* does not apply in this context," that the majority's decision is "out of line with the clear weight of authority," that "[t]here is a split among states that have considered this recurring issue of federal law," and that "the majority's decision deepens and confirms" the split. Pet. App. 33, 43-45 (describing Colorado, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, New Jersey, and Tennessee as resolving the issue

contrary to the majority's holding, and describing Ohio and Washington as agreeing with that holding).

Other courts also have recognized a much broader split than respondent is willing to acknowledge. Prior to the Oregon decision, the Maine Supreme Court described the split as 9-to-1 (or 9-to-2 depending on whether Washington was included in light of the conflicting opinions from that state). *State v. Keene*, 2007 Me 84, 927 A.2d 398, *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007). That court described Alaska, Florida, Hawaii, Iowa, Kansas, Massachusetts, New Hampshire, and New York as adopting the same view that Maine did—"that *Apprendi* and its successors are limited to sentences for individual crimes, and *Apprendi* does not apply to judicial determinations regarding the sequence in which discreet sentences for multiple crimes are to be served." *Keene*, 927 A.2d at 407. Adding Oregon to the list, the split—from the perspective of the Maine Supreme Court—would be 9-to-2 (or 9-to-3).

Moreover, when the Washington Supreme Court held that "consecutive sentencing decisions do not trigger the concerns identified in *Apprendi*," it noted that its "holding [was] in line with the position taken in most other jurisdictions"—including Alaska, California, Colorado, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New Hampshire, and Tennessee—"that have faced this issue." *State v. Cubias*, 155 Wn. 2d 549, 555, 120 P.3d 929, 932 (2005). Thus, the *Cubias* court would view the split as 13-to-2, after Ohio and Oregon addressed the question.

Finally, the Hawaii Supreme Court has listed jurisdictions that "have aphoristically dismissed the proposition that either *Blakely* or *Apprendi* proscribes consecutive term sentencing" as including Alaska, Florida, Illinois, Minnesota, New Hampshire, New Jersey, and New York (along with Ohio, prior to that state's change in direction, and Washington). *State v. Kahapea*, 111 Haw. 267, 279-80, 141 P.3d 440, 452-53, *recons. den.*, 111 Haw. 316, 141 P.3d 489 (2006). With the changes in Ohio, Washington, and Oregon, the Hawaii court would consider the split to be 8-to-3.

The State is aware of no state appellate court that has taken as restrictive a view of the split as respondent takes, with the possible exception of Ohio (which labored under the misconception that its requirement for findings for consecutive sentences was unique and which predated some of the more significant decisions, *see* Pet. 25). The differences between the State's assessment of the extent of the split and respondent's can largely be explained by four considerations, none of which minimizes the nationwide significance of the question presented. First, respondent simply disregards states—Ohio and Washington, most notably—in which the legislative branch or judicial branch took steps to remedy the perceived constitutional violation at issue in this case. Br. in Opp. 8-9. Respondent has it backwards. That the Ohio Supreme Court annulled a legislatively-enacted policy and that the Washington legislature appears to have amended its consecutive-sentencing procedure based on what may be an incorrect reading of this Court's *Apprendi* and *Blakely* decisions is a prime reason why

review is warranted. This Court's review will clarify whether the federal constitution displaces the states' traditional authority to legislate in this area and mandates this kind of modification of legislative policy choices. In determining the extent of the split, the key point is that both Ohio and Washington had required findings to impose consecutive sentences and that appellate courts in both states issued holdings on the precise federal constitutional issue raised here. Those holdings squarely place Ohio and Washington in the category of states that have struggled with this recurring issue.

Somewhat similarly, respondent attempts to remove Indiana from consideration because that state amended its sentencing scheme in 2005 to ensure compliance with *Blakely*, by making sentences for individual offenses merely advisory. Br. in Opp. 6-7. But that amendment does not appear to have nullified the judicially-imposed requirement that a trial court must find at least one aggravating circumstance to impose a consecutive sentence. *See Page v. State*, 878 N.E. 2d 404 (Ind. App. 2007) (identifying requirement in post-amendment case). And the Indiana court clearly addressed the question presented in the petition in a manner contrary to the Oregon Supreme Court's holding. Pet. 20-21.

Second, respondent focuses on possible alternate bases for various state appellate court holdings while ignoring clear statements by those courts about how they construe the scope of *Apprendi* and *Blakely*. For example, respondent maintains that this Court should disregard the analysis of the Minnesota and

Colorado courts on this question because, according to respondent's construction of those states' laws, consecutive sentences were authorized without factfinding, thus rendering the courts' statements on this question unnecessary. Br. in Opp. 4-5, 7-8. Respondent's arguments appear to conflict with how the Minnesota and Colorado courts have construed their own state statutes. *See State v. Rannow*, 703 N.W. 2d 575, 578 (Minn. App. 2005); *Juhl v. State*, 172 P.3d 896 (Colo. 2007). But more importantly, respondent simply disregards the fact that the appellate courts in those states considered the question presented in this case and—contrary to the conclusion reached by the Oregon Supreme Court—read the rule from *Apprendi* and *Blakely* as applying only to sentences for individual offenses and not to aggregate-sentencing determinations. *See* Pet. 22, 23-24.

Third, respondent eliminates Alaska and Indiana from the mix because the factual findings in those jurisdictions were judicially, rather than statutorily, imposed. Br. in Opp. 5-7. But that distinction is insignificant for *Apprendi* and *Blakely* purposes. What matters is whether states require factual findings in order to make a sentencing determination—either a departure sentence or, as in this case, a consecutive sentence. And for purposes of the question presented here, the critical point is that the Alaska and Indiana appellate courts concluded that *Apprendi* and *Blakely* do not apply to the findings necessary for consecutive sentences, contrary to the Oregon Supreme Court's holding. Pet. 20-21, 22-23.

Finally, respondent simply removes Tennessee from consideration because the Tennessee Supreme Court has now granted review in cases raising this issue. Br. in Opp. 3 n. 2. But those grants of review do not eliminate Tennessee from the equation and—in the end—it is immaterial which side of the split the Tennessee Supreme Court falls on. It is enough to note simply that Tennessee requires findings to impose consecutive sentences, and that it has long wrestled with—and continues to wrestle with—the federal constitutional issue presented here. Pet. 21-22.

To be sure, there is some disagreement among the state courts about how best to characterize the extent of the split. The State in its petition took a conservative approach to categorizing the holdings of the various states on the question presented in the petition. But any disagreement about how to quantify the split cannot render the split insignificant or mask the need for this Court to clarify whether *Apprendi* and *Blakely* apply to consecutive sentencing.

Even if respondent were correct that the split on the question presented is somewhat smaller than the State described, this Court should grant the petition to address the uncertain and inconsistent application of the rules announced in *Apprendi* and *Blakely*. It is unquestioned that a split exists on this important question of federal constitutional law, and that the split is driven by differing views on whether this Court intended *Apprendi* and *Blakely* to apply to aggregate-sentencing determinations. Whether the split is 13-to-2, as some state appellate judges have construed it, or 7-to-3, as the State continues to assert, or

even 2-to-1, as respondent acknowledges, it is undisputed that state courts are applying this Court's Sixth Amendment caselaw inconsistently, based on uncertainty about what this Court intended. Even the more modest split that respondent acknowledges would warrant this Court's review, because it would mean—at a minimum—that the federal constitutional right to a jury trial is being applied more broadly in Oregon than in Maine and Illinois. This Court should grant review, should decide whether the *Apprendi* and *Blakely* rule is offense specific or applies to aggregate-sentencing determinations, and should thereby establish a uniform application of the federal constitutional right to a jury trial.

B. The question presented in this case has significant consequences and cannot be addressed through subsequent state-court litigation.

Respondent also asserts that the Oregon Supreme Court's holding on the question presented is "inconsequential" because it will apply in only a small percentage of the criminal proceedings in Oregon and because the State is attempting to limit the impact of that holding in litigation in other cases. Br. in Opp. 11-18. Neither argument is correct.

It should not be at all surprising that the State is now attempting in other cases to limit the impact of the Oregon Supreme Court's holding. As it stands, that holding has immense consequences not only for sentencing, but on pleading, settlement and other criminal litigation issues in Oregon. Contrary to respondent's assertion that this issue will arise in less

than five percent of the criminal cases in the state (Br. in Opp. 12), the reach is considerably greater. First, respondent incorrectly asserts that the rules announced in *Apprendi* and *Blakely* are limited to cases in which defendants have jury trials. Br. in Opp. 12. But given that the defendants in both *Apprendi* and *Blakely* had no jury trial and pled guilty, the error in respondent's assertion is plain. Rather, the rule applies and must be accounted for—in one way or another—in every single case involving a sentence enhancement: under *Apprendi* and *Blakely*, a defendant must either admit the enhancement fact or the state must prove the enhancement fact beyond a reasonable doubt to the trier of fact (which may be a judge if the defendant tenders the appropriate waiver).

It follows that, under the Oregon Supreme Court's decision, the state must comply with the *Apprendi* and *Blakely* requirements in all cases in which consecutive sentences are imposed. Under current Oregon law, as the Oregon Supreme Court made clear in this case, factual findings are necessary for the imposition of a consecutive sentence. The application of *Apprendi* and *Blakely* to the aggregate-sentencing determination means that in all cases in which consecutive sentences are contemplated, the defendant must have admitted the required fact, the jury must find the fact, or the defendant must have waived the jury-trial right and agreed to permit the trial judge to make the necessary factual determination. And the proof-beyond-a-reasonable-doubt standard attaches in all cases involving a finding to support a consecutive

sentence and applies at all trials, whether to the court or a jury. By no means can the impact of the decision fairly be characterized as "inconsequential" or "trifling."

The State's ongoing state-court efforts to narrow the impact of the Oregon Supreme Court decision are largely irrelevant for the question presented in the State's petition. On that question—whether the rule from *Apprendi* and *Blakely* extends to findings necessary to impose consecutive sentences—the State has no basis on which to challenge the core holding except to seek this Court's review and reversal of that holding. The additional arguments the State is making in other cases, and that respondent refers to (Br. in Opp. 14-18), all *start* from the basic holding that the Oregon Supreme Court articulated in this case—that the rules of *Apprendi* and *Blakely* apply to the factual findings required for consecutive sentences. The State did not make those additional arguments in this case (Br. in Opp. 14) because they would not apply to the specific circumstances of this case. Moreover, in these other cases that respondent refers to, the State has accepted the Oregon Supreme Court's construction of the state statute as requiring findings in order to impose consecutive sentences.

The State's efforts to soften the impact of the Oregon Supreme Court's holding primarily have focused on identifying the subset of cases in which the requisite findings can be deemed to be inherent in the verdict of guilt. The State's position that, under *Apprendi* and *Blakely*, the facts reflected by the jury's verdict sometimes may authorize consecutive sen-

tences is entirely unremarkable and expressly contemplated by this Court's caselaw. *See Blakely*, 542 U.S. at 303 (sentence may be based on facts reflected in the jury verdict).

Whether the State's efforts will ultimately prove successful in narrowing the impact of the Oregon Supreme Court's holding in this case is speculative at this point, is irrelevant to the question which the Oregon Supreme Court and other state appellate courts have addressed, and is not a basis for denying the petition. Two points about the ongoing litigation in other cases in the Oregon courts are worth emphasizing. First, that additional litigation will likely take years and many cases before the unanswered questions are resolved and the full impact of the Oregon Supreme Court's opinion in this case is known. All of that litigation is unnecessary and would be avoided if the Oregon Supreme Court's basic holding is reversed by this Court. Second, none of the State's arguments in these other cases is directed at the Oregon Supreme Court's core holding—that the rules announced in *Apprendi* and *Blakely* apply to the factual findings required for imposition of consecutive sentences. Whether that core holding is correct is the question presented in this petition and, on that question, nothing suggests that the Oregon Supreme Court will revisit its holding, in light of the thoughtful and extensive analysis that both the majority and the dissent articulated.

Nor should the fact that the Oregon Legislative Assembly might be able to adapt to the Oregon Supreme Court holding dissuade this Court from re-

viewing the question presented. Br. in Opp. 12. Again, if this Court determines that that holding is incorrect, the state legislature need not alter the state policy it has established for imposition of consecutive sentences. It should be required to take those steps only if the policy changes are truly required by the federal constitution.

C. Respondent largely ignores the State's argument that, aside from the split, this case presents an important question about the scope of this Court's decisions in *Apprendi* and *Blakely* that is deserving of review.

Finally, it is noteworthy that respondent disregards the importance of the federal constitutional question presented in this case. Even if no other state appellate court had addressed that question, this case would be appropriate for this Court's review for the reasons the State discussed at some length in the petition. Pet. 28-35. The Oregon Supreme Court's decision clearly presents the significant issue of how broadly this Court intended states to apply *Apprendi* and *Blakely*. The issue is one of national consequence with a significant impact on the policy choices available to states in handling aggregate-sentencing determinations. The Oregon Supreme Court produced two thoughtful and well-analyzed opinions that describe very different approaches and conclusions about the scope of the Sixth Amendment jury-trial right. Those opinions directly and clearly address the question presented in this case, they rely exclusively on considerations of federal constitutional law, and

they reflect no procedural impediments to this Court's review.

CONCLUSION

For the reasons set out in the petition and in this reply brief, this Court should grant the State's petition for writ of certiorari.

Respectfully submitted,
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