No. _____

IN THE

# Supreme Court of the United States

---

**STATE OF OREGON,**

**Petitioner,**

**v.**

**THOMAS EUGENE ICE,**

**Respondent.**

---

## PETITION FOR WRIT OF CERTIORARI

---

**Petition for Writ of Certiorari to the Oregon Supreme Court**

---

**HARDY MYERS**
**Attorney General of Oregon**
**PETER SHEPHERD**
**Deputy Attorney General**
***MARY H. WILLIAMS**
**Solicitor General**
**DOUGLAS PETRINA**
**Assistant Attorney General**
**1162 Court Street**
**Salem, Oregon 97301-4096**
**Phone: (503) 378-4402**
**Counsel for Petitioner**

***Counsel of Record**

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is violated by the imposition of consecutive sentences based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### Cases Cited

**Constitutional and Statutory Provisions**

## PETITION FOR WRIT OF CERTIORARI

---

The petitioner, State of Oregon, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court filed on October 11, 2007, and to resolve the significant split among state courts concerning the application of *Apprendi* and *Blakely* to factual findings required for imposition of consecutive sentences.

## OPINIONS BELOW

The Oregon Court of Appeals affirmed respondent's conviction and sentence without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

The Oregon Supreme Court reversed in a 5-2 decision. *State v. Ice*, 343 Or. 248, ___ P.3d ___ (2007). That decision is reprinted in the Appendix at App. 1 to App. 46.

## JURISDICTION

The Oregon Supreme Court filed its decision on October 11, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the state court's decision on a writ of certiorari.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

## STATE STATUTORY PROVISION INVOLVED

Or. Rev. Stat. § 137.123[1] provides for consecutive sentencing as follows:

> (1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the

---

[1] With the exception of some legally insignificant changes made in 2003 to correct a typographical error and to alter punctuation, Oregon Laws 2003, ch. 14, § 58, the version set out above is the version that applied to respondent.

same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.

(2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.

(3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.

(4) When a defendant has been found guilty of more than one crimi-

nal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a dif-

> ferent victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

## STATEMENT

After a jury trial, respondent was convicted of two counts of first-degree burglary and four counts of first-degree sexual abuse. The court sentenced him to a total of 340 months, with three of the sentences running consecutively. The Oregon Court of Appeals affirmed the judgment, without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001). The Oregon Supreme Court reversed and remanded for resentencing, holding that the sentencing court—by imposing consecutive sentences based on its own findings and not based on jury findings—violated respondent's rights under the Sixth Amendment, as construed by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). *State v. Ice*, 343 Or. 248, ___ P.3d ___ (2007).

### 1. The underlying facts and convictions

Respondent managed an apartment complex where the 11-year-old victim lived with her mother and her younger brother. App. 2. Respondent twice entered the family's apartment, entered the victim's bedroom, and touched her

breasts and then her vagina. *Id.* Respondent faced six charges. For each of the two incidents, the state charged respondent with first-degree burglary for entering the victim's apartment with the intent to commit sexual abuse, first-degree sexual abuse for touching the victim's breasts, and first-degree sexual abuse for touching the victim's vagina. App. 3. The jury convicted respondent of all six charges. *Id.*

**2. The sentencing proceeding**

Before sentencing, the parties submitted sentencing memoranda. The state sought consecutive sentences. App. 3-4. The state argued that the sentencing court should run the sentences for the two burglaries consecutively based on a finding that there were two separate criminal episodes. *See* Or. Rev. Stat. § 137.123(2). The state also argued that, within each of those two criminal episodes, the sentence for sexual abuse based on touching the victim's vagina should run consecutively to the sentence for burglary. *See* Or. Rev. Stat. § 137.123(4) and (5). The state recommended that the sentences for sexual abuse based on touching the victim's breasts should run concurrently with the sentences for sexual abuse based on touching the victim's vagina. App. 3-4. Respondent initially presented only a state constitutional argument concerning the necessity for a jury finding instead of a judicial finding on the

issue of the merger of the sexual abuse convictions within each episode. App. 4-5.

Between the time respondent presented his sentencing memorandum and the sentencing proceeding, this Court decided *Apprendi*. Respondent filed a supplemental memorandum bringing *Apprendi* to the sentencing court's attention and asserting broadly, "'[I]t is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute.'" App. 5.

At the sentencing hearing, the sentencing court rejected respondent's arguments and followed the state's sentencing recommendations. App. 5-6. Or. Rev. Stat. § 137.123 directs that multiple sentences be served concurrently unless the judge finds (1) that the offenses did not occur as part of the same course of conduct or (2) that, even if the offenses occurred as part of the same course of conduct, one offense was not incidental to the other or the two offenses resulted in separate harms. The sentencing court "found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of 'separate incident[s]' and, thus, did not 'arise from the same continuous and uninterrupted course of conduct.'" App. 12. (quoting Or. Rev. Stat. § 137.123(2)). That finding permitted the sentencing court "to order that the sentences arising out

of the second burglary run consecutively to the sentences arising out of the first burglary." *Id.*

The sentencing court also implicitly found "that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a 'continuous and uninterrupted course of conduct.'" App. 12 (quoting Or. Rev. Stat. § 137.123(4); footnote omitted). In order to impose consecutive sentences on the burglary and sexual abuse convictions, the sentencing court found that the convictions for burglary and sexual abuse reflected a "'willingness to commit more than one criminal offense'" and, alternatively, that the two offenses "'caused * * * greater or qualitatively different loss, injury or harm to the victim.'" App. 13 (quoting Or. Rev. Stat. § 137.123(5)(a) and (b)). Based on these factual findings, the sentencing court imposed consecutive sentences on the two burglary convictions, consecutive sentences on each conviction for sexual abuse based on touching the victim's vagina, and concurrent sentences for the remaining two sexual abuse convictions based on touching the victim's breasts. App. 7-8.

### 3. The Oregon Court of Appeals affirmed without opinion.

Respondent appealed and the Oregon Court of Appeals affirmed without a written opinion.[2] *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

### 4. The Oregon Supreme Court reversed, holding that the imposition of consecutive sentences violated respondent's Sixth Amendment rights.

Respondent petitioned for review in the Oregon Supreme Court. In a 5-2 decision, that court reversed and remanded for resentencing. On the consecutive-sentencing issue, the majority first addressed respondent's arguments under the state constitution. The court conducted a thorough review of its precedent and reaffirmed that the state constitutional jury-trial right applies only to "elements" of the crime. App. 13-21. Regardless of legislative labels, all "facts which con-

---

[2] The significant delay between the Oregon Court of Appeals opinion in 2001 and the Oregon Supreme Court opinion in 2007 was caused by the large number of cases in the state appellate courts presenting various issues related to *Apprendi* and *Blakely*. As lead cases were identified with issues to be resolved by those courts, other cases raising similar issues were held in abeyance.

stitute the crime"—that is, facts that pertain to the act to be punished—are "elements" for state constitutional jury-trial purposes and must be proved to the jury. *Id.* Other types of facts that lead to enhanced punishment, including "those that 'characterize the defendant,'" may be reserved for the sentencing judge. *Id.* Applying those principles to the question at hand, the Oregon Supreme Court held that consecutive-sentencing findings could not be deemed to be elements of the individual crimes. App. 21-23. Because those findings "involve a comparison between *two* crimes for which defendant is to be punished, none of the [findings] can reasonably be deemed to constitute an *element* of either crime." App. 22 (emphasis in original). Therefore, the sentencing court findings did not violate respondent's right to a jury trial under the Oregon Constitution. On this point, the majority and dissent agreed.

Turning to the federal constitution, however, the majority rejected the state's argument that the rule from *Apprendi* and *Blakely* is offense specific and is not intended to apply to the sequence in which discrete sentences for multiple crimes are to be served. In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." 530 U.S. at 490. In determining the scope of *Apprendi*, the Oregon Supreme Court focused on this Court's statement that "'the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict.'" App. 28 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added by Oregon Supreme Court). The Oregon Supreme Court concluded that that was the overarching principle to be gleaned from *Apprendi* and *Blakely*. The court then extended the application of those cases to *any* sentencing determination that results in a longer total sentence based on judicial factfinding, even aggregate sentencing determinations about how independent sentences are to be served. App. 28-30.

The Oregon Supreme Court held that the imposition of consecutive sentences based on judicial factfinding violates the Sixth Amendment as construed in *Apprendi* and *Blakely*. According to the majority, judicial factfinding as a prerequisite to a defendant serving multiple sentences consecutively "necessarily 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict,' *Apprendi*, 530 US at 494, based on judicial factfinding – and thereby violates the principles discussed in *Apprendi* and *Blakely*." App. 30 (footnote omitted).

The majority acknowledged that most other courts have construed *Apprendi* and *Blakely* as applying more narrowly to the sentence imposed on each separate conviction and not to sentencing in the aggregate. App. 30-31. But the majority disagreed with those decisions and, in doing so, clearly adopted a broad reading of this Court's precedent. "The *Apprendi*, *Blakely*, and [*United States v.*] *Booker*[, 543 U.S. 220 (2005),] decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage in an adamantine refusal to get the message." App. 31 (footnote omitted).

Where the majority discerned a broad underlying principle from this Court's cases, the dissent examined the specific problem this Court was addressing and concluded that this Court intended a more narrow focus. Writing for the dissent, Justice Kistler noted that in *Apprendi* and *Blakely*, "a trial court had enhanced a defendant's sentence for a single offense beyond the statutory maximum authorized for that offense based on a fact that the court had found during sentencing by a preponderance of the evidence." App. 35 (Kistler, J., dissenting). Justice Kistler determined that nothing in this Court's cases "answer[s] the separate question of how a trial court should aggregate multiple sentences when a jury has found a defendant guilty of multiple offenses." App. 37.

Justice Kistler stressed that this Court's broad references to punishment had to be read in context, while considering both the issues before the Court and the precise terms of this Court's holding. *Id.*

Justice Kistler identified the narrow issue before the *Apprendi* Court as the extent to which a legislature could avoid due-process requirements by redefining elements of crimes as sentencing factors that need not be determined by a jury beyond a reasonable doubt. App. 37-42. He traced this Court's response to that type of problem beginning with this Court's caselaw addressing affirmative defenses to crimes. App. 37-38 (discussing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977)). From there, he traced this Court's consideration of the issue into the realm of sentencing factors. App. 39-40 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). Those decisions resulted in adoption of an open-ended multi-factor test to distinguish true "elements" from "sentencing factors." As Justice Kistler noted, this Court changed course in *Apprendi* and adopted a bright-line rule to avoid the problems inherent in that multi-factor test. App. 40-42 and n. 3.

Based on its understanding of the problem that this Court addressed in *Apprendi* and

*Blakely*, the dissent adopted a much narrower reading of that precedent. "Far from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature's efforts to redefine the elements of a single offense will stay within constitutional bounds." App. 41-42. That rule would apply only to individual sentences, not to aggregate sentencing determinations such as whether those sentences should be served consecutively. Thus, the dissent would have resolved the question in this case in favor of the state.

## REASONS FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari and review this case for two reasons. First, the Oregon Supreme Court opinion deepens the significant split among the state courts that have considered this recurring issue of federal constitutional law. Unlike many decisions in this area, the Oregon Supreme Court opinion is thoroughly analyzed and clearly presents the conflict over the scope of this Court's precedent that underlies the split among state courts. This Court should grant review to resolve this split and establish a uniform application of the federal constitutional jury-trial right for all states.

Second, the Oregon Supreme Court's holding is an unwarranted extension of *Apprendi* and *Blakely* beyond what this Court's reasoning supports. This Court has explained the *Apprendi* rule as a non-subjective means for determining the elements of an offense. By extending the jury-trial requirement to establishing how otherwise-lawful sentences are served, the Oregon Supreme Court has gone well beyond the due-process concerns that require states to prove each element of an offense to a jury beyond a reasonable doubt. The Oregon Supreme Court untethered the *Apprendi* rule—a rule grounded in the jury-trial guarantee—from the focus on an individual "offense" and, instead, linked it broadly to a defendant's total punishment. This Court should grant review to clarify the scope of the *Apprendi* rule and whether it applies to aggregate punishment.

## I. State courts are deeply divided over the scope of *Apprendi* and *Blakely* and their application to consecutive sentencing.

The parting of ways between the majority and dissent in the Oregon Supreme Court opinion mirrors the split in other state courts that have addressed whether *Apprendi* and *Blakely* extend to findings that are necessary to impose consecutive sentences. The Oregon court's holding "deepens and confirms" the split on this recurring and significant issue of federal law. App. 44 (Kistler,

J., dissenting). There is at least a 7-3 split with state courts falling into two categories on whether *Apprendi* and *Blakely* apply to sentences in the aggregate.[3]

### A. The majority of state courts in which a factual finding is required for imposition of a consecutive sentence have construed *Apprendi* and *Blakely* narrowly to not apply to aggregate sentencing determinations.

The majority of state courts that have addressed the issue have concluded that the principles of *Apprendi* and *Blakely* do not apply to findings required for imposition of consecutive sentences. Illinois, Maine, Indiana, Tennessee, Minnesota, Alaska and Colorado provide the clearest

---

[3] For many other states, as well as the federal courts, the imposition of consecutive sentences does not require factfinding, so the question of the applicability of *Apprendi* and *Blakely* does not arise in the same manner. *See State v. Jacobs*, 644 N.W. 2d 695, 698-99 (Iowa 2001); *State v. Bramlett*, 273 Kan. 67, 41 P.3d 796, 797-98 (2002); *Gould v. State*, 2006 Wy 157, 151 P.3d 261, 267-68 (2006); *see also United States v. Booker*, 543 U.S. 220 (2005).

examples.[4] Each of those states, like Oregon, requires certain findings to impose consecutive sentences. Yet, each state's highest appellate court to have addressed the question concluded, unlike the Oregon Supreme Court, that this Court's cases were not intended to apply to aggregate sentences, but only to the individual sentence imposed for each separate conviction.

Illinois law, with some exceptions, requires concurrent sentences "unless, having regard to

---

[4] In addition to the seven states discussed in this section, several other states have grappled with the application of *Apprendi* and *Blakely* to consecutive sentences. Hawaii, New Jersey, New York and Texas have rejected consecutive-sentencing challenges under *Apprendi* and *Blakely*, although the precise reasoning is more difficult to discern and may be influenced, especially in Texas, by peculiarities of state sentencing law. *State v. Kahapea*, 111 Haw. 267, 141 P.3d 440, 447 n. 8, 451-53, *recons. den.*, 111 Haw. 316, 141 P.3d 489 (2006); *State v. Abdullah*, 184 N.J. 497, 878 A.2d 746, 755-57 (2005); *People v. Lloyd*, 23 A.D.3d 296, 297-98, 805 N.W.S.2d 20, *appeal den.*, 6 N.Y.3d 755, 843 N.E.2d 1163, 810 N.Y.S. 2d 423 (2005); *Barrow v. State*, 207 S.W.3d 377, 378-80 (Tex. Crim. App. 2006); *Alameda v. State*, 235 S.W.3d 218, 223-24 (Tex. Crim. App.), *cert. den.*, 169 L. Ed. 2d 406 (2007).

the nature and circumstances of the offense and the history and character of the defendant, [the court] is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant[.]" 730 I.L.C.S. 515-8-4(b). Notwithstanding that that finding is required, the Illinois Supreme Court determined "that *Apprendi* concerns are not implicated by consecutive sentencing. It is a settled rule in this state that sentences which run consecutively to each other are not transmuted thereby into a single sentence. Because consecutive sentences remain discrete, a determination that sentences are to be served consecutively cannot run afoul of *Apprendi*, which only addresses sentences for individual crimes." *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, 441-42, *cert. den. sub nom. Wagener v. Illinois*, 534 U.S. 1011 (2001) (citations and footnote omitted). The court "recognize[d] that *Apprendi* contains isolated statements which on their face might appear to support the conclusion that the jury must find beyond a reasonable doubt each and every fact which might have any real-world impact on the length of time the defendant might spend in prison." 752 N.E.2d at 442. Nevertheless, the court determined that "these statements cannot be taken out of context" and declined "to extend the decisions of [this] Court to arenas which it did not purport to address, which indeed it specifi-

cally disavowed addressing[.]" *Id.* *See also People v. Carney*, 196 Ill. 2d 518, 752 N.E.2d 1137, 1147 (2001) ("*McMillan*, as well as *Apprendi*, spoke in terms of exposing a defendant to a greater punishment than that authorized for the particular offense. Consecutive sentences do not expose a defendant to punishment exceeding the statutory maximum for each conviction.").[5]

Similarly, Maine requires sentencing judges to make certain findings to impose consecutive sentences. *See* 17-A M.R.S.A. § 1256(2) (delineating findings) and *State v. Commeau*, 2004 Me. 78, 852 A.2d 70, 75 (2004) ("in the absence of the required findings, supported by the record, sentences must run concurrently"). The Maine Supreme Court recently denied a defendant's *Apprendi* challenge to the imposition of consecutive sentences. *State v. Keene*, 2007 Me 84, 927 A.2d 398, *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007). The court concluded that "the principles underlying *Apprendi* do not apply to

---

[5] Although *Wagener* and *Carney* predate *Blakely*, an Illinois intermediate appellate court has subsequently held that *Blakely* does not change the analysis from the Illinois Supreme Court and has declined to require jury factfinding for consecutive sentences. *See People v. Tabb*, 374 Ill. App. 3d 680, 870 N.E.2d 914, 929, *appeal denied* 2007 Ill. LEXIS 1522 (2007).

consecutive sentences because a judge's decision on how two separate sentences for two distinct crimes shall be served is entirely different from the jury's determination of whether the elements of a crime, necessary for a particular sentence for that crime, have been committed." 927 A.2d at 408. "The [sentencing] court's decision to require that separate sentences be served consecutively in no way increases the penalties for the individual crimes." *Id.* at 407.

Indiana requires judicial factfinding not as a matter of statutory requirement, but as a judicially created requirement. The Indiana Supreme Court noted in *Smylie v. State*, 823 N.E.2d 679, 686 (Ind.), *cert. den. sub nom. Smylie v. Indiana*, 546 U.S. 976 (2005), that the state statutes "do not erect any target or presumption concerning concurrent or consecutive sentences." But the court also confirmed that a finding is required for imposition of consecutive sentences. *Smylie*, 823 N.E.2d at 686 ("an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator"; citations and footnote omitted); *id.* at 686 n. 8 ("Indiana's caselaw has developed to make an aggravating circumstance a requirement before a consecutive sentence may be imposed."). On the question of who must make the factual finding, the Indiana Supreme Court distinguished *Apprendi* and *Blakely* and concluded that "[t]here is no constitutional problem

with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums." *Id.* at 686.

Tennessee law requires the sentencing court to make factual findings by a preponderance of the evidence in order to impose consecutive sentences. T.C.A. § 40-35-115. Tennessee's intermediate appellate court consistently has held that the rule from *Apprendi* and *Blakely* does not apply to those findings. *See State v. Allen*, 2007 Tenn. Crim. App. LEXIS 506, *4-*9 (2007); *State v. Davis*, 2007 Tenn. Crim. App. LEXIS 580, *68-*69 (2007); *State v. Roberts*, 2004 Tenn. Crim. App. LEXIS 1049, *32-*36, *appeal den.*, 2005 Tenn. LEXIS 281 (2005). In doing so, the Tennessee appellate court has explained that "[t]he manner of service of the sentence imposed when a trial court decides whether to impose consecutive sentences—a decision it may make only after the jury has found the defendant guilty of multiple offenses beyond a reasonable doubt—does not usurp the jury's factfinding powers or offend the defendant's due process rights." *State v. Higgins*, 2007 Tenn. Crim. App. LEXIS 763, *42 (2007). "*Apprendi* and *Blakely* establish that the right to jury trial as embodied in the Sixth Amendment applies merely to the findings necessary to establish a defendant's guilt of a specific offense." *State v. Davis*, 2004 Tenn. Crim. App. LEXIS 1106, *31

(2004), *appeal den.*, 2005 Tenn. LEXIS 526 (2005).

In Minnesota, "[i]f a defendant is convicted of multiple current offenses, it is presumed that sentences for these offenses will be served concurrently." *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005). Consecutive sentences may be imposed based on a finding that the multiple offenses were for crimes against persons. *State v. Senske*, 692 N.W.2d 743, 746 (Minn. App.), *review denied* 2005 Minn. LEXIS 302 (2005). The Minnesota Court of Appeals has rejected *Apprendi* challenges to the imposition of consecutive sentences. The court has explained that "the holdings of *Blakely* and *Apprendi* are limited to the enhancement of a sentence for a single crime and do not extend to consecutive sentencing, which determines the relationship between two or more sentences separately imposed for different offenses." *Rannow*, 703 N.W. at 581. Because consecutive sentencing "involves separate punishments for discrete crimes[,]" there is no basis to apply *Apprendi* and *Blakely* to those determinations "any more than [they] would require a jury determination whether multiple sentences are permissible." *Senske*, 692 N.W.2d at 749.

In Alaska, "before a sentencing judge imposes consecutive sentences that total more than the maximum sentence for a defendant's most serious offense, the judge must expressly find that the

total sentence is necessary to protect the public." *Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005) (footnote omitted). The Alaska Court of Appeals rejected the argument that *Apprendi* and *Blakely* principles require a jury to make that finding. *Id.* at 361-63. The court explained that "[t]he facts that a jury finds are not essential to the lawful imposition of consecutive sentencing" and that "[w]hen a judge is sentencing a defendant on more than one conviction in a single judgment * * * the jury retains its power to find the facts underlying each count and underlying the 'statutory maximum' that a judge has authority to impose on any single count." *Id.* at 363.

Finally, in Colorado, a trial court has authority to impose consecutive sentences in some but not all cases, depending on the facts. *People v. Clifton*, 69 P.3d 81, 84 (Colo. App. 2001), *reaff'd in part*, 74 P.3d 519 (Colo. App. 2003). But a court is required to impose consecutive sentences when "[a] person [is] convicted of two or more separate crimes of violence arising out of the same incident." C.R.S. § 18-1.3-406(1)(a), formerly numbered C.R.S. § 16-11-309(1)(a). The Colorado Court of Appeals held that the rule from *Apprendi* did not extend to that determination. *Clifton*, 69 P.3d at 83-86. The court concluded that "the Supreme Court's concern in *Apprendi* was whether the sentencing court had, on the basis of facts found by the court and not the jury,

exceeded the sentence for a particular count." *Id.* at 85. The court held that the imposition of consecutive sentences did not violate *Apprendi* because "[w]hen defendant's sentence on each count is viewed separately, each sentence he received was less than the statutory maximum prescribed for the offense." *Id.* at 86; *see also People v. Lehmkuhl*, 117 P.3d 98, 106-08 (Colo. App. 2004), *cert. den. sub nom. Lehmkuhl v. People*, 2005 Colo. LEXIS 719 (2005), *cert. den.* 546 U.S. 1109 (2006) (following *Clifton* and reaching same result in post-*Blakely* case).

### B. Oregon now joins the minority of state courts which have broadly construed *Apprendi* and *Blakely* to apply to the factual determinations necessary for imposition of consecutive sentences.

Only two other state courts—the Ohio and Washington Supreme Courts—have reached the same conclusion as the Oregon Supreme Court on this issue. Under Ohio's statutes, consecutive sentences "may not be imposed except after additional factfinding by the judge." *Ohio v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio 856, 845 N.E.2d 470, *cert. den. sub nom. Foster v. Ohio*, 127 S. Ct. 442 (2006). The *Foster* court summarily announced, without any analysis, that "because the total punishment increases through consecutive sentences only after judicial findings beyond

those determined by a jury or stipulated to by a defendant, [the Ohio statute] violates principles announced in *Blakely*." 845 N.E.2d at 491.

In addition to the scarce analysis from the court, its holding appears to be based, in part, on the misapprehension that its statute and requirement for findings was unique. *See id.* ("[w]hile 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"; citations and footnote omitted). Yet Ohio's sentencing structure is not unique when compared with the other states in which appellate courts have considered and rejected the broad application of *Apprendi* and *Blakely* to consecutive sentences. Whether dictated by statute or judicial construction, each of the seven states discussed above—like Ohio—requires factfinding to impose a consecutive sentence. The different results in Ohio (and now Oregon) and other states cannot be explained away by any differences in state-law requirements for imposition of consecutive sentences. Instead, any differences are predicated on distinctly different readings of the scope of *Apprendi* and *Blakely*.[6]

---

[6] In *Foster*, the Ohio Supreme Court excised the requirement of a finding as a basis for impo-

Washington also has applied *Apprendi* and *Blakely* to sentences in the aggregate rather than limiting their application to each individual sentence. But the picture that emerges from that state is clouded. Indeed, the two lead Washington cases on the issue appear to be directly at odds with each other.

In *State v. Cubias*, 155 Wn. 2d 549, 120 P.3d 929 (2005), the Washington Supreme Court held that the imposition of consecutive sentences under Washington's consecutive-sentencing statute did not violate the principle set forth in *Apprendi* and *Blakely*. The consecutive sentences were based on a judicial finding that convictions for three counts involving three different victims arose out of "separate and distinct criminal conduct[.]" 120 P.3d at 930-31. The court determined that *Apprendi* and *Blakely* were not concerned with consecutive sentences, but only whether the sentence for a single count exceeded the statutory

---

sition of consecutive sentences. 845 N.E.2d at 497-98. Although sentencing courts in Ohio now have inherent authority to impose consecutive sentences, the Ohio Supreme Court felt compelled to rewrite a legislatively enacted policy based solely on its interpretation of federal constitutional law. Thus, the holding is significant even if it has minimal impact on defendants currently being sentenced in Ohio.

maximum, and the court rejected the challenge to the consecutive sentences. *Id.* at 931-33; *see also State v. Louis*, 155 Wn. 2d 563, 120 P.3d 936, 940 (2005) ("the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense").

Yet the Washington Supreme Court made the opposite determination for consecutive sentences imposed under a different portion of the statute, which requires courts to first find an aggravating factor. In *In re VanDelft*, 158 Wn. 2d 731, 147 P.3d 573, 578-79 (2006), *cert. den. sub nom. Washington v. VanDelft*, 127 S. Ct. 2876 (2007), the court held that *Apprendi* applied simply because a finding was required. The court distinguished *Cubias* as based on a portion of the sentencing statute that did not establish a presumption of concurrent sentences. *Id.*

The lead Washington cases are difficult to reconcile. Both statutory provisions require judicial fact-finding to impose consecutive sentences. As Justice Kistler noted in his dissent in this case, the statutes are "analytically identical" for *Apprendi* purposes with "[t]he only difference" being that the statute at issue in *VanDelft* posed the *Apprendi* issue "in a more obvious way." App. 45 n. 5. In any event, for purposes of this petition it is clear that at least some consecutive sentences

in Washington are subject to *Apprendi* and *Blakely*.

Oregon now joins Ohio and Washington as the only states to have determined that the principles announced in *Apprendi* and *Blakely* apply not only to the sentences imposed for individual offenses, but also to the aggregate sentence imposed through consecutive sentencing. This Court should grant the petition to resolve the uncertainty about the application of *Apprendi* and *Blakely* to consecutive sentencing and to establish a uniform application of the federal constitutional jury-trial right for all states.

## II. The Oregon Supreme Court's decision improperly expands *Apprendi* and *Blakely* to apply to all aspects of a defendant's total sentencing rather than limiting those cases to ensuring that a jury properly considers each element of a single offense.

The Oregon Supreme Court majority construed *Apprendi* and *Blakely* to stand broadly for the proposition that any fact that extends a defendant's sentence—even when viewed in the aggregate—must be determined by a jury. The dissent read those decisions as addressing only the more narrow concern that the state may not avoid proving elements of a crime by recharacterizing them as factors related solely to punish-

ment. As the dissent explains, the majority's conclusion "marks an abrupt departure from years of tradition[,]" and is "at odds with the holdings and reasoning of" this Court's cases by extending beyond the reach of the narrow question this Court addressed in *Apprendi* and *Blakely*. App. 33, 43.

As an initial matter, nothing in this Court's cases purports to address consecutive sentences or the aggregate punishment for multiple crimes. In both *Apprendi* and *Blakely*, this Court addressed a narrow question—the validity of an individual sentence that exceeded the statutory maximum for a single offense. In neither case, or any subsequent case, did this Court address whether *Apprendi* and *Blakely* apply only to the sentence imposed for a single offense or more broadly to aggregate sentences imposed for multiple offenses.

Indeed, the only discussion about consecutive sentences in *Apprendi* suggests that the *Apprendi* rule does not extend to that determination. The Court began by explaining that the narrow issue involved a particular sentence for a particular offense on a particular count and that the fact that the defendant's sentence fell within the authorized *aggregate* maximum was irrelevant. *Apprendi*, 530 U.S. at 474. The Court specifically set aside, as irrelevant to this narrow issue, the argument that a judge could have imposed a consecutive sentence on two other counts to reach

the same sentence imposed on the single count. *Id.* "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* The sentences on the other counts were not relevant to the issue before the Court. *Id.* Thus, in *Apprendi*, this Court did not even consider, let alone hold, that judicial factfinding for imposition of consecutive sentences violates the constitution. Similarly, in *Blakely*, the Court considered only the validity of an individual sentence imposed for a single offense. 542 U.S. at 298-99. Again, the Court noted that a sentence on a separate offense was not relevant to the issue before the Court. *Id.* at 299 n. 2.

While it remains possible that the Court's narrow focus on the individual sentences rather than the aggregate sentences reflected merely the specific facts of the cases before it, as the Oregon Supreme Court majority presumed, other aspects of the cases strongly suggest otherwise. *Apprendi* is predicated on a defendant's right to have a jury find, beyond a reasonable doubt, the elements of an offense (*i.e.*, the facts that are "necessary to constitute a statutory offense"). *See Apprendi*, 530 U.S. at 476-78, 483-84 (identifying those as underlying constitutional principles); *see also United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("[t]he Constitution gives a criminal defendant

the right to demand that a jury find him guilty of all the elements of the crime with which he is charged"); *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). And, as this Court explained in *Booker*, the *Apprendi* rule was a response to "a new trend in the legislative regulation of sentencing" that shifted from indeterminate sentencing to defined sentences with enhancements based on the finding of additional "sentencing factors." *Booker*, 543 U.S. at 236-37.

*Apprendi* protected the jury-trial right by providing a legal framework to determine whether a fact that state law ostensibly describes as a "sentencing factor" is more accurately characterized as an element of the underlying offense. Under *Apprendi*, the legislature is deemed to have created the functional equivalent of a "greater" offense, with an additional element, when it provides that a factual finding made at sentencing authorizes a punishment in excess of the statutory maximum that would otherwise be available for the offense. *Apprendi*, 530 U.S. at 494, n. 19. Short of that, the legislature is free to create "sentencing factors" that affect a defendant's sentence *within* the statutory maximum, and those factors need not be submitted to the jury or

proven beyond a reasonable doubt. *Harris v. United States*, 536 U.S. 545, 549-50 (2002).

The Oregon Supreme Court wrongly extrapolated broad principles from *Apprendi* and *Blakely* that go beyond this Court's concern with the required proof for each element of a particular offense. As Justice Kistler explained in dissent, "the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature's effort to redefine the elements of a single offense will stay within constitutional bounds." App. 41-42. That narrower focus is discernible from the very rule itself: "[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." *Apprendi*, 530 U.S. at 490 (emphasis added). That is, the proper focus is on the elements of (and punishment for) the individual crime.

Consecutive sentences do not increase penalties for the individual offenses and do not increase the stigma associated with the individual convictions. *See Apprendi*, 530 U.S. at 484, 495 (noting both "the loss of liberty and the stigma attaching to the offense" as concerns underlying procedural protections in criminal prosecutions). Nor do consecutive sentences transform the individual offenses into greater offenses or create additional elements that implicate a defendant's

right to have a jury find, beyond a reasonable doubt, all of the elements of the offense. The judicial determination that there should be no "free crime" and that an offender should be punished for each crime of conviction neither alters the maximum penalty for any of the crimes committed nor creates a separate offense calling for an additional penalty. Nothing in the history of the common law or the Sixth Amendment prohibits a judge from deciding that multiple sentences should be served in a way that imposes meaningful punishment for each crime of conviction and nothing suggests that those decisions intrude on the jury's role.

The Oregon Supreme Court majority's expansive reading of the *Apprendi* rule also creates considerable tension with this Court's non-*Apprendi* Sixth Amendment precedent. On a different Sixth Amendment issue, this Court held that "[t]he Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, *and its scope does not change where a defendant faces a potential aggregate prison term* in excess of six months for petty offenses charged." *Lewis v. United States*, 518 U.S. 322, 323-24 (1996) (emphasis added). In *Lewis*, this Court addressed the distinction for Sixth Amendment purposes between "serious" offenses, to which the Sixth Amendment right to a jury trial attaches, and "petty" offenses, to which it does not. *Id.* at

325. A maximum prison term greater than six months indicates that the legislature considered the offense serious and, therefore, the Sixth Amendment right to a jury trial attaches. *Id.* at 326. The Court held that, to determine whether the right to a jury trial attaches when a defendant is charged with multiple offenses, a court must look to the maximum penalty for each of the individual offenses, rather than the aggregate maximum. *Id.* at 323-30. The Court specifically rejected the notion that the aggregate penalties could transform petty offenses into serious offenses: "The fact that petitioner was charged with two counts of a petty offense * * * [does not] transform the petty offense into a serious one." *Id.* at 327.

If the Sixth Amendment right to a jury trial at the front end of the criminal justice proceeding is limited to individual offenses and not to the aggregate, the scope should be limited in the same manner at the back end of the process. If the aggregate maximum punishment is immaterial for determining whether the Sixth Amendment right attaches at the front end, it should also be immaterial at sentencing under the principles announced in *Apprendi* and *Blakely*. The Oregon Supreme Court majority's opinion appears at odds with this Court's holding in *Lewis* and offers no basis for distinguishing the scope of the Sixth

Amendment's jury-trial guarantee in the two substantially similar legal contexts.

This Court should grant the petition to address the scope of *Apprendi* and *Blakely* and the apparent inconsistencies between the Oregon Supreme Court's decision and this Court's Sixth Amendment precedent.

## III. This case provides an excellent vehicle to resolve this unsettled question about whether the Sixth Amendment jury-trial right applies to aggregate sentencing determinations.

This Court's landmark decisions in *Apprendi* and *Blakely* have had a profound impact on sentencing practices throughout this country and have resulted in waves of litigation and new legislation. The meaning and scope of *Apprendi* have been among the most pressing issues in criminal law in recent years. Many of the questions have been resolved, but it is clear that the issue presented in this petition—one that has created at least a 7-3 split among state courts—can be settled only by this Court.

The importance of this issue can be seen in courtrooms daily. Consecutive sentencing is one of the crucial tools used to impose meaningful punishment for each separate conviction where warranted. Traditionally, that determination has been made by the sentencing court. In the major-

ity of states that have considered the issue, the sentencing court retains that traditional authority. But Oregon judges have now lost their traditional role in this critical area because of uncertainty about the scope of the Sixth Amendment jury-trial guarantee addressed by this Court in *Apprendi* and *Blakely*. And the policy choice implemented through the Oregon legislative process—like the choice made in Ohio and Washington—has been struck down based on an uncertain reading of this Court's precedent.

This case provides an excellent vehicle for resolving this important and recurring question of the scope of the Sixth Amendment jury-trial guarantee and its application to consecutive sentencing. The question was squarely raised in the Oregon Supreme Court and the issues were well-briefed on both sides. As the Oregon court made clear, there are no procedural impediments to this Court's review of the issue. The claim was adequately preserved in the trial court and properly presented in the state appellate courts. The Oregon Supreme Court considered—and rejected—the possibility that the question could be resolved on state statutory or state constitutional grounds. The majority and dissenting opinions are well-analyzed and mirror the fundamental split that has divided state appellate courts on this issue.

This Court has rejected petitions raising this issue in other cases. But in some of those cases, the issue had not been presented to the state sentencing court or other procedural impediments may have limited the Court's ability to resolve the question. Until the Oregon Supreme Court decision, the split among the state courts was not well-defined because the Ohio Supreme Court had "fixed" the problem by excising some of the statutory requirements for factfinding and because the Washington caselaw was confusing. Now, the split is sufficiently developed and warrants this Court's review at this time.

The issue presented in this petition is pending before this Court in *Black v. California*, 07-6140 (petition filed August 24, 2007; brief in opposition filed December 10, 2007; scheduled for consideration at this Court's conference on January 11, 2008). As California has argued in its brief in opposition, that state does not require judicial factfinding as a prerequisite to the imposition of consecutive sentences. If California's contention is correct, the issue that has divided the state courts is not squarely presented in *Black*.[7] In ad-

---

[7] If California's contention is not correct, then the split on this issue is at least 8-3, with one of the largest states taking the opposite view of *Apprendi* and *Blakely* than did the Oregon Supreme Court. *See People v. Black*, 41 Cal. 4th 799, 62 Cal.

dition, there are other potential barriers to the Court's reaching this issue in that case. If, however, this Court grants Black's petition for a writ of certiorari, it should grant review in this case and consolidate the two.[8] This case presents the better vehicle for deciding this important question under the Sixth and Fourteenth Amendments as construed in *Apprendi* and *Blakely*, and granting the petition in this case will ensure that no "vehicle" problems prevent this Court from reaching this significant issue.

## CONCLUSION

This Court should grant the petition for a writ of certiorari in order to clarify the scope of *Apprendi* and *Blakely*, and to clarify whether the Sixth Amendment jury-trial guarantee applies to

---

Rptr. 3d 569, 161 P.3d 1130, 1144-45 (2007). In *Black*, the California Supreme Court rejected the defendant's argument that *Apprendi* and *Blakely* require a jury determination of facts to support imposition of consecutive sentences. Even if the California court's holding is based, in part, on the discretionary nature of the state's sentencing law, it is clear that the court takes a narrower view of the scope of *Apprendi* and *Blakely* than the Oregon Supreme Court took in this case.

[8] Alternatively, this Court could hold this case until it decides *Black*.

sentencing in the aggregate or is limited to ensuring jury consideration of the elements of a single offense.

Respectfully submitted,
HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
DOUGLAS PETRINA
Assistant Attorney General
Counsel for Petitioner

January 4, 2008