

NO. 81393-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT L. VANCE,

Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
08 AUG 11 AM 7:56
BY RONALD R. CARPENTER
CLERK

SUPPLEMENTAL PETITION FOR REVIEW

JANICE E. ELLIS
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Petitioner

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 APR 30 2 30
BY RONALD R. CARPENTER
CLERK

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER..... 1

II. SUPPLEMENTAL ISSUE 1

III. STATEMENT OF THE CASE 1

IV. SUPPLEMENTAL ARGUMENT 1

SINCE THE U.S. SUPREME COURT HAS NOW AGREED TO
CONSIDER WHETHER BLAKELY REQUIREMENTS APPLY TO
THE IMPOSITION OF EXCEPTIONAL SENTENCES, THIS
COURT SHOULD ACCEPT REVIEW OF THAT ISSUE..... 1

V. CONCLUSION..... 4

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re VanDelft</u> , 158 Wn.2d 731, 147 P.3d 573 (2006), <u>cert. denied</u> , 127 S. Ct. 2876 (2007).....	2
<u>State v. Cubias</u> , 155 Wn.2d 549, 120 P.3d 929 (2005).....	2

FEDERAL CASES

<u>Apprendi v New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	1, 2
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	1, 2

OTHER CASES

<u>People v. Lehmkuhl</u> , 117 P.3d 98 (Colo. App. 2004), <u>cert. denied</u> , 546 U.S. 1109 (2006).....	2
<u>People v. Tabb</u> , 374 Ill. App. 3d 680, 870 N.E.2d 914, <u>appeal</u> <u>denied</u> , 225 Ill. 2d 670, 875 N.E.2d 1122 (2007).....	2
<u>Smylie v. State</u> , 823 N.E.2d 679, 686 (Ind.), <u>cert. denied</u> , 546 U.S. 976 (2005)	2
<u>State v. Foster</u> , 109 Ohio. St. 3d 1, 845 N.E.2d 470, <u>cert. denied</u> , 127 S. Ct. 442 (2006).....	2
<u>State v. Ice</u> , 343 Ore. 248, 170 P.3d 1049 (2007), <u>cert. granted</u> , 128 S. Ct. 1657 (2008).....	2
<u>State v. Keene</u> , 2007 Me. 84, 927 A.2d 398, <u>cert. denied</u> , 128 S. Ct. 490 (2007)	2
<u>State v. Senske</u> , 692 N.W.2d 743 (Minn. App. 2005).....	2

U.S. CONSTITUTIONAL PROVISIONS

Sixth Amendment.....	2
----------------------	---

COURT RULES

RAP 13.4(b)(3).....	3
RAP 13.4(b)(4).....	3

I. IDENTITY OF PETITIONER

The State of Washington, seeks review of the additional issue designated in part II.

II. SUPPLEMENTAL ISSUE

Do the requirements of Apprendi and Blakely govern a sentencing courts decision whether sentences on multiple counts will be consecutive or concurrent?

III. STATEMENT OF THE CASE

The facts are set out in the petition for review.

IV. SUPPLEMENTAL ARGUMENT

SINCE THE U.S. SUPREME COURT HAS NOW AGREED TO CONSIDER WHETHER BLAKELY REQUIREMENTS APPLY TO THE IMPOSITION OF EXCEPTIONAL SENTENCES, THIS COURT SHOULD ACCEPT REVIEW OF THAT ISSUE.

The trial court in this case imposed a standard-range sentence on each separate count. The sentences were exceptional only because they were made consecutive. Thus case thus raises the issue whether the imposition of consecutive sentences requires jury findings under Apprendi v New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

This issue has split courts across the country. In the present case, the Court of Appeals reached conflicting decisions. It initially

held that jury findings are not required, applying the reasoning of State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005). Following remand from this court, the Court of Appeals held that jury findings are required under In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), cert. denied, 127 S. Ct. 2876 (2007).

Other jurisdictions have likewise grappled with this issue. A majority of courts have held that jury findings are not required. State v. Keene, 2007 Me. 84, 927 A.2d 398, cert. denied, 128 S. Ct. 490 (2007); People v. Tabb, 374 Ill. App. 3d 680, 696-97, 870 N.E.2d 914, appeal denied, 225 Ill. 2d 670, 875 N.E.2d 1122 (2007); People v. Lehmkuhl, 117 P.3d 98, 107 (Colo. App. 2004), cert. denied, 546 U.S. 1109 (2006); Smylie v. State, 823 N.E.2d 679, 686 (Ind.), cert. denied, 546 U.S. 976 (2005); State v. Senske, 692 N.W.2d 743 (Minn. App. 2005). Two courts have agreed with this court's holding that jury findings are required. State v. Foster, 109 Ohio. St. 3d 1, 21-22, 845 N.E.2d 470, cert. denied, 127 S. Ct. 442 (2006); State v. Ice, 343 Ore. 248, 262-67, 170 P.3d 1049 (2007), cert. granted, 128 S. Ct. 1657 (2008).

In Ice, the Supreme Court granted review of the following issue: "Whether the Sixth Amendment, as construed in [Apprendi] and [Blakely], requires that facts (other than prior convictions)

necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.” Oregon v. Ice, U.S. Supreme Court no. 07-901¹. Argument is set for October 15, 2008.

All of the issues in the present case stem from the premise that under Federal law, jury findings are required to impose consecutive sentences. The premise may not be accurate. This court should be willing to re-examine it in light of the U.S. Supreme Court’s grant of review. This is a significant question of law under the Constitution of the United States. It is also an issue of substantial public interest that should be determined by this court. Review should be granted under RAP 13.4(b)(3) and (4).

¹ The court’s docket can be viewed at <http://origin.www.supremecourtus.gov/docket/07-901.htm>.

V. CONCLUSION

For these reasons, as well as those set out in the Petition for Review, this court should grant review, reverse the Court of Appeals, and reinstate the exceptional sentence.

Respectfully submitted on August 8, 2008.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: *Seth A. Fine*
SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Petitioner