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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-2039**

Krishawn Andrew Harris, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed August 12, 2008  
Affirmed  
Huspeni, Judge\***

Hennepin County District Court  
File No. 27-CR-98-066209

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Minge, Presiding Judge; Huspeni, Judge; and Muehlberg, Judge.\*\*

## UNPUBLISHED OPINION

**HUSPENI**, Judge

Appellant challenges the denial of postconviction relief, arguing that *Blakely v. Washington* should be applied retroactively to his 1998 sentence, which was not appealed. Because appellant's case was no longer pending on direct review when *Blakely* was decided, and *Blakely* is also inapplicable to appellant's postconviction collateral attack, we affirm.

## FACTS

On November 18, 1998, appellant Krishaun Harris was sentenced to two consecutive 408-month prison terms resulting from two convictions of second-degree murder. The 408-month sentence imposed on each conviction represented an upward durational departure based on the district court's findings that Harris's offenses had been committed with particular cruelty and against multiple victims.<sup>1</sup> Harris did not appeal.

In July 2007, Harris sought postconviction relief based on the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The district court denied Harris's petition, concluding that *Blakely* does not

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\*\* Retired judge of the district court, serving by appointment pursuant to Minn. Const. art. VI, § 10.

<sup>1</sup> Because these sentences were for Harris's multiple current murder convictions, imposing them consecutive to one another was not a departure from the guidelines in effect at the time. See Minn. Sent. Guidelines II.F. (1998) (authorizing permissive consecutive sentences for multiple current felony convictions of crimes against persons).

apply retroactively to Harris's collateral attack on his sentence by means of a postconviction petition. This appeal followed.

## DECISION

Harris challenges his sentence as violating the rule announced in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We agree that if *Blakely* applies to Harris's sentence, reversal is required. The rule announced in *Blakely* prohibits upward departures based on judicial fact-finding, *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005) (applying *Blakely* to Minnesota Sentencing Guidelines), and Harris's sentence represents an upward departure based on the district court's findings. *Blakely* was decided almost six years after Harris was sentenced. We must, therefore, first determine whether it applies retroactively to Harris's sentence. This presents a question of law, which we review de novo. *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005).

Our review of the record convinces us that there is no merit in Harris's argument. Because *Blakely* announced a new rule of federal constitutional criminal procedure, it applies retroactively only to cases pending on direct review when it was decided. *State v. Losh*, 721 N.W.2d 886, 893 (Minn. 2006). A case is pending on direct review until "the availability of direct appeal has been exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari with the United States Supreme Court has been filed and finally denied." *Id.* (quotation omitted). Harris was sentenced on November 18, 1998, and did not appeal. Consequently, his case was no longer pending on direct review by early 1999. See Minn. R. Crim. P. 28.05, subd. 1(1) (providing 90-day window to

appeal sentence). The district court correctly determined that *Blakely* does not apply retroactively to this matter.

**Affirmed.**