No. 06-1081

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM R. VANDELFT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, State of Washington, files this reply to address several claims in the new points raised in Van-Delft's Brief in Opposition (hereinafter BIO).

First, respondent seriously misstates the record when he asserts that the Washington Supreme Court issued a Mandate instead of a Certificate of Finality in this case. The Washington Supreme Court did issue a Certificate of Finality on January 2, 2007. *See* App. 1-2. There is no Mandate in this case. The Certificate of Finality was the appropriate document to issue at the conclusion of this Personal Restraint Petition proceeding. *See* Washington Rules of Appellate Procedure 16.15(e)(2) [App. 3]. The state court issued the appropriate order.

Second, respondent claims that because the judgment of the Washington Supreme Court required a remand to the trial court for a new sentencing proceeding the case is not final. He is mistaken; the ruling of the Washington Supreme Court which petitioner challenges is final. In fact, the Certificate of Finality says just that. *See* Washington Rules of Appellate Procedure 16.15(e). App. 3. ["A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end."] The judgment of the Washington Supreme Court is final.

The fact that the Washington Supreme Court's decision requires a new sentencing proceeding does not make the ruling less final. The legal question at issue is whether sentencing error occurred at all. The Washington Supreme Court's decision on that legal question will not change on resentencing. This case is in the exact same procedural

posture as this Court faced when it accepted review in *Washington v. Recuenco*, ___ U.S. ___, 165 L. Ed. 2d 466, 126 S. Ct. 2546 (2006). There, as here, the Washington Supreme Court had ordered a remand for resentencing. *State v. Recuenco*, 154 Wn.2d 156, 164, 110 P.3d 188, 192 (2005). There, as here, this Court should review the significant federal question presented.

Respondent cites *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*), for the assertion that a judgment is not final for purposes of 28 U.S.C. §1257(a) whenever a state court returns a case to a lower court. He reads that case too broadly, in a manner that would essentially preclude the government from ever seeking review in a criminal case that was remanded for a new trial. This Court has noted that the purpose of the finality rule is to preclude review of interlocutory rulings. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81-82 (1997). Where further proceedings are anticipated in a lower court, there are four circumstances under which a decision is still final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Two of those circumstances apply here. First, review of a state court ruling is appropriate where the federal issue is "conclusive" or the outcome of the case is "preordained." *Id*. at 480. That exception squarely applies here because the Washington Supreme Court remanded this case "for resentencing on count 1 concurrent with the other counts." Petition, App. 12. The outcome – a concurrent instead of consecutive sentence – is "preordained". *Cox Broadcasting* also recognized that review is appropriate where reversal of the state court ruling would preclude further litigation. 420 U.S. at 482-483. That also would be the situation here. Respondent's entire argument was predicated on *Blakely v. Washington*, 542 U.S. 296 (2004), and the claim that

Blakely requires a jury fact finding to impose a consecutive sentence. The Washington Supreme Court accepted that argument. Thus, there would be nothing more to litigate on the *Blakely* claim if this Court reverses that decision. The federal question is the only legal question in this case, and resolution of that issue ends the litigation. Review is permissible under §1257(a).

Third, respondent argues that because of "unique" state laws, many of the cases cited in the Petition are not truly in conflict with the Washington ruling. This argument, too, is flawed. Although sentencing codes vary by jurisdiction, the core issue is whether *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require a jury finding to impose a consecutive sentence on multiple counts. As argued in the Petition the vast majority of courts have held that a separate jury finding is not required by *Apprendi* and *Blakely* because the jury has already authorized multiple punishments by returning multiple verdicts. The conflict arises from varying interpretations of *Apprendi* and *Blakely*, not from differences in codes. This Court can resolve the conflict by granting *certiorari* in this case.

Finally, respondent misleadingly suggests that changes in Washington sentencing law apply to his case. He notes that, "If VanDelft were sentenced for the first time today," he might be subject to the 2005 amendments to Washington's Sentencing Reform Act. BIO at 27. Of course, VanDelft cannot now be sentenced "for the first time" because he has already been sentenced. More importantly, the Washington Supreme Court has recently ruled that the 2005 legislative amendments do not apply to persons such as VanDelft whose trials occurred before the

law took effect. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

Whether *Apprendi* and *Blakely* require a separate jury finding when a defendant has already been found guilty of multiple offenses is a question of import and confusion across this country. Respondent's argument that states have changed their codes to address those rulings simply underscores the significance of the problem. It is not a reason to deny review.

CONCLUSION

The ordering of consecutive sentences does not fall within the scope of *Apprendi v. New Jersey* and *Blakely v. Washington*. This Court should grant review to answer the important federal question presented concerning the scope of those cases and to resolve conflicts among the state courts. Rule 10(b) and (c).

Respectfully submitted,

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THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint Petition of WILLIAM RAYMOND VANDELFT, Petitioner.	**CERTIFICATE OF FINALITY** NO. 77733-1 C/A No. 23788-5-III Spokane County No. 01-1-02317-0 (Filed Jan. 2, 2007)

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the Opinion of the Supreme Court of the State of Washington filed on November 30, 2006, became final in the above entitled cause on December 20, 2006. This cause is returned to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No costs bills having been timely filed costs are deemed waived.

[SEAL]

I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 2nd day of January, 2007.

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Clerk of the Supreme Court
State of Washington

cc: Sheryl Gordon McCloud
Steven J. Tucker
Andrew J. Metts
William Raymond Vandelft
Reporter of Decisions

WASHINGTON RULES OF APPELLATE PROCEDURE

16.15(e) Certificate of Finality. A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end.

(1) * * *

(2) When Certificate of Finality is Issued by the Supreme Court. The clerk of the Supreme Court issues the certificate of finality twenty days after the written opinion or order disposing of the petition is filed unless a motion for reconsideration of the decision is filed. If a motion for reconsideration is timely filed, the certificate of finality shall issue upon the entry of an order denying the motion for reconsideration.