NO. 37576-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

DINO J. CONSTANCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert A. Lewis, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by denying the appellant's CrR 3.6 motion to suppress evidence seized pursuant to an order authorizing electronic interception and recording of the appellant's private conversation.

Issue Pertaining to Assignment of Error

Did the trial court erroneously authorize police to intercept and record telephone conversations between the appellant and a police informant under RCW 9.73.130 where the officers applying for permission to record failed to show other normal investigative procedures reasonably appeared unlikely to succeed if tried or too dangerous to employ?

B. STATEMENT OF THE CASE

1. Procedural Facts

The state charged the appellant, Dino J. Constance, with three counts of solicitation to commit first degree (premeditated) murder -- domestic violence and one count of solicitation to commit second degree assault -- domestic violence. CP 5-7. The target of the purported murder was Constance's wife Jean Koncos, the mother of Constance's son. CP 5-7, RP 8-9.[1] The solicitees were Michael Spry and his son, Jordan Spry,

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[1] The sequentially paginated 10-volume verbatim report of proceedings, which includes one volume from the earlier dissolution proceedings held April 10, 2007, is collectively referred to as "RP."

Ricci Castellanos, and Zach Brown (assault). CP 5-7. A Clark County jury found Constance guilty as charged. CP 200-203. The trial judge imposed a 640-year prison term, running each standard range murder solicitation consecutively. CP 210-15; RP 840-41.

2. Substantive Facts

Jean Koncos married Constance in December 2004. They had a son who was three and one-half years old at the time of trial. Koncos filed for dissolution in March 2006 and the related proceedings, including a custody dispute, were contentious. RP 352-53. At some point, Koncos and Constance obtained mutual restraining orders. RP 675. Alleged violations of the orders resulted in numerous police complaints by both parties. CP 89-138 (Ex. 5 attached to Constance's Motion to Suppress Recorded Conversations).

a. Counts one and two -- the Sprys

Spry and his son, Jordan, met Constance when he moved into the Sprys' rented home as a roommate in January 2007. RP 356-58, 375, 409-10, 425.[2] The three remained roommates until the end of March 2007. RP 375. Constance divulged to the Sprys he was involved in a difficult

[2] Constance refers to the elder Spry by his surname and the son Jordan as "Jordan."

and frustrating divorce and custody proceeding against his wife, Jean Koncos and involving their son. RP 360-61, 410-11.

Constance asked Jordan to make an appointment with Koncos, a masseuse who worked out of her home, learn things about Koncos and their son, and see if she would perform sexual favors for a fee. RP 361-64. After initially agreeing to Constance's plan, Jordan called for appointments several times and decided not to get involved several times, thus canceling appointments. RP 364-67, 381-84. He did, however, obtain some information Constance wanted in phone conversations with Koncos and kept the money Constance paid him for the jobs. RP 381-85.

Around February, Jordan called Koncos and revealed his identity as Constance's roommate. RP 367-69, 387-88, 667-68. By this point his relationship with Constance had significantly deteriorated. RP 368-69.

Constance repeatedly said he wanted to pay someone, including either Spry, $5,000 to beat up Koncos and another $5,000 to kill her. RP 370-73, 386-87, 419-20, 440-44. Both Sprys took Constance's offers seriously, but Jordan played them off as jokes. RP 370-73, 387, 420, 450-52.

Nevertheless, Jordan contacted Koncos around the end of February 2007 and warned her to stop seeing clients. RP 373-74, 387-89. He also

advised her to call the police but did not do so himself because he did not want to get too deeply involved. RP 371-72.

Toward the end of March 2007, Spry agreed to fly to California and drive back with a truck full of Constance's belongings for $1,500. RP 375-77, 413-15, 427, 429, 437. Constance refused to pay Spry the $1,500 because of a dispute about where the property was to be delivered. RP 376, 429, 437-38.

Jordan called a police officer to assist with the dispute. RP 389, 437-38, 716-17. Jordan said nothing about Constance's alleged threats against Koncos because "[t]hat's not my issue." RP 390.

Spry also did not report Constance's threats against Koncos to the responding officer. RP 438, 718. Instead he claimed he called Koncos while he was in California to "reinforce" the warning Jordan had given her earlier. RP 439-40, 450.

Spry sued Constance for the money and Koncos served Spry with the complaint. RP 429. This was after the Sprys had moved out of the home and were no longer roommates with Constance. RP 429-30. It was about this time Jordan agreed to testify for Koncos and against Constance

in the pending child custody proceeding. RP 372-74, 377. Spry also testified at that hearing in April 2007. RP 431.[3]

Jordan admitted leaving about three messages to Constance about April 1, 2007, telling him he would "disappear" and not testify for Koncos in the custody matter if Constance paid the money he owed to Jordan's father. RP 377-78, 393-95. Jordan said his father told him to "fix" the problem to get the money Constance owed for the California trip. RP 393, 398.

But Jordan said his messages were in response to Constance's written statement, left in the rental truck Spry drove back from California, indicating if he (Jordan) signed an affidavit saying he would not testify against Constance in the custody hearing, or say anything against him, he would pay the dept to Spry. RP 399-401. Jordan also said he was responding to Constance's email messages to Spry about threatening to sue the Sprys. RP 401-02. Recordings of each of the three voice messages from Jordan to Constance were played to the jury. RP 396-98; Ex. 2.

Koncos recalled the phone call from Spry, who told her he was driving Constance's belongings from California to Washington. RP 668-69.

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[3] *See* RP 11-12 (Spry), 81-82, 84-86 (testimony regarding Constance's threats against Koncos in dissolution hearing).

Koncos said Spry said nothing to her about Constance's alleged plot to have her killed. 670-71.

Contrary to Jordan's testimony, Koncos said it was about that time, near the end of March 2007, that Jordan told her about Constance's death threats. RP 669-70. Koncos was in California at the time and called the police. RP 670-72.

b. Count four -- Zachary Brown

For several days at the end of March 2007, Constance shared a "pod" in the Clarke County Jail with about 30 inmates, one of whom for about three days was Zachary Brown. RP 533-34, 544, 562. Constance approached Brown in a common area without ever having spoken at length with him before. RP 535-37, 546. Brown said he was not sure if he told Constance he was serving time for violating a domestic violence no-contact order. RP 549, 554-55.

Constance offered Brown a "one-time job:" schedule an appointment with his son's mother, disguise himself, and "beat her up, rob her, bust her teeth out, make her bleed, and then leave." RP 538. Constance explained his son's mother had cost him a lot of money in custody and child support expenses. RP 547-48. Constance said he would pay $500 before and another $500 upon completion of the task. RP 538. To collect the

second $500, Brown was to call Constance from a pay phone only. RP 538-39.

Brown said Constance was serious, open and persistent about getting the job done despite not even knowing his name, never divulging the identity of Koncos, and knowing Brown was not to be released until May 20, 2007. RP 541-43, 548-49.

Brown claimed he agreed but actually had no intention of assaulting Koncos. RP 539-40, 548. He noticed Constance had been "scamming" other inmates by cheating them out of food. RP 539-40, 546-47. So Brown decided he was going to scam Constance. RP 548. He told Constance if he was serious about the assault, he could show his good faith by putting money on Brown's "books," which could then be withdrawn to buy things from the jail commissary. RP 539-41, 552-53, 555. Constance responded several days later by putting $25 on Brown's "books." RP 541, 548, 572.

Constance was released from jail several days later. RP 548, 562. Brown never heard from him again, despite calling him on the day Constance left jail. RP 549. Brown never told the jailers about Constance's offer. RP 550. He did not want his name involved in the matter. RP 551.

More than one month later, Brown saw on television Constance was back in custody because of the solicitation. RP 550-52. The next day police confronted Brown with proof Constance put money on his books. RP 552, 577-79. Police were aware of this payment because Constance had told them in an interview after his arrest. RP 574-75, 579. Brown then told them about Constance's offer. RP 557, 573.

c. Count three -- Ricci Castellanos

Constance was booked again into the Clark County Jail on April 13, 2007 and released April 16. RP 562-63. Constance was in a cell with Roy Bradley one day and Ricci Castellanos the next. RP 563. All three spent time together in the intake area during booking. RP 564.

Bradley testified he spent about four or five hours with Constance and a third inmate. RP 589-91, 594. During that time Constance asked him if he knew anyone who could "do away with" his wife. RP 592, 595. Constance complained about what his wife had taken and went "on and on and on." RP 594-95. Constance also spoke with the third man about the same subject. RP 592-93.

Bradley did not pay much attention to the conversation. RP 593. He recalled mention of $500 to pay someone else to harm Constance's wife.

RP 595. Bradley did not take the conversation seriously; he considered it as Constance "blowing off steam." RP 596.

The third man in the intake room was Castellanos, who was more helpful to the prosecution than the other alleged solicitees. RP 473-74. He spent about 26 hours with Constance in the intake cell over two days. RP 474-75.

Castellanos also testified Constance asked both he and Bradley if they knew anyone who would kill his wife for money. RP 475-76, 494. Constance wanted custody of his son. RP 482. Castellanos thought Constance was "nuts," so he said he could do the killing for $15,000. RP 476-77, 494-95. Bradley indicated he wanted nothing to do with the matter. RP 477. Constance rejected Castellanos price and countered with a $5,000 offer. RP 477-78, 495-99.

Constance and Castellanos were scheduled to be released from jail about the same day. RP 479-80. Constance created "code names" for himself and for Castellanos to be used during telephone conversations, all of which were to be initiated by Castellanos on pay phones because the calls would be more difficult to trace. RP 479-82.

Constance went through a variety of ideas as to how Koncos would be killed. RP 482-85, 496, 505-07. During the planning, the price was

reduced from $5,000 to $3,000. RP 483-85. Finally, Castellanos suggested he inject heroin into the back of Koncos's neck during a massage to make it look like an overdose. RP 485, 501, 512-13. Castellanos testified he had "died" from heroin a dozen times, only to be revived by paramedics each time. RP 513. Constance liked the idea and the two exchanged phone numbers. RP 485, 503-04, 507. Castellanos was not actually interested in doing the job. RP 495.

Castellanos sent a note to jail guards the same day Constance expressed a desire to have his wife killed. CP 73; RP 485-86. The notes made their way to Detective John O'Mara, who recorded an interview with Castellanos. CP 79-88; RP 486, 565-66, 572, 574. Castellanos said he told O'Mara what he and Constance discussed. RP 486. O'Mara returned Castellanos to his cell. Castellanos then noted everything he could about things Constance said about killing his wife and mailed the notes to O'Mara. CP 75-77; RP 486.

Castellanos volunteered to wear a recording wire even though the officers did not originally suggest such a plan. CP 77; RP 504. In exchange for his cooperation, Castellanos wanted his work crew days removed from his punishment. CP 77; RP 505.

Constance was released from jail April 16, 2007, and Castellanos was released about one week later. RP 510-11, 562-63. Castellanos maintained contact with police and agreed with O'Mara and Detective John Hess to participate in recorded phone calls with Constance. RP 487. Hess was to play the role of a "hit man." RP 455, 462. Hess also set up the equipment to record the conversations between Constance and Castellanos, which occurred at area pay phones. RP 455-59.

Castellanos called Constance three times from different pay phones between his release and May 1. CP 141; RP 512. By the time he made the third call, the officers were "coaching" Castellanos through the communications procedure. RP 512.

Castellanos first called Constance while accompanied by O'Mara and Hess on May 1, according to plan, from a pay phone. CP 142-43; RP 456, 487-91. Those calls revealed little of substance. RP 459-61, 487-91. Castellanos called Constance, again with O'Mara and Hess, on May 7. RP 461-67, 491-92. The record implicitly indicates Constance implicated himself in the solicitation plot during the fourth and final call on May 7.

RP 488-92. All four recorded conversations were played to the jury. RP 487-92; Ex. 1.[4]

Castellanos admitted on cross examination that while riding in an elevator during trial two days earlier he told a friend he was a witness and was going to put Constance in prison. RP 713-14.

d. Motion to suppress

Constance filed a motion to suppress the recorded telephone conversations with Castellanos. CP 35-45 (motion and brief in support). Constance maintained the police applications for permission to intercept the private conversations were inadequate in two ways. First, the police failed to comply with RCW 9.73.130(3)(f), which requires "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]" CP 40-43, RP 229-32, 234-39.[5] Second, the recordings exceeded the scope

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[4] Appellate counsel has not heard a copy of the tapes; however, the record indicates Constance incriminated himself during the fourth call. Counsel has designated Exhibit 1 for transfer to this Court.

[5] RCW 9.73.130(3), part of what has become known as Washington's one-party consent privacy act, authorizes a trial court to permit police to record private conversations upon an application requiring a "particular statement of the facts" relied on by the officer to support a belief an authorization should be issued, including:

(continued...)

of the order authorizing the interception and recording of the private conversations. CP 43, RP 240-42.

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[5](...continued)

> (a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;
>
> (b) The details as to the particular offense that has been, is being, or is about to be committed;
>
> (c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;
>
> (d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;
>
> (e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
>
> (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]

The police filed two applications for authority to record, one dated April 20, 2007, CP 58-70, and another dated May 1, which requested an extension of time to record private conversations based on a change of plans. CP 49-54; RP 236.[6]

In the pertinent part of the original, more detailed application, the applicant, Vancouver Detective Bryan, Acee stated Constance was a suspect in five separate domestic violence assaults in the previous three years, violated a restraining order against Koncos 11 times during the same time period, had been arrested 16 times in Washington, Oregon and Colorado, and had been convicted of first degree criminal mischief "(x2)," violation of a domestic violence protection order, prostitution, disorderly conduct and driving under the influence. CP 63.

The stated plan was to have Castellanos meet with Constance and notify him Detective Hess was a "hit man" from Seattle and would kill Koncos for $5,000. CP 63, 65. Hess might then speak with Constance on the phone to arrange a meeting to discuss the specific means by which the murder would occur. CP 63-64. Any conversation between Constance and Hess and/or Constance and Castellanos would be audio recorded and any meetings videotaped as well. CP 64-66.

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[6] The applications are attached as an appendix.

Normal investigative techniques, according to applicant Acee, would be unlikely to succeed if tried or would be too dangerous to try. CP 67. Arresting Constance and having him confess to intending to hire a hit man to kill Koncos was unlikely and even if he did, that alone might not support a prosecution for first degree solicitation and criminal conspiracy. CP 67.

Further, Constance "demonstrated a propensity toward violence," as detailed in the police reports attached to the application.[7] Indeed, Acee went so far as to describe Constance as an "habitual domestic violence offender and violent ex-con," as well as an "elusive criminal who has been engaged in criminal activity for quite some time." CP 68.

Constant electronic surveillance was therefore necessary to monitor Hess's safety because he would not always be "in close proximity to close cover protection teams." CP 68. More generally, "the inherent danger of undercover work" made recording essential. CP 68.

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[7] Acee attached 16 police reports alleging various violations of a mutual no-contact order and other incidents between Koncos and Constance. CP 89-138. He also attached recording from "Judge Rulli's courtroom," which apparently was the sworn testimony of the Sprys at the dissolution hearing and which is included in the record on appeal at RP at 7-142, a one-page report of Clark County Jail Classifications Officer Schubach stating Castellanos said Constance told him and his cell mate he wanted to hire someone to kill his wife, three pages of Castellanos's handwritten notes capturing Constance's in-cell statements, and the transcript of a recorded interview between officers and Castellanos. CP 71-88.

Acee also explained a recording of all conversations would help rebut any defense entrapment claim. CP 68.

In addition, recording would provide additional corroboration to Castellanos's testimony, necessary because Castellanos had convictions for second degree theft in 1992 and 1996, a 2000 forgery conviction, and a 2004 conviction for second degree possession of stolen property. CP 62, 67-68.

Based on this application and attachments, the trial court ordered authorization to intercept and record communications between Constance, Castellanos and/or Hess between April 20, 2007 and April 27, 2007. CP 56-57. Specifically, the court found "[n]ormal investigative techniques reasonably appear to be unlikely to succeed if tried and reasonably appear to be too dangerous to employ[.]" CP 144-45.

Acee's plans, however, went awry and Det. O'Mara submitted a supplemental application for an extension of time to record dated May 1, 2007. CP 139-43. According to O'Mara, Castellanos failed to follow the original plan and called Constance April 20. CP 141. Constance told Castellanos he wanted to wait two Thursdays to arrange the "hit" because of complications caused by the Sprys' April 10 testimony at the dissolution hearing detailing Constance's threats to have Koncos killed. CP 141-42.

Officers decided to follow Constance's direction to wait, fearing an earlier phone call might cause suspicion Castellanos was working for the police. CP 142-43. In all other respects, O'Mara incorporated Acee's representations from the first application. CP 140.

For the same reasons set forth in the original authorization, the trial court ordered authorization of this extension and permitted recording from May 1, 2007 to May 8, 2007. CP 47-48.

C. ARGUMENT

THE INTERCEPTION ORDER VIOLATED THE PRIVACY ACT BECAUSE THE APPLICATION FAILED TO SHOW THAT THE RECORDINGS WERE NECESSARY.

1. Summary of argument

Washington's privacy statute places a high value on the privacy of communications. *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Unlike similar statutes in 38 other states, our provision "tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." *Christensen*, 102 P.3d at 795.

Among other requirements, police can record a conversation without the consent of all concerned parties only after articulating a particular statement of facts showing how other investigative techniques have been

tried and have failed or that normal investigative techniques reasonably appear to be unlikely to succeed, or that they would be too dangerous to use in the contemplated situation. RCW 9.73.130(3)(f).

The trial court authorized the recording of Constance's conversations with Castellanos after concluding "[n]ormal investigative techniques reasonably appear to be unlikely to succeed if tried and reasonably appear to be too dangerous to employ." CP 47-48. The court erred because the application failed to establish a standard investigation would likely be unsuccessful and too dangerous to try.

2. *The police failed to show standard investigation would unlikely be successful and too dangerous to try.*

Statements that do no more than support the "truism" that presenting a recording at trial benefits the state in obtaining a conviction are not sufficient to obtain authorization to record private conversations under RCW 9.73. *State v. Porter*, 98 Wn. App. 631, 636, 990 P.2d 460 (1999), *review denied*, 140 Wn.2d 1024 (2000) (*quoting State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162, *review denied*, 130 Wn.2d 1010 (1996)).

Indeed, police must first "seriously consider other techniques, and the authorizing court must be informed of the reasons the alternatives have been or likely will be inadequate." *State v. Knight*, 54 Wn. App. 143, 150, 772 P.2d 1042, *review denied*, 113 Wn.2d 1014 (1989). The Legislature

clearly did not intend that electronic recordings by police be the first investigative step whenever such recordings appear convenient or helpful.

The applications in this case violate these principles for several reasons, as illustrated by comparing them to the application in *Manning*. In the application for authorize to record the conversations a suspected cocaine distributor Fred Manning, a King County detective outlined information provided from a confidential informant and described the proposed plan for the investigation. *Manning*, 81 Wn. App. at 715-17. A district court judge approved the application, and police recorded several conversations in which Manning discussing buying cocaine. *Manning*, 81 Wn. App. at 717. Manning moved to suppress the evidence, contending the recordings were obtained in violation of RCW 9.73. The trial court denied the motion and convicted Manning of possession of cocaine with intent to distribute. *Manning*, 81 Wn. App. at 717.

Among other reasons noted in the application and relied on by the state in Manning's appeal were that interception and recording would (1) avert one-on-one swearing matches as to who said what; (2) provide irrefutable evidence of the defendant's criminal intent; (3) minimize factual confusion; (4) rebut the defense of entrapment; and (5) provide the most reliable evidence of conversations, since there was no better evidence of

criminal intent than the actual spoken words. *Manning*, 81 Wn. App. at 720.

The *Manning* court observed the "justifications . . . appear to have become boilerplate in applications under the Privacy Act" and added that "[b]oilerplate is antithetical to the statute's particularity requirement set forth in RCW 9.73.130(f)." *Manning*, 81 Wn. App. at 720. The court emphasized that sanctioning recording based on an application that "contains nothing more than general boilerplate declarations of the type set forth above would undermine the restrictive intent of the statute." *Manning*, 81 Wn. App. at 720-21.

Acee's application in Constance's case was based on the same general boilerplate, albeit in slightly different form. First, rather than using the "one-on-one swearing match" language, Acee noted "[a] recording of statements between Castellanos and Constance will be the best way to verify Castellanos['s] statements," especially in light of Castellanos impeachable character due to prior felony convictions. CP 67-68.

Second, Acee asserted interception of the conversations "would be critical to a later evaluation of who made which statements and the knowledge and intentional participation of the suspect[.]" This is akin to

the statements condemned in *Manning* that recording would provide the best evidence of criminal intent and minimize factual confusion.

Third, as in *Manning*, Acee asserted capturing Constance's voice on tape would be helpful in defeating a claim of entrapment. CP 68.

Fourth, because Hess was the undercover "hit man," he would be unable to take notes during conversations with Constance and would therefore have to rely on the recordings to "later clearly provide evidence of the suspects statements and willing participation in the criminal scheme." CP 68. This is no different than representing that the recordings would provide the most reliable evidence of conversations, i.e., "boilerplate," according to the *Manning* court.

These features of Acee's applications alone render them insufficient to meet the stringent specificity requirements of RCW 9.73.130(3)(f). But here there are additional reasons to reverse the trial court's authorizations.

Importantly, Acee's own attachments belie his characterizations of Constance as "violent" and an "active and elusive criminal." CP 67-68. Of the 16 police reports attached to Constance's suppression motion, in none did Koncos require medical assistance from any assaultive behavior of Constance. Nor was Constance ever reported to be armed.

In the first report, dated April 1, 2004, Koncos was considered the primary aggressor. An April 5, 2004 report noted Koncos said Constance pushed her against the refrigerator. Constance returned, denied pushing Koncos, and was permitted to leave without being arrested. CP 93-95. Other incidents involved telephone calls and emails to Koncos, which may have been technical violations of a mutual no-contact order but contained no threats. Two reports detailed minor complaints, one by Koncos and one by Constance, that required no further action.

An August 25, 2004 report detailed conflicting accounts of assaults by both Koncos and Constance that led the reporting officer to refer the matter to the prosecutor for assault charges against either Koncos or Constance, with Koncos characterized as the primary aggressor. CP 96-101.

In the report of an August 5, 2005 incident, Koncos walked into Constance's residence and took some of her belongings, thus violating the terms of the no-contact order. CP 119-21. The reporting officer checked several addresses for Koncos, did not find her, and forwarded the report to the city attorney for review for a warrant. CP 121.

Koncos was arrested after one incident in April 2005 for violating the no-contact order by leaving a note to Constance with their son's daycare provider. CP 150-52.

Constance did appear to be the wrongdoer in a February 16, 2006, incident. The report stated he attempted to take their young son from Koncos and assaulted Koncos in the process. CP 105-06. The reporting officer arrested him. CP 106.

These reports and the police knowledge of Constance's prior convictions hardly paint the picture of a "violent, active and elusive criminal."

Finally, while undercover work is, as explained by Acee, inherently dangerous, CP 68, this justification is nothing more than the type of "truism" condemned in *Porter* and *Manning* and thus does not support Acee's bald conclusion "it is essential that the conversations be monitored." CP 68. As this Court is well aware, undercover police activities, often using the cooperation of a superficially unreliable confidential informant, are one of those undesirable yet often necessary tasks police officers must perform. The Legislature and courts have made clear, however, that authorization to record private conversations must be earned only upon a

particularized showing of need, not by the use of boilerpate, truisms, sweeping generalities and misrepresentations.

Acee's justifications reflect a single-minded desire to obtain the "best" possible and "most effective" evidence of the crime under investigation. Such a showing cannot suffice, because the fact that electronic recordings provide better, or even uncontroverted, evidence of criminal activity is irrelevant to the statutory inquiry: the likely inadequacy of normal investigative techniques. *See Porter*, 98 Wn. App. at 636 (that having a recording to play at trial is more advantageous to the state is an insufficient justification to invade a suspect's privacy).

If the showing in this case is deemed legally sufficient, the protections of RCW 9.73.130(3)(f) will be eviscerated. No longer will officers actually need to try or even consider using other investigative methods; since electronic eavesdropping is better or best, it can always be obtained, and, therefore, it becomes the norm. This is a result that the Legislature, in enacting this statute, surely could not have intended.

Constance anticipates the state may rely on several cases that predate *Porter* and *Manning* to contend the trial court properly authorized recording here. But the cases are distinguishable. In *State v. Cisneros*,[8] the court

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[8] 63 Wn. App. 724, 821 P.2d 1262, *review denied*, 119 Wn.2d 1002 (1992).

relied on *State v. Platz*[9] and upheld an interception authorization in part because recording was necessary to avoid "a one-on-one swearing contest." *Cisneros*, 63 Wn. App. at 729-30. But in *Platz*, police were investigating a suspected murder that had gone unsolved for more than nine months despite the use of other investigative techniques. *Platz*, 33 Wn. App. at 350. *See Manning*, 81 Wn. App. at 721 (noting these distinctions in *Platz*).

Moreover, contrary to the plan in Constance's case, in *Cisneros* it was not possible for police to employ an undercover officer. *Cisneros*, 63 Wn. App. at 726, 729 (Cisneros told informant that he would neither meet nor talk with anyone he did not know, and would not deliver cocaine himself); *see also State v. Irwin*, 43 Wn. App. 553, 556-57, 718 P.2d 826 (authorization to intercept conversations between suspected drug dealers and confidential informant properly based in part on dealers' refusal to introduction of other parties), *review denied*, 106 Wn.2d 1009 (1986). Finally, the *Cisneros* court warned its "decision should not be interpreted as permitting intercept orders where normal investigative techniques would suffice." *Cisneros*, 63 Wn. App. at 731.

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[9] 33 Wn. App. 345, 655 P.2d 710 (1982), *review denied*, 99 Wn.2d 1012 (1983).

Here the trial court erred by finding the police made an adequate showing normal investigative techniques reasonably appeared to be unlikely to succeed if tried and too dangerous to try.

3. The error was not harmless.

Failure to suppress evidence obtained in violation of the privacy act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the jury's verdict. *Christensen*, 153 Wn.2d at 200. The erroneous admission of the recordings in Constance's case was not harmless.

The primary evidentiary source to support count three was Castellanos's testimony. Unlike the Sprys, Castellanos did not contact Koncos and caution her of Constance's alleged plan. Neither Hess nor O'Mara nor any other officer heard the substance of Constance's alleged offer. Like most jailhouse "snitches," Castellanos was motivated by self-interest: a desire to exchange his cooperation for the removal of his work crew days. Indeed, Castellanos jumped at the chance to use Constance's alleged offer for his own gain, going so far as to come up with the plan to kill Koncos. And he initiated contact with Constance once both were out of jail. RP 459-62.

Constance was no naïve newcomer to the criminal justice system. He acknowledged his convictions for two different incidents of second degree theft, a conviction for forgery, and a conviction for second degree possession of stolen property. RP 645-46. Each is a crime involving moral turpitude, thus casting further doubt on Castellanos's credibility. *See State v. Gregor*, 11 Wn. App. 95, 100, 521 P.2d 960 (credit card theft), *review denied*, 84 Wn.2d 1005 (1974); *State v. Thrift*, 4 Wn. App. 192, 196-197, 480 P.2d 222 (1971) (forgery); *State v. McKinsey*, 116 Wn.2d 911, 913-914, 810 P.2d 907 (1991) (possession of stolen property).

Finally, there was no physical evidence of the crime alleged, such as a written agreement between Constance and Castellanos or a cash transaction. Constance acknowledges cellmate Roy Bradley overheard part of the initial conversation between Constance and Castellanos, but Bradley said he did not pay much attention and did not think Constance actually intended to solicit anyone to harm his wife. RP 595-96. Bradley also admitted he had convictions for burglary and forgery. RP 596.

In determining whether a privacy act violation constitutes harmless error, a reviewing court may weigh the relative credibility of those witnesses who implicate a defendant in a crime. *See Christensen*, 153 Wn.2d at 200 (erroneous admission of mother's testimony that derived from

her illegal interception of her daughter's telephone conversation prejudicial because mother "was likely the most credible of those witnesses who testified" about defendant's alleged criminal involvement). The admission of the illegally intercepted telephone conversations between Constance and Castellanos bolstered the otherwise dubious testimony of Castellanos and Bradley.

Finally, jurors are presumed to follow instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The trial court instructed Constance's jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 176. This court must therefore assume jurors did not consider the evidence in support of counts one, two and four to strengthen the evidence supporting count three.

For these reasons, it is reasonably probable the erroneous admission of the recordings materially affected the trial's outcome and was thus prejudicial. Failure to comply with RCW 9.73.130(3) requires exclusion of the evidence illegally recorded. *Porter*, 98 Wn. App. at 638. This Court should therefore reverse count three and remand Constance's case for a new trial absent admission of Exhibit 1, the recorded conversations between Constance and Castellanos.

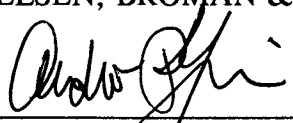
D. CONCLUSION

The trial court violated Constance's privacy act rights by authorizing the interception and recording of telephone conversations with Castellanos because the police did not make the requisite showing that other normal investigative procedures reasonably appeared unlikely to succeed if tried or to be too dangerous to employ. The admission of the recording was prejudicial. Constance respectfully requests this Court reverse the trial courts denial of his motion to suppress illegally intercepted evidence and remand count three for a new trial.

DATED this 27 day of February, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051

Attorneys for Appellant

APPENDIX

STATE OF WASHINGTON
SUPERIOR COURT OF CLARK COUNTY

IN THE MATTER OF AUTHORIZATION TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS PURSUANT TO RCW 9.73.090	)	No. APPLICATION FOR AUTHORITY TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

I, Detective Bryan Acee, being first duly sworn on oath, depose and say:

I have been a law enforcement officer for ten years and am employed as a police detective with the Vancouver Police Department. I am currently assigned to the interagency Career Criminal Apprehension Team, hereafter referred to as CCAT. CCAT is a task force that works to identify and target for prosecution violent fugitives, repeat offenders, high-risk parolee and probation offenders, and felons who have committed criminal acts within the Southwest Washington area. CCAT is comprised of detectives from the Vancouver Police Department, Clark County Sheriff's Office, Washington State Department of Corrections and United States Marshals Service. Over the past ten years, I have received training in the use of communication intercepts, body wires, audio and video surveillance and electronic tracking. I am familiar with the practical application and utilization of numerous types of electronic surveillance equipment and have received on the job training and experience with such equipment. I have successfully operated a variety of electronic surveillance equipment under field conditions in the past. The Vancouver Police Department and Clark County Sheriff's Office possess various electronic instruments that may capture audio and video transmission and recordings and they will be utilized for this case. I have been authorized by Vancouver Police Investigations Commander Scott Bieber to make this application. I make this application by authority of RCW 9.73.090.

Detective Bryan Acee
C-CAT Task Force
Vancouver Police Dept.
P.O. Box 1995
Vancouver, WA 98668-1995

BASIS FOR FACTS CONTAINED IN THIS APPLICATION:

I make this application, in part, based on personal knowledge derived from my participation in this investigation and, in part, based upon information from the following sources:

- Oral and written reports about this investigation, which I have reviewed;
- A review of available documentation concerning the named defendant;
- Summaries of conversations I've had with other peace officers concerning the defendant;
- Summaries of conversations with family and associates of the named defendant;
- Training I have received concerning violent crimes and electronic surveillance; and
- Statements of cooperating individuals

Except as otherwise noted, the information set forth in this affidavit has been provided to me by detectives with the Clark County Sheriff's Office Major Crimes Unit (CCSO/MCU), the interagency Career Criminal Apprehension Team (CCAT) and/or the Clark-Skamania Drug Task Force (DTF). Unless otherwise noted, whenever in this affidavit I assert that a statement was made, the information was provided by another law enforcement officer (who may have had either direct or hearsay knowledge of the statement) to whom I have spoken or whose report I have read and reviewed.

STATEMENT OF PROBABLE CAUSE:

There is probable cause to believe that Dino CONSTANCE has committed, and will further commit, the felony crime of Criminal Solicitation to commit Murder in the First Degree, in violation of RCW 9A.28.030/RCW 9A.28.040, and Criminal Conspiracy, in violation of RCW 9A.28.040, and that interception and recording of the communications or conversations of CONSTANCE should be authorized for the following reasons:

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(a) Background:

On April 10, 2007, Michael K. SPRY and Jordan P. SPRY gave sworn testimony under oath in Clark County Superior Court Judge James Rulli's courtroom as witnesses, regarding their observations in an on-going domestic violence and family non-support dispute between Dino CONSTANCE and Jean KONCOS. Michael SPRY and Jordan SPRY (father/son) testified independently that they were former roommates of CONSTANCE and that CONSTANCE had offered to pay them $10,000 dollars to kill his ex-wife, Jean KONCOS. The testimony in that matter was recorded as part of the video and audio record in the courtroom. I have personally viewed the video testimony and observed the statements made therein. A CD copy of the video testimony has been attached hereto and incorporated as **Exhibit No. 1.**

On April 13, 2007, CONSTANCE was arrested and incarcerated in the Clark County jail for family non-support violations. He was housed in the reception pod of the jail. CONSTANCE's jail cell was located in pod number G-2 and his cellmates at the time were Ricci Dewayne CASTELLANOS and Roy Leon BRADLEY.

On April 14, 2007, at approximately 1300 hours, Clark County Sheriff Custody Officer Barbara SCHUBACH interviewed jail inmate Ricci CASTELLANOS as part of a routine classification interview. Inmates housed in the reception pod are interviewed before being housed in the general population. During the interview, CASTELLANOS related his cellmate, Dino CONSTANCE, had solicited him to murder his ex-wife. CASTELLANOS said CONSTANCE offered him five thousand dollars to murder his ex-wife. CASTELLANOS reported CONSTANCE was upset with his ex-wife over some missing money and the fact that his ex-wife had primary custody of their two and a half year old son. CASTELLANOS did not request consideration, favoritism, transfer, or otherwise during the interview with Deputy SCHBACH. CASTELLANOS said he would continue to converse with CONSTANCE and try to gain additional intelligence. At the conclusion of the interview, Custody Officer SCHUBACH summoned CCSO detectives to the jail for further investigation. Officer SCHUBACH then completed a detailed report of her interview with CASTELLANOS. Officer SCHUBACH completed a one page report on her interview with CONSTANCE and it has been attached hereto and incorporated as **Exhibit No. 2.** Meanwhile, CASTELLANOS returned to his cell and wrote a three-page statement detailing his conversation with CONSTANCE. CASTELLANOS pretended to be writing to his girlfriend, as CONSTANCE was still in the cell with him. CATELLANOS' note abruptly ended when he was

summoned to a ruse medical visit (at which time he would actually meet with CCSO detectives). CASTELLANOS' three page note has been attached hereto and incorporated as **Exhibit No. 3.**

On April 14, 2007, at approximately 1700 hours, CASTELLANOS was escorted from his cell by custody staff as part of a ruse in which CASTELLANOS was to report to the jail medical facility. CCSO Major Crimes Unit Detectives John O'Mara and Eric O'Dell met with CASTELLANOS in a secure area within the jail. Detectives O'Mara and O'Dell conducted a detailed, tape recorded, interview of CASTELLANOS regarding his conversation with CONSTANCE. During the interview, CASTELLANOS said CONSTANCE had stated, "I need someone to kill my ex." CASTELLANOS indicated to CONSTANCE that he could have her killed, but it would cost him about fifteen thousand dollars. CONSTANCE then negotiated the price down to three to five thousand dollars. CASTELLANOS said he would accept the lesser amount. CASTELLANOS said CONSTANCE questioned him about who would commit the murder and by what means they would do it. CONSTANCE did not mention his ex-wife by name, but described her as being 5'10" in height, a masseuse that advertises on Craig's List, the mother of his only child and said she lived in a four-plex off Mill Plain Boulevard. CONSTANCE would later tell CASTELLANOS that his ex-wife's name was "Jean KONCOS". Detective O'Mara told me KONCOS is 5'10", lives at a location off Mill Plain Boulevard, has a two and a half year old child with CONSTANCE and that she is a masseuse, who advertises her business on Craig's List.

CONSTANCE suggested CASTELLANOS could club KONCOS over the head and throw her off the side of his boat. CONSTANCE said if they timed it right, the tide could carry her body thirty miles away and "out to sea". CASTELLANOS pointed out that because CONSTANCE's ex-wife was a larger lady, at 5'10", CASTELLANOS would need a second person to help him. CONSTANCE suggested the second person not be a black man, because he did not want any "mistakes" made. CONSTANCE indicated a white man should be utilized to do the job. At one point in the conversation, CONSTANCE told CASTELLANOS that they would meet up the following week to prepare the final details of the murder plan. CONSTANCE subsequently gave COSTELLANOS his cell phone number and told him to call him in a few days. CONSTANCE suggested the two men use code names in the future – CONSTANCE said he would use the name "Tim" and COSTELLANOS should use the name

"Dewayne" (Dewayne is COSTELLANOS' real and true middle name). CONSTANCE told COSTELLANOS he wanted to be a thousand miles away the day the murder happened.

COSTELLANOS said he believed CONSTANCE was very serious about having his ex-wife killed and agreed to cooperate with law enforcement in hopes of saving the woman's life. COSTELLANOS also indicated he would be grateful if authorities changed his post-conviction sentence of work crew to community service. COSTELLANOS offered to wear a listening device in future conversations with CONSTANCE.

Detectives O'Mara and O'Dell conducted a thorough interview of COSTELLANOS. At the conclusion on the recorded interview, Detective O'Mara had the interview transcribed. The text of the interview has been attached hereto as a ten page document and incorporated as **Exhibit No. 4.** Detective O'Mara told me he believed COSTELLANOS' account of the incident to be truthful because COSTELLANOS had specific knowledge and information pertaining to CONSTANCE's ex-wife.

On April 17, 2007, Detective O'Mara interviewed CONSTANCE's ex-wife, Jean KONCOS. Detective O'Mara told me KONCOS was afraid of CONSTANCE and believed him capable of killing her – or having her killed. KONCOS has been relocated to a safe-house at the direction of the Clark County Sheriff's Office.

On April 18, 2007, COSTELLANOS called CONSTANCE's cell phone [360-798-1082] and left a message for "Tim" (CONSTANCE's code name) and said, "This is Dewayne (COSTELLANOS' code name) from earlier this weekend. It's a go for this Saturday. Give me a call back."

On April 20, 2007, Detective O'Mara spoke with COSTELLANOS and learned that CONSTANCE had telephoned COSTELLANOS the day before (04/19/07). COSTELLANOS related that CONSTANCE yelled at him because CONSTANCE had expected COSTELLANOS to call him sooner. CONSTANCE told COSTELLANOS he had been bogged down with court. CONSTANCE went on to say he had court with his wife the next day (04/20/07) and he would call him back as soon as he got done with court.

I have reviewed a print out of COSTELLANOS' criminal history from the Washington State Patrol. That criminal history printout indicates that COSTELLANOS has four prior felony convictions, including for Theft in the Second Degree (1992), Theft in the Second Degree (1996), Forgery (2000) and Possession of Stolen Property in the Second Degree (2004). Additionally,

COSTELLANOS has several convictions for Driving Under the Influence, at least two convictions for Assault in the Fourth Degree; False Reporting and being in Violation of a Domestic Violence Protection Order. I verified COSTELLANOS' felony convictions via the Clark County Superior Court SCOMIS computer system. All of these felony convictions appear to be in Clark County, Washington.

A review of Vancouver Police Department and Clark County Sheriff's Office records indicate CONSTANCE has been listed as the suspect in five (5) separate domestic violence assaults with KONCOS over the past three years (reference case numbers S04-133, S04-4782, S04-11942, S04-12031 and V06-3067). The same database lists CONSTANCE as being in violation of a court issued protection order with KONCOS on eleven (11) separate incidents over the past three years (reference case numbers S04-15926, S05-5715, V05-8218, V05-14646, V05-15063, V05-15235, V06-3611, V06-20514, V07-5256, V07-5560, and V07-6887). Vancouver police report number V07-7587, dated March 27, 2007, indicates KONCOS telephoned VPD after speaking with Jordan SPRY. KONCOS reported SPRY had told her CONSTANCE was trying to get someone to kill her. All of the reports listed above have been attached hereto and incorporated as **Exhibit No. 5.**

A review of CONSTANCE's criminal history indicates he has sixteen (16) prior arrests in Washington, Oregon and Colorado with convictions for Criminal Mischief in the First Degree (x2), Violation of a Domestic Violence Protection Order, Prostitution, Disorderly Conduct, and DUI.

~~(b) Operational Plan:~~

CASTELLANOS will attempt to set up a meeting with CONSTANCE to introduce him to the "hit-man" – who will actually be an undercover detective. Washington State Patrol (WSP) Detective John HESS, is a member of the Clark-Skamania Drug Task Force. Detective HESS will be utilized as an undercover officer in this investigation. CASTELLANOS will introduce CONSTANCE to Detective HESS and represent HESS a professional "hit-man" from Seattle. COSTELLANOS will tell CONSTANCE that HESS will murder CONSTANCE's ex-wife for $5000 dollars. Detective HESS may need to have telephone conversations with CONSTANCE to set up a person-to-person meeting. During the phone conversation(s) and subsequent meeting(s), Detective HESS will talk with CONSTANCE, seeking to learn more about his ex-wife and the manner in which CONSTANCE would like her murdered. I am planning on the in-person meeting between HESS and CONSTANCE to

take place within the McDonalds parking lot located at Highway 99 and 134th Street, within Clark County, Washington. Detective HESS will make it extremely clear to CONSTANCE that he will kill CONSTANCE's ex-wife in exchange for $5,000 dollars. Detective HESS will also give CONSTANCE a chance to back out of the deal. While meeting with CONSTANCE, Detective HESS will obtain a description of CONSTANCE's ex-wife, her address, information pertaining to her daily routine and information pertaining to how CONSTANCE might want her killed. CONSTANCE will believe HESS is going to murder his ex-wife for five thousand dollars or other financial compensation.

Because this investigation involves a murder-for-hire plot between the suspect and an undercover officer, it is anticipated that the suspect and the undercover officer will engage in lengthy conversation about the plan and scheme to murder the suspect's ex-wife. During the meeting(s) and/or phone conversations, Detective HESS and I will be intercepting and recording conversation with the suspect. Because this is a joint operation between Clark County Sheriff Major Crimes Unit (MCU), the interagency Career Criminal Apprehension Team (CCAT) and the Clark-Skamania Drug Task Force (DTF), detectives within those teams/units may be assisting Detective HESS and I in intercepting and recording conversations with the suspect. I also anticipate making a videotape of HESS' interactions with the suspect. Once this portion of the operation begins, it will be a 24-hour investigation and the personnel assisting Detectives HESS, O'MARA and I may change slightly, based on who is available at the time. I anticipate the following MCU, CCAT and DTF detectives will be utilized in this investigation:

CCSO Major Crimes Unit (MCU):

a) Detective O'Mara
b) Detective O'Dell
c) Detective Harper
d) Detective Buckner
e) Sergeant Trimble

Career Criminal Apprehension Team (CCAT):

a) Detective Acee (VPD)
b) Detective Conroy (CCSO)
c) Detective Lobdell (VPD)
d) Detective Matua (DOC)
e) Detective Ford (DOC)
f) Detective Anderson (PPB)
g) Deputy Rakoz (USMS)

h) Supervisor Wilcox (DOC)
i) Sergeant Chylack (VPD)

Drug Task Force:

a) Detective Hess (WSP)
b) Detective Gardner (CCSO)
c) Detective Hopkins (VPD)
d) Detective Nelson (CCSO)
e) Detective Brockus (CCSO)
f) Detetctive Boardman (CCSO)
g) Detective Whyckoff (SCSO)
h) Detective Billingsly (VPD)
i) Detective Hall (VPD)
j) Sergeant Lester (VPD)
k) Commander Warren (CCSO)
l) Investigator Brown (CCSO)
m) Investigator Shirron (CCSO)

Ricci CASTELLANOS, the jail informant, will be needed to introduce CONSTANCE to the undercover officer. The meeting will likely be planned over one or more telephone conversations. During the phone conversations, and subsequent meeting(s), between CASTELLANOS and CONSTANCE, I anticipate the men will discuss the planned murder of the suspect's ex-wife and the background, capabilities and/or methodology of the hired "hit-man". MCU, CCAT and DTF detectives may assist me intercepting and recording conversations between CASTELLANOS and CONSTANCE. I also anticipate making a videotape of the meeting(s) between CASTELLANOS and CONSTANCE.

The operational plan will be to arrest CONSTANCE after he meets with Detective HESS and solicits the undercover officer to murder his ex-wife.

Detective HESS and CASTELLANOS have consented to audio and video interception and recording of their communications and conversations with CONSTANCE.

(c) Locations to be Recorded:

The plan pertaining to the telephone calls will be to provide CASTELLANOS with a phone and phone number controlled by the police. CASTELLANOS will provide that number to CONSTANCE and tell him that the number is the cell number for the "hit man" (meaning Detective HESS). Detective HESS will answer the call and converse with CONSTANCE. This phone number has already been arranged and

is (206) 337-2138. We are using this number, with a Seattle prefix, as CASTELLANOS has already told CONSTANCE that the "hit man" is from Seattle. The equipment to record the call will be operated at the direction of detectives from DTF, MCU and CCAT. All telephone calls will take place in Clark County, Washington.

It is anticipated that CONSTANCE will be using the telephone number listed above, or some other number he utilizes to communicate with HESS or CASTELLANOS for the purposes of these conversations. It is anticipated that any face-to-face conversations with CONSTANCE to discuss arrangements for the murder of his ex-wife will occur in the McDonalds parking lot located at Highway 99 and 134th Street, within Clark County, Washington. Given the fluid nature of an investigation, and the fact that the actual location of the meeting is dependent on agreement of CONSTANCE, this location may change to another location in Clark County.

The plan as to direct recording of "in-person" contacts between the CASTELLANOS, HESS and CONSTANCE are that a first meeting with the suspect will occur at a public location, located within Clark County, Washington. It is anticipated that conversations will be intercepted and recorded between the undercover officer (HESS) and CONSTANCE or CASTELLANOS and CONSTANCE during these meetings on or after April 20, 2007. The conversations and meetings will allow CONSTANCE to plan the entire operation with CASTELLANOS and the undercover officer.

There may be numerous recorded phone calls between HESS and CONSTANCE or CASTELLANOS and CONSTANCE to finalize the plan. On or after April 20, 2007, conversations will be intercepted and recorded at subsequent meeting sites located within Clark County, Washington, and possibly during transit between the sites. The undercover officer and/or CASTELLANOS will be wearing a body wire (recording device) during any meeting(s) with CONSTANCE. Telephone conversations between CASTELLANOS and CONSTANCE or HESS and CONSTANCE will be intercepted and recorded via DTF phone -recording equipment.

(d) Duration of Investigation:

Completion of this phase of the investigation will require several telephone calls and/or meetings between the undercover officer, CASTELLANOS and CONSTANCE to assess the willingness of the undercover officer to participate in the murder, set up the actual plan to kill CONSTANCE's ex-wife, and

to carrying out the actual scheme. At a minimum this will take three days to complete. However, as often happens when working with criminals, plans can change. Additionally, if the investigation does not proceed as planned, much time and effort will be required to coordinate with MCU, CCAT, DTF detectives, the victim, the numerous investigators required for an operation of this type, and the suspect. For these reasons, seven days are being requested for this operation. Seven days of authority allows officers to have contingency plans in the event that the operation does not take place as anticipated. Seven days is the maximum allotted time allowed pursuant to RCW 9.73.090. I am requesting this authorization begin on April 20, 2007, at 1:00 pm and conclude on April 27, 2007, at 1:00 pm.

(e) Necessity for Recording

Normal investigative techniques are unlikely to succeed if tried and are too dangerous to try. CASTELLANOS was in contact with CONSTANCE as the two shared a jail cell over the weekend. Outside the above described investigative operation, involving the murder of CONSTANCE's ex-wife, CONSTANCE has not requested to meet CASTELLANOS' "hit-man". The idea of arresting CONSTANCE in hopes he will admit his intent to hire a hit-man to murder his ex-wife is unlikely. Even if CONSTANCE did divulge his desire to have his ex-wife murdered, that alone may not support his prosecution for Solicitation to Commit Murder in the First Degree and Criminal Conspiracy. In the meantime, as CONSTANCE has demonstrated, he may be soliciting other individuals to murder his ex-wife. I believe time is of the essence, as CONSTANCE is out of jail and may be soliciting another person, or persons, to murder his wife. The statements made by COSTELLANOS and the sworn testimony made under oath by Jordan and Michael SPRY support my belief. Additionally, CONSTANCE has demonstrated a propensity toward violence, as detailed in the many police reports attached herein (Exhibit No. 5).

An additional, but significant problem occurs with CASTELLANOS' testimony. His felony criminal history is of a nature that they will be disclosed to a jury during any trial. Although his information corresponds with the statements of Jordan and Michael SPRY, who testified in court that CONSTANCE tried to hire them to kill KONCUS, any solicitation of CASTELLANOS is a separate crime. Because of the nature of CASTELLANOS' criminal background, independent verification of

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his statements is necessary to help prove he was solicited. A recording of statements between CASTELLANOS and CONSTANCE will be the best way to verify CASTELLANOS statements.

Further, because of the nature of the crime, a recording of all of the conversations is appropriate and helpful to prove that the scheme originates in the mind of CONSTANCE and that he is not entrapped into committing the crime. Given CASTELLANO'S background and potential issues with his criminal history being placed in front of a jury, a recording will be the best way to ensure that he has not overstepped his role and entrapped CONSTANCE.

It would be unsafe for Detective HESS to meet with CONSTANCE without audio and video capability so that other investigators can monitor the meetings and ensure the ability to respond quickly if anything goes wrong. Because of the inherent danger of undercover work, it is essential that the conversations be monitored. The undercover officer will not always be in close proximity to close cover protection teams. The only way to monitor the safety of the officer is through the use of transmitted conversation. Usually undercover operations involve a single officer and the suspect(s); in this case the suspect has demonstrated a violent history and is planning the murder of his former spouse. The use of the monitored conversation will allow fellow officers to quickly respond to any changes in conversation and be able to listen for help signs or arrest signals.

The investigative plan described above, if successful, is anticipated to result in the arrest and prosecution of a habitual domestic violence offender and violent ex-con. Interception of conversations with this suspect would be critical to a later evaluation of who made which statements and the knowledge and intentional participation of the suspect in the above listed and described crime. The undercover officer will not be in a position to be able to take notes, so he will have to rely on the recording to later clearly provide evidence of the suspect's statements and willing participation in the criminal scheme.

CONSTANCE's interactions with his ex-wife and his criminal history show him to be an active and elusive criminal who has been engaged in criminal activity for quite some time. He is therefore not likely to speak about his criminal activity or to participate in the planned murder of his ex-wife if he thinks non-participant witnesses are in a position to overhear his conversations. For these reasons, transmission and recording of the conversations is necessary.

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STATE OF WASHINGTON
SUPERIOR COURT OF CLARK COUNTY

PRIOR APPLICATIONS:

I know of no previous applications involving the same persons named herein, whose communications or conversations are to be recorded.

CONCLUSION:

Based upon my training, experience and the information contained in this application and the attached exhibits, I believe that communications or conversations concerning the felony crime of Criminal Solicitation to commit Murder in the First Degree, in violation of RCW 9A.28.030/RCW 9A.28.040, and Criminal Conspiracy, in violation of RCW 9A.28.040, will occur during the time intervening between April 20, 2007, at 1:00 pm and April 27, 2007 at 1:00 pm., involving Dino CONSTANCE, Ricci COSTELLANOS and Detective John HESS; that those communications or conversations will be evidence of the above listed crimes; and that interception and recording of those communications or conversations by any device or instrument should be authorized commencing April 20, 2007, at 1:00 pm and conclude on April 27, 2007 at 1:00 pm.

Detective Bryan Acee #1383
Vancouver Police Department
Career Criminal Apprehension Team

SUBSCRIBED and SWORN to before me this 20 day of April, 2007, at 12:18 ~~a.m.~~/p.m.

Superior Court Judge
County of Clark
State of Washington

Application approved by:

James David, WSBA# 13754

Detective Bryan Acee
C-CAT Task Force
Vancouver Police Dept.
P.O. Box 1995
Vancouver, WA 98668-1995

STATE OF WASHINGTON
SUPERIOR COURT OF CLARK COUNTY

Senior Deputy Prosecuting Attorney
Major Crimes Unit
Clark County Prosecuting Attorney's Office

ATTACHMENTS:

Exhibit No. 1	- 04/10/07 CD recording from Judge Rulli's courtroom.
Exhibit No. 2	- 04/14/07 report by CCSO Deputy Schubach.
Exhibit No. 3	- 04/16/07 notes by Castellanos.
Exhibit No. 4	- 04/16/07 MCU interview of Castellanos.
Exhibit No. 5	- CCSO and VPD police reports listed herein on page 5.

STATE OF WASHINGTON
SUPERIOR COURT OF CLARK COUNTY

IN THE MATTER OF AUTHORIZATION TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS PURSUANT TO RCW 9.73.090	)	No. APPLICATION FOR AUTHORITY TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

I, **Detective John O'Mara**, being first duly sworn on oath, depose and say:

I have been a law enforcement officer for twenty one years and am employed as a detective with the Clark County Sheriff's Department. I am currently assigned to the Major Crimes Unit as a Homicide Detective. In addition to Homicide Investigations we also conduct investigations of crimes that would usually entail numerous hours of investigation and follow up, including, but not limited to: Rape; Major Assaults; Major Frauds; Any Major investigations involving the Clark County Jail, such as suicides or allegations of assault to prisoners by Custody Officers. I am also part of a Regional Major Crimes Team that includes Detectives from various departments within Clark County that, from time to time, assist with major investigations regarding officer involved shootings and Homicides. Over the past twenty one years, I have received training in the use of communication intercepts, body wires, audio and video surveillance and electronic tracking. I have received extensive training in all aspects of Law Enforcement techniques, to include surveillance and undercover operations; search warrants; task forces; interviewing; and over 2,000 hours of training at various levels. The Vancouver Police Department and Clark County Sheriff's Office possess various electronic instruments that may capture audio and video transmission and recordings and they will be utilized for this case. I make this application by authority of RCW 9.73.090. This application is an addendum to the original application.

Detective John O'Mara
Major Crimes Unit
Clark County Sheriff's Dept.
P.O. Box 410
Vancouver, WA 98666

STATE OF WASHINGTON
SUPERIOR COURT OF CLARK COUNTY

REQUEST FOR EXTENSION TO THE SEVEN DAY LIMIT:

I am attaching and incorporating by reference an APPLICATION FOR AUTHORITY TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS which was prepared and entered on April 20, 2007. As a result of such application, an ORDER AUTHORIZING INTERCEPTION AND RECORDING OF COMMUNICATIONS OR CONVERSATIONS PURSUANT TO RCW 9.73.090 entered on that date. At this time, I am requesting the court sign an additional ORDER AUTHORIZING INTERCEPTION AND RECORDING OF COMMUNICATIONS OR CONVERSATIONS PURSUANT TO RCW 9.73.090 to extend the authority granted by the first Order. I do so in part, based on personal knowledge derived from my participation in this investigation. I submit the following information to show cause why I am requesting an extension of Seven Days to the original application.

On April 20th, 2007, **Judge Harris** approved an Application for Authority to Intercept and Record Communications or Conversations and an Order Authorizing Interception and Recording of Communications or Conversations Pursuant to RCW 9.73.090.

Also on April 20th, 2007, I, **Detective John O'Mara**, with the Clark County Sheriff's Department Major Crimes Unit, based on the aforementioned Order, contacted the **CI** in this case, witness **Ricci Dewayne Castellanos**, and advised him that he could now call the defendant in this case, **Dino Constance**, as **Constance** had instructed. I gave **Ricci Castellanos** a phone number, (206) 337-2138, that had been set up to be utilized for the purpose of recording any conversations with defendant **Dino Constance**. I instructed **Ricci Castellanos** to tell **Dino Constance** to call the phone number in order to speak directly to someone that **Castellanos** had contacted at the request of

1 **Constance** in regard to the Criminal Solicitation agreement he had entered into with **Castellanos** while
2 they were both housed in the same jail cell while incarcerated at the Clark County Jail, as noted in the
3 original application. The phone number would have put **Constance** in direct contact with our
4 undercover operative, **Detective John Hess**, who would be posing as the "hit man", and would have
5 created documentation and recordings of the call itself and any further contact or correspondence
6 through use of the phone number and/or through meetings while wearing a "wire".

7 On April 21st, 2007, **Detective Bryan Acee**, along with other Detectives in his unit, conducted
8 surveillance on the home of **Dino Constance** for several hours. They took reference photographs of
9 his home and vehicles and waited to see if **Constance** would leave, in order to get an idea of his
10 activities and locations frequented for purposes of setting up a meet with the undercover, **Detective**
11 **Hess**. That same morning I, **Detective John O'Mara**, along with **Detective Eric O'Dell**, made
12 contact with the CI, **Ricci Castellanos**, picking him up at his residence and bringing him to the
13 Vancouver Police Department Central Precinct for a meeting with **Detective O'Dell** and I, and the
14 undercover operative, **Detective John Hess**. The meeting was to plan what **Castellanos** would say to
15 **Constance** in order to set up a meet with the undercover operative, **Detective Hess**.

16 However, during our meeting I learned from **Castellanos** that he had spoken with **Dino**
17 **Constance** on Friday, April 20th, 2007, for about 20 minutes. **Castellanos** stated that **Constance** told
18 him he wanted to wait for two Thursday's from now to set up the "hit" with the person (**Detective John**
19 **Hess**) that **Castellanos** solicited on behalf of **Constance**. (It should be noted that I, **Detective John**
20 **O'Mara**, later learned a possible correlation with the significance of waiting two Thursdays. I
21 discovered that **Constance** has visitation every other Thursday with his son, the child he has in
22 common with victim **Jean Koncos**. His next visitation is set up for two Thursdays from now, or May

1 3rd. It is felt that **Constance** will use this Supervised visit as a possible alibi and have the "hit man",
2 undercover **Detective John Hess**, perform the "hit" that day, during the hours of visitation.)
3 **Castellanos** told me that **Constance** said that things are "too hot now" and told **Castellanos** that the
4 Judge (Judge Rulli in Family Court) is putting too much heat on him because of statements/testimony
5 made in court about threats made by **Constance** toward the target/victim, **Jean Koncos**. **Castellanos**
6 said **Constance** told him to call him back in about one and one half weeks to set up the meeting in
7 order to "get this done".

8 For fear of causing **Constance** to become suspicious, and thereby jeopardizing the operation,
9 we did not feel it would be in our best interest and for Castellanos' safety, to have **Castellanos** call
10 **Constance** based on the previous day's conversation. There was a real possibility of **Constance**
11 becoming "wise" and/or "suspicious" of **Castellanos** if he did not follow **Constance's** instructions.
12 Therefore it was determined that we would not have **Castellanos** call **Constance** at this time for fear
13 of jeopardizing the operation and putting **Castellanos** and/or the undercover operative, in jeopardy. It
14 was then decided that we would attempt an "accidental" meet, in order to keep **Constance** from
15 becoming suspicious of **Castellanos**. **Detective Bryan Acee** and other Detectives from his unit would
16 set up surveillance on **Constance** while **Castellanos** and **Detective Hess** were fitted with "wires" and
17 be prepared for immediate deployment. **Detective Acee** would then contact us as soon as **Constance**
18 went to a public place, such as a grocery store, so that **Castellanos** and **Detective Hess** could enter the
19 same establishment and make it appear as though it were a chance meeting. They would then engage
20 **Constance** into conversation with **Castellanos** introducing **Detective Hess** as the contact person
21 reference the solicitation by **Constance** as referred to in the original Order.

STATE OF WASHINGTON
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Due to difficulties in man power, scheduling, and other active cases, and not wanting to jeopardize the operation by causing **Constance** to become suspicious of **Castellanos**, which would then also place **Castellanos** and undercover operative **Detective John Hess** in possible jeopardy, it was determined that we would not be able to set the operation/plan into motion until Tuesday, May 1, 2007. Because of this, we respectfully submit to the court a request the court grant another 7 day time period for us to continue our investigation.

Detective John O'Mara #3804
Clark County Sheriff's Department
Major Crimes Unit

SUBSCRIBED and SWORN to before me this 1st day of ~~April~~ MAY, 2007, at 0945 a.m./~~p.m.~~

Superior Court Judge
County of Clark
State of Washington

Application approved by:

James David, WSBA# 13754
Senior Deputy Prosecuting Attorney
Major Crimes Unit
Clark County Prosecuting Attorney's Office

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 37576-1-II
	)	
DINO CONSTANCE,	)	
	)	
Appellant.	)	

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2009 FEB 27 PM 4:30

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

FILED
COURT OF APPEALS
DIVISION II
09 MAR -3 AM 11:37
STATE OF WASHINGTON
BY
DEPUTY

[X] ANTHONY GOLIK
ATTORNEY AT LAW
P.O. BOX 5000
1200 FRANKLIN STREET
VANCOUVER, WA 98660

[X] DINO CONSTANCE
DOC NO. 317289
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY 2009.

x Patrick Mayovsky