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NO. 54287-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

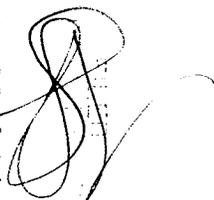
MITCHELL VARNELL,

Appellant.

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

The Honorable Linda C. Krese, Judge  
The Honorable Richard J. Thorpe, Judge  
The Honorable Ronald L. Castleberry, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

No one was harmed as a result of appellant Mitchell Varnell's alleged conduct. He nonetheless was sentenced to 950 months in prison.

The state claimed Varnell solicited an undercover detective to kill his ex-wife, and her mother, father, and brother. The single act supporting those four charged counts was one conversation with the detective. The other count was based on Varnell's alleged offer of money to his part-time secretary to kill his ex-wife.

The defense presented expert psychiatric evidence that Varnell was erotomaniac, supporting the defense that he believed his ex-wife still loved him, he loved her, and he would not hire someone to harm her. Varnell testified that he wanted to set up the dangerous alleged "hit man" and turn him in to the police, so his ex-wife would understand Varnell's love for her and they would reconcile. Varnell denied making any offer to his secretary.

Although trial defense counsel properly offered expert psychiatric testimony to support the defense, counsel ineffectively failed to present available corroborating evidence. As a result, the expert opinion was improperly minimized and the defense was needlessly weakened.

Several sentencing errors occurred, resulting in the court's erroneous conclusion that counts II-V constituted more than one offense and that it could not impose concurrent sentences. The court violated Blakely and the Sixth and Fourteenth Amendments by finding that the offenses constituted "separate and distinct" criminal conduct, without submitting that fact to the jury. The court also violated Varnell's Sixth Amendment right to counsel at sentencing by accepting an invalid waiver of counsel and proceeding in the absence of counsel.

B. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel denied appellant his Sixth Amendment right to counsel and his Fourteenth Amendment right to a fair trial.

2. The trial court erred in denying the motion for a new trial.

3. The trial court erred in entering multiple convictions for counts II-V. CP 19, 536-39.

4. The trial court erred in imposing consecutive sentences for counts II-V, and in finding those counts to constitute "separate and distinct criminal conduct." CP 24; 20RP 17-19.

5. The trial court erred in finding that counts II-V constituted "separate and distinct criminal conduct" absent a jury determination of that fact beyond a reasonable doubt. CP 24; 20RP 17-19.

6. The trial court erred in imposing a sentence of 950 months. CP 24; 20RP 51.

7. The trial court erred in imposing sentence where Varnell was not represented by counsel and where there had been no valid waiver of counsel. CP 19-31; 20RP 9-51.

#### Issues Related to Assignments of Error

1. Did trial counsel deficiently fail to offer available testimony to corroborate the defense, and was such deficient performance prejudicial, where the jury would naturally expect to hear the corroborative testimony, the state repeatedly emphasized the absence of corroboration in cross-examination and closing argument, and the absence of corroboration undermined the testimony of the expert psychiatrist who was the only neutral defense witness?

2. Where the single solicitation incident leading to counts II-V occurred at the same time and place, with the same undercover police officer, and the solicited (but impossible) murders were to be committed at the same time and place, did the trial court err in: (a) entering multiple

convictions; (b) finding that each count resulted from separate and distinct criminal conduct; and (c) imposing consecutive sentences?

3. Did the trial court deny appellant his constitutional right to counsel at sentencing, where the court proceeded to sentencing without counsel and without a valid waiver of counsel?

C. STATEMENT OF THE CASE

1. Procedural Facts

On February 19, 2002, the Snohomish County prosecutor charged appellant Mitchell Varnell with two counts of solicitation to commit first degree murder. CP 624-25. On August 1, 2002, the state filed an amended information charging five counts. The first count alleged that Varnell solicited Mary Wilson to kill his ex-wife, Karen Varnell. The second through fifth counts alleged that Varnell solicited an undercover policeman, Detective Terrence Warren, to kill Karen, her parents, and her brother. CP 617-18; RCW 9A.28.030; 9A.32.030(1)(a).

Trial proceedings occurred July 7-15, 2003. After deliberating approximately a day, the jury returned guilty verdicts on all counts on July 16, 2003. CP 536-40; Supp. CP \_\_\_ (sub no. 154, Court Minutes).

After Varnell discharged his trial counsel, new counsel filed a motion for new trial on February 23, 2004.<sup>1</sup> The court denied the motion on March 5, 2004. 18RP 19.

Sentencing occurred April 19, 2004. The Court imposed 190-month sentences on each count, running consecutively, for a total prison confinement of 950 months. CP 24; 20RP 51.

2. Pretrial Proceedings

Before trial, Varnell retained attorney James White as his counsel. White hired Harvey Chamberlin to assist.

There were numerous continuances of trial. Varnell often asserted his dissatisfaction with counsel's attention or inattention to Varnell's communications. Varnell also had substantial medical issues and disputes with the Snohomish County Jail about the inadequacy of the Jail's treatment of his painful and chronic conditions. See, e.g., 9RP 4-24.

The court held several hearings to clarify whether Varnell wished to continue with White and Chamberlin as counsel. Varnell asserted that he fired Chamberlin in December, 2002. Chamberlin nonetheless continued to

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<sup>1</sup> Several continuances were granted to permit new counsel to procure copies of the transcripts and to conduct appropriate investigation. See note 6, infra. The court did not grant the state's request to deny the motion as untimely. 18RP 20.

assist White in representing Varnell. The result was particularly contentious.<sup>2</sup>

During the proceedings there were several hearings to determine Varnell's competency. 1RP 2-5; 5RP 2-8; 7RP 2-33; 9RP 24; 10RP 6-11; 11RP 3-21. The court found him competent. 6RP 3; 11RP 41-42.

At the beginning of trial on July 8, 2003, Varnell clearly stated that he wanted White and Chamberlin to represent him. CP 286; 11RP 58.

### 3. Trial Testimony

Mitchell and Karen Varnell were married for 17 years and had two sons. During the marriage, Karen was the office manager for the excavation business Varnell ran from their home office in Arlington. After a contentious divorce trial where custody was an issue, the divorce became final in 2001. 11RP 140-41, 173.

Varnell loved his sons and was very proud of them. He was a good father. 11RP 227, 459.

Karen was awarded custody and Varnell had visitation rights every other weekend. 11RP 143. According to Karen, after the divorce, the two still would get angry at each other when exchanging custody. 11RP 145.

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<sup>2</sup> See e.g., 2RP 4; 3RP 2-19; 4RP 2-14; 6RP 7-31; 7RP 8-25; 11RP 49-53.

Varnell's house was sold after his arrest. Karen said she found a picture -- of Karen, Varnell, their boys, and Karen's parents -- and a floor plan of her parents' house, in a filing cabinet from the business. 11RP 151-52; Ex. 11A, 11B. According to Karen's parents, they moved into their new house, a block-and-a-half from Karen's house, after the divorce. They had not invited Varnell to visit. 11RP 156-59, 232.

Mary Wilson was Varnell's part-time secretary after the separation and divorce. She organized Varnell's office and prescription reimbursement paperwork because he was very disorganized. 11RP 161-62, 192, 223, 487.

She said that Varnell continued to express his love for Karen, even though he also would get frustrated with Karen. He continued to talk about reconciling and getting back together with Karen. Toward the first part of February, 2002, Wilson thought Varnell was expressing more anger. 11RP 165-66; 195, 225-26.

During the course of her work, she found several "post it" or "sticky" notes in a stack of Varnell's personal prescription paperwork. She thought they were bizarre, maybe a plot to a movie. 11RP 166-67, 174, 217-23; EX 5A-5F. Varnell wrote the notes. 11RP 361-62.

According to Wilson, one day in February Varnell saw that she had a handgun in her purse. She said he asked to buy it, or if she knew anyone willing to sell one like it. 11RP 168-70. At that point, Wilson said Varnell asked whether she wanted to make \$50,000 to kill Karen. Wilson laughed, saying she wanted to believe it was a joke, although she thought he was serious. Wilson said Varnell brought it up again the next day, saying either "are you sure, \$50,000, kill my wife," or that he was looking for someone "who would be willing to take care of his problem." 11RP 171-72, 187-91, 225. Wilson said no.

About a week later, she saw the sticky notes again. She took them and called Karen. 11RP 175-76. Wilson met Karen at a gas station in Granite Falls and handed Karen the notes. According to Wilson, Karen's divorce attorney was at the meeting. 11RP 146-49, 178-79; .

Wilson admitted that there had been an "ugly incident" between Varnell and her husband, and that Varnell had threatened him. 11RP 193-94; EX 15A, at 16.

After Karen and her attorney called the police, Wilson met with several police officers and detectives to come up with a plan to ensnare Varnell. 11RP 180-81, 236-38, 257-59. Wilson was to tell Varnell that she had a friend who met some "biker" guys who could take care of his

problem. She actually was setting up a meeting between Varnell and an undercover Detective, Terry Warren. 11RP 238-39,

Wilson called Varnell about 2:00 pm on February 14, 2002. The call was recorded. 11RP 180-81, 240-43, 257-59; EX 8.<sup>3</sup> In the call Wilson said she had been partying over the weekend and had met the perfect person. Varnell had reservations about talking on the phone. EX 15A, at 7-9. Mary said she had given Varnell's number to the man, who she identified as "Mike" and described as a "gypsy joker." EX 15A, at 7-8, 10, 18.

Warren called Varnell about 11:30 the night of the 14th. According to Warren, he did not properly activate the recording equipment so there was no intelligible recording of the call. Warren said he heard Varnell through a mutual friend, Mary, that Varnell had a job. He told Varnell he had a prepaid cell phone that could not be traced. They spoke about a "pruning job," and according to Warren, Varnell suggested they meet at the Cook Book Restaurant in Everett. Warren asked Varnell to bring a picture of Karen. Warren was supposed to call Varnell again on the 16th. 11RP 260-65, 286.

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<sup>3</sup> The recording was admitted as evidence, with a transcript offered to assist the jury in listening to the tape. The jury was cautioned that the recording, not the transcript, was evidence. 11RP 243, 247; EX 8. For ease of reference, this brief refers to the transcript pages, but the tape has been designated to this Court.

Warren did not want to wait, however, and called Varnell three times on the 15th. Varnell only answered the second call, and told Warren he could not talk. Warren again asked Varnell to bring a picture. Warren left a message later that night. 11RP 266-67.

Warren started calling Varnell at 8:30 the morning of Saturday the 16th. He called at 8:30, 9:00, 9:30, 9:45 and again at 11:50. Varnell did not answer. 11RP 268-71, 292. Varnell answered Warren's call at 1:00, and Warren told him to meet at the Cook Book at 4:00. 11RP 272, 292.

Varnell never called Warren back, even though Warren requested it in several conversations. 11RP 288-89.

Warren arrived at the Cook Book about 3:50. He sat down, and eventually ordered food. Varnell did not show up until about 4:50, walking slowly by the window. He was carrying a sticky note with the word "Mike" on it. 11RP 275-76. Warren motioned for Varnell to come in, but Varnell shook his head and turned around, walking toward the sidewalk. Warren ran after Varnell and stopped him. 11RP 276-77.

They had a conversation in the parking lot for about 65 minutes. Warren was wearing a recording device, and other officers were listening.

11RP 277-79, 335-36; EX 4A, EX 16A.<sup>4</sup> The staff at the Cook Book came out and interrupted the conversation a few times because Warren had ordered food and they were concerned about getting paid. EX 16A, at 1, 17, 19, 26.

During the conversation, Warren tried to steer Varnell into subjects relating to money and specifics about who was to be killed and how. EX 16A at 9, 18, 20, 30, 33-34, 36-37, 43-44. Varnell, on the other hand, spent a large amount of time talking about his sons and how Karen was alienating them from their father. EX 16A at 4-9, 16-18, 23-26, 28-29, 37-44. In a few places, however, Varnell and Warren did manage to discuss money and logistics. EX 16A; 11RP 504-06, 512-17.

During the conversation it became apparent that the alleged offer was to kill all four people, "[a]ll in the same place, same time." EX 16A at 3.<sup>5</sup> Varnell variously spoke about how he had planned to do it and to

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<sup>4</sup> The court again cautioned the jury that the audio exhibit was evidence, and that the transcript was not the evidence. 11RP 362; EX 4-A. Again, for ease of reference, this brief refers to the transcript while designating the audio exhibit.

<sup>5</sup> See also EX 16A at 10 ("Four all together"); at 13 ("All four would be there at the same time"); at 18 ("I don't wanna fuckin' go part way . . . just to end up with my kids even worse off than they are now"); at 19 ("Fifty [grand] for all four"); at 28 (Warren says he wants more money for all four); at 31 (Warren recognizes the deal is for all four); at 32 ("It'd

provide for an alibi. EX 16A at 11, 14, 16, 23, 27, 46. There was a suggestion to kill all four and make it look like an accident, like they drove into the river. EX 16A at 10, 35-36.

Warren said Varnell at times appeared angry during the conversation. 11RP 279-80. The video, however, showed that Varnell hardly moved during the hour-long conversation. EX 10.

On cross-examination, Warren reluctantly admitted that the officers wanted Varnell to bring a down payment and a picture to the meeting. In fact, the officers had told the judge approving the one-party recording that they expected to get this information from Varnell. 11RP 308, 310, 315-16, 371. Although Warren asked for both, Varnell brought neither. 11RP 316-21, 325-26.

Warren admitted that Varnell gave him no information that would actually put Karen or her family at risk. 11RP 327. After Warren insisted, Varnell gave him \$100 to pay for the food Warren ordered. 11RP 320, 330-31; EX 16A at 44.

Detective Brad Pince was in charge of the operation to ensnare Varnell. He sought authorization to record the conversations. From a

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have to be all in one night"); at 36 ("The main thing is gettin' all four of em"); at 36-37 (Warren again states he wants more money for all four); at 47 (Warren says "I gotta have sixty" and "you want all four"), at 47 (Varnell responds, "I mean it's all four or nothin'. Four, four is four." "Four don't mean three, four don't mean one." Four means four.").

hotel across the street, he also videotaped the conversation in the parking lot. 11RP 335-36, 353-54; EX 10. Oddly, however, Pince edited the video to omit the first part -- the part where Varnell walked away and Warren chased him down. 11RP 372.

During their conversation in the parking lot that February evening, Varnell was wearing dark clothes, a dark knit cap, sunglasses, and a scarf. 11RP 277, 471; EX 10.

After the state rested, the defense presented expert testimony from Dr. August Piper, a psychiatrist. Piper's testimony and seven-page curriculum vitae revealed he had been a psychiatrist for 30 years holding numerous positions of responsibility in the medical profession. He had been retained by the state in other cases. 11RP 386-90; EX 20.

He met with Varnell for about 11 hours and had reviewed Varnell's medical records and the extensive discovery from the state. He criticized Varnell's prior treating physician, Dr. Rice, who had badly managed Varnell's medications and failed to refer him for therapeutic counseling. 11RP 395-98.

He opined that Varnell suffered from a delusional disorder, erotomanic type. He concluded that Varnell still believed that Karen loved

him, despite the huge amount of evidence to the contrary. 11RP 403-05, 412, 418-19; EX 21.

He had reviewed the literature and determined that a person with erotomanic delusional beliefs does not hate or become angry at the object of their love. He found no case in the literature where an erotomanic person tried to hire someone to kill the object of their love. 11RP 409-11, 441. There was no question in Dr. Piper's mind that Varnell had an erotomanic disorder before and after he was arrested. 11RP 412, 441, 445.

The erotomanic disorder would support Varnell's delusional belief that if he exposed a dangerous hit man to the police, it would show Karen he was courageous. It would show how much he loved her and he could win her back. 11RP 426-29, 433.

In his sessions with Dr. Piper, Varnell explained the sticky notes as ideas that his friend Ron White had come up with. 11RP 438-39. Varnell had told Dr. Piper that the notes were discussions about a woman who had slandered Varnell in public. 11RP 437-39. Dr. Piper challenged Varnell on this, because it did not really make sense. 11RP 442-44.

He also concluded that Varnell had a narcissistic personality disorder. 11RP 399, 445. He described his meetings with Varnell as very difficult, because Varnell would not stay on track and it would even be

difficult to agree on the agenda for a session. 11RP 407, 416-17, 420. His review of the materials led to the conclusion that Varnell was not a very nice guy. 11RP 407-08, 446.

Although Dr. Piper recognized that a wounded narcissist might act to hurt a loved one, Dr. Piper believed Varnell's erotomania was a more powerful force. 11RP 411-12, 438-39.

In cross-examining Dr. Piper, the state emphasized that Dr. Piper's conclusion depended on the accuracy of information submitted by Varnell. 11RP 422. The prosecutor summarized it as a "garbage in, garbage out sort of thing?" 11RP 422. Dr. Piper reinforced that his opinion was supported by the police investigation and discovery, which showed that Varnell continued to behave like he was passionately in love with Karen. 11RP 421.

Varnell testified that he grew up in the Everett area with three younger sisters. Their stepfather was abusive and Varnell dropped out of school and left home in the 10th grade. 11RP 447-50. He started a landscaping business at 17, which grew into a tree service and ultimately a large excavation business. 11RP 451-57.

Karen and Varnell met in 1983 and moved in together 2 days later. They married in June of 1984, when Varnell was 22 and Karen was 24. They worked together and had two sons. 11RP 454-60.

After Mary introduced Warren as some king of "gypsy joker", Varnell thought he was someone who was trying to run a scam. 11RP 460. He was shocked and afraid when Warren called on Thursday the 14th. He wanted a 10% "down payment" or "earnest money." Varnell asked for Warren's number and said he would call back. Varnell never called back. 11RP 461-62.

Nonetheless, Warren was persistent. He called on Friday and Varnell said he did not want to talk. 11RP 463. Varnell was meeting with a realtor so he could sell a 40-acre parcel of property to pay Karen in the divorce decree. 11RP 463-66.

Warren called again several times on Saturday. Varnell saw the number on caller ID and did not answer. 11RP 466. He happened to answer the phone at 1:00 on his way out to bid a job. It was Warren again. 11RP 468. He agreed to meet later at the Cook Book because he was concerned Warren would show up at his house. 11RP 468-69.

Varnell was scared and confused because Warren was threatening to do harm to the person Varnell loved. He wanted to set up Warren to the

police to show Karen how much he still loved her. 11RP 472. He felt he had to meet the man before he could call the police. 11RP 472-73, 500, 502-03. Varnell still believed Karen loved him, and that they would reconcile. 11RP 479-80.

When he walked up to the restaurant, he saw Warren sitting in the booth and "chickened out right there." 11RP 474. He turned and walked away. Warren came after Varnell and caught up. Varnell stayed and spoke with Warren, saying things off the top of his head. At the end of the conversation he agreed to meet Warren the next day, but he really planned to go to the police. 11RP 474-75, 481. Varnell felt he had to say terrible things about Karen and her family in order to keep the hit man on the hook. 11RP 504-06. Varnell did not bring money or a picture of Karen to the meeting, even though there were pictures of her around the house. 11RP 228, 475-76, 502, 513.

After the conversation with Warren, Varnell was arrested. The prosecutor asked Varnell a series of questions about why he did not tell the police about the hit man. Varnell responded that it was obvious he had been set up, and that he would have told the police after he spoke with his attorney. 11RP 480-81, 500.

The state also emphasized that Varnell did not get the custodial arrangement he wanted in the divorce and that Karen would interfere with Varnell's custodial time. 11RP 482-83. Varnell denied asking Mary Wilson to kill Karen. 11RP 489-94. He admitted that the sticky notes referred to Karen, and that he had told Dr. Piper the story about Ron White to make himself look better. 11RP 494-96, 523.

4. Closing Argument.

The defense theory was that the state did not prove Varnell's intent that the murders be committed. 11RP 530, 580.

The defense argued the state had failed to prove Varnell intended for Warren to kill Karen or her family. Varnell did not go to the meeting with Warren with money or a picture. As Dr. Piper testified, erotomaniac persons do not hire others to kill the person they love. Varnell clearly was not "angry" during the meeting with Warren, as shown in the video. 11RP 572-617.

In closing, the prosecutor argued that Varnell made an offer to Warren with the intent to kill Karen and that he therefore was guilty. 11RP 556-57. The prosecutor referred to the taped conversations with Wilson and Warren, arguing that Varnell did not state that he loved Karen. 11RP 567. The prosecutor discounted Dr. Piper's opinion, stating that it relied

on self-reported information from Varnell. 11RP 569. He argued Varnell never told the police about his plan to set up the hit man. 11RP 570.

5. Motion for New Trial

After trial, Varnell hired new counsel, John Muenster. After several continuances,<sup>6</sup> Muenster filed a motion for a new trial on February 23, 2004. CP 290-92, 496-523.<sup>7</sup> The motion argued, *inter alia*, that White and Chamberlin had provided ineffective assistance by failing to present

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<sup>6</sup> The process took time, as Varnell again was having medication issues that prevented meaningful communication with his attorneys; was dissatisfied with White and Chamberlin; and due to restrictions on phone calls at the Jail, was unable to quickly retain other counsel. 12RP 4-5, 13RP 5-13; 15RP 11-13, 17, 24-25. New counsel also needed time to procure and review the trial transcripts. 14RP 3-7; 11-12, 16-17; 15RP 38; 16RP 6-13.

<sup>7</sup> Varnell also filed lengthy pro se submissions to support a new trial and to support reconsideration of the court's denial of the motion for new trial. The general theme of those submissions was that White and Chamberlin were ineffective and failed to communicate with Varnell or properly investigate the case and potential mental defenses, that White's and Chamberlin's lack of diligence improperly forced him to agree to speedy trial waivers, that Varnell's medical issues made him confused and unable to competently testify, that White and Chamberlin misrepresented Varnell's financial situation to the court, that White had taken Varnell's money, and that Chamberlin was verbally and physically abusive to Varnell. CP 43-63, 64-102, 106-232, 229-32, 244-81, 531-35; Supp. CP \_\_\_\_ (sub no 238, Additional Pro Se Materials in Support of New Trial or Reconsideration); 17RP 102, 106-112.

witnesses to corroborate Varnell's continuing feelings of love for Karen at the time of the arrest.<sup>8</sup> CP 520-21; 17RP

On February 27, 2004, the court heard testimony on the motion. 17RP. White admitted that Chamberlin and Varnell had personality issues that prevented them from effectively communicating with each other. 17RP 9-12, 34-35. Varnell consistently stated he wanted nothing to do with Chamberlin. 17RP 13-14. Varnell asked Chamberlin and White to withdraw more than once. 17RP 19-20. White nonetheless stated that the three had good communication during trial and the two-week period before trial. 17RP 42. White described Varnell as a difficult client. 17RP 38-40.<sup>9</sup>

Varnell also provided White and Chamberlin with the information about family witnesses who would corroborate that Varnell often expressed his love for Karen, even after the divorce. 17RP 27. White stated that he did not want to open the door to issues about Varnell's character, because he believed that there was a substantial amount of prior evidence from the

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<sup>8</sup> The motion also argued that Varnell was denied his right to counsel of choice, and to conflict-free counsel. CP 515-19; 17RP 81-88.

<sup>9</sup> The record supports a certain res ipsa loquitur aspect to this statement. See generally, CP 43-63, 64-102, 106-232, 229-32, 244-81, 531-35; Supp. CP \_\_\_ (sub no 238, Additional Pro Se Materials in Support of New Trial or Reconsideration); 18RP 14.

marriage that would present Varnell in a very negative light, and would damage the defense theory. 17RP 27, 48-50.

White nonetheless admitted that corroborative evidence would have helped to show the lack of criminal intent. 17RP 34. He also admitted that corroborative testimony about how Varnell felt about Karen at the time of the arrest would not necessarily open the door to damaging evidence that occurred during the divorce. 17RP 51-52.

At the evidentiary hearing, Varnell's mother, stepfather, and sisters testified that Varnell spoke at length before the arrest about his love for Karen. Whenever family members would criticize Karen's actions during or after the divorce, Varnell would tell them not to criticize her, that he still loved her and she needed their prayers. He never said he wanted Karen dead. They provided this information to White, but their calls and letters were not returned by White or Chamberlin. 17RP 53-56, 60-67, 68-70, 77-79.

Muenster argued that it was crucial to present corroborative evidence to support the defense theory on the key question at trial -- was Varnell's intent to hire a hit man or to set himself up as the hero? Although the defense presented Dr. Piper to support the conclusion that Varnell loved Karen after the arrest, every reasonable juror would want to

know what Varnell was saying to others before the arrest. But White and Chamberlin failed to call even a single family member to testify how Varnell felt about Karen. 17RP 87-90.

During the prosecution's argument, the Court noted that some of the evidence from the family witnesses likely would have been admissible to show Varnell's state of mind. 17RP 97.

Nonetheless, on March 5, 2004, the Court denied the motion for new trial. 18RP 6-19. The court concluded that White and Chamberlin had a legitimate strategy for not presenting corroborating evidence, because of the risk that it might open the door to prior bad acts directed toward Karen during the marriage and divorce. 18RP 15-16.

6. Sentencing

At sentencing on April 19, 2004, Varnell said he did not want Muenster to represent him. CP 226-28; 20RP 8-9.<sup>10</sup> Without conducting a colloquy to ensure Varnell was knowingly and voluntarily waiving his right to counsel, the court allowed Muenster to withdraw and Varnell proceeded pro se. 20RP 10; Supp. CP \_\_\_ (sub no. 254, Order).

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<sup>10</sup> At a hearing on March 15, 2004, Varnell was equivocal in his desire to release Muenster as counsel. 19RP 3-4, 9, 13, 15-20.

Muenster had filed a presentencing memorandum arguing that the Court should not impose consecutive sentences because the offenses were not "separate and distinct." CP 34-35. The memo argued that contrary cases were distinguishable or wrongly decided. CP 34-35. The memo further recommended an exceptional sentence below the range, because the police had set up the additional counts and because Varnell's capacity to appreciate the wrongfulness of his conduct was substantially impaired by the use of overwhelming amounts of prescription medication. CP 36-41.

The court orally ruled that the Sentencing Reform Act required the court to find that the five counts were separate offenses, and constituted "five separate acts; two of which occur on different occasions." 20RP 18-19. The court rejected the request for an exceptional sentence below the range. 20RP 19-23. The court ultimately imposed consecutive sentences of 190 months on each count, for a total of 950 months in prison. 20RP 51; CP 24.

This appeal timely follows. CP 3-4.

C. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO PRESENT AVAILABLE CORROBORATING EVIDENCE WAS DEFICIENT PERFORMANCE THAT PREJUDICED THE DEFENSE.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10) guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). The accused has received ineffective assistance of counsel when (1) counsel's performance was deficient and (2) the deficient performance prejudiced the accused. Strickland, 466 U.S. at 687; Townsend, 142 Wn.2d at 843.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Townsend, 142 Wn.2d at 843-44. Where counsel's deficient conduct cannot be characterized as legitimate tactics, counsel has rendered ineffective assistance. State v. Aho, 127 Wn.2d at 745-46.

The first prong of the Strickland test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. Strickland, 466 U.S. at 689.

The second prong of Strickland requires the defense to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The defense "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

As the post-trial evidentiary hearing showed, White and Chamberlin received information from various witnesses before trial that Varnell continued to express his love for Karen in the weeks leading to his arrest. Varnell went so far as to upbraid those in his family who criticized Karen's conduct. Defense counsel nonetheless failed to present this known and available testimony.

Often, the decision to call a certain witness is a matter of trial tactics that will not support a claim of ineffective assistance of counsel. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). The presumption that counsel was competent can be overcome, however, by a showing that counsel failed to conduct appropriate investigations to develop a defense, adequately prepare for trial, or subpoena necessary witnesses. State v. McSorley, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2005 WL 1743869 (2005); State v. Maurice, 79 Wn. App. 544, 903 P.2d 514 (1995); State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

McSorley is illustrative. The state charged McSorley with child luring, based on a child's allegation that McSorley stopped his jeep and told the child to get in the truck or he was going to get hurt. McSorley, at \*1. McSorley was arrested shortly after and said he was going to a doctor's appointment that morning.<sup>11</sup> A detective said he contacted the doctor's office and McSorley's appointment was not until 3:30 that afternoon. In closing, the prosecutor used the alleged timing discrepancy to undermine McSorley's credibility. Id., at \*5. Several weeks after the verdict,

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<sup>11</sup> The state contrarily theorized McSorley was cruising the neighborhood looking for children at school bus stops.

McSorley produced written proof that the appointment was at 10:30 that morning -- proof that counsel should have investigated before the trial. McSorley, at \*2, 4.

The court held that counsel's performance was deficient in failing to investigate and present this evidence. The court also held it was prejudicial, because McSorley's credibility was a key trial question. The failure to contradict the detective's testimony was damaging and exposed McSorley to damaging cross-examination, and allowed the state to argue that no evidence corroborated McSorley's testimony. Id., at \*6. Because the missing corroboration was important, the court held that a new trial was required. Id.

In Maurice, the defendant was charged with vehicular homicide. He believed that a mechanical malfunction had caused him to lose control of the vehicle, and mentioned that theory to his attorney. Counsel failed to investigate that claim or to call an expert witness for the defense, however. After he was convicted, Maurice hired an accident reconstructionist, who found evidence of mechanical failure. 79 Wn. App. at 550-51. He then filed a personal restraint petition alleging he had been denied effective assistance of counsel. The Court of Appeals agreed that counsel's performance was deficient. In light of Maurice's insistence that the

accident resulted from a mechanical malfunction, his attorney's failure to investigate that claim before trial could not be justified. Id. at 552.

Here, as in McSorley and Maurice, the key question was credibility.

Varnell testified that he did not intend for Warren to follow through with the subject of their conversation. Although White properly presented Dr. Piper's expert testimony to support the defense, the testimony was subject to damaging cross-examination that Dr. Piper merely relied on Varnell's self-reported feelings that he loved Karen and would not hire someone to harm her. This allowed the prosecutor to make the prejudicial implication of "garbage in, garbage out," to support the state's argument that the jury should reject Dr. Piper's opinion because it was not based on reliable facts.

The state's argument would have lost its luster, however, had White presented the available evidence to corroborate Varnell's claim. The evidence preceded the arrest -- before Varnell had an arguable reason to fabricate a defense. Furthermore, as Muenster explained, a reasonable juror would naturally expect to hear from an accused's friends and family if his defense was that he was still passionately in love with his wife and wanted to win her back. 17RP 88-90.

Although White explained that he did not offer this evidence because he was concerned that it might open the door to evidence about the

divorce, that concern was not legitimate. As Muenster argued in the new trial motion, evidence that Varnell was expressing his love for Karen in the weeks leading to the arrest would not open the door to unfairly prejudicial evidence relating to events occurring during the marriage. 17RP 103-05.

In light of the jury's natural expectation to hear such evidence -- coupled with the state's full exploitation of the absence of the evidence -- White's failure to present the evidence essentially doomed the defense to fail. For these reasons, White's performance was deficient, there was no legitimate tactical justification for it,<sup>12</sup> and the deficient performance prejudiced the defense. Varnell's conviction should be reversed and the case remanded for a new trial.

## 2. IMPOSITION OF CONSECUTIVE SENTENCES FOR COUNTS II-V VIOLATES SEVERAL CONSTITUTIONAL AND STATUTORY PROVISIONS.

As the state conceded in the trial court, the taped conversation between Varnell and Warren constituted a single act of solicitation, and the only act supporting the charges in counts II-V.<sup>13</sup> Although there was only

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<sup>12</sup> For an alleged tactical reason to defeat a claim of ineffective assistance, the tactic must be legitimate. Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); State v. Ward, 125 Wn. App. 243, 249-51, 104 P.3d 670 (2004).

<sup>13</sup> Although the state asserted that the offenses were different at

one act, the court entered four convictions and imposed four consecutive sentences, under the apparent theory that there were multiple victims of the solicitation. This violates several settled legal doctrines relating to double jeopardy, unit of prosecution, and same criminal conduct. The multiple convictions and consecutive sentences should be vacated.

The solicitation statute provides:

A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

RCW 9A.28.030(1). "[C]riminal solicitation under RCW 9A.28.030 also requires proof the solicitor intended the crime be committed." State v. Duke, 77 Wn. App. 532, 535, 892 P.2d 120 (1995) (citing WPIC 105.02 and notes thereto).

Few Washington cases have interpreted the solicitation statute. Other courts, however, have held and reasoned that facts like the present case support only one conviction and sentence for solicitation.

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sentencing, it made a different argument that no unanimity instruction was needed for counts II-V. At that time, the state's theory was that Varnell committed one act and only one act, a theory it argued to the jury. 11RP 538, 555.

a. Under General Solicitation Analysis, Only One Offense Was Committed.

The evidence showed that the solicitation was for "all four" people at the "same time." It also was for the same reason -- to ensure Varnell's custody of his sons. See note 5, supra, citing EX 16A. Because there was no separate intent and no separate act, this was a single solicitation.

Several courts have addressed the question whether a defendant may be convicted and sentenced on more than one count of solicitation where only one conversation takes place, but the offer is to commit crimes against more than one person. In Meyer v. State, 47 Md. App. 679, 425 A.2d 664 (1981), Meyer was convicted of four counts of solicitation of murder based on two conversations he had with an undercover police officer, during which he sought to arrange the killings of four people. The court first distinguished the charge of solicitation from that of conspiracy. The court noted that:

We see no reason why, on the one hand, in a single conversation (much less in two separate conversations as occurred here), a person cannot make successive and distinct incitements, each having a separate object; and we therefore reject the notion that merely because there is but one solicitor, one solicitee, and one conversation, only one solicitation can arise. We similarly reject, however, as being equally simplistic, the "per capita" theory that there are necessarily as many solicitations as there are victims.

Meyer, at 689 (emphasis added). The court reasoned that the focus should be on the number of incitements, rather than on the number of victims.

The number of victims is important only as it may be evidence of the number of incitements. By way of example, an entreaty made by a solicitor to blow up a building in the hope that two or more particular persons may be killed in the blast could be characterized as one solicitation, notwithstanding that implementation of the scheme might violate several different laws or, because of multiple victims, constitute separate violations of the same law. The multiple criminality of the implementation would not, in that instance, pluralize the incitement, which was singular. . . . But that is quite different from the situation in which the solicitee is being importuned directly to commit separate and distinct acts of murder to kill, individually, several different victims possibly at different times and places and by different means and executioners. In the later case, there is not a single incitement but multiple ones, each punishable on its own.

Meyer, at 689-90. In Meyer's case, the court found that the evidence supported the four counts of solicitation because the solicitations were made at different times, in different parts of the conversations. Also, the executions were to take place at different times and places, and possibly by different means and executioners. Different and cumulative fees were to be paid for the act, and Meyer had a different motive for killing each victim. Based on these factors, the court found, "In short, the evidence sufficed to permit a finding that it was not a 'lump sum' singular deal, but separate and

independent indictments to commit four separate and distinct acts of murder against specific named individuals." Meyer, at 690.

This issue was examined in California in People v. Morocco, 191 Cal.App.3d 1449, 237 Cal.Rptr. 113 (1987). Morocco was convicted of two counts of solicitation of murder based on his request that an acquaintance, Wingard, kill his ex-wife and her new husband. The plan developed over a series of meetings. Morocco wanted them to be killed inside their home. He was very concerned about Wingard being caught, and told him that if anyone else happened to be in the house, they should be killed as well. This included Morocco's oldest son, who he thought might be present. Wingard was further instructed that the ex-wife was to be killed "nice and easy," but that he "didn't give a shit" as to how her husband was killed. In exchange for the killings, Wingard was to be given weapons and drugs. Morocco, at 1451.

The appellate court agreed with Morocco's arguments that the record did not support his conviction for two separate counts of solicitation. In reaching its decision, the court noted prior decisions in People v. Cook, and People v. Miley,<sup>14</sup>:

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<sup>14</sup> People v. Cook, 151 Cal.App.3d 1142, 199 Cal.Rptr. 269 (1984); People v. Miley, 158 Cal.App.3d 25, 204 Cal.Rptr 347 (1984).

In People v. Miley, *supra*, 158 Cal.App.3d 25, 204 Cal.Rptr. 347, the court considered a situation in which the defendant requested that another individual commit three murders and several related crimes. Originally charged as six counts of solicitation, the trial court consolidated the counts so that the defendant was charged with a single count of solicitation. Approving the consolidation, the Court of Appeals referred to Cook and distinguished it as follows:

In Cook, the solicited killings "'might have to occur at different times and places, and perhaps by different means.'" Accordingly, the court upheld Cook's conviction of four counts of solicitation to commit murder. In this case, on the other hand, the solicited crimes were all part of one package; each offense would be consummated (or not) depending upon the circumstances encountered by the solicitee. Therefore, the consolidation was proper." (*Id.* at p. 31, fn. 4, 204 Cal.Rptr. 347).

Morocco, at 1452-53.

The Morocco court held that the multiple solicitation question is similar to the test to determine whether multiple conspiracies have occurred -- a question of fact for the jury. Morocco, at 1453 (citing Cook, United States v. Orozco-Prada 732 F.2d 1076, 1086 (2nd Cir. 1984), and Blumenthal United States, 332 U.S. 539, 588, 68 S. Ct. 248, 92 L.Ed.2d 154 (1947)). Based on the evidence presented at trial, the Morocco court held that the state had only proven a single count of solicitation. The court noted that the potential victims were husband and wife, were to be killed at

the same time and presumably by the same means, and there appeared no independent motive or objective for each victim. Morocco, at 1454.

When applied here, the holdings and reasoning of these cases shows that any solicitation for counts II-V was a "lump sum singular deal" for four people with one stated motive -- Varnell would receive custody of his sons. The solicited (but impossible) murders were to take place at the same time and place. See note 5, supra. The solicitation was one offense.

In response, the state may claim a different result follows State v. Clapp, 67 Wn. App. 263, 834 P.2d 1101 (1992).<sup>15</sup> The brief discussion and result in Clapp, however, are consistent with Meyer and Morocco.

Clapp was convicted of two counts of solicitation of murder and one count of solicitation of arson. The solicitations arose from a business dispute and the resulting litigation between Clapp and two men, Gillard and Marlton. Clapp approached an acquaintance named Robinson with some ideas to intimidate the two men, some of which Robinson carried out. Eventually Clapp began to talk to Robinson about killing Gillard and

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<sup>15</sup> The state may also point the Court to dicta in State v. Pacheco, 125 Wn.2d 150, 157, 882 P.2d 183 (1994). The dicta suggests that a unilateral conspiracy is not appropriate to charge, but a unilateral solicitation can be charged (*i.e.* solicitation of an impossible crime because the solicitee is a police officer). The Pacheco dicta does not address the question of how many charges may be filed.

Marlton, promising to pay him \$5000 to kill one or the other, or both. After Robinson threw a "Molotov cocktail" through Marlton's window, Robinson had second thoughts about his involvement. He contacted Marlton and cooperated with the police.

Clapp argued that the evidence was insufficient to support two separate murder solicitation convictions. The court briefly rejected the argument. Clapp, at 270. The court also concluded that the two convictions did not violate double jeopardy and need not be merged, because they involved two distinct crimes against two separate victims. Clapp, at 274-75.

The Clapp court did not cite Meyer, Morocco, or Cook, but its conclusion is consistent given the facts. Clapp clearly solicited Robinson on multiple different occasions, to engage in separate murders at separate times and separate places. Robinson ultimately acted on those solicitations, before he thought better of it. Because none of these facts are present in Varnell's case, a different result follows.

b. The Multiple Convictions Violate Double Jeopardy and Unit of Prosecution Analysis.

Double jeopardy protects a defendant from being convicted more than once under the same statute if the defendant commits only one unit of

the crime. U.S. Const. amend. V; Const. art. I, § 9; State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). The unit of prosecution is designed to protect the accused from overzealous prosecution that violates double jeopardy. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution is determined by examining the statute. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). When a defendant is convicted of multiple violations of the same statute, the question is what unit of prosecution the Legislature intended as the punishable act under the statute. In re Personal Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000); Adel, 136 Wn.2d at 634.

Legislative intent is determined by first looking at the plain language of the statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The plain language of a statute is discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L. L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

If the statutory language can reasonably be interpreted in more than one way, it is ambiguous. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P. 3d 583 (2001); In re Charles, 135 Wash.2d 239, 249-50,

955 P.2d 798 (1998). If the Legislature has failed to identify the unit of prosecution, or the statute is ambiguous, it must be construed in the defendant's favor. Adel, 136 Wn.2d at 634-35 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

The solicitation statute does not define what it considers "a crime." The Legislature did not indicate that multiple offense could arise from a single solicitation. The Legislative intent is at best ambiguous.

Other courts construing similar solicitation provisions have held that facts like these lead to one conviction. For the reasons set forth in section 2a, supra, a solicitation that occurs in one place, for criminal conduct to occur at the same time and place, is a single solicitation. The multiple convictions are therefore erroneous and counts III, IV, and V should be vacated and the matter remanded for resentencing on counts I and II only.

c. The Offenses Were Not "Separate and Distinct Criminal Conduct.

The Sentencing Reform Act (SRA) presumes sentences for multiple current offenses "shall be served concurrently." RCW 9.94A.589(1)(a). This presumption of concurrent sentences may only be overcome by a

judicial finding that the offenses arose from "separate and distinct criminal conduct."<sup>16</sup>

RCW 9.94A.589(1)(b) provides in relevant part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

In cases where the court finds that conduct was "separate and distinct," it must impose consecutive sentences. RCW 9.94A.589(1)(b).

"Separate and distinct criminal conduct" is not defined by statute, but case law has defined it by its counterpart "same criminal conduct," which is defined in subsection (a). State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). In order for the court to impose consecutive sentences in Varnell's case, it must have found that his offenses did not involve the same intent, time and place, and victim. RCW 9.94A.589(1)(a); Tili, at 123-25.

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<sup>16</sup> The statute also permits the trial court to impose consecutive sentences as an "exceptional" sentence. RCW 9.94A.589(1)(a).

Assuming arguendo the solicitation statute permits multiple offenses, there is no reasonable basis to conclude that the single solicitation was "separate and distinct criminal conduct." For the reasons set forth in section 2a, a solicitation that occurs in one place, for criminal conduct to occur at the same time and place, is a single solicitation. The consecutive sentences are therefore erroneous and should be vacated. Tili, at 123-25.

3. IMPOSITION OF CONSECUTIVE SENTENCES FOR ALL OF THE COUNTS, BASED ON A JUDICIAL FINDING THAT THE CRIMES WERE "SEPARATE AND DISTINCT," VIOLATED VARNELL'S RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW.

An accused person has the right to a jury trial and may only be convicted upon proof beyond a reasonable doubt of every element of the crime. U.S. Const. amends. 6, 14. A fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" constitutes an element of the substantive crime that must be proved beyond a reasonable doubt to the trier of fact. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In other words, if the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt. Blakely, 124 S. Ct. at

2536; Apprendi, 530 U.S. at 482-83; Jones v. United States, 526 U.S. 227, 243, 251-52, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J., concurring). The judge may only impose punishment within the maximum term justified by the jury verdict. Blakely, 124 S. Ct. at 2537.

In order to assess whether a fact is an element that must be proven to the jury, the relevant inquiry is what effect the additional fact has on the sentence to which the defendant is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. If the fact increases the maximum sentence, it is "the functional equivalent of an element of a greater offense", and must be proven to the jury. Apprendi, 530 U.S. at 494 n. 19; see also Blakely, 124 S. Ct. at 2539 (the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.") (court's emphasis).

Varnell's sentence was unconstitutionally elevated above the otherwise-permissible statutory maximum when the court found that the crimes were "separate and distinct." Varnell's sentence should be vacated and the matter remanded for resentencing.

- a. The "Separate and Distinct Criminal Conduct" Finding to Impose Consecutive Sentences Exposed Varnell to Increased Punishment and Should Have Been Proven to a Jury Beyond a Reasonable Doubt.<sup>17</sup>

As explained in argument 2c, supra, the SRA presumes sentences for multiple offenses "shall be served concurrently" unless the court enters a judicial finding that the offenses arose from "separate and distinct criminal conduct." RCW 9.94A.589(1)(a). In cases where the court finds that conduct was "separate and distinct, it must impose consecutive sentences. RCW 9.94A.589(1)(b).

In order for the court to impose consecutive sentences in Varnell's case, it must have found that his offenses did not involve the same intent, time and place, and victim. RCW 9.94A.589(1)(a). Under Blakely, however, this is a factual determination that must be made by a jury, not the court.

Varnell's standard sentence for an anticipatory serious violent offense, seriousness level XV, would depend on how his current offenses

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<sup>17</sup> Counsel for Varnell is aware that this Court has held that the "separate and distinct" finding need not be made by a jury. State v. Kinney, 125 Wn. App. 778, 780-81, 106 P.3d 274, rev. pending, No. 76821-8. The Supreme Court also heard argument in a case raising the issue on February 10, 2005. State v. Cubias, 119 Wn. App. 1018, 2003 WL 22701538, review granted, 152 Wn.2d 1013 (2004).

are counted. If the counts II-V sentences are considered the same criminal conduct for scoring purposes,<sup>18</sup> then Varnell's score on counts I, and counts II-V, is three points. The standard range would be 203.25 - 270.75 months. If all the offenses are counted, then the score is 9 or more, with a range of 308.25-411 months.<sup>19</sup>

No matter what this Court determines is the appropriate score, the maximum is far less than the 950 months the trial court imposed. Thus, the sentencing court's factual finding that the offenses arose from "separate and distinct" conduct exposed Varnell to more punishment than supported by the jury's verdict.<sup>20</sup>

Because this finding of fact increased the sentence to which Varnell was exposed, the Sixth and Fourteenth Amendments required the State to prove the fact to a jury beyond a reasonable doubt. See Apprendi, 530 U.S. at 497; Blakely, 124 S. Ct. at 2543 (quoting 4 Blackstone, Commentaries on the Laws of England 343 (1769)).

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<sup>18</sup> See argument 2, supra.

<sup>19</sup> RCW 9.94A.525(16); 9.94A.595; Adult Sentencing Manual (2004), at III-147. A copy of the scoring form is attached as appendix A.

<sup>20</sup> Under the state's theory, the trial court could have run five sentences of 240 months each, for a total of 1200 months.

b. Apprendi's Rule Applies to the Imposition of Consecutive Sentences.

In response, the State might suggest the rule articulated in Apprendi does not apply to the imposition of consecutive sentences, as the sentence for each individual offense remains within the standard range. Such a position is untenable as it ignores the meaning of the constitutional protections. Justice Scalia explained,

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt.

Apprendi, 536 U.S. at 610 (emphasis added) (concurring opinion). In the case at hand, the court could not have imposed a sentence of 950 months without the additional finding. The constitutional violation in cases regarding consecutive sentences is arguably greater than in other cases, as the finding simultaneously enhances the sentences for multiple counts.

The State is also likely to rely upon the rulings of other courts that have addressed the impact of Apprendi on the imposition of consecutive sentences. Such reliance is misplaced. Unlike many jurisdictions, judges in Washington may only impose consecutive sentences after making a judicial finding of fact. Compare State v. Tili, 139 Wn.2d 107, 120, 124, 985 P.2d 365 (1999) (noting statutory requirements and remanding where

trial court made erroneous finding), with United State v. White, 240 F.3d 127, 135 (2nd Cir. 2001) (citing 18 U.S.C. § 3484, allowing for imposition of consecutive sentences without judicial finding of fact), cert. denied sub nom. Cruz v. United States, 124 S. Ct. 157 (2003); State v. Bramlett, 41 P.3d 796, 797 (Kan. 2002) (rejecting claim of Apprendi error because K.S.A. 21-4608 affords judicial discretion in imposing consecutive sentences and requires no additional finding of fact).

Moreover, the majority of courts that have considered whether Apprendi impacted the imposition of consecutive sentences decided this question before the Court's decision in Blakely. As such, many courts dismissed claims of Apprendi error in imposing exceptional sentences by relying on the reasoning, now known to be faulty, that there was no error if the sentence was within the statutory maximum, even if outside the standard range. See, e.g., Wright v. Alaska, 46 P.3d 395, 398 (Alaska 2002) (affirming sentence where consecutive sentence was within statutory maximum, although exceeding presumptive sentence); compare Blakely, 124 S. Ct. at 2537 (clarifying "statutory maximum" for Apprendi purposes is maximum sentence judge may impose based solely on jury's verdict).

Moreover, in Apprendi, the Court did not consider the application of the articulated rule to consecutive sentences. In defense of its practice,

New Jersey had argued there was no error, as the sentencing court *could* have imposed consecutive sentences on the other two counts and achieved the same ultimate result. 530 U.S. at 474. The Supreme Court disagreed.

The constitutional question . . . is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. . . . The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

Id. This statement does not authorize the imposition of consecutive sentences based upon a judicial finding of fact. Rather, it recognizes the action the trial court actually took -- imposition of an enhanced sentence on a single count. Id. at 471. Additionally, unlike RCW 9.94A.589, the relevant New Jersey statute afforded the trial court unbridled discretion in imposing consecutive sentences. N.J.S.A. 2C:44-5(a). As such, and as discussed above, it does not implicate the same constitutional concerns presented here.

Varnell, like Mr. Blakely, had the constitutional right to a jury trial and due process of law. These constitutional rights were violated when the Legislature defined the punishment for a particular offense or offenses and provided for increased punishment based upon the finding of some fact by a judge, not a jury, by a preponderance of the evidence, not beyond a

reasonable doubt. Apprendi, 530 U.S. at 491-2; Blakely, 124 S. Ct. at 2538.

- c. Varnell's Sentence Should be Vacated and His Case Remanded for Resentencing Within the Correct Standard Range.

The Washington Supreme Court has held that Blakely error is structural and requires resentencing because it cannot be harmless. State v. Hughes, 154 Wn.2d 118, 147-48, 110 P.3d 192 (2005); see also State v. Jones, 126 Wn. App. 136, 148, 107 P.3d 755 (2005). Thus, Varnell is entitled to be resentenced. The remedy for a court's imposition of a sentence that exceeds the jury verdict is to vacate the sentence and remand for resentencing for a term authorized by the verdict. Apprendi, 530 U.S. at 496-97.

4. WHERE THERE WAS NO VALID WAIVER OF THE RIGHT TO COUNSEL AT SENTENCING, THE SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING.

At sentencing, Varnell asserted that he did not want Muenster to assist him as counsel. The court allowed Varnell to proceed pro se, but did not engage in any meaningful colloquy before accepting Varnell's alleged waiver of counsel. 20RP 8-10.<sup>21</sup> In proceeding without counsel and without a valid waiver, the trial court erred.

The state and federal constitutions guarantee an accused the right to counsel at all critical stages of a criminal proceeding, including sentencing.

These provisions also guarantee the right to self-representation. U.S. Const. amend. 6, 14; Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997).

Before a trial court may accept a waiver of counsel, the court must ensure that the defendant knows the risks inherent in self-representation, including the maximum penalty. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). This is usually accomplished through a colloquy with the

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<sup>21</sup> See also, 19RP 4, 9-15.

defendant, and "only in rare circumstances [will] a record devoid of a colloquy contain sufficient information to show a valid waiver of counsel." Silva, at 540 (citing Acrey, at 211).

Silva is controlling. Silva had just completed a trial and "had displayed exceptional skill" as a litigator. Silva, at 540. He had twice previously represented himself in trials. He knew the standard range sentence for the offenses. Nonetheless, this Court held the waiver invalid, because the trial court failed to inform Silva of the five-year maximum penalty attached to the class C felonies at issue there. Silva, at 541-42.

When applied here, Silva and Acrey mandate vacation of the sentence. As this Court held in Silva, apprising a defendant of the potential standard range is not sufficient; the defendant must know the statutory maximum penalty. Silva, at 541. Furthermore, Varnell clearly did not possess the legal knowledge and "exceptional skill" of Mr. Silva.<sup>22</sup> The sentencing transcript offers no reason to believe Varnell knew the seriousness of his predicament.<sup>23</sup> Although the standard range was

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<sup>22</sup> See record citations in note 7, supra; see also 19RP 15; 20RP 9-14, 17, 33-46.

<sup>23</sup> In his allocution, Varnell said he agreed with Muenster's sentencing brief, and thought his "sentencing range should be reduced . . . to the time served as of to date." 20RP 15. He previously stated that he could not see

discussed in Muenster's sentencing memo, the Court did not engage in a colloquy with Varnell to inform him that the maximum punishment for this class A felony was life in prison. Without that colloquy, Varnell's waiver of counsel is invalid. Silva, 108 Wn. App. at 541.

The error cannot be harmless, particularly where the court denied the request for a mitigated sentence, denied the request for concurrent sentences, and did not impose a sentence at the bottom of the range. Cf. State v. Gonzales, 90 Wn. App. 852, 854-55, 954 P.2d 360, rev. denied, 136 Wn.2d 1024 (1998) (where a standard range sentence must be imposed and a low-end sentence was imposed, other errors at sentence may be found harmless). The sentence should be vacated and the matter remanded to a different judge for a new sentencing hearing. State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) (remand to a different judge is appropriate where court has made a fundamental error that denied the defense a fair opportunity to present arguments at sentencing).

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what he had to gain by proceeding with counsel at sentencing, citing the state's "plea bargain" of "30 years." 19RP 15. The state actually was recommending a 1020-month sentence, an 85-year term. 20RP 24.

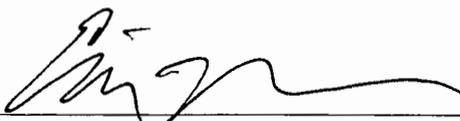
E. CONCLUSION

For the reasons set forth in argument 1, this Court should reverse Varnell's convictions and remand for a new trial. For the reasons set forth in arguments 2-4, Varnell's sentences should be vacated and the matter remanded for resentencing.

DATED this 29<sup>th</sup> day of July, 2005.

Respectfully submitted,

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Office ID No. 91051

Attorneys for Appellant

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Eric Broman  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Eric Broman 7/29/05  
Name Done in Seattle, WA Date

2005 JUL 29 PM 4:50  
ERIC BROMAN

***State of Washington vs. Mitchell Varnell,***  
Cause No. 02-1-00390-1, COA No. 54287-7-I  
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- 1 RP = June 10, 2002 – Castleberry
- 2 RP = Sept. 6, 2002 – Fair
- 3 RP = Sept. 20, 2002 – Thorpe
- 4 RP = Jan. 10, 2003 – Thorpe
- 5 RP = Jan. 24, 2003 – Thorpe
- 6RP = Feb. 14, 2003 – Thorpe
- 7RP = March 27, 2003 (*Appears to be January 10, 2003*)
- 8RP = May 9, 2003 – Wynne
- 9RP = May 23, 2003 – Farris
- 10RP = July 3, 2003 – Thorpe
- 11RP = 1) July 7, 2003 – Krese
  - 2) July 8, 2003 – Krese
  - 3) July 9, 2003 – Krese
  - 4) July 10, 2003 – Krese
  - 5) July 11, 2003 – Krese
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  - 7) July 15, 2003 – Krese
- 12RP = July 25, 2003 – Krese
- 13RP = August 20, 2003 – Krese
- 14RP = September 10, 2003 – Krese
- 15RP = October 2, 2003 – Krese
- 16RP = January 28, 2004 – Krese
- 17RP = February 27, 2004 – Krese
- 18RP = March 5, 2004 – Krese
- 19RP = March 15, 2004 – Krese
- 20RP = April 19, 2004 – Krese

# APPENDIX A

**MURDER, FIRST DEGREE**

(RCW 9A.32.030)

CLASS A FELONY

SERIOUS VIOLENT

(If sexual motivation finding/verdict for conspiracy or solicitation, use form on page III-16)

**I. OFFENDER SCORING (RCW 9.94A.525(9))**

**ADULT HISTORY:**

Enter number of serious violent felony convictions ..... \_\_\_\_\_ x 3 = \_\_\_\_\_  
 Enter number of violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent felony dispositions ..... \_\_\_\_\_ x 3 = \_\_\_\_\_  
 Enter number of violent felony dispositions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass this offense ..... \* count in offender score)

Enter number of violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed ..... + 1 = \_\_\_\_\_

*APPENDIX*

Total the last column to get the **Offender Score**  
 (Round down to the nearest whole number)

**II. SENTENCE RANGE**

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL XV)	240 - 320 months	250 - 333 months	261 - 347 months	271 - 361 months	281 - 374 months	291 - 388 months	312 - 416 months	338 - 450 months	370 - 493 months	411 - 548 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 24 to 48 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- D. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-6 or III-7 to calculate the enhanced sentence.
  - Statutory minimum sentence is 240 months (20 years) (RCW 9.94A.540).
  - The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules