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 SUPREME COURT
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 BY RONALD R. CARPENTER

IN THE SUPREME COURT
 OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 78979-7
Respondent,)	
)	MOTION TO STRIKE
vs.)	PORTION OF
)	PETITIONER'S
MITCHELL LEE VARNELL,)	SUPPLEMENTAL
)	BRIEF
Petitioner.)	

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

That the petitioner's Blakely argument be stricken.

III. FACTS RELEVANT TO MOTION

In briefing below, the petitioner argued (1) ineffective assistance of counsel, BOA 31-36; (2) the 'unit of prosecution' for solicitation, BOA 31-38; (3) the factual underpinning for "separate and distinct criminal conduct" under RCW 9.94A.589(1), BOA 38-40; (4) the finding of "separate and distinct criminal conduct" as a

violation of Blakely¹ and Apprendi,² BOA 40-47; and (5) the absence of a valid waiver of counsel at sentencing, BOA 48-51.

In his petition, the petitioner sought review of (1) the unit of prosecution issue, Petition at 4-10; the Court of Appeals finding of “four distinct causes of conduct” as a violation of Blakely and Apprendi, Petition at 10-12; and (3) ineffective assistance of counsel, Petitioner at 12-13. In his petition, the petitioner asserted issue (2) was not a new argument. Petition at 11, n.11. The phrase “unit of prosecution” does not appear in it once. Petition at 10-12.

This Court granted review on the unit of prosecution issue *only*. Order of April 4, 2007.

In his supplemental briefing, the petitioner incorporates his Blakely claim into his “unit of prosecution” argument. The petitioner discusses the factual bases and the question of legislative intent, Appellant’s Suppl. Brf. at 5-10, 13-17, but incorporates a Blakely argument as well, Appellant’s Suppl. Brf. at 4, 10-13. However, this

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

is a new argument, and even if it were not, this is not the issue on which this Court granted review.

IV. GROUNDS FOR RELIEF AND ARGUMENT

When accepting review, the Supreme Court will only review those issue raised in the petition, and may limit the issues to one or more raised by the parties. RAP 13.7(b). Here, the Court has limited review to the “unit of prosecution” issue only. This is at root an issue of statutory construction, to divine legislative intent. State v. Adel, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). And it was so considered below. State v. Varnell, 132 Wn. App. 441, 452-53, 132 P.3d 772 (2006). A Blakely argument based on Lavery³ and Hughes,⁴ neither of which address units of prosecution, is something altogether different on which this court did not grant review. See RAP 13.7(b). Moreover, a new argument raised for the first time in supplemental briefing should not be addressed by this Court. State v. Williams, 158 Wn.2d 904, 908 n.1, 148 P.3d 993 (2006). The petitioner’s Blakely argument should be stricken. It is readily severable from the rest of his argument properly before the Court.

³ In re Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

⁴ State v. Hughes, 154 Wn.2d 118, 135, 110 P.3d 192 (2005).

RESPECTFULLY SUBMITTED this 10th day of May, 2007.



CHARLES BLACKMAN, WSBA 19354
Deputy Prosecuting Attorney
Attorney for Respondent

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 11 day of May, 2007.

