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STATE OF WASHINGTON
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No. 78979-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

MITCHELL VARNELL,
Petitioner

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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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES IN SUPPLEMENTAL BRIEF

1. What is the unit of prosecution for a solicitation offense arising from a single conversation, under RCW 9A.28.030 and 9A.32.030(1)(a), where the solicitation occurs in one conversation, where the record supports a finding that the solicited crimes could be committed at the same time and place and for the same general objective, but where the alleged targets for the solicitation included four potential victims?

2. Where the Legislature has not clearly stated that multiple convictions should arise in this circumstance, and where this Court has previously required application of the rule of lenity when the "unit of prosecution" is ambiguous, did the Court of Appeals err in declining to follow this Court's decisions?

3. Does the Court of Appeals' affirmance of multiple convictions violate petitioner's Sixth Amendment rights under Blakely and Lavery,¹ where the jury never found the facts necessary to justify the Court of Appeals' finding that the solicitation "encompassed four distinct courses of conduct"? State v. Varnell, 132 Wn. App. 441, 453, 132 P.3d 772 (2006), rev. granted, ___ Wn.2d ___ (2007).

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004); In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.2d 837 (2005).

B. SUPPLEMENTAL STATEMENT OF THE CASE²

Petitioner Mitchell Varnell had a single conversation with Terrence Warren, an undercover detective. During that conversation, the two discussed the possibility of Varnell hiring Warren to kill Varnell's ex-wife Karen, her brother, and her parents. Varnell and Karen had divorced and Karen was the primary custodial parent for their two sons. The sole alleged reason for the solicitation was to ensure that Varnell would have his sons returned to him.

Varnell presented a substantial factual defense that he did not actually intend any killing to occur. The defense was supported by significant holes in the state's case, as well as by substantial defense evidence showing Varnell loved Karen and did not want her killed. Varnell instead wanted to create a situation where he could win her back by being a hero who saved her from a dangerous man. The defense was supported by expert psychological testimony as well as Varnell's testimony. See BOA at 6-18.

Varnell initially walked away from the restaurant where he was to meet Warren, but Warren chased him down. The ensuing conversation outside the restaurant lasted about an hour. During the conversation Varnell spent a lot of time talking about his sons and his

² Citations to the record are set forth in full in the Brief of Appellant, at 6-18.

concern for their well-being. On several occasions Warren tried to steer Varnell back to Warren's purpose for the meeting. BOA at 10-12; EX 16A.

Varnell also presented a substantial legal argument that the conversation could support only one unit of prosecution. The text of the conversation made it plain that any alleged solicitation was to kill all four, not one, two, or three. BOA at 11-12 n.5 (citing EX 16A). The state also theorized that Varnell did this for one purpose: to regain custody of his two sons. Finally, substantial discussion on the tape showed that the contemplated killings should occur at the same place and time. See note 9, infra, and accompanying text.

Varnell was arrested as he walked away from the conversation with Warren. The state charged four counts arising from the single conversation.³

On appeal Varnell argued, inter alia, the four counts should be considered one offense. BOA at 29-38. The Court of Appeals rejected Varnell's argument and held the single conversation could support four convictions. State v. Varnell, 132 Wn. App. at 452-53. The court accordingly upheld Varnell's consecutive sentences, totalling 950 months in prison. CP 24. This Court granted review.

³ The state charged a fifth count arising from a different alleged solicitation in a conversation with a different person.

C. SUPPLEMENTAL ARGUMENT

THE CONSTITUTION PERMITS ONE CONVICTION FOR AN INCHOATE SOLICITATION UNLESS A JURY FINDS THE TARGET OFFENSE WAS INTENDED TO OCCUR AT DIFFERENT TIMES AND DIFFERENT PLACES.

Varnell was improperly convicted of four counts for a solicitation in one conversation with Detective Warren. Varnell's argument is supported by the tape and transcript of the conversation (EX 16A), by persuasive authority from other jurisdictions, by this Court's authority addressing inchoate conspiracies, and by the state's own theory in the trial court – there was but one act the jury needed to agree upon. 11RP 538-55. The state's contrary position conflicts with this Court's conspiracy jurisprudence and with the Sixth Amendment requirement for a jury to find all facts necessary to support a sentence beyond the statutory maximum.

Double jeopardy protects an accused from being convicted more than once under the same statute when only one unit of the crime is committed. U.S. Const. amend. 5; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342-43, 138 P.3d 610 (2006); State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When addressing whether single or multiple statutory violations occur, the question is what "unit of prosecution" the Legislature intended as the punishable act. Leyda, at 342-43; Adel, 136 Wn.2d at 634.

Washington's 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) (emphasis added). Although this case presents an issue of first impression under the solicitation statute, this Court has addressed the closely parallel conspiracy statute, which provides:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1) (emphasis added); State v. Bobic, 140 Wn.2d 250, 265-66, 996 P.2d 610 (2000).

In Bobic, this Court held the unit of prosecution for conspiracy is the agreement and the substantial step in furtherance of the conspiracy, despite multiple objectives and multiple potential victims. Bobic, at 265-66. This Court specifically rejected the idea that the number of victims should be outcome-determinative in deciding the unit of prosecution for inchoate offenses. Bobic, at 265-66 (vacating two of three conspiracy convictions even though the co-conspirators stole, stripped, and resold numerous vehicles from different victims).

Bobic remains good law, as it has been cited with approval in dozens of Washington cases. The Legislature has not amended the conspiracy statute to show any disagreement with Bobic. The Legislature's acquiescence in this Court's construction is an indication of legislative intent. 1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 181, 149 P.3d 616 (2006); State v. Roggenkamp, 153 Wn.2d 614, 630, 106 P.3d 196 (2005). The Legislature also is presumed to be aware of this Court's interpretations of similar language in similar statutes. State v. Ose, 156 Wn.2d 140, 148, 124 P.3d 635 (2005).

Bobic's holding and analysis apply here. The conspiracy and solicitation statutes both punish inchoate offenses. Both have parallel "a crime" constructions supporting parallel interpretations. Cf. RCW 9A.28.030(1); RCW 9A.28.040(1).

Bobic also compliments substantial authority from other jurisdictions that have rejected an overly simplistic "per capita" theory when the state charges solicitation to commit murder. BOA at 31-38 (citing, inter alia, People v. Morocco, 191 Cal.App.3d 1449, 237 Cal.Rptr. 113 (1987); People v. Miley, 158 Cal.App.3d 25, 204 Cal.Rptr 347 (1984); Meyer v. State, 47 Md. App. 679, 689, 425 A.2d 664 (1981)). In those cases, the question is whether the allegedly intended offense will occur with the same general motive and

objective, at the same time and place, and by the same means. Morocco, at 1451-53; Meyer, at 689-90.

Varnell's brief discussed Morocco, Miley, and Meyer at some length, and that analysis is not repeated here. BOA at 31-36. The Supreme Court of Kentucky also addressed this issue recently and rejected the state's position. Wyatt v. Commonwealth, ___ S.W.3d ___, 2007 WL 1166395 (Ky., April 19, 2007).

In Wyatt, the government proved Wyatt had one conversation with an undercover officer in a parking lot. The undercover officer started the conversation, noting he had heard Wyatt was willing to offer drugs in exchange for killing two police officers. The discussion involved potential methods and prices, they agreed on a down payment, but a final price was never discussed or agreed upon. There was to be one executioner, one fee, and one motive. Wyatt, at *1-2, 7. On appeal, the Wyatt court held there could only be one conviction for solicitation. Wyatt, at *7-8 (citing Meyer and People v. Vandelinder, 192 Mich. App. 447, 481 N.W.2d 787 (1992)).

Wyatt and Morocco also compliment Bobic. The Wyatt and Morocco courts both recognized the analysis for inchoate solicitations is closely related to the analysis for inchoate conspiracies. Wyatt, 2007 WL 1166395 at *7 ("the offense of criminal solicitation may be logically viewed as an imperfect conspiracy or as an attempt to

conspire") (citing Ira P. Robbins, Double Inchoate Crimes, 26 Harv. J. on Legis. 1 (1989)); accord Morocco, at 1453. As the Wyatt court reasoned, it is conceptually difficult to understand why solicitation would be punished more harshly than conspiracy. Although the undercover officer's refusal to participate may not have lessened the solicitor's arguable mental culpability, "[b]y the same token, . . . a refusal by the person solicited to participate should not result in greater punishment than if there had been a completed agreement." Wyatt, at *7. Under Bobic, if Warren was not an undercover policeman and the state proved an actual agreement, there would have been but one conspiracy. Bobic, at 264-66. As the Wyatt court reasoned, "[i]t would be illogical to obtain a different result where the conspiracy fails and the only crime committed is the solicitation." Wyatt, at *8.

The state's brief in the Court of Appeals recognized the general rejection of a "per capita" rule in solicitation cases. BOR at 32-33 (citing Meyer, Vandelinder, and People v. Cook, 151 Cal. App.3d 1142, 199 Cal.Rptr. 269 (1984)). The state also conceded this is a "fact-based, case-by-case analysis." BOR at 34.⁴ In essence, the

⁴ A leading Washington criminal law commentator has also recognized the fact-based nature of this inquiry, offering this summary of the Court of Appeals decision:

state then asked the Court of Appeals to enter its own factual findings (BOR at 34), and it may ask this Court to do the same. Under the state's newfound appellate theory, it claimed the solicitation involved "separate logistical planning," because Karen, her parents, and her brother lived at "separate locations[.]" BOR at 31. From this, the state asked the Court of Appeals to find the solicitation actually involved "separate and distinct acts," and therefore, "separate units of prosecution." BOR at 31.

The state's brief to Division One repeated the word "separate" or "separately" five times in six lines of text. BOR, at 31. But repeating an allegation is no substitute for proof, particularly in the context of the Sixth Amendment. See generally, In re Lavery, 154 Wn.2d at 254-58; Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (requiring proof of prior found

A defendant can be convicted of one count of solicitation for each solicitation for conduct that would constitute the underlying crime. For example, a defendant could be convicted of four counts of solicitation for soliciting the murders of four people, since the murders were intended to occur at different times and places.

Seth A. Fine, 13 Wash.Pract. Criminal Law, § 605 (2007 pocket part) (emphasis added, citing Varnell).

facts, not prior allegations). Nor is simple repetition a particularly persuasive rhetorical device.⁵

Although the state has conceded on appeal this is a fact question, the state never asked the jury to find Varnell's conversation with Warren involved "separate and distinct acts," or that any offense(s) was or "were intended to occur at different times and places."⁶ Without a jury finding on this unresolved question of fact, there can be no constitutional consecutive sentence for multiple offenses. In the post-Blakely world, the unresolved factual question cannot be answered by an appellate court's after-the-fact "finding," nor by the state's repetition of the word "separate" in its appellate pleadings. The Blakely court held, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely, 542 U.S. at 303-04 (emphasis added).⁷

⁵ See, e.g., Honore v. State Bd. of Prison Terms, 77 Wn.2d 660, 693, 466 P.d 485 (1970) (Finley, J., concurring, quoting "The Hunting of the Snark", Logical Nonsense – The Works of Lewis Carroll 268 (P. Blackburn and L. White ed. 1934), exposing as nonsense the notion that repeating an unproved allegation ("Just the place for a Snark!") somehow makes it true).

⁶ None of the state's proposed verdict forms or "to-convict" instructions included language on this theory. CP 692-710.

⁷ Blakely and Apprendi stand for the basic proposition that a court cannot impose a sentence exceeding the statutory maximum

Assuming arguendo the failure to secure the jury's verdict on this question could ever be harmless under state law,⁸ this record cannot satisfy the state's burden to prove the constitutional error harmless beyond a reasonable doubt. The weight of the evidence instead shows the allegedly intended (but impossible) offense would occur at a single place and time.⁹ Although Varnell spent more time talking about his sons, Warren was still able to understand and then summarize the unitary nature of the proposed offense, stating "if I

unless the facts necessary to support that sentence were found by a jury or stipulated by the defense. 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, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005); U.S. Const. amend. 6.

⁸ Counsel understands this Court is considering the effect of Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), in two recently argued cases: State v. Recuenco, no. 74964-7, and In re Restraint of Hall, no. 75800-0 (both argued March 13, 2007).

⁹ See EX 16A at 3 (stating that the price was for four people, "[a]ll in the same place, same time"); at 4, 12-13, 21 (discussing the possibility that the offense could occur in Idaho, as "[a]ll four would be there at the same time"); at 10 ("[f]our all together"); at 10 (where Varnell notes his initial figuring that Karen's brother, father and mother could all be "taken out" at "one house," then Karen could be loaded up in the same car, as they lived only a block apart); at 23 (specifically stating "no" when Warren asked if Varnell wanted Karen killed at her house by herself); at 27 (noting that the offense would involve the "whole family"); at 31-32 ("[i]t'd have to be all in one night"); at 35 ("[a]nd I'd preferably want it to look like a . . . accident"); at 46 (suggesting that the offense could occur when all were in the same house).

can't get all four at once or at the same night then I'll wait. . . . I'll get all four at the same time." EX 16A at 36. Varnell never instructed Warren how to accomplish the alleged offense, but Varnell relayed several of his own prior musings on the subject.¹⁰ There also was some discussion of the possibility that acts might occur at different times and places.¹¹

Given this record, the state simply cannot show the error in failing to submit this fact question to the jury was harmless. Nor can the state show there was no "overlap" in the potential means the offense(s) might be committed. In the pre-Blakely decision in Bobic, for example, the court analyzed whether there was an overlap of time, common overt acts, geographic scope, and common objectives in determining whether there were multiple conspiracies or a single conspiracy for double jeopardy purposes. Bobic, at 266. Here, the state would have to concede there is substantial overlap under Bobic's pre-Blakely analysis, even if the evidence showed more than

¹⁰ EX 16A at 10-11 (Varnell relates one potential means for committing the offense, but does not answer Warren's question, "[y]ou want me to do that or do you want me to do something else?"); at 35-36, 39 (similar exchange); see also, 31-32 (Warren says he would do it his own way unless Varnell required something different).

¹¹ See EX 16A at 33 (noting that Karen lived a block away from the other three); at 44-45 (Warren discusses the need to get both addresses and to deal with security systems).

one potential time and place where the proposed conduct might occur. EX 16A.

Given these fact problems, the state's other potential means to avoid reversal would be to advocate the simplistic "per capita" rule. In the Court of Appeals, however, the state conceded the "per capita" rule was expressly rejected by other courts. BOR at 32-34 (citing, inter alia, Meyer, Cook, and Vandelinder). Nonetheless, the state may try to revive that rule in this Court, citing this Court's decision in State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005). If the state makes the argument, this Court should reject it.

The state charged Graham with three counts of reckless endangerment. That statute allows conviction where a person "recklessly engages in conduct . . . that creates a substantial risk of death or physical injury to another person." Graham, at 405 (quoting RCW 9A.36.050(1)). Graham had driven recklessly, endangering and actually injuring three passengers who were ejected from her car in a rollover accident.¹² Graham, at 402-03.

This Court held the words "another person" – rather than "any person" – revealed legislative intent to establish a per capita unit of prosecution when other persons were endangered. Graham, at 405-

¹² A fourth passenger was killed, leading to conviction for vehicular homicide. Graham, at 402-03.

06. The Court distinguished the "any fire" language of the arson statute, which rendered the fire, rather than the number of vehicles damaged, the unit of prosecution for arson. Graham, at 405-06 (distinguishing State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002)). The Graham decision adequately rested on this sole ground. Graham, at 406 ("the plain language analysis of Westling supports the conclusion of the Court of Appeals in the present case").

The Graham court continued, however, finding additional support "from a broader consideration of the nature of reckless endangerment." Graham, at 406. Although the Graham court used the word "inchoate" to describe the offense of reckless endangerment, there was nothing inchoate about Graham's offense.¹³ She drove recklessly and actually injured three of her passengers. Relying on a Maryland case discussing the general theory behind reckless endangerment, the Graham court in dicta reasoned "that an inchoate crime draws its essential character from the consummated form of the crime." Graham, at 407 (citing Albrecht).

The state may seize on this dicta to argue that inchoate solicitations should also draw their character from the completed

¹³ In theory, the crime may be inchoate. See e.g., Albrecht v. State, 105 Md.App. 45, 658 A.2d 1122, 1128-29 (1995).

crime. But the state's claim would necessarily conflict with this Court's decision in Bobic. Because there is no showing that the oft-cited decision in Bobic is "incorrect and harmful," the state's claim should be rejected. Where a "per capita" rule also would conflict with the weight of authority from other jurisdictions, there is little persuasive reason to adopt it.¹⁴

The state may also contend the unit of prosecution for all "crimes against persons" should depend on the number of potential victims. See former RCW 9.94A.411(2)(a) (2002)¹⁵ (identifying "crimes against persons" in standards for filing charges). As argued supra, the majority of jurisdictions reject this rule in the context of murder solicitation offenses. Furthermore, that is not the rule in Washington, even when the offense is completed rather than inchoate. See e.g., State v. Brooks, 113 Wn. App. 397, 399-400, 53 P.3d 1048 (2002). The state charged Brooks with two counts of first degree burglary – a "crime against persons" – because two people were assaulted inside the building Brooks unlawfully entered. The

¹⁴ One of the early cases rejecting the "per capita" rule is Meyer v. State, decided by the same Maryland court as Albrecht. It would be odd for a Washington court to construct an analysis that requires those two cases to be inconsistent, where both are still good law in Maryland.

¹⁵ The conversation with Warren occurred in 2002, so the governing statutes are those in effect then. RCW 9.94A.345.

Court of Appeals expressly rejected the state's claim, holding the number of victims does not establish the unit of prosecution. Brooks, at 400. The court accordingly vacated one of Brooks' convictions. Brooks, at 398.¹⁶

For these reasons, this Court should follow the leading cases and jurisdictions that have rejected a "per capita" rule. Rather than unweave the existing tapestry of Washington law, this Court should reaffirm Bobic and, if necessary, limit the Graham dicta in this context.

In the final analysis, neither the state nor the Court of Appeals identified a clear legislative intent to justify multiple convictions for a single solicitation occurring in one conversation, for an underlying offense intended to occur at one time and place for one purpose. At best, the statute is ambiguous. When the Legislature has failed to identify the unit of prosecution, or the statute is ambiguous, the rule of lenity requires it be construed in the accused's favor. Leyda, 157 Wn.2d at 345, n8; 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)). This

¹⁶ Division Three reached a similar conclusion in State v. Ustimenko, 137 Wn. App. 109, 151 P.3d 256 (2007). There the court rejected the state's argument that the failure to remain at the scene and render assistance at an injury accident is a "per capita" offense that might justify multiple convictions depending on how many people were injured, or that the driver failed to give information to, following the accident. Ustimenko, 151 P.3d at 259-60.

Court accordingly should vacate counts 3, 4, and 5 and remand for resentencing on counts 1 and 2. CP 19-31.

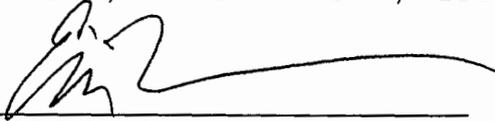
G. CONCLUSION

For the reasons set forth above, this Court should reverse the Court of Appeals, remand the case to the trial court with directions to vacate counts 3, 4, and 5 and to resentence Varnell on counts 1 and 2.

DATED this 7th day of May, 2007.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly addressed envelope directed to attorneys of record containing a copy of the document and declaration is attached.

Sohanish T. - Charlie Blachara
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 5/7/07
Name 18487 Done in Seattle, WA Date