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STATE OF WASHINGTON

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No. _____
COA No. 54287-7-1

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

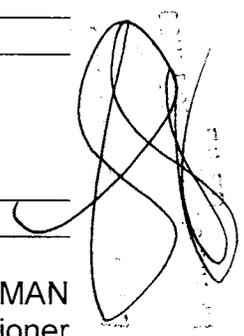
MITCHELL VARNELL,
Petitioner

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

PETITION FOR REVIEW

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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.

Snohomish County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Maysosky *6-20-2006*
Name Done in Seattle, WA Date

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A. IDENTITY OF PETITIONER

Petitioner Mitchell Varnell, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Varnell seeks review of Division One's partially published decision in State v. Varnell, ___ Wn. App. ___, 132 P.3d 772, No. 54287-7-I, (April 10, 2006), attached as appendix A. The Court of Appeals denied Varnell's pro se motion to reconsider by order dated May 23, 2006. Appendix B.

C. ISSUES PRESENTED FOR REVIEW¹

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?

¹ An additional issue and argument is set forth in section F, infra.

3. Does the Court of Appeals' affirmance of multiple convictions violate petitioner's Sixth Amendment rights under Blakely and Lavery,² 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 P.3d at 777.

D. STATEMENT OF THE CASE³

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 for any killing to occur. The defense was supported by significant holes in the state's case, as well as by substantial defense evidence that Varnell loved Karen and did not want her killed. Varnell instead wanted to create a situation where he could win her back by

² 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).

³ Citations to the record are set forth in full in the Brief of Appellant, at 6-18.

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 lasted about an hour. During the conversation Varnell spent a lot of time talking about his sons and his 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 6, 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.⁴

⁴ The state charged a fifth count arising from a different alleged solicitation in a conversation with a different person.

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 that the single conversation could support four convictions. State v. Varnell, 132 P.3d at 777-78. The court accordingly upheld Varnell's consecutive sentences, totalling 950 months in prison. CP 24.

Varnell also argued he was denied effective assistance of counsel when counsel failed to present available evidence to corroborate Varnell's defense. BOA at 24-29. In his pro se statement of additional grounds, Varnell raised additional claims of ineffective assistance, as well as other claims that he was denied a fair trial when his trial counsel and the trial court failed to recognize the debilitating nature of his medical problems. This petition timely follows.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE UNIT OF PROSECUTION FOR SOLICITATION OFFENSES IS AN IMPORTANT QUESTION THAT SHOULD BE REVIEWED BY THIS COURT.

Varnell argues he was improperly convicted of four counts for a single solicitation that occurred during one conversation with Detective Warren. Varnell's argument is supported by the tape and transcript of the conversation (EX 16A), by authority from other jurisdictions, and by the state's own theory in the trial court, namely that there was but one act the jury needed to agree upon. 11RP 538-

55. The Court of Appeals nonetheless affirmed the four convictions and four consecutive sentences arising from the single conversation.

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. 5; Const. art. I, § 9; 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. 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). Although this case presents an issue of first impression under the Washington statute, Varnell cited substantial authority from other jurisdictions that have rejected a simple "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)). The question instead 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.

As the record shows, the weight of the evidence showed the allegedly intended (but impossible) offense would occur at a single place and time. Much of the taped discussion supports the conclusion that any offense, if it was to be committed, would occur at a single place and time.⁵ Although Varnell spent more time talking about his sons, even Warren was able to summarize the unitary nature of the proposed offense, stating "if I 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

⁵ 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).

on the subject.⁶ There also was some discussion of the possibility that offenses might occur at different times and places.⁷

Faced with these facts and authority, the Court of Appeals offered two justifications for its decision. First, the court offered a legal conclusion: "[b]ecause the crime of murder is victim specific, the crime of solicitation to commit murder, directed to a specific individual, is likewise victim specific." Varnell, 132 P.3d at 777. But this is just the "per capita" rationale expressly rejected by Meyer and Morocco. See Meyer, at 689; Morocco, at 1452.⁸

Second, the Court of Appeals offered its own factual finding, reasoning that the facts showed the offense was intended to be committed at different places. Varnell, 132 P.3d at 777 (stating the single plan "still encompassed four distinct courses of conduct leading

⁶ 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).

⁷ 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).

⁸ In an unpublished decision, Division Two also appears to have rejected the "per capita" theory. State v. Hubbard, 118 Wn. App. 1017, 2003 WL 21964828 (2003). Varnell does not cite Hubbard as "authority" (see RAP 10.4(g)), but rather to point out an arguable conflict among the Court of Appeals Divisions in analyzing this issue. RAP 13.4(b)(2).

to four murders"). But the jury was never asked to find this alleged fact and the weight of the evidence is contrary to such a finding.⁹ In addition, this type of post-hoc appellate fact-finding violates the Sixth Amendment and Blakely. See argument 2, infra.

Given these problems, neither the state nor the Court of Appeals has shown 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. When 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)); accord, In re Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). Absent a clear statement of legislative intent, multiple convictions violate the rule of lenity.

Varnell also argued that the case law interpreting the "unit of prosecution" for other inchoate offenses should guide the Court of Appeals. The Morocco court reasoned the unit of prosecution analysis for inchoate solicitations is closely related to the unit of prosecution analysis for inchoate conspiracies. Morocco, at 1453.

As Varnell pointed out in additional authority and at oral argument in the Court of Appeals, this Court has addressed this issue

⁹ See note 5, supra.

under the conspiracy statute. 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 multiple potential 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's holding and analysis apply here. Both statutes punish inchoate offenses. Both have parallel "a crime" constructions that should lead to parallel interpretations. Cf. RCW 9A.28.030(1); RCW 9A.28.040(1). The Court of Appeals nonetheless rejected this Court's decision in Bobic, albeit without stating any reason why. Varnell, 132 P.3d at 777 (merely noting "[w]e disagree with [Varnell's] argument").

In light of these facts and applicable law, this Court should grant review for four reasons. First, this interesting issue is one of first impression under the solicitation statute that this Court should decide. RAP 13.4(b)(4). Second, the Court of Appeals' published analysis and result conflict with this Court's unit of prosecution analysis in State v. Bobic. RAP 13.4(b)(1). Third, the unit of prosecution

question is a significant question under the double jeopardy clauses of the state and federal constitutions. RAP 13.4(b)(3); BOA at 36-38.¹⁰ And fourth, the Court of Appeals' analysis and result conflict with this Court's case law applying the rule of lenity. RAP 13.4(b)(1). This Court accordingly should grant review.

2. THE COURT OF APPEALS' DECISION RELIES ON FACTS NOT FOUND BY THE JURY. BECAUSE THE RESULTING CONSECUTIVE SENTENCES EXCEED THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE, THE DECISION VIOLATES BLAKELY AND LAVERY.

As discussed supra, the Court of Appeals' abbreviated analysis simply assumed the factual finding that the alleged offense was intended to be committed at different times and at different places. State v. Varnell, 132 P.3d at 777. But the jury was not instructed to find whether the different counts were intended to occur at different places and times, and the state offered no special verdict to insure that the jury found that fact. CP 536-61. Unless the jury has found the fact, a sentencing court cannot rely on that fact to justify a sentence beyond the top of the standard range.

¹⁰ U.S. Const. amend. 5; Const. art. 1, § 9; Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); Bobic, 140 Wn.2d at 265-66; Adel, 136 Wn.2d at 634.

Blakely and Apprendi stand for the basic proposition that a court cannot impose a sentence that exceeds the statutory maximum 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. Here, the Court of Appeals engaged in its own fact-finding on appeal, finding that the single conversation with Warren encompassed "four distinct courses of conduct." Varnell, 132 P.3d at 777. Because the jury did not find this fact, the multiple, consecutive sentences violate Varnell's Sixth Amendment rights. Hughes, 154 Wn.2d at 131-32, 135-37; In re Personal Restraint of Lavery, 154 Wn.2d 249, 254-58, 111 P.2d 837 (2005).¹¹

¹¹ The state may suggest that Varnell is raising this claim for the first time in this petition, but Varnell raised Blakely claims in his brief. BOA at 40-47. This specific claim was not ripe or foreseeable until the Court of Appeals engaged in its own fact-finding. The state will suffer no prejudice, as it can address the merits of the claim in an answer, or in a supplemental brief in this Court. RAP 13.4(d), 13.7(d).

Because the Court of Appeals' decision on this important constitutional question conflicts with this Court's decisions in Hughes and Lavery, this Court should grant review. RAP 13.4(b)(1), (3).¹²

F. OTHER ISSUE PRESENTED FOR REVIEW AND ARGUMENT¹³

This court should accept review of the following additional issue.

1. ISSUE: 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?

ARGUMENT: 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). The

¹² A similar issue is pending in this Court, In re Restraint of Vandelft, no. 77733-1 (argued May 9, 2006). The question in Vandelft is whether consecutive sentences violate Blakely if the jury did not find all facts necessary to justify the consecutive sentences, notwithstanding broad dicta from State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005).

¹³ Varnell seeks review of these issues to exhaust his state remedies for potential federal habeas corpus review.

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.

As Varnell argued in his opening brief, his trial counsel provided deficient performance by failing to provide available corroborative evidence to support the defense. There was no legitimate tactical reason for the failure. Because the failure prejudiced Varnell's defense, his convictions should have been reversed. BOA at 24-29. This Court should grant review. RAP 13.4(b)(3).

G. CONCLUSION

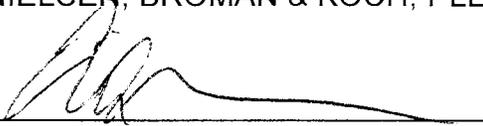
For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 20th day of June, 2006.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Mitchell Lee VARNELL, Appellant.
No. 54287-7-I.

April 10, 2006.

Background: Defendant was convicted by jury in the Superior Court, Snohomish County, Linda C. Krese, J., of five counts of solicitation to commit murder in the first degree of his wife and her family members. He appealed.

Holdings: The Court of Appeals, Coleman, J., held that:

(1) defense counsel was not ineffective in failing to present evidence of defendant's love for his wife, and
(2) convictions for four counts from single conversation did not violate double jeopardy.
Affirmed.

West Headnotes

[1] Criminal Law  **641.13(6)**

110k641.13(6) Most Cited Cases

Defense counsel was not ineffective, in prosecution for solicitation to commit murder of defendant's wife and her family members, by deciding not to introduce testimony by his family members about defendant's prearrest declarations of love for his wife; such testimony was duplicative of defendant's own testimony, would have enabled prosecution to cross-examine those witnesses about postdissolution difficulties between defendant and his wife, and might have opened door to predissolution difficulties. U.S.C.A. Const.Amend. 6.

[2] Criminal Law  **641.13(1)**

110k641.13(1) Most Cited Cases

To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. U.S.C.A. Const.Amend. 6.

[3] Criminal Law  **641.13(1)**

110k641.13(1) Most Cited Cases

To prove deficient performance by counsel, a

defendant must establish that the representation fell below an objective standard of reasonableness under professional norms. U.S.C.A. Const.Amend. 6.

[4] Criminal Law  **641.13(6)**

110k641.13(6) Most Cited Cases

A presumption of defense counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. U.S.C.A. Const.Amend. 6.

[5] Double Jeopardy  **182**

135Hk182 Most Cited Cases

Convicting defendant for four counts of solicitation to commit murder in first degree from single conversation proposing murder of four victims did not violate double jeopardy under unit of prosecution analysis; although defendant's proposal derived from single plan with single motive, crime of solicitation to commit murder, directed to specific individual, was victim specific. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9A.28.030(1).

[6] Double Jeopardy  **5.1**

135Hk5.1 Most Cited Cases

The double jeopardy clause of the Fifth Amendment and the state constitutional rule against double jeopardy protect a defendant from being punished multiple times for the same offense. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[7] Double Jeopardy  **134**

135Hk134 Most Cited Cases

[7] Double Jeopardy  **182**

135Hk182 Most Cited Cases

In determining whether defendant could be convicted, without violating double jeopardy, of four counts of solicitation to commit murder in first degree from single conversation proposing to kill four victims, inquiry was what "unit of prosecution" Legislature intended as the punishable act under the solicitation statute. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9A.28.030(1).

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Published in Part Opinion

COLEMAN, J.

¶ 1 **Mitchell Lee Varnell** was convicted of five counts of solicitation to commit murder in the first degree. He contends that his trial lawyers' decision not to have family members testify about his expressions of love for his ex-wife, Karen Varnell, constituted ineffective assistance of counsel, as such testimony could have demonstrated his lack of intent to solicit the murder of Karen, her brother, and her parents. He also makes a "unit of prosecution" challenge to four solicitation convictions that derive from a conversation between himself and an undercover detective. He further argues that these convictions did not arise from separate and distinct criminal conduct and that the sentencing court erred in imposing consecutive sentences. He makes a *Blakely* [FN1] challenge to the imposition of consecutive sentences. He also argues that his waiver of the right to assistance of counsel during his sentencing hearing was invalid. We affirm.

FN1. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

¶ 2 Testimony by family members about Varnell's expressions of love for Karen would have been duplicative and could have opened the door to the couple's postdissolution and predissolution difficulties. The conversation with the undercover detective supports four solicitation convictions because Varnell solicited the murders of Karen, her brother, and her parents through distinct and separate acts. Because the solicitations involved different victims, the convictions arose from separate and distinct criminal conduct that justifies consecutive sentences. Our Supreme Court's opinion in *State v. Cubias*, 155 Wash.2d 549, 553, 120 P.3d 929 (2005), is dispositive of the *Blakely* challenge. The circumstances of Varnell's decision to represent himself pro se indicate that he understood the risks and the factors of self-representation during sentencing.

FACTS

¶ 3 **Mitchell Lee Varnell** was convicted of five counts of solicitation to commit murder in the first degree. He was given consecutive sentences of 190

months of confinement, for a total sentence of 950 months.

¶ 4 According to trial testimony, Varnell and Karen divorced after 17 years of marriage. Karen Varnell was awarded custody of their two sons. The divorce was bitter. After the marital dissolution, Varnell hired Mary Wilson to work at his business, Mitchell Excavating. To Wilson, Varnell expressed feelings of anger and love for Karen. He spoke of his hope to reconcile. Wilson noticed Post-It notes suggestive of a plan to commit a murder. Wilson thought that Mitchell was writing a script or a plot to a movie. But when Mitchell saw that Wilson carried a handgun in her purse, he asked if he could borrow it. She refused. Mitchell then asked if she would be willing to kill Karen for \$50,000. She did not think he was serious. Mitchell later asked the same question in the presence of a coworker. Wilson then remembered the Post-It notes. She took them and showed them to Karen Varnell. At the request of the Snohomish County Sheriff's Office, Wilson made a tape-recorded telephone call to Varnell. Wilson told him that she had met a suitable person for carrying out his request and that she would have this person call him to set up a meeting.

¶ 5 Detective Terence Warren of the Snohomish County Sheriff's Office contacted Varnell under the pretense that he was the man identified by Wilson. They arranged to meet at a restaurant in Everett. At the restaurant, Varnell and Warren had an hour-long conversation that was recorded by the Sheriff's Office. [FN2] Varnell told Warren that Karen lived near her parents and brother and that "[t]he way I had it figured originally" was to murder Karen and three other *774 people and dump their bodies in a river. Exhibit 16A, at 10. Varnell speculated whether Karen and her parents had alarm systems in their houses. He told Warren he had entered their homes without their knowledge. He also told Warren that "I know that the ways that the wills are set up" and that "depending on what the judge would say, that the grandparents could end up with my ... kids or her brother." Exhibit 16A, at 18. "I don't wanna ... go part way ... just to end with my kids even worse off than they are now." Exhibit 16A, at 18. Varnell and Warren discussed scenarios in which Warren would kill Karen while she was taking a trip with one son to Idaho or wait for her at her home and murder her there. Varnell then repeated that he wanted Warren to kill Karen, her parents, and her brother at the same time. "I'd preferably would want it to look like [an] accident," possibly by placing them in a car and running the car into a river so that they would drown.

Exhibit 16A, at 35.

FN2. At trial, an audio recording of this conversation was entered into evidence and played for the jury. A transcript of the recording was numbered Exhibit 16A. The transcript was not entered into evidence, but copies were given to jurors to assist them in listening to the recording.

¶ 6 The Sheriff's Office arrested Varnell immediately after the conversation. He was charged with one count of solicitation for his conversations with Wilson and four counts of solicitation for his taped conversation with Warren.

¶ 7 During trial, the State offered into evidence a 10-minute segment of a videotape record of the meeting between Varnell and the undercover detective to show how Varnell appeared. Varnell's counsel cross-examined the witness for the videotape. The witness acknowledged that the videotape did not show that when Varnell initially arrived at the restaurant, he turned and walked back to the parking lot and that Warren came out of the restaurant and chased him down.

¶ 8 Varnell's trial counsel presented the expert testimony of Dr. August Piper, a psychiatrist. Piper had reviewed Varnell's medical history and a transcript of the meeting with Warren and had spoken with Varnell for about 11 hours. Piper testified that Varnell had a personality disorder and that he suffered an "erotomaniac" delusional disorder. Piper described the latter disorder as a belief that Karen "is still in love with him, and loves him passionately, and, you know, there's just a huge amount of evidence against that belief and yet he continues to hold it despite all this evidence against it." Verbatim Report of Proceedings (VRP) (July 11, 2003) at 403.

¶ 9 On cross-examination, the State questioned Piper about the dependence of his diagnosis on information provided to him. Piper testified that he relied upon police reports, including a report of a violation by Varnell of a no-contact order or a restraining order when he tried to give Karen flowers or balloons outside a supermarket.

Q. Now, but a large part of your diagnosis was based on the representations of Mr. Varnell; correct?

A. The short answer to your question is yes, a large part was based upon my interactions with him and what he told me, yes.

Q. And I believe you indicated earlier to Mr. White

that the validity or accuracy of your diagnosis is dependent on the accuracy of the information you receive?

A. As with any physician, including psychiatrists, yes.

Q. Right. And certainly, you know, garbage in, garbage out sort of thing; correct?

A. Well, in psychiatry we are especially dependent upon what the patient, the person tells us. In other branches of medicine, like when I was practicing internal medicine, you know, if I wanted to find out what was really going on I could get blood tests, or urine tests, or X-rays, or whatever, but there are no such diagnostic tests available in psychiatry. So we are crucially dependent upon what the patient tells us.

VRP (July 14, 2003) at 422.

¶ 10 Varnell testified in his own defense. He stated that when he agreed to talk to the man recommended by Wilson, he "wanted to catch this guy and get him caught by the police for the things he was saying so that I could show Karen how much I still loved her and that there was no way that I would ever do anything to hurt her by catching this potential bad guy." VRP (July 14, 2003) at 472. Varnell also testified that he believed *775 Karen loved him and they were going to reconcile.

¶ 11 The jury found Varnell guilty of all five counts. Varnell hired new counsel, John Muenster, and moved for a new trial on multiple grounds, including ineffective assistance of counsel.

¶ 12 At a hearing on the motion, one of Varnell's trial counsel testified that Varnell had wanted several additional people to testify, primarily as to Varnell's character or to issues related to his divorce, but that he and the other counsel believed that this testimony would not be productive and might be counterproductive. He also testified that he didn't want family members to testify about Varnell's love for Karen because this evidence was already presented through Varnell himself, because interviews with the family members led to inconsistent facts, and because he did not want to "open the box of the divorce to allow all of that evidence to come in." VRP (Feb. 27, 2004) at 48. He stated that the "nastiness from the divorce" included "terrible declarations" and "allegations that he was physically abusive to the wife, that he pointed a gun at her, knocked her off a horse, a lot of stuff." VRP (Feb. 27, 2004) at 49. During argument on the motion, the State contended that it would have welcomed this testimony because it would "open the

door ... to the divorce box" as rebuttal evidence. VRP (Feb. 27, 2004) at 98. The motion was denied.

¶ 13 Varnell communicated to the court that he wished to fire Muenster as his counsel. A hearing took place on March 15, 2004, and Varnell told the court that he had "no reason to believe Mr. Muenster can represent me." VRP (March 15, 2004) at 9. Muenster informed the court that he would prefer to represent Varnell during sentencing.

I think it's very important that he be represented by a lawyer in his sentencing, because there's an extremely significant issue, and that is whether the consecutive sentence policies in the [Sentencing Reform Act of 1981] are overly harsh and whether an exceptional sentence downward is warranted, because otherwise, the sentence range for Mr. Varnell gets to be longer than I think I've ever seen in my practice outside of an aggravated murder case."

VRP (Mar. 15, 2004) at 9-10.

¶ 14 The court told Varnell that it believed that Muenster was correct about the importance of having representation. It repeatedly asked Varnell whether he wished to represent himself, but Varnell would not give a clear "yes" or "no" answer. The court recessed while Varnell conferred privately with Muenster. The court again asked Varnell whether he wished to have Muenster represent him. Varnell did not give a clear response, but instead replied, "You can just use your judgment," and "You can make your decision." VRP (Mar. 15, 2004) at 20. When Varnell told the court that he was "confused at this point," the court interrupted him and stated, "Mr. Varnell, I don't believe you are confused. I think you know exactly what is going on here. I think what you want is to have it both ways. That's not possible. Mr. Muenster will continue to represent you." VRP (Mar. 15, 2004) at 20.

¶ 15 A sentencing hearing was set for the next month. Muenster filed a brief arguing that the four solicitation convictions from the conversation with Warren should not be deemed separate and distinct criminal conduct and that an exceptional sentence below the standard range should be imposed.

¶ 16 At the hearing, Varnell informed the court that Muenster was no longer his counsel. The following conversation took place:

THE COURT: ... If you do not wish to have Mr. Muenster represent you any further at this particular proceeding. We can address that issue. *We've already discussed some of the advantages to*

you of being represented. In fact, I think those issues have been discussed with you by a number of judges by now. Mr. Muenster has already submitted a brief on your behalf about whether or not the Court should consider a mitigated sentence. I would assume that Mr. Muenster is prepared to also present some argument on that issue, as well as whatever ruling the Judge, that is, myself, might make on that point, he's also prepared to make an argument on your behalf as to an appropriate sentence, *776 whether it's a mitigated sentence or standard range sentence. As an attorney, he obviously has more knowledge than you of the law. He can present those arguments on your behalf. You still have a right of [a]llocution on sentence to address the Court on your appropriate sentence. My question is to you, do you want Mr. Muenster not to participate any further in these proceedings? THE DEFENDANT: I want him to--well, I guess the question I have for you, Your Honor, have you already made a decision--

THE COURT: I don't know that that has any bearing on the question of whether or not you wish to be represented, Mr. Varnell.

THE DEFENDANT: I do not wish to be represented by Mr. Muenster.

THE COURT: *As I said, courts have gone over this several times with you about your rights to have representation or your right to represent yourself. You understand the issues there; right? You understand, if you do not wish to have Mr. Muenster participate any further on your behalf or to represent you, then I am going to take into account the brief he's already filed, but he's not going to address the Court further, I guess, if that's what you wish.*

....

THE COURT:.... I simply want to know, and I think you know enough about these issues, I feel you're adequately advised already about the issues about representing yourself. I want an unequivocal answer one way or the other, do you want Mr. Muenster to represent you at this sentencing proceeding?

THE DEFENDANT: No, I do not, Your Honor.

THE COURT: I'll instruct Mr. Muenster that he is not [to] present any further arguments or presentations on your behalf during this proceeding.

VRP (April 19, 2004), at 7-10 (emphasis added). Later in the hearing, Varnell asked for a lighter sentence. "Basically, I feel the same way, even though Mr. Muenster is not representing me, I've read his brief and I feel as such in the same opinion as pertaining to what is specified in that brief, and the

direction of a sentencing procedure." VRP (Apr. 19, 2004) at 15. He also asked that the sentences run concurrently and that the sentences be reduced to time served.

¶ 17 Varnell was sentenced to 190 months of confinement for each count to run consecutively, for a total confinement of 950 months. He appeals.

ANALYSIS

[1][2][3] ¶ 18 We begin by examining Varnell's claim that his trial counsel rendered ineffective assistance by deciding not to introduce testimony by family members about his prearrest declarations of love for Karen. "To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant." State v. Aho, 137 Wash.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To prove deficient performance, a defendant must establish that the representation fell below an objective standard of reasonableness under professional norms. State v. Thomas, 109 Wash.2d 222, 226, 743 P.2d 816 (1987).

[4] ¶ 19 Varnell contends that his trial attorneys received information before trial that he expressed his love for Karen in the weeks before the arrest, but they failed to investigate this information or introduce it at trial. He argues that such action falls below an objective standard of reasonableness and, therefore, constitutes deficient performance. A presumption of competence can be overcome "by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses." State v. Maurice, 79 Wash.App. 544, 552, 903 P.2d 514 (1995). He further contends that such testimony would have supported his argument that he never intended to solicit the murder of Karen or her family and that the absence of this testimony was prejudicial. He argues that such testimony would have bolstered the testimony of Piper, who was *777 subject during cross-examination to a "garbage in, garbage out" challenge to his reliance on Varnell's postarrest statements. He also argues that such testimony would not have opened the door to his actions toward Karen before the dissolution of their marriage.

¶ 20 We conclude that counsel's decision not to investigate or introduce into evidence testimony by Varnell's family members and friends of his

declarations of love for Karen was a legitimate and intelligent trial tactic. Assuming that these out-of-court statements were admissible, such testimony would have enabled the prosecution to cross-examine those witnesses about the postdissolution difficulties between Varnell and Karen and might have opened the door to predissolution difficulties. Furthermore, such testimony was duplicative of Wilson's testimony about Varnell's prearrest statements of love for Karen and his hope for reconciliation. Because the decision not to offer this testimony was a legitimate trial tactic, it does not support a claim of ineffective assistance of counsel.

[5][6][7] ¶ 21 We next analyze Varnell's claim that the four convictions arising from the conversation between Varnell and an undercover detective violate double jeopardy under a unit of prosecution analysis. The double jeopardy clause of the Fifth Amendment and the state constitutional rule against double jeopardy protect a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wash.2d 629, 632, 965 P.2d 1072 (1998). "The proper inquiry in this case is what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." Adel, 136 Wash.2d at 634, 965 P.2d 1072. Washington's Criminal Code provides that a person has committed 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...." RCW 9A.28.030(1). "A person is guilty of murder in the first degree when ... [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]" RCW 9A.32.030(1)(a).

¶ 22 Varnell argues that his statements during the taped conversation with the undercover detective can support only one solicitation conviction. He argues that the proper unit of prosecution for solicitation is an incitement and that he made only one incitement during his conversation with the undercover detective. For support, he cites State v. Bobic, 140 Wash.2d 250, 996 P.2d 610 (2000), in which our Supreme Court ruled that under a unit of prosecution analysis, the focus for criminal conspiracy is the conspiratorial agreement, not the criminal object or objects. Bobic, 140 Wash.2d at 265, 996 P.2d 610. See also People v. Morocco, 191 Cal.App.3d 1449, 1453, 237 Cal.Rptr. 113 (1987) (holding that the crimes of solicitation and conspiracy share similar conceptual underpinnings). We disagree with his

argument.

¶ 23 While the inchoate crimes of solicitation and conspiracy have many similarities, the proper unit of prosecution for solicitation of murder is not an overall agreement or incitement, but each solicitation for conduct constituting a murder. Because the crime of murder is victim specific, the crime of solicitation to commit murder, directed to a specific individual, is likewise victim specific. Varnell proposed that the undercover detective invade the separate residences of Karen, her brother, and her parents, with multiple possibilities for alarm systems and other safety measures, and abduct them in separate and distinct acts so they could be brought to a central location or vehicle. Although Varnell's proposal derived from a single plan with a single motive, it still encompassed solicitations of four distinct courses of conduct leading to four murders.

¶ 24 This situation is analogous to the circumstances of *Meyer v. State*, 47 Md.App. 679, 689, 425 A.2d 664 (1981), in which the Maryland Court of Appeals upheld four solicitation convictions arising from two conversations because the solicitations occurred at different parts of the conversations and because they involved separate and distinct acts of murder. *Meyer*, 47 Md.App. at 690, 425 A.2d 664. Because Varnell's plan contemplated the abduction of the four people from *778 their residences to be murdered elsewhere, it is distinguishable from the circumstances of *Morocco*. There, the appellate court ordered stricken one of two solicitation convictions arising from a request for the murder of a husband and wife living in the same residence at the same time, presumably by the same means. *Morocco*, 191 Cal.App.3d at 1454, 237 Cal.Rptr. 113.

¶ 25 Affirmed.

¶ 26 The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

*****UNPUBLISHED TEXT FOLLOWS*****

¶ 27 We next analyze Varnell's argument that the four solicitation convictions resulting from the conversation with the undercover detective did not arise out of separate and distinct criminal conduct and that the sentencing court erred in imposing consecutive sentences for these convictions. He argues that the convictions arose from a single solicitation, at a single time and place, not from separate and distinct criminal conduct. We disagree.

¶ 28 The Sentencing Reform Act of 1981(SRA) provides that when an offender is convicted "of two or more serious violent offenses arising from separate and distinct criminal conduct," all sentences will be served consecutively to each other. RCW 9.94A.589(1)(b). [FN3] In the absence of a definition by the Legislature of "separate and distinct criminal conduct," a court will look to the factors defining "same criminal conduct" to determine whether an offender's conduct was not "separate and distinct." *State v. Tili*, 139 Wash.2d 107, 122, 985 P.2d 365 (1999).

FN3. The SRA expresses a presumption that current offenses will be sentenced concurrently. RCW 9.94A.589(1)(a). But when a person is convicted of two or more serious violent offenses "arising from separate and distinct criminal conduct," sentences will be served consecutively to each other. RCW 9.94A.589(1)(b). Criminal solicitation of murder in the first degree constitutes a seriously violent offense. RCW 9.94A.030(37)(a)(i), (ix).

¶ 29 For multiple crimes to be treated as the "same criminal conduct" at sentencing, the crimes must have (1) been committed at the same time and place, (2) involved the same victim, and (3) involved the same objective criminal intent. *Tili*, 139 Wash.2d at 123, 985 P.2d 365. Because the four solicitation convictions involved different victims, the convictions cannot be treated as the same criminal conduct. The sentencing court did not err in treating the four convictions as arising out of separate and distinct criminal conduct or in imposing consecutive sentences.

¶ 30 We next consider Varnell's *Blakely* challenge to the sentencing court's finding without a jury determination that the four convictions arose from separate and distinct criminal conduct. The constitutional guarantee of a right to trial by an impartial jury requires that any fact, other than a fact of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301, 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).

¶ 31 Varnell argues that the sentencing court violated *Blakely* and *Apprendi* when it decided that

his multiple solicitation convictions resulting from the conversation with the undercover detective arose from separate and distinct criminal conduct without a jury determination. He argues that because a finding of separate and distinct criminal conduct is necessary for the imposition of consecutive sentences pursuant to RCW 9.94A.589(1)(b), Blakely and Apprendi require a jury determination on this issue. In State v. Cubias, 155 Wash.2d 549, 553, 120 P.3d 929 (2005), however, our Supreme Court ruled that consecutive sentencing decisions under RCW 9.94A.589(1)(b) "do not trigger the concerns identified in Apprendi." Cubias, 155 Wash.2d at 553, 120 P.3d 929. "It seems clear from Blakely that so long as the sentence for any single offense does not exceed the statutory maximum for that offense, as is the case here, Blakely is satisfied." Cubias, 155 Wash.2d at 554, 120 P.3d 929. Because our Supreme Court's decision in Cubias clearly governs, we decline to accept Varnell's argument.

¶ 32 We next consider Varnell's argument that he did not make a valid waiver of his right to counsel at sentencing and that the sentence should be vacated. Because of the tension between the constitutional right to represent oneself and the constitutional right to adequate assistance of counsel, a defendant desiring to proceed pro se must make a knowing and intelligent waiver of the right to counsel. State v. Silva, 108 Wash.App. 536, 539, 31 P.3d 729 (2001).

There is no formula for determining a waiver's validity, but the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense.

Silva, 108 Wash.App. at 539-40, 31 P.3d 729 (footnote omitted). "Absent a colloquy, a waiver may still be valid if a reviewing court determines from the record that the accused was fully appraised of these factors and other risks associated with self-representation that would indicate that he made his decision with his 'eyes open.'" Silva, 108 Wash.App. at 540, 31 P.3d 729. "[O]nly in rare circumstances would a record devoid of a colloquy contain sufficient information to show a valid waiver of counsel." Silva, 108 Wash.App. at 540, 31 P.3d 729.

¶ 33 Varnell contends that his waiver of his right to counsel was not knowledgeable because he did not know the seriousness of his predicament or the maximum statutory penalty and that the court did not engage in a colloquy designed to alleviate these deficiencies. We disagree. Although the sentencing

court did not engage in a colloquy meeting all the formal requirements, the record indicates that Varnell's case constitutes a rare set of circumstances in which the defendant was fully aware of the risks and factors and made his decision with his "eyes open." The discussions between the court and Varnell on March 15, 2004, and April 19, 2004, the overall process of his trial, and Muenster's sentencing memorandum, which he acknowledged reading, indicate that Varnell knew of the existence of technical and procedural rules, the seriousness of the charges, the likelihood of consecutive sentences, and the risks of proceeding pro se. In light of Blakely and the absence of a special jury finding of aggravating circumstances, no penalty above the standard range was possible. Because Muenster's sentencing memorandum informed Varnell of the standard range, Varnell knew the maximum possible penalty. For these reasons, Varnell's waiver was valid.

¶ 34 Varnell raises additional arguments in his Statements of Additional Grounds for Review. He first contends that his trial counsel rendered ineffective assistance by failing to challenge the recording of his conversation with the undercover detective as violative of RCW 9.73.090(1). The governing law, however, is RCW 9.73.090(2), and the record indicates that the proper authorization was obtained.

¶ 35 Varnell further contends that his trial counsel rendered ineffective assistance by failing to make proper arguments in the motion to suppress. In particular, he argues that his counsel erred in failing to argue that Karen and Mary Wilson were biased against him and that the affidavit relied upon illegally obtained Post-It notes and that other investigative techniques should have been tried before the Post-It notes were taken from his office.

¶ 36 Varnell further contends that his counsel failed to show that law enforcement officials had two persons in for questioning after the arrest and failed to show that one of these witnesses claimed that he, not Varnell, started a rumor about a Mexican mafia hit man. We conclude that his trial counsel did not render ineffective assistance by failing to make these arguments. The possibility of biases by Karen and Wilson against Varnell would not defeat a threshold establishment of probable cause. Furthermore, he fails to show why the Post-It notes were illegally obtained. As for the possibility of other investigative techniques, the court correctly ruled that the affidavit demonstrated the need for immediate action to protect Karen. As for Varnell's other arguments, they

concern postarrest matters and are irrelevant to the validity of the affidavit.

¶ 37 Varnell argues that his constitutional rights to a fair trial and the assistance of counsel were infringed by the failure of the trial court and his counsel to recognize his medical problems. He specifically argues that the failure of the jail to properly dispense his medicine impaired his ability to work with counsel on his defense. He further argues that his counsel and the trial court should have realized this problem and should have postponed the trial. The record, however, indicates that his trial counsel and the trial court knew of his medical problems and acted to compensate for them. His trial counsel attested to the fact that they spent countless hours discussing his case with him. Furthermore, Varnell does not explain how his medical problems impaired his defense, other than to state in a conclusory fashion that he would have been able to assist his attorneys in presenting a defense that would have shown he was innocent. For these reasons, he fails to show a violation of his constitutional rights to a fair trial and assistance of counsel.

¶ 38 Varnell additionally argues that his trial counsel provided ineffective assistance when they failed to move to suppress photographs removed from his home and business by Karen and given to law enforcement officials. He contends that these photographs were of Karen, her family, and her parents' home. He argues that their removal was not authorized by a search warrant and law enforcement officials must have known that they were obtained illegally. But he fails to establish state action on the part of Karen, and alternatively, even if Varnell's account is true, he fails to show how the use of the photographs prejudiced him.

¶ 39 Varnell argues that his trial counsel provided ineffective assistance by failing to move for acquittal on the ground that State failed to establish the necessary element of intent. We disagree. He does not demonstrate that he was entitled to acquittal as a matter of law, especially in light of the damning evidence against him.

¶ 40 Varnell argues that his trial lawyers failed to object to the trial court's denial of the motion to suppress and that in the absence of an objection, his lawyers failed to preserve the denial for appellate review. He fails to show, however, why an objection is required before a denial of a motion to suppress can be appealed.

¶ 41 Varnell argues that his trial counsel provided ineffective assistance by failing to aggressively pursue a viewing of the original videotape footage of his walk up to the restaurant and his act of waving off the undercover detective. He argues that he wanted to use this videotape to emphasize the fact that he wanted nothing to do with the undercover detective. He further argues that use of this videotape would have likely resulted in an acquittal. We disagree.

¶ 42 The videotape record was introduced into evidence to show how Varnell looked, not as a record of the events at the restaurant. Furthermore, the State's witness acknowledged that Varnell initially walked away from the restaurant and that the detective chased after him. This reinforced Varnell's testimony. Varnell fails to show that the performance by his trial counsel fell below an objective standard of reasonableness that resulted in prejudice to him.

¶ 43 Varnell contends that his trial lawyers provided ineffective assistance of counsel by failing to interview witnesses and have them testify about his mental and psychological health. He also contends that Muenster provided ineffective assistance of counsel by failing to make this argument during his motion for a new trial. He does not explain, however, what additional testimony these witnesses could have provided. Piper testified about his diagnosis of a personality disorder and an "erotomaniac" disorder. Muenster described Varnell's mental health problems in his sentencing memorandum. Because Varnell does not describe the testimony that additional witnesses could have provided, he has not shown that the assistance of his trial lawyers or of Muenster fell below an objective standard of reasonableness or caused prejudice to him.

¶ 44 Affirmed.

*****END OF UNPUBLISHED TEXT*****

WE CONCUR: ELLINGTON and BAKER, JJ.

132 P.3d 772

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APPENDIX B

2006 MAY 23 AM 8:58

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 54287-7-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MITCHELL LEE VARNELL,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
Appellant.)	
_____)	

The appellant, having made a motion for reconsideration, and the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 23rd day of May 2006.

FOR THE COURT:

Colman, J
Judge

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