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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTE

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

I. IDENTITY OF ANSWERING PARTY

Petitioner Mitchell Varnell responds to the State's motion to strike a portion of Varnell's Supplemental Brief.

II. STATEMENT OF RELIEF SOUGHT

This Court should deny the state's motion.

III. FACTS RELEVANT TO RESPONSE

The facts show Varnell met with Detective Warren, an undercover policeman. During the course of a rambling conversation lasting about an hour, Varnell and Warren discussed the possibility

that Varnell might hire Warren to kill Varnell's ex-wife and three members of her family. The motive was the same. The weight of the evidence supported the conclusion that any contemplated offense would take place at the same time and place. Supp'l BOP at 11-12. Some evidence also supported the possibility that the contemplated killings might occur at slightly different times and places. The jury never determined whether the contemplated offense could be segregated into four separate offenses to support the state's theory on appeal.

In the Court of Appeals, Varnell argued that prosecution and conviction for four solicitation offenses violated his double jeopardy rights because the state established only one "unit of prosecution" for this solicitation offense. Brief of Appellant (BOA) at 29-40. He also argued the judicial determination that these four offenses were "separate and distinct" criminal conduct violated his Sixth Amendment right to a jury determination of all facts supporting the increased penalty of consecutive sentences. BOA at 40-47 (citing, *inter alia*, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004)).

In Varnell's petition for review (PRV), he again raised the double jeopardy and "unit of prosecution" claim. PRV at 4-10. He also claimed the Court of Appeals violated the Sixth Amendment and Blakely by entering its own "finding," for the first time on appeal, that these offenses encompassed "four distinct courses of conduct." PRV at 10-12. Counsel for Varnell included a "separate" Blakely claim in order to make it very clear that Varnell's state remedies on his Sixth Amendment claim were exhausted should Varnell ultimately need to seek federal habeas corpus relief from the unconstitutional consecutive sentences.

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

IV. ARGUMENT

The state's motion asks this Court to strike Varnell's "Blakely argument." Although the state asserts the Blakely argument is "readily severable from the rest of his argument," Motion, at 3, the motion does not identify which pages or paragraphs of the brief cause the state's current offense. The state's suggested severance is neither readily apparent, nor appropriate.

Varnell's supplemental brief analyzes the "unit of prosecution" double jeopardy claim in straightforward and simple terms. The brief relies on this Court's decision in State v. Bobic and on substantial foreign authority to support the conclusion this was a single solicitation offense, not four separate offenses. Varnell's brief shows the Court of Appeals erred in adopting a "per capita" rule, and in failing to apply the rule of lenity. Supp'l BOP at 4-17.

Under the solicitation "unit of prosecution" test established by other courts addressing this claim, the question is whether the offenses were separate and distinct acts intended to occur at different times and places. Supp'l BOP at 6-9. In the Court of Appeals and in this Court, the state concedes this is a fact question. BOR at 31, 34; Supp'l BOR at 12-15.

Varnell's supplemental brief further showed the state failed to prove its multiple solicitation theory to the jury, and the jury failed to find facts necessary to support the state's theory. The state requested no instruction or special verdict. The record does not show the jury actually found these were separate offenses intended to be committed at different times and places. Without such findings, the multiple consecutive sentences could not be lawfully imposed. Supp'l

BOP at 9-13. This is simply another means of showing that the state's appellate conclusion lacks necessary factual findings to support it.

The state correctly recognizes that Varnell's brief cites Blakely (and other cases) in making this additional point. But the point is still well within the proper scope of the issue on review – whether this offense involves one solicitation or four separate solicitations. The citation to Blakely is merely another method of arguing the state's burden in a "unit of prosecution" claim is to prove, to the jury, that what may be a single offense was actually four separate offenses. The state failed to do that here.

When this court grants review of an issue, it will consider argument within the reasoned scope of that issue. RAP 13.7(b); State v. Miller, 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005); State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006). This Court also has inherent authority to consider issues to serve the ends of justice. Niemann v. Vaughn Community Church, 154 Wn.2d 365, 389-90, 113 P.3d 463 (2005) (citations omitted). The state's motion therefore should be denied.

The state's motion also should be denied because this Court should not blind itself to obvious constitutional problems that arise when the state asserts one offense can be parceled into multiple units of prosecution, but fails to ensure the jury finds the facts necessary to support that conclusion. Varnell's supplemental brief shows why the multiple convictions violate the Fifth Amendment and traditional "unit of prosecution" analysis. That claim is unquestionably before the Court. Although Varnell's brief also reveals a Sixth Amendment violation, there is no legitimate reason to strike any part of the brief. Varnell's petition for review exhausted his state remedies on that claim, and he may pursue review of it in federal court should such review prove to be necessary.

V. CONCLUSION

This Court should consider Varnell's arguments and should deny the state's motion.

DATED THIS ____ day of May, 2007.

Respectfully submitted,

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TO E-MAIL