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WPIC 100.0513

ASSIGNMENTS OF ERROR

1. Mr. Eplett's conviction violated his Fourteenth Amendment right to due process.
2. The trial court erred by instructing the jury with an erroneous definition of the phrase "substantial step."
3. The trial court erred by giving Instruction No. 7.
4. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of the offense by proof beyond a reasonable doubt.
5. Mr. Eplett was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel deprived Mr. Eplett of effective assistance by proposing an instruction that relieved the prosecution of its burden to prove an element of the offense.
7. The trial court erred by refusing to ask certain jurors about their observations of Mr. Eplett stepping out of an elevator under escort and wearing handcuffs.
8. The trial court erred by refusing to immediately admonish those jurors who observed Mr. Eplett under escort and wearing handcuffs not to discuss what they had seen with other jurors.
9. The trial court erred by refusing to immediately admonish jurors not to draw an adverse inference from their observation of Mr. Eplett under escort and in handcuffs.
10. The trial court erred by including Mr. Eplett's court martial in his offender score.
11. The trial court erred by finding Mr. Eplett's court martial comparable to a Washington felony.
12. The trial court erred by finding Mr. Eplett's court martial comparable to a Washington sex offense.

13. The trial court erred by adopting Finding No. 2.2 of the Judgment and Sentence.
14. The trial court erred by adopting Finding No. 2.3 of the Judgment and Sentence.
15. The trial court erred by sentencing Mr. Eplett with an offender score of three.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for attempt requires proof that the accused person took a “substantial step,” defined as “conduct strongly corroborative of the actor’s criminal purpose...” Here, the court’s instructions defined the phrase as “conduct that strongly indicates a criminal purpose...” Did the instruction relieve the prosecution of its burden to prove the elements of the offense beyond a reasonable doubt?
2. An accused person has a constitutional right to the effective assistance of counsel. Here, defense counsel proposed an instruction that relieved the prosecution of its burden to prove a substantial step. Was Mr. Eplett denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?
3. A trial judge must ensure that jurors do not see the accused person being escorted in restraints, and must correct prejudice that results from jurors’ inadvertent glimpses of the defendant in restraints. Here, the judge refused to question jurors who saw Mr. Eplett wearing handcuffs and escorted by guards, refused to admonish them not to discuss what they’d seen with other jurors, and refused to immediately admonish them not to draw adverse inferences from what they had seen. Was Mr. Eplett’s conviction entered in violation of his Fourteenth Amendment right to due process?

4. Federal convictions may not be included in the offender score unless the prosecution proves they are comparable to Washington felonies. Here, Mr. Eplett objected to inclusion of his federal court martial, and the state failed to prove its comparability. Did the trial court err by including Mr. Eplett's federal court martial in his offender score without proof that it was comparable to a Washington felony?

5. A conviction for a federal sex offense should not score triple against a Washington sex offense unless the prosecution proves that the federal offense is comparable to a Washington sex offense. Here, the prosecution failed to prove that Mr. Eplett's federal court martial was equivalent to a Washington sex offense. Did the trial court err by scoring Mr. Eplett's federal court martial as three points against his current offense?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Lewis County Detectives Engelbertson and Kenepah set up a sting operation, posing as a single mother looking to prostitute herself and her 13-year-old daughter. RP (8/12/10) 63-110; RP (8/13/10) 12-34, 57-95. They used Craigslist, and Michael Eplett got caught in their net. RP (8/12/10) 63-110; RP (8/13/10) 12-34, 57-95.

The state charged Mr. Eplett with Attempted Rape of a Child in the Second Degree. CP 1.

At one point after the start of trial, Mr. Eplett was in an elevator with handcuffs on (in front), guarded by two officers. RP (8/13/10) 34, 37. The elevator door opened and five jurors who were sitting on his jury saw Mr. Eplett with his guards and handcuffs. RP (8/13/10) 34. The elevator was in a secured area not open to the public. RP (8/13/10) 37.

The defense moved for a mistrial. Counsel argued, among other things, that the jurors had seen officers in the courtroom previously, but now knew the officers were there to guard Mr. Eplett. RP (8/13/10) 34-36. The court denied the motion. RP (8/13/10) 37.

The defense asked to be allowed to inquire of the jurors what they saw, and whether it would impact their deliberations. RP (8/13/10) 36-. Mr. Eplett argued that the only way to determine if the jurors' view of Mr.

Eplett in custody was prejudicial was to ask them. RP (8/13/10) 37-38. Further, he urged the court to presume prejudice since the message now being sent to these jurors was that the court did not trust Mr. Eplett and required him to be handcuffed and escorted to and from the courtroom by two guards. RP (8/13/10) 41-43. Finally, Mr. Eplett argued that by denying him an opportunity to ask jurors about the incident, the judge was unrealistically presuming the jurors would ignore the incident and would not discuss it amongst themselves. RP (8/13/10) 43.

The court refused to allow Mr. Eplett to question the jurors. The judge acknowledged that the incident painted Mr. Eplett in a bad light, but believed that asking jurors about it would only highlight the problem. RP (8/13/10) 35-37, 43-44, 49, 51-52. The judge found the contact inadvertent, and refused to immediately instruct the jurors to disregard what they'd seen and to refrain from discussing it. Instead, he included such an admonishment in his instructions at the end of the trial. RP (8/13/10) 44, 56; Court's Instructions to the Jury, Supp. CP.

The prosecutor and Mr. Eplett's attorney proposed identical instructions defining substantial step. The instruction, which was included in the court's instructions, reads as follows: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere

preparation.” Instruction No. 7, Supp. CP; *see also* Defendant’s Proposed Instructions, Supp. CP; Plaintiff’s Proposed Instructions, Supp. CP.

At sentencing, the state alleged that Mr. Eplett had been court martialled while in the military, and urged the court to count the court martial order as a prior sex offense. RP (9/29/10) 140-150. The prosecutor submitted Exhibit 1, which included documents relating to a conviction for the offense of “carnal knowledge”.

The defense objected, arguing that the elements of “carnal knowledge” were not comparable to any Washington felony. RP (9/29/10) 144-147. The court found the offense comparable to Washington’s Rape of a Child in the Third Degree. CP 5. The court scored the offense as a Washington sex offense, adding three points to Mr. Eplett’s offender score, and sentenced Mr. Eplett to 90 months. CP 7.

Mr. Eplett timely appealed. CP 19.

ARGUMENT

I. MR. EPLETT’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE A SUBSTANTIAL STEP.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).¹ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

- B. The court's instructions relieved the state of its burden to prove that Mr. Eplett engaged in conduct corroborating an intent to commit the specific crime of Rape of a Child in the Second Degree.

The Due Process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Instructions that relieve the state of its burden to prove an element violate due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995).

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose."

State v. Workman, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick*, at 427.

In this case, the trial court gave an instruction that differed from the definition of “substantial step” adopted by the *Workman* Court. Instruction No. 7 defined “substantial step” (in relevant part) as “conduct that strongly indicates a criminal purpose...” Court’s Instructions to the Jury, Supp. CP. This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word “corroborate” means “to strengthen or support with *other* evidence; [to] make *more* certain.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company), *emphasis added*. The *Workman* Court’s choice of the word “corroborative” requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused’s conduct. Instruction 7 removed this requirement by employing the word “indicate” instead of “corroborate;” under Instruction No. 7, there is no requirement that intent be established by independent proof and corroborated by the accused’s conduct. Court’s Instructions to the Jury, Supp. CP.

Second, Instruction 7 requires only that the conduct indicate *a* criminal purpose, rather than *the* criminal purpose. This is similar to the

problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts*, 142 Wash.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in “a crime,” even if he was unaware that the principal intended “the crime” charged); *see also State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts and Cronin*, the language used in Instruction No. 7 permits conviction if the accused person’s conduct strongly indicates intent to commit *any* crime. This is incorrect under the definition adopted by the Supreme Court in *Workman*.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of the charged crime.² Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Eplett’s alleged criminal intent; nor was it required to show that his conduct strongly corroborated an intent to commit the particular crime of Rape of a Child in the Second Degree. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

² This creates a manifest error affecting Mr. Eplett’s right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See State v. Russell*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011).

II. MR. EPLETT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. If the error in the court's instructions is attributable to defense counsel, Mr. Eplett was denied the effective assistance of counsel.

An attorney's misunderstanding of applicable law can constitute ineffective assistance: "[r]easonable attorney conduct includes a duty to investigate the relevant law." *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007). See also *United States v. Spence*, 450 F.3d 691, 694-695 (7th Cir. 2006), citing *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Smith v. Dretke*, 417 F.3d 438, 442 (5th Cir. 2005).

In this case, defense counsel proposed an instruction defining substantial step in the same terms as the instruction proposed by the prosecution. Defendant's Proposed Instructions, p. 11, Supp. CP. As outlined above, this instruction impermissibly reduced the state's burden to prove the elements of the offense. This was deficient performance. Counsel should have been familiar with the language in *Workman* defining the phrase "substantial step." *Workman*, at 451. Furthermore, counsel should have been alerted by the Supreme Court's decision in *Roberts* and *Cronin* that substituting the phrase "a criminal purpose" for the phrase "the actor's criminal purpose" relieved the prosecution of its burden to prove an element of the offense.

Although the instruction was based on a pattern instruction (WPIC 100.05), this should not negate Mr. Eplett's ineffective assistance claim.³ The *Workman* decision was decided long before Mr. Eplett went to trial and should have prompted counsel to propose an instruction using the language set forth in that case. *See Kylo*, at 866 (“[A]t the time of Kylo’s trial there were several cases that should have indicated to counsel that the pattern instruction was flawed.”) Similarly, *Cronin* and *Roberts* predated Mr. Eplett’s trial by years. *Id.*

Because defense counsel proposed a defective instruction, his performance fell below an objective standard of reasonableness.

Reichenbach, supra.

Because counsel’s deficient performance prejudiced Mr. Eplett, his conviction must be reversed. *Reichenbach, supra.* The case must be remanded to the trial court for a new trial. *Id.*

D. If *State v. Studd* bars Mr. Eplett’s ineffective assistance argument, due process prohibits application of the invited error doctrine (included for preservation of error).

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the court gave the

³ *See State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999) (“counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC...”).

instruction.⁴ *State v. Vander Houwen*, 163 Wash.2d 25, 36-37, 177 P.3d 93 (2008). Where *Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. See *Studd*, at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wash.2d 867, 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wash.2d 100, 103 *et seq.*, 683 P.2d 194 (1984).

If an instruction unconstitutionally relieves the state of its burden to prove the elements of a criminal case, convictions based on that instruction should be reversed. *Winship*, *supra*. The sole exception should be for cases in which the error is harmless beyond a reasonable doubt. *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997). If *Studd* and the invited error rule bar Mr. Eplett's appeal, he'll be left without a remedy despite the prejudicial violation of his constitutional rights.

The invited error rule should not be applied in circumstances such as these. It is fundamentally unfair to affirm a conviction obtained in

⁴ Our Supreme Court has observed only one exception to the invited error rule: where the trial court refuses a defendant's proposed instruction, the defendant will not be penalized on appeal for offering a flawed instruction. *Vander Houwen*, at 37.

violation of the accused person's constitutional right to due process, solely because the error was brought about by defense counsel.

III. THE TRIAL COURT VIOLATED MR. EPLETT'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY FAILING TO INQUIRE OR TAKE CORRECTIVE MEASURES AFTER JURORS SAW GUARDS ESCORTING MR. EPLETT IN RESTRAINTS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. Mr. Eplett was entitled to appear before jurors with the physical indicia of innocence.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). "Shackling or handcuffing a defendant... tends to prejudice the jury against the accused." *Id.*, at 845. Such measures "single out a defendant as a particularly dangerous or guilty person," and thereby "threaten his or her constitutional right to a fair trial." *Id.*

When jurors see an accused person in handcuffs, the presumption of innocence is undermined. *State v. Gonzalez*, 129 Wash.App. 895, 901, 120 P.3d 645 (2005). The problem extends to chance observations by jurors outside the courtroom; such observations "provide a source of

prejudicial speculation which might infect the ultimate verdict.” *United States v. Larkin*, 417 F.2d 617, 618 (1st Cir. 1969). Accordingly, the court should question jurors about any chance encounters with the accused person, and should also admonish jurors not to draw adverse inferences from their observations. *Id.*; see also *State v. Bonner*, 21 Wash.App. 783, 793, 587 P.2d 580 (1978) (“defense counsel could have requested the court to admonish [jurors] from drawing any inference from the fact that defendant had been handcuffed.”)

The burden is on the court to remain alert to any factor that may undermine the fairness of trial. *Gonzalez*, at 901. The judge is responsible for preventing prejudicial occurrences and for determining their effect. *Id.* It is the court’s duty to shield the jury from routine security measures; this duty “is a constitutional mandate.” *Id.* (citing *State v. Hutchinson*, 135 Wash.2d 863, 887-888, 959 P.2d 1061 (1998)).

C. The trial judge violated Mr. Eplett’s Fourteenth Amendment right to due process by refusing to question or immediately admonish jurors regarding their observations of Mr. Eplett in restraints.

In this case, five jurors saw Mr. Eplett wearing handcuffs and escorted by jail guards. RP (8/13/10) 34. The trial judge refused to question the jurors about their observations, and refused to immediately admonish them to refrain from drawing adverse inferences from what they had seen. RP (8/13/10) 35-37, 43-44, 49, 51-56.

Under these circumstances, the trial judge violated Mr. Eplett's Fourteenth Amendment right to due process. *Finch, supra; Gonzalez, supra*. Defense counsel asked for a mistrial, asked the judge to question the jurors, asked the judge to immediately admonish them, and (finally) asked the judge to admonish them at a later time. RP (8/13/10) 34-56. The judge's refusal to question the jurors made it impossible to determine the extent of the problem and the depth of any prejudicial effect. His failure to immediately admonish the jurors meant that those jurors who saw the restraints were free to discuss them with the other jurors. Throughout the trial, all the jurors were free to speculate as to the reasons for the restraint, and to draw inferences in favor of Mr. Eplett's guilt.

Accordingly, Mr. Eplett's conviction must be reversed. The case must be remanded for a new trial. *Finch, supra*.

IV. THE EVIDENCE AT SENTENCING WAS INSUFFICIENT TO PROVE THAT MR. EPLETT'S FEDERAL COURT MARTIAL WAS EQUIVALENT TO A WASHINGTON FELONY SEX OFFENSE.

- A. The prosecution is required to prove the existence and comparability of any federal criminal history.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score.

The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

Federal convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges a defendant's criminal history contains federal convictions, the state bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999). A federal conviction may not be used to increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wash. App. 165, 168, 868 P.2d 179 (1994).

To determine whether a federal conviction is comparable to a Washington offense, the court must compare the elements of the federal offense to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998). "If the elements are not

identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the [federal] conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, at 479 (citing *Morley*, at 606). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wash.2d 121, 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wash.App. 374, 378, 909 P.2d 309 (1996)).

In this case, the state failed to prove that Mr. Eplett’s federal court martial was equivalent to a Washington felony sex offense.

B. Mr. Eplett’s federal court martial should not have been included in his offender score.

To prove that Mr. Eplett had a prior conviction, the prosecution submitted documents suggesting that he had been found guilty at a court martial proceeding. Sentencing Exhibit 1, Supp. CP. The documents established his guilt under Article 120 of the Uniform Code of Military Justice. At the time of the offense, Article 120 defined the crime of “carnal knowledge” as follows:

Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person--

(1) who is not that person's spouse; and

(2) who has not attained the age of sixteen years;

is guilty of carnal knowledge and shall be punished as a court-martial may direct.

Former 10 U.S.C. § 920 (2006). The offense, as defined, is not equivalent to any Washington offense. The potentially comparable state offense is Rape of a Child in the Third Degree, which has the additional requirement that “the perpetrator is at least forty-eight months older than the victim.” RCW 9A.44.079. This is not an element required for conviction under Article 120; accordingly it is “necessary to look into the record of the [federal] conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, at 479.

The sentencing exhibit does not establish that Mr. Eplett was at least forty-eight months older than the victim at the time of the offense. The Court-Martial Order indicates only that the victim had “attained the age of 12 but was under the age of 16.” Sentencing Exhibit 1, p. 1, Supp. CP. The Stipulation of Fact (attached to the Order) indicates that the victim had a birth date of “15 March 1991,” and that she was “fifteen years old at the time of the intercourse.” Sentencing Exhibit 1, p. 4, Supp. CP. None of the documents contained in the exhibit establishes Mr.

Eplett's date of birth, or his age at the time of the offense. Sentencing Exhibit 1, Supp. CP.

Neither the elements of the federal offense nor the record of the federal conviction establish comparability.⁵ Because the prosecution failed to prove that Mr. Eplett's federal court martial was equivalent to a Washington felony, it should not have been included in Mr. Eplett's offender score. Accordingly, Mr. Eplett's sentence must be vacated and his case remanded for resentencing without the court martial. RCW 9.94A.525(3); *Ford, supra*.

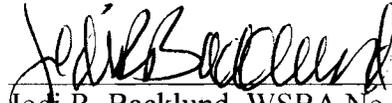
CONCLUSION

For the foregoing reasons, Mr. Eplett's conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on February 28, 2010.

⁵ It may be tempting to supply the missing element by looking to evidence outside the record of conviction, such as Mr. Eplett's date of birth as reflected in the court file. This would be improper. First, evidence of Mr. Eplett's DOB was not presented to the military court, and was neither admitted by Mr. Eplett nor found beyond a reasonable doubt. Second, neither the statute on comparability (RCW 9.94A.525(3)) nor *Ford* authorize a sentencing court to look to facts outside the record of conviction to establish a missing element when evaluating comparability.

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DIVISION II

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DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: BY _____

Michael Eplett, DOC #342838
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 28, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 28, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant