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A. SUMMARY OF ARGUMENT

Under the Sentencing Reform Act, an out-of-state prior conviction may be used to increase the available range of punishment for a current crime only if the elements of the prior crime are the same or narrower than those of the relevant Washington crime. This Court applied the rule in *Lavery*,¹ and Divisions One and Three have followed suit. In *Descamps*,² the U.S. Supreme Court held that the above rule is not only statutory, but is compelled by the Sixth and Fourteenth Amendments.

Some courts – like the lower court in *Descamps* and Division Two in this case – have been confused about the allowable scope of the inquiry. This is likely due to the description of the procedure as a two-part “legal” and “factual” comparison. The only “factual” inquiry allowed is a determination of the elements of the prior crime of conviction. Courts may not make factual findings about conduct underlying prior convictions, because doing so would violate the Sixth Amendment right to a jury trial. However, that is exactly what the Court of Appeals did in this case.

To alleviate this confusion and prevent future violations, this Court should clarify that there is no “factual” inquiry as that word is commonly

¹*In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

²*Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276, 2281 (2013).

understood. Rather, when determining whether a prior foreign conviction counts as a felony in Washington the rule is simple: An out-of-state prior conviction may be used to increase the available range of punishment for a current crime only if the elements of the prior crime are the same or narrower than those of the relevant Washington crime.

Mr. Olsen was convicted of “terroristic threats” in California. The elements are broader than those of the Washington crime of felony harassment, because the California statute does not require a threat to kill or a fear of death. Accordingly, the California conviction may not be counted as a felony in Mr. Olsen’s offender score. This Court should reverse and remand for resentencing based on an offender score of four.

B. ISSUE ACCEPTED FOR REVIEW

Under the Sentencing Reform Act (“SRA”) and the Sixth and Fourteenth Amendments, out-of-state convictions may not be included in a defendant’s offender score if the elements of the foreign statute are broader than those of the analogous Washington statute, because no jury would have found the elements necessary to raise the crime to a Washington felony beyond a reasonable doubt. The Court of Appeals recognized that the California crime of “terroristic threats” is broader than the Washington crime of felony harassment, but it ruled that Mr. Olsen’s conviction for the California crime was properly included in his offender

score based on its own factual finding – never proved to a jury or admitted by Mr. Olsen – that Mr. Olsen engaged in conduct that would have satisfied the elements of felony harassment in Washington. Does the Court of Appeals’ finding violate Mr. Olsen’s rights under the Constitution and the SRA?

C. STATEMENT OF THE CASE

1. Testimony about the prior crime at trial

Edward Olsen was charged with crimes based on acts he allegedly committed against Bonnie Devenny, his ex-girlfriend and the mother of his children. CP 163-71. Over Mr. Olsen’s objections, the trial court admitted evidence of prior crimes Mr. Olsen committed against Ms. Devenny, pursuant to ER 404(b), to show motive and intent.³ 6/18/10 RP 7; 12/15/10 RP 618. As relevant here, Mr. Olsen had pled no contest to the crime of “terroristic threats”⁴ in California in 2000. Ex. 37.

Ms. Devenny testified that the 2000 incident occurred out of the blue – that she had come out of the shower and Mr. Olsen yelled at her, wrapped her in duct tape and threatened to cut her up. 12/15/10 RP 622-23. Mr. Olsen vehemently disputed this description of the California

³This Court did not accept review of the ER 404(b) ruling, but the prior crime introduced to show motive or intent under ER 404(b) is the same crime that was improperly used to increase Mr. Olsen’s offender score – an issue that is before this Court.

⁴ The crime has since been renamed “criminal threats”.

event, but the trial court said, “[w]e are not going to have a full-born mini trial” on the prior crime. 12/16/10 RP 711.

The trial court did allow the couple’s two sons, who were present during the prior incident, to testify about what happened. According to the children, the incident began when Mr. Olsen came upon Ms. Devenny beating the boys. Both children said that Ms. Devenny punched them so hard they fell down the stairs. 12/16/10 RP 760, 767-68. Mr. Olsen walked in the door after work and encountered the abuse. He said, “Why are you beating my children? What is going on?” 12/16/10 RP 760. “And she starts screaming at him and getting in his face and hitting him and pushing him, and he just grabs her by the hands, and they are both fighting back and forth.” 12/16/10 RP 760. As Mr. Olsen restrained Ms. Devenny, the children ran to a neighbor’s house. The neighbors called the police, and Mr. Olsen ultimately entered the no-contest plea described above. 12/16/10 RP 760-61. Child Protective Services intervened, and the children eventually went to live with Mr. Olsen’s parents. 12/15/10 RP 641-42.

Although the court admitted testimony about this prior crime, it limited the jury’s consideration of the evidence. The judge told the jury it could consider the prior act as evidence of motive or intent to commit the current charged crimes, but that “the defendant is not on trial” for the prior

act or any other offense not charged. 12/15/10 RP 618-19. The jury acquitted Mr. Olsen of the most serious charge but convicted him on counts two through five. It found an aggravating factor applied to counts two through four. CP 256-66.

2. Dispute about the prior crime at sentencing

At sentencing, Mr. Olsen's offender score was highly contested. Among other things, Mr. Olsen argued that the California crime of "terroristic threats" was broader than the Washington crime of felony harassment, and therefore his California conviction could not be counted as a felony. 4/11/11 RP 12, 38-39. The California statute makes it a crime to "threaten[] to commit a crime which will result in death or great bodily injury," thereby causing the person threatened "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." Cal. Penal Code § 422. In Washington such threats constitute a gross misdemeanor; a threat rises to the level of a felony only if it is a threat to *kill* and causes the listener to fear *death*. RCW 9A.46.020(2)(b)(ii); *State v. C.G.*, 150 Wn.2d 604, 606, 80 P.3d 594 (2003); 4/11/11 RP 38-39, 43.

The State argued the crimes were comparable in light of Ms. Devenny's description of the prior event at the current trial. The prosecutor seemed to believe that Ms. Devenny's description should be

treated as a verity at sentencing. 4/11/11 RP 10-11. The State argued that because Ms. Devenny claimed that Mr. Olsen threatened “to cut her into little pieces” during the event in 2000, the prior crime could be counted as felony harassment even though Mr. Olsen never agreed and no jury ever found that he made that statement. 4/11/11 RP 13; *see ex. 37*. Defense counsel protested, “the plea document that he signed didn’t incorporate any facts by reference ... and he didn’t stipulate to any facts.” 4/11/11 RP 41.

The trial court nevertheless determined that the crimes were comparable. The judge’s oral ruling indicates she believed the difference between death and great bodily injury was irrelevant. The court scored the crime as a felony because it was a felony in California. 4/11/11 RP 57-58. The judge relied on a police report from the 2000 incident in which Ms. Devenny claimed Mr. Olsen said he was going to “cut her into pieces.” 4/11/11 RP 56-57. The court said, “the underlying language that was used by the defendant was a threat to kill and, therefore, it is clear to me, and I do find by a preponderance of the evidence that it is equivalent to the crime of felony harassment.” 4/11/11 RP 57.

The court calculated an offender score of six, resulting in a range of 146.25 months to life. CP 280. It imposed a sentence of 360 months. CP 281.

3. The Court of Appeals' Opinion

Contrary to the trial court, the Court of Appeals acknowledged that “the California and Washington crimes are not legally comparable: under California’s statute, it is possible to be convicted of a felony for threatening great bodily injury *or* death, whereas felony harassment in Washington requires a true threat involving death; a threat involving bodily injury constitutes only a misdemeanor.” *State v. Olsen*, 175 Wn. App. 269, 309 P.3d 518, 527 (2013). Like the trial court, however, the Court of Appeals relied on Ms. Devenny’s testimony in the current trial to find the crimes factually comparable. *Id.* (Mr. Olsen “told her he was going to cut her in pieces and put her in a blue bin. 5 RP at 623”). The court concluded, “[t]he conduct underlying [Mr.] Olsen’s terrorist threat conviction would have satisfied the conduct necessary to be convicted of felony harassment in Washington under RCW 9A.46.020,” and therefore it was properly included in the offender score. *Id.* at 528.

D. SUPPLEMENTAL ARGUMENT

The Court of Appeals’ factual finding violates Mr. Olsen’s rights under the Sixth and Fourteenth Amendments and the Sentencing Reform Act. The Constitution guarantees the right to have a jury find beyond a reasonable doubt every fact that increases the range of punishment, and the sole exception is the *fact* of a prior conviction. A court violates this

rule when it makes a factual finding about *conduct underlying* a prior conviction. The only “factual” inquiry a court may engage in is a determination of the elements of the prior crime. If the prior crime has the same elements as a Washington felony or is narrower, the conviction may be counted in the offender score. If the crime has broader elements than the analogous Washington felony, the conviction may not be counted in the offender score. Because the California crime of terroristic threats is broader than the Washington crime of felony harassment, it may not count as a point in Mr. Olsen’s offender score.

1. The inclusion in Mr. Olsen’s offender score of a California conviction for terroristic threats, which is broader than the Washington crime of felony harassment, violated Mr. Olsen’s rights under the Sixth and Fourteenth Amendments and the Sentencing Reform Act.

- a. Out-of-state convictions may not be included in a defendant’s offender score if the foreign statute prohibits a broader swath of conduct than the analogous Washington statute.

The SRA creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant’s offender score. RCW 9.94A.505, .510, .520, .525; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court’s calculation

of the offender score. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

“Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). A foreign conviction for a crime that is *not* comparable to a Washington felony may not be included in the offender score. *State v. Thomas*, 135 Wn. App. 474, 477, 144 P.3d 1178 (2006); *see also Lavery*, 154 Wn.2d at 258 (conviction for foreign crime that is broader than analogous Washington statute may not be counted as a “strike” for purposes of sentencing).

The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process. U.S. Const. amend. XIV; *State v. Hunley*, 175 Wn. 2d 901, 917, 287 P.3d 584 (2012). Furthermore, “fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Ford*, 137 Wn.2d at 481.

To determine whether a prior out-of-state conviction may be included in a defendant’s offender score, the sentencing court must compare the elements of the foreign crime with the elements of the similar Washington crime. If the elements are the same, or if the foreign crime is

narrower than the Washington felony, the foreign conviction may be included in the offender score. *Lavery*, 154 Wn.2d at 255. For example, a prior Oregon conviction for “criminally negligent homicide” would count in a Washington defendant’s offender score because the elements are the same as those of the Washington crime of second-degree manslaughter. *Compare* O.R.S. § 163.145 (“A person commits the crime of criminally negligent homicide when, with criminal negligence, the person causes the death of another person”) *with* RCW 9A.32.070 (“A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person”).

If the out-of-state statute is “divisible,” in the sense that it sets forth alternative elements, the sentencing court may engage in a limited factual inquiry to determine under which prong of the foreign statute the defendant was convicted. *See Descamps*, 133 S.Ct. at 2281. In *Descamps*, the U.S. Supreme Court explained the constitutional limits of comparability analysis while addressing whether a defendant’s prior California conviction for burglary could be counted as a “prior violent felony” that would increase his sentence under the federal Armed Career Criminal Act (“ACCA”). *See id.* (citing 18 U.S.C. § 924(e)). Prior crimes do not count under the ACCA unless they are comparable to the so-called “generic offense”. The Court explained its “modified categorical

approach” for addressing whether a prior conviction obtained under a “divisible statute” is comparable to the generic offense:

That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction.

Id.

Thus, for example, if a person had a prior conviction under Washington’s harassment statute, which sets forth alternative means and is therefore divisible, the sentencing court could perform a limited factual inquiry to determine whether the defendant was convicted under subsection (2)(a) or (2)(b). *See* RCW 9A.46.020 (setting forth alternative elements for misdemeanor harassment and felony harassment). If the person had been convicted of a felony under subsection (2)(b), the conviction would count as a point in the offender score (assuming it had not washed out). RCW 9.94A.525. If the person had been convicted of misdemeanor harassment under subsection (2)(a), the conviction could be used to interrupt the wash-out period but would not count as a point. *See id.*

If the out-of-state statute under which the defendant was convicted is not divisible and simply prohibits a broader swath of conduct than the relevant Washington felony statute, the prior foreign conviction may not be counted as a felony in the defendant's offender score. A sentencing court may not consider the underlying facts of a prior conviction to determine whether the defendant *could have* been convicted under the narrower Washington statute. *Descamps*, 133 S.Ct. at 2281-82; *Lavery*, 154 Wn.2d at 256-57; *State v. Ortega*, 120 Wn. App. 165, 174, 84 P.3d 935 (2004).

The U.S. Supreme Court has explained why this type of factual inquiry violates the Sixth and Fourteenth Amendments. Because the Constitution guarantees the rights to due process and a jury trial, any fact that increases the prescribed range of penalties must be either admitted by the defendant or found by a jury beyond a reasonable doubt. *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2162-63 (2013) (citing, *inter alia*, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); U.S. Const. amends. VI, XIV. Although the fact of a prior conviction may be an exception to the above rule, there is no exception allowing courts to find facts *underlying* prior convictions. *Descamps*, 133 S.Ct. at 2288. "The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a

reasonable doubt.” *Id.* A sentencing court may not “rely on its own finding about a non-elemental fact” to increase a defendant’s sentence. *Id.* at 2289.

This Court already recognized as much in *Lavery*:

In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. All a sentencing court needs to do is find that the prior conviction exists. No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are *not* facially identical. In essence, such crimes are *different* crimes.

Lavery, 154 Wn.2d at 256-57 (internal citations omitted) (emphases in original). Similarly, Division Three in *Ortega* recognized that “*Apprendi* prohibits a sentencing court’s consideration of the underlying facts of a prior conviction if those facts were not found by the trier of fact beyond a reasonable doubt.” *Ortega*, 120 Wn. App. at 174.

Applying these rules, this Court, the U.S. Supreme Court, and Divisions One and Three of the Court of Appeals have refused to allow prior convictions under broader statutes to be used to increase a defendant’s available sentence. In *Descamps*, the Court held a prior California burglary could not be used to increase a defendant’s sentence because the California burglary statute is broader than generic burglary: it does not require breaking and entering. *Descamps*, 133 S.Ct. at 2293.

The Court emphasized, “[w]hether Descamps *did* break and enter makes no difference.” *Id.* at 2286. “A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense.” *Id.* at 2289; *accord Lavery*, 154 Wn.2d at 257 (“Where the foreign statute is broader than Washington’s, ... there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense”). Because a conviction for generic burglary requires proof of an element that does not exist in the California burglary statute, the prior California burglary could not be counted. *Descamps*, 133 S.Ct. at 2293.

In *Ortega*, Division Three held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. *Ortega*, 120 Wn. App. at 167. Washington’s statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. *Id.* at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. *Id.* at 173-74. But the Court of Appeals held the trial court properly refused to consider that evidence, because “the Texas crime as charged was not clearly comparable to first degree child molestation.” *Id.* at 174.

In another case, Division One held a prior Illinois robbery conviction was improperly counted as a “strike” in Washington. *State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003). Robbery in Washington requires proof of specific intent to deprive, but robbery in Illinois is broader: it requires only proof of general intent. *Id.* at 141. The State had presented evidence of the defendant’s underlying conduct in Illinois, including an “Official Statement of Facts,” which alleged specific intent to deprive: “Defendant displayed a small caliber revolver and demanded victim’s money.” *Id.* at 142. But the Court of Appeals held this document could not be considered because it contained allegations that were irrelevant to the elements of the crime and therefore were never proven at trial or admitted by the defendant. *Id.*

If the statutory formulation of the out-of-state crime did not contain one or more of the elements of the Washington crime on the date of the offense, it means that the out-of-state court or jury did not have to find each fact that must be found to convict the defendant of the essential elements of liability under the Washington counterpart crime.

Id. at 140. “Because [the defendant] pled guilty to armed robbery, the only acts he conceded were *the elements of the crime* stated in the indictment.” *Id.* at 143. The court held the Illinois conviction could not be used to increase the sentence to life without parole. *Id.* at 143.

Convictions under broader statutes similarly could not be used to increase the penalties in *Lavery* (prior federal bank robbery), and *Thomas*, 135 Wn. App. 474 (prior California burglary). The bottom line is that “[w]here the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.” *Lavery*, 154 Wn.2d at 258.

- b. The California terroristic threats statute prohibits a broader swath of conduct than Washington’s felony harassment statute, so Mr. Olsen’s prior conviction may not be counted as a felony in his offender score.

Division Two acknowledged that the elements of the crime of terroristic threats in California are broader than those under Washington’s felony harassment statute. *Olsen*, 309 P.3d at 527. This is so because a felony conviction for terroristic threats requires only a threat of great bodily injury resulting in the listener’s fearing for his or her safety, while a conviction for felony harassment requires a threat to kill and a fear of death. *See* RCW 9A.46.020; Cal. Penal Code § 422;⁵ *C.G.*, 150 Wn.2d at 606. Thus “the foreign conviction cannot truly be said to be comparable,” *Lavery*, 154 Wn.2d at 258, and “the inquiry is over.” *Descamps*, 133 S.Ct. at 2286.

⁵ The full text of these statutes is set forth in an appendix to this brief.

But the Court of Appeals engaged in the forbidden factual inquiry. It credited the complaining witness's description of the event – a description never admitted by Mr. Olsen or found by a jury beyond a reasonable doubt. 309 P.3d at 527. It found, “[t]he conduct underlying [Mr.] Olsen’s terrorist threat conviction would have satisfied the conduct necessary to be convicted of felony harassment in Washington under RCW 9A.46.020.” *Id.* at 528. The trial court similarly engaged in impermissible factfinding, even reviewing a police report whose contents Mr. Olsen had never endorsed. 4/11/11 RP 56-57; *see Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (sentencing court may not “look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted” the elements of the broader crime). By engaging in this factfinding regarding Mr. Olsen’s prior conviction pursuant to a broader statute, the trial court and Court of Appeals violated Mr. Olsen’s rights under the Sixth and Fourteenth Amendments and the SRA. *Descamps*, 133 S.Ct. at 2288-89; *Lavery*, 154 Wn.2d at 256-57; *Ortega*, 120 Wn. App. at 174. The California conviction for terroristic threats may not be counted as a felony for purposes of Mr. Olsen’s offender score. *See id.*

2. Because the California conviction may not be counted, the custodial interference conviction washes out.

Class C felony convictions “wash out” after a period of five crime-free years in the community and may not be included in the offender score. RCW 9.94A.525(2)(c). Custodial interference in the first degree is a class C felony. RCW 9A.40.060(4). As explained above, Mr. Olsen’s California conviction must be treated as misdemeanor because the California crime of terroristic threats is not comparable to a Washington felony. Accordingly, the time Mr. Olsen spent in custody due to parole revocations for the terroristic threat conviction must be treated as misdemeanor probation violations. This Court has held that time spent in custody on misdemeanor probation violations does not interrupt the wash-out period for felony convictions. *State v. Ervin*, 169 Wn.2d 815, 826, 239 P.3d 354 (2010). The State does not contest this point. Resp. Brief at 26-30. Because the probation violations do not count against the wash-out period, Mr. Olsen’s custodial interference conviction washes out and must not be included in the offender score. *Id.*; 4/11/11 RP 48-49.

3. The remedy is remand for resentencing based on an offender score of four.

Constitutional violations require reversal unless the State can prove, beyond a reasonable doubt, that the error did not contribute to the result obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17

L.Ed.2d 705 (1967); *see Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (applying *Chapman* to *Apprendi* violations). The State cannot meet that heavy burden here.

It is true that the maximum available sentence remains the same (life) because of the aggravating factor. CP 280, 292; RCW 9.94A.535(3)(h)(ii); RCW 9A.20.021. However, because Mr. Olsen's offender score is four rather than six, the bottom of his sentencing range drops to 123.75 months. RCW 9.94A.510; RCW 9.94A.533(2); CP 279-80. Resentencing is required because the trial court originally sentenced Mr. Olsen based on an offender score of six and a low end of 146.25 months. CP 280. Indeed, this case is like *Alleyne*, where resentencing was required because although the maximum sentence remained life, the minimum sentence dropped by two years. *See Alleyne*, 133 S.Ct. at 2163-64.⁶

The State argues that any remand should simply be “for correction of the offender score” and not for resentencing, because it believes the

⁶Just as the relevant “maximum” for *Apprendi* purposes is the top of the standard range, the relevant “minimum” is the bottom of the standard range. *See Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004) (top of standard range is relevant maximum); RCW 9.94A.535(1) (court cannot go below bottom of range absent additional findings); *Alleyne*, 133 S.Ct. at 2162 (*Apprendi* applies to facts that increase the prescribed range of allowable sentences).

court “would have imposed the same [exceptional] sentence anyway.”

Brief of Respondent at 28-29. The State is wrong.

This Court has made clear that it is “hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus.” *State v. Parker*, 132 Wn.2d 182, 190, 937 P.2d 575 (1997). The rule is: “When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record *clearly* indicates the sentencing court would have imposed the same sentence anyway.” *Id.* at 189. This Court cautioned, “[g]iven the fact that a correct standard range is intended as the departure point, we cannot imagine many instances where it could be shown that the resulting exceptional sentence would have been the same regardless of the length of the standard range.” *Id.* at 192 n.15.

Here, the judge said that she would impose the same sentence even if *the aggravating factor* applied to only one or two counts instead of to three counts. CP 292. But the trial court did *not* say – or clearly indicate in any way – that it would impose the same sentence even if the offender score were 33% lower. CP 292. This makes sense in light of this Court’s statements in *Parker*. Accordingly, the appropriate remedy is remand for

resentencing based on an offender score of four. *Parker*, 132 Wn.2d at 192-93.

E. CONCLUSION

This Court should clarify that an out-of-state prior conviction may be used to increase the available range of punishment for a current crime only if the elements of the prior crime are the same or narrower than those of the relevant Washington crime. Mr. Olsen's case should be remanded for resentencing based on an offender score of four rather than six.

DATED this 6th day of December, 2013.

Respectfully submitted,

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APPENDIX

Relevant Statutes

Cal. Penal Code § 422 (1998)

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

RCW 9A.46.020 (1999)

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2) A person who harasses another is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW, except that the person is guilty of a class C felony if either of the following applies: (a) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 89134-6
v.)	
)	
EDWARD OLSEN,)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RANDALL SUTTON	()	U.S. MAIL
KITSAP COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
614 DIVISION ST.	(X)	E-MAIL
PORT ORCHARD, WA 98366-4681		
e-mail: kcpa@co.kitsap.wa.us		

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF DECEMBER, 2013.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711

OFFICE RECEPTIONIST, CLERK

From: Maria Riley <maria@washapp.org>
Sent: Friday, December 06, 2013 2:33 PM
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Subject: 891346-OLSEN-BRIEF
Attachments: Olsen Supp Brief With Appendix.pdf

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

Lila J. Silverstein - WSBA #38394
Attorney for Petitioner
Phone: (206) 587-2711
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By

Maria Arranza Riley

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