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NO. 89134-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARK OLSEN,

Petitioner.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 42135-6-II
Superior Court No. 09-1-01567-6

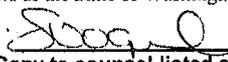
SUPPLEMENTAL BRIEF OF RESPONDENT

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SERVICE	Lila Jane Silverstein 1511 3rd Avenue Suite 701 Seattle, WA 98101-3647 Email: lila@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 6, 2014, Port Orchard, WA  Original e-filed at the Supreme Court; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUE

Whether the conclusion of the Court of Appeals that Olsen's California conviction of terroristic threats was comparable to the Washington crime of felony harassment comports with both Washington precedent and the Sixth Amendment?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Edward Olsen was charged by second amended information filed in Kitsap County Superior Court with the felony offenses of attempted first-degree murder, attempted second-degree murder, first-degree burglary, felony harassment (threat to kill), and the gross misdemeanor of third-degree malicious mischief (a). CP 163-70. All felony counts included an allegation that the crimes were aggravated domestic violence offenses for purposes of RCW 9.94A.535. *Id.* The victim was the mother of Olsen's children, Bonnie Devenny. *Id.*

A jury acquitted Olsen of attempted first-degree murder. CP 256. The jury convicted Olsen as charged on the remaining counts, including the aggravating circumstances. CP 256-64.

The trial court imposed an exceptional sentence of 360 months. CP 281.

On appeal, Olsen challenged, *inter alia*, the comparability of his

prior offense of terroristic threats. The Court of Appeals, rejected this contention, finding that as a matter of California law, Olsen had pled guilty to elements constituting the Washington crime of felony harassment. *State v. Olsen*, 175 Wn. App. 269, ¶¶ 28-39, 309 P.3d 518 (2013). Olsen sought review, and this Court accepted review, only on the comparability issue.

B. FACTS

The facts of the offense are set forth in the Court of Appeals opinion:

Around 4:00 a.m. on November 29, 2009, Devenny was awakened by Olsen, the estranged father of her three children, dousing her bed in gasoline while threatening that she was going to die. Devenny “struggled and jumped up out of bed screaming.” 5 Report of Proceedings (RP) at 626. J.E.O., Devenny and Olsen’s 12-year-old son who had fallen asleep in Devenny’s room while watching television earlier in the evening, awoke to his mother’s screaming. J.E.O. grabbed Olsen and “tried to get him as far away as possible from [Devenny].” 5 RP at 586. J.E.O. forced Olsen into the hallway, while Devenny made it into the bathroom across the hall and escaped through the bathroom window. Devenny ran across the street to the Wyatt House Retirement Center where J.E.O. later ran to meet her.

Olsen, 175 Wn. App. at ¶ 3.

III. ARGUMENT

THE CONCLUSION OF THE COURT OF APPEALS THAT OLSEN'S CALIFORNIA CONVICTION OF TERRORISTIC THREATS WAS COMPARABLE TO THE WASHINGTON CRIME OF FELONY HARASSMENT COMPORTS WITH BOTH WASHINGTON PRECEDENT AND THE SIXTH AMENDMENT.

Olsen claims, as he did below, that his offender score was incorrect because his California conviction of terrorist threats was not comparable to a Washington felony offense. He asserts the crimes are not comparable that the statutory elements of the California crime are broader than those of felony harassment under RCW 9A.46.020. This claim is without merit because under California law Olsen specifically pled to allegations that are equivalent to the Washington felony. He thus misinterprets the Court of Appeals decision: any reference that court made to the underlying facts of the California offense are dicta. The holding of the Court of Appeals was that Olsen's plea, as a matter of California law, included an admission of elements that establish the elements of the Washington felony. The Court of Appeals was correct.

1. The Court of Appeals properly found that Olsen had pled guilty to elements equivalent to the Washington crime of felony harassment.

Washington courts employ a two-part test to determine the comparability of a foreign offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the Court determines whether the foreign

offense is legally comparable – “that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense.” *Thiefault*, 160 Wn.2d at 415. Second, if the foreign offense elements are broader than Washington’s elements, precluding legal comparability, the Court determines “whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.” *Thiefault*, 160 Wn.2d at 415 (*citing State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). “In making its factual comparison the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *Thiefault*, 160 Wn.2d at 415, 158 P.3d 580 (*citing In re Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)).

RCW 9A.46.020 provides:

(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

* * *

(b) A person who harasses another is guilty of a class C felony if any of the following apply: ... (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person;

Cal. Penal Code § 422 (2000) defined terroristic threats:

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 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.

(Emphasis supplied). Olsen argues that because the highlighted portion of the statute is presented in the alternative, he could have been convicted only of a threat to commit great bodily harm, which would constitute a gross misdemeanor under RCW 9A.46.020.

Olsen pled no contest to the California offense. Exh. 37. Under California law, the “legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes.” *People v. Wallace*, 33 Cal. 4th 738, 749, 93 P.3d 1037, 16 Cal. Rptr. 3d 96 (2004). Further, a guilty plea admits the allegations of the charging document. *People v. Tuggle*, 232 Cal. App. 3d 147, 154, 283 Cal. Rptr. 422 (1991), *overruled on other grounds*, *People v. Jenkins*, 10 Cal. 4th 234, 893 P.2d 1224, 40 Cal. Rptr. 2d 903 (1995).

The latter principle is important in this case, because under California law, even where the statutory elements are in the disjunctive, if the charging document presents them in the conjunctive, a guilty plea

admits *each* of the elements. *Tuggle*, 232 Cal. App. 3d at 154-55. Count I of the information charged Olsen in the conjunctive:

EDWARD MARK OLSEN did commit a felony ... in that said defendant did willfully and unlawfully threaten to commit a crime which would result in the death *and* great bodily injury to BONNIE MARIE DEVENNY, with the specific intent that the statement be taken as a threat.

Exh. 37 (emphasis supplied). Thus under California precedent, Olsen pled guilty to threatening to kill Devenny, as a matter of law, which makes his prior offense comparable to felony harassment in Washington. As such the trial court did not err in including the offense in Olsen's offender score.

The Court of Appeals, contrary to Olsen's contention, did not impermissibly consider facts that were not found by a jury or admitted by the defendant. Rather, its holding was based on the precepts just discussed:

Unlike in Washington, California allows defendants to plead "no contest" to charged offenses. Under California law, the "legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes." *California v. Wallace*, 33 Cal. 4th 738, 749, 93 P.3d 1037, 16 Cal. Rptr. 3d 96 (2004) (quoting Cal. Penal Code § 1016(3)). And under established California law, a guilty plea "amounts to an admission of every element of the crime charged." *California v. Jones*, 52 Cal. 2d 636, 651, 343 P.2d 577 (1959) (emphasis added), *cert. denied*, 361 U.S. 926, 80 S. Ct. 364, 4 L. Ed. 2d 350 (1960). Thus, when a defendant is charged under a California statute that employs the inclusive disjunctive – as is this case with "or" here – the defendant, in pleading no contest, admits guilt to all elements of the statute set

forth in the charging document. FN10 *California v. Tuggle*, 232 Cal. App. 3d 147, 154, 283 Cal. Rptr. 422 (1991), *overruled on other grounds by California v. Jenkins*, 10 Cal. 4th 234, 893 P.2d 1224, 40 Cal. Rptr. 2d 903 (1995).

In 2000, while Olsen and Devenny were living in California, Olsen began duct taping her and told her “he was going to cut [her] in pieces and put [her] in a blue bin.” 5 RP at 623. The information charging Olsen with violating California’s terrorist threats statute states that Olsen “did willfully and unlawfully threaten to commit a crime which would result in death *and* great bodily injury to [Devenny], with the specific intent that the statement be taken as a threat.” Ex: 37 (emphasis added). The information also stated that

[i]t is further alleged that the threatened crime, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to BONNIE MARIE DEVENNY a gravity of purpose and an immediate prospect of execution.

It is further alleged that the said BONNIE MARIE DEVENNY was reasonably in sustained fear of his/her safety and the safety of his/her immediate family.

Ex. 37. Thus, Olsen, by pleading no contest, pleaded guilty to threatening to kill Devenny *and* threatening to gravely injure her. Because of this, the conduct that Olsen pleaded no contest to in the 2000 information involves (1) a true threat against Devenny (2) involving a threat to kill that (3) placed Devenny in fear of “an immediate prospect of execution” of the threat, namely Olsen carrying out his threat to kill. Ex. 37. Accordingly, the conduct underlying Olsen’s terrorist threat conviction would have satisfied the conduct necessary to be convicted of felony harassment in Washington under RCW 9A.46.020; the crimes are factually comparable and the trial court correctly included this conviction in calculating Olsen’s offender score.

State v. Olsen, 175 Wn. App. 269, ¶¶ 35-37, 309 P.3d 518 (2013)

(alterations and emphasis the Court's, footnote omitted). Thus, while the Court mentions the underlying threat, its analysis is clearly predicated on the legal effect of Olsen's plea under California law. Olsen's contention that the courts below found facts to which Olsen did not admit is thus untrue. Under the law where Olsen pled guilty, he *did* admit facts that support each element of the Washington crime of felony harassment. The Court of Appeals should be affirmed.

2. Descamps, primarily a federal statutory construction case, should not be imported into Washington law.

The Court has requested that the parties address the effect of *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), on the issue raised herein. *Descamps* primarily interprets federal statutory law in an analysis that roughly parallels existing Washington practice. Existing Washington comparability procedures are both well-understood and constitutional. The State respectfully submits that this Court should decline to confuse matters by changing the Washington analysis when there is no reason to do so.

a. The federal approach.

In *Descamps*, the Supreme Court continued the exegesis of 18 U.S.C. § 924(e), which it had begun in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). *Descamps*, 133 S. Ct. at 2283. The primary focus of the cases from *Taylor* through *Descamps* is

the proper construction of the federal statute. In the statute Congress failed to specify how to determine whether prior state-law offenses were predicate crimes. *See Taylor*, 495 U.S. at 590-92.

To meet this challenge, *Taylor* and its progeny developed the concept of the “generic offense” to which the state crime would be compared, using a “categorical approach”:

To determine whether a past conviction is [countable], courts use what has become known as the “categorical approach”: They compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the “generic” crime – *i.e.*, the offense as commonly understood. The prior conviction qualifies as [a] predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense.

Descamps, 133 S. Ct. at 2281. Under this approach, only the elements of the prior offense were examined. *Descamps*, 133 S. Ct. at 2283; *Taylor*, 495 U.S. at 600.

Next, in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), the Court also permitted a “modified categorical approach” when the defendant had been charged under a “divisible” statute. Thus, where a statute contained alternative elements, some of which constituted the generic offense, and others which did not, the court could look to certain “extra statutory materials” to determine whether the defendant was convicted of the generic offense. *Descamps*, 133 S. Ct. at 2284. These materials include plea proceedings, but the Court cautioned

that the “It was not to determine ‘what the defendant and state judge must have understood as the factual basis of the prior plea,’” but only to assess whether the plea was to the version of the crime in the [state] statute corresponding to the generic offense. *Id.*, (quoting *Shepard*, 544 U.S. at 25-26 (plurality opinion)).

Finally, at issue in *Descamps* was whether the modified categorical approach could be applied to an “indivisible” offense. In other words, whether the court could count a prior conviction of a state crime that *lacked* an element of a generic offense if an examination of the “extra statutory documents” showed that the defendant had committed the generic crime as a matter of fact. The Court rejected this approach. *Descamps*, 133 S. Ct. at 2285-86.

b. The Washington approach.

Unlike Congress, in enacting the SRA, the Washington Legislature specified the test for determining whether non-Washington offenses count in the offender score:

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). Additionally, in the nearly thirty years since the SRA was enacted, this Court and Court of Appeals have issued an extensive body of caselaw defining the parameters of this statutory provision. As discussed above, the resulting test is straightforward and

relatively easy to apply:

A court must first query whether the foreign offense is legally comparable – that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense.

Thiefault, 160 Wn.2d at 415. This test is roughly equivalent to the categorical approach discussed in *Descamps*.

If a foreign prior fails to meet the legal comparability test under the SRA, then the court undertakes a “factual” analysis:

If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.

Thiefault, 160 Wn.2d at 415 (citations omitted). This “factual” analysis, despite its nomenclature, does not conflict with the holding in *Descamps*. To the contrary, because the sentencing court may not consider facts that were not admitted to, stipulated to, or proved beyond a reasonable doubt, Washington’s “factual” analysis is more comparable to the “modified categorical approach” discussed in *Descamps* than the approach to “indivisible” offenses that it rejected.

As discussed, *Descamps* is primarily a case about federal statutory interpretation. As such, there is no reason to import its analysis into Washington law. To the contrary, because the case law in Washington has

developed over the course of 30 years, to suddenly change the nomenclature would invite nothing more than confusion and unnecessary litigation.

This is all the more true given that the analyses are fundamentally the same. The legal comparison and categorical approach ask whether the prior contains all the elements of the Washington or generic offense, respectively. The factual comparison or the modified categorical approach are used when the prior statute contains alternative elements, some of which would constitute the Washington/generic offense, and some of which do not. Under neither Washington precedent nor *Descamps* may the sentencing court examine the underlying facts to “find” an element that the prior *statute* lacked, but which is essential to the Washington/generic offense. See *In re Lavery*, 154 Wn.2d 249, 257, 111 P.3d 837 (2005) (*discussing State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004)).

c. Washington’s analysis is constitutional.

Although *Descamps* is primarily a case of statutory construction, the Court did observe that looking to the underlying facts could run afoul of the Sixth Amendment as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000):

Yet again, the Ninth Circuit’s ruling flouts our reasoning – here, by extending judicial factfinding beyond

the recognition of a prior conviction. *Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits.* But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. And there's the constitutional rub. The Sixth Amendment contemplates that a jury – not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances. Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he “broke and entered”) irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Descamps, 133 S. Ct. at 2288-89 (emphasis supplied).

Washington's legal/factual analysis is consistent with *Descamps*. Like the modified categorical approach, the factual analysis only permits the sentencing court to examine the record to determine whether the defendant was *necessarily* convicted of all the elements of a Washington offense:

Any attempt to examine the underlying facts of a foreign conviction, *facts that were neither admitted or stipulated to*, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where 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 (emphasis supplied); *accord*, *Thiefault*, 160 Wn.2d at 415. Washington procedure satisfies the dictates of *Apprendi* as well as the concerns in *Descamps*. There is no need to alter it.

Here, the documents adduced at sentencing, as well as their legal effect under California law, established that Olsen admitted to or stipulated to violating a California statute that was equivalent to felony harassment under RCW 9A.46.020. That is, he pled guilty to knowingly making a true threat to kill Devenny. Because the analysis below comported with both Washington precedent and the Sixth Amendment, it should be affirmed.

3. *Remedy*

Finally, even if Olsen's offender score were incorrect, the case should be remanded, not for resentencing, but for correction of the offender score. "When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." *State v. Rowland*, 160 Wn. App. 316, ¶ 25, 249 P.3d 635, 643 (2011) (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Here, the trial court not only felt the standard range was inadequate

punishment for the offense, it rejected the State's requested sentence of 300 months and imposed a sentence of 360 months:

I am going to utilize the opportunity to sentence you above the standard range here because I believe that it's warranted given the facts in this particular case and the history that you present here. I am going to decline the State's invitation to sentence him to 300 months and instead go higher than that. I think that a sentence of 360 months on the Attempted Murder in the Second Degree is warranted here. That is 30 years.

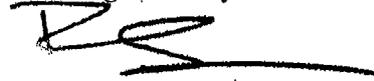
RP (4/11) 81. The court further noted in its written findings that "the grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid." CP 292. The record is plain that the trial court would impose the same exceptional sentence, which was not dependent of the offender score, regardless of what the score was. Therefore, in the event the Court were to find error, remand for correction of the offender score only would be the proper remedy.

IV. CONCLUSION

For the foregoing reasons, Olsen's conviction and sentence should be affirmed.

DATED January 6, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Hauge', with a long horizontal stroke extending to the right.

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