

NO. 93668-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES BLUFORD,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julia Garratt, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER CHARLES BLUFORD

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**A. ISSUES**

1. Whether the trial court violated Bluford's due process right to a fair trial in joining nine counts because the evidence for each count was not cross-admissible to show identity via modus operandi and the jury could not be expected to compartmentalize the evidence?

2. Where the trial court erroneously failed to give lesser offense instructions, whether the error remains available for review because counsel acknowledged adverse authority but persisted in requesting the instructions?

3. Whether the State failed to prove the New Jersey robbery conviction is comparable to the Washington offense of robbery because the foreign offense is legally broader, the record is insufficient to show factual comparability, and the Sixth Amendment prohibits consideration of judicial findings to which Bluford did not agree?

**B. STATEMENT OF THE CASE**

The Court of Appeals rejected Bluford's improper joinder argument but agreed the trial court erred in failing to give a lesser offense instruction and the State failed to prove Bluford is a persistent offender. State v. Bluford, 195 Wn. App. 570, 574, 379 P.3d 163 (2016). Relevant facts are set forth in Bluford's petition for review. Additional facts are set forth in the argument section of this brief.

C. **ARGUMENT**

1. **JOINING NINE COUNTS INVOLVING SEVEN SEPARATE INCIDENTS FOR A SINGLE TRIAL PREJUDICED BLUFORD'S RIGHT TO A FAIR TRIAL.**

Joinder and severance are covered by court rule and statute. CrR 4.3(a); CrR 4.4(b); RCW 10.37.060. Joinder that results in a fundamentally unfair trial violates due process. Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998) (citing United States v. Lane, 474 U.S. 438, 446 n.8, 106 S. Ct. 725, 730, 88 L. Ed. 2d 814 (1986)); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Consideration of the requisite factors shows joinder violated Bluford's right to a fair trial. The evidence was not cross-admissible to show identity because the test for showing a signature was unmet. And because the offenses were joined for the purpose of showing identity and the State urged the jury to consider the offenses collectively for this purpose, the jury could not be expected to do the opposite by compartmentalizing the offenses.

Because joinder and severance are based on the same underlying principle that the defendant must receive a fair trial untainted by undue prejudice, the "pure" legal issue of joinder cannot be decided in a vacuum without considering prejudice. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017, 978 P.2d 1100

(1999). Thus, "even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant." Bryant, 89 Wn. App. at 865. The State says Bryant was wrongly decided, prejudice is only considered in relation to severance, and Bluford waived the severance issue by not renewing his objection at trial. Bluford disagrees. The trial court considered and decided the cross motions for joinder and severance at the same hearing. The court and parties treated the joinder and severance issues as "six of one, half dozen of the other." 1RP 3-4. Cases addressing joinder and severance often blur the distinction between the two decisions because they are intertwined. Bryant, 89 Wn. App at 865. The blurring reflects the reality that, in practice, dueling motions for joinder and severance are not considered separately and there is no meaningful distinction between the two in terms of the need to assess prejudicial effect. If this Court overrules in Bryant and decides joinder does not implicate the prejudice analysis, then Bluford requests that this Court exercise its discretion to consider the prejudicial effect of denying the severance motion under RAP 2.5(a). See Reply Brief (RB) at 6-9.

Beginning with this Court's decision in State v. Smith, courts have assessed whether prejudice results from joinder by looking at four factors: (1) the strength of the State's evidence on each of the counts; (2) the

clarity of the defenses on each count; (3) the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) admissibility of the evidence of the other crimes. State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972); Bryant, 89 Wn. App. at 867-68. The central dispute in Bluford's appeal is whether the evidence was cross-admissible and whether the jury could be expected to compartmentalize the evidence.

The petition for review and previous briefing develop why the evidence was not cross-admissible to show modus operandi and why the jury in Bluford's case could not be expected to compartmentalize the evidence. Petition at 3-20; Amended Brief of Appellant (ABOA) at 13-31; Reply RB at 1-9. The main points will be reemphasized here.

When evidence of other acts is admitted to show identity under ER 404(b), the method employed in the commission of crimes must be so unique that proof an accused committed one of the crimes creates a high probability that he also committed the other crimes. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). The modus operandi used to prove identity "must be so unusual and distinctive as to be like a signature." State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). Substantial similarity between crimes does not satisfy the modus operandi

requirement. State v. DeVincentis, 150 Wn.2d 11, 18-21, 74 P.3d 119 (2003). Dissimilar features of the crimes must be considered in deciding whether they establish a signature. Thang, 145 Wn.2d at 643, 645.

The trial court applied an improper legal standard in failing to take dissimilarities into account. See Petition at 8-9. The commonalities identified by the trial court do not meet the stringent test for showing the presence of a signature. See Petition at 6-7, 10-11. The common features are not sufficiently unique in combination, and no court has explained how adding up common features somehow transmogrifies the facts of this case into a signature. The trial court recited the rule for admitting *modus operandi* evidence, but really applied the less onerous test for admission under *common scheme or plan*, which may be established by evidence that the defendant "committed markedly similar acts of misconduct against similar victims under similar circumstances." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Resort to the notion that a bunch of common features add up to a unique signature erases the distinction between *modus operandi* evidence and *common scheme* evidence and dilutes the test for showing identity when not applied in a rigorous manner. Bluford requests that this Court reinvigorate the stringent test for showing identity through *modus operandi*.

Further, merely identifying a proper purpose for admission is not enough to render ER 404(b) evidence admissible. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). The ER 403 analysis is particularly significant for the two charged sex offenses at issue, as they carried the highest risk of prejudice. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). The trial court did not consider the unfair prejudice analysis mandated by ER 403 in ruling the evidence was cross-admissible under ER 404(b). CP 15-18. Again, the court necessarily abused its discretion because it applied the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). The jury in Bluford's case was unlikely to compartmentalize the evidence of the different counts. The trial spanned nearly six weeks, with 19 days of testimony. 11RP-33RP. Testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from incident to incident. Given the length of trial, non-sequential testimony, and no less than nine counts involving seven different victims, the jury was likely to infer Bluford had a criminal disposition.

Further, the instruction directing jurors to consider each count separately could not have had any meaningful effect in guarding against prejudice from joinder because the evidence of other crimes was admitted for the purpose of showing identity through the presence of a modus operandi. In closing argument, the State urged the jury to consider the evidence of the different crimes in relation to one another as evidence that the same man committed all of them. 31RP 19-22. The State, consistent with the trial court's joinder ruling, in effect exhorted the jury *not* to compartmentalize the evidence because doing so would preclude considering the crimes in relation to one another on the issue of identity.

Finally, this Court long ago cited a federal case for the proposition that "the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration." Smith, 74 Wn.2d at 755 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)). Later, this Court pronounced "defendants seeking severance have the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Philips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). The principle has been repeated ad nauseam ever since. See, e.g., Bythrow, 114 Wn.2d at 718.

No Washington court has ever explained why the principle is sound. Bluford challenges such decisions as incorrect and harmful. In re Stranger Creek & Tributaries in Stevens Cty., 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Joining counts makes court administration more efficient. The counter-proposition is that "[c]ourts must not sacrifice constitutional rights on the altar of efficiency." State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010). Defendants in criminal cases have the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Improper joinder implicates that due process right. Bean, 163 F.3d at 1084; Lane, 474 U.S. at 446 n.8. If joinder prejudices a defendant's right to a fair trial, that should end the inquiry and reversal should follow. There is no sound reason rooted in constitutional law to require a defendant to show even more prejudice, such that it outweighs the desire for judicial economy, before a new trial is warranted.

**2. THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTION ON FOURTH DEGREE ASSAULT AS A LESSER OFFENSE TO INDECENT LIBERTIES AND THE ERROR IS PROPERLY BEFORE THE COURT ON REVIEW.**

The Court of Appeals agreed with Bluford that the reasoning of State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) eclipses State v. Thomas, 98 Wn. App. 422, 989 P.2d 612 (1999) and shows why the legal prong of the test is met for fourth degree assault as a lesser offense of

indecent liberties. Bluford, 195 Wn. App. at 584-85. By failing to argue otherwise on appeal, the State concedes Thomas is no longer good law and Bluford was entitled to the lesser offense instruction.

The State, however, asserts defense counsel invited or waived the error. Bluford's counsel requested the lesser offense instructions and maintained they were appropriate. CP 60-66; 29RP 75-77. There is no waiver or invited error. Cf. State v. Hoffman, 116 Wn.2d 51, 111-13, 804 P.2d 577 (1991) (defendant waived the right to argue on appeal that lesser offense instruction should have been given when the defendant objected to such instruction at trial); State v. Mak, 105 Wn.2d 692, 747-48, 718 P.2d 407 (1986) (invited error applied when defendant did not request lesser offense instruction at trial and then complained on appeal that such instruction should have been given).

For the invited error doctrine to apply, the State bears the burden of proving the defendant "materially contribute[s] to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). Defense counsel responded to the prosecutor's contention that Thomas controlled by conceding Thomas ascribed a higher mens rea to assault than it did to indecent liberties. 29RP 74. Counsel acknowledged what Thomas held, but persisted in

making the request for the lesser offense instruction on the theory that the jury could find Bluford committed fourth degree assault with its intent requirement. 29RP 74-75. Counsel asked the court to consider whether there was "applied intent in indecent liberties." 29RP 76. That theory is consistent with the one raised on appeal: the "sexual contact" aspect of indecent liberties requires touching with the purpose of gratifying sexual desire, thereby incorporating the "intent" element of assault.

The trial judge ruled Thomas controlled. 29RP 76-77. The judge relied on Thomas, not what counsel had to say about Thomas, as the basis to refuse the lesser offense instructions. Bluford's counsel did not "knowingly and voluntarily" set up any error because he maintained a lesser included offense instruction was appropriate. Bluford, 195 Wn. App. at 586 (quoting Mercado, 181 Wn. App. at 630).

Adopting the State's position would effectively foreclose review of all errors on appeal where a party acknowledges adverse authority at the trial level. Further, application of invited error in this context would create perverse incentives and negatively affect the integrity of court proceedings. Attorneys have a duty of candor to the court, which encompasses disclosing adverse authority to the court. RPC 3.3(a)(3). Applying invited error on appeal when such authority is brought to the trial court's attention would provide an incentive for trial counsel to avoid

mentioning adverse authority to avoid invited error. That places counsel in a Catch-22 situation: comply with the duty of candor to the court and create error that bars relief for the client, or avoid invited error by violating the rules of professional conduct. The invited error doctrine was erected to protect the integrity of judicial proceedings, not undermine it. See State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009) (invited error doctrine designed "to prevent parties from misleading trial courts and receiving a windfall by doing so.").

**3. THE STATE DID NOT PROVE THE NEW JERSEY ROBBERY CONVICTION IS COMPARABLE TO THE WASHINGTON OFFENSE OF ROBBERY, AND SO THE TRIAL COURT ERRED IN IMPOSING A PERSISTENT OFFENDER SENTENCE.**

The Court of Appeals properly held the State did not prove the New Jersey robbery conviction at issue is comparable to the Washington offense of robbery. Bluford, 195 Wn. App. at 589-90. This offense therefore cannot be counted as strike offense and Bluford cannot be sentenced as a persistent offender.

The first step of the comparability analysis is to determine whether the foreign offense is legally comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). This is done by comparing the elements of the out-of-state crime with the elements of a Washington crime. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses

are not legally comparable if the Washington statute defines the offense more narrowly than does the foreign statute. Lavery, 154 Wn.2d at 255-56. If offenses are not legally comparable, it must be determined whether the offenses are factually comparable. Thiefault, 160 Wn.2d at 415.

The Sixth Amendment right to a jury trial provides a constitutional limit on the facts that a sentencing court can use to support a sentence above a statutorily mandated range. Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "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. The court can go no further due to limitations imposed by the Sixth Amendment. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007).

Washington law provides a person commits robbery "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or

overcome resistance to the taking; in either of which cases the degree of force is immaterial." RCW 9A.56.190. The specific intent to steal is an essential, non-statutory element of the crime of robbery. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012).

N.J.S.A. 2C:15-1(a) defines robbery as follows:

A person is guilty of robbery if, in the course of committing a theft, he:

- (1) Inflicts bodily injury or uses force upon another; or
- (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
- (3) Commits or threatens immediately to commit any crime of the first or second degree.

An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

The original charge for the New Jersey offense was first degree robbery. CP 309, 315-16. But Bluford pled guilty to an amended charge of second degree robbery. CP 309. Neither the New Jersey judgment nor the plea form specify the subsection of the robbery statute that Bluford pled guilty to. The judgment merely lists N.J.S.A. 2C:15-1. CP 309-10, 318-20. The amended charging document to which Bluford pled guilty is not part of the record. New Jersey's robbery statute is broader because injury or threat of injury is not required — a person can commit robbery by committing "any" first or second degree crime in the course of

committing theft. N.J.S.A. 2C:15-1(a)(3). The State did prove legal comparability to Bluford's New Jersey robbery conviction because we do not know what prong of the robbery statute he pled guilty to.

The State is unable to cite a single case where the State proved comparability when the charging document to which the defendant pled guilty was not in the record. The State contends Bluford pled guilty to the same prong of robbery identified in the original charging document because the amended charging document does not appear in the record. We don't know why it doesn't appear in the record. Perhaps the State did not try hard enough to get it. Perhaps New Jersey authorities failed to keep a copy of the amended charging document and so there is no such document to acquire. In examining whether the State proved comparability, courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008) (citing State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977)). In the absence of the charging document that contains the elements of the crime to which Bluford pled guilty, it is speculation that he pled guilty to the prong of the robbery statute that required use or threat of force.

The State argues the trial judge's comments in the judgment show which prong of the New Jersey statute Bluford pled guilty to. The sentencing judge described the basis for imposing the sentence in the

judgment. CP 310. These are judicial findings, not jury findings. Nothing in the record establishes that Bluford pled guilty to these facts or agreed to these facts. The State attempts to rely on facts underlying the foreign offense to demonstrate the offense to which Bluford pled guilty. The Sixth Amendment prohibits reliance on the judicial findings contained in the New Jersey judgment as a basis to find comparability.

In State v. Olsen, this Court considered the propriety of examining the facts of the foreign conviction in light of Descamps v. United States, \_\_\_U.S. \_\_\_, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). State v. Olsen, 180 Wn.2d 468, 474, 325 P.3d 187 (2014), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014). Olsen held Washington's comparability analysis survives Descamps. Olsen, 180 Wn.2d at 474. The federal framework described in Descamps "is consistent with the Lavery framework, which limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant." Id. at 476. Descamps and its recent progeny, Mathis v. United States, \_\_\_U.S. \_\_\_, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), thus provide guidance on what to do in a case such as this, where the question is which of the alternative elements of the New Jersey robbery offense Bluford pled guilty to.

The "categorical approach" described in Descamps involves comparing the elements of the statute forming the basis of conviction with the elements of the "generic crime." Descamps, 133 S. Ct. at 2281. The focus of the categorical approach is "solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." Mathis, 136 S. Ct. at 2248. "Elements" are "what the jury must find beyond a reasonable doubt to convict the defendant" and, "at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." Mathis, 136 S. Ct. at 2248.

The "modified categorical approach" is used when a prior conviction involves a divisible statute, i.e., one that sets out one or more elements of the offense in the alternative. Descamps, 133 S. Ct. at 2281. "[T]he modified approach serves — and serves solely — as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." Mathis, 136 S. Ct. at 2253. This approach "permits sentencing courts to consult a limited class of documents" to determine which alternative formed the basis of the prior conviction. Descamps, 133 S. Ct. at 2281. The court then applies the categorical approach by comparing the conviction crime elements with the generic crime elements. Id.

The New Jersey statute defining robbery is a divisible statute because it contains three alternative elements. N.J.S.A. 2C:15-1(a). Application of a modified categorical approach is therefore appropriate.

Under the Sixth Amendment, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." Mathis, 136 S. Ct. at 2252 (citing Apprendi, 530 U.S. at 490). This means "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." Mathis, 136 S. Ct. at 2252. "He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea.'" Mathis, 136 S. Ct. at 2252 (quoting Shepard v. United States, 544 U.S. 13, 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005); Descamps, 133 S. Ct. at 2288). "He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." Mathis, 136 S. Ct. at 2252.

In light of the limitation imposed by the Sixth Amendment, the documents that can be reviewed in a modified categorical approach include "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and

jury instructions and verdict forms." Olsen, 180 Wn.2d at 475 n.2 (quoting Johnson v. United States, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)). The court may also look to "any explicit factual finding by the trial judge to which the defendant assented." United States v. Rocha-Alvarado, 843 F.3d 802, 806 (9th Cir. 2016) (quoting Parrilla v. Gonzales, 414 F.3d 1038, 1043 (9th Cir. 2005) (quoting Shepard, 544 U.S. at 16). The ultimate question is whether the defendant "necessarily admitted" the elements of the particular statutory alternative that is a categorical match to the generic offense. Descamps, 133 S. Ct. at 2284 (quoting Shepard, 544 U.S. at 26).

In Bluford's case, the indictment to which he pled guilty is missing. This is a plea case, so there are no jury instructions. The plea form does not show which alternative element Bluford pled guilty to. CP 318-20. There is no colloquy in the record. None of the "limited class of documents" that can be relied on to figure out which alternative element he pled guilty to are in the record. Nor is there an explicit factual finding by the trial judge to which Bluford assented. Case closed. The State loses.

In arguing the judge's comments in the judgment can be relied on as evidence of the crime that Bluford pled guilty to, the State cites In re Pers. Restraint of Adolph for the proposition that "the best method of proving a prior conviction is by the production of a certified copy of the

judgment, but 'other comparable documents of record or transcripts of prior proceedings' are admissible to establish criminal history." In re Pers. Restraint of Adolph, 170 Wn.2d 556, 568, 243 P.3d 540 (2010) (quoting State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). This evidentiary standard is grounded in the due process requirement that facts relied upon at sentencing must have some basis in the record and must be minimally reliable. Ford, 137 Wn.2d at 481; State v. Hunley, 175 Wn.2d 901, 914, 287 P.3d 584 (2012).

Adolph and Ford are pre-Blakely. The Sixth Amendment right to a jury trial, and its constraint on what can be relied on to prove comparability, was not at issue in either case. They are inapposite for this reason. The Sixth Amendment provides a constitutional limit on what may be considered to support a sentence above a statutorily mandated range. As the foregoing analysis makes clear, the documents and kinds of facts available to prove comparability in compliance with the Sixth Amendment are missing here.

A judge's findings set forth in the judgment are not among the documents that can be consulted to determine the version of the crime Bluford pled guilty to. To rely on the judge's comments would violate the Sixth Amendment. Nothing in the record shows Bluford agreed to those facts. At best, those findings set forth what the judge understood to be the

factual basis for the plea, which cannot be relied on. Mathis, 136 S. Ct. at 2252; Descamps, 133 S. Ct. at 2284. The record that can be relied on does not show the alternative element of committing the New Jersey robbery offense to which Bluford pled guilty. The defect in the record is fatal to demonstrating comparability with the Washington offense of robbery.<sup>1</sup>

**D. CONCLUSION**

For the reasons stated, this Court should reverse the remaining convictions, and affirm the Court of Appeals' reversal of the indecent liberties conviction and persistent offender sentence.

DATED this 8<sup>th</sup> day of February 2017

Respectfully Submitted,

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<sup>1</sup> A second barrier to legal comparability is that, under the New Jersey statute, one can commit robbery in the attempt to commit a theft, which means the New Jersey offense is broader than the Washington offense of robbery or even attempted robbery due to a broader mens rea. N.J.S.A. 2C:15-1(a). See ABOA at 50-51; RB at 17-18. The Court of Appeals did not reach the merits of this argument because it reversed on the alternative theory of incomparability addressed above. Nor did the Court of Appeals reach the merits of Bluford's argument that the South Carolina offenses are incomparable. See ABOA at 41-48; RB at 12-15. If this Court reverses the Court of Appeals, then Bluford requests remand to the Court of Appeals to decide these remaining issues. RAP 13.7(b).