101956-4

Supreme Court No. (to be set)
Court of Appeals No. 38343-1-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

---

**In re the Detention of Bruce Austin, Petitioner**

**v.**

**State of Washington, Respondent**

---

Spokane County Superior Court

Cause No. 19-2-01509-2

The Honorable Judge Tony Hazel

# PETITION FOR REVIEW

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

**BACKLUND & MISTRY**
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### WASHINGTON STATE CASES



### WASHINGTON STATE STATUTES

**OTHER AUTHORITIES**

## INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on two Alaska convictions entered more than forty years ago, the State petitioned for civil commitment of Bruce Austin. Neither of the Alaska convictions qualified as a sexually violent offense under Washington law. Accordingly, the evidence was insufficient for commitment. The commitment order must be reversed, and the case remanded for dismissal.

## DECISION BELOW AND ISSUES PRESENTED

Petitioner Bruce Austin asks the Court to review the Court of Appeals' Opinion entered on April 4, 2023.[1] This case presents one issue: Was the evidence insufficient to prove that Mr. Austin has been convicted of a sexually violent offense?

## STATEMENT OF THE CASE

In the early 1980s, Bruce Austin entered no-contest pleas to two Alaska offenses. Ex. 3, 4; RP (3/19/21) 20. One

[1] A copy of the opinion is attached.

conviction was for sexual abuse of a minor under former AS 11.41.440(2) (1981). The other was for first-degree sexual assault under former AS 11.41.410(3) (1981).

In 2019, the State of Washington petitioned for civil commitment. CP 1. It alleged that the two Alaska convictions qualified as sexually violent offenses.[2] CP 1, 108-109.

Prior to trial, the State sought a ruling that each Alaska conviction was comparable to a sexually violent offense under Washington law. CP 108-109. It argued that Alaska's sexual abuse of a minor under Alaska law was akin to indecent liberties under Washington law as it stood in 1981. CP 109. It also argued that first-degree sexual assault under Alaska law was akin to first-degree statutory rape under Washington law at the time of Mr. Austin's conviction. CP 109.

The State conceded that the offenses were not legally comparable to sexually violent offenses under Washington law.

[2] It also alleged that Mr. Austin had committed a "recent overt act." *See* RCW 71.09.020(13).

CP 114-115; RP (3/19/21) 19. However, it argued that the court should find comparability based on the underlying facts of each offense. CP 115-119; RP (3/19/21) 25-26.

The court found the offenses comparable and entered written findings and conclusions. CP 538-540; RP (3/19/21) 38-39. In reaching this decision, the court "looked at Mr. Austin's conduct at the time the [Alaska] offenses occurred." CP 538.

The record of the Alaska convictions did not include evidence regarding the marital status of Mr. Austin and the underaged person against whom he had offended. Despite this, the court found that the two were not married. CP 539. Nonmarriage was an essential element under Washington law but was not an element of either Alaska offense. CP 539.

The court also found that both Alaska offenses were "sexually motivated." CP 543, 565. Presumably, the court intended this finding to mean that the offenses were undertaken for sexual gratification, an essential element of indecent liberties in Washington. CP 114. Sexual gratification was not an

essential element of Alaska's statute criminalizing sexual abuse of a minor. CP 114.

Following a bench trial, the court entered findings of fact and conclusions of law. CP 541-566. These findings incorporated the court's pretrial ruling that each Alaska offense qualified as a "sexually violent offense." CP 542-543, 564. Based on this conclusion, the court decided that Mr. Austin had been convicted of a "crime of sexual violence." CP 542-543.

The court entered an order of commitment. CP 566. Mr. Austin appealed, and the Court of Appeals affirmed. He now seeks review of that decision.

## ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### I. NEITHER OF MR. AUSTIN'S ALASKA OFFENSES WOULD "BE" A QUALIFYING WASHINGTON OFFENSE.

Bruce Austin has never been convicted of a sexually violent offense. His two Alaska sex offenses were not the same as any sexually violent offense in Washington. Because of this, Mr. Austin does not meet criteria for civil commitment.

A. Foreign convictions do not qualify a person for commitment unless the elements of the foreign offense are the same as the elements of a sexually violent offense in Washington.

Civil commitment requires proof that a person has been convicted of sexually violent offense. RCW 71.09.020(19). The definition of "sexually violent offense" includes a list of crimes, outlined in RCW 71.09.020(18)(a).[3]

The definition also includes certain out-of-state convictions. To justify civil commitment, an out-of-state conviction must be "for a felony *offense* that under the laws of this state would *be* a sexually violent offense." RCW 71.09.020(18)(b) (emphasis added).

When considering convictions for out-of-state offenses, the statute's plain language prohibits inquiry into the facts of

[3] This list includes "rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree." RCW 71.09.020(18)(a).

the prior conviction. Accordingly, commitment based on a foreign conviction is permissible only when the two offenses have the same elements.

Statutory interpretation is a question of law reviewed de novo. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149 (2017). The fundamental objective is to give effect to the legislature's intent. *Id.* The plain meaning of a statute controls. *Id.*, at 723.

When a statute's language is unambiguous, courts "look only to that language to determine the legislative intent without considering outside sources." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Language is unambiguous "when it is not susceptible to two or more interpretations." *Id.*, at 726.

Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.*, at 727. Instead, courts must "assume the legislature means exactly what it says." *Id.* (internal quotation marks and citation omitted).

Here, the statutory language is unambiguous. It requires the elements of the foreign offense to be the same as the elements of the Washington offense.

A foreign conviction qualifies a person for commitment if it is for a felony offense that would "be" a sexually violent offense.[4] The word "be" means, *inter alia*, "to equal in meaning," or "to have identity with." *See* "Be," *Merriam-Webster.com Dictionary*, Merriam-Webster (2023).[5]

Thus, under the plain meaning of the statute, the foreign *offense* must be *the same* as a sexually violent offense in Washington. It is not the foreign *conviction* that is to be examined for equivalence; rather, it is the *offenses* that must be analyzed. RCW 71.09.020(18).

---

[4] The word "would" is an auxiliary verb expressing a contingency or possibility. *See* "Would." *Merriam-Webster.com Dictionary* (accessed 4/18/23).

[5] Available at https://www.merriam-webster.com/dictionary/be, (accessed 4/18/23).

This precludes consideration of any facts. The plain and unambiguous language of the statute permits only examination of the legal elements of each *offense*, without regard to the facts of the conviction. The foreign offense must be the same as the Washington offense.

The Court of Appeals selects a different definition of the word "be." *See* Opinion, p. 9. According to the Court of Appeals, a foreign conviction would "be" a sexually violent offense if it "constitute[s], or belong[s] to the same class" as such an offense. Opinion, p. 9.

According to the court, this means that the facts of the conviction may be analyzed. Opinion, p. 10. But this ignores the directive that the foreign *offense*—not the conviction—would "*be*" a sexually violent offense. RCW 71.09.020(18).

Furthermore, if the Court of Appeals' approach is a viable interpretation of the statute, then the language is ambiguous. If the language is ambiguous, it must be interpreted in Mr. Austin's favor. *Matter of Det. of Marcum*, 189 Wn.2d 1,

8, 403 P.3d 16 (2017). Statutes that involve a deprivation of liberty must be strictly and narrowly construed. *Id.*

Thus, if the statute is ambiguous, it must be interpreted to prohibit consideration of facts that might broaden the range of qualifying foreign offenses. *Id.* This is a reasonable interpretation, suggesting the legislature's recognition that proof of the facts underlying a foreign conviction will create a hardship for both parties, especially where (as here), the foreign conviction was entered 40 years ago.

In addition, it is "firmly established… that where the legislature uses different language in the same statute, differing meanings are intended." *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004).

Here, the legislature used "different language" to differentiate between two kinds of prior convictions. *See* RCW 71.09.020(18). Because "the legislature use[d] different language in the same statute, differing meanings are intended." *Id.*

The different language comes in a provision allowing the use of (1) convictions under obsolete Washington statutes, and (2) out-of-state convictions. The different language shows the legislature's intent to apply different tests to these two categories. *Id.*

The provision regarding out-of-state convictions does not use the word "comparable." Instead, it requires proof that the out-of-state conviction is for an offense that would "be" a sexually violent offense. RCW 71.09.020(18)(b).

This contrasts with the test for convictions under obsolete statutes. RCW 71.09.020(18)(b). Such crimes qualify if they are "comparable" to a sexually violent offense under current statutes. RCW 71.09.020(18)(b).

Given this difference, the test for out-of-state offenses must be something other than the traditional factual and legal comparability test used for obsolete Washington statutes. *Id.* The language suggests a stricter standard.

The word "comparable" means "similar," "like," or "capable of or suitable for comparison." *See* "Comparable," *Merriam-Webster.com* (2023).[6] The legislature's use of the word "comparable" suggests that *similarity* is sufficient when measuring convictions under obsolete Washington statutes.

By contrast, the requirement that an out-of-state conviction would "*be*" a sexually violent offense under Washington law requires more than similarity. RCW 71.09.020(18)(b) (emphasis added). The legislature's use of the verb "to be" suggests that the two offenses must be the same, not merely similar.

The different language used in the statute must be given "differing meanings." *Costich*, 152 Wn.2d at 475–76. Legal identity is the sole test for out-of-state offenses. Courts may not

[6] Available at https://www.merriam-webster.com/dictionary/comparable (accessed 4/18/23).

examine the conduct that gave rise to the out-of-state conviction.

Instead, the State must show that the out-of-state statute describes an offense that is the same as a sexually violent offense under Washington law. Only if the essential elements are the same would conviction for the out-of-state conviction "be" a sexually violent offense under Washington law. RCW 71.09.020(18)(b).

B. Neither of Mr. Austin's prior convictions were for an offense having the same elements as a sexually violent offense in Washington.

Here, the State relied on two 40-year-old Alaska convictions. CP 108-119. These were convictions for first-degree sexual assault and sexual abuse of a minor.

The State conceded that neither Alaska conviction was legally the same as a qualifying Washington offense. The court agreed and found that both convictions were for offenses that were not the same as a sexually violent offense. CP 539.

This ends the analysis. Neither Alaska conviction was for an offense that would "be" a sexually violent offense under Washington law. RCW 71.09.020(18)(b). Having failed the legal equivalence test, the Alaska convictions cannot justify civil commitment.

## II. MR. AUSTIN'S ALASKA CONVICTIONS WERE NOT FACTUALLY COMPARABLE TO A SEXUALLY VIOLENT OFFENSE IN WASHINGTON.

Mr. Austin's Alaska convictions were not comparable to any Washington offense that qualifies as a sexually violent offense. Accordingly, the evidence was insufficient for conviction.

### A. Any examination of factual comparability is limited to facts that were admitted, stipulated to, or proved beyond a reasonable doubt.

Instead of limiting its analysis to the elements of each offense, the court purported to examine the facts underlying each Alaska conviction. Even under this test, the Alaska convictions did not qualify as sexually violent offenses.

In criminal cases, a comparability test rather than a legal equivalence test applies to foreign convictions. RCW 9.94A.525(3). This comparability test has a factual and a legal component. *State v. Howard*, 15 Wn.App.2d 725, 731-732, 476 P.3d 1087 (2020), *review denied*, 197 Wn.2d 1006, 483 P.3d 783 (2021).

Where offenses are not legally comparable, the court may make a limited factual inquiry. *Id.* However, "the elements of the charged crime must remain the cornerstone of the comparison." *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Accordingly, "courts consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt." *Howard*, 15 Wn.App.2d at 732 (internal quotation marks and citation omitted). Here, the court's comparability finding rested on "facts" that were not admitted, stipulated to, or proved during the Alaska proceedings.

B. Mr. Austin's Alaska conviction for sexual abuse of a minor was not factually comparable to indecent liberties in Washington.

The trial court correctly found that Mr. Austin's prior Alaska convictions were not legally comparable to a sexually violent offense. CP 539. Because the offenses are not legally comparable, the sufficiency of the evidence turns on factual comparability.

The State argued—and the trial court found— that Mr. Austin's Alaska conviction for sexual abuse of a minor was factually comparable to Washington's crime of indecent liberties against a child under 14. CP 108-119; *see* former AS 11.41.440(2) (1981) *and* former RCW 9A.88.100(b) (1981). This is incorrect. The Alaska conviction was not factually comparable to indecent liberties.

**Proof of sexual gratification.** In 1981, Washington's indecent liberties statute required proof of "sexual contact." Former RCW 9A.88.100(1) (1981). This obligated the State to show that the contact was "done for the purpose of gratifying

sexual desire of either party." Former RCW 9A.88.100(2) (1981).

At the time of Mr. Austin's plea, the Alaska statute defining sexual abuse of a minor did not require proof of sexual gratification. Former AS 11.41.440(2) (1981); former AS 11.81.900(b)(51)(A) (1981).

The Alaska Court of Appeals *later* interpreted the statute to require proof of contact "intended to result in either the sexual arousal or sexual gratification of the actor or the victim." *Flink v. State*, 683 P.2d 725, 733 (Alaska Ct. App 1984) (Singleton and Coats, JJ, for majority). However, this interpretation did not arise until 1984, three years *after* Mr. Austin's guilty plea.[7] *Id.*

[7] Following *Flink*, the Alaska legislature redefined "sexual contact," removing any requirement of sexual gratification but allowing an exception for "normal caretaker responsibilities." *See Peratrovich v. State*, 903 P.2d 1071, 1074 (Alaska Ct. App. 1995) (citing former AS 11.81.900(b)(53)(B)(i)).

Here, the trial court did not mention the sexual gratification element, either in its oral ruling or in its written findings. RP (3/19/21) 37-39; CP 539, 541-566. However, the court did find that the Alaska offenses were "sexually motivated." CP 543, 565. Presumably, the court intended this to mean that they were committed for the purpose of sexual gratification.

Sexual gratification was not established during the Alaska proceeding. The Alaska charging document did not allege that Mr. Austin committed sexual abuse of a minor for the purpose of sexual gratification. Ex. 1. Nothing suggests that Mr. Austin's no-contest plea included an admission to sexual gratification. Ex. 3. Nor is there any indication that the Alaska court heard evidence or made a finding that the offense was committed for the purpose of sexual gratification. Ex. 1-4.

The Court of Appeals declined to reach this argument. Opinion, p. 3.

Sexual gratification was not "admitted, stipulated to, or proved beyond a reasonable doubt" when Mr. Austin was convicted and sentenced in Alaska. *Howard*, 15 Wn.App.2d at 732 (internal quotation marks and citation omitted). Accordingly, the Alaska conviction was not factually comparable to a sexually violent offense under Washington law.

**The nonmarriage element.** The Alaska crime was not factually comparable for another reason as well. Washington's indecent liberties statute required proof that the victim was "not [the] spouse" of the defendant. Former RCW 9A.88.100(1) (1981). By contrast, the Alaska statute did not include a non-marriage requirement. Former AS 11.41.440(2) (1981).

The non-marriage element was not established during the Alaska proceeding. The Alaska charging document did not mention this non-marriage element. Ex. 1. There is no suggestion that Mr. Austin made any statements about his marital status when he entered his no-contest plea. Ex. 2, 4.

There is no indication that the court heard evidence and made findings on the subject. Ex. 1-4.

The record does not show that the nonmarriage element of indecent liberties was "admitted, acknowledged, or proved" during the Alaska prosecution. *Id.* The two crimes are not factually comparable.

Furthermore, even if permitted to consider extrinsic evidence (beyond facts that were admitted, stipulated to, or proved), the court did not have before it proof of the non-marriage element. *See In re Pers. Restraint Petition of Crawford*, 150 Wn.App. 787, 798, 209 P.3d 507 (2009).

In *Crawford,* the court of appeals addressed a comparability finding involving the defendant's prior rape of his 7-year-old niece. *Id.*, at 797. The court concluded that the State had failed to prove the non-marriage element. *Id.*, at 798. This was so even though the State "was unaware of any jurisdiction in the United States that would allow a legal marriage between a 25-year-old male and a 7-year-old niece."

*Id.* Even considering the age of the parties, the Court of Appeals found that the out-of-state crime was not factually comparable. *Id.*

Here, the State attempted to distinguish *Crawford* by arguing that *Crawford* did not involve a same-sex marriage. CP 117-118. However, the State did not cite any authority permitting courts to apply different rules to same-sex marriages when conducting a comparability analysis. CP 117-118.

Instead, the State pointed out that Alaska and Washington did not recognize same-sex marriages in 1981.[8] CP 118. But the statute did not require that the marriage be recognized as legitimate in Alaska or Washington. Former RCW 9A.88.100(1) (1981).

Under the plain language of the statute, the State was required to prove that the minor was not the defendant's

[8] It also noted that the Supreme Court has since required "all 50 States to perform and recognize same sex marriages." CP 118 (citing *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

"spouse." Former RCW 9A.88.100(1) (1981). A marriage recognized in another jurisdiction—including another country, political subdivision, or culture—would be sufficient to prevent conviction under the statute.

Even if the State were permitted to present extrinsic evidence to show factual comparability, an inference of non-marriage would arise only if the State proved that Mr. Austin and J.L. had never traveled to a jurisdiction where same-sex child marriages were recognized.

There is at least some possibility that such marriages were recognized somewhere in the world in 1981. Legal same-sex marriages existed long before they were constitutionally required by the U.S. Supreme Court.[9] *See* Jeffrey S. Jacobi, *Two Spirits, Two Eras, Same Sex: For A Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy,* 39 U. Mich. J.L. Reform 823, 834 (2006) (discussing

[9] *Obergefell*, *supra.*

two-spirit marriages). In 1981, some jurisdictions permitted child marriages. As late as 2012, one out of nine girls in the developing world are married before age 15. *Marrying Too Young*, p. 6, United Nations Population Fund (2012).[10]

The Court of Appeals did not address the State's failure to prove that marriage was impossible. Opinion, pp. 17-18. Instead, the court focused on Alaska and Washington, concluding that "same sex-marriage was not legal in either Washington or Alaska in 1981." Opinion, p. 18.

This may be true, but it misses the point. The Washington statute refers only to the perpetrator's "spouse." Former RCW 9A.88.100(1) (1981). There is no requirement that the marriage be legally recognized in Washington (or in Alaska).

Furthermore, the legislature chose not to excuse the State from proving the nonmarriage element in the case of same-sex

[10] Available at https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf (accessed 4/18/2023).

offenses. Former RCW 9A.88.100(1) (1981). This omission should be deemed an exclusion. *See In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). In other words, the statutory language shows the legislature's intent to require proof of nonmarriage whether or not the offender was the same gender as the victim. *Id.*

In this case, there was no admission, stipulation, or proof during the Alaska proceeding that Mr. Austin and J.L. were not married. Even if a same-sex child marriage would not be recognized in Washington or Alaska, the State failed to show that J.L. was not Mr. Austin's "spouse." Former RCW 9A.88.100(1) (1981).

Accordingly, Mr. Austin's Alaska conviction for sexual abuse of a minor was not factually comparable to indecent liberties. It is not a sexually violent offense and cannot support the court's commitment order. The order must be vacated, and the case remanded for dismissal.

C. Mr. Austin's Alaska conviction for sexual assault in the first degree was not factually comparable to first-degree statutory rape in Washington.

The court erroneously found that Mr. Austin's Alaska conviction for first-degree sexual assault was factually comparable to Washington's statutory rape in the first degree.[11] CP 108-144, 539; *see* former AS 11.41.410(a)(3) (1981) and former RCW 9A.44.080 (1981). First-degree statutory rape included an implied element of nonmarriage. *State v. Stockwell*, 159 Wn.2d 394, 399, 150 P.3d 82 (2007).[12]

As with Mr. Austin's other Alaska offense, the State failed to establish the nonmarriage element. The non-marriage element was not charged in the Indictment. Ex. 1. There is no

[11] In its comparability ruling, the court referred to "Rape in the First Degree" rather than statutory rape in the first degree. CP 539.

[12] Although *Stockwell* was decided in 2007, this does not affect the analysis. In Washington, the Supreme Court's construction of a statute "becomes as much a part of the legislation as if it were originally written into it." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (Wash. 1997). The non-marriage element applied to Mr. Austin's conviction.

suggestion that it was mentioned as part of Mr. Austin's no-contest plea. Ex. 2, 3. Nor is there any indication that the Alaska court heard evidence or made findings regarding Mr. Austin's marital status. Ex. 1-4. Thus, the element was not admitted, stipulated to, or proved beyond a reasonable doubt in the Alaska proceeding.

The State's failure to prove the non-marriage element is fatal to a finding of factual comparability. *Crawford*, 150 Wn.App. at 797-798. As outlined above, the State was required to show that Mr. Austin was not married to the alleged victim in any country, political subdivision, or culture. There is nothing in the record of Mr. Austin's Alaska conviction that shows his marital status.

In the absence of an admission, a stipulation, or proof beyond a reasonable doubt, the State failed to establish factual comparability. *Id.* The conviction cannot provide the basis for civil commitment. The evidence was insufficient, and the

commitment order must be vacated. The case must be remanded for dismissal.

## III. THE SUPREME COURT SHOULD GRANT REVIEW UNDER RAP 13.4(B)(4).

The Supreme Court will accept review of a Court of Appeals decision if it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court of Appeals' Opinion meets that test.

The interpretation of a statute is an issue that is public in nature. *State v. Vevea*, 23 Wn. App. 2d 171, 178, 514 P.3d 779 (2022) (addressing mootness). A proper interpretation of RCW 71.09.020(18) will provide guidance to lower courts and attorneys. *Id.*

Similarly, the appellate court's use of an unproven inference to establish factual comparability is an issue of public interest. The Supreme Court can provide guidance on this issue as well.

The issues are significant. They will impact all civil commitment cases involving foreign convictions. The court's approach to factual comparability will apply in criminal cases as well.

The Supreme Court should grant review under RAP 13.4(b)(4). The commitment order must be vacated, and the case remanded for dismissal.

## CONCLUSION

Mr. Austin does not have a prior conviction that would make him eligible for civil commitment. His Alaska convictions were not comparable to sexually violent offenses under Washington law. Because the evidence was insufficient, the commitment order must be reversed, and the case dismissed.

## CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 3966 words, as calculated by our word processing software.

Respectfully submitted May 3, 2023.

**BACKLUND AND MISTRY**

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

Manek R. Mistry, No. 22922
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to:

Bruce Austin
McNeil Island Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

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 May 3, 2023.

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

*Tristen L. Worthen*
*Clerk/Administrator*

*(509) 456-3082*
*TDD #1-800-833-6388*

# *The Court of Appeals of the State of Washington Division III*

*500 N Cedar ST*
*Spokane, WA 99201-1905*

*Fax (509) 456-4288*
*http://www.courts.wa.gov/courts*

April 4, 2023

Email
Carol Jean Murray
Attorney at Law
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188

Email
Jodi R. Backlund
Backlund & Mistry
PO Box 6490
Olympia, WA 98507-6490

CASE # 383431
In re the Detention of: Bruce Austin
SPOKANE COUNTY SUPERIOR COURT No. 1920150932

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **E-mail** Hon. Tony Hazel

**FILED**
**APRIL 4, 2023**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| In the Matter of the Detention of | ) | |
| | ) | No. 38343-1-III |
| BRUCE AUSTIN, | ) | |
| | ) | |
| Appellant. | ) | UNPUBLISHED OPINION |

STAAB, J. — In 2011, Bruce Austin was convicted of first degree possession of depictions of minors engaged in sexually explicit conduct. In 2019, when Austin was about to be released from prison, the State filed a petition to have him civilly committed as a sexually violent predator (SVP). To meet its burden, the State had to prove that Austin had been "convicted of or charged with a crime of sexual violence." Former RCW 71.09.020(18) (2019).[1] The State argued that two of Austin's prior Alaska convictions from 1981 were legally and factually comparable to Washington offenses that qualified as "sexually violent offense[s]" under former RCW 71.09.020(17) (2019).

[1] Several statutes within chapter 71.09 RCW were amended, effective July 25, 2021. Citations to the statutes throughout this opinion refer to the statute in effect at the time of Austin's trial unless otherwise noted.

Austin argued that neither of his Alaska convictions were comparable to Washington's sexually violent offenses because both of the Alaska offenses encompassed more conduct than proscribed by the comparable Washington offenses. Specifically, he pointed out that the Washington offenses included an element of nonmarriage between the defendant and victim and neither of his Alaska convictions pleaded or proved an element of nonmarriage.

Additionally, Austin argued that his prior Alaska conviction for sexual abuse of a minor was not comparable to Washington's offense of indecent liberties against a child under age 14 because the Washington offense requires proof of sexual gratification and his Alaska conviction neither pleaded nor proved this element.

The trial court found that the offenses were comparable because sexual gratification was implied under the Alaska statute and because non-marriage between Austin and his victim could be implied in both Alaska offenses given that neither Alaska nor Washington recognized same-sex marriages in 1981.

We agree that the trial court properly held that a non-marriage element could be properly implied in both Alaska offenses since it was legally impossible for the defendant to be married to his male victim at the time of his conviction. Since nonmarriage is the only legal difference between Austin's Alaska conviction for sexual assault in the first degree and Washington's qualifying offense of first degree statutory rape, the State has met its burden of proving that Austin had been previously convicted of or charged with a

sexually violent offense. We therefore decline to consider whether the trial court properly implied an element of sexual gratification into the Alaska offense of sexual abuse of a minor.

BACKGROUND

In 1981, Bruce Austin entered a no contest plea[2] to three Alaska offenses. Two of the three convictions are relevant here. One conviction was for sexual abuse of a minor under former AS 11.41.440(a)(2) (1980) (Count II) and another was for first degree sexual assault under former AS 11.41.410(a)(3) (1980) (Count III).

Austin's no contest plea to the indictment, Count II, admitted:

> That on or about the period of March 1981 through May 19, 1981, at or near Anchorage, in the Third Judicial District, State of Alaska, Bruce Lawrence Austin, being 16 years of age or older, did unlawfully engage in sexual contact with J.L., age 8, by touching J.L.'s penis.
>
> All of which is a class C felony offense being contrary to and in violation of AS 11.41.440(a)(2) and against the peace and dignity of the State of Alaska.

Clerk's Papers (CP) at 502. Austin's no contest plea to the indictment, Count III, admitted:

> That on or about the period of March 1981 through May 19, 1981, at or near Anchorage, in the Third Judicial District, State of Alaska, Bruce

[2] "[A] plea of no contest 'is an admission of every essential element of the offense well-pleaded in the charg[ing] [document].'" *Jones v. State*, 215 P.3d 1091, 1238 (Alaska App. 2009) (quoting *Scott v. State*, 928 P.2d 1234 (Alaska App. 1996)).

> Lawrence Austin, being 16 years of age or older, did unlawfully engage in sexual penetration with J.L., age 8, by inserting J.L.'s penis into his mouth.
>
> All of which is a class A felony offense being contrary to and in violation of AS 11.41.410(a)(3) and against the peace and dignity of the State of Alaska.

CP at 502-03.

Austin later moved to Cheney, and in 2010, he befriended at least five neighborhood children between the ages of eight and thirteen. Austin invited the children over to watch movies, took them to church, and went camping with them. Shortly thereafter, Austin was charged with rape of a child in the first degree, child molestation in the first degree, and two counts of possession of depictions of minor engaged in sexually explicit conduct, all stemming from his contact with two children. Austin was acquitted of the rape and molestation charges, but was convicted of first degree possession of depictions of minor engaged in sexually explicit conduct.

In 2019, when Austin was about to be released from prison, the State petitioned to have him committed as an SVP under former RCW 71.09.020(18). The State's petition alleged that Austin's 1981 Alaska convictions for sexual assault of a minor and sexual assault in the first degree (four counts) constituted sexually violent offenses as defined in former RCW 71.09.020(17). Upon the State's motion, the trial court determined as a matter of law that both convictions qualified as sexually violent offenses and qualified as predicate offenses.

Following a bench trial, the court found that Austin was a sexually violent predator.[3] The court also concluded that the State proved beyond a reasonable doubt that Austin's Alaska convictions were comparable to sexually violent offenses listed in former RCW 71.09.020(17)(a)-(b). The court entered written findings and conclusions of law. The court also entered an order of commitment.

Austin appeals from the order of commitment. He raises two issues of statutory interpretation but his primary argument is that the trial court erred in finding his Alaska convictions were legally and factually comparable to predicate offenses considered sexually violent offenses under former RCW 71.09.020(17). We disagree and conclude that the trial court did not err in concluding that Austin's Alaska conviction for sexual assault in the first degree was legally and factually comparable to Washington's offense of statutory rape in the first degree under former RCW 9A.44.070. We therefore affirm.

## ANALYSIS

### 1. TEST FOR COMPARING OUT-OF-STATE OFFENSES TO WASHINGTON OFFENSES

The first issue we address is the test to be applied when comparing out-of-state convictions to Washington offenses within chapter 71.09 RCW. Austin argues that the wording used in former RCW 71.09.020(17) requires a more limited comparability test than the two-prong test applied for sentencing purposes. Austin contends that the statute

[3] The court determined pretrial that Austin committed a "recent overt act" as a matter of law. RCW 71.09.020(12). Austin does not contest this on appeal.

allows only for a legal comparability of out-of-state convictions to predicate offenses identified in former RCW 71.09.020(17), and the court here erred by considering whether the Alaska offenses were factually comparable. The State contends that Washington has a long history of using the two-prong test for out-of-state conviction comparability under the sentencing reform act of 1981, ch. 9.94A RCW, under ch. 71.09 RCW, and that Austin's reading of the statute is contrary to the rules of statutory construction. We agree with the State that the correct test is a two-prong legal and factual comparability test.

In Washington, a two-part test is traditionally used to determine comparability of out-of-state convictions for purposes of sentencing under the sentencing reform act. *E.g.*, *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Olsen*, 180 Wn.2d 468, 476, 325 P.3d 187 (2014). The two-part test consists of a legal and a factual inquiry. First, the court looks to the elements of the crime and determines whether the elements of the out-of-state criminal statute are "substantially similar" or narrower than the comparable Washington statute. *Lavery*, 154 Wn.2d at 255. If the elements of the crimes are "substantially similar," then the analysis stops there. *Id.* If, on the other hand, the elements of the out-of-state conviction are broader than the Washington statute, the court proceeds to the second part of the analysis, factual comparability. *Id.*

The factual comparability component allows courts to "look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself

would have violated a comparable Washington statute." *Id.* (citing *Morley*, 134 Wn.2d at 606). However, the "elements of the charged crime must remain the cornerstone of the comparison." *Id.* The court may consider "only facts that were admitted, stipulated to, or proved beyond a reasonable doubt" in conducting its factual inquiry. *Olsen*, 180 Wn.2d at 478.

At an SVP determination trial, there is one question for the fact finder: "Has the State proved, beyond a reasonable doubt, that the respondent is an SVP?" *In re Detention of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). In order to answer this question in the affirmative, the fact-finder must find three elements: "(1) that the respondent has been convicted of or charged with a crime of sexual violence, (2) that the respondent suffers from a mental abnormality or personality disorder, and (3) that such abnormality or disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." *Id.* at 309-10 (citing former RCW 71.09.020(18)) (internal quotation marks omitted).

In this case, Austin disputes that the State has proved that he has been previously convicted of a crime of sexual violence.

> "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child

> molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is **comparable** to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state **would be** a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

RCW 71.09.020(17) (emphasis added).

Austin contends that the use of the word "comparable" when referring to felonies prior to July 1, 1990, in contrast to the use of the words "would be" when referring to out-of-state offenses, demonstrates a legislative intent to use a stricter test when analyzing an out-of-state conviction's comparability. We disagree.

The meaning of a statute is a question of law, which we review de novo. *State v. Sweat*, 180 Wn.2d 156, 159, 322 P.3d 1213 (2014). In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). To determine legislative intent, we first look to the plain language of the statute. *Id*. If a statute is clear on its face, its meaning is to be derived from the plain language of

the statute alone. *Id*. If a statute is unambiguous after considering its plain meaning, our inquiry ends. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Austin contends that the phrase "would be" means something different than "comparable." He does not provide a plain-language analysis, but instead relies on the maxim of statutory construction: "where the legislature uses different language in the same statute, differing meanings are intended." *State v. Costich*, 152 Wn.2d 463, 475-76, 98 P.3d 795 (2004). Austin's reliance on this maxim fails because the plain language of the statute is unambiguous.

Here, the plain language of the statute requires courts to determine if out-of-state convictions "would be" considered a sexually violent offense under the statute. Since the term "would be" is not defined, we apply each word's ordinary dictionary definition. "Would" is defined as a word "used in auxiliary function in the conclusion of a conditional sentence to express a contingency or possibility." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2637 (1993). The definition of the verb "be" is "to constitute the same class as" or "to belong as an individual to the class of." *Id.* at 189. Thus, the phrase "would be" as used in the statute means the out-of-state conviction must constitute, or belong to the same class as, a sexually violent offense under former RCW 71.09.020(17).

The word "comparable" means "equivalent" or "similar" or "having enough like characteristics or qualities to make comparison appropriate." *Id.* at 461. Consequently, the word "comparable" as used in the statute means that the felony offense committed before July 1, 1990 must be sufficiently similar to allow comparison and it must be "equivalent" to a sexually violent offense in the statute. Given these definitions, we find that the statute is unambiguous; "would be" and "comparable" as used in the statute mean the same thing.

Even if we were to find the statute ambiguous, we still conclude that the well-defined two-part legal and factual comparability test should apply. If a statute is ambiguous, meaning it is subject to more than one reasonable interpretation, it is appropriate to resort to statutory construction, case law, and legislative history to discern the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). "Unlikely, absurd or strained results are to be avoided." *Morris v. Baker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992) (citing *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987); *State v. Fjermstad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990)).

The purpose of Washington's civil commitment statute, is to provide treatment to the "small but extremely dangerous group of sexually violent predators" through civil involuntary confinement. Former RCW 71.09.010. By confining these individuals, the legislature intended to ensure that they "do not have access to potential victims." *Id.* Austin's reading of the statute would undermine the legislature's intent by treating

offenders who committed acts of sexual violence in other states differently from those who committed similar acts in Washington. There is no evidence that the legislature intended out-of-state offenses to be subjected to a stricter test for comparability.

The plain language of RCW 71.09.020(17) does not impose a stricter comparability test than the traditional two-step analysis currently employed in other circumstances. In determining whether out-of-state offenses qualify as a sexually violent offense, courts should continue to use the legal and factual comparability test.

2. WHETHER "SEXUALLY VIOLENT OFFENSE" IS THE SAME AS "CRIME OF SEXUAL VIOLENCE."

In his second issue of statutory construction, Austin argues that the phrase "sexually violent offense" under RCW 71.09.020(17) has a different meaning than the term "crime of sexual violence" used in RCW 71.09.020(18). Similar to his previous argument, Austin contends that the use of two different phrases presumes two different meanings. The State argues that this court has already determined that the phrase "sexually violent offense" is synonymous with "crime of sexual violence."

Thirteen years ago, in *In re Detention of Coppin*, Division One of this court found, by applying principles of statutory interpretation, that the phrase "sexually violent offense" was synonymous with "crime of sexual violence." 157 Wn. App. 537, 553-54, 238 P.3d 1192 (2010), *review denied*, 170 Wn.2d 1025, 249 P.3d 181 (2011). The court stated that the "legislature expressly defined 'sexually violent offense' to include" those

offenses listed in the statute, including indecent liberties against a child under age 14 and statutory rape in the first degree. *Id.* at 553; RCW 71.09.020(17)(a). The court went on to state that "[g]iven this definition, it would be absurd to conclude that [offenses listed in RCW 71.09.020(17)(a) are] . . . not also . . . . crimes 'of sexual violence,' as the SVP definition requires." *Coppin*, 157 Wn. App. at 553.

Further, in *In re Detention of Taylor-Rose,* Division Two of this court followed *Coppin*. 199 Wn. App. 866, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018). The offender, Taylor-Rose, argued that a "sexually violent offense." could not mean the same thing as a "crime of sexual violence." *Id.* at 875-76. The court reiterated that the *Coppin* court, under general principles of statutory interpretation, had already correctly concluded that the two phrases were synonymous. *Id.* at 876. Consequently, the court held that "[a] crime that is expressly listed in the definition of 'sexually violent offense' in RCW 71.09.020([17]) necessarily also qualifies as a 'crime of sexual violence.'" *Id.*

"The legislature 'is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *State v. Blake*, 197 Wn.2d 170, 190, 481 P.3d 521 (2021) (quoting *Friends of Snowqualmie Valley v. King County Boundary Rev. Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992) (internal quotation marks omitted). If the legislature disagreed with our conclusion that

the two terms were synonymous, they would have amended the statute to overrule *Coppin*. Their failure to do so supports the holding in *Coppin*.

Austin urges this court to reject Division One and Two's holdings in *Coppin* and *Taylor-Rose*. We see no reason to do so. Instead, we reaffirm that a crime expressly listed in RCW 71.09.020(17) as a "sexually violent offense" necessarily qualifies as a "crime of sexual violence."

3. COMPARABILITY OF ALASKA CONVICTION FOR SEXUAL ASSAULT IN THE FIRST DEGREE AND STATUTORY RAPE IN THE FIRST DEGREE.

Austin argues that his Alaska conviction of sexual assault in the first degree (former AS 11.41.410(a)(3) (1980)) was not comparable to Washington's statutory rape in the first degree under former RCW 9A.44.070 (1981). He contends that Washington's offense is legally narrower because it included an implied element that the defendant and victim were not married. He contends that the Alaska conviction is not factually comparable because the implied element of non-marriage was not admitted or proved for the Alaska conviction. The State responds that it was legally impossible for the defendant to be married to the eight-year-old male victim in Alaska in 1981. The comparability of offenses is a question of law we review de novo. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).

Washington's statutory rape in the first degree statute (former RCW 9A.44.070 (1981)) is considered a "sexually violent offense" under RCW 71.09.020(17). At trial the

State sought to prove that this offense was comparable to Austin's Alaska conviction for sexual assault in the first degree (former AS 11.41.410(a)(3) (1980)).

Former AS 11.41.410(a)(3) (1980) stated, in relevant part: "(a) A person commits the crime of sexual assault in the first degree if . . . (3) being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age." In comparison, in 1981 Washington's statutory rape in the first degree provided that "[a] person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old." Former RCW 9A.44.070(1) (1981). Since the Alaska statute criminalizes more conduct than Washington's comparable statute, the elements are not legally comparable. *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

The State conceded and the court found that the two statutes were not legally comparable. Consequently, the superior court moved on to the factual component of the two-part comparability analysis. The court then "looked at Mr. Austin's conduct at the time the offenses occurred to determine whether his conduct under the Washington law, as [it] existed at the time, constituted a sexually violent offense." CP at 538.

Austin entered a no contest plea to the indictment, Count III, admitting:

> That on or about the period of March 1981 through May 19, 1981, at or near Anchorage, in the Third Judicial District, State of Alaska, Bruce Lawrence Austin, being 16 years of age or older, did unlawfully engage in sexual penetration with J.L., age 8, by inserting J.L.'s penis into his mouth.

> All of which is a class A felony offense being contrary to and in violation of AS 11.41.410(a)(3) and against the peace and dignity of the State of Alaska.

CP at 502-03. Here, Austin's placing of J.L.'s penis in his mouth constituted sexual penetration under Washington law. RCW 9A.44.010(1)(a), (c) (1981 version).[4] Further, J.L. was eight years old at the time while Austin's date of birth on the indictment and judgment showed he was twenty-five years old. Consequently, "look[ing] at the defendant's conduct, as evidenced by the indictment or information," the elements of former RCW 9A.44.080 (1981 version), statutory rape in the first degree, were satisfied aside from the implied marital status element. *Lavery*, 154 Wn.2d at 255 (citing *Morley*, 134 Wn.2d at 606). Austin does not appeal this finding by the superior court.

Washington's first degree statutory rape offense also includes an element of nonmarriage that was read into the statute by the court in 2007. In *Stockwell*, the court was comparing Washington's more current offense of first degree rape of a child with the former offense of first degree statutory rape. The court noted that the two offenses were

[4] Washington defined "sexual intercourse" to include "any penetration, however slight, and . . . . any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex." RCW 9A.44.010(1)(a), (c). "Sexual contact" "means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.100(2) (1981 version).

not identical because the more current offense of rape of a child had an express element of nonmarriage that the statutory rape charge did not include. *Stockwell*, 159 Wn.2d at 397-98. The defendant made the same argument in *Stockwell* that Austin makes here: since nonmarriage was not an element of the older offense and since it was not admitted in the plea of the older offense, the two offenses were not comparable.

The Supreme Court disagreed and cited Division Two's reasoning:

> "[T]he Legislature cannot possibly have contemplated statutory rape in the first degree [as] being perpetrated on one's spouse. In the unlikely event that a child of 10 years [old] or less establishes sufficient necessity to receive permission from the superior court to marry, it is inconceivable that the Legislature intended to criminalize consensual sexual intercourse between spouses, regardless of their ages. The fact that the Legislature did not expressly make nonmarriage an element of first degree statutory rape can lead to only one logical conclusion: the Legislature did not expect that children under the age of 10 would be marrying. Therefore, the only plausible reading of former RCW 9A.44.070 is to consider nonmarriage an implicit element of the crime."

*Id*. (quoting *State v. Bailey*, 52 Wn. App. 42, 46, 757 P.2d 541 (1988), *aff'd on other grounds*, 114 Wn.2d 340, 787 P.2d 1378 (1990)).[5]

[5] As Austin points out, under statutory interpretation principles, judicial construction of a statute becomes a part of the statute as if it were part of the statute from its enactment. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997).

In this case, as in *Stockwell*, accepting Austin's argument would lead to absurd results. Clearly in 1981, the Alaska Legislature did not expect an eight-year-old boy to be legally married to his 25-year-old male neighbor.

Austin contends that the court considered extrinsic evidence in finding that the implied non-marriage element of Washington's statutory rape statute was satisfied. The State argues that the court did not rely on extrinsic evidence and instead, properly inferred satisfaction of the non-marriage element based on the law and Austin's admissions in the indictment. We agree with the State and find that the Alaska offense is factually comparable to Washington's statute.

Austin relies on *In re Pers. Restraint of Crawford* to support his position that the marital element cannot be inferred. 150 Wn. App. 787, 209 P.3d 507 (2009). In that case, the court conducted the two-part legal and factual inquiry in comparing Crawford's Kentucky conviction of sexual abuse in the first degree to Washington's first degree child molestation statute (former RCW 9A.44.083 (1990)). *Id.* at 794-98. The crimes were not legally comparable because Washington's crime required that the victim not be married to the perpetrator while the foreign conviction did not. *Id.* at 796. Consequently, the court analyzed factual comparability of the offenses. *Id.* at 797. The State contended "that it was unaware of any jurisdiction in the United States that would allow a legal marriage between a 25-year-old male and a 7-year-old niece, but it acknowledged during oral argument before us that it had not researched or verified this to be true in Kentucky."

*Id.* at 798. Consequently, the court held that the two crimes were not factually comparable. *Id.*

Here, on the other hand, the State researched and argued at the hearing on its motion for comparability that in 1981, same-sex marriages were not legally recognized in either Alaska or Washington. *See Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974) (holding that Washington's marriage statute limited marriages to be between a man and a woman); *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (DOMA's[6] prohibition against same-sex marriage did not violate the state Equal Rights Amendment); *Hamby v. Parnell*, 56 F.Supp.3d 1056 (D. Alaska 2014) (holding that Alaska's constitutional and statutory provisions prohibiting same-sex marriages violated fundamental rights under the U.S. and Alaska Constitutions). It is clear from the indictment that Austin and his victim were both male. Consequently, because same-sex marriage was not legal in either Washington or Alaska in 1981, and because the State researched and proved as much, Austin's argument that the marriage elements cannot be inferred fails.

Given that same-sex marriage was not recognized in either Alaska or Washington in 1981, the nonmarriage element and therefore factual comparability of the Alaska offense and the Washington statute was satisfied.

[6] Defense of Marriage Act.

Austin's Alaska conviction of sexual assault in the first degree (former AS 11.41.410(a)(3) (1980)) is comparable to statutory rape in the first degree in Washington (former RCW 9A.44.070 (1981)).

We affirm the trial court's order of commitment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

## BACKLUND & MISTRY

## May 03, 2023 - 9:16 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division III |
| **Appellate Court Case Number:** | 38343-1 |
| **Appellate Court Case Title:** | In re the Detention of: Bruce Austin |
| **Superior Court Case Number:** | 19-2-01509-2 |

**The following documents have been uploaded:**

- 383431_Petition_for_Review_20230503091605D3956473_0138.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was 38343-1 In Re Detention of Bruce Austin Petition for Review with Attachment.pdf*

**A copy of the uploaded files will be sent to:**

- cj.murray@atg.wa.gov
- crjsvpef@ATG.WA.GOV

**Comments:**

---

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

**Note: The Filing Id is 20230503091605D3956473**