Supreme Court No. 96778-4
COA No. 77197-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HAROLD MARQUETTE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable David A. Kurtz

ANSWER TO STATE'S PETITION FOR REVIEW

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A. SUMMARY OF ANSWER

The Court of Appeals correctly decision held that the defendant's five-year washout period under RCW 9.94A.525(2)(c) could neither have its starting date re-triggered, nor could that period be deemed interrupted, by the commission of a California conviction (entered by guilty plea) or by the multi-year prison sentence served in California for that conviction, where the foreign offense was non-comparable to a Washington crime. The decision correctly held that Washington's offender scoring statutes do not consider foreign conduct that would not constitute a crime in Washington. State v. Marquette, No 77197-3-I (Division One, December 17, 2018). The State's petition for review should be denied.

B. ARGUMENT IN OPPOSITION TO GRANT OF REVIEW

1. Contrary to the Petitioner's argument, review is not warranted under RAP 13.4(b)(4).

The present case is of substantial interest to Mr. Marquette, because his release date will likely have come and gone by the time the present case is resolved, even if this Court denies the State's petition for review, as he urges it should do. CP 31-44 (judgment and sentence).

However, the case - that being the Court of Appeals decision complained of, which simply applied the plain language of the Sentencing Reform Act to a relatively unlikely circumstance - is not one of substantial public interest under RAP 13.4(b)(4), as Petitioner contends. Petition, at p. 8. Although the Marquette decision was compelled by the pertinent Washington statutes, it is of little future consequence. In the majority of instances, a defendant who commits a crime in a foreign state that is serious enough to merit a multi-year sentence in that jurisdiction, will have engaged in conduct under a statute that is legally comparable, i.e., equivalent to or narrower than a Washington offense statute, and if not, then the defendant's foreign conduct will in many instances be factually comparable to a Washington crime.

In such event, the foreign conviction and its sentence served will properly defeat washout of previous offenses under RCW 9.94A.525. The present case is one in which the California crime was deemed not factually comparable because the only available documentation of the putative facts that the prosecution could muster, that might establish factual comparability, came in the form of a probation officer's "post-sentence report" which was drafted subsequent to the entry of the plea.

Pursuant to In re PRP of Lavery, 154 Wn.2d 468, 474, 325 P.3d 187 (2014), and State v. Morley, 154 Wn.2d 249, 262, 952 P.2d 167 (1998), the document could not be considered to contain facts that were clearly admitted by the defendant by his plea, which was of course entered prior to the post-sentence report. See also State v. Olsen, 180 Wn.2d 468, 476, 325 P.3d 187 (2014) (affirming the Lavery standard for comparability of foreign convictions). But in this age of increasingly comprehensive retention of digital records of foreign convictions, instances where truly serious foreign crimes cannot be found to be comparable to a qualifying Washington crime as a result of incomplete documentation will be less and less likely, as thus will be instances in which the defendant's lengthy absence from the community by incarceration in a foreign state will not also result in defeat of RCW 9.94A.525(2)(c)'s washout requirement.

And, in those instances where a defendant has committed a crime in a foreign jurisdiction deemed serious enough in that state to merit lengthy incarceration, but the conduct, although showing a failure to obey the laws of the state in which the defendant found himself, is simply not even possibly a factual crime in this State – such as an offense of homosexual sodomy – the proper result at a future

Washington sentencing will be that such offense is wholly uncognizable here, and therefore, properly, will not defeat washout.[1]

2. <u>The Court of Appeals decision properly relied on the plain language of the pertinent Washington statutes</u>.

As the Court of Appeals noted, RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in a person's offender score. That statute provides, in relevant part,

> [C]lass C prior felony convictions ... shall not be included in the offender score if, since the last date

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[1] For example, under the Petitioner's theory that non-comparable foreign offenses should prevent "washout," trial courts presently sentencing defendants in Washington must include washed-out offenses in the person's offender score if the person in the intervening time committed any act of homosexual sodomy. <u>See</u> https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/ ("Of 14 states that had anti-sodomy laws, only Montana and Virginia have repealed theirs since the Supreme Court ruling [in <u>Lawrence v. .Texas</u>], said Sarah Warbelow, legal director for the Human Rights Campaign, a national gay rights organization."); South Carolina (S.C.) Code Ann. § 16-15-120 (criminalizing "buggery" as a felony with a five year maximum term in the penitentiary) (1987 Act No. 168 Section 3); <u>see also</u> S.C. Code Ann. § 44-48-30(2)(k) (defining violation of § 16-15-120 as a "sexually violent offense") (2012 Act No. 255, § 11, eff June 18, 2012).

For further example, under the State's proposed interpretation of Washington law, "any crime" would include the foreign offense of feeding the homeless in any public area. <u>See</u> Lay, Matthew, <u>Do Not feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes the So-Called "Enablers,"</u> 8 Nev. L. J. 740, 741-42 and n. 15 (2008) (addressing ACLU challenge to the City of Las Vegas's 2006 enactment of L.V.M.C. 13.36.055(a)(6), which prohibits feeding the "indigent" in city parks, in order to stop "the impacts of vagrants...on the surrounding neighborhoods") (available at https://scholars.law.unlv.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1113&context=nlj).

> of release from confinement ... pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c); see State v. Marquette, ___ Wn. App. ___, 431 P.3d 1040, 1042-43 (Wash. Ct. App. 2018). The Marquette Court continued on to note that "[i]t is the sole province of our state legislature to define criminal conduct in our state." Marquette, at 1043 (citing McInturf v. Horton, 85 Wn.2d 704, 706, 538 P.2d 499 (1975) ("The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative."). Operating squarely within that province, the legislature has clearly defined crimes and classes of crimes:

> (1) An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, gross misdemeanors, or misdemeanors.
> (2) A crime is a felony if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year.

RCW 9A.04.040. As the Court of Appeals correctly held, "[t]he plain language of this statute does not encompass crimes defined by the law

of other states or federal law that are not crimes under Washington law." Marquette, at 1043.

The Court therefore agreed with Mr. Marquette's argument that a person convicted of a foreign state's crime, and released from confinement therefrom, is only subjected to defeat of his washout of previous offenses where the crime was comparable to a Washington crime under the standards of Lavery and Morley. Marquette, at 1043. Specifically addressing the "trigger" clause and the "continuity/interruption" clause analyses of State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), the Court of Appeals held that non-comparable foreign crimes cannot defeat washout under any theory:

> While the length of imprisonment referenced in RCW 9A.04.040(2) may make a crime a felony as opposed to a misdemeanor, the threshold question is whether the conduct is in fact a crime - a crime recognized under Washington law - not merely conduct that is criminal in nature. RCW 9A.04.040(1); RCW 9.94A.525(3). That determination is properly made under the comparability analysis. Under the comparability analysis, Marquette's crime in California was not a crime - let alone a felony crime - in Washington. Therefore, the State's argument that because Marquette's 2007 California conviction resulted in a sentence for more than a year, the underlying crime is a felony for purposes of the "trigger" clause, fails. For the same reason, Marquette's argument, that the California offense is not comparable to a Washington crime and does not interrupt the washout period, is correct. The issue is addressed in State v. Crocker, 196

> Wn. App. 730, 385 P.3d 197 (2016). In Crocker, the defendant had an Oregon drug conviction from March 2000, and an Oregon offensive littering conviction from September 2009. Id. at 733, 385 P.3d 197. The issue was whether the defendant's 2009 Oregon offensive littering conviction prevented his 2000 drug conviction from washing out under RCW 9.94A.525(2)(c). Id. at 734, 385 P.3d 197. On appeal, this court stated [that when] an out-of-state conviction is alleged to interrupt the washout period under RCW 9.94A.525(2)(c), the trial court must determine whether the out-of-state crime or conviction is legally or factually comparable to a Washington offense.. . . Therefore, this court held that the out-of-state conviction was not "any crime" that interrupted the washout period.

Marquette, at 1043-44. The Court of Appeals was correct – the plain language of the Washington statutes that define crimes, and the classes thereof, and the statutes which require comparability, rendered Mr. Marquette's sentencing issue on appeal an easy question to answer – his non-comparable California offense plainly cannot defeat washout.

3. The Petitioner's arguments on appeal ignore the plain statutory language that defines crimes and comparability inextricably.

The Petitioner craftily puts words together in its argument by suggesting that the Court of Appeals decision authorizes Washington defendants to purposely commit an offense in another state in order to be found guilty and serve a lengthy prison sentence, for the purpose of ensuring a passage of years that will in future secure washout of their

previous offenses when they commit a new crime in Washington, after release from incarceration in the foreign jurisdiction. Petition, at pp. 3, 8. This clever wordplay elides the issue of the plain language of the pertinent statutes.

This is shown by the fact that thereafter, the Petitioner's argument relies solely on a wholesale, and patently unavailable theory of rejection of our legislature's comparability requirement. The State argues that Washington offender scores should depend on whether the defendant has met the "requirement that every person obey the laws of whichever state he is in." (Emphasis added.) Petition, at p. 7. This theory is contrary to basic Washington law in the area of offender scoring. As the Court of Appeals stated, relying on Crocker:

> When our legislature enacted the offender score statute, RCW 9.94A.525, it intended to "[treat] defendants with equivalent prior convictions in the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere." Therefore, the legislature's intent that offenders be treated the same way applies equally to the washout provision. When an out-of-state conviction is alleged to interrupt the washout period under RCW 9.94A.525(2)(c), the trial court must determine whether the out-of-state crime or conviction is legally or factually comparable to a Washington offense.

Marquette, at 1043-44 (citing Crocker, at 736).

The State's argument that the Court of Appeals decision is "contrary to both the statutory language and [Washington's] legislative intent" is erroneous. Review is not warranted under any provision of RAP 13.4(b), including the sole subsection cited by the Petitioner, RAP 13.4(b)(4). For all the foregoing reasons, the State's Petition for Review should be denied.

C. CONCLUSION

Based on the foregoing, this Court should deny the State's Petition for Review.

Respectfully submitted this *15th* day of February, 2019.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. HAROLD MARQUETTE, Respondent.	)))))))))	NO. 96778-4

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