FILED
SUPREME COURT
STATE OF WASHINGTON
6/2/2023 11:41 AM
BY ERIN L. LENNON
CLERK

NO. 101956-4

SUPREME COURT OF THE STATE OF WASHINGTON

BRUCE AUSTIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

CAROL J MURRAY
Assistant Attorney General
WSBA No. 19668
Office of the Attorney General
800 Fifth Avenue, Ste 2000
Seattle, WA 98104
(206) 464-6430
OID No. 91094

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 3

A. Restatement of Facts 3

IV. REASONS WHY REVIEW SHOULD BE DENIED 9

A. The Court of Appeals Correctly Determined a Well-Established, Constitutionally Sound Two-Part Comparability Test Applies To RCW 71.09..... 10

1. The Two-Part Test Applies under the Plain Language of former RCW 71.09.020 (17). 12

B. Applying Washington's Two-Part test, Austin's Alaska Conviction of Sexual Assault in the First Degree was Factually Comparable to Statutory Rape in the First Degree. 16

C. The Trial Court Properly Applied the Two-Part Comparability Test in Determining that Austin's Alaska Conviction of Sexual Assault of a Minor was Factually Comparable to Indecent Liberties Against a Child under 14. 24

V. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Anderson v. King County,
158 Wn.2d 1, 138 P.3 963 (2006).. 22

Christen v. Ellsworth,
162 Wn.2d 365, 173 P.3d 228(2007).................................... 13

Flink v. State,
683 P.2d 725, (Alaska App. 1984) (*superseded by statute, as stated in, Peratrovich v. State,* 903 P.2d 1071, Alaska 1995) 25, 26, 27

Hanby v. Parnell,
56 F.Supp.3d 1056 (Alaska App. 2014) 20

In re Det. of Strand,
167 Wn.2d 180, 217 P.3d 1159 (2009)................................. 13

In re Detention of Young, 122 Wn.2d 1, 27-33, 857 P.2d 989 (1993)... 15

In re Pers. Restraint of Lavery,
154 Wn. 2d 249, 111 P.3d 837(2005)............................. 10, 11

In re Pers. Restraint Petition of Crawford,
150 Wn. App. 787, 209 P.3d 507(2009)......................... 21, 22

Jametsky v. Olsen,
179 Wn.2d 756, 317 P.3d 1003(2014).................................. 13

Miller v. State,
617 P.2d 516,(Alaska 1980) 17

Morris v. Blaker,
118 Wn.2d 133, 831 P.2d 482 (1992).................................. 14

Obergefell v. Hodges,
576 U.S. 644, 135 S.Ct. 2584(2015).................................... 22

Scott v. State,
928 P.2d 1234 (Alaska 2009) 18

Singer v. Hara,
11 Wn. App. 247, 522 P.2d 1187(1974)............................... 20

Ski Acres v. Kittitas Cy.,
118 Wn.2d 852, 827 P.2d 1000 (1992)........................... 13, 15

State v. Armendariz,
160 Wn.2d 106, 156 P.3d 201(2007).................................... 13

State v. Lorenz,
152 Wash. 2d 22, 93 P.3d 133(2004) 27

State v. Morley,
134 Wn.2d 588, 952 P.2d 167(1998)............................. 10, 11

State v. Olson,
180 Wn.2d 468, 325 P.3d 187(2014)............................. 10, 11

State v. Stockwell,
159 Wn.2d 394, 150 P.3d 82(2007)...................................... 19

State v. T.E.H.,
91 Wn. App. 908, 960 P.2d 441(1998)................................. 27

Statutes

AS 11.41.410(a)(3)... 5, 17

AS 11.41.440 (1981 Version) 28
AS 11.41.440(a)(2).. 5, 24
AS 11.81.900(53) (1981 version).. 18
AS Sec. 11.81.900(51) (1981 Version)................................... 25
RCW 71.09.. 10
RCW 71.09.010.. 15
RCW 71.09.02 (17) 29
RCW 71.09.020.. 4
RCW 71.09.020 (17) 12
RCW 71.09.020(17) .... passim
RCW 71.09.020(17)(a).. 4, 16
RCW 71.09.020(17)(b) 3, 4, 12, 14
RCW 71.09.020(18) 4
RCW 71.09.030(1) 4
RCW 9A.44.010 (1)(c) (1981 version) 19
RCW 9A.44.010 (1981 Version)... 25
RCW 9A.44.080(1), 1981 version 18
RCW 9A.44.080, 1981 version 6
RCW 9A.44.100, 1981 version 6

Other Authorities

Laws of 1975, 1st Ex. Sess., ch. 14 § 7 6

Laws of 1975, 1st Ex. Sess., ch. 260 § 9A.88.100 6

Laws of 1979, Ex. Sess. Ch. 244 § 5 6

Rules

RAP 13.4(b)(4) 9

I. INTRODUCTION

Washington Courts have a longstanding history of applying a two-part test for determining the comparability of an out-of-state conviction under the Sentencing Reform Act. The two-part test includes a legal and factual inquiry. Consistent with this history, the Court of Appeals used this two-part test in this Sexually Violent Predator civil commitment proceeding to decide whether Austin's 1981 Alaska convictions were comparable to Washington-defined sexually violent offenses. The Court of Appeals correctly determined that requiring a stricter comparability test advocated for by Austin would be contrary to settled law and the plain language and purpose of the sexually violent predator statute.

The Court of Appeals also correctly applied the two-part comparability test. After determining the Alaska and Washington statutes were not legally comparable, the Court of Appeals shifted its analysis to the factual prong of the test. The key difference between the two statutes is Washington's required

the person not be married to the victim. The Court of Appeals affirmed the trial court's conclusion that Austin was not married to the eight-year-old male victim based on 1981 marriage law and Austin's admissions at the time of the plea.

Austin challenges the Court of Appeals decision, arguing that there was "insufficient evidence" that he was previously convicted of a sexually violent offense because 1) the plain language of RCW 71.09.020(17) requires a stricter comparability test for out-of-state convictions, and 2) the trial court relied on "extrinsic evidence" when it conducted the factual portion of the traditional two-part test. Neither are correct. His challenges are meritless and would lead to absurd results. Review is unwarranted.

II. RESTATEMENT OF THE ISSUES

For the reasons stated below, this Court should deny review. If this Court accepts review, this case would present the following issues:

1. Did the Court of Appeals correctly use and apply a two-part comparability test firmly rooted in Washington Law

to compare Austin's Alaska convictions to Washington sexually violent offenses as defined by RCW 71.09.020(17)(b)?

2. Did the Court of Appeals properly conclude Austin's Alaska conviction for sexual assault in the first degree was factually comparable to statutory rape in the first degree in Washington based on the facts Austin stipulated and admitted to in his Alaska conviction documents?

3. Did the trial court properly conclude Austin's Alaska conviction for sexual abuse of a minor was factually comparable to indecent liberties against a child under age fourteen in Washington based on the facts Austin stipulated and admitted to in his Alaska conviction documents?

III. STATEMENT OF THE CASE

A. Restatement of Facts

In April 2019, prior to Austin's release from prison, the State filed a petition alleging that Austin was a sexually violent predator (SVP). CP 1-2. A "sexually violent predator" is defined by statute as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not

confined in a secure facility." RCW 71.09.020(18).[1] The State also alleged that Austin committed a "recent overt act," as a matter of law.[2] CP 2.

The State's petition alleged that Austin's 1981 Alaska convictions for Sexual Abuse of a Minor and Sexual Assault in the First Degree constituted sexually violent offenses as defined in RCW 71.09.020(17)(a)-(b). CP 1-2. The statute authorizes the filing of a petition if an out-of-state conviction qualifies as a sexually violent offense. RCW 71.09.030(1), .020(17)(b).

Prior to trial, the State advocated the trial court to find, as a matter of law, that Austin's Alaska convictions, committed against J.L., were sexually violent offenses using Washington's traditional two-part criminal comparability test. Conceding legal comparability, the State relied on Austin's plea and supporting case law to provide the basis for factual comparability. Austin

---

[1] Citations to former RCW 71.09.020 are referenced throughout Respondent's brief because Austin's SVP trial occurred before select amendments to the statute took effect on July 25, 2021.

[2] The court determined pretrial that Austin committed an ROA as a matter of law, which is not contested on appeal. CP 530-34.

entered a “no contest” plea, admitting each element, to counts II and III of the Alaska indictment (CP 21-28), which read:

> Count II – Sexual Abuse of a Minor: That during the period from 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. CP 128
>
> Count III – Sexual Assault in the First Degree: That during the period from 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 128-29.

The State argued that Counts II and III were factually comparable to Washington’s 1981 offenses of indecent liberties against a child under age 14 and statutory rape in the first degree,

respectively. VRP 1, 23-27. In 1981, those crimes were defined as follows:

> Indecent Liberties (RCW 9A.44.100, 1981 version)[3]
>
> (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another…(b) when the other person is less than fourteen years of age….
>
> (2) For purposes of this section, '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.
>
> Statutory Rape in the First Degree (RCW 9A.44.080, 1981 version)[4]
>
> (1) A person over thirteen years of age is guilty of statutory rape in the first degree when such person engages in sexual intercourse with another person who is less than eleven years old….

Applying the factual prong of the comparability test, the trial court determined that Austin's admitted conduct was comparable to the Washington statutes. In reaching its

---

[3] Laws of 1975, 1st Ex. Sess., ch. 260 § 9A.88.100. Formerly RCW 9A.88. 100.

[4] Laws of 1979, Ex. Sess. Ch. 244 § 5; Laws of 1975, 1st Ex. Sess., ch. 14 § 7, codified as former RCW 9.79.200.

conclusion, the court relied solely on the "indictment, judgment and sentence, order [on probation]," and marital laws as existed in 1981. VRP 39, VP 538 - 40.

A bench trial commenced on March 29, 2021. CP 541. The State called four witnesses, including the victim, J.L, Austin, and its forensic expert, Dr. Harry Goldberg, Ph.D. who testified about Austin's mental condition and risk. VRP 138-45; VRP 171-43; VRP 238-39, 262. It presented substantive testimony about the acts Austin committed in 1981 against J.L. VRP 138-45; CP 359-365, 410-411. This evidence included Austin's admission that he was not married to J.L. and that he committed at least 60 undetected sexual assaults of children between 1981 and 2010. VRP 145, CP 353, 426, 545.

At the end of trial, the court found that Austin is a sexually violent predator. CP 564. The court also concluded that the State proved beyond a reasonable doubt, during trial, that Austin's acts against the 1981 victim constituted a "sexually violent offenses" under Washington law as it existed in 1981. CP 565. The court

entered written findings of fact and conclusions of law. CP 541-66. On July 15, 2021, the court entered an order of commitment. CP 566.

The Court of Appeals affirmed Austin's commitment in its decision filed on April 4, 2023. The Court looked to the plain language of RCW 71.09.020(17) and determined it unambiguously does not require a stricter comparability test for out-of-state convictions than the traditional two-part test as used in other circumstances. Op. at 11.

Applying the two-part comparability test, the Court agreed with the trial court that Austin's Alaska conviction for sexual assault in the first degree was factually comparable to Washington's offense of statutory rape in the first degree. Op. at 5. The Court stated it was clear from Austin's admissions, at the time of his plea, that he and his victim were both male, and because the State had researched and proved same-sex marriages were not legal in Washington and Alaska at the time, it was

reasonable to infer the non-marriage element was established. Op. at 18.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Austin seeks review under RAP 13.4(b)(4). PFR at 26. This court grants review on this ground only if it involves an issue of substantial public interest. RAP 13.4(b)(4). Review of this case is unwarranted because the Court of Appeals properly interpreted and applied the pertinent law.

The Court analyzed the plain language of the statute and determined that a firmly rooted test applied. Based on the application of that test, Austin's Alaska conviction of sexual assault in the first degree was properly deemed a "sexually violent offense" because it was factually comparable to Washington's statutory rape in the first degree, and Austin and J.L. were not married. Op. at 17-18. Finally, the Court of Appeals declined to consider whether the trial court reasonably concluded sexual gratification is implied in Austin's other Alaska conviction (sexual abuse of a minor) because, given the above

holdings, resolution of that issue was immaterial to the validity of Austin's SVP status. Op. at 3.

The Court of Appeals decision is well reasoned, consistent with settled principles of statutory construction, and provides no basis for this Court's review.

A. The Court of Appeals Correctly Determined a Well-Established, Constitutionally Sound Two-Part Comparability Test Applies To RCW 71.09.

Washington Courts have consistently applied a two-part test to determine comparability of out-of-state convictions. *State v. Morley,* 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); *In re Pers. Restraint of Lavery*, 154 Wash. 2d 249, 255, 111 P.3d 837, 841 (2005); *State v. Olson,* 180 Wn.2d 468, 476, 325 P.3d 187, 191 (2014). The test has withstood constitutional challenges. *Olson,* at 472-77. The two-part test consists of a legal and a factual inquiry.

In applying this test, the court first determines whether the elements of the out-of-state conviction are "substantially similar" or narrower than the Washington criminal statute in effect at the

time the offense occurs. *Lavery*, at 255. If so, the analysis ends. If the elements of the conviction are broader than the Washington statute, the court proceeds to the second step of the analysis, factual comparability. *Id.*

Factual comparability allows courts to consider the defendant's conduct as evidenced by the indictment or information or other records of the conviction to determine whether the conduct would have violated the comparable Washington statute. *Id*. As long as the court limits its consideration to facts "stipulated, admitted to, or proved beyond a reasonable doubt," its analysis does not infringe on a defendant's constitutional right to trial. *Olson at* 477-78. The elements remain the "cornerstone" for comparison. *Lavery,* at 255 (citing *Morley*, at 601)

Here, the Court of Appeals correctly affirmed that this constitutionally sound, two-part test was the correct test to determine whether an out-of-state felony is "comparable to a sexually violent offense." 71.09.020(17); Op. at 6.

1. The Two-Part Test Applies under the Plain Language of former RCW 71.09.020 (17).

Despite the two-part comparability test's constitutional soundness and well-established application in Washington Courts, Austin fallaciously argues that the terms "comparable" and "would be" in RCW 71.09.020(17)(b) requires the application of two different comparability standards: the traditional two-part test for obsolete Washington statutes, and also an unprecedented stricter comparability test for out-of-state convictions. His interpretation is inconsistent with statutory interpretation and would lead to an absurd result.

> RCW 71.09.020 (17) reads, in pertinent part:
> A "sexually violent offense" is defined as an "act" committed on, before, or after July 1, 1990, that is: … (b) a felony offense in effect at the time before 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." (*emphasis* added)[5]

[5] The language set forth in RCW 71.09.020 (17) (b) is nearly identical to the comparability statute in RCW 9.94A.030 (t) in which the two part comparability test is applied: Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state

Statutory construction is reviewed de novo. *In re Det. of Strand,* 167 Wn.2d 180, 186, 217 P.3d 1159 (2009). In interpreting a statute, the Court's primary role is to "ascertain and give effect to the Legislature's intent." *Ski Acres v. Kittitas Cy.,* 118 Wn.2d 852, 856, 827 P.2d 1000 (1992). A Court first looks to the plain language of the statute. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the language is unambiguous, the inquiry ends. *Id.* If ambiguous, meaning it is susceptible to more than one reasonable interpretation, Courts turn to "statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Jametsky v. Olsen,* 179 Wn.2d 756, 762, 317 P.3d 1003 (2014) (quoting, *Christen v. Ellsworth,* 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). When interpreting a statute, "unlikely, strained, or

---

conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection.

absurd" results should be avoided. *Morris v. Blaker,* 118 Wn.2d 133, 143, 831 P.2d 482 (1992).

Here, the Court of Appeals first looked at the plain language of RCW 71.09.020(17)(b). In doing so, the Court relied on the dictionary definitions of "comparable" and "would be," determining:

> [T]he 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 form RCW 71.09.020(17). The word "comparable" means "equivalent" or "similar" or "having enough like characteristics or qualities to make comparison appropriate." 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.

Op. at 9-10.

Consequently, because "compare" and "would be" have the same meaning, the Court properly held that the statute does not impose

a stricter standard or require a different test than is applied in other circumstances. Op. at 11.

In the alternative, Austin argues that the statute is ambiguous and therefore "must be interpreted to prohibit consideration of facts that might broaden the range of qualifying offenses." PFR at 9. Austin ignores the Court's primary role when interpreting a statute, which is to "ascertain and give effect to the legislature's intent." *Ski Acres v. Kittitas Cy.,* 118 Wn.2d at 856.

The stated intent and purpose of the SVP statute is to ensure the commitment of and provide treatment to persons who meet the definition of a sexually violent predator in order to protect the community. RCW 71.09.010. The State has legitimate interests in treating sexual predators and protecting the community from their sexually violent behavior. *In re Detention of Young,* 122 Wn.2d 1, 27-33, 857 P.2d 989 (1993). As the Court of Appeals recognized, treating offenders who committed sexually violent offenses in other states differently from those

who committed similar offenses in Washington would undermine the legislative intent of the statute and would lead to an absurd result. Op. at 10-11.

B. Applying Washington's Two-Part test, Austin's Alaska Conviction of Sexual Assault in the First Degree was Factually Comparable to Statutory Rape in the First Degree.

The Court of Appeals affirmed the trial court's ruling that Austin's Alaska conviction of sexual assault in the first degree was factually comparable to statutory rape in the first degree, a "sexually violent offense" under RCW 71.09.020(17)(a).

The trial court first examined the legal prong. CP 538. The State conceded and the court agreed the elements of Alaska's sexual assault in the first-degree statute were broader than the elements of Washington's statutory rape in the first degree, as those statutes existed in 1981. CP 538. Consequently, the court turned to the factual comparability part of the test. CP 539.

In determining factual comparability, the trial court "looked at Mr. Austin's conduct at the time the offenses occurred to determine whether his conduct under the Washington law, as

existed at the time, constituted a sexually violent offense" as defined under RCW 71.09.020(17). CP 538. The trial court limited its factual analysis to conduct Austin stipulated and admitted to as charged in the indictment. VRP 39. The trial court reached the conclusion that Austin's Alaska conviction was factually comparable to statutory rape in the first degree. CP 539. The record supports this conclusion.

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

> That during the period from 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 139-40.

In Alaska, defendants have a right to enter a plea of "no contest," even when they maintain innocence. *Miller v. State*, 617 P.2d 516, 518-19 (Alaska 1980). "[A] plea of no contest 'is

an admission of every essential element of the offense well-pleaded in the charg[ing] [document].'" *Scott v. State*, 928 P.2d 1234, 1238 (Alaska 2009).

By entering a "no contest" plea to the indictment (CP 134), Austin admitted that J.L was eight-years-old and that he (Austin) placed J.L.'s penis into his mouth. His admission supported factual comparability between the Alaska and Washington statutes. Alaska's legislature included fellatio in its definition of sexual penetration. AS 11.81.900 (53) (1981 version).

In comparison, statutory rape in the first degree was defined as: "A person <u>over thirteen years</u> of age is guilty of statutory rape in the first degree when such person engages in <u>sexual intercourse</u> with another person who is <u>less than eleven years old</u>." (RCW 9A.44.080(1), 1981 version)[6]

Similar to Alaska's sexual penetration definition, Washington defined sexual intercourse to include fellatio,

---

[6] 1979 ex.s. c 244 § 5; 1975 Wash. Laws, 1st ex. sess., ch. 14, § 7, codified as former RCWA 9.79.200. (emphasis added.)

defining it as "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)(c) (1981 version).

Here, the trial court found factual comparability based on Austin's admission that he placed his mouth on J.L.'s penis, constituting sexual penetration under Washington law, and that the age differential was also factually comparable: J.L. was eight-years-old and Austin's date of birth on the indictment and judgement established he was 25 years old. CP 128, 132. The trial court also inferred that Austin and J.L. were not married. CP 538-540, VRP 39.

Washington's statutory rape statute did not expressly include the non-marital element, but our Washington Supreme Court determined proof of non-marriage was an implied element. *State v. Stockwell*, 159 Wash. 2d 394, 399, 150 P.3d 82, 85 (2007). Like *Stockwell*, Austin argues that the non-marriage element was not proven during the 1981 Alaska proceeding.

While the *Stockwell* Court held that non-marriage was an implied element of statutory rape in the first degree, it stated, "it is simply inconceivable that the legislature would expect that children 10 years old or less would marry." *Id*. at 399.[7] It follows that the legislature never intended a child J.L.'s age, age eight, would be married. As the Court of Appeals recognized, "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 neighbor." Op. at 17.

Additionally, in 1981, same-sex marriages were not legally recognized in either Alaska or Washington. *See*, *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1189 (1974) (held Washington's marriage statute limited marriages to be between a man and a woman). *Hanby v. Parnell*, 56 F.Supp.3d 1056 (Alaska App. 2014) (Alaska's constitutional and statutory

[7] The *Stockwell* Court's reasoning is consistent with the 2021 amendments removing the non-marriage element from sexual offense statutes against minors. RCW 9A.44.

provisions prohibiting same-sex marriages violated fundamental rights under the U.S. and Alaska Constitutions).

Here, based on the State's extensive research, the trial court concluded, "beyond a reasonable doubt," that eight-year-old J.L. was not married at the time of the offense. VRP 39. The trial court relied on the conviction documents and legal research establishing that same-sex marriages were not yet legally recognized. VRP 39.

In affirming the trial court, the Court of Appeals distinguished *In re Pers. Restraint Petition of Crawford*, 150 Wn. App. 787, 209 P.3d 507, 513 (2009). In *Crawford,* the Court ruled Kentucky's Sexual Abuse First Degree statute was neither legally nor factually comparable to Washington's Child Molestation First Degree statute. *Id.* at 796-97. The statutes were not legally comparable because only Washington's statute required the victim be under 12 years old and not married to the perpetrator. Because the statutes were not legally comparable, the Court examined the Kentucky offense's underlying facts.

Although Crawford admitted to "digitally penetrating the vagina of his 7-year-old niece," the Court held the Kentucky and Washington statutes were not factually comparable since the prosecution failed to research the non-marriage element. *Id.* at 797-98.

Here, unlike in *Crawford,* the relevant history of marital law was before the trial court. Also, *Crawford* did not address same-sex marriages, rather, the *Crawford* Court addressed the issue of providing proof of marital status only between a male and a female. Marriages between a man and woman have a longstanding history of being legally recognized. *See generally, Anderson v. King County,* 158 Wn.2d 1, 25-29, 138 P.3 963 (2006), *abrogated by, Obergefell v. Hodges,* 576 U.S. 644, 135 S.Ct. 2584 (2015).

In Austin's case, the indictment and the judgments established that J.L. and Austin identified as male. CP 128-29, 132-35. The indictment refers to J.L.'s penis and Austin inserting *his* mouth over *his* [J.L.'s] penis. CP 128. The Judgment and

Order on Probation also references Austin as identifying as male. CP 132-35.

The trial court had sufficient information from the indictment and case law to reach its conclusion, beyond a reasonable doubt, that an eight-year-old boy could not be legally married to an adult male. The court's reliance on case law and legal reasoning does not constitute "extrinsic evidence" as Austin claims.

Further, Austin cites no authority that if there is any "possibility" same sex marriages were recognized someplace else in the world, Austin and J.L. could have traveled there to get married. PFR at 21. This strained hypothetical would be an insurmountable, unreasonable task for the State to research. Moreover, it is senseless to entertain the notion that Austin would travel outside of Alaska with an unrelated minor to locate a "possible" jurisdiction to be married.

Accordingly, the trial court properly examined, and the Court of Appeals affirmed, that the Alaska and Washington's

child rape statutes were factually comparable, as the statutes existed in 1981. CP 539.

C. The Trial Court Properly Applied the Two-Part Comparability Test in Determining that Austin's Alaska Conviction of Sexual Assault of a Minor was Factually Comparable to Indecent Liberties Against a Child under 14.

As was the case with Austin's other Alaska conviction, the State conceded and the trial court agreed, that Austin's Alaska conviction of sexual assault of a minor was not legally comparable to indecent liberties against a child under 14 as the Alaska statute was broader than Washington's statute. CP 539. The trial court then analyzed factual comparability. Austin entered a no contest plea to Sexual Abuse of a Minor, Count II, of the Alaska indictment, which read:

> That during the period from 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. CP 128.

By entering a "no contest" plea to the indictment (CP 134), Austin admitted J.L. was age eight, meeting Washington's indecent liberties requirement under age 14. He also admitted he unlawfully engaged in sexual contact with J.L. by touching J.L.'s penis. CP 128. This admission implies sexual contact for the purpose of sexual gratification. *Flink v. State,* 683 P.2d 725, 733 (Alaska App. 1984) (*superseded by statute, as stated in, Peratrovich v. State,* 903 P.2d 1071, 1074-77. Alaska 1995).

Both Alaska and Washington statutory schemes required sexual contact to include the touching of the sexual or intimate body parts of another person.[8] Washington's definition of sexual contact explicitly stated that the touching be for purposes of sexual gratification, but Alaska's definition did not. However, the *Flink* Court directly addressed the 1981 definition of sexual

---

[8] Alaska defined sexual contact as the "intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus, or female breast; or the defendant intentionally causing the victim to touch directly or through clothing, the defendant's or victim's genitals, anus, or female breast." AS Sec. 11.81.900 (51), (1981 Version). Washington defined sexual contact as "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.44.010 (1981 Version).

contact. Flink was convicted by jury of sexual abuse of a minor and contributing to the delinquency of a minor, both statutes prohibited sexual contact with a child. Sexual contact was a required element the State had to prove at trial. *Id.* at 726.

On appeal, Flink argued the statutes were overbroad and vague. More specifically, he argued the definition of sexual contact sanctioned innocent and culpable conduct. *Id.* at 728. He contended that the Court should interpret the phrase "sexual contact" to require the conduct be for a sexual motive or purpose. *Id*. at 729.

In addressing the issue, the *Flink* Court turned its attention to the legislative intent and history of the statutes, particularly in reference to the phrase "sexual contact." *Id*. at 729-32. Ascertaining that the legislative commentary was silent, the *Flink* Court interpreted sexual contact as inferring sexual motive or purpose, noting that sexual abuse requires sexual contact. *Flink Id.* at 733.

Austin contends that *Flink* undermines the trial court's factual comparability analysis. On the contrary, *Flink* supports it. *Flink's* reasoning should not be discounted simply because it was decided nearly three years after Austin entered his plea. PFR at 16. In *Flink,* sexual gratification was not an "element" asserted in a charging document. *See, Id.* at 729. The same is true in Washington.

In Washington, sexual gratification was (and remains to be) a definitional term clarifying the meaning of sexual contact "such that it excludes inadvertent touching or contact from being a crime." *See, State v. Lorenz*, 152 Wash. 2d 22, 34, 93 P.3d 133, 139 (2004); *See also*, *State v. T.E.H.,* 91 Wn. App. 908, 915, 960 P.2d 441, 445 (1998). Similarly, *Flink* inferred sexual gratification within the meaning of sexual contact to ensure that innocent conduct was not punished. *Flink,* at 733.

Here, Austin was not penalized for innocent or inadvertent conduct, rather, he admitted that he committed sexual abuse

against J.L. and that the sexual contact was intentional[9] and unlawful.[10] CP 128. This admission counters Austin's claim that "nothing suggests" he admitted sexual gratification in the no contest plea. PFR at 17. It also contradicts Austin's argument that the trial court relied on "extrinsic evidence" in concluding Austin's conduct had a sexual motive or purpose. Importantly, the appellate court declined to reach Austin's claim regarding proof of sexual gratification because it properly determined Austin's other Alaska conviction was a "sexually violent offense." Op. at 3. Since that holding effectively renders discussion of this Alaska conviction moot, Austin's arguments here are unworthy of further review by this Court.

Nonetheless, the trial court properly implied Austin admitted to sexual gratification via his no-contest plea to sexual

---

[9] Intentional conduct was included in the Alaska definition of sexual contact.

[10] Sexual Abuse of a Minor was statutorily defined as (a) a person committing the crime of sexual abuse of a minor if, being 16 years of age or older he… (2) engages in sexual contact with a person who is under 13 years of age or aids, induces, causes or encourages a person under 13 years of age to engage in sexual contact with another person. AS 11.41.440 (1981 Version). It did not include the term "unlawful," which Austin admitted. His admission of "unlawful" conduct is consistent with the holding in *Flink*.

abuse of a minor and reasonably inferred the non-marriage element as argued in IV, A, *supra*. Austin's 1981 Alaska conviction for sexual abuse of a minor is comparable to indecent liberties against a child under fourteen. This Court should deny review.

V. CONCLUSION

The Court of Appeals correctly analyzed the plain language of RCW 71.09.02 (17), determining that the language did not require a stricter test for out-of-state convictions than the traditional two-part comparability test.

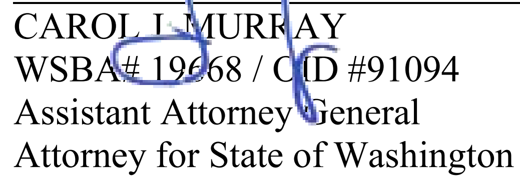
The Court of Appeals correctly affirmed that Alaska and Washington's rape statutes were factually comparable and the trial court properly inferred Austin and the victim were not married based on the marriage laws as existed in 1981.

The Court of Appeals decision is well reasoned, consistent with settled principles of statutory construction, and provides no basis for this Court's review. Review should be denied.

This document contains 4692 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of June, 2023.

ROBERT W. FERGUSON
Attorney General



CAROL L. MURRAY
WSBA# 19668 / OID #91094
Assistant Attorney General
Attorney for State of Washington

FILED
SUPREME COURT
STATE OF WASHINGTON
6/2/2023 11:41 AM
BY ERIN L. LENNON
CLERK

NO. 101956-4

WASHINGTON STATE SUPREME COURT

In re the Detention of Bruce Austin, Petitioner, v STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On June 2, 2023, I sent via electronic mail, per service agreement, a true and correct copy of Answer to Petition for Review and Declaration of Service, addressed as follows:

Jodi Backlund
Backlund & Mistry
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of June, 2023, at Seattle, Washington.

ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

June 02, 2023 - 11:41 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,956-4
Appellate Court Case Title:	In the Matter of the Detention of: Bruce Austin
Superior Court Case Number:	19-2-01509-2

The following documents have been uploaded:

- 1019564_Answer_Reply_20230602114021SC723434_6391.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 003-Answer_PFR.pdf
- 1019564_Cert_of_Service_20230602114021SC723434_5739.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was DecSvc.pdf

A copy of the uploaded files will be sent to:

- backlundmistry1@gmail.com
- backlundmistry@gmail.com

Comments:

Sender Name: Allison Martin - Email: allison.martin@atg.wa.gov
Filing on Behalf of: Carol Jean Murray - Email: cj.murray@atg.wa.gov (Alternate Email: crjsvpef@ATG.WA.GOV)

Address:
800 Fifth Avenue
Suite 2000
Seattle, WA, 98104
Phone: (206) 464-6430

Note: The Filing Id is 20230602114021SC723434

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

June 02, 2023 - 11:41 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,956-4
Appellate Court Case Title:	In the Matter of the Detention of: Bruce Austin
Superior Court Case Number:	19-2-01509-2

The following documents have been uploaded:

- 1019564_Answer_Reply_20230602114021SC723434_6391.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 003-Answer_PFR.pdf
- 1019564_Cert_of_Service_20230602114021SC723434_5739.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was DecSvc.pdf

A copy of the uploaded files will be sent to:

- backlundmistry1@gmail.com
- backlundmistry@gmail.com

Comments:

Sender Name: Allison Martin - Email: allison.martin@atg.wa.gov
Filing on Behalf of: Carol Jean Murray - Email: cj.murray@atg.wa.gov (Alternate Email: crjsvpef@ATG.WA.GOV)

Address:
800 Fifth Avenue
Suite 2000
Seattle, WA, 98104
Phone: (206) 464-6430

Note: The Filing Id is 20230602114021SC723434