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STATE OF WASHINGTON,

Respondent,

v.

DAN STOCKWELL,

Petitioner.

ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 31920-9-II  
Kitsap County Superior Court No. 03-1-01319-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED June 12, 2006, Port Orchard, WA \_\_\_\_\_

**Original: Supreme Court**

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## **I. COUNTERSTATEMENT OF THE ISSUE**

Whether first-degree statutory rape and first-degree rape of a child are comparable offenses under the Persistent Offender Accountability Act where, although rape of a child contains the element of non-marriage, the non-marriage has also been held to be a non-statutory element of statutory rape?

## **II. STATEMENT OF THE CASE**

Dan Stockwell was charged by amended information filed in Kitsap County Superior Court with first-degree child molestation of his five-year-old granddaughter E.N.M., and first-degree child molestation of his granddaughter M.S. while she was six or seven years old. CP 7-8, 14-15. Both charges also contained domestic violence allegations. CP 15. A jury found him guilty as charged. CP 35-36.

The State asked the trial court to sentence Stockwell under the Persistent Offender Accountability Act (POAA). CP 76. The proposed two-strike sentence was based on Stockwell's prior 1986 conviction of first-degree statutory rape under RCW 9A.44.070(1) (1985).

In the prior case, involved Stockwell engaged in oral and anal intercourse with his girlfriend's eight-year old daughter. CP 64-65. He also had an indecent liberties conviction based on a 1985 incident in which he digitally penetrated the labia of the thirteen-old-daughter of a long-time

friend. CP 49.

Stockwell argued that statutory rape was not comparable to first degree child rape under RCW 9A.44.073 (1) because child rape contains an additional element -- that the victim was not married to the perpetrator. The trial court nevertheless found the crimes comparable because the prior judgment and sentence indicated that Stockwell was 35 years old at the time of his conviction and the affidavit of probable cause showed that the victim was the eight-year-old daughter of Stockwell's girlfriend. *State v. Stockwell*, 129 Wn. App. 230, ¶ 4, 118 P.3d 39 (2005). The trial court concluded that these documents were sufficient circumstantial evidence that the victim was not married to Stockwell at the time of the offense, and therefore found that the prior 1986 statutory rape conviction was comparable to first degree child rape. *Stockwell*, 129 Wn. App. at ¶¶ 4-5. The trial court accordingly counted the prior as a strike and sentenced Stockwell to life without the possibility of parole. *Stockwell*, 129 Wn. App. at ¶ 5; CP 84.

On appeal, Stockwell renewed his claim that the offenses were not comparable. The Court of Appeals noted that the issue of comparability of could be either legal or factual. *Stockwell*, 129 Wn. App. at ¶¶ 9-10.

The court concluded, relying on its decision in *State v. Bailey*, 52 Wn. App. 42, 47, 757 P.2d 541 (1988), *aff'd*, 114 Wn.2d 340, 787 P.2d 1378

(1990), which held that on-marriage was a non-statutory element of statutory rape, that the two offenses were legally comparable. *Stockwell*, 129 Wn. App. at ¶¶ 12-13. It therefore did not address the factual comparability analysis. *Stockwell*, 129 Wn. App. at ¶ 14.

Stockwell filed a petition for review. This Court granted review “only on the issue of whether the trial court erred in sentencing Petitioner to life as a persistent offender, either because a jury did not decide whether his prior conviction of first degree statutory rape was comparable to the present crime of first degree rape of a child, or because as a matter of law the crimes are not comparable.” Order of May 3, 2006.

### III. ARGUMENT

#### A. THE COURT OF APPEALS PROPERLY DETERMINED THAT STATUTORY RAPE CONTAINS ALL THE ELEMENTS OF, AND IS THUS COMPARABLE TO, RAPE OF A CHILD FOR PURPOSES OF THE TWO-STRIKE LAW.

Stockwell claims that the trial court erred in imposing, and the Court of Appeals erred in affirming, his two-strike sentence. He argues that his prior conviction for first-degree statutory rape is not comparable to the present-day offense of first-degree rape of a child because the former lacked the non-marriage element found in the latter. The Court of Appeals properly determined that these offenses are comparable because non-marriage was a

non-statutory element of first-degree statutory rape.

Well before the present case arose, the Court of Appeals had determined that non-marriage is a non-statutory element of first-degree statutory rape:

We believe that the analysis in *Hodgson* leads to absurd results. First, the Legislature cannot possibly have contemplated statutory rape in the first degree being perpetrated on one's spouse. In the unlikely event that a child of 10 years 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 non-marriage 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 RCW 9A.44.070 is to consider non-marriage an implicit element of the crime.

*State v. Bailey*, 52 Wn. App. 42, 46, 757 P.2d 541 (1988), *aff'd*, 114 Wn.2d 340, 787 P.2d 1378 (1990). Division I of the Court of Appeals did conclude to the contrary. *State v. Hodgson*, 44 Wn. App. 592, 599, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part*, 108 Wn.2d 662, 740 P.2d 848 (1987).<sup>1</sup>

*Bailey's* reasoning is sound. As noted although it may be unlikely, the superior courts are empowered to authorize persons under 17 years of age to marry upon a showing of necessity. RCW 26.04.010(2). This provision

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<sup>1</sup> Stockwell pled guilty to statutory rape the day after the *Hodgson* decision was filed.

has no further age limit. Thus it would have been possible, absent the implied nonmarriage element, for a person to be charged and convicted of statutory rape for having sexual relations with his or her lawful spouse. This would have been an absurd result.

This situation is analogous to that of the communicating with a minor statute, RCW 9.68A.090. In *State v. Luther*, 65 Wn. App. 424, 427-428, 830 P.2d 674 (1992), cited with approval in *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), the defendant was charged with communicating with a minor for immoral purposes. The charges were based upon an offer to have consensual sex with individuals who, although under 18 year of age, were above the legal age of consent. The court concluded that the statute had to be impliedly limited to situations where the proposed sexual activities were themselves illegal:

Although it is rational to prohibit certain communications designed to further conduct that will be illegal if performed, or that will breach the peace, there can be no rational reason for prohibiting communications about peaceful, consensual conduct that will itself be legal if performed.

*Luther*, 65 Wn. App at 427-28.

*Hodgson* fails to seriously address this issue. Instead, while conceding, as it had to, that an eleven-year-old could lawfully be married, it concluded the Legislature nevertheless intended to criminalize sex within the bounds of such a lawful marriage. *Hodgson*, 44 Wn. App. at 599-600. This

is an absurd result.

On review, this Court declined to resolve the conflict between *Bailey* and *Hodgson*, affirming instead on the basis that that the alleged error had not been preserved for appeal. *Bailey*, 114 Wn.2d at 346.<sup>2</sup> Notably, however, when addressing the defendant’s contention that the claimed error was of constitutional magnitude because he was not given notice of the non-marriage element, the Court’s language suggests that it believed non-marriage *was* implied element: “Even if we were to concede that ‘nonmarriage’ is not an element of the offense charged (first degree statutory rape), the defendant cannot be said to have been prejudiced by the proof of this additional element.” *Bailey*, 114 Wn.2d at 349.

It is true that *Bailey* was decided after Stockwell pled guilty to statutory rape. It is a well settled principle of law, however, that when the appellate courts interpret a statute, the interpretation applies *ab initio*. *In re Hinton*, 152 Wash.2d 853, 859, 100 P.3d 801 (2004). *Bailey* construed the meaning of the first-degree statutory rape statute. That construction should therefore apply to Stockwell’s prior conviction. Since first-degree statutory rape and first-degree rape of a child are legally comparable, the prior offense was properly counted as a strike and Stockwell was properly sentenced under

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<sup>2</sup> The issue on review in this Court in *Hodgson* was solely the applicability of an amended statute of limitation. *Hodgson*, 108 Wn.2d at 666.

the POAA. The judgments of both the trial court and the Court of Appeals should be affirmed.

**B. ASSUMING, ARGUENDO, THAT THE OFFENSES WERE NOT LEGALLY COMPARABLE, THEY WOULD NOT BE FACTUALLY COMPARABLE.**

As discussed above, the Court of Appeals correctly determined that the two offenses were legally comparable. Based on this Court's holding in *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005),<sup>3</sup> the State concludes that factual comparability would not be appropriate in the present case.

In *Lavery*, it appears that this Court has largely limited the comparability analysis to whether offenses are legally comparable:

The State asks us to ... examine the underlying facts ... to determine if his 1991 offense was factually comparable to Washington's second degree robbery. Where the foreign statute is broader than Washington's, that examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense. *See, e.g., State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004).

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be

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<sup>3</sup> *Lavery* issued the day before oral argument was held in the Court of Appeals. While discussed at the argument, it was not addressed in the briefing.

comparable.

As in *Ortega*, Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution. Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction.

*Lavery*, 154 Wn.2d at ¶¶ 15-17.

It thus appears that the trial court should not properly have made a factual determination that the offenses were comparable. However, an appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). Because as discussed above, the Court of Appeals correctly determined that the offenses were legally comparable, Stockwell's POAA sentence should be affirmed. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

#### IV. CONCLUSION

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

DATED June 12, 2006.

Respectfully submitted,

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