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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 82744-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COA No. 36804-8-II

STATE OF WASHINGTON,
Petitioner,

v.

MATTHEW J. HIRSCHFELDER,
Respondent.

Answer to Petition for Review
RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
A. IDENTITY OF RESPONDENT	1
B. DECISION BELOW	1
C. ISSUE PRESENTED FOR REVIEW	1
D. STATEMENT OF CASE	1
E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED	3
1. The Court of Appeals decision is not in direct conflict with the decision of Division III in <i>State v. Clinkenbeard</i>	4
2. The Court of Appeals decision was not based on questions arising under the State or Federal Constitution	5
3. This case does not present an issue of broad public interest that should be decided by the Supreme Court	11
F. CONCLUSION	13

TABLE OF AUTHORITIES

TABLE OF CASES

<u>Case Citation</u>	<u>Page(s)</u>
<i>Colautti v. Franklin</i> , 439 U.S. 379, 392, 99 S. Ct. 675 (1979).....	7
<i>Davis v. Department Licensing</i> , 137 Wn.2d 957, 968, 977 P.2d 554 (1999).....	7
<i>Personal Restraint of Hopkins</i> , 137 Wn.2d 897, 976 P.2d 616 (1999).....	6
<i>State v. Clinkenbeard</i> , 130 Wn. App 552, 123 P.3d 872 (Div. III 2005)	3, 5
<i>State v. Hirschfelder</i> , --- Wn. App.---, --- P.3d--- 2009, 2009 WL 73254 (Div. II 2009).....	5
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	2
<i>State v. Scranton</i> , 130 Wn. App 760, 764-65, 124 P.3d 660 (Div. II 2005).....	6
<i>Wheeler v. Rocky Mountain Fire & Casualty</i> , 124 Wn. App. 868, 873, 103 P.3d 240 (Div. II 2004).....	8, 10
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).....	7

CONSTITUTIONAL PROVISIONS

Const. art. 1, § 12.....	4, 5
U.S. Const. amend. XIV.....	4, 5

WASHINGTON STATUTES

RCW 9A.44.....	7
RCW 9A.44.093.....	1, 2, 3, 4, 6, 7, 9, 10, 12
RCW 9A.44.096.....	9
RCW 9A.44.010.....	7
RCW 9.68A.011.....	8
RCW 9.68A.040.....	9
RCW 9.68A.050.....	9

WASHINGTON STATUTES (continued)

RCW 9.68A.060.....	9
RCW 9.68A.070.....	9
RCW 9.68A.080.....	9
RCW 9.68A.090.....	9
RCW 9.68A.100.....	9
RCW 9.68A.140.....	8
RCW 9.68A.150.....	9
RCW 26.09.191.....	12
RCW 26.28.....	6
RCW 26.28.010.....	8,9
RCW 26.28.020.....	8
RCW 26.28.010-020.....	10
RCW 26.50.020.....	8
RCW 66.44.270.....	10
RCW 74.13.....	8,10
RCW 74.13.020.....	8

REGULATIONS AND RULES

RAP 13.4(b).....	3, 4, 5, 12
------------------	-------------

OTHER AUTHORITIES

<i>Webster's Third New International Dictionary</i> 1439 (1976).....	8
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A. IDENTITY OF RESPONDENT

Matthew J. Hirschfelder (“Hirschfelder”), prevailing party in his petition for discretionary review at the Court of Appeals Division II, asks this court deny the State’s Motion for Review of the Court of Appeals decision terminating review.

B. DECISION BELOW

Hirschfelder prevailed in the Court of Appeals’ discretionary review of the Order Denying Motion to Dismiss entered in Grays Harbor County Superior Court, Cause Number 07-1-00294-7, on September 4, 2007.

C. ISSUES PRESENTED FOR REVIEW

Whether the statute criminalizing sexual misconduct with a minor also criminalized sexual relations between a school district employee and a student over the age of 18. RCW 9A.44.093(1)(b).

D. STATEMENT OF THE CASE

The State of Washington filed a Criminal Complaint against Hirschfelder alleging Sexual Misconduct With a Minor In the First Degree under RCW 9A.44.093(1)(b) on April 19, 2007. A corresponding Information was filed on May 18, 2007. The charging documents allege

that Hirschfelder was a school employee and had sexual intercourse with a student, A.N.T., and was more than 60 months older than A.N.T. and not married to her. It is undisputed that at the time the State alleges sexual relations between Hirschfelder and A.N.T, A.N.T. was over 18 years of age.

On July 13, 2007, Hirschfelder filed a Motion to Dismiss Pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). On August 1, 2007, Hirschfelder filed a Motion to Declare RCW 9A.44.093(1)(b) Unconstitutional and To Dismiss. In these motions, Hirschfelder argued that RCW 9A.44.093(1)(b) either: (1) did not criminalize sexual relations between a school employee and an adult student, or (2) was unconstitutionally vague.

On September 4, 2007, the Honorable Judge David Foscue heard oral argument on Hirschfelder's motions. Judge Foscue denied Hirschfelder's motions, but certified "that this order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation."

After accepting discretionary review, the Court of Appeals

Division II reversed the trial court's denial of the *Knapstad* motion and remanded the case for dismissal, holding that RCW 9A.44.093(1)(b) is ambiguous and that Legislative History demonstrates that the statute was intended to apply only to 16 and 17 year-old students. Having decided the case on these grounds, the court did not reach the constitutional issues raised by Hirschfelder and amicus Washington Association of Criminal Defense Lawyers.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The respondent urges the court to reject the state's three bases for accepting review. The state's argument in favor of review under RAP 13.4(b)(2) should be rejected because the Court of Appeals decision does not directly conflict with the Division III case of *State v. Clinkenbeard*, 130 Wn. App 552, 123 P.3d 872 (Div. III 2005), since the *Clinkenbeard* court addressed only the privacy constitutional issues and did so only in dicta, and, in any event, was not asked to determine the meaning of the statute, which was the ground for the decision in this case. The state's argument that the court should accept review under RAP 13.4(b)(3) should also be rejected because the case was not decided on constitutional

grounds.¹

Finally, the state's argument in favor of review under RAP 13.4(b)(4) should be rejected because while the underlying subject matter and policy may present an issue of substantial public interest, the grounds on which the case was decided do not present such issues.

1. THE COURT OF APPEALS DECISION IS NOT IN DIRECT CONFLICT WITH THE DECISION OF DIVISION III IN *STATE V. CLINKENBEARD*.

While the *Clinkenbeard* court conducted an extensive analysis of the constitutionality of RCW 9A.44.093(1)(b), it did so under the 14th Amendment to the US Constitution and Article 1, Section 12 of the Washington Constitution relating to rights of privacy and rights of "intimate association." While these issues were raised by amicus Washington Association of Criminal Defense Lawyers in the instant case, these issues were not addressed by the Court of Appeals. Moreover, the *Clinkenbeard* court addressed the meaning of the statute itself in a single sentence:

By its terms, this statute can be applied to criminally prosecute a public school employee who has sexual intercourse with a

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Hirschfelder concedes, however, that if the court were to accept review on other grounds, that the review should include the constitutional challenges raised by Hirschfelder and amicus WACDL.

student who is legally an adult (over the age of 18) and does not require the school employee to be in a position of authority or supervision over the students.

Clinkenbeard, at 560.

The court in that case was not asked to assess the meaning of the statute and did not in any manner delve into the legislative history or the text and meaning of the statute in the detailed and exhaustive way in which the Court of Appeals Division II did in this case.

Finally, while the *Clinkenbeard* court addressed the constitutionality of the statute under the 14th Amendment to the U.S. Constitution and Article 1, Section 12 of the State Constitution, the Court of Appeals in this case recognized that the constitutional analysis in *Clinkenbeard* was dicta in light of the reversal on the grounds of insufficiency of the evidence. *State v. Hirschfelder*, --- Wn. App. ---, --- P.3d ---, 2009 WL 73254, n.19 (Div. II 2009). Consequently, the decision of the Court of Appeals is not in conflict with *Clinkenbeard*.

2. THE COURT OF APPEALS DECISION WAS NOT BASED ON QUESTIONS ARISING UNDER THE STATE OR FEDERAL CONSTITUTION.

The state's argument for review under RAP 13.4(b)(3) requires an assumption that the state will prevail on a review of the Court of Appeals

decision on statutory grounds. While Hirschfelder concedes that should the court accept review, it should consider the constitutional issues raised but not reached at the Court of Appeals, the reaching of these constitutional issues would require both that this court reverse the extremely thoughtful textual and legislative history analysis by the Court of Appeals *and* that this court decide that rule of lenity does not apply.

Even if this court were to reject the Court of Appeals conclusion that the statute does not apply and was not intended to apply to sexual contact between school employees and students over the age of 18, Hirschfelder submits that the ambiguity in the statute would absolutely require that the rule of lenity be applied and that the case against him be dismissed. *State v. Scranton*, 130 Wn. App 760, 764-65, 124 P.3d 660 (Div. II 2005). Under the rule of lenity, if a criminal statute is ambiguous and the legislative intent is insufficient to clarify it, the court must resolve the ambiguity in favor of the accused. *Personal Restraint of Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999). In the case of RCW 9A.44.093(1)(b), the statute is ambiguous at best. The Legislature, under the terms of RCW 26.28, could have specifically defined “minor” differently for purposes of this statute but did not; and its use of the term “with a minor” must be

given some effect if possible. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979); *Davis v. Department of Licensing*, 137 Wn.2d 957, 968, 977 P.2d 554 (1999); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“statutes must be interpreted and construed so that all language is given effect, with no portion rendered meaningless or superfluous”).

The Court of Appeals decision was based on both a textual analysis of the statute as well as several pieces of legislative history and historical interpretation demonstrating that RCW 9A.44.093 was not understood to criminalize sexual contact between a school employee and an adult student — neither by the Legislature which passed it, the Governor who signed it, nor the Superintendent of Public Instruction who trains school employees about the consequences of sexual misconduct with students.

Implicit in the sexual misconduct statute is the requirement that the victim be a minor, a term which is not specifically defined in the criminal statute.² While subsection (1)(a), the original enacted version of the statute, contains the language defining the upper end of the victim age range, neither (b), enacted in 2001, nor (c), added in 2005, contain such

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The definitions section of RCW 9A.44 was amended in 2001, the year that (1)(b) was added and again in 2005, the year that (1)(c) was added, but no specific alternate definition of “minor” was adopted. RCW 9A.44.010; Laws 2001, ch. 251 sec. 28; Laws 2005, ch. 262, sec. 1.

language. The word *minor* means “not having reached the age of majority.” *Webster’s Third New International Dictionary* 1439 (1976), adopted in *Wheeler v. Rocky Mountain Fire & Casualty*, 124 Wn. App. 868, 873, 103 P.3d 240 (Div. II 2004). While the Legislature in RCW 26.28.010 clearly left open the potential to legally define “minor” differently for some purposes, it explicitly limits alternate definitions to where it is *specifically provided by law*.³ RCW 26.28.010. Both subsection (a) by its own terms and subsection (c) implicitly by the provisions of RCW 74.13⁴ (which governs foster care) limit the offense of Sexual Misconduct With a Minor to victims less than 18 years of age.

Moreover, under the chapter heading “Sexual Exploitation of Children,” the Legislature twice defines minor as “any person under eighteen years of age.” RCW 9.68A.011(4); RCW 9.68A.140. Consequently, this definition of minor applies to a wide variety of crimes

³ Under the Chapter “Age of Majority,” RCW 26.28.010 provides: “Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.” Further, also under the Chapter “Age of Majority,” RCW 26.28.020 provides: “Notwithstanding any other provision of law and except as provided under RCW 26.50.020, all persons shall be deemed and taken to be of full age for the specific purposes hereafter enumerated at the age of eighteen years: ... (5) To make decisions in regard to their own body and the body of their lawful issue....”

⁴ RCW 74.13.020(5) provides: “As used in this chapter, child means a person less than eighteen years of age.”

involving sex-related offenses and minors.⁵ Because there is no specific legislative provision to the contrary, the word “minor” as used in the offense “Sexual Misconduct With a Minor” in RCW 9A.44.093(1)(b), under which Mr. Hirschfelder is charged, can only mean “a person less than eighteen years of age.” It is simply not *otherwise specifically provided by law*. RCW 26.28.010.

This textual analysis is consistent with legislators’, the Governor’s, House and Senate legislative committees’, and the media’s interpretation of the law. The Court of Appeals cited extensive additional supporting evidence of legislative history and historical interpretation demonstrating that the intent of the legislation was to close a “loophole” regarding the requirement of a supervisory position, not to extend the crime to adult students.

Contrary to the state’s assertion in its brief in support of review,

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These include: “Sexual Exploitation of a Minor” (a Class B Felony under RCW 9.68A.040), “Dealing in depictions of minor engaged in sexually explicit conduct” (a Class C felony under RCW 9.68A.050), “Sending or bringing into state depictions of minor engaged in sexually explicit conduct” (Class C Felony under RCW 9.68A.060), “Possession of depictions of minor engaged in sexually explicit conduct” (Class C felony under RCW 9.68A.070), Failure to Report Depictions of Minor Engaged in Sexually Explicit Conduct” (Gross Misdemeanor under RCW 9.68A.080), “Communication with a minor for immoral purposes” (Gross Misdemeanor/Class C Felony under RCW 9.68A.090(1) and (2), Patronizing a Juvenile Prostitute (Class C Felony under 9.68A.100), “Allowing minor on premises of live erotic performance (a gross misdemeanor under RCW 9.68A.150), and Sexual Misconduct with a Minor 1st and 2nd Degree (Class C Felony/Gross Misdemeanor under RCW 9A.44.093(1)(a) and (c) and RCW 9A.44.096(1)(a) and (c)).

“Sexual Misconduct With a Minor” is not merely the title of the section of the code but the name of the criminal offense.⁶ Under subsection (1)(a) of RCW 9A.44.093, the victim must be under 18 by the explicit terms of that subsection, which was originally the entirety of RCW 9A.44.093. Under the 2005 amendment that added section (1)(c), Laws of 2005 ch. 262 sec. 3, the victim must be under the age of 18 by definition of the term “foster child” in RCW 74.13. See *Wheeler v. Rocky Mountain Fire & Casualty*, 124 Wn. App. 868, 873, 103 P.3d 240 (Div. II 2004). Hirschfelder contends that the word “minor” in the phrase “sexual misconduct with a minor” has the same effect on subsection (1)(b) in this case: that even though the statute is silent on the upper age limit of the victim, that the law defines the upper age limit as 18 because of the use of the word “minor,” which is defined *for all purposes* in RCW 26.28.010-020, except as otherwise *specifically* provided by law.

If RCW 9A.44.093 were to be interpreted to permit the prosecution of a school employee for a relationship with an adult student, the phrase “with a minor” becomes at least inoperative, if not contradictory in reference to (1)(b). Given that both (1)(a) and (1)(c) otherwise limit their

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Compare RCW 66.44.270, and related statutes regulating alcoholic beverages, which uses the word minor in the section heading but refers continuously to “persons under the age of twenty-one years” in the text of the statute itself.

applications to victims under the age of 18, the “with a minor” language would become utterly useless at best. The offense would be more accurately titled simply “Sexual Misconduct In the First Degree” since, of its three possible applications, only two would be limited to minor victims.

3. THIS CASE DOES NOT PRESENT AN ISSUE OF BROAD PUBLIC INTEREST THAT SHOULD BE DECIDED BY THE SUPREME COURT.

Because this case was decided on grounds of statutory interpretation and legislative intent, it does not present a question of such broad public interest as to warrant review by this Court. While the underlying policy issues may present important questions for the Legislature to address, the Court of Appeals decision was based on a soundly reasoned conclusion that the Legislature did not *intend* to criminalize sexual contact between school district employees and adult students.⁷ While the constitutional issues surrounding an attempt to criminalize sexual relations between consenting adults would certainly present questions of broad public interest for the Supreme Court to decide, those issues are not ripe for review until the Legislature decides to criminalize such conduct. The state’s argument for review under

⁷ At this writing, the State Senate has passed and the State House of Representatives is considering a bill purporting to criminalize such conduct, which, if passed, could potentially limit the application of a review by this court to Hirschfelder himself.

RAP 13.4(b)(4) must fail for this reason.

The state's argument on this issue is persuasive at first glance, but is nonetheless an argument that should be made before a Legislative body. On closer scrutiny, though, the state's policy argument leads to absurd results that ironically could hurt actual children even as it attempts to extend the protection normally reserved for children to young adults.

If the statute were to be read as the state advocates, for example, a school employee who "causes" a 20-year old student to have sexual intercourse with a 16 year-old student would be guilty of a sex offense against the 20 year-old but not the 16 year-old. If the school employee "caused" an 18 year-old (or a 16 year-old) to have sexual intercourse with a 54 year-old, the school employee would be guilty of nothing.

More importantly perhaps, because of the consequences of conviction of an offense under RCW 9A.44.093, the 26 year-old school janitor who has sex with a 20 year-old high school senior must register as a sex offender, resulting in a dilution of the sex offender registry with people who do not present real risk to children. Further, because of the operation of RCW 26.09.191, which mandates restrictions in residential schedules of parents convicted of specified sex offenses, the relationship

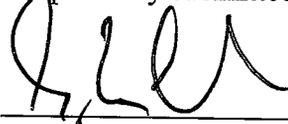
of that 26 year-old janitor to her own children must be severely restricted by law.

F. CONCLUSION

None of the bases argued by the state warrant review by the Supreme Court. Hirschfelder requests that the Court reject the petition for review for the foregoing reasons.

DATED this 12th day of March, 2009.

Respectfully submitted,



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