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STATE OF WASHINGTON

No. 36804-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HIRSCHFELDER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AMICUS CURIAE BRIEF

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I. INTEREST OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Washington Association of Criminal Defense Lawyers (hereinafter "WACDL") is a non-profit corporation of approximately 1,100 lawyers, professors, law students and other individuals which strives to improve the quality and administration of justice and to protect the individual rights guaranteed by the Federal and Washington State Constitutions.

II. STATEMENT OF THE CASE

Matthew Hirschfelder has been charged with sexual misconduct with a minor in the first degree. Mr. Hirschfelder, a teacher, is charged with having sexual intercourse with an 18-year-old student a few days before graduation.

The relevant statute, RCW 9A.44.093(1)(b) states in pertinent part:

1) A person is guilty of sexual misconduct with a minor in the first degree when

...

(b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student;

(2) Sexual misconduct with a minor in the first degree is a class C felony.

III. ARGUMENT

A. RCW 9A.44.093(1)(b) Violates the Right to Privacy Secured by Article I, section 7 as Applied to the Facts of this Case, Where the “Victim” Attained the Age of Majority, Consented to the Sexual Intercourse, and the Statute Excused the State from Proving Coercion or Absence of Consent.

Article 1, Section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

It is well established that Article I, section 7 provides substantially greater protection than the Fourth Amendment, its federal counterpart. *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (hereinafter “*York*”); *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). “[T]he unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. Amend. 4 provides to persons generally.” *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

When determining whether Article I, section 7 provides greater protection in a particular context, courts focus on the unique characteristics of this constitutional provision and its prior interpretations by Washington Courts. *York*, 163 Wn.2d at 306; *State v. Walker*, 157

Wn.2d 307, 317, 138 P.3d 113 (2006). Courts evaluate the constitutional text, historical treatment of the interest at stake, relevant case law and statutes, as well as the current implications of recognizing or not recognizing an interest. *York, supra*, at 297, 307; *Id.*

1. **An Independent State Constitutional Analysis Compels the Conclusion that Article I, Section 7 Protects the Right of Consenting Adults in this State to Privately Engage in Consensual Sexual Intercourse Without Government Intrusion.**

Although this Court need not undertake an independent analysis of Article I, section 7 in order to assess whether RCW 9A.44.093(1)(b) violates our state constitution's expansive privacy protections,¹ in an excess of caution, a *Gunwall* analysis is provided here. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

In *Gunwall*, the court set forth six non-exclusive criteria for determining whether, in a given situation, the Washington State Constitution should be construed to extend broader rights to its citizens than the United States Constitution. These are: (1) the textual language; (2) comparisons of the text; (3) constitutional history; (4) pre-existing state law; (5) structural

¹ The Supreme Court has held that because it is settled that Article I, section 7 is more protective than its federal counterpart, no independent constitutional analysis under the six factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), is necessary. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

differences; and (6) matters of particular state or local concern. 106 Wn.2d at 58.

a) **Gunwall Factors One, Two and Three.**

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The provision was adopted in lieu of a provision identical to the Fourth Amendment. *Journal of the Washington State Constitutional Convention, 1889*, at 497 (B. Rosenow, ed. 1962). There is no comparable federal constitutional provision to Article I, section 7.

Instead, the federal constitution’s protection of individual privacy rights is implied from the First, Fourth, Fifth, Ninth and Fourteenth Amendments. *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (2001); *but see In Re Custody of RRB*, 108 Wn. App. 602, 618-19, 31 P.3d 1212 (2001) (noting that because Article I, section 7 deals primarily with search and seizure, a *Gunwall* analysis of this provision in another context is “problematic”). The Washington Supreme Court, however, considering the privacy rights emanating from the specific guaranties of the Bill of Rights and the First, Fourth, Fifth, Ninth and Fourteenth Amendments has held an analogous right to privacy is contained in Article I, section 7. *Farmer*, 116 Wn.2d at 429. And certainly the text of Article I, section 7 weighs in favor of broad state constitutional protection of Hirschfelder’s

right to privately engage in sexual intercourse with another consenting adult without suffering criminal penalties for the exercise of that right.

Likewise, textual differences provide an explicit guarantee that Hirschfelder's privacy rights are secure from government intrusion without authority of law. *Cf.*, *Farmer*, 116 Wn.2d at 429 (noting statute authorizing nonconsensual HIV testing as condition of criminal sentence set forth "legislatively recognized exceptions to an *already existent* constitutional right of privacy." (emphasis added)); *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 809, 10 P.3d 452 (2000) (noting Article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations" and places greater emphasis on privacy than does the Fourth Amendment, *quoting State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999)).

Although it may be argued that the third factor – the constitutional and common law history of the privacy interest – weighs neither for nor against a broader privacy protection than under federal law, as the Framers adopted Article I, section 7 in lieu of adopting a provision identical to the Fourth Amendment, *State v. Ringer*, 100 Wn.2d 686, 690, 670 P.2d 646 (1983), the recent decisions of the Washington Supreme Court suggest otherwise. *See State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007) (random and suspicionless search of motel guest registry, which might

reveal intimate details of one's life, is a private affair under Article I, section 7 because it reveals sensitive, discreet and private information about the motel's guests); *York, supra*, at 309 (a student athlete's bodily functions is a private affair to which Article I, section 7 "offer[s] heightened protection," which requires "reasonable grounds" to believe the search is necessary); *Robinson v. Seattle*, 102 Wn. App. at 809 (tax payer's lawsuit challenging city's urinalysis drug testing program for prospective employees significantly intruded upon citizen's privacy interest and were invalid under Article I, section 7, except as it narrowly applied to those employees whose duties would implicate public safety)

b) Gunwall Factor Four.

Preexisting state law supports a broader construction for the right to privacy, as considered in the instant context, than under the federal constitutional provisions. Washington law does not restrict sex to marriage. *Andersen v. King County*, 158 Wn.2d 1, 36, 138 P.3d 963 (2006). And prior to the enactment of RCW 9A.44.093(1)(b), consensual sex between a teacher and a student above the age of consent – even if that student was a minor – was not a crime in Washington. See "New State Law Really Makes Sex Between Teachers, Teens a Crime" Seattle Post-

Intelligencer (July 27, 2001).² In conducting a *Gunwall* analysis, the court may consider all statutory and case law dealing with the issue, and not just the constitutional provision. *State v. Smith*, 117 Wn.2d 263, 286, 814 P.2d 652 (1991) (Utter, J., concurring). The fact that historically, the Legislature has chosen not to regulate consensual intimate affairs between two individuals above the age of consent in this context supports a broader protection of this type of “private affair” under our state constitution.

c) Gunwall Factors Five and Six.

Because “the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power,” *Gunwall* factor five will always support an independent state constitutional analysis. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Likewise, the privacy rights of Washington citizens are a matter of state or local concern, and there is no need for national uniformity on the issue.

Sex is a constitutionally protected liberty interest. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, the government may make sex a crime only where it has a constitutionally sufficient justification for doing so. In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the court held that a statute making it a crime for two persons of the same sex to engage in

² Available at http://seattlepi.nwsourc.com/local/32940_teacherbill27.shtml.

sexual intercourse was unconstitutional, as applied to adult males who engaged in sex in the privacy of their own home:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. (Internal citations omitted.)

Id., 593 U.S. at 578. The government does not have a constitutionally sufficient justification for making private sex a crime. *Id.*

This Court should conclude a prosecution for a teacher's private act of engaging in sexual intercourse with another consenting adult implicates the broader protections of Article I, section 7 under an independent state constitutional analysis.

Having established that an independent state constitutional analysis is appropriate, this Court first must make a determination whether the state action constitutes a disturbance of one's private affairs. *York*, at 307. Second, if a privacy interest has been disturbed, the court analyzes whether authority of law justifies the intrusion. *Id.* When inquiring about private affairs, the court looks to "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from

governmental trespass absent a warrant.” *Young*, 123 Wn.2d at 181 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). The Washington State Supreme Court has

recognized two types of privacy: the right to nondisclosure of intimate personal information or confidentiality, and the right to autonomous decision making. The former may be compromised when the State has a rational basis for doing so, while the latter may only be infringed when the State acts with a narrowly tailored compelling state interest.

York, 163 Wn.2d 297, 314, quoting *Robinson v. City of Seattle*, 102 Wn.App. at 813; *In re Juveniles A,B,C,D,E*, 121 Wn.2d 80, 96-97, 847 P.2d 455 (1993).

2. **The Statute is Unconstitutional as Applied to the Facts of this Case, Where the “Victim” Attained the Age of Majority and Consented to the Sexual Intercourse.**

The Washington State Supreme Court has “offer[ed] heightened protection for bodily functions compared to the federal courts.” *York*, 163 Wn.2d at 307. As the Court explained:

A student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions. The urinalysis test is by itself relatively unobtrusive. Nevertheless, a student is still required to provide his or her bodily fluids. Even if done in an enclosed stall, this is a significant intrusion on a student’s fundamental right of privacy.

Id. at 308.

Likewise, in *State v. Jorden, supra*, the Court recognized that a random and suspicionless search of a hotel guest registry might “reveal intimate details of one’s life”:

an individual’s very presence in a motel or hotel may in itself be a sensitive piece of information . . . as the amicus American Civil Liberties Union (ACLU) points out, couples engaging in extramarital affairs may not wish to share their presence at the hotel with others, just as a closeted same-sex couple forced to meet at the motel also would not.”

Id. at 129.

The Washington Supreme Court has extended protection under Article 1, section 7 to sexual behavior that has previously been considered illegal, immoral or both. Importantly, where the protections relate to consenting adults, any prohibitions criminalizing such conduct must be held to be unconstitutional under the Washington State Constitution.

The alleged victim in this case was 18 years old at the time of the incident. RCW 26.28.010 “Age of Majority” provides:

Except as otherwise specifically provided by law, all persons shall be deemed and taken to be a full age for all purposes at the age of 18 years.³

RCW 26.28.020 “Age of Majority for Enumerated Specific Purposes” provides that notwithstanding any other provision of law, all persons at the

³ An example of an age being set beyond the age of majority is that for which one can purchase alcoholic beverages. The legislature has specifically set the age of purchasing alcohol at 21 years old. RCW 66.44.290.

age of 18 shall be deemed to have the right “to make decisions in regard to their own body. . . .”

While it can be conceded that sexual relations between a school employee and an 18 year old student should be discouraged, nevertheless this cannot be accomplished by a penal criminal law statute since this implicates the private affairs of two consenting adults in violation of Article 1, section 7.

3. **Because the Statute Does Not Require the State to Prove Illegal Coercion or Absence of Consent to Obtain a Conviction, and Permits the State to Regulate the Private Sexual Affairs of Two Consenting Adults, RCW 9A.44.093(1)(b) is Unconstitutional.**

This Court should also find the statute unconstitutional as applied because the State need not prove either illegal coercion or the absence of consent to obtain a felony conviction. Importantly, this is not a case where the State alleged that the Defendant was “in a significant relationship to the victim and abus[ed] a supervisory position within that relationship in order to engage in . . . sexual intercourse with the victim.” *See* RCW 9A.44.093(1)(a). Instead, under RCW 9A.44.093(1)(b), as charged in this case, the only elements that the State must prove are that the Defendant was a school employee who had sexual intercourse with a registered student of the school who was at least 16 years old and the was

Defendant 60 months older. Under these circumstances, there can be no contention that coercion was inherent merely because the Defendant was a school employee. Just as the State would not be allowed to criminalize the private sexual affairs of a municipal transit bus driver who might transport an 18 year old student to school, the same should be true of a “school employee” who engages in consensual intercourse with a student who reaches the age of majority.

Certainly, there are some situations that are so inherently coercive that the State can criminalize sexual contact because of the very nature of the relationship. An example is found in RCW 9A.44.160 “Custodial Sexual Misconduct in the First Degree” where any sexual conduct between a correctional agency employee and a person who is detained, and therefore deprived of their liberty, can never be consensual. However, this is not true in the context of an adult student at a school having sexual contact with a school employee.

This Court should conclude that under Article I, section 7, a prosecution of a school employee who engages in sexual intercourse with a registered student who is legally an adult is unconstitutional.

B. State v. Clinkenbeard and Other States’ Decisions

In *State v. Clinkenbeard*, 130 Wn. App. 552, 123 P.3d 872 (2005), Division Three of this Court held that there was insufficient evidence to

convict a school bus driver of having sexual intercourse with an 18 year old student in violation of RCW 9A.44.093(1)(b). The court reversed defendant's conviction with prejudice, holding that since there was insufficient evidence, he could not be retried. *Id.* at 572.

Besides the sufficiency of the evidence challenge, there were also due process and equal protection challenges to the constitutionality of RCW 9A.44.093(1)(b). Although the *Clinkenbeard* decision examined the interplay of the facial and as applied constitutionality of RCW 9A.44.093(1)(b), the case is not in any way precedential. First and foremost, any discussion in *Clinkenbeard* of the constitutionality of RCW 9A.44.093(1)(b) was strictly *dicta*, since it was not necessary to reach the constitutional issues because the case was decided on the independent ground of sufficiency of the evidence. *State v. Potter*, 68 Wn.App. 134, 150 n.7 (1992) ("statements in a case that "are unnecessary to decide the case constitute *orbiter dictum*, and need not be followed"). Moreover, a reading of *Clinkenbeard* demonstrates either that the defendant did not raise the state constitutional issue under Article 1, section 7, or, the court did not consider it. With that in mind, *Clinkenbeard* is in no way dispositive of the constitutional challenge brought here.

While some other states have rejected constitutional challenges to similar statutes, these courts were relying upon the United States

Constitution, as opposed to a state constitution with similar provisions to Washington's Article I, section 7. For example in *Ex Parte Morales*, 212 S.W.3d 483 (Ct. App. Texas, 2006), the court upheld a similar statute prohibiting school employees from engaging in sexual contact with students. While a reading of *Morales* indicates that the challenge was pursuant to the United States Constitution "and their Texas counterparts," *id.* at 489, Texas, unlike Washington, does not provide for the right of privacy in its constitution. *City of Sherman v. Henry*, 928 S.W.2d 464 (S.Ct. Texas 1996).

Likewise, in *State v. McKenzie-Adams*, 915 A.2d 822 (S.Ct. Conn. 2007), the Court upheld a statute similar to Washington's where a teacher was charged with having sexual intercourse with two students. However, that decision is not persuasive here, since, unlike the instant case, the students were under the age of 18. Unlike Washington, the Connecticut court determined there was no broader sexual right to privacy under the Connecticut constitution.

In addition, the *McKenzie-Adams* court found a sexual relationship between a teacher and a student to be "inherently coercive." *Id.* at 828-829. No Washington court has reached a similar conclusion with respect to RCW 9A.44.093. *Cf.*, *State v. Fiser*, 99 Wn. App. 714, 719-20, 995 P.2d 107 (2000) (addressing sufficiency of evidence on essential element

of "abuse of supervisory position" under RCW 9A.44.093(1)(a)). There is no basis under our state constitution to apply the faulty reasoning of the Connecticut Supreme Court to the instant case.

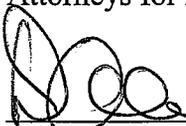
This Court should conclude that the application of RCW 9A.44.093 to consensual sexual intercourse between two adults violates Article I, section 7's protection of "private affairs," and invalidate the statute.

IV. CONCLUSION

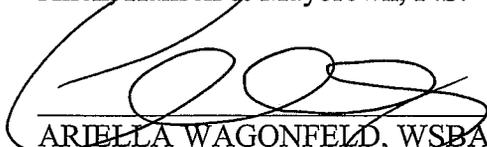
For the foregoing reasons, this Court should declare that RCW 9A.44.093(1)(b) is unconstitutional as applied to the facts of this case under Article 1, section 7 of the Washington State Constitution.

RESPECTFULLY SUBMITTED this 31st day of July, 2008.

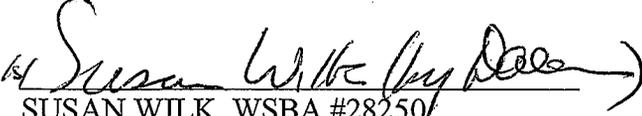
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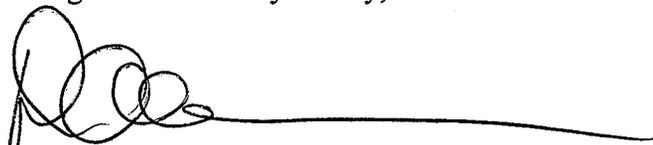
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