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NO. 36804-8

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

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STATE OF WASHINGTON
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GRAYS HARBOR COUNTY SUPERIOR COURT NO. 07-1-00294-7

STATE OF WASHINGTON,
Plaintiff/Respondent,

and

MATTHEW J. HIRSCHFELDER,
Defendant/Petitioner.

PETITIONER'S OPENING BRIEF

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I. INTRODUCTION

Matthew Hirschfelder has been charged with Sexual Misconduct with a Minor in the First Degree for allegedly having sexual intercourse with an 18-year-old student a few days before graduation. A fair reading of the statute under which Hirschfelder has been charged, however, does not include sexual relations with adult students. This conclusion is supported by a textual analysis of the law, as well as voluminous evidence demonstrating that it was not understood to criminalize such conduct by the Legislature which passed it, the Governor who signed it, or the Superintendent of Public Instruction who trained school employees about the consequences of sexual misconduct with students.

Alternatively, Hirschfelder asserts that the statute, if applied to hold a defendant criminally liable for a consensual sexual contact with an adult student, is unconstitutionally vague and/or that it is so ambiguous as to invoke the rule of lenity, requiring that the statute be interpreted in favor of the accused.

II. ASSIGNMENTS OF ERROR

A. Hirschfelder contends the trial court erred in denying his Motion to Dismiss Pursuant to *State v. Knapstad*, because the facts alleged

by the state do not constitute a crime under the statute with which Hirschfelder is charged.

B. Hirschfelder contends the trial court erred in denying his Motion to Declare RCW 9.44.093(1)(b) Unconstitutional and To Dismiss, because the statute under which Hirschfelder is charged is unconstitutionally vague as applied to Hirschfelder's conduct.

III. 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 9.44.093(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. (CP 1.) 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. (CP 96, lines 18-19.)

Hirschfelder was charged under RCW 9A.44.093. That statute, titled "Sexual misconduct with a minor in the first degree" reads in relevant part as follows:

> (1) A person is guilty of sexual misconduct with a minor in the first degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; (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; or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with his or her foster child who is at least sixteen.

On July 13, 2007, Hirschfelder filed a Motion to Dismiss Pursuant to *State v. Knapstad* ("*Knapstad* motion") and a Motion to Declare RCW 9.44.093(1)(b) Unconstitutional and To Dismiss ("Vagueness motion").[1] (CP 4-5.) In these motions, Hirschfelder argued that RCW 9.44.093(1)(b) either: (1) did not criminalize sexual relations between a school employee and an adult student (*Knapstad* motion), or (2) was unconstitutionally vague (Vagueness motion). (CP 4-29.)

On August 17, 2007, Hirschfelder was served with the State's

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[1]The supporting memorandum for the Vagueness motion was filed on August 1, 2007. (CP 14.)

consolidated Response to Hirschfelder's motions to dismiss. (CP 93-104.) Hirschfelder did not file a Reply brief but filed supplemental evidence on August 23, 2007. (CP 105-115.)

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." (CP 117.)

On September 13, 2007, Hirschfelder filed a Notice of Discretionary Review. (CP 118.) This motion was granted on November 19, 2007. Hirschfelder correspondingly files the instant Brief of Petitioner.

IV. ARGUMENT

The Superior Court denied Hirschfelder's motions to dismiss. These rulings of the Superior Court were in error.

Hirschfelder, a teacher at Hoquiam High School, was charged with Sexual Misconduct With a Minor In the First Degree under RCW 9A.44.093(1)(b) for allegedly having sexual intercourse with an 18 year-

old student several days prior to her graduation from high school. Hirschfelder's argument is essentially two-fold: (1) the charge must be dismissed because it was not the intent of the law to criminalize sexual contact between a school employee and a student who has reached the age of majority (*Knapstad* motion); and (2) the statute, if applied to hold the defendant criminally liable for a consensual sexual contact with an adult student, is unconstitutionally vague and/or so ambiguous as to invoke the rule of lenity, requiring that the statute be interpreted in favor of the accused (Vagueness motion).

A. The Superior Court Erred In Denying Hirschfelder's *Knapstad* Motion.

Where there are no material facts in dispute, and the facts do not establish a prima facie case of guilt, a trial court has the authority to dismiss a criminal charge under *State v. Knapstad.* 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). To prevail on a *Knapstad* motion, the defendant must show that there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. *Id.* at 356. The court may dismiss a criminal charge if the "State's pleadings and evidence fail to establish prima facie proof of all elements of the charged crime." *State v. Sullivan*, 143 Wn.2d 162, 171 n.32, 19 P.3d 1012 (2001). The standard

of review for a *Knapstad* motion and a challenge to the sufficiency of the evidence are similar. *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (Div. II 1996), *review denied*, 131 Wn. 2d 1006, 932 P.2d 644 (1997).

1. Textual analysis of law supports interpretation that it does not criminalize sexual contact between a school employee and a student who has reached the age of majority.

Here, dismissal pursuant to *Knapstad* was appropriate. Even assuming the facts alleged by the State — that Hirschfelder engaged in sexual relations with A.N.T. while she was still a student — this conduct does not violate RCW 9A.44.090(1)(b) because A.N.T. was over 18 years old. Implicit in the "sexual misconduct with a minor" 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 language.

The word "minor" means "not having reached the age of majority."

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[2]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.

Webster's Third New International Dictionary 1439 (1976), *adopted in, Wheeler v. Rocky Mountain Fiore & Cas. Co.*, 124 Wn. App. 868, 873, 103 P.3d 240 (2004). 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...." Thus, while the Legislature in RCW 26.28.010 clearly left open the potential to legally define "minor" differently for some purposes,[3] it explicitly limits alternate definitions to where it is *specifically provided by law.* RCW 26.28.010.

Both subsection (a) by its own terms and subsection (c) implicitly

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[3] For example, RCW 66.44.270 and 290 refer in the body of the statutes to persons under 21 years of age. References in that law to "minors," however, pre-date the amendment of the law making 18 the age of majority.

by the provisions of RCW 74.13[4] (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 involving sex-related offenses and minors.[5]

Therefore, 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 Hirschfelder is

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

[5]These include: "Sexual exploitation of a minor" (Class B Felony under RCW 9.68A.040), "Dealing in depictions of minor engaged in sexually explicit conduct" (Class C felony under RCW 9.68A.050), "Sending, 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 juvenile prostitute" (Class C Felony under 9.68A.100), "Allowing minor on premises of live erotic performance (Gross Misdemeanor under RCW 9.68A.150-160), 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)).

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. If the Legislature specifically intended to make an exception to the definition of minor with regard to this subsection of this statute only, it would have had to do so *specifically*. Its failure to do so indicates a lack of intent to do so.

The lower end of the victim age range is defined as sixteen in all three subsections of the statute because, where the victims are under 16, the perpetrators would be guilty of other, more serious criminal offenses. Although the original section of the statute contained an upper age limit of 18, presumably as a matter of clarity, neither the 2001 amendment adding subsection (1)(b) nor the 2005 amendment adding (1)(c) contained an upper age limit. The upper age limit, however, is established as a matter of law by the legal definitions of the words "minor" and "foster child." The apparent redundancy of subsection (1)(a) is not unique in the law. See RCW 26.28.085 ("Every person who applies a tattoo to any minor under the age of eighteen is guilty of a gross misdemeanor.").

There is no dispute that the alleged victim in this case was over the age of 18. She clearly is not a minor. Even conceding the truth of the

alleged facts for purposes of this motion, Hirschfelder cannot be guilty of the crime of Sexual Misconduct With a Minor In the First Degree.

2. Legislative history and historical interpretation of law indicate that it does not criminalize sexual contact between a school employee and a student who has reached the age of majority.

The foregoing textual analysis is supported by 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 by the Legislature which passed it, the Governor who signed it, or the Superintendent of Public Instruction who trains school employees about the consequences of sexual misconduct with students.

While there is legislative history of a predecessor bill suggesting that some members of the State House of Representatives understood that the bill proposed to criminalize school employee sexual conduct with adult students, it is apparent that such an understanding was not universal among legislators and that such understanding did not include the Governor who signed the law.

In fully vetoing ESHB1091, an earlier proposed version of the law

at issue here, Governor Locke objected to the bill's breadth, asserting that because that version of the bill did not have a required age difference between the employee and the student that it would criminalize even sex between teenage classmates if one were also an employee of the school. (See, CP 31 , Governor Gary Locke's Veto Message on HB 1091-S dated May 15, 2001; CP 33-34, Substitute House Bill 1091.) In that veto message, Governor Locke summarized the effect of the proposed legislation as follows:

> Substitute House Bill 1091 would have made it a felony for any school employee to engage in sexual conduct with a student between 16 and 18 years old. Such conduct is already a felony if the perpetrator is at least five years older and abuses a supervisory position, such as that of a teacher or coach, by making threats or promises to the victim. The bill was intended to remove the requirement that threats or promises be made.

(CP 31.)

The language in the bill ultimately signed by Locke following a special session later in the year did not change except to add the age difference requirement. The Governor's obvious belief that the bill's purpose was simply to extend the existing law in a way that removed the requirement that the school employee make threats or promises to the

victim appears to be consistent with the legislative history in the state Senate, where the testimony summarized in the bill report focused on extending the prohibition to all school employees, regardless of whether the employee is in a supervisory position over the student. (CP 36-37, Senate Bill Report SHB 1091.) (However, the House of Representatives Legislative History indicates an intent to eliminate the requirement that the student be under age 18, which was defined in the original House Bill, [CP 39-41, House Bill Report HB 1091], even though the later bill report does not mention this extension as a reason for the legislation. [CP 43-45, House Bill Report SHB 1091]). The Governor's interpretation is also supported by the press coverage of the law's enactment, which makes no mention of an extension of protection to students over age 18 but quotes the bill's prime sponsor, State Representative Kathy Lambert (R-Redmond) as saying that the bill's supporters saw the bill "closing a loophole" that was making prosecutions difficult because of the need to show abuse of a supervisory position. (CP 47-49, "New State Law Really Makes Sex Between Teachers, Teens a Crime, *Seattle Post-Intelligencer Reporter*, July 27, 2001; see also, CP 106-107, excerpt from Washington State's House Floor Debate, June 4, 2001, 12:00:00 pm, from 38:00.)

When Senator Jeanne Kohl-Welles (D-Seattle) sought to amend the sexual misconduct with a minor statute in 2005 to include the prohibition against sex with a foster child, the Senate Democratic Caucus had occasion to revisit the state of the law and the reasons for extending it with the passage of Senate Bill 5309. In summarizing current law, the Democratic Caucus' release said: "Current law forbids sexual contact with ***a minor age 16 or 17*** in situations in which the perpetrator is either an employee of the school where the minor is a student, or is at least five years older than a minor and uses and implied threat to coerce her or him into a sexual relationship." (CP 51-52, Senate Democratic Caucus Press Release; emphasis added.)

In the training module jointly produced and presented by the Washington State Superintendent of Public Instruction and the Washington School Personnel Association entitled *What Every Employee Must Be Told!* (exclamation point in original), designed for use between September 1, 2006 and August 31, 2007, the state's chief education official asserts, in the section titled "Sexual Misconduct":

> Washington state law makes sexual misconduct between school district employees and students unlawful. If the student is under age 16, it is statutory rape. If the student is over 16 and under 18, it is a felony when the employee is at

> least five years older. In all other cases involving students and employees it is an unprofessional act and will result in discipline (most typically discharge) and potential sanctions and loss of a teaching credential.

(CP 54-62, Washington School Personnel Association and Office of Superintendent of Public Instruction, *What Every Employee Must Be Told! Training for New and Existing Employees (Employee Version)*, page 19 (September 2006)[6]).

State House Bill Report SSB 5309, in laying out the background of the law, states that "Sexual misconduct with a minor in the first degree is committed ***when the victim/minor is 16 or 17 years old*** and: ...(2) the offender: (a) is at least five years older than the victim; (b) is a school employee who has, or knowingly causes another person under 18 years old to have, sexual intercourse with a registered student of the school who is aged 16 or 17; and (c) is not married to the victim/student." (CP 109-110; emphasis added.) In the "Testimony For" section, the report states that

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[6]This training module is © 2006 Washington School Personnel Association and therefore only the cover, introduction and relevant pages were attached to Hirschfelder's motion. The entire module can be provided if requested by the court and is available online. It is not clear whether the state itself has made this training mandatory for all employees, but at least some school districts required it of all new and existing employees.

"This bill helps protect children ages 16 and 17 who are victimized by sexual misconduct ...." (CP 111.) Thus, House Bill Report SSB 5309 summarizes the statute multiple times as criminalizing sexual relations between teachers and a student who is aged 16 or 17. Finally, a bill analysis by the state House Criminal Justice and Corrections Committee reflects its similar understanding that the law involves victims who are "aged 16 or 17." (CP 113-115.)

B. The Superior Court Erred In Denying Hirschfelder's Vagueness Motion.

Alternatively, Hirschfelder asserts that RCW 9A.44.093(1)(b), if applied to hold a defendant criminally liable for a consensual sexual contact with an adult student, is unconstitutionally vague and/or that it is so ambiguous as to invoke the rule of lenity, requiring that the statute be interpreted in favor of the accused.

1. The statute is unconstitutionally vague because persons of common intelligence must necessarily guess at its meaning and differ as to its application.

"A statute is unconstitutionally vague if the statute does not (1) define the criminal offense with sufficient definiteness such that ordinary persons understand what conduct is proscribed, or (2) provide

ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Stevenson,* 128 Wn. App.179, 188, 114 P.3d 699 (2005). A statute is indefinite, and thus void for vagueness, "if persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Glas,* 147 Wn.2d, 410, 421, 54 P.3d 147 (2002). In analyzing a statute for vagueness, the context of the enactment is examined as a whole, giving the language a sensible, meaningful, and practical interpretation to determine whether it gives fair warning of the proscribed conduct. *Stevenson,* 128 Wn. App. at 188.

Both the legislative intent and the meaning of statutory words are determined by considering the statute as a whole. *Davis v. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Id.*; see also *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) ("elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"). A statute is construed to avoid absurd or strained consequences. *Davis,* 137 Wn.2d at 963; *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1998).

The crime with which Hirschfelder is charged is Sexual Misconduct With a Minor In the First Degree, RCW 9A.44.093. That is not merely the title of the section of the code, but the name of the criminal offense.[7] Under subsection (1)(a) of RCW 9A.44.093, the victim must be under 18 by the explicit terms of that subection, which was originally the entirety of RCW 9A.44.093. Under the 2005 amendment that added section (1)(c),[8] 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 & Cas. Co.*, 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, the law defines the upper age limit as 18 because of the use of the word minor, which is defined *for all purposes* in 26.28, except as otherwise *specifically* provided by law.[9]

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[7]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.

[8]Laws of 2005 ch. 262 sec. 3

[9]See RCW 26.28.010-020, *supra*, page 7.

If the statute 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 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" since, of its three possible applications, only two would be limited to minor victims.[10]

The Legislature, under the terms of RCW 26.28, could have specifically defined "minor" differently for purposes of this statute but did not; its use of the term "with a minor" must be given some effect if possible. *Colautti,* 439 U.S. at 392; *Davis,* 137 Wn. 2d at 963; *Whatcom*

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[10]In *State v. Clinkenbeard*, 130 Wn. App 552, 123 P.3d 872 (Div. III 2005), Division III of the Court of Appeals reversed the defendant's conviction for Sexual Misconduct with a Minor for insufficiency of evidence but, in what would appear to be merely thoughtful dicta in light of the reversal on other grounds, rejected a constitutional challenge to the statute on Equal Protection and Due Process grounds. There was apparently no challenge in that case to the interpretation of the statute or to its vagueness; the court simply asserted that the statute can apply to sexual relationships between school employees and students even if the student is over the age of 18. *Id.* at 560. No reported case has challenged the vagueness of the statute or its applicability to consensual sex involving an adult student.

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."). If the Legislature intended the crime "sexual misconduct with a minor" to include sexual misconduct with persons who are not minors, it has enacted an unconstitutionally vague and therefore void statute because persons of common intelligence are left to guess at its meaning and differ as to its applicability. See *Davis*, 137 Wn.2d at 971.

Of the states that have outlawed sexual contact between teachers and students over the age of 18, none has used the word "minor" in the law, the name of the offense or the heading of the statutory provision. North Carolina's statute is headed "Intercourse and sexual offenses with certain victims; consent no defense" and provides, in relevant part, that "If a defendant, who is a teacher, school administrator, student teacher, school safety officer or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in [sex] with a victim who is a student, the defendant is Guilty of a Class G felony...." (CP 64, Laws of North Carolina, § 14-27.7.) Ohio's law is headed "Sexual Battery" and provides, in relevant part: "No person shall engage

in sexual conduct with another, not the spouse of the offender, when any of the following apply: ... (7) the offender is a [school employee], the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school." (CP 66-67, Ohio Revised Code § 2907.03(A)(7).) Connecticut's law is titled "Sexual assault in the second degree: Class C or B felony" and provides, in relevant part: "[A] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and ... (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works...." (CP 69-70, Laws of Connecticut § 53a-71(a)(7).) And Texas's law is headed "Improper relationship between educator and student" and provides, in relevant part: "An employee of a public or private primary or secondary school commits an offense if the employee engages in [sex] with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse." (CP 72, Laws of Texas, Penal § 21.12.)

Thus, while the fairness, wisdom, and to some extent the constitutionality of those statutes can be and is being debated, there is no ambiguity with regard to the intent of the laws. Conversely, Washington's

statute, if applied to include adult student victims, will have been misunderstood by at least some of the legislators who voted for it, the Governor who signed it, the Superintendent of Public Instruction who trains school personnel about the consequences of sexual misconduct, and even Wikipedia, the modern Encyclopedia Brittanica, which in a remarkably comprehensive survey of the age of consent around the country and the rest of North America, reports about Washington:

> **WASHINGTON**
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> 18 - Applies under three different sets of circumstances, enumerated in RCW 9A.44.096. Foster parents with their foster children; school teachers and school administration employees over their students; The third set of circumstances require all of the following situations to occur in tandem: The older person is 60 months or more older than the 16 or 17 year old, the person is in a significant relationship as defined, and such older person abuses the relationship to have sexual contact.
>
> 16 - Under all other circumstances.

(CP 74-92.)

The statute is particularly confusing because of its prohibition against the school employee's causing "another person under the age of eighteen" to engage in sexual intercourse with the victim. Although an attentive analysis of the meaning of the statute might reveal that the "under eighteen" phrase does not explicitly apply to the victim, the defense asserts

that the average reader, and even the average legislator, would intuitively connect this phrase as a description of the victim, especially based on the reference to "*another person* under eighteen," which implies the existence of a first person (i.e., the victim) that is also under 18.

Moreover, the usefulness of this phrase in the statute, considering the purposes of this section, is questionable for the following reason. Clearly, the drafters of this statute were targeting adults in positions of influence and authority over kids who would otherwise be treated as having reached the age of legal consent, to protect young people from being manipulated or threatened into sexual relationships with adults in positions of power or influence over them. Application of the "another person under the age of eighteen" provision results in scenarios that are either inconsistent with the premise of the legislation or altogether absurd, to wit: (1) the school employee "causes" two students, both over 18 to persuade them into a sexual contact with each other and is guilty of nothing; (2) the school employee "causes" an 18 year-old student to have sexual contact with a 16 year-old student and is guilty of sexual misconduct with the 18 year-old but not the 16 year-old; (3) the school employee "causes" a 16 year-old non-student to have sex with an 18 year-

old student and is guilty of sexual misconduct with a minor, but if he causes an 18 year-old non-student to have sex with a 16 year-old student he is guilty of nothing; (4) the school employee "causes" a 16 year-old student to have sexual contact with a 52 year-old man and neither the school employee nor the 52 year-old man is guilty of anything.[11] Consequently, Hirschfelder contends that the Legislature, which certainly could not have intended to enact a statute with absurd provisions, either intended that the legislation not apply to adult students, or otherwise must not itself have understood the effect of the legislation.

A person who diligently read all Washington state statutes relating to sexual misconduct with minors would, at the end of that reading, either be convinced that RCW 9A.44.093(1)(b) applies only to victims under age 18 or would at the very least be confused as to the definition of the offense. How is a person of common intelligence to understand that

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[11]Note that the provisions in child molestation and rape statutes relating to "causing a person under the age of eighteen" to have sexual contact with the child are logical provisions given that persons over the age of 18 having sexual contact with a person under the age of consent would generally be guilty of the crime themselves; that same logic is lost in this statute where the victims are by definition over the age of consent and the person who the school employee "causes" to have sexual contact with the student is guilty of nothing, even if the student is just sixteen years old.

"minor" means something different in RCW 9A.44.093(1)(b) than it does in (1)(a) and (1)(c)? That in fact "minor," though not specifically defined in the statute, means something different in RCW 9A.44.093(1)(b) than it means anywhere else in state law or the dictionary? That, in essence, as used in RCW 9A.44.093(1)(b), "minor" doesn't mean "minor" at all? How is a person of common intelligence expected to understand the law to criminalize sexual contact with an adult student when legislators, legislative committees, the Governor of the State of Washington, and the Superintendent of Public Instruction, all with armies of lawyers at their beck and call, did not understand it that way?

2. The Rule of Lenity requires that ambiguities in the statute be resolved in favor of Hirschfelder.

A statute subject to two or more reasonable interpretations is ambiguous. *State v. Carter*, 138 Wn. App. 350, 356, 157 P.3d 420 (Div. II 2007). "Under the rule of lenity, when 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." *Id.*; see also *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 (or the Governor, the

Senate Democratic Caucus, the House Criminal Justice and Corrections Committee, and the Superintendent of Public Instruction are persons of less than "common intelligence"). And the legislative intent itself is ambiguous, with a single bill report from an earlier version of the bill among many referencing an amendment to remove the requirement that the student be under 18, but with all other bill reports being silent on the question and the Governor's veto message containing a clear indication that he interpreted the bill to outlaw sex only among students under 18, an interpretation which was not questioned or clarified by the legislature in the subsequently-passed bill.

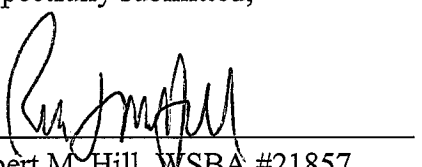
V. CONCLUSION

This Court should reverse the ruling of the Superior Court and grant Hirschfelder's Motions To Dismiss because the statute, by its plain terms, should not be interpreted to apply to a consensual sexual relationship involving an adult student because sexual misconduct with a minor can not be committed against someone who is not a minor. If the statute is interpreted to apply to such a relationship, the charge against Hirschfelder must nonetheless be dismissed because the statute is unconstitutionally vague and because the rule of lenity requires that the

ambiguity in the statute be resolved against the state and in Hirschfelder's favor.

The defense respectfully requests that the court so find and dismiss the charge of Sexual Misconduct With a Minor. Further, costs should be awarded to Hirschfelder as allowed pursuant to RAP 14 and applicable case law.

Respectfully submitted,



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NO. 36804-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MATTHEW HIRSCHFELDER, Appellant	)	AFFIDAVIT OF SERVICE
vs.	)	
STATE OF WASHINGTON, Respondent.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

The undersigned, being first duly sworn on oath, now deposes and states:

The undersigned is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

I certify that on January 14, 2008, I caused to be hand delivered a true and correct copy of the Petitioner's Opening Brief upon the following individuals:

ORIGINAL

Megan M. Valentine, WSBA #35570
Deputy Prosecuting Attorney
Grays Harbor County
Attorney for Plaintiff
102 W. Broadway, Room 102
Montesano, WA 98563

I further certify that on January 14, 2008, a true and correct copy of the aforementioned Petitioner's Opening Brief was mailed by U.S. Mail, postage prepaid to:

Matthew Hirschfelder
1416 Cunningham Lane S.
Salem, OR 97302

DATED this 14th day of January, 2008, at Olympia, Washington.

Cherry L. Dalrymple, Paralegal for
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 14th day of January, 2008, by Cherry L. Dalrymple.

Notary Public in and for the State of
Washington, residing at Olympia
My commission expires 3/8/08