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NO. 36804-8

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

and

MATTHEW J. HIRSCHFELDER,
Defendant/Petitioner.

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DIVISION II
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PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Petitioner Matthew Hirschfelder (“Hirschfelder”) brings the following Reply memorandum to respond to specific points contained in the State’s Respondent’s Brief.

II. ARGUMENT

A. The Legislative History Cited By Hirschfelder Supports Both Sections Of His Appeal, In Distinct Ways.

Hirschfelder made two, alternative arguments in two separate motions in support of his motion to dismiss the charge against him. The first motion argued that RCW 9.44.093(b), 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. The second motion contends that the charge against Hirschfelder must 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 legislative history cited by Hirschfelder functions in two distinct ways to support each of these motions. It supports both the notion

that the statute should be construed to exclude adult victims, as well as the notion that, if the State's construction is adopted, the statute is fatally ambiguous in that even legally-trained and statutory-savvy legislators, politicians, and educators misunderstood the statute.

It is perhaps this second purpose of the legislative history cited by Hirschfelder — to demonstrate vagueness — that is most unique and powerful, and thus, not surprisingly, the State's opposition arguments focus almost exclusively on the first. The alleged "misunderstanding" of the law by the legislative committees connected to it, the Governor that signed it, and the education organization implementing it, however, demonstrates in powerful terms how patently vague and ambiguous the statute is. The State, in its effort to sidestep this evidence, goes so far as to argue that these various statements that the law prohibits sexual intercourse between school employees and students who are sixteen or seventeen do not also indicate that "the statute was not to apply to students eighteen or older." (Respondent's Brief, p. 20.) This illogical reading of those statements, in the face of various such statements from various sources, is utterly without merit.

B. The Term “Minor” Is Contained In Both the Title *and* Text of RCW 9A.44.093(b).

Implicit in the “sexual misconduct with a minor” statute is the requirement that the victim be a minor; indeed, both the title and text of the statute contain the word “minor.” The State, however, mistakenly argues that the word “minor” is not contained in the text of the statute, but merely the title. (Respondent’s Brief, pp. 4-5.) This is not accurate.

After the title of the statute, “Sexual Misconduct With a Minor In the First Degree,” the *text* of the statute reads as follows:

A person is guilty of sexual misconduct *with a minor* in the first degree when: ... (b) the person is a school employee who has ... 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.

RCW 9A.44.093 (emphasis added). This initial textual language, by its grammatical construction with a colon and various subparts, is necessarily part of the language of each subpart, including subpart (b), which is at issue in this case. As such, the term “minor” is contained in RCW 9A.44.093(b), and is implicit in the statute and must be considered and given meaning in its construction. *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.”)

Consequently, the State’s arguments that “the body of the statute is where the offense is defined” (Respondent’s Brief, p. 4), and citation to cases holding that the “[statutory] analysis must turn on the language within the statute” (*Equipto Div. Aurora Equipment Co. v. Yarmouth*, 134 Wn. 2d 356, 364, 950 P.2d 451 (1998)), do not help the State in addressing the fact that the term “minor” *is* contained in the body of this statute. The three cases cited by the State on this point, for example, do not address a situation where, as here, the disputed language from the title of the statute is repeated in the body of the statute.¹ As such, the State fails to account, in its recitation of the statute’s requirements, for the legislature’s inclusion of the word “minor” in the text of RCW 9A.44.093(b).

In any case, the alcohol statutes cited by the State and containing the word “minor” do not support an inference that any alternate definition of “minor” was intended at the time they were drafted. To the contrary, the statutes cited by the State, as well as others in Chapter 66.44, were

¹ *Equipto*, 134 Wn. 2d at 364 (“preincorporation” contained in title but not text of statute); *City of Spokane v. State*, 198 W. 682, 690-91, 89 P.2d 826 (1939) (“compensating” contained in a chapter heading but not title or text); *State v. Vaughan*, 163 W. 681, 682-83 (1931) (“attempt” contained in title but not text of statute).

drafted using the word “minor” between 1955 and 1965, well before the age of majority was lowered in 1971. Prior to 1971, then, there was no distinction between “minors” and those legally permitted to drink. After 1971, subsequent statutes and statutory amendments refer exclusively to “persons under the age of twenty-one years.”

C. The Phrase “Another Person Under the Age Of Eighteen” Implies That the Victim Also Must Be Under Eighteen.

RCW 9A.44.093(b) states, within its provisions, “or knowingly causes another person under the age of eighteen to have, sexual intercourse....” The important issue with regard to this clause is whether the words “under the age of eighteen,” as they are situated within the statutory language, create an age limit on the victim, or at least an ambiguity in that regard. A careful analysis reveals that they do.

The State’s grammar analysis on this point is misleading. The pertinent question is not whether “under the age of eighteen” modifies the school employee or the student (the focus of the State’s analysis), but whether the phrase “*another* person under the age of eighteen” is to be read restrictively, thereby implying the existence of a first person under the age of 18, or non-restrictively, so that “under the age of eighteen” does not alter the meaning of “another person”:

A phrase that is restrictive, that is, essential to the meaning of the noun it belongs to, should not be set off by commas. A non-restrictive phrase, however, *should* be enclosed in commas or, if at the end of a sentence, preceded by a comma. [Ex.] The woman wearing a red coat is my sister. But [...] My sister, wearing a red coat, set off for the city.

Chicago Manual of Style (15th ed.), § 6.31, p. 248 (emphasis in original).²

Here, the phrase “under the age of eighteen” is a restrictive one because it is not set off by commas, and thus it is, similar to the former example above, essential to the meaning of “another person.” Had the drafters intended that phrase to be non-restrictive, it would read: “another person, under the age of eighteen, to have”³ As drafted, the statute implies that the victim also must be under the age of 18. At best, it is ambiguous in this regard.

²The State’s citations to the Chicago Manual of Style must refer to an earlier edition, since neither the section citations nor page citations correspond to the newest 15th edition.

³Contrary to the State’s analysis, removal of the commas enclosing the entire clause “or knowingly causes another person under the age of eighteen to have” would not change the analysis of whether “under the age of eighteen” is a restrictive or non-restrictive phrase in relation to noun it belongs to, “another person.” In essence, there is no way for the statute to *clearly* read the way the State wants the court to read it other than through use of the additional commas setting off “under the age of eighteen.”

D. RCW 26.28.010 Applies To Supply an Age Limit Unless Specifically Defined Otherwise In Law.

In addressing the presence of the word “minor” in RCW 9A.44.093(b) and the applicability of RCW 26.28.010, the State makes the illogical argument that the concept of a “minor” is not connected to “the age of majority,” and that RCW 26.28.010, defining the age of majority for “*all purposes not otherwise defined in law*,” has nothing to do with the legal definition of a “minor.” (Respondent’s Brief, p. 8.) But the opposite of “minor” is “major.” This is how the terms “minor” and “age of majority” are derived. The “age of majority” would have no meaning if it was not inherently tied to the concept of “minority.”⁴ If a statute on “Age of Majority” does not correspondingly and implicitly define what a “minor” legally is, then it does not define anything at all.

The State cites to examples of statutes where “minor” was used in the title, but the body of the statute contained an age limit other than 18. (Respondent’s Brief, p. 9.) But the salient point is that each of these examples *contain an age limit*. In each, an explicit definition defines the age limit created by the use of the word “minor” in the statute, as

⁴The definition of “Major” in Black’s Law Dictionary is “A person of full age; one who is no longer a minor”; the definition of “Majority” is “Full age; legal age ... the opposite of minority.” Black’s Law Dictionary (5th ed.), p. 860.

contemplated by RCW 26.28.010. These example statutes do not, as the State would have the court do in this case, use the word “minor” without applying any corresponding age limit. The State is asking the court to move one step beyond the examples it cites as support, without justification for such an interpretation. As such, there is no basis for constructing RCW 9A.44.093(b) to have used the word “minor” with no specific, or default, age limit attached.

Inherent in the concept of using the word “minor” in a statute is the concept that it makes meaningful reference to persons who have not reached age of majority, as that is defined in law. For that very reason, RCW 26.28.010, “Age of Majority,” by its plain terms, applies in every instance where not otherwise defined by law. The State suggests an interpretation for *this* statute that would use “minor,” in the text, but not contain an age limit, either by explicit definition *or* by the default provision of RCW 26.28.010. This is a strained interpretation that is not warranted by an examination of any other Washington statute related to minors.

E. *State v. Clinkenbeard* Is Inapposite To the Issues In This Appeal For Several Reasons.

In *State v. Clinkenbeard*, 130 Wn. App 552, 123 P.3d 872 (Div. III 2005), Division 3 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.

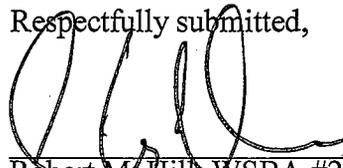
No reported case has challenged the vagueness of the statute or its applicability to consensual sex involving an adult student. The basis of the court's reversal was that the State improperly used impeachment evidence as substantive evidence of guilt, and insufficient other evidence was admitted to support the charge. *Id.* at 568-72. Because the defendant prevailed on that evidentiary ground, which precluded re-trial, there could be no further appeal of the equal protection and due process issues. Moreover, because the case was decided on an evidentiary ground, the

discussion of constitutional questions was dicta. Most importantly, the constitutional issues argued in *Clinkenbeard* were not the ones raised here; therefore, the State's reliance on a passing statement in that decision is not applicable here. Finally, it should be noted that in any case the *Clinkenbeard* decision came from Division 3, and as such is not binding on this court.

III. CONCLUSION

Hirschfelder respectfully requests that the court find RCW 9A.44.093(b) as not applying to a student over 18 years of age, or, alternatively, that the statute is unconstitutionally vague, 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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08 APR 16 PM 1:42

STATE OF WASHINGTON
BY _____
DEPUTY

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 April 14, 2008, I caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the Petitioner's Reply Brief upon the following individuals:

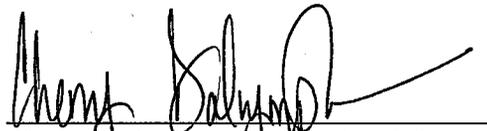
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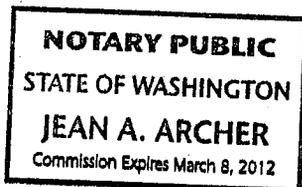
I further certify that on January 14, 2008, a true and correct copy of
the aforementioned Petitioner's Reply Brief was mailed by U.S. Mail,
postage prepaid to:

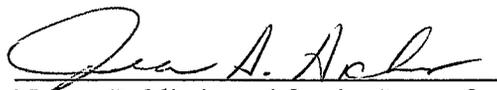
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DATED this 14th day of April, 2008, at Olympia,
Washington.


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

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




Notary Public in and for the State of
Washington, residing at Olympia
My commission expires 3/8/2012