

NO. 82744-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COA No. 36804-8-II

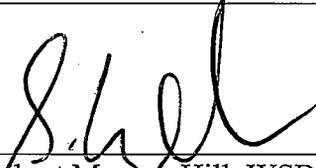
STATE OF WASHINGTON,
Petitioner,

v.

MATTHEW J. HIRSCHFELDER,
Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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Defendant Matthew Hirschfelder (“Hirschfelder”) submits the following supplemental brief only to address those issues not adequately addressed by prior briefing.

ARGUMENT

I. HIRSCHFELDER’S APPEAL CONTAINED SEVERAL ALTERNATE ARGUMENTS NOT ADDRESSED BY THE COURT OF APPEALS.

The Court of Appeals ruling that former RCW 9A.44.093(1)(b) did not criminalize sexual relations between a teacher and 18-year-old student left untouched several alternate arguments raised by Hirschfelder.

Hirschfelder’s first argument was that former RCW 9A.44.093(1)(b) should be construed to only apply to students under the age of 18, or, if ambiguity existed in that regard, should be so construed based on the rule of lenity. The Court of Appeals agreed with Hirschfelder’s argument regarding statutory construction and did not reach the question of whether the rule of lenity would apply. That issue is addressed in the subsequent section of this brief.

Second, Hirschfelder argued that the statute was unconstitutionally vague under the federal and state constitutions. U.S. Const. amend. 5, 14; Wash. Const. art. I, § 3. “A vagueness challenge seeks to vindicate two

principles of due process: the need to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid, and the need to prevent arbitrary and discriminatory law enforcement.” *State v. Lee*, 135 Wn.2d 369, 393, 957 P.2d 741 (1998). This argument — separate and apart from the issue of statutory construction — was supported by voluminous evidence that the Governor and several legislative committees that considered the bill did not understand or intend that it be applied to students over 18 years of age. It was also supported by an *amicus* brief filed by the Washington Education Association. This issue was never squarely addressed by the Court of Appeals because it decided that the statute did not apply on its face to students over 18.

Third, the Washington Association of Criminal Defense Lawyers (“WACDL”) filed an *amicus* brief in this case arguing that RCW 9A.44.093(1)(b) violated state constitutional privacy rights. WACDL argued that the relationship between a school employee and student is not so inherently coercive as to overcome a consenting adult citizen’s heightened privacy protection to engage in sexual relations under Article I, Section 7 of the Washington Constitution. This issue was also not

addressed by the Court of Appeals.

Finally, Hirschfelder himself filed a brief raising equal protection arguments pursuant to Rule of Appellate Procedure 10.10. These arguments were acknowledged but not considered by the Court of Appeals.

II. THE RULE OF LENITY REQUIRES THE AMBIGUITY IN THE STATUTE TO BE CONSTRUED IN HIRSCHFELDER'S FAVOR.

The Court of Appeals, after careful and thorough analysis of the legislative history of RCW 9A.44.093(1)(b), decided that former RCW 9A.44.093(1)(b) did not criminalize sexual misconduct between school employees and 18-year-old and older students. Thus, the Court did not specifically reach the issue of whether the statute was ambiguous and it did not need to apply the rule of lenity. *State v. Hirschfelder*, 148 Wash. App. 328, 349 n.17, 199 P.3d 1017 (Div. II 2009).

Even if this Court disagreed with the Court of Appeals about its interpretation of former RCW 9A.44.093(1)(b), however, the statute is, at minimum, ambiguous with regard to its application and, as such, must be construed in Hirschfelder's favor. "[I]f a criminal statute is ambiguous, the rule of lenity requires that we interpret it in favor of the defendant absent

legislative intent to the contrary.” *State v. Stratton*, 130 Wash. App. 760, 764-65, 124 P.3d 660 (Div. II 2005). Therefore, although the Court of Appeals was able to resolve the statutory ambiguities in favor of Hirschfelder, should this Court decide otherwise, the rule of lenity would then apply and the Court of Appeals ruling should be affirmed.

III. THE COURT OF APPEALS PROPERLY CONSTRUED
FORMER RCW 9A.44.093(1)(B).

A. The State Has Not Presented Any Compelling Arguments
Regarding the Plain Meaning Of Former RCW
9A.44.093(1)(b).

The State believes that an abuse of authority is an adequate basis to restrict sexual relations between a school employee and a student over 18 years of age. While this may or may not be true — WACDL’s *amicus* brief filed in the Court of Appeals argued that such regulation of private affairs between adults runs afoul of the Washington constitution — it does not bear at all on the question of whether the plain meaning of former RCW 9A.44.093(1)(b) includes students over 18 years of age.

The State’s position is that the inclusion of a “school employee” definition in former RCW 9A.44.093(3) somehow demonstrates an intent to include students over 18 within the purview of former RCW 9A.44.093(1)(b). The “school employee” definition, however, operates

only to limit the class of *defendants* to which the statute will apply. The definition does not, as contended by the State, shed any light on legislative intent regarding the *victim's* age. As noted by the State, the definition serves to preclude application to college professors who may be teaching students under 18 either as college freshman or pursuant to academic programs that permit high school students to take college classes.

B. The Phrase “Or Knowingly Causes Another Person Under the Age Of Eighteen To Have” Creates Ambiguity In the Statute.

The State contends that the grammar of RCW 9A.44.093(1)(b) does not create any ambiguity in the statute. *In re Personal Restraint of Mahrle*, 88 Wash. App. 410, 945 P.2d 1142 (1997) (discussing the “last antecedent rule”). But *Marhle* discusses the limitations in the grammatical rules relied on by the State, based on the overall punctuation of sentence. *Id.* at 415. Here, the absence of clarifying commas in the phrase “or knowingly causes another person under the age of eighteen to have,” leads to, just as in *Mahrle*, “two reasonable interpretations” of the provision at issue. *Id.*

Moreover, the State seems to miss — but the Court of Appeals’ analysis did not — that the core of the dispute is not about the application

of “under the age of eighteen,” but the application of “another.” If “another” applies to the larger subject “person under the age of eighteen” and not just “person,” then the State’s interpretation is in error. This was just the analysis of the Court of Appeals: “we do not read ‘another person’ out of the statute ... our analysis here focuses on the entire disputed portion ‘another person under the age of eighteen’.” *Hirschfelder*, 148 Wash. App. at 342. Additional commas would be necessary to make clear that “another” applied only to “person.” Without them, it is clear that “another person” is “a *second* person as the *same kind* as the student” *Id.* at 343.

The inclusion of the clause “or knowingly causes another person under the age of eighteen to have” in the child molestation statutes is not instructive on this point. First, because those statutes necessarily involve minors under 18, it is consistent with the Court of Appeals’ interpretation of former RCW 9A.44.093(1)(b), as conceded by State.¹ Perhaps more importantly, however, the rationale for the “another person” language is entirely different in the context of the child molestation statute than in the sexual misconduct statute. In the case of the child molestation laws, the “another person” clauses are logical provisions given that persons over the

¹Supplemental Brief of Petitioner, p. 11 n.34.

age of 18 having sexual contact with a person under the age of consent would generally be guilty of the crime themselves. In the case of former RCW 9A.44.093(1)(b), however, that logic is absent 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. As such, its inclusion in RCW 9A.44.083-89 does nothing to lessen the ambiguity it creates in former RCW 9A.44.093(1)(b).

C. The Term “Minor” Is Contained In the Text Of Former RCW 9A.44.093(1)(b).

As argued previously, the term “minor” is not merely contained in the title or section caption of former RCW 9A.44.093(1)(b), but in its text:

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.

(Emphasis added). This initial textual language, by its grammatical construction with a colon and various subparts, is part of the language of each subpart, including subpart (b). 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).

Moreover, the Court of Appeals not only analyzed RCW 9.68A in determining the appropriate definition of “minor,” but it relied also on RCW 26.28 *et seq.*: “RCW 26.28.105(5) supports Hirschfelder’s argument that under RCW 9A.44.093(1)(b) the legislature criminalized sexual misconduct with 16- and 17-year-olds because 18-year-olds can make decisions regarding their bodies, including whether to have intercourse.” *Hirschfelder*, 148 Wash. App. At 338 n.7. The Court of Appeals’ construction of the term “minor” as meaning “under eighteen” was supported by law.

D. The Legislature Did Not Intend To Criminalize Sexual Relations Between School Employees and Students Over 18.

The State’s position that the 60-month age requirement in former RCW 9A.44.093(1)(b) demonstrates that the Legislature intended to include students over the age of 18 is untenable. The 60-month age difference applies to a situation where, say, a 16- or 17-year-old student has sexual relations with a teenage reading program tutor or the like, who was both a student and employee (addressing the concern raised in Governor Locke’s veto message). Nothing about this age requirement suggests that the law was intended to apply to students over 18 years old.

Finally, the Legislature's decision to amend RCW 9A.44.093(1)(b) in the wake of the Court of Appeals' decision does not shed any light on its intent when it enacted the law. To the contrary, this has been a high-profile media case and hot-button political issue, prompting intense local news coverage and commentary from such national television programs as *Saturday Night Live* and the *Tonight Show*. It is equally likely that the Legislature simply responded to the media reports and perceived politics of the issue than that it intended to rewrite history concerning its original intent.

The evidence in this case regarding legislative intent is just the opposite. The record includes numerous committee reports, floor debate, and Governor's statements demonstrating that the Legislature did not intend to criminalize sexual relations between school employees and adult students, and that the bill's supporters saw the bill as "closing a loophole" that was making prosecutions difficult because of the need to show abuse of a supervisory position. *See, Hirschfelder*, 148 Wash. App. 344-45. The Court of Appeals went carefully through these materials, concluding that "the legislature intended RCW 9A.44.093(1)(b) to criminalize only sexual misconduct between school employees and 16- and 17-year-old students." *Hirschfelder*, 148 Wash. App. at 344-49. That decision should be

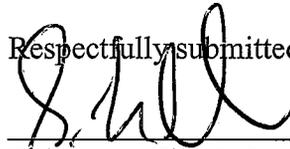
affirmed.

CONCLUSION

For the foregoing reasons, Hirschfelder respectfully request that the decision of the Court of Appeals be affirmed and this matter dismissed.

DATED this 7th day of August, 2009.

Respectfully submitted,



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