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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 85860-8
)	
vs.)	C/A NO. 28495-6-III
)	
JOSE R. VELIZ, JR.,)	
)	
Petitioner.)	

APPEAL FROM COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PETITIONER'S REPLY TO BRIEF OF AMICI CURIAE LEGAL VOICE,
THE WASHINGTON STATE COALITION AGAINST DOMESTIC
VIOLENCE, AND THE NORTHWEST JUSTICE PROJECT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES _____	i
I. SUMMARY _____	1
II. ARGUMENT _____	2
A. The plain meaning of the language of RCW 9A.40.060(2) does not support <i>Amici Curiae's</i> argument that Domestic Violence Protection Orders, containing residential provisions for minor children, are "court-ordered Parenting plans", as contemplated by RCW 9A.40.060(2) _____	2
B. The Legislative History of the Custodial Interference Statute does not support <i>Amici's</i> contention that Domestic Violence Protection Orders containing residential provisions for minor children are "court-ordered Parenting plans", for purposes of Custodial Interference charges pursuant to RCW 9A.40.060(2) _____	5
III. CONCLUSION _____	8
CERTIFICATE OF SERVICE _____	9

TABLE OF AUTHORITIES

CASES	Page
<u>City of Seattle v. Winebrenner</u> , 167 Wn.2d 451, 219 P.3d 686 (2009) _____	4
<u>In re Pers. Restraint of Piercy</u> , 101 Wn.2d 490, 492, 681 P.2d 223 (1984) ____	2
<u>Rozner v. Bellevue</u> , 116 Wn.2d 342, 804 P.2d 24 (1991) _____	5
<u>State v. Pesta</u> , 87 Wn.App. 515, 942 P.2d 1013 (1997) _____	7
review denied, 135 Wn.2d 1002 (1998) _____	7
 STATUTES	
RCW 9A.40.060(2) _____	IBID
RCW 26.09 _____	IBID
RCW 26.50 _____	1, 3, 8
RCW 46.61.505 _____	4
 MISC.	
Final Bill Rep. on H.B. 2333, 53d Leg., Reg. Sess. (Wash.1994) _____	6

I. SUMMARY

Appellant's hereby timely files his Reply to the arguments submitted by *Amici Curiae*.

Amici urge this Court to find that domestic violence protection orders entered pursuant to RCW 26.50.060 may be considered "court-ordered parenting plans", when they happen to contain any residential provisions for minor children, for purposes of RCW 9A.40.060(2): the Custodial Interference statute. However, the plain language of 9A.40.060(2) does not reference any type of protection order.

Similarly, nothing in the legislative history of the statute suggests the legislature intended to include "protection orders with residential provisions for minors" in the definition of "Parenting plan".

Amici argues that unless this Court holds that "protection orders" are "court-ordered parenting plans", this Court "will undermine the effectiveness of domestic violence protection orders in protecting victims and their children and in holding them accountable." However, *Amici* provides no evidence or authority for its dire prediction in this regard.

Victims of Custodial Interference are protected in the state of Washington. The legislature in Washington has enacted statutes intended to prevent and severely punish the abduction of children. *Amici* fails to show how expanding the definition of "Parenting plan" to include "Protection Order" would further that goal. Instead, this Court would be legislating the expansion of the scope of what the legislature has already passed into law.

It is logical that a citizen of this State cannot be guilty of Custodial Interference until a court of law has determined custody rights. Due process and notice requirements demand no less. Because no Parenting plan was in place at the time of the "abduction", Appellant's actions do not fall within the ambit of RCW 9A.40.060(2).

II. ARGUMENT

- A. The plain meaning of the language of RCW 9A.40.060(2) does not support *Amici Curiae's* argument that Domestic Violence Protection Orders, containing residential provisions for minor children, are "court-ordered Parenting plans", as contemplated by RCW 9A.40.060(2).

It is argued that, when considering an undefined statutory term, the court will consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions. In re Pers. Restraint of Piercy, 101 Wn.2d 490, 492, 681

P.2d 223 (1984). Appellant submits this rule does not apply because there is no undefined term in RCW 9A.40.060(2).

The plain language of RCW 9A.40.060(2) specifically enumerates the manner by which Custodial Interference may be committed. The plain language of the statute does not include violations of Protection Orders.

A "Parenting plan" is not, as *amici* argue, simply a "plan to parent a child" - in whatever form. The term "court ordered Parenting plan" is a highly specific type of court order. It is a term of art, not a word of ordinary usage. The purpose and procedures with respect to Parenting plans pursuant to RCW 26.09.181 *et. seq.* are very specific and very different from those of RCW 26.50 *et seq.*, which applies to Orders of Protection such as the one entered in this case.

RCW 26.50.060, is the statutory basis for the Order of Protection at issue here. The form specifically states:

However, parenting plans as specified in chapter 26.09 shall not be required under this chapter. RCW 26.50.060 (1) (d).

Thus, the statute under which the Order for Protection was issued itself draws a distinction between any order under its provisions and a court ordered parenting plan entered pursuant to

the provisions of RCW 26.09. "Protection Orders" are not considered the same as "Parenting plans" in any other context.

The fact that the Legislature referred to "parenting plans *as specified in chapter 26.09*" does not, as *amici* argue, demonstrate its recognition that there are parenting plans *other* than those in RCW 26.09. To the contrary, that language demonstrates the Legislature's clear intent to refer specifically to violations of "Parenting plans" as specified in chapter 26.09.

The Protection Order Petitioner violated contained general residential provisions for a minor child. Such a bare outline would not be acceptable as a "Parenting plan", pursuant to RCW 26.09. As outlined in Petitioner's opening brief, RCW 26.09.194 sets forth the specific provisions that must be included in a "Parenting plan". The Protection Order in this case certainly does not include all the necessary provisions.

As previously argued, if the court agrees that the term "court ordered parenting plan" is undefined, and the issue is subject to varying interpretations, the court should apply the "rule of lenity" as was recently done by this Court in City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009). There, the Court concluded that RCW 46.61.5055 is subject to more than one reasonable interpretation so the statute was ambiguous. It stated:

If, after applying rules of statutory construction, we conclude that a statute is ambiguous "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." (citations omitted).

Alternatively, the statute, which is silent as to what is a court ordered parenting plan, is ambiguous as it is subject to more than one reasonable interpretation. Thus, application of the rule of lenity requires that the interpretation be in favor of the defendant/appellant in the absence of a legislative intent to the contrary. Moreover, in interpreting statutory provisions, "[t]he fundamental objective . . . is to ascertain and carry out the intent of the legislature." Rozner v. Bellevue, 116 Wn.2d 342, 347 (1991).

B. The Legislative History of the Custodial Interference Statute does not support Amici's contention that Domestic Violence Protection Orders containing residential provisions for minor children are "court-ordered Parenting plans", for purposes of Custodial Interference charges pursuant to RCW 9A.40.060(2).

Obviously, by enacting RCW 9A.40.060, the Legislature intended to prohibit Custodial Interference. The purpose of HB 2333 in 1994 was to modify the language of RCW 9A.40.060(2) to include reference to violation of a court ordered parenting plan, among the enumerated means of committing the crime of Custodial Interference.

The purpose of the bill is to "ensure that a parent [who] deliberately conceals a child from the other parent and moves out of the state with the intention of hiding the child from the parent" would be charged with a felony. HOUSE BILL REP. on HB 2333, 53d Leg., Reg. Sess. (Wash. 1994).

Amici provides no authority to support its contention that the Legislature intended to consider a domestic Protection order containing any type of residential provision with respect to minor children, a "court ordered parenting plan", when it added the language referencing "court ordered parenting plan".

If *Amici* contends the legislature intended to include violations of Protection Orders in addition to Parenting plans but by oversight failed to do so, they present no evidence of it. Alternatively, if *Amici's* argument is that the legislature intended "Protection Orders" to be some implicit sub-class of "Parenting plans", such a claim is unsupported by the legislative history. "Protection Orders" are not considered the same as "Parenting plans" in any other context.

As the lower court's decision pointed out, the term "parenting plan" is used in the domestic relations title of the Washington code, and the legislative history is clear that the 1994 amendment adding "parenting plan" language to RCW 9A.40.060

was the result of changes made to chapter 26.09 RCW, dealing with dissolution proceedings and legal separation. Final Bill Rep. on H.B. 2333, 53d Leg., Reg. Sess. (Wash.1994); State v. Pesta, 87 Wn.App. 515, 942 P.2d 1013 (1997), review denied, 135 Wn.2d 1002 (1998).

Prior to the amendment, former RCW 9A.40.060(2) (1984) read as follows: "A parent or other person acting under the directions of the parent is guilty of custodial interference in the first degree if the parent or other person intentionally takes, entices, retains, or conceals a child, under the age of eighteen years and for whom no lawful custody order has been entered by a court of competent jurisdiction, from the other parent with intent to deprive the other parent from access to the child permanently or for a protracted period." It is clear that prior to the amendment, the existence of a "Parenting plan" was not a predicate to guilt. By amending the statute, the legislature must have intended to require violation of a lawful custody order-specifically, a "Parenting plan" pursuant to RCW 26.09.

As *Amici* points out, the legislature in Washington has enacted strong protections for victims of domestic violence. Among those is the ability to obtain a domestic violence protection order to keep a victim and her children safe. However, obtaining a

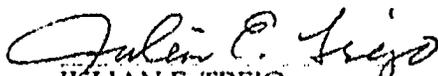
domestic violence protection order "with enforceable parenting provisions for her children" is not implicit in the aim of safety.

III. CONCLUSION

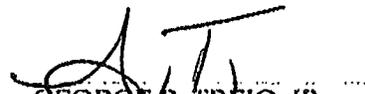
For the foregoing reasons, *Amici's* concerns are misplaced. As explained above, the plain language of RCW 9A.40.060(2), read in conjunction with RCW 26.09 et seq and RCW 26.50, indicates that a domestic violence protection Order which happens to contain residential provisions for minor children, is not the same as a "Parenting plan." Thus, violation of the residential terms of a domestic violence protection Order does not trigger the penalties of RCW 9A.40.060(2).

Respectfully submitted this 1st day of February, 2012.

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I hereby certify that on February 1st, 2012, I have sent electronically and via mail through the United States Postal Service this filing to the following:

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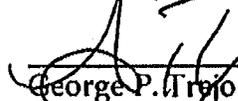
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