

FILED
SUPREME COURT
STATE OF WASHINGTON
12/12/2017 1:49 PM
BY SUSAN L. CARLSON
CLERK

Nº. 94544-6

SUPREME COURT OF THE STATE OF WASHINGTON

PERSONAL RESTRAINT OF
EDDIE ARNOLD,
Respondent.

**RESPONDENT'S RESPONSE TO WASHINGTON APPELLATE
LAWYERS ASSOCIATION'S AMICUS BRIEF**

REED SPEIR, WSBA No. 36270
Attorney for Appellant
3800 Bridgeport Way Suite A, #23
Tacoma, Washington 98466
(253) 722-9767

TABLE OF CONTENTS

	<u>Page</u>
A. RESPONSE	1
1. This court should decline to consider the argument of WALA because WALA’s briefing addresses an issue not present in this case	1
2. Should this court decide to consider the issue of whether Division III adopted a rule of horizontal stare decisis, Mr. Arnold adopts and incorporates the arguments contained in WALA’s amicus brief...	6

TABLE OF AUTHORITIES

	Page(s)
<u>Washington Cases</u>	
<i>Grisby v. Herzog</i> , 190 Wn. App. 786, 809–10, 362 P.3d 763 (2015).....	5
<i>In re Personal Restraint of Wheeler</i> , 188 Wn.App. 613, 354 P.3d 950 (2015).....	3
<i>Mains Farm Homeowners Ass'n v. Worthington</i> , 121 Wn.2d 810, 854 P.2d 1072, 1080 (1993).....	
<i>Matter of Arnold</i> , 198 Wn. App. 842, 396 P.3d 375, 378 (2017)2, 3, 4, 5	
<i>State v. Taylor</i> , 162 Wn.App. 791, 259 P.3d 289 (2011).....	3

On November 28, 2017, the Washington Appellate Lawyers Association (WALA) filed a motion for permission to file an amicus curiae brief in this matter as well as the amicus brief itself. On December 6, 2017, this court denied Respondent Arnold's objection to WALA's motion to be permitted to file an amicus brief. Accordingly, Mr. Arnold submits this response to WALA's amicus brief.

A. RESPONSE

1. This court should decline to consider the argument of WALA because WALA's briefing addresses an issue not present in this case.

The State of Washington sought review in this court regarding two issues: whether Division III of the Court of Appeals adopted a new rule of horizontal stare decisis in its opinion in this case; and whether the analysis of all divisions of the Court of Appeals on the issue of the duty of individuals convicted of statutory rape prior to 1988 to register as a sex offender is based on an incorrect analysis of RCW 9.94A.030 and RCW 9A.44.128.¹

Proceeding from the presumption that Division III adopted a rule of mandatory stare decisis between the division of the Court of Appeals, WALA sought permission from this court to submit an amicus brief arguing against this court adopting such a rule of horizontal stare decisis.

¹ State's Motion for Discretionary Review, p. 12-17.

As discussed in Mr. Arnold's Response to the State's petition for review, Motion to Modify the Commissioner's Ruling Granting Review, Reply to State's Response to Respondent's Motion to Modify Commissioner's Ruling Granting Discretionary Review, Mr. Arnold's Supplemental Brief, and Mr. Arnold's Objection to WALA's Motion to File an Amicus Brief, WALA's presumption is incorrect and contrary to the plain language of the majority opinion.

In rendering its decision in this case, Division III explicitly held that it **was not** adopting any rule of horizontal stare decisis:

no case has explicitly adopted stare decisis for decisions issued by a different division.

We are not prepared to resolve the question of exactly how stare decisis applies in the current context, involving decisions issued by other divisions.

Nevertheless, it is apparent that stare decisis must apply at least to some degree, otherwise we face vexing problems. **Because one panel decision cannot overturn a prior contrary decision, "two inconsistent opinions ... may exist at the same time,"** *Grisby v. Herzog*, 190 Wn.App. 786, 809, 362 P.3d 763 (2015), both with binding force over trial Courts and litigants throughout the state.²

Contrary to WALA's position, Division III did not adopt any new rule of horizontal stare decisis. The Court of Appeals clearly and unequivocally stated (a) that it was not announcing or adopting a new rule regarding horizontal stare decisis and (b) that it agreed with *Grisby* that

² *Matter of Arnold*, 198 Wn. App. 842, 847–48, 396 P.3d 375, 378 (2017) (emphasis added) (internal citations omitted).

“two inconsistent opinions may exist at the same time.”

The Commissioner of this Court ruled that review was appropriate based on a finding that the Court of Appeals had “adopt[ed] a ‘horizontal stare decisis’ rule...that a geographic division [of the Court of Appeals] is bound by previous decisions from other geographic divisions of the Court unless the previous decisions are both incorrect and harmful.”³ Given that the Court of Appeals took pains to explicitly state it was not resolving the question of how stare decisis applies in the context of conflicting decisions from different divisions of the Court of Appeals, the Commissioner erred in finding that the Court of Appeals did, in fact, resolve exactly that question.

The Court of Appeals discussed “horizontal stare decisis” in the context of recognizing that the decisions in *Taylor*⁴ and *Wheeler*⁵ were persuasive authority that were also controlling authority with binding authority “over **trial** Courts and litigants throughout the state.”⁶ The Court of Appeals was persuaded to follow *Taylor* and *Wheeler*, not because it felt it was required to follow under horizontal stare decisis, but because failing to do so would lead to a criminal law that was so vague that it would violate Fifth Amendment guarantees of due process fair notice of punishable conduct or standardless and arbitrary enforcement of

³ Corrected Ruling Granting Review, p. 5.

⁴ *State v. Taylor*, 162 Wn.App. 791, 259 P.3d 289 (2011).

⁵ *In re Personal Restraint of Wheeler*, 188 Wn.App. 613, 354 P.3d 950 (2015).

⁶ *Matter of Arnold*, 198 Wn. App. 842, 848, 396 P.3d 375, 378 (2017) (emphasis added).

the law:

Because one panel decision cannot overturn a prior contrary decision, “two inconsistent opinions ... may exist at the same time,” *Grisby v. Herzog*, 190 Wn.App. 786, 809, 362 P.3d 763 (2015), both with binding force over trial Courts and litigants throughout the state. This creates a potential problem for the liberty interests of our state's citizens. The issuance of conflicting decisions about what an individual must do to abide by the law, each of which is equally binding, would call the very constitutionality of our system of appellate jurisprudence into question. *See Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) (“the Government violates [the Fifth Amendment guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement”).

The harm caused by failing to follow *Taylor* and *Wheeler* under stare decisis is salient here. Regardless of whether *Taylor* and *Wheeler* were incorrectly decided, parting company at this point would create unjustified harm by rendering the applicable law impermissibly vague.⁷

The Court of Appeals' decision to follow *Taylor* and *Wheeler* was driven by concerns for the harm that would come if the Court issued a ruling contrary to *Taylor* and *Wheeler*, not because the Court felt it was required to follow those decisions under horizontal stare decisis:

The facts of this case make the practical problems of disagreeing with *Taylor* and *Wheeler* apparent. After his conviction, Mr. Arnold was sent a notice by the sheriff's department stating he no longer needed to register as a sex offender based on *Taylor*. Presumably other similarly

⁷ *Matter of Arnold*, 198 Wn. App. 842, 848, 396 P.3d 375, 378 (2017).

situated individuals were also sent notices. What steps would the sheriff's department need to take if we issued a decision contrary to *Taylor*? Because we cannot overturn *Taylor*, it would not be able to advise individuals that its prior notice was incorrect. Yet the failure to advise individuals of a decision contrary to *Taylor* would frustrate the State's desire to increase sex offender registrations. Our Court strives to solve problems, not create them. But departing from *Taylor* and *Wheeler* would do just that.

We decline to upend settled expectations throughout the state by rejecting *Taylor* and *Wheeler*. The harm of doing so is too great.⁸

As pointed out by the Commissioner at pages 4-5 of the Corrected Ruling Granting Review, the traditional interpretation, supported by decisions from both Division II and Division III of the Court of Appeals, is that a division of the Court of Appeals is not bound by conflicting decisions from another division of the Court of Appeals, but conflicting decisions are treated as persuasive authority. This is the interpretation endorsed by Division I in *Grisby*⁹ as well as Division III in this case. The unanimous position of all three divisions of the Court of Appeals is that decisions of one division of the Court of Appeals are nothing more than persuasive authority in another division of the Court of Appeals.

Because the Court of Appeals in this case adopted no rule of mandatory horizontal stare decisis, WALA's amicus brief to this court discusses an issue that is not before this court.

⁸ *Matter of Arnold*, 198 Wn. App. 842, 849, 396 P.3d 375, 379 (2017).

⁹ *Grisby v. Herzog*, 190 Wn. App. 786, 809–10, 362 P.3d 763 (2015).

2. **Should this court decide to consider the issue of whether Division III adopted a rule of horizontal stare decisis, Mr. Arnold adopts and incorporates the arguments contained in WALA's amicus brief.**

In an abundance of caution, should this court find that Division III did adopt a new rule of horizontal stare decisis, Respondent Arnold adopt and incorporates the arguments of WALA in its amicus brief.

DATED this 12th day of December, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Eddie Arnold

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 12th day of December, 2017, I delivered via US mail a true and correct copy of the Objection to WALA's Motion to File an Amicus Brief to which this certificate is attached by United States Mail, to the following:

Mr. Eddie Arnold
1217 North Lincoln Street, Apt. 4
Spokane, WA 99201

And to

Gretchen Eileen Verhoef
Lawrence Henry Haskell
Spokane County Prosecuting Attorney's Office,
1100 W. Mallon Avenue
Spokane, WA 99260

And to

Lewis County, by Eric Eisenburg
351 N. North St
Chehalis, WA 98532

And to:

Catherine C. Clark
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121

And to:

Shelby R. Frost Lemmel
241 Madison Avenue
N. Bainbridge Island, WA 98110

And to:

Valerie A. Villacin
1619 8th Avenue North
Seattle, WA 98109-3007

Signed at Tacoma, Washington this 12th day of December, 2017.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

December 12, 2017 - 1:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94544-6
Appellate Court Case Title: Personal Restraint Petition of Eddie Dean Arnold
Superior Court Case Number: 13-1-03641-1

The following documents have been uploaded:

- 945446_Other_20171212134827SC146045_8165.pdf
This File Contains:
Other - Respondent Arnold's Response to WALA's Amicus Brie
The Original File Name was ARNOLDANSWERToWALAAmicus.pdf

A copy of the uploaded files will be sent to:

- LHaskell@spokanecounty.org
- appeals@lewiscountywa.gov
- cat@loccc.com
- eric.eisenberg@lewiscountywa.gov
- gverhoef@spokanecounty.org
- lori.cole@lewiscountywa.gov
- paralegal@appeal-law.com
- scpaappeals@spokanecounty.org
- shelby@appeal-law.com
- valerie@washingtonappeals.com

Comments:

Sender Name: Reed Speir - Email: reedspeirlaw@seanet.com

Address:

3800 BRIDGEPORT WAY W STE A23

UNIVERSITY PLACE, WA, 98466-4495

Phone: 253-722-9767

Note: The Filing Id is 20171212134827SC146045