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SUPREME COURT  
STATE OF WASHINGTON  
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Nº. 94544-6

SUPREME COURT OF THE STATE OF WASHINGTON

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PERSONAL RESTRAINT OF  
EDDIE ARNOLD,  
Respondent.

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**RESPONDENT'S RESPONSE TO LEWIS COUNTY'S AMICUS  
BRIEF**

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On November 16, 2017, Lewis County, through Eric Eisenberg, the Civil Deputy Prosecuting Attorney for the Lewis County Prosecuting Attorney's Office, filed a motion for permission to file an amicus curiae brief in this matter. Mr. Arnold objected to motion, but this court granted Lewis County's motion and accepted its amicus brief.

Lewis County argues that RCW 9A.44.900 and RCW 9A.44.901 fill the "gap" in the sex offender registration requirement first identified by Division I of the Court of Appeals in *Taylor* but recognized and affirmed by Division II in *Wheeler* and Division III in this case.

Mr. Arnold submits this response to Lewis County's Amicus Brief.

A. RESPONSE

**1. Lewis County's amicus brief should be disregarded by this court since the only issues raised by Lewis County are issues not raised by any party in this case or in *Taylor* or *Wheeler*.**

The Supreme Court does "not consider issues raised first and only by amicus."<sup>1</sup>

Lewis County's amicus brief should be disregarded by this court since Lewis County admits its argument regarding RCW 9A.44.900 and RCW 9A.44.901 has never been raised or briefed by any party in this case, *Taylor*, or *Wheeler*, and admits that no division of the Court of Appeals

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<sup>1</sup> *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072, 1080 (1993), citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984).

has addressed those statutes in the context of the issues in this case: “To be fair, no one pointed out RCW 9A.44.900-.901 to the *Taylor* court. The statutes are not mentioned in any of the briefing...*Wheeler* and *Arnold* adopt *Taylor*’s result without considering this argument, either.”<sup>2</sup>

Because this court does not consider issues raised first and only by amicus, this court should not consider Lewis County’s amicus brief in its entirety since, as admitted by Lewis County, the only issue discussed in the brief is an issue raised first and only by Lewis County.

**2. Should this court decide to consider Lewis County’s argument, the argument fails because Lewis County has not shown that resort to statutory interpretation beyond the plain language of the applicable statutes is necessary.**

In an abundance of caution, should this court chose to consider Lewis County’s amicus brief, Mr. Arnold submits the following response to Lewis County’s amicus brief.

The primary issue in this case is one of statutory interpretation. In 1988, Mr. Arnold, like the defendants in *Taylor* and *Wheeler*, pleaded guilty to statutory rape under former RCW 9A.44.080. In 2015, Mr. Arnold pleaded guilty to failure to register as a sex offender in violation of RCW 9A.44.130.

In 2013, the time Mr. Arnold allegedly failed to register as a sex

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<sup>2</sup> Amicus Brief of Lewis County, p. 8.

offender, RCW 9A.44.128(10)(1)(a) defined “sex offense,” in pertinent part as “[a]ny offense defined as a sex offense by RCW 9.94A.030.”<sup>3</sup>

The then-applicable version of RCW 9.94A.030(46) defined “sex offense” as, in pertinent part, “A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132.”

RCW 9A.44.080 was repealed in 1988 and was not part of chapter 9A.44. RCW at the time Mr. Arnold failed to register as a sex offender. The dispute in this case is whether Mr. Arnold’s conviction of violating RCW 9A.44.080 was a conviction that triggered his duty to register as a sex offender under RCW 9A.44.130 when the then-current version of RCW 9.94A.030 did not include a violation of RCW 9A.44.080 in the definition of a “sex offense” for purposes of triggering a duty to register under RCW 9A.44.130.

Division I of the Court of Appeals in *Taylor*,<sup>4</sup> Division II of the Court of Appeals in *Wheeler*,<sup>5</sup> and Division III of the Court of Appeals in Mr. Arnold’s case,<sup>6</sup> have all answered this question in the negative. In *Taylor*, Division I found that because RCW 9A.44.090 was repealed in

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<sup>3</sup> Laws 2010 Chapter 267 (S.S.B. 6414) amended RCW 9A.44.130 in part by removing the definition of “sex offense” from that statute and placing it in a newly created section, RCW 9A.44.128. The relevant language of the definition did not change.

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

<sup>5</sup> *In re Pers. Restraint of Wheeler*, 18 Wn.App. 613, 354 P.3d 950 (2015).

<sup>6</sup> *Matter of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017).

1988<sup>7</sup>, and because “there is no provision...for offenses listed in chapter 9A.44 that existed after 1976 but were subsequently repealed”,<sup>8</sup>

The language of the SRA's definition resulted in a gap. Filling this gap would require us to read words into the statute to make it applicable to any felony that is “or was at the time of the offense” a violation of chapter 9A.44 RCW. It is highly likely this gap was inadvertent rather than intentional. Regardless, we may not fill such a gap without legislative authority.<sup>9</sup>

Ultimately, the *Taylor* court held that “the plain language of the statute does not define Taylor's conviction as a sex offense”<sup>10</sup> and “Taylor's crime of conviction is no longer listed in the provision of the SRA defining ‘sex offense.’”<sup>11</sup> The *Taylor* court found that it was “not empowered to add words to the statute to fix that gap” and reversed Taylor’s conviction.<sup>12</sup>

Statutory interpretation begins with the plain language of the statute.<sup>13</sup> If the statute is unambiguous after a review of the plain meaning, the inquiry is at an end.<sup>14</sup>

A court's objective in reading a statute is to ascertain and

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<sup>7</sup> *Taylor*, 162 Wn.App. at 795-796, 259 P.3d 289.

<sup>8</sup> *Taylor*, 162 Wn.App. at 799, 259 P.3d 289.

<sup>9</sup> *Taylor*, 162 Wn.App. at 799, 259 P.3d 289.

<sup>10</sup> *Taylor*, 162 Wn.App. at 800, 259 P.3d 289.

<sup>11</sup> *Taylor*, 162 Wn.App. at 801, 259 P.3d 289.

<sup>12</sup> *Taylor*, 162 Wn.App. at 801, 259 P.3d 289.

<sup>13</sup> *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *see also State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (the plain language of the statute is “[t]he surest indication of legislative intent.”)

<sup>14</sup> *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010); *see also State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010).

carry out the legislature's intent. The court first looks to the statute's plain language to determine the legislature's intent. If the court finds that the statutory language can be given only one reasonable interpretation, its inquiry ends because that language requires no construction.<sup>15</sup>

A statute is ambiguous only “if it can be reasonably interpreted in more than one way” and a reviewing court “[is] not obliged to discern an ambiguity by imagining a variety of alternative interpretations.”<sup>16</sup> A statute is not ambiguous merely because different interpretations are “conceivable.”<sup>17</sup>

In its amicus brief, Lewis County argues that RCW 9A.44.900 and RCW 9A.44.901 fill the “gap” identified by *Taylor* and that since “the ‘gap’ convictions are accounted for by a rule of construction, the gap disappears.”<sup>18</sup> Lewis County therefore acknowledges that it is necessary to resort to the rules and exercise of statutory construction for its argument to have any force. However, Lewis County ignores the first rule of statutory interpretation- that the statute must first be determined to be ambiguous before a court will resort to statutory interpretation.

Lewis County’s discussion of RCW 9A.44.900 and RCW 9A.44.901 and the legislative history of the crimes of statutory rape and

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<sup>15</sup> *State v. H.Z.-B.*, 405 P.3d 1022, ¶6 (2017).

<sup>16</sup> *W. Telepage, Inc. v. City of Tacoma Dep’t of Fin.*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000).

<sup>17</sup> *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

<sup>18</sup> Amicus Brief of Lewis County, p. 8.

how those statutes were repealed and new statutes enacted to replace them becomes relevant and necessary only *after* Lewis County first establishes that the plain language of RCW 9.94A.030(46) is ambiguous in some way. Lewis County has made no such showing. All three divisions of the Court of Appeals have agreed that the plain language of RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) is clear and Division II in *Wheeler* and Division III in this case have rejected the State's attempts to argue statutory interpretation is necessary.<sup>19</sup>

Where there is no ambiguity in a statute, there is nothing for the court to interpret.<sup>20</sup> Because Lewis County has failed to show any ambiguity in the plain language of any statute, it is improper for this court to engage in statutory interpretation and construction and consider Lewis County's arguments.

The plain language of RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) is unambiguous. It is unnecessary to resort to statutory interpretation to understand the meaning of the statutes. The legislature clearly did not include a conviction under the now-repealed RCW 9A.44.080 in the list of crimes that require an offender to register as a sex offender, and it is clearly not part of current chapter 9A.44.

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<sup>19</sup> *Wheeler*, 188 Wn. App. 613, 619–21, 354 P.3d 950.

<sup>20</sup> *State v. Keeney*, 112 Wn.2d 140, 142, 769 P.2d 295 (1989).

3. **Even if this court were to find the language of RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) ambiguous and engage in statutory interpretation, Lewis County’s argument fails because the plain language of RCW 9A.44.900 and RCW 9A.44.901 clearly states those statutes do not apply in this case and the rule of lenity requires this court to interpret ambiguous statutes in favor of Mr. Arnold.**

Again, in an abundance of caution, should this court choose to address the arguments in Lewis County’s amicus brief, and should this court find that the plain language of RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) is ambiguous, Mr. Arnold submits the following argument.

The purpose of interpreting a statute is to determine and enforce the legislature's intent. *State v. Alvarado*, 164 Wn.2d 556, 561–62, 192 P.3d 345 (2008). Where the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Id.* at 562, 192 P.3d 345. In discerning the plain meaning of a provision, courts consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *Id.*<sup>21</sup>

All divisions of the Court of Appeals have looked at the statutory language of the statutes relevant in this case and determined that the statutory language is unambiguous and does not require any further statutory interpretation. For the first time in this case, amicus Lewis County argues in its amicus brief that RCW 9A.44.900 and RCW

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<sup>21</sup> *Wheeler*, 188 Wn. App. at 620, 354 P.3d 950.

9A.44.901 were not considered by the *Taylor*, *Wheeler*, or *Arnold* courts and should be considered by this court because consideration of those statutes cures the “anomaly” that is the *Taylor* decision.<sup>22</sup>

- a. *The plain language of RCW 9A.44.900 and RCW 9A.44.901 state that those statutes are not applicable to any analysis of whether former RCW 9A.44.080 is included in the definition of a “sex offense” under RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46).*

Lewis County’s argument is as follows: in 1975 the Washington Legislature enacted RCWs 9.79.200, 9.79.210, and 9.79.220 codifying first, second, and third degree statutory rape, respectively.<sup>23</sup> In 1979, these statutes were recodified as RCW 9A.44.070, 9A.44.080, and 9A.44.090, respectfully.<sup>24</sup> The 1979 recodification of the statutory rape statutes included the passage of RCW 9A.44.900 and RCW 9A.44.901.<sup>25</sup> RCW 9A.44.900 and RCW 9A.44.901 acknowledged the decodification of 9.79.200, 9.79.210, and 9.79.220 and the inclusion of those statutes in the newly created chapter 9A.44 RCW.<sup>26</sup> In 1988 RCW 9A.44.070, 9A.44.080, and 9A.44.090 were repealed and replaced with statutes defining the crimes of rape of a child, child molestation, and sexual

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<sup>22</sup> Amicus Brief of Lewis County, p. 8.

<sup>23</sup> Amicus Brief of Lewis County, p. 5.

<sup>24</sup> Amicus Brief of Lewis County, p. 5-6.

<sup>25</sup> Amicus Brief of Lewis County, p. 5.

<sup>26</sup> RCW 9A.44.900.

misconduct with a minor.<sup>27</sup>

The State argues that because “RCW 9A.44.900 and .901 are still on the books and have never been repealed...[t]hey instruct one to construe former RCW 9.79.200-.220 and former RCW 9A.44.070-.090 as part of Chapter 9A.44 RCW.”<sup>28</sup> The State’s argument fails because it is contrary to the plain language of RCW 9A.44.900 and RCW 9A.44.901 and it ignores the legislature’s decision to repeal RCW 9A.44.070, 9A.44.080, and 9A.44.090 in 1988.

RCW 9A.44.900 and RCW 9A.44.901 make no mention of RCW 9A.44.070, 9A.44.080, and 9A.44.090. RCW 9A.44.900 refers to various provisions of RCW 9.79 and RCW 9A.88, but do not refer to RCW 9A.44 beyond acknowledging that such a chapter is created and certain crimes that had formerly been codified in RCW 9.79 will be recodified somewhere in the newly created RCW 9A.44. RCW 9A.44.900 and RCW 9A.44.901 were accurate summaries of the Legislature’s intent in 1979 but are silent as to the Legislature’s intent in 1988.

RCW 9A.44.900 and RCW 9A.44.901 are still “on the books” because they serve as historical markers of the Legislature’s intent in repealing and recodifying the statutory rape statutes *in 1979*. In **1988** this same Legislature decided to repeal those statutes that it enacted in 1979

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<sup>27</sup> Amicus Brief of Lewis County, p. 5-6.

<sup>28</sup> Amicus Brief of Lewis County, p. 6.

and create new crimes relating to the sexual abuse of minors. The crime of failure to register as a sex offender was not created until 1990. Any statement of legislative intent about the crime of statutory rape in 1979 or even 1988 is irrelevant and inapplicable to a crime that was not enacted until 1990.

The fact the 1988 Legislature did not repeal RCW 9A.44.900 or RCW 9A.44.901 when it repealed the statutory rape statutes is not surprising since RCW 9A.44.900 or RCW 9A.44.901 were still accurate statements of what the Legislature intended to do in 1979. Lewis County grossly misinterprets the Legislature's decision not to repeal RCW 9A.44.900 and RCW 9A.44.901 as somehow indicative of the Legislature's intent that the repealed crime of statutory rape was still a part of chapter 9A.44 RCW post-1988.

The first step in statutory construction is to review the plain language of the statute being considered. The Legislature clearly stated the statutes to which RCW 9A.44.900 and RCW 9A.44.901 apply. The crime of statutory rape was part of chapter 9A.44 RCW from 1979 to 1988, but the Legislature clearly repealed those statutes in 1988. The plain language of RCW 9A.44.900 and RCW 9A.44.901 clearly indicates that those statutes are applicable only to sections of former chapter 9.79 RCW and are not applicable to *any* provision of chapter 9A.44, especially post-1988,

let alone applicable to RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46).

- b. *Even if this court were to find that RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) were ambiguous and therefore find that resort to statutory interpretation were proper, the rule of lenity requires this court to construe those statutes in favor of Mr. Arnold.*

The meaning of a statute is a question of law that courts review de novo.<sup>29</sup> When possible, courts derive the legislative intent of a statute solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.<sup>30</sup> If more than one interpretation of the plain language is reasonable, then the statute is ambiguous and courts must construe it.<sup>31</sup> Courts may then rely on rules of statutory construction, legislative history, and relevant case law to discern legislative intent.<sup>32</sup> If, after applying rules of statutory construction, the court concludes that a statute remains ambiguous, “the rule of lenity requires [the court] to interpret the statute in favor of the defendant absent legislative intent to the contrary.”<sup>33</sup>

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<sup>29</sup> *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

<sup>30</sup> *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

<sup>31</sup> *Id.*

<sup>32</sup> *Ervin*, 169 Wn.2d at 820, 239 P.3d 354.

<sup>33</sup> *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009) (quoting *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)).

Thus, courts will interpret an ambiguous penal statute adversely to the defendant **only if** statutory construction “clearly establishes” that the legislature *intended* such an interpretation.<sup>34</sup>

As stated above, by their plain language RCW 9A.44.900 and RCW 9A.44.901 are irrelevant to an analysis of the Legislature’s intent when it enacted RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46). RCW 9A.44.900 and RCW 9A.44.901 were enacted over a decade before the crime of failing to register as a sex offender was even created. If this court is going to engage in statutory construction, then RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) would remain just as ambiguous after consideration of RCW 9A.44.900 and RCW 9A.44.901 as they were before such consideration. Accordingly, this court would then have to apply the rule of lenity and interpret RCW 9A.44.900, RCW 9A.44.901, RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) in favor of Mr. Arnold. In the context of this case that would mean this court would **affirm** the interpretation of those statutes **already reached by every division of the Court of Appeals**.

B. CONCLUSION

Issues raised only by amicus will not be considered by the

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<sup>34</sup> *Id.*

Supreme Court.<sup>35</sup> Lewis County concedes that the only issues it is raising are issues not present in this case and not present in any of the other decisions of the Court of Appeals addressing the issue of the duty of individuals convicted of statutory rape to register as sex offenders. Accordingly, this court should disregard the amicus brief filed by Lewis County.

Lewis County has not established the ambiguity of any statute calling for the statutory analysis and construction necessary to reach Lewis County's arguments. However, should this court decide to engage in statutory interpretation of the statutes at issue in this case, and should this court choose to consider Lewis County's arguments, Lewis County's argument that RCW 9A.44.900 and RCW 9A.44.901 indicate the Legislature's intent that RCW 9A.44.080 would remain part of chapter 9A.44 RCW after the Legislature explicitly repealed that statute fails. The plain language of RCW 9A.44.900 and RCW 9A.44.901 indicates that those statutes do nothing more than indicate what the Legislature intended in 1979 when it decodified chapter 9.79 RCW and created chapter 9A.44 RCW. RCW 9A.44.900 and RCW 9A.44.901 offer no guidance as to the Legislature's intent in 1988 or in 1990.

Further, if this court engages in statutory interpretation, given the

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<sup>35</sup> *Rabon v. City of Seattle*, 135 Wn.2d 278, 291 n. 4, 957 P.2d 621, 627 (1998).

fact that RCW 9A.44.900 and RCW 9A.44.901 provide no guidance to this court as to how to interpret RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46), the rule of lenity requires this court to interpret those statutes in favor of Mr. Arnold and affirm the Court of Appeals.

All three divisions of the Court of Appeals have analyzed the issues in this case. This means that no fewer than nine justices and six lawyers have reviewed the applicable statutes and found RCW 9A.44.900 and RCW 9A.44.901 not worth mentioning in their analysis. This is so not because those statutes were overlooked, as is posited by Lewis County, but because those statutes are irrelevant to the issues in this case. RCW 9A.44.900 and RCW 9A.44.901 expressly apply to the 1979 repeal of chapter 9.79 RCW, are not applicable to this case, and it is a waste of this court's time and resources to consider them.

DATED this 15<sup>th</sup> day of December, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Reed Speir", is written above a horizontal line.

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 15<sup>th</sup> day of December, 2017, I delivered via US mail a true and correct copy of the Objection to Lewis County'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  
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And to

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And to

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And to:

Catherine C. Clark  
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And to:

Shelby R. Frost Lemmel  
241 Madison Avenue  
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And to:

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

Signed at Tacoma, Washington this 15<sup>th</sup> day of December, 2017.



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Reed Speir, WSBA No. 36270

# LAW OFFICE OF REED SPEIR

December 15, 2017 - 9:25 AM

## 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

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