

Supreme Court No. 94544-6

Court of Appeals No. 34018-0

FILED
MAY 23 2017
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

EDDIE D. ARNOLD, Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

MOTION FOR DISCRETIONARY REVIEW

LAWRENCE H. HASKELL
Spokane County Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. IDENTITY OF PETITIONER..... 1

II. ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 1

IV. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT..... 4

 A. THE *ARNOLD* MAJORITY’S ADHERENCE TO THE PRINCIPLE OF “HORIZONTAL STARE DECISIS” HIGHLIGHTS A CONFLICT IN THE OPINIONS OF THE COURT OF APPEALS AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT. 5

 B. REGARDLESS OF THE DEGREE OF DEFERENCE THE COURT OF APPEALS IS TO GIVE TO ITS PREVIOUS DECISIONS, EACH OF THE JUDGES REVIEWING *ARNOLD* INDICATED A BELIEF THAT *TAYLOR* AND *WHEELER* WERE INCORRECTLY DECIDED; THIS COURT SHOULD ACCEPT REVIEW TO RESOLVE THAT CONFLICT..... 12

 C. THIS COURT SHOULD ALSO ACCEPT REVIEW OF THIS MATTER OF SUBSTANTIAL PUBLIC INTEREST; *TAYLOR* AND *WHEELER’S* INCORRECT DECISIONS ARE CLEARLY HARMFUL AS THEY ALLOW TWELVE YEARS OF CONVICTED SEX OFFENDERS TO ESCAPE SEX OFFENDER REGISTRATION REQUIREMENTS. 17

V. CONCLUSION..... 18

TABLE OF AUTHORITIES

WASHINGTON CASES

Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (2015)..... 7, 8

In Re Pers. Restraint of Eddie D. Arnold, No. 34018-0,
2017 WL 1483993 (April 25, 2017) passim

In Re Personal Restraint of Wheeler, 188 Wn. App. 613,
354 P.3d 950 (2015)..... passim

Little v. King, 147 Wn. App. 883, 198 P.3d 525 (2009)..... 9

State v. Breaux, 167 Wn. App. 166, 273 P.3d 447 (2012)..... 9

State v. Larson, 185 Wn. App. 903, 344 P.3d 244, *review
granted*, 183 Wn.2d 1007, 352 P.3d 188 (2015),
and rev'd, 184 Wn.2d 843, 365 P.3d 740 (2015)..... 9, 17

State v. Otton, 185 Wn.2d 673, 374 P.3d 1108 (2016)..... 5

State v. Stalker, 152 Wn. App. 805, 219 P.3d 722 (2009),..... 6

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

State v. Weatherwax, 193 Wn. App. 667,
376 P.3d 1150 (2016)..... 9, 10

CONSTITUTIONAL PROVISIONS

WASH. CONST. art IV § 30 11

STATUTES

1988 FINAL LEGISLATIVE REPORT, 50th Wash. Leg. 13

H.B. REP. ON H.B. 1333, 50th Leg., Reg. Sess. (Wash. 1988)..... 13

Laws of 1975..... 12

Laws of 1975, 1st Ex. Sess., ch 14 12

Laws of 1975, 1st Ex. Sess., ch 260 12

Laws of 1979, 1 st Ex. Sess., ch. 244	13
Laws of 1990, ch. 3.....	13, 14, 18
Laws of 1991, ch. 274.....	14
Laws of 1999, ch. 352.....	15
RCW 9.79.210(1) (1975).....	12
RCW 9.94A.030.....	16
RCW 9.94A.030 (1990).....	14
RCW 9A.44.073.....	13
RCW 9A.44.076.....	13
RCW 9A.44.079.....	13
S.B. REP. ON SUBSTITUTE S.B. 6259, 51st Leg., Reg. Sess. (Wash. 1990)	14

RULES

RAP 13.4.....	4, 5, 11, 17
RAP 13.5A.....	4
RAP 16.14.....	4

I. IDENTITY OF PETITIONER

The State of Washington, petitioner herein and respondent below, respectfully requests pursuant to RAP 13.5A(a) and (b), this Court grant review of the published decision of the Court of Appeals in *In Re Matter of the Personal Restraint of Eddie D. Arnold*, No. 34018-0-III, 2017 WL 1483993, filed April 25, 2017. A copy of that opinion is attached as Appendix A.

II. ISSUES PRESENTED FOR REVIEW

1. Whether, pursuant to the doctrine of “horizontal stare decisis,” one division of the Court of Appeals is bound by the decision of another division of the Court of Appeals even where the prior precedent is demonstrated to be incorrect?
2. Whether Division One and Division Two correctly determined that sex offenders convicted between July 1, 1976, and July 1, 1988, are not required to register as sex offenders due to a “legislative gap,” or whether, as discussed by the dissent in *Arnold*, their determination rests on an incorrect understanding of the history of the statutes at issue and no such legislative gap exists which would relieve Mr. Arnold of the requirement to register as a sex offender?

III. STATEMENT OF THE CASE

On May 3, 1988, the defendant was charged in Chelan County, Washington, with statutory rape in the second degree, in violation of RCW 9A.44.080(1). *Arnold*, 2017 WL 1483993 at *1. The defendant pled guilty as charged. *Id.* The defendant was released from prison on August 13, 1990, and was under the supervision of the Department of Corrections from that date until March 20, 1992. *Id.* Between the date of his release from

supervision on the rape charge in 1992, and the current date, the defendant has been convicted of 12 felonies; of those, five were convictions for failing to register as a sex offender, with offense dates in 2000, 2003 (two convictions), 2004 and 2007. *Id.*

On October 11, 2013, the State charged the defendant with failing to register as a sex offender, alleging that between May 2013 and October 2013, the defendant failed to comply with the registration requirements of RCW 9A.44.130. *Id.* The defendant pled guilty as charged to failure to register as a sex offender.¹ *Id.* Pursuant to a negotiated plea agreement, a joint recommendation of 51 months was requested. *Id.* At the sentencing hearing on June 4, 2015, the court followed the sentencing recommendation, and imposed 51 months of incarceration, along with other conditions. *Id.*

On June 17, 2015, the Spokane County Sheriff's Office sent the defendant a letter indicating that he was no longer required to register as a sex offender pursuant to *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289

¹ The defendant entered a plea of guilty on the failure to register as a sex offender charge in exchange for the State's agreement to amend an unrelated charge of first degree trafficking in stolen property to second degree trafficking in stolen property. The plea agreement provided that the state would recommend concurrent sentences on the two charges for a total of 51 months of incarceration.

(2011). *Id.* The defendant then moved to withdraw his guilty plea, alleging that he was unaware of *State v. Taylor*. *Id.* The trial court transferred the matter to the Court of Appeals pursuant to CrR 7.8 for its consideration as a personal restraint petition. *Id.*

Adhering to the principle of “horizontal stare decisis,” two of the three court of appeals judges declined to deviate from Division One’s holding in *Taylor*, and Division Two’s analogous holding in *In Re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015), despite their opinion that the “State’s argument has much force.” *Arnold* at *2. In so holding, the majority indicated, “the State’s criticisms of our prior decisions are well taken. But only the Washington Supreme Court can provide the State the kind of definitive relief it seeks. That route for review remains available.” *Id.* at 4.

The three Judge panel authored four separate opinions. Judge Pennell’s concurring opinion to her majority opinion expounded on the principle of “horizontal stare decisis,” and acknowledged that “[o]ur Supreme Court may ultimately agree with the dissent and find *Taylor* and *Wheeler* wrongly decided.” *Id.* at *6 (Pennell, J. concurring). In a separate concurrence, Judge Siddoway indicated her recognition that the State would likely seek review by this Court, in light of her conclusion that, although this Court’s stare decisis requirements do not apply to the divisions of the

court of appeals, in this case, “justice is best served by deciding this case consistently with *Taylor* and *Wheeler*.” *Id.* at *7 (Siddoway, J. concurring).

Judge Lawrence-Berrey dissented, accepting only for the purpose of his opinion that the majority’s stare decisis rule for the court of appeals was correct, and determined that *Taylor* and *Wheeler* were both incorrectly decided and harmful. *Id.* at *7 (Lawrence-Berrey, J. dissenting). Judge Lawrence-Berrey “invite[d] our Supreme Court to address whether *Taylor* and *Wheeler* are incorrect, [and also] to clarify the role of stare decisis in the Court of Appeals.” *Id.* at *10.

IV. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

Pursuant to RAP 13.5A and RAP 16.14(c), a decision of the Court of Appeals granting a personal restraint petition is subject to review by this Court only by a motion for discretionary review. In such a motion for discretionary review, this Court applies the same considerations found in RAP 13.4(b). RAP 13.5A(b). Under RAP 13.4(b), this Court will only accept review of a Court of Appeals decision if: (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, (2) the decision is in conflict with a published decision of the Court of Appeals, (3) the decision involves a significant question of law under the Constitution of the State of Washington or the United States, or (4) the

petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

A. The *Arnold* majority's adherence to the principle of "horizontal stare decisis" highlights a conflict in the opinions of the Court of Appeals and is an issue of substantial public interest that should be determined by this Court.

In Washington, this Court applies the principle of stare decisis to established precedent, requiring a "clear showing that an established rule is incorrect and harmful" before it is abandoned. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). Mr. Arnold's case questions whether the principle of "horizontal stare decisis" binds one division of the Court of Appeals to a prior decision of another division, even where the reviewing court acknowledges the prior precedent was incorrectly decided. Even among the judges reviewing Mr. Arnold's case, it is unclear what standard is to be applied by the Court of Appeals in such cases.

Judge Pennell authored both the majority opinion and her own concurrence, in which she set forth her view that the principle of stare decisis plays a significant role in Court of Appeals decisions. *Arnold* at *4 ("While the Supreme Court did not explicitly state that stare decisis applies across the different divisions of our court, I see no substantive basis for limiting its application"). Despite Judge Pennell's recognition that some may view RAP 13.4 as implicitly permitting the appellate divisions to

disagree with one another without the constraints of stare decisis, Judge Pennell would opt to follow the rule as discussed in *State v. Stalker*, 152 Wn. App. 805, 811-812, 219 P.3d 722 (2009), which “appl[ies] the same formulation of stare decisis [in the Court of Appeals] as the Supreme Court,” requiring a demonstrable showing that a prior rule adopted in the Court of Appeals is both incorrect and harmful.

Concentrating on the required harm that a party must demonstrate in the Court of Appeals to convince the court to deviate from a prior holding (having already agreed that the State had demonstrated “with much force” that *Taylor* and *Wheeler* were incorrectly decided), Judge Pennell indicated:

[T]he manner in which harm should be assessed at the Court of Appeals is different in our Court than it is in the Supreme Court. There is value to our appellate panels engaging in rigorous debate over the interpretation of our state’s laws prior to the Supreme Court issuing a final decision.

Arnold at *6.

However, despite Judge Pennell’s recognition of value in the Court of Appeals’ “rigorous debate” in her concurring opinion, she would find that, where the court of appeals believes the harm caused by “changing course” has a “salient” impact on real property, contract and criminal law, or may impact liberty and property interests, “it may be better to be consistent than right.” *Id.*

While Judge Siddoway joined the majority opinion, she would not follow the *Stalker* rule, but rather the reasoning of *Grisby v. Herzog*, 190 Wn. App. 786, 806, 362 P.3d 763 (2015). In *Grisby*, the court examined whether it was bound to prior precedent of the Court of Appeals. Division One indicated, “[o]nly a few Court of Appeals opinions have expressly applied [the incorrect and harmful] test or indicated that the parties must brief it.”² *Id.* at 808. It further indicated that one panel of the Court of Appeals does not overrule the decision of another panel, but instead, when one panel disagrees with another panel, the opinion will state that the panel “disagrees with,” “departs from” or “declines to follow” the previous opinion. *Id.* at 809-810. The *Grisby* court indicated that while “the various panels of the Court of Appeals strive not to be in conflict with each other because, like all courts, we respect the doctrine of stare decisis,” the court also recognizes that conflict will arise, pointing to RAP 13.4 as providing this Court with a mechanism for settling those conflicts. *Id.* at 807, 809. Also concerning to the *Grisby* court were the inherent problems associated with a “first to the post” rule, “wherein the earliest decision by one of the divisions functions to establish binding precedent on the other divisions,

² *Grisby* also criticized *Stalker*'s assertion that the Court of Appeals employs the same stare decisis test as this Court, as “contrary dicta” that “should not be taken as a new requirement to be met in briefs and argument before the Court of Appeals.” 190 Wn. App. at 807 n.6.

come rain or shine.” *Id.* at 810 (citing Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 504 (2012/2013)). Such a rule could perpetuate binding, but utterly incorrect precedent, unless or until this Court takes review. *Id.* Such a rule would also eliminate conflicts in Court of Appeals which serve the positive function of alerting this Court to unsettled areas of the law that are in need of review. *Id.*

However, despite *Grisby’s* determination that the Court of Appeals is not obliged to apply the stare decisis standard that precedent must be “harmful and incorrect” before announcing a contrary rule, Judge Siddoway determined that, in Mr. Arnold’s case, “justice is best served by deciding this case consistently with *Taylor* and *Wheeler*, recognizing that the State may seek review by our Supreme Court.” *Arnold* at *7.

Judge Lawrence-Berrey accepted the majority’s stare decisis rule for the purposes of his dissent, but clearly did not believe that the Court of Appeals is bound by earlier precedent: “The Court of Appeals should not be hampered if one panel aspires to correct a rule that is clearly wrong. Through such a disagreement, the Supreme Court can weigh the merits of the conflict and determine the correct rule.” *Arnold* at *10.

The question left unresolved by this fractured decision is whether and to what extent the doctrine of stare decisis affects the opinions of the Court of Appeals. Even in recent years, the Court of Appeals (including Division Three) has been inconsistent in its application of the doctrine,³ sometimes not even addressing the potential harm that would result from the promulgation of contrary court precedent. For instance, in *State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150 (2016), Division Three expressly reached “a different conclusion than was reached by Division One of our court in *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012),” resulting in the creation of two different rules for calculation of offender scores including anticipatory serious violent offenses. The majority opinion did not mention the doctrine of stare decisis, or the harm caused by *Breaux*’s rule.

Judge Pennell dissented in *Weatherwax*, indicating that the doctrine of stare decisis should counsel the court against departing from *Breaux*, as

³ See e.g. *State v. Larson*, 185 Wn. App. 903, 344 P.3d 244, review granted, 183 Wn.2d 1007, 352 P.3d 188 (2015), and rev’d, 184 Wn.2d 843, 365 P.3d 740 (2015) (“We are aware that the foregoing analysis is at odds with a recent Division Two decision. See *State v. Reeves*, 184 Wn. App. 154, 336 P.3d 105 (2014) (holding that “ordinary pliers” do not constitute a device designed to overcome security systems.) We are not persuaded by that decision’s reasoning”); *Little v. King*, 147 Wn. App. 883, 198 P.3d 525 (2009) (“Although under the policy of stare decisis, we are exceedingly reluctant to disagree with recent opinions, we will do so if such an opinion ‘is demonstrably “incorrect or harmful””).

such a departure would “upend[] settled expectations and risk[] inequitable outcomes” in Washington’s trial courts. 193 Wn. App. at 682.

Judge Pennell’s later expounded in *Arnold* that,

when it comes to issues of legal process such as what level of scrutiny to apply to a constitutional claim ... the scope of the prior conviction exception to the Sixth Amendment’s jury trial right, and eligibility for attorney fee awards, there is little public disruption or harm caused by discordant decisions from our court... Such inconsistencies may be frustrating to a superior court Judge tasked with deciding which binding opinion to follow... Nevertheless, they are not insurmountable...

But the harm caused by changing course is sometimes salient. When it comes to rules applicable outside of court proceedings, governing how ordinary people and businesses conduct their day to day affairs, there are substantial costs to deviating from prior decisions... Overturning such cases can cause substantial harm to individuals who are simply following the law. In such circumstances, it may be better to be consistent than right.

Arnold at *6 (internal citations omitted).

Implicit in Judge Pennell’s opinions in *Arnold* and *Weatherwax* is the question of whether only certain types of cases are subject to heightened deference under the principle of “horizontal stare decisis”; in other words, is the Court of Appeals to apply the principle more stringently to cases “relied on by the public and impact liberty and property interests?” *Arnold* at *6. Arguably, even cases merely involving “issues of legal process” are

relied upon by the public, and especially legal practitioners in advising clients, and could significantly impact both liberty and property interests.

RAP 13.4(b)(2) provides that this Court will accept review if the decision of the court of appeals is in conflict with a published decision of the Court of Appeals. The *Arnold* decision highlights the Court of Appeals' conflict over whether to follow the *Stalker* rule or the *Grisby* rule. The divided opinion here also demonstrates a conflict within Division Three itself on the proper application of stare decisis in the Court of Appeals.

Additionally, this Court should accept review of the issue pursuant to RAP 13.4(b)(3) and (b)(4). The Washington State Constitution provided for the creation of a court of appeals. WASH. CONST. art IV, § 30(1). The extent to which the Court of Appeals, as a "unitary court," may issue conflicting opinions, is a significant issue under our State Constitution and is a matter of substantial public interest. This Court should, in the public interest, clarify whether the Court of Appeals is to stringently apply the principle of stare decisis to its own opinions, whether the "first [opinion] to the post," governs until this Court takes review, and whether it is better for the Court of Appeals to be "consistent than right," or, conversely, whether the Court of Appeals, after exercising deference to the opinions produced by different judges, is free to disagree and publish conflicting precedent

without first determining that such disagreement may only be made if the prior precedent is both incorrect and harmful.

B. Regardless of the degree of deference the Court of Appeals is to give to its previous decisions, each of the judges reviewing *Arnold* indicated a belief that *Taylor* and *Wheeler* were incorrectly decided; this Court should accept review to resolve that conflict.

The rule announced in *Taylor* and *Wheeler* is demonstrably incorrect as discussed by the dissent in *Arnold*, and as also acknowledged by the majority opinion.

In April 1975, the legislature repealed Washington's former carnal knowledge statute, and replaced it with three degrees of statutory rape. Laws of 1975, 1st Ex. Sess., ch 14, §§ 7-9, 10(2). The second degree statutory rape law provided:

(1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210(1) (1975). Its effective date, along with the other statutory rape provisions, was September 8, 1975. *See* Laws of 1975, p. ii, "EFFECTIVE DATE OF LAWS."

Less than a year later, the legislature adopted the Washington Criminal Code, Title 9A RCW, effective July 1, 1976. Laws of 1975, 1st Ex. Sess., ch 260. Sex offenses remained codified under chapter 9.79 RCW until

1979, when the legislature recodified the statutory rape provisions, merely moving them from Title 9 RCW to Title 9A RCW. Laws of 1979, 1st Ex. Sess., ch. 244, §§ 17-18. The legislature changed the language grading the offenses, but otherwise did not amend the statutes. Laws of 1979, 1st Ex. Sess., ch. 244, §§ 4-6.

In 1988, the legislature then repealed the statutes defining statutory rape, and replaced them with three degrees of rape of a child. RCW 9A.44.073, .076, .079. The legislature described this change as a “renaming” of the offenses. 1988 FINAL LEGISLATIVE REPORT, 50th Wash. Leg., at 24-25; H.B. REP. ON H.B. 1333, 50th Leg., Reg. Sess. (Wash. 1988).

In 1990, the legislature passed the Community Protection Act (hereinafter “Act”), requiring any resident who had been convicted of a “sex offense” to register. Laws of 1990, ch. 3, § 402(1). Its stated purpose in requiring sex offenders to register was to assist local law enforcement agencies in protecting their communities:

The legislature finds that sex offenders often pose a high risk of re-offense, and that law enforcement’s efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency’s jurisdiction. Therefore, this state’s policy is to assist local law enforcement agencies’ efforts to protect their communities by regulating sex

offenders by requiring sex offenders register with local law enforcement agencies.

Laws of 1990, ch. 3, § 401.

The Act defined “sex offense” as any offense defined as a “sex offense” in the SRA. Laws of 1990, ch. 3, § 402(5). The SRA defined a “sex offense” in relevant part as “[a] felony that is a violation of chapter 9A.44 RCW.” Former RCW 9.94A.030(29)(a) (1990). The registration requirement applied to crimes committed after the effective date of the statute and also applied retroactively for offenders who were incarcerated or under supervision when the statute became effective. *See* S.B. REP. ON SUBSTITUTE S.B. 6259, 51st Leg., Reg. Sess. (Wash. 1990).⁴

In 1991, the legislature amended the Community Protection Act to clarify and amend the deadlines for sex offenders to register. Laws of 1991, ch. 274, § 1. However, the Legislature stated that the clarification or amendment of RCW 9A.44.130 “does not relieve the obligation of sex offenders to comply with the registration requirements of RCW 9A.44.130 as that statute exists before July 28, 1991.” Laws of 1991, ch. 274, § 1. Thus, the legislature did not intend that its 1991 amendment should nullify the pre-existing duty to register under the 1990 version of the statute.

⁴ Mr. Arnold was incarcerated until August 13, 1990 and then was supervised until 1992.

Then, in 1999, the legislature amended RCW 9.94A.030 in 1999 to include in the definition of “sex offense” “any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection.” Laws of 1999, ch. 352, § 8. Thus, the 1999 amendment had the effect of including sex offenses existing before the promulgation of Title 9A in the registration requirement. The 1999 amendment also included the language that a “sex offense” also means “a felony that *is a violation* of chapter 9A.44” excluding convictions under RCW 9A.44.130(10). Laws of 1999, ch. 352, § 8 (emphasis added).

Taylor and *Wheeler* relied on the 1999 amendment to RCW 9.94A.030, holding that the plain language of RCW 9.94A.030’s definition of “sex offense” applies only to offenses *currently* listed in chapter 9A.44 RCW, and therefore, does not apply to any previously codified “sex offenses” under 9A.44 RCW.

The 1999 amendment extended the registration requirement to any conviction for a felony offense before July 1, 1976, that is comparable to a current sex offense... But, there is no provision, comparable to what was done for pre-1976 convictions, for offenses listed in chapter 9A.44 that existed after 1976, but were subsequently repealed. 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.

Taylor, 162 Wn. App at 799.

Judge Lawrence-Berrey disagreed with this assessment:

Although the legislature repealed the statutory rape provisions, its 1999 amendment made it possible for repealed felonies to still constitute “sex offenses” triggering the registration requirement. Under this amendment, Mr. Arnold would be required to register if he had “[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection.” RCW 9.94A.030(47)(b).

Arnold at *9. He then criticized an assumption made by both the *Taylor* and *Wheeler* courts, that the statutory rape laws were enacted in 1979, which resulted in the aforementioned “gap” in the statute. Judge Lawrence-Berrey determined the “gap” does not exist. *Arnold* at *10:

This is because Washington’s statutory rape laws went into effect in September 1975, not 1979. *See* LAWS OF 1975, 1st Ex. Sess., pg. ii. Because the legislature enacted the statutory rape provisions in 1975, Mr. Arnold’s second degree statutory rape conviction meets the first requirement of subsection (b)—it was a “felony offense in effect ... prior to July 1, 1976.” RCW 9.94A.030(47)(b).

Arnold at *10.

Finding that Mr. Arnold’s offense of second degree statutory rape is comparable for purposes of RCW 9.94A.030(47)(b), and that the only reason the Legislature would enact RCW 9.94A.030(47)(b) “would be to

include statutory rape offenses in the definition of “sex offense,” Judge Lawrence-Berrey would have determined that Mr. Arnold is still required to register as a sex offender.

This Court is the final authority on matters of statutory construction. Statutory interpretation is an issue of substantial public importance. RAP 13.4(b)(4); *see also, Larson*, 184 Wn.2d at 847-848. This Court is also, as indicated above, the final arbiter of conflicting decisions in the Court of Appeals. Although Judge Lawrence-Berrey’s dissent is not precedential, it thoroughly explains the logical errors leading the *Taylor* and *Wheeler* courts to an incorrect decision. This Court should accept review in order to determine whether *Taylor* and *Wheeler* were incorrectly decided, or whether Mr. Arnold’s conviction for second degree statutory rape “is a sex offense” requiring him to continue to register as a sex offender.

C. This Court should also accept review of this matter of substantial public interest; *Taylor* and *Wheeler*’s incorrect decisions are clearly harmful as they allow twelve years of convicted sex offenders to escape sex offender registration requirements.

As argued by the State below, and as discussed by the dissenting opinion, the rule announced in *Taylor* and *Wheeler* is also clearly harmful. The legislature has expressly declared its intent that sex offenders be required to register such that law enforcement might “protect their communities, conduct investigations, and quickly apprehend offenders”

who pose such “a high risk of re-offense,” finding that law enforcement is “impaired by the lack of information available” to them about where convicted sex offenders live. Laws of 1990, ch. 3, § 401. The “gap” created by *Taylor* and *Wheeler’s* misinterpretation of the applicable statutes significantly hampers the efforts of law enforcement to protect their communities and arrest offenders who happen to fall within that gap. Under *Taylor* and *Wheeler*, any sex offender convicted between July 1, 1976 and July 1, 1988 is relieved of complying with sex offender registration, leaving a twelve year gap of convicted sex offenders free to move about the state unregistered and whereabouts unknown, “pos[ing] clear harm to the people of our state.” *Arnold* at *10 (Lawrence-Berrey, J. dissenting). As indicated by Judge Lawrence-Berrey, “[t]he clear error in *Taylor* and *Wheeler* puts children in our state at a heightened risk and is thus clearly harmful.” *Id.* It is a matter of significant public interest and public safety to ensure that the children of our state are safe from child predators, and that the legislature’s intent is fulfilled.

V. CONCLUSION

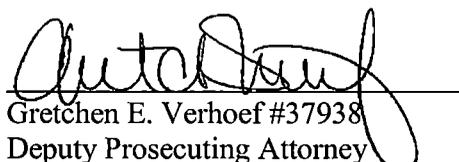
In its four-opinion decision, the *Arnold* court unanimously agreed on one thing – to invite this Court to accept review of the issues presented here. *Arnold* at *4 (“The State’s criticisms of our prior decisions are well taken. But only the Washington Supreme Court can provide the State the

kind of definitive relief it seeks”); *Arnold* at *11 (“Not only do I invite our Supreme Court to address whether *Taylor* and *Wheeler* are incorrect, but I invite the Supreme Court to clarify the role of stare decisis in the Court of Appeals”). The State would respectfully request that this Court accept that invitation pursuant to RAP 14.3(b).

As acknowledged by each of the three judges reviewing this matter below, the State’s argument that *Taylor* and *Wheeler* were incorrectly decided “has much force.” Additionally, as argued by the dissent, *Taylor* and *Wheeler* are decisions that are harmful because the perceived “legislative gap” – an unintended twelve year amnesty for convicted sex offenders - “put[s] children in our state at a heightened risk” of victimization at the hands of convicted, yet unregistered, sex offenders. Furthermore, it is a matter of substantial public interest and one of state constitutional law for this Court to define the extent to which one division of the Court of Appeals may issue a decision contrary to a decision of another division.

Respectfully submitted this 17 day of May 2017.

LAWRENCE H. HASKELL
Spokane County Prosecuting Attorney


Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 17, 2017, I emailed a copy of the Motion for Discretionary Review in this matter, pursuant to agreement to:

Reed M.N. Speir
Reedspeirlaw@seanet.com

5/17/2017
(Date)

Spokane, WA
(Place)



(Signature)

ATTACHMENT A

FILED
APRIL 25, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Personal Restraint of)	No. 34018-0-III
)	
EDDIE D. ARNOLD,)	
)	
Petitioner.)	PUBLISHED OPINION
)	

PENNELL, J. — Eddie Arnold was convicted of failing to register as a sex offender. His conviction was based on a statutory rape statute that was subsequently repealed. Prior decisions of our court, issued by Divisions One and Two, have overturned failure to register convictions in analogous circumstances. The doctrine of stare decisis persuades us to follow suit. We therefore grant Mr. Arnold’s personal restraint petition (PRP) and vacate his conviction.

BACKGROUND

The facts in this case are materially similar to those considered by Division One of our court in *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011), and Division Two in *In re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015). On June 27, 1988, Mr. Arnold pleaded guilty to second degree statutory rape in violation of former RCW 9A.44.080(1) (1979). Several days after the guilty plea, the legislature repealed

No. 34018-0-III

In re Pers. Restraint of Arnold

provisions defining the three degrees of statutory rape in former RCW 9A.44.070, .080, and .090, and replaced them with three degrees of the crime of rape of a child in RCW 9A.44.073, .076, and .079. See SUBSTITUTE H.B. 1333, ch. 145, §§ 2-4, 24, 26, 50th Leg., Reg. Sess. (Wash. 1988).¹

Mr. Arnold was released from his prison sentence in August 1990. That same year, the legislature enacted RCW 9A.44.130, which required sex offenders to register.

SECOND SUBSTITUTE S.B. 6259, ch. 3, § 402, 51st Leg., Reg. Sess. (Wash. 1990).

Throughout the 2000s, Mr. Arnold was convicted five times for failure to register as a sex offender.²

In 2011, the Court of Appeals decided *Taylor*. That case reversed a conviction for failure to register as a sex offender, reasoning that the defendant's prior conviction for third degree statutory rape was no longer listed in the provision of the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), that defined "sex offense." 162 Wn. App. at 801.

In October 2013, the State charged Mr. Arnold with failure to register. The State alleged Mr. Arnold's 1988 statutory rape conviction required him to register and Mr.

¹ The legislature passed and the governor approved the bill in March 1988, but it did not take effect until July 1, 1988.

² Mr. Arnold has not sought relief from these prior convictions here.

No. 34018-0-III

In re Pers. Restraint of Arnold

Arnold failed to comply with RCW 9A.44.130's registration requirements between May and October 2013. Several weeks later, the State also charged Mr. Arnold with first degree trafficking in stolen property.

In March 2015, the State and Mr. Arnold negotiated a global plea agreement, under which Mr. Arnold pleaded guilty to failure to register and an amended second degree trafficking in stolen property charge. The State and Mr. Arnold jointly recommended 51 months of incarceration for both charges and agreed Mr. Arnold would serve both sentences concurrently. The trial court accepted the plea agreement and imposed the requested sentence on June 4.

Two weeks after the sentencing hearing, the Spokane County Sheriff's Office sent Mr. Arnold a letter informing him that he was relieved of his duty to register as a sex offender pursuant to *Taylor*. On August 6, 2015, Mr. Arnold moved to withdraw his guilty plea under CrR 7.8. Mr. Arnold asserted that he was not required to register as a sex offender under *Taylor* and he was unaware of *Taylor* when he pleaded guilty. The trial court transferred Mr. Arnold's motion to this court for consideration as a PRP.

ANALYSIS

Divisions One and Two of our court have ruled invalid convictions that are materially indistinguishable from Mr. Arnold's. *Taylor*, 162 Wn. App. at 801; *Wheeler*,

No. 34018-0-III

In re Pers. Restraint of Arnold

188 Wn. App. at 621. In brief, these decisions hold that because the sex offender registration statute specifically requires registration by anyone convicted of a felony that “is” a violation of chapter 9A.44 RCW, the registration obligation does not apply to convictions under Washington’s repealed statutory rape statute.

The State largely acknowledges that, if we were to follow *Taylor* and *Wheeler*, Mr. Arnold’s failure to register conviction cannot stand.³ Nevertheless, the State urges us not to follow the lead of our court’s other divisions because they rest on an incorrect interpretation of the relevant statutes. As pointed out by our dissenting colleague, the State’s argument has much force. Nevertheless, we are persuaded to follow the lead of our court’s prior decisions under the doctrine of stare decisis.

“Stare decisis” is a Latin phrase, meaning “to stand by things decided.” BLACK’S LAW DICTIONARY 1626 (10th ed. 2014). The doctrine of stare decisis has two primary incantations: vertical stare decisis and horizontal stare decisis. Under vertical stare decisis, courts are required to follow decisions handed down by higher courts in the same

³ The State argues Mr. Arnold was still incarcerated when the registration statute took effect and therefore *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994) controls this case. The *Ward* court held that requiring individuals to register who were incarcerated or under supervision at the time the statute took effect did not violate the constitutional prohibition against ex post facto laws. *Id.* at 511. *Ward* does not apply to this case because it does not involve an ex post facto issue. The question here is whether Mr. Arnold’s 1988 conviction meets the SRA’s definition of a “sex offense.”

No. 34018-0-III

In re Pers. Restraint of Arnold

jurisdiction. For example, trial and appellate courts in Washington must follow decisions handed down by our Supreme Court and the United States Supreme Court. Adherence is mandatory, regardless of the merits of the higher court's decision. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Horizontal stare decisis is different and more complex. Under this doctrine a court, such as this one, is not *required* to follow its own prior decisions. Yet it is often well advised to do so. Adherence to past decisions through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts' decisions to make personal and professional decisions that comply with legal mandates. *See In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Horizontal stare decisis is fairly well defined at the level of our Supreme Court. While it is not strictly bound by prior decisions, a litigant seeking to upend a prior case faces an arduous task. Our Supreme Court does not lightly set aside a prior decision. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). Because of the many benefits of adhering to precedent, the Supreme Court will only revisit prior decisions upon “a clear showing that an established rule is incorrect and harmful.” *Id.* (quoting *Stranger Creek*, 77 Wn.2d at 653). Both prongs of this analysis are required. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016); *State v. Barber*, 170 Wn.2d 854,

No. 34018-0-III
In re Pers. Restraint of Arnold

864, 248 P.3d 494 (2011). A prior case that is merely incorrect, but not also harmful, does not meet the criteria for reversal. *Deggs*, 186 Wn.2d at 727-28; *Barber*, 170 Wn.2d at 864.

When it comes to our state Court of Appeals, application of horizontal stare decisis has been less clear. See Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 456 (2012/13); Kelly Kunsch, *Stare Decisis: Everything You Never Realized You Need to Know*, 52 WASH. ST. BAR NEWS 31 (Oct. 1998). Our courts have applied the doctrine to prior decisions issued by the same division. See, e.g., *State v. Stalker*, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009). However, no case has explicitly adopted stare decisis for decisions issued by a different division.⁴

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

⁴ In *State v. Yarbrough*, 151 Wn. App. 66, 84 n.5, 210 P.3d 1029 (2009), Division II invoked stare decisis to decline the appellant’s invitation to “overturn” *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998), and *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995). *Campbell* was a decision from Division II, but *Boot* was decided by Division III.

No. 34018-0-III

In re Pers. Restraint of Arnold

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.

The State and our dissenting colleague take a different approach to harm. They claim the greatest harm lies in continued application of *Taylor* and *Wheeler* because the two decisions hamper law enforcement’s efforts at community protection. This may be a valid concern. But it is not something we can redress. Even if we were to rule in the

No. 34018-0-III

In re Pers. Restraint of Arnold

State's favor, *Taylor* and *Wheeler* would still stand. Rather than eliminating harm, the issuance of a decision contrary to *Taylor* and *Wheeler* would exacerbate harms to the public in that sex offenders would still likely avoid registration but the legal rights and obligations of individuals throughout the state would also be in doubt.

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 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. The State's criticisms of our prior decisions are well taken. But only the Washington Supreme Court can provide the State the kind of definitive relief it seeks. That route for review remains available.

No. 34018-0-III

In re Pers. Restraint of Arnold

Because Mr. Arnold's 2015 failure to register conviction was facially invalid pursuant to *Taylor and Wheeler*, he is illegally restrained and therefore entitled to relief on his PRP. The fact that Mr. Arnold received a concurrent conviction and sentence for possession of stolen property does not alter this result. *In re Pers. Restraint of Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979) (PRP relief available despite concurrent sentence); *see also In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 363-64, 256 P.3d 277 (2011); *Wheeler*, 188 Wn. App. at 617 (holding petitioner was under "restraint" even though he had completed his sentence for failure to register as a sex offender).

CONCLUSION

We grant Mr. Arnold's personal restraint petition and vacate his 2015 conviction for failing to register as a sex offender.



Pennell, J.

I CONCUR:



Siddoway, J.

PENNELL, J. (concurring) — I write separately to provide my thoughts on how stare decisis should function within our appellate court. This is a matter that deserves clarity, especially as our court nears its 50th anniversary. I come to the task of analyzing stare decisis favorably disposed to its application. Stare decisis is what ensures the law exists on its own, separate from the various personalities that come and go from the bench. Adhering to stare decisis does not necessitate avoiding disagreement with past decisions. It simply requires respect. Invoking stare decisis means that, prior to deviating from a prior decision, we will concern ourselves not only with analytical integrity, but also with the practical implications of disrupting existing law. Doing so permits litigants and attorneys to have confidence in how to administer their affairs, advise clients, and present cases to our court.

As a foundational matter, there can be no doubt that stare decisis has at least some role to play in our appellate courts. Our Supreme Court has stated as much. In 2002, the court recognized application of the doctrine, noting “[t]he Court of Appeals can overrule a previous decision if it is ‘demonstrably incorrect or harmful.’” *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37 n.9, 42 P.3d 1265 (2002) (internal quotation marks omitted) (quoting *King v. Western United Assurance Co.*, 100 Wn. App. 556, 561, 997 P.2d 1007 (2000)). *Fire Fighters* involved a conflict within Division One’s case law. Given this procedural posture, the Supreme Court did not address whether the stare decisis test applied throughout the Court of Appeals, or only within a given division.

No. 34018-0-III

In re Pers. Restraint of Arnold

While the Supreme Court did not explicitly state that stare decisis applies across the different divisions of our court, I see no substantive basis for limiting its application. Our state Court of Appeals is a unitary court. WASH. CONST. art. IV, § 30(1) (creating “a court of appeals”). Although we are divided into three geographic regions, we are one court, and a decision by any one panel in the court is binding on lower courts throughout the state, regardless of location. *See, e.g., Marley v. Dep’t of Labor & Indus.*, 72 Wn. App. 326, 330, 864 P.2d 960 (1993), *aff’d*, 125 Wn.2d 533, 886 P.2d 189 (1994).

It has been suggested that RAP 13.4(b)(2) provides implicit permission for the appellate divisions to disagree with one another without the constraints of stare decisis. Kelly Kunsch, *Stare Decisis: Everything You Never Realized You Need to Know*, 52 WASH. ST. BAR NEWS 31, 34 (Oct. 1998). I am unpersuaded. RAP 13.4 states that the Washington Supreme Court may accept a petition for review if an appellate decision “is in conflict with a published decision of the Court of Appeals.” RAP 13.4 does not distinguish between inter- and intra-division conflicts. Furthermore, the fact that the rule recognizes conflicts may occur does not mean they should. Indeed, even in the federal system, where panels are bound by prior decisions within the same circuit, conflicts occur. *See, e.g., United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689-90, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960); *Wright v. R.R. Donnelley & Sons Co. Grp. Benefits Plan*, 402 F.3d 67, 75 n.5 (1st Cir. 2005); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 387-88 (2d Cir. 2015); *United States v. Tann*, 577 F.3d 533, 541-42 (3d Cir. 2009); *McMellon v.*

No. 34018-0-III

In re Pers. Restraint of Arnold

United States, 387 F.3d 329, 332-33 (4th Cir. 2004); *Johnson v. Moral*, 843 F.2d 846, 847-48 (5th Cir. 1988); *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984); *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987); *United States v. VanMeter*, 278 F.3d 1156, 1167 (10th Cir. 2002); *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). It is for this reason that the federal rules of appellate procedure allow for en banc review when panel decisions within a circuit are in conflict. FRAP 35(a)(1).

However, the fact that FRAP 35 permits en banc courts to address intra-circuit conflicts does not mean panels within a circuit are free to disagree with each others' decisions. So too RAP 13.4 cannot fairly be read to imply that stare decisis does not apply to decisions within the Court of Appeals, regardless of division.

Apart from the question of whether stare decisis applies across divisions, confusion has arisen as to the applicable formulation. In *Fire Fighters*, the Supreme Court stated the test involved an analysis of whether a past decision was "incorrect *or* harmful." 146 Wn.2d at 37 n.9 (emphasis added). However, the court's choice of the word "or" is of questionable significance. The Supreme Court has traditionally referred to the two prongs of stare decisis in the conjunctive, requiring analysis of whether a past decision was incorrect *and* harmful. *State v. Stalker*, 152 Wn. App. 805, 811 n.1, 219 P.3d 722 (2009). But in the mid-1990s, the court changed course and occasionally began articulating the standard in the disjunctive. *Id.* No explanation was given for this shift

No. 34018-0-III

In re Pers. Restraint of Arnold

and the conjunctive formulation was still utilized. *Id.* In recent decisions, the Supreme Court resolved this inconsistency, definitively holding that the stare decisis test is conjunctive, not disjunctive. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016); *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011).

Unfortunately, the court did not address whether this formulation also applied to the stare decisis test utilized in the Court of Appeals.

Division One has attempted to clear up the conjunctive versus disjunctive question, as it applies to the Court of Appeals. *See Stalker*, 152 Wn. App. at 811-12. According to the court in *Stalker*, the appellate courts apply the same formulation of stare decisis as the Supreme Court. *Id.* Accordingly, a prior appellate decision should not be rejected unless it is “both incorrect and harmful.” *Id.* at 812.

I generally agree with this approach. Although we lack the ability to overrule a prior appellate decision, *Grisby v. Herzog*, 190 Wn. App. 786, 808-09, 362 P.3d 763 (2015), we should follow the Supreme Court’s lead in recognizing the importance of both the “incorrect” and “harmful” prongs of stare decisis.

There can be little debate over the importance of finding a prior decision incorrect prior to changing course. It is inconceivable that an appellate court would deviate from a prior decision without first concluding that decision was incorrect. No amount of perceived harm can justify promulgating a newly minted incorrect legal rule. If a given

No. 34018-0-III

In re Pers. Restraint of Arnold

rule is harmful but nevertheless correct, the proper remedy lies with the legislature, not the judiciary.

The harm component of stare decisis is more controversial. Yet it is critical. Without an assessment of harm, the doctrine of stare decisis has little significance. It is the question of harm that makes application of stare decisis a pragmatic exercise, focused on enhancing stability in the law, rather than simply analytic purity. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 854-61, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The need to assess harm is what gives weight to our precedents and ensures they will not be easily overturned.

Although fidelity to stare decisis means always delving into the issue of harm, the manner in which harm should be assessed is different in our court than it is in the Supreme Court. There is value to our appellate panels engaging in rigorous debate over the interpretation of our state's laws prior to the Supreme Court issuing a final decision. Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 505 (2012/13). When it comes to issues of legal process such as what level of scrutiny to apply to a constitutional claim, *State v. Danis*, 64 Wn. App. 814, 819, 826 P.2d 1096 (1992), the scope of the prior conviction exception to the Sixth Amendment's jury trial

No. 34018-0-III

In re Pers. Restraint of Arnold

right,¹ *State v. Hochhalter*, 131 Wn. App. 506, 520-22, 128 P.3d 104 (2006), and eligibility for attorney fee awards, *King*, 100 Wn. App. at 560-61, there is little public disruption or harm caused by discordant decisions from our court. *See Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). Such inconsistencies may be frustrating to a superior court judge, tasked with deciding which binding opinion to follow. DeForrest, 48 GONZ. L. REV. at 509. Nevertheless, they are not insurmountable. *Id.* There is great value to getting the law correct, especially when doing so vindicates individual rights. *See, e.g., Grisby*, 190 Wn. App. at 811. Often the goal of righting past wrongs justifies deviating from past decisions.

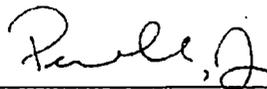
But the harm caused by changing course is sometimes salient. When it comes to rules applicable outside of court proceedings, governing how ordinary people and businesses conduct their day to day affairs, there are substantial costs to deviating from prior decisions. Published case law in areas such as real property, contract, and criminal law are relied on by the public and impact liberty and property interests. *See, e.g., Payne*, 501 U.S. at 828; *House v. Erwin*, 83 Wn.2d 898, 909, 524 P.2d 911 (1974). Overturning such cases can cause substantial harm to individuals who are simply trying to follow the law. In such circumstances, it may be better to be consistent than right.

¹ U.S. CONST. amend. VI

No. 34018-0-III

In re Pers. Restraint of Arnold

As set forth in the majority decision, the potential inequities presented by this case highlight the importance of applying the harm component of stare decisis across the different divisions of our court. Our Supreme Court may ultimately agree with the dissent and find *Taylor* and *Wheeler* wrongly decided. Should it do so, it will be empowered to overrule those decisions and provide consistent relief. But we cannot. I therefore join the decision to maintain *Taylor* and *Wheeler* and vote to reverse Mr. Arnold's conviction.



Pennell, J.

SIDDOWAY, J. (concurring) — As explained in the majority opinion, the harm that will ensue if we do not follow the decisions of our fellow divisions in *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011) and *In re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015) is a compelling consideration and a sufficient reason to follow that authority and grant Eddie Arnold's personal restraint petition.

When it comes to whether our Supreme Court's "incorrect and harmful" standard applies in this court, I agree with the reasoning of *Grisby v. Herzog* that it does not. 190 Wn. App. 786, 808-09 & n.6, 362 P.3d 763 (2015). It is not inappropriate for this court to consider whether a previous opinion is incorrect and harmful in the course of deciding whether or not to follow it, but since we do not overrule prior decisions, "it is not obligatory for this court to use . . . a standard developed by the highest state court for its own use in determining whether to overrule one of its own decisions." *Id.* at n.6 (referring to the contrary position in *State v. Stalker*, 152 Wn. App. 805, 219 P.3d 722 (2009) as "dicta"). Among other differences, decisions to which our Supreme Court applies stare decisis were decided by no less than 5 of its 9 members. Decisions within our court that we heed, but with which we sometimes disagree, are reached by 3, and sometimes only 2, of our 22 members.

I conclude that justice is best served by deciding this case consistently with *Taylor* and *Wheeler*, recognizing that the State may seek review by our Supreme Court.


Siddoway, J.

No. 34018-0-III

LAWRENCE-BERREY, A.C.J. (dissenting) — The majority adopts a stare decisis rule for future Court of Appeals panels to apply. The rule prevents correcting a prior holding unless the panel determines that the prior holding is both incorrect and harmful. For purposes of my dissent, I will accept the majority's rule. I dissent because the holdings of *Taylor*¹ and *Wheeler*² are incorrect and harmful.

A. *TAYLOR AND WHEELER ARE INCORRECT*

Statutory interpretation is a question of law reviewed de novo. *Taylor*, 162 Wn. App. at 797. The court's goal is to discern and implement the legislature's intent. *Id.* When interpreting a statute, courts first look to the statute's plain meaning. *Id.* This court discerns plain meaning "from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

¹ *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011).

² *In re Pers. Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015).

Prior to discussing *Taylor* and *Wheeler*, it is important to understand the progression of Washington's child rape statutes and the requirement that certain sex offenders register.

1. *Background of Washington's child rape statutes*

For most of the 1900s, Washington criminalized adults engaging in sex with minors by its "carnal knowledge" statute. *See* former RCW 9.79.020 (1974). It provided that a person who "carnally [knew]" a child under 18 years old would be imprisoned for up to 15 years, up to 20 years, or up to life, depending on the child's age. *See* former RCW 9.79.020(1)-(3).

In April 1975, the legislature repealed the carnal knowledge statute and replaced it with three degrees of statutory rape. *See* LAWS OF 1975, 1st Ex. Sess., ch. 14, §§ 7-9, 10(2); *see also* former RCW 9.79.200, .210, and .220 (1975). The newly-enacted second degree statutory rape law provided:

(1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210(1) (1975). Its effective date, along with the other statutory rape provisions, was September 8, 1975. *See* LAWS OF 1975, pg. ii, "Effective Date of Laws." (Capitalization omitted.)

Less than one year after enacting the statutory rape provisions in chapter 9.79 RCW, the legislature enacted the Washington Criminal Code, Title 9A RCW, effective

No. 34018-0-III

In re Pers. Restraint of Arnold

July 1, 1976. *See* LAWS OF 1975, 1st Ex. Sess., ch. 260. However, all sex crimes remained codified in chapter 9.79 RCW. *See* former ch. 9.79 RCW (1976).

In 1979, the legislature recodified the three statutory rape provisions, moving them from Title 9 RCW to Title 9A RCW. *See* LAWS OF 1979, 1st Ex. Sess., ch. 244, §§ 17-18; *see also* former RCW 9A.44.070, .080, and .090 (1979). The legislature changed the language grading the offenses, but otherwise left them the same. *See* LAWS OF 1979, 1st Ex. Sess., ch. 244, §§ 4-6.

In 1988, the legislature repealed the provisions defining the three degrees of statutory rape, and replaced them with three degrees of the crime of rape of a child, RCW 9A.44.073, .076, and .079. *See* LAWS OF 1988, ch. 145, §§ 2-4, 24. The house bill report described the changes to the statute as follows: "The crimes of statutory rape are renamed, moved up one level in the SRA's [Sentencing Reform Act of 1981, chapter 9.94A RCW] sentencing grid and modified with respect to the ages of victims and offenders. . . . Statutory rape is renamed 'rape of a child.'" H.B. REP. ON H.B. 1333, 50th Leg., Reg. Sess. (Wash. 1988).

RCW 9A.44.076(1) defines the current crime of second degree rape of a child:

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

2. *Background of Washington's sex offender registration statute*

In 1990, the legislature passed the "Community Protection Act," which required any resident who had been convicted of a "sex offense" to register. LAWS OF 1990, ch. 3, § 402(1); former RCW 9A.44.130(1) (1990). It defined "sex offense" as any offense defined as a "sex offense" in the SRA. See LAWS OF 1990, ch. 3, § 402(5). The SRA defined a "sex offense" in relevant part as "[a] felony that is a violation of chapter 9A.44 RCW." Former RCW 9.94A.030(29)(a) (1990). The registration requirement applied to crimes committed after the effective date of the statute and also applied retroactively for offenders who were incarcerated or under supervision when the statute became effective. See S.B. REP. ON SUBSTITUTE S.B. 6259, 51st Leg., Reg. Sess. (Wash. 1990).

In 1999, the "Sentencing Guidelines Commission" recommended technical corrections for the criminal code to the legislature. S.B. REP. ON H.B. 1544, at 1, 56th Leg., Reg. Sess. (Wash. 1999). One of the recommendations was to amend the definition of "sex offense" in the SRA. *Id.* at 2. The legislature amended the definition to add that "sex offense" also meant "[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection." LAWS OF 1999, ch. 352, § 8(33)(b).

3. *The Taylor and Wheeler cases*

In *Taylor*, Division One considered whether a person has a duty to register when he or she has previously been convicted for violating the repealed statutory rape provisions. *Taylor*, 162 Wn. App. at 794-800. In 1988, Homer Taylor pleaded guilty to

third degree statutory rape under former RCW 9A.44.090 (1979). *Taylor*, 162 Wn. App. at 793-94. As discussed above, the legislature then repealed that statute later that year. *Id.* at 795-96. In 2009, the State charged Mr. Taylor with failure to register as a sex offender, listing his predicate offense as the 1988 statutory rape conviction. *Id.* at 794 n.1. The trial court found him guilty as charged. *Id.* at 794.

The *Taylor* court reversed Mr. Taylor's conviction for failure to register, holding that he was not required to register because his 1988 statutory rape conviction was not a "sex offense" for which the SRA required registration. *Id.* at 800. The court reasoned that the plain language of former RCW 9.94A.030(46)(a)(i) (2008) only applied to sex offenses *currently* listed in chapter 9A.44 RCW. *Taylor*, 162 Wn. App. at 799.

The court then acknowledged that the 1999 amendment extended the registration requirement to individuals who had convictions for any comparable felony offense that existed prior to July 1, 1976. *Id.* *Importantly, the Taylor court assumed the legislature enacted the third degree statutory rape statute in 1979. Id.* at 799. Under this assumption, the court reasoned that the legislature failed to extend the registration requirement to statutory rape convictions. *Id.* The court concluded this resulted in a legislative "gap." *Id.* Recognizing this gap was likely inadvertent, the court nevertheless declined to fill the gap in the absence of legislative authority. *Id.*

In *Wheeler*, Division Two considered the exact same issues from *Taylor*, but in the context of a personal restraint petition (PRP). *Wheeler*, 188 Wn. App. 613. In 1985, Michael Wheeler was convicted of third degree statutory rape. *Id.* at 616. In 2000, he

pleaded guilty to failure to register, with his statutory rape conviction as the predicate offense. *Id.* In 2013, he moved to withdraw his guilty plea, arguing that under *Taylor* his failure to register conviction was unlawful. *Id.* The trial court transferred the case to the Court of Appeals for consideration as a PRP. *Id.*

The State asked Division Two to disagree with *Taylor*. *Wheeler*, 188 Wn. App. at 619. It argued the *Taylor* court relied on an improper interpretation of the word “is” in the sex offense definition. *Id.* It further argued that it was more reasonable to read the word “is” broadly and conclude that the legislature intended that any crime that was at any time included in chapter 9A.44 RCW “is” a sex offense. *Id.* at 619-20. The State cited the policy statement underlying the registration statute, which notes the high risk of reoffense that sex offenders pose and the need to assist local law enforcement agencies in protecting their communities. *Id.* at 620 (citing LAWS OF 1990, ch. 3, § 401).

The *Wheeler* court rejected these arguments. *Id.* at 620-21. It also reasoned the 1999 amendment “shows the legislature’s ability to tailor the definition to include offenses other than those currently classified as sex offenses under the SRA.” *Id.* at 620. The court further reasoned that despite Division One’s holding in *Taylor*, the legislature had not amended the sex offense definition to include repealed felonies. *Id.* at 621.

4. *Persons convicted of statutory rape are required to register as sex offenders*

In June 1988, Mr. Arnold pleaded guilty to second degree statutory rape. In addition to five previous times, Mr. Arnold failed to register as a sex offender between

May 2013 and October 2013. The State charged Mr. Arnold with failure to register based on his 1988 second degree statutory rape conviction. Although the legislature repealed the statutory rape provisions, its 1999 amendment made it possible for repealed felonies to still constitute “sex offenses” triggering the registration requirement. Under this amendment, Mr. Arnold would be required to register if he had “[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection.” RCW 9.94A.030(47)(b).

The *Taylor* court assumed that the statutory rape laws were enacted in 1979. Given this assumption, the *Taylor* court determined statutory rape convictions fell into a “gap” in the registration requirement between convictions for offenses in effect prior to 1976 and convictions for felonies that are current violations of chapter 9A.44 RCW. However, this “gap” does not exist. This is because Washington’s statutory rape laws went into effect in September 1975, not 1979. *See LAWS OF 1975, 1st Ex. Sess., pg. ii.* Because the legislature enacted the statutory rape provisions in 1975, Mr. Arnold’s second degree statutory rape conviction meets the first requirement of subsection (b)—it was a “felony offense in effect . . . prior to July 1, 1976.” RCW 9.94A.030(47)(b).

The second requirement for subsection (b) is that the former felony offense be comparable to a current felony classified as a sex offense. Here, second degree statutory rape is most comparable to second degree rape of a child, codified at RCW 9A.44.076(1). I note there are a couple differences between second degree statutory rape and second degree rape of a child, both quoted above. For instance, the span of the victim’s age is

somewhat different, and second degree rape of a child includes a requirement that the perpetrator be 36 months older than the victim.

I would nevertheless conclude that all statutory rape and child rape offenses are comparable for purposes of RCW 9.94A.030(47)(b). First, these offenses separate child rape offenses into three distinct categories based upon the age of the child. Second, these offenses criminalize the same type of deviant conduct.

Third, RCW 9.94A.030(47)(b) must mean something. Many felony sex offenses in effect prior to July 1, 1976 lack modern counterparts and are therefore not comparable to a current felony classified as a sex offense.³ Those that have modern counterparts are rape, statutory rape, incest, and indecent liberties.⁴ Of these, all but statutory rape were already classified as sex offenses in the SRA prior to the 1999 amendment.⁵ Therefore, the only purpose for the legislature to add RCW 9.94A.030(47)(b) would be to include statutory rape offenses in the definition of "sex offense."

I would conclude that Mr. Arnold's conviction for second degree statutory rape is comparable to today's second degree child rape, and that Mr. Arnold is required to register as a sex offender. For this reason, I would dismiss his PRP.

³ See former RCW 9.79.040 (1974) (compelling a person to marry); former RCW 9.79.050 (1974) (abduction); former RCW 9.79.060 (1974) (placing persons in house of prostitution); former RCW 9.79.070 (1974) (seduction); former RCW 9.79.100 (1974) (sodomy); former RCW 9.79.110 (1974) (adultery).

⁴ See former ch. 9.79 RCW (1975) (rape; statutory rape); former RCW 9A.88.100 (1975) (indecent liberties); former RCW 9A.64.020 (1975) (incest).

⁵ See former RCW 9.94A.030(33)(a) (1998) (defining "sex offense" as a "felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020"); chapter 9A.44 RCW (1998) (rape; indecent liberties); RCW 9A.64.020 (1998) (incest).

B. NOT REQUIRING PERSONS CONVICTED OF STATUTORY RAPE TO REGISTER AS SEX OFFENDERS IS HARMFUL

I need look no further than a legislative pronouncement to conclude that unregistered sex offenders pose clear harm to the people of our state:

The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies

LAWS OF 1990, ch. 3, § 401.

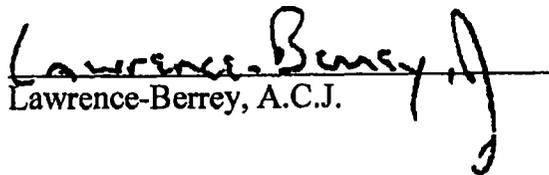
Because of *Taylor* and *Wheeler*, persons convicted of raping children before July 1988 are not required to register as sex offenders. The clear error in *Taylor* and *Wheeler* puts children in our state at a heightened risk and is thus clearly harmful. The majority's determination that *Taylor* and *Wheeler* are not harmful stands in contrast to the legislature's determination.

Not only do I invite our Supreme Court to address whether *Taylor* and *Wheeler* are incorrect, but I invite the Supreme Court to clarify the role of stare decisis in the Court of Appeals. As stated by Thomas Jefferson, "[A] little rebellion now and then is a good thing." Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 5 THE WORKS OF THOMAS JEFFERSON 256 (Paul Leicester Ford ed., Fed. ed. 1904). The Court of Appeals should not be hampered if one panel aspires to correct a rule that is clearly

No. 34018-0-III

In re Pers. Restraint of Arnold

wrong. Through such a disagreement, the Supreme Court can weigh the merits of the conflict and determine the correct rule.


Lawrence-Berrey, A.C.J.

SPOKANE COUNTY PROSECUTOR

May 17, 2017 - 1:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34018-0
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:

- 340180_Petition_for_Review_20170517133337D3290481_3812.pdf
This File Contains:
Petition for Review
The Original File Name was Arnold Eddie - DR Mtn - GEV.pdf

A copy of the uploaded files will be sent to:

- gverhoef@spokanecounty.org
- scpaappeals@spokanecounty.org
- reedspeirlaw@seanet.com
- alott@goodsteinlaw.com
- LHaskell@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170517133337D3290481