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Nº. 94544-6

SUPREME COURT OF THE STATE OF WASHINGTON

PERSONAL RESTRAINT OF
EDDIE ARNOLD,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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On October 3, 2017, a Commissioner of this court granted the State's motion for discretionary review in this matter. Pursuant to RAP 13.7(d), Respondent Arnold hereby submits this supplemental brief for this Court's review.

For purposes of this Supplemental Brief, Respondent Arnold adopts and incorporates the facts as set forth in the decision of the Court of Appeals.

A. SUPPLEMENTAL ISSUES

1. Did the Court of Appeals adopt a new rule regarding horizontal stare decisis between the divisions of the court of appeals where the majority opinion expressly holds that the Court was not adopting any rule regarding horizontal stare decisis?

2. Is it necessary to resort to statutory interpretation where the plain language of RCW 9A.44.128(10)(1)(a) and RCW 9.94A.030(46) is clear and unambiguous?

3. Where the language of RCW 9A.44.128(10)(1)(a) and RCW 9.94A.030(46) is clear and unambiguous, can this court add language to the statutes should this court find that the Legislature omitted the language by mistake?

B. ARGUMENT

1. The Court of Appeals decision in this case did not adopt a new rule of horizontal stare decisis and is not in conflict with any decision of the other divisions of the Court of Appeals.

As pointed out in Mr. Arnold's response to the State's motion for discretionary review, there is no "*Stalker* rule" or "*Grisby* rule" regarding

how one division of the Court of Appeals must interpret and apply a contrary decision form another Court of Appeals. Not a single reported case in Washington, published or unpublished, discusses or even refers to a "*Grisby* rule" or "*Stalker* rule." The only decision that even mentions "*Grisby*" and "*Stalker*" in the same paragraph is the Court of Appeals' decision in this case.

If the plain language of *Grisby* is not enough to establish that there is no rule mandating a division of the Court of Appeals ***must*** follow a prior contrary decision of another division of the Court of Appeals, then the plain language of the Court of Appeals in Mr. Arnold's case makes clear that that the Court of Appeals did not adopt any rule regarding horizontal stare decisis in this case:

> Horizontal stare decisis is fairly well defined at the level of our Supreme Court...When it comes to our state Court of Appeals, application of horizontal stare decisis has been less clear...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.
>
> **We are not prepared to resolve the question of exactly how stare decisis applies in the current context, involving decisions issued by other divisions.** Nevertheless, it is apparent that stare decisis must apply at least to some degree, otherwise we face vexing problems. **Because one panel decision cannot overturn a prior contrary decision, "two inconsistent opinions ... may exist at the same time**," *Grisby v. Herzog*, 190 Wn.App.

786, 809, 362 P.3d 763 (2015), both with binding force over trial Courts and litigants throughout the state.[1]

The Court of Appeals clearly and unequivocally stated (a) that it was not announcing or adopting a new rule regarding horizontal stare decisis and (b) that it agreed with *Grisby* that "two inconsistent opinions may exist at the same time." Given that the Court of Appeals took pains to explicitly state is ***was not*** resolving the question of how stare decisis applies in the context of conflicting decisions from different division of the Court of Appeals, the State's argument that the Court of Appeals did adopt a new rule of stare decisis fails and lacks support in the record.

The Court of Appeals discussed "horizontal stare decisis" in the context of recgonizing that the decisions in *Taylor*[2] and *Wheeler*[3] were persuasive authority that were also controlling authority with binding authority "over **trial** Courts and litigants throughout the state."[4] The Court of Appeals was persuaded to follow *Taylor* and *Wheeler*, not because it felt it was required to follow under horizontal stare decisis, but because failing to do so would lead to a criminal law that was so vague that it would violate Fifth Amendment guarantees of due process fair notice of punishable conduct or standardless and arbitrary enforcement of

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[1] *Matter of Arnold*, 198 Wn. App. 842, 847–48, 396 P.3d 375, 378 (2017) (emphasis added) (internal citations omitted).
[2] *State v. Taylor*, 162 Wn.App. 791, 259 P.3d 289 (2011).
[3] *In re Personal Restraint of Wheeler*, 188 Wn.App. 613, 354 P.3d 950 (2015).
[4] *Matter of Arnold*, 198 Wn. App. 842, 848, 396 P.3d 375, 378 (2017) (emphasis added).

the law:

> Because one panel decision cannot overturn a prior contrary decision, "two inconsistent opinions ... may exist at the same time," *Grisby v. Herzog*, 190 Wn.App. 786, 809, 362 P.3d 763 (2015), both with binding force over trial Courts and litigants throughout the state. This creates a potential problem for the liberty interests of our state's citizens. The issuance of conflicting decisions about what an individual must do to abide by the law, each of which is equally binding, would call the very constitutionality of our system of appellate jurisprudence into question. *See Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) ("the Government violates [the Fifth Amendment guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement").
>
> The harm caused by failing to follow *Taylor* and *Wheeler* under stare decisis is salient here. Regardless of whether *Taylor* and *Wheeler* were incorrectly decided, parting company at this point would create unjustified harm by rendering the applicable law impermissibly vague.[5]

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

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

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

> situated individuals were also sent notices. What steps would the sheriff's department need to take if we issued a decision contrary to *Taylor*? Because we cannot overturn *Taylor*, it would not be able to advise individuals that its prior notice was incorrect. Yet the failure to advise individuals of a decision contrary to *Taylor* would frustrate the State's desire to increase sex offender registrations. Our Court strives to solve problems, not create them. But departing from *Taylor* and *Wheeler* would do just that.
>
> We decline to upend settled expectations throughout the state by rejecting *Taylor* and *Wheeler*. The harm of doing so is too great.[6]

The majority opinion of the Court of Appeals explicitly stated that the Court was "not prepared to resolve the question of exactly how stare decisis applies in the current context."[7] The Court of Appeals took pains in the majority opinion to state unequivocally that it was not taking a position on the issue of whether horizontal stare decisis required one division of the Court of Appeals to follow a decision of another division of the Court of Appeals. The State's argument that the Court of Appeals adopted a new rule of horizontal stare decisis fails.

2. The plain language of RCW 9A.44.128(10)(1)(a) and RCW 9.94A.030(46) is clear and unambiguous, rendering statutory interpretation unnecessary and inappropriate, and a court cannot add language to a statute even where the court believes the legislature left the language out by mistake.

The primary issue in this case is one of statutory interpretation. In

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[6] *Matter of Arnold*, 198 Wn. App. 842, 849, 396 P.3d 375, 379 (2017).
[7] *Arnold*, 198 Wn. App. at 848, 396 P.3d 375.

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 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."[8]

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.

[8] 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.

Division I of the Court of Appeals in *Taylor*,[9] Division II of the Court of Appeals in *Wheeler*,[10] and Division III of the Court of Appeals in Mr. Arnold's case,[11] have all answered this question in the negative. Despite this, the State sought review in this Court under RAP 13.4(b)(4), arguing, "This Court is the final authority on matters of statutory construction" and "Statutory interpretation is an issue of substantial public importance."[12]

In support of this argument the State engages in a lengthy review of the development of the law relating to crimes involving statutory rape from pre-1975 through 1999. The State relies on this discussion to argue that while the Legislature did not explicitly include RCW 9A.44.080 in the definition of a "sex crime" under RCW 9.94A.030, the legislature intended to include violations of RCW 9A.44.080 in the definition of a sex crime. The State argues this is so because in 1999 the Legislature amended RCW 9.94A.030 to include in the definition of "sex offense" any pre-1976 felony conviction that is comparable to a felony classified as a sex offense in RCW 9A.44.030.

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[9] *State v. Taylor,* 162 Wn.App. 791, 259 P.3d 289 (2011).
[10] *In re Pers. Restraint of Wheeler*, 18 Wn.App. 613, 354 P.3d 950 (2015).
[11] *Matter of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017).
[12] State's Petition for Review, p. 12-18.

a. Because the State has failed to demonstrate that RCW 9.94A.030 is ambiguous, it is unnecessary and improper to consider the development of the law relating to crimes of statutory rape or the legislature's adoption of other statutes.

Interpretation of a statute is a question of law reviewed de novo.[13] The fundamental goal of statutory interpretation is to ascertain and carry out the intent of the legislature.[14] Statutory interpretation begins with the plain language of the statute.[15] If the statute is unambiguous after a review of the plain meaning, the inquiry is at an end.[16]

If the language of the statute is unambiguous, reviewing courts assume the legislature means exactly what it says and "give effect to that plain meaning as an expression of legislative intent."[17]

The State's discussion of the legislative history of various statutes relating to statutory rape and sex offender registration becomes relevant and necessary only if the State can first establish that the plain language of RCW 9.94A.030(46) is ambiguous in some way. The State has made no such showing.

As it existed in 2013, RCW 9.94A.030(46) was nothing but a list

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[13] *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).
[14] *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).
[15] *Armendariz*, 160 Wn.2d at 110, 156 P.3d 201; *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.")
[16] *Gonzalez*, 168 Wn.2d at 263, 226 P.3d 131; *see also State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010).
[17] *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

of crimes that the Legislature had identified as meeting the definition of a "sex offense." The specific provision at issue in this case is RCW 9.94A.030(46)(a)(i) that defined "sex offense" as "a felony that is a violation of chapter 9A.44.RCW other than RCW 9A.44.132." This is not ambiguous in any way: the Legislature chose to identify only those crimes listed in chapter 9A.44 RCW (other than RCW 9A.44.132) as the crimes it intended to define as sex crime. As stated above, Mr. Arnold had been convicted of violating RCW 9A.44.080, a statute that had been repealed over twenty years before Mr. Arnold was charged with failing to register as a sex offender.

The State has failed to show how the Legislature's decision not to include RCW 9A.44.080 in the definition of "sex offense" as relevant to the failure to register statute is in any way ambiguous. Without such a showing, the State's discussion of legislative history and intent relating to sex crimes is irrelevant, unnecessary, and contrary to the rules of statutory interpretation.

b. Even if it is assumed that the Legislature's failure to include RCW 9A.44.080 in the list of crimes defined as a "sex offense" that triggered a duty to register as a sex offender was unintentional, it is beyond this Court's power to read into the definition of "sex offense" a crime that the Legislature failed to include.

Washington Courts have identified three types of scenarios where

the Legislature has omitted some apparently necessary language in enacting a statute:

> The first class of cases includes those in which a party argued the statute represented a legislative omission or mistake, but in which the court was able to postulate why the Legislature may have intended the literal meaning of the statute. In such cases the court has uniformly concluded judicial intervention was unwarranted.
>
> In a second class of cases, the court concedes the Legislature's omission was clearly inadvertent. *While the legislative omission created some inconsistencies, it did not undermine the purposes of the statute. It simply kept the purposes from being effectuated comprehensively. The court in these cases has not supplied the omitted language because it was not "imperative" to make the statute rational.* To do so would have been to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent. The statutes in these cases remained rational with the omission even though there were inconsistencies in the comprehensive scheme.
>
> The third class of cases is represented by *State v. Brasel*, 28 Wn.App. 303, 309, 623 P.2d 696 (1981). In *Brasel*, the sole purpose of the act was to provide new standards for the commitment of criminal defendants. Because of drafting errors in one sentence of the statute, the Governor vetoed the sentence in which the error occurred, eliminating the standard the statute was designed to create. The Legislature did not restore the sentence correcting the drafting error. This omission created the contradiction of the statute containing different conditions for commitment than were required to be negated as a condition of release. Thus a person who qualified for commitment might simultaneously qualify for release. The omission rendered the statute absurd and undermined its sole purpose. The court thus supplied the omitted sentence.[18]

[18] *State v. S.M.H.,* 76 Wn. App. 550, 557–58, 887 P.2d 903, 907–08 (1995) (emphasis in original), *citing State v. Taylor*, 97 Wn.2d at 724, 729–30, 649 P.2d 633 (1982).

Mr. Arnold's case falls squarely into the second category of Legislative omission cases identified in *S.M.H.* The Legislature's omission of RCW 9A.44.080 from the definition of "sex offense" in RCW 9.94A.030(46) might create some inconsistencies, but it did not undermine the purpose of RCW 9.94A.030 or RCW 9A.44.130. Even if this Court agreed with the State and concluded that the Legislature really intended to include statutory rape in the definition of crimes triggering the duty to register as a sex offender, this Court cannot grant the State the relief it seeks by "legislating from the bench" and adding RCW 9A.44.080 to the list of crimes identified by the Legislature as "sex offenses" under RCW 9.94A.030(46):

> "[a] Court may not read into a statute those things which it conceives the Legislature may have left out unintentionally." *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986); *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Moreover, a statute that defines a criminal offense, such as a sex offense, must be strictly construed. *See Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 580, 627 P.2d 1316 (1981). As the *Jenkins* Court stated in the context of the offense of driving while under the influence,
>
>> [i]t is necessary to keep in mind that we are here concerned with enactments defining offenses. They must be strictly construed. The Court is not at liberty to create offenses through judicial construction. Much less can we do so by supplying legislative omissions or correcting legislative oversight.

> (Citations omitted.) *Jenkins*, 95 Wn.2d at 580–81, 627 P.2d 1316.[19]

As Division I concluded in *Taylor*,

> 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.**[20]

The State has failed to make the requisite initial showing that the statute at issue is ambiguous. Unless the State demonstrates the ambiguity of the statute, the interpretation of the statute is limited to the plain language of the statute as written, which clearly does not include statutory rape as a crime triggering a duty to register as a sex offender.

Even if the State's argument about legislative history and intent is considered, and even if, for the sake of argument, the State's argument is considered to be correct, this Court lacks the power to "read into a statute those things which it conceives the Legislature may have left out unintentionally."[21] This Court, like Division I of the Court of Appeals concluded in *Taylor,* lacks the power to correct any unintentional Legislative omission in the statutory language.

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[19] *State v. S.M.H.,* 76 Wn. App. 550, 556–57, 887 P.2d 903, 907 (1995).
[20] *State v. Taylor*, 162 Wn. App. 791, 799, 259 P.3d 289, 293 (2011).
[21] *State v. Taylor*, 162 Wn. App. 791, 799, 259 P.3d 289, 293 (2011).

C. CONCLUSION

There is no dispute in any division of the Court of Appeals that Mr. Arnold was entitled to the relief granted by the Court of Appeals in this case. All three divisions of the Court of Appeals have held that a conviction under former RCW 9A.44.080 does not trigger a duty to register as a sex offender under RCW 9A.44.130 because RCW 9A.44.128 and RCW 9.94A.030 did not include a conviction a conviction under former RCW 9A.44.080 as a conviction that met the definition of a "sex offense." The State did not seek discretionary review of the Court of Appeals' decision in either *Taylor* or *Wheeler.*

Further, the State has failed to demonstrate any ambiguous statutory language that requires an analysis of the history and development of the statutory rape or sex offender registration laws. The plain language of the statutes does not include a conviction under former RCW 9A.44.080 in the definition of a "sex offense" that triggers the duty to register as a sex offender.

The Court of Appeals clearly and unambiguously stated that the Court was not adopting any new rule regarding horizontal stare decisis. The State's argument about the Court of Appeals adopting a new rule of horizontal stare decisis is not supported by the record and is a clear "hail Mary" attempt to challenge *Taylor* and *Wheeler*.

Even if this Court agreed with the State completely, this court cannot give the State the relief it seeks because it is beyond the power of this court to add language to a statute, even if this court believes the omission of the language was unintentional.

DATED this 24th day of October, 2017.

Respectfully submitted,

Reed Speir, WSBA No. 36270
Attorney for Eddie Arnold

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of October, 2017, I delivered via US mail a true and correct copy of the Supplemental Brief of Respondent to which this certificate is attached by United States Mail, to the following:

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

And, I delivered via US Mail a true and correct copy of the Supplemental Brief of Respondent to which this certificate is attached, to

Gretchen Eileen Verhoef
Lawrence Henry Haskell
Spokane County Prosecuting Attorney's Office,
1100 W. Mallon Avenue
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Signed at Tacoma, Washington this 24th day of October, 2017.

Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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