No. 94544-6

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

EDDIE D. ARNOLD

AMICUS CURIAE BRIEF OF WASHINGTON APPELLATE LAWYERS ASSOCIATION

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I. INTRODUCTION

The Washington Appellate Lawyers Association (WALA) urges the Court to hold that the divisions of the Court of Appeals are not bound by each other's holdings, and that stare decisis does not apply to decisions of different divisions of the Court of Appeals. This holding would be consistent with the existing longstanding approach by the Court of Appeals. The traditional approach allows for robust development of the common law, respects regional differences in the State, and is consistent with RAP 4.2, RAP 13.4, and RCW 2.06.030(e). This rule will best promote the development of the common law in Washington and the interests of all its citizens.

II. STATEMENT OF THE CASE

This matter arises from a decision by Division Three of the Court of Appeals. *In re Personal Restraint of Arnold*, 198 Wn. App. 842, 844, ¶ 1, 396 P.3d 375 (2017). WALA adopts the facts set forth therein.

Although divided, the Division Three panel agreed that it should generally follow decisions from the other divisions of the Court of Appeals to avoid inconsistent results, particularly in the criminal law context. The majority noted that while the doctrine of stare decisis has been applied to prior decisions issued by the same

division, "no case has explicitly adopted stare decisis for decisions issued by a different division." 198 Wn. App. at 847, ¶ 12. In granting the personal restraint petition, the majority stated, "[t]he 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." 198 Wn. App. at 848, ¶ 14 (*referring to State v. Taylor,* 162 Wn. App. 791, 259 P.3d 89 (Div. I 2011) and *In re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (Div. II 2015)). The dissent accepted the rule adopted by the majority, that stare decisis applies across the different divisions of the Court of Appeals. 198 Wn. App. at 855, ¶ 35 (J. Lawrence-Berrey, *dissenting*). The dissent added, however, that it would not follow *Taylor* and *Wheeler*, where the decisions are "incorrect and harmful." 198 Wn. App. at 856, ¶ 35 (J. Lawrence-Berrey, *dissenting*).

In accepting review, the Commissioner of this Court characterized the issue as one of "horizontal stare decisis" – whether a division of the Court of Appeals is bound by previous decisions from other divisions:

> By adopting a "horizontal stare decisis" rule, the Court of Appeals here has determined that a geographic

> division is bound by previous decisions from other geographic divisions of the court unless the previous decisions are both incorrect and harmful. It may be that this change will result in less confusion arising out of disagreements between the court's divisions. But this change itself conflicts with the traditional view of the role of the Court of Appeals divisions and directly conflicts with the holdings of *Schmitt, McClarty,* and *Ericksen*. Thus, review is appropriate under RAP 13.4(b)(2). Moreover, altering the way that the divisions treat other division decisions risks perpetuating incorrect decisions of law, insulating them from this court's review on the basis of divisional conflicts as contemplated by RAP 13.4(b)(2). Thus, the adoption of a horizontal stare decisis rule is an issue of substantial public interest that merits this court's review under RAP 13.4(b)(4).

(October 3, 2017 Commissioner Ruling at 5)

III. ARGUMENT

WALA urges the Court to hold that divisions of the Court of Appeals are not bound by the decisions from other divisions of the Court of Appeals. This traditional approach that has long been followed by the Court of Appeals, allows for robust development of the common law, respects regional differences across the State, and is consistent with RAP 4.2, RAP 13.4, and RCW 2.06.030(e). This rule will best promote the development of the common law in Washington and the interests of all its citizens.

WALA offers no argument on the substantive question of whether Mr. Arnold should register as a sex offender. Further, WALA

offers no argument on whether *Taylor* and *Wheeler* were correctly decided.

1. The Three Divisions Generally Treat Each Other's Decisions as Persuasive Authority.

Until the decision on review, the three divisions of the Court of Appeals have regularly treated the decisions from the various divisions as persuasive, rather than binding, authority. *Eriksen v. Mobay Corp.,* 110 Wn. App. 332, 346, 41 P.3d 488 (Div. III 2002) (authority relied on by Division II in another decision was "only persuasive" authority); *McClarty v. Totem Elec.*, 119 Wn. App. 453, 469, n.8, 81 P.3d 901 (Div. II 2003) (while a decision from Division III was not binding authority, it "can still be persuasive"), *reversed on other grounds,* 157 Wn.2d 214 (2006);[1] *Grisby v. Herzog*, 190 Wn. App. 786, 808-11, ¶¶ 35-43, 362 P.3d 763 (Div I 2015) (noting that

[1] In *McClarty*, Division Two followed Division Three, which had previously treated decisions of other divisions of the Court of Appeals as persuasive authority, stating: "McClarty argues that because *Roeber* [*v. Dowty Aero.*, 116 Wn. App. 127, 64 P.3d 691 (2003)] is a Division Three case, this court is neither bound by the decision nor is the holding persuasive, *citing Eriksen v. Mobay Corp.,* 110 Wn. App. 332, 346, 41 P.3d 488 (2002). Although McClarty is correct that the case is not binding on this court, he is incorrect in arguing that it is not persuasive. Eriksen states that a nonbinding case can still be persuasive and, if its reasoning is sound, may be applied to the case at bar. *Eriksen*, 110 Wn. App. at 346-47. 41 P.3d 488." 119 Wn. App. at 469, n. 8; *See also State v. Simmons*, 117 Wn. App. 682, 688, 73 P.3d 380 (Div. II, 2003); *Joyce v. Dep't of Corr.,* 116 Wn. App. 569, 586-587, 75 P.3d 548 (Div. II, 2003), *affirmed in part and reversed in part on other grounds*, 155 Wn.2d 306, 119 P.3d 825 (2005).

our appellate rules already acknowledge that two inconsistent options of the Court of Appeals may exist at the same time).

Most recently, in *State v. Dennis*, __ Wn. App. __, 402 P.3d 943 (Div I Oct. 2, 2017), Division One specifically rejected the horizontal stare decisis rule adopted by Division Three in *Arnold*:

> Dennis cites *In re Personal Restraint of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017) for its holding that we are bound by horizontal stare decisis to the decisions of our sister divisions. We respectfully disagree that *Payseno* [*v. Kitsap County*, 186 Wn. App. 465, 346 P.3d 784 (2015)] dictates our holding in this case. *Grisby v. Herzog*, 190 Wn. App. 786, 808-11, 362 P.3d 763 (2015) (The doctrine of stare decisis does not preclude one panel from the court of appeals from stating a holding that is inconsistent with another panel within the same division.).

402 P.3d at 945, n. 2. A petition for review of this decision was filed on October 3, 2017, and is currently pending (Cause No. 950831).

2. Reasons Why Horizontal Stare Decisis Should Be Rejected.

a. Treating the Court of Appeals Decisions as Persuasive Authority Supports a Robust Development of the Common Law.

Decisions from one of the three divisions of the Court of Appeals should not be binding on the others, but should remain persuasive authority only. This traditional approach has resulted in rigorous debate at the intermediate appellate level, where arguments are not foreclosed by binding precedent, but must focus on *whether*

a rule of law should be followed. That improves the quality of appellate advocacy and the quality of judicial decision-making. Further, this approach allows the divisions of the Court of Appeals the flexibility to choose when to agree or disagree, fostering the creation of the common law. By contrast, horizontal stare decisis hinders the development of the common law, forcing the appellate courts to forgo reasoned decision-making simply because another court has ruled first.

This Court should reject a rule that further restricts the development of the common law at time when entire categories of disputes are removed from appellate review through private dispute resolution.[2] The first court to decide an issue will be right only because it is first -- a perversion of Justice Jackson's oft-quoted comment regarding the authority of the Supreme Court.[3]

The treatment of Court of Appeals decisions as persuasive authority, on the other hand, encourages a more robust examination of issues presented to the judges in the three divisions. Differing perspectives and opinions are forced into the open, particularly in

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[2] *See, e.g.,* Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law, 2016 U. Ill. L. Rev. 371 (2016).

[3] "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540, 73 S. Ct. 397, 427, 97 L. Ed. 469 (1953) (Jackson, J., concurring).

developing areas of the law, because the law of the division is still in play. The expression of differing points of view by litigants and judges ensures full exploration of all facets of an issue. Moreover, decisions under such circumstances are more likely to distill competing views, making controversial areas of the law more apparent to this Court, and ensuring a better vehicle for this Court's ultimate determination of important and recurring issues of law. Allowing the appellate courts to disagree across divisions is a more healthy and robust process and benefits all citizens in the State.

b. Treating the Court of Appeals Decisions as Persuasive Authority Respects the Regional Interests of Washington State.

The Court of Appeals is designed to reflect and respect cultural, political, economic and other important differences across our state. Each division of the Court of Appeals is divided into districts comprised of multiple counties with the exception of King County, Pierce County, and Snohomish County each of which comprise one district. RCW 2.06.020. Appellate judges are elected to the bench that serves the geographic area in which they reside. WASH. CONST. ART. IV, sec. 3 & 5.

Currently, the Court of Appeals decisions are expressions of the important regional differences in our State. The adoption of

horizontal stare decisis would diminish the appellate court's expression of these naturally divergent points of view. That could impair legal reasoning and disadvantage minority voices.

c. Application of Horizontal Stare Decisis Would Be Inconsistent RAP 4.2, RAP 13.4, and RCW 2.06.030(e).

Existing rules and statutes anticipate divergent opinions emanating from the various divisions of the Court of Appeals. This court accepts cases on either direct review under RAP 4.2 or by a petition for discretionary review under RAP 13.4. Both methods authorize this court to accept a case if there are conflicting decisions between the three divisions of the Court of Appeals. RAP 4.2(a)(3) and RAP 13.4(b)(2). Adoption of horizontal stare decisis at the Court of Appeals would render RAP 4.2 and RAP 13.4 confusing at best and superfluous at worst – there will be few if any conflicts if each division of the Court of Appeals is bound by the others' decisions.

Further, horizontal stare decisis creates tension with the statutory scheme for the appellate courts. RCW 2.06.030(e) provides:

> Cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court [of appeals] or between decisions of the supreme court … shall be appealed to the supreme court.

There is no tension between the statute and current appellate practices that allow the intermediate appellate courts to be persuaded, but not bound, by the decisions of other divisions. Whenever possible, this Court should harmonize appellate rules, procedures, and practices with relevant statutes. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254, 127 S. Ct. 1382, 167 L. Ed. 2d 162 (2007); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 981, 216 P.3d 374 (2009).

IV. CONCLUSION

For the foregoing reasons, WALA respectfully requests that this Court reject a rule of horizontal stare decisis at the Court of Appeals. Court of Appeals decisions should be considered not as binding authority within that Court, but as persuasive authority.

Dated this 27th day of November, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on November 27, 2017, I arranged for service of the foregoing document, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of November, 2017.

/s/ Catherine C. Clark
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