



Commonwealth of Kentucky
Supreme Court
File No. 2011-SC-000615

MARK STINSON

APPELLANT

Appeal from Madison Circuit Court
Hon. Jean C. Logue, Judge
Indictment No. 09-CR-00316

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 11th day of September, 2012 to; Hon. Jean C. Logue, Judge, Madison County Courthouse, 101 W. Main St., Richmond, Ky. 40475, and to Matthew R. Malone, Esq. and Jacob K. Michul, Esq., Hurt, Crosbie and May, PLLC, 127 W. Main St., Lexington, Ky. 40507, Counsels for Appellant; and via e-mail to Hon. David Smith, Commonwealth's Attorney

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INTRODUCTION

The Appellant challenges his guilty plea to the charge of First Degree Sexual Abuse alleging that the statute is unconstitutionally vague and that his niece consented to sexual abuse

STATEMENT CONCERNING ORAL ARGUMENT

Although the Appellant's arguments present some novel questions, the issues are thoroughly addressed by the parties' briefs herein.

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COUNTERSTATEMENT OF THE CASE

On December 3, 2009, the Appellant, Mark Stinson (“the Appellant”) was indicted for the offense of First Degree Sexual Abuse, perpetrated upon L.P., a niece that had been residing in the Appellant’s family home during the summer school holiday. TR 1; VR, 6/1/10; 10:29:17. On June 1, 2010, the day set for the jury trial in the Madison Circuit Court, the Appellant agreed that he did, in fact, perform oral sex upon his niece. VR, 6/1/10; 10:29:17. His contention was that no crime occurred because L.P. consented to the contact. Id. The Commonwealth disputed this factual accounting and asserted that there was no consent. Id. at 10:30:14.

The record documents the Appellant’s adherence to this theory. He first submitted Tendered Jury Instructions in the days preceding the trial that requested an instruction directing the jury to find the Appellant not guilty “[e]ven if you would otherwise find the Defendant guilty of sexual abuse” if L.P. consented to the contact. TR 37. The instruction also asked that the jury be directed that L.P. could “tacitly or passively” consent to the abuse by simply allowing the abuse to occur. TR 37.

The Appellant also made a Motion to Dismiss the Indictment, filed May 24, 2010, alleging that the charge of abuse by a person “in a position of authority” as set out by KRS 510.110, was either vague or overly broad. TR 49. This Motion was followed by a “Motion for Court to Decide as a Matter of Law Whether ‘Lack of Consent’ is an Element of KRS 510.110(1)(d),” filed on the morning that the trial was to begin. TR 73. The trial court denied these motions on the record, and noted the rulings in writing on the docket sheet, which was properly signed and entered into the record on June 1, 2010. TR 108; VR, 6/1/10;

10:25:00 - 10:27:48. The trial court vacated and re-entered the same rulings after the parties notified the Attorney General's Office of the constitutional challenge. TR 115.

The Appellant entered a conditional guilty plea reserving the right to appeal the trial court's rulings on these motions concerning the role of a minor's consent as an element. TR 110. The agreement was extensively discussed on the record and noted that the Appellant understood that, should he succeed on appeal, his only remedy would be retrial on the question of forcible compulsion. VR, 6/1/10; 10:32:27.

The attempt to vilify the victim of the crime culminated in the Defendant's Sentencing Memorandum, filed August 11, 2010, that included such items as pictures of the Appellant's children and letters from the parties' family members (excluding the members of the victim's immediate family). TR 120. The letters chastised the teenage girl for everything ranging from trouble in school to allegations that she had a lesbian relationship. Id. The trial court sentenced the Appellant to one year imprisonment (TR 156), noting that the victim had been forgotten and finding that probation would unduly depreciate the seriousness of the offense. VR, 8/12/10; 16:20:15 - 19:00:00. The Final Judgment and Sentence of Imprisonment was entered on August 17, 2010. TR 163.

The Appellant appealed the ruling of the trial court to the Court of Appeals. In a published opinion rendered on September 9, 2011, the Court of Appeals affirmed the trial court and ruled that KRS 510.110(1)(d) did not violate any constitutional principle, and that the statute criminalized behavior that was inherently coercive. The Appellant now encourages this Court to ignore the intent of the legislature and continues his quest to

characterize the victim of the crime as a teenage seductress that jeopardized his happy family life when she was placed in his care and under his supervision.

ARGUMENTS

This Court should affirm the rulings of the Madison Circuit Court and the Court of Appeals. These Courts were correct in concluding that KRS 510.110(1)(d) criminalizes the behavior of those in positions of power over minors when they use their authority to find sexual partners amongst their underage charges. Sexual contact between those in positions of such trust should not be permitted to violate that trust by engaging in presumptively coercive sexual acts with children in their care. Such sexual acts are presumed non-consensual by KRS 510.110(1)(d). Further, the statute cannot be reasonably characterized as vague, either as applied to the Appellant or on its face. In addition, the concept of overbreadth does not apply because there is no constitutionally protected right to solicit sex from minors. Finally, the trial court lacked any authority to unilaterally dismiss the indictment.

I.

LACK OF CONSENT IS NOT AN ELEMENT OF KRS 510.110(1)(d)

Consent cannot be a defense to the conduct described by KRS 510.110(1)(d) because lack of consent is not an element of the offense, and it cannot serve as a justification to abuse children. When read together, the statutes describe a situation in which a child cannot be free to exercise their own, and uninfluenced judgment. Thus, there is no ambiguity between the statutes. Further, even if the Court is inclined to state that there is an ambiguity in the statutory scheme, *every* rule of statutory construction mandates the result reached by the Courts below.

A. There is No Ambiguity in the Statutory Scheme

As set out above, the Appellant was charged with, and pled guilty to, sexually abusing his niece under KRS 510.110. Under the statute and the facts of this case, there are two theories of guilt. The first, that the Appellant subjected his niece to the sexual act by forcible compulsion. The Appellant agreed that he engaged in a sexual act with his niece, but, contrary to the statements of the Commonwealth, he stated that his niece consented to the act. However, under the provisions of KRS 510.110(1)(d), the Appellant is guilty of sexual abuse in the first degree under the second theory of guilt. Under this provision those persons “in a position of authority or position of special trust” are guilty if they subject a person less than sixteen years of age to sexual contact if they come “into contact [with the minor] as a result of that position.” Here, the Appellant was standing in the place of a parent and had the absolute charge of his niece as a member of his household.

The Appellant argues that this new and more specific provision of KRS Chapter 510 is at odds with the general provisions of KRS 510.020, which states that consent is a defense to the offenses described by the chapter. In fact, there is no conflict. KRS 510.110(1)(d) could have been more precisely written, but this fact does not render its meaning indiscernible. KRS 510.110(1)(d) renders an otherwise capable sixteen or seventeen year old juvenile incapable of consenting to sexual contact with a person in a position of authority or special trust over them. Because certain adults (like teachers and coaches) are trusted with the care of children, they should not have a license to attempt to influence these impressionable teenagers and pressure them for sexual activities.

This concept is, in fact, embraced by KRS 510.020(2)(c) which states that lack of consent results from “any circumstance...in which the victim does not expressly or impliedly acquiesce in the actor’s conduct.” By the inclusion of this phrase the legislature was stating that lack of consent can result from one or more of a long list of circumstances. Some of those circumstances are specifically enumerated in the statute, but the list is not exclusive. As the Court of Appeals concluded, the language of KRS 510.110(1)(d) recognizes that the nature of certain relationships between adults and children creates a presumption that any sexual contact must be inherently coercive. The coercive nature of the relationship renders the contact non-consensual. Under KRS 510.020(2)(c) the lack of consent exists by virtue of the coercive nature of the relationship. When read together, the statutes simply state that an adult role model should not be able to use his or her relationship and authority to coerce and manipulate a minor into engaging in sexual contact. Such contact simply cannot be the product of the child’s free will.

The idea that a relationship can be inherently coercive, so as to render any perfunctory consent a facade at best, is not unique to KRS 510.110(1)(d). If the Court were to accept the Appellant’s interpretation, consent would then be an element in other situations embodied in KRS 510. For example, under KRS 510.060(1)(c) and KRS 510.090(1)(c), it is a crime, regardless of perfunctory consent, for a foster parent to have sexual contact with a foster child. Under KRS 510.060(1)(e) and KRS 510.090(1)(e), it is a crime, regardless of any perfunctory consent, for an employee of the Department of Corrections to have sexual contact with a juvenile that is incarcerated, supervised, or treated by the department. These four provisions would be invalidated and rendered completely meaningless by the

Appellant's arguments. Under that argument, a probation officer that supervises a juvenile status offender can coerce that juvenile into a sexual relationship so long as that child is sixteen years old. The legislature never intended to give those that work with and influence children a license to troll for sexual partners amongst the impressionable and dependent children entrusted to their influence.

Although this particular aspect of the statute has never been addressed by this Court, the concepts that it embodies are well known and supported by precedent. For example, in Holbrook v. Commonwealth, 662 S.W.2d 484, 488 (Ky. App. 1984) the Court of Appeals stated that consent is not an element of an offense when a statute is designed to protect a group from exploitation. That case involved the use of a minor in a sexual performance and the defendant argued that he could not have induced the minor to participate because the minor was nearly eighteen and was a willing and consenting participant. Here, KRS 510.110(1)(d) was designed with the goal of protecting impressionable children from those that might be in a position to influence their decisions. It should not be a defense to suggest that the defendant was successful in the act of persuasion.

Similarly, this Court has recognized that it defeats the purpose of a statute meant to protect children from exploitation to suggest that the child can consent to being exploited. In Baker v. Commonwealth, 103 S.W.3d 90,94 (Ky. 2003) the defendant suggested that a twelve year old consented to having nude photographs taken. In that case the Court stated that the language of the statute implied the possibility of a consenting minor by using the terms "employs, consents to, authorizes or induces" in lieu of words that conveyed forcible compulsion. Here, the same result is dictated by Baker. The use of the words "subjects a

minor” implies the possibility of a consenting minor. This was the implication recognized by the Court of Appeals’ Opinion. Because a consenting minor is contemplated by the language of the statute, the defense of consent is excluded by implication.

B. Nearly Every Rule of Statutory Construction Mandates the Same Result

Even assuming, for the purposes of argument, that the statutory scheme created an ambiguity with regard to consent, then nearly every applicable rule of statutory construction mandates the result reached by the lower courts.

1. Legislative Intent

First, every statute must be read, as written, and the intent of the legislature must be applied as written. The courts may not add or subtract from the plain language of the statute.

Commonwealth v. Frodge, 962 S.W.2d 864 (Ky. 1998). This Court has stated the rule as

A fundamental rule of statutory interpretation is that a court must determine legislative intent based on the clear language of the statute. As with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language *835 used [in the statute]. A court may not interpret a statute at variance with its stated language. To determine legislative intent, a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed.

Stogner v. Commonwealth, 35 S.W.3d 831, 834-35 (Ky. App. 2000); see also Mitchell v.

KFB Mut. Ins., 927 S.W.2d 343 (Ky. 1996).

The legislative intent contributing to the enactment of KRS 510.110(1)(d), is a reflection of both the legislature's and society's disdain for persons in a position of authority or a position of special trust being able to use that position to exercise undue influence over a minor for purposes of sexual contact. The legislature sought to create a special class of individuals from which children must be protected due to the undue influence that can potentially be exercised by those individuals. The statute is rendered meaningless if the Appellant's argument is accepted. Contrary to the statements of the Appellant (on page nine of his brief), KRS 510.110(1)(d) has no function if consent is a defense. Sexual contact accomplished by force is still a Class D Felony under KRS 510.110(1)(a).

In the face of statutory silence with respect to legislative intent, the Court may "look for guidance to outside sources, such as legislative history." Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 764 (Ky. 2003). Here the bill that became the section at issue was HB 211, which was considered during the 2008 Regular session. The bill states that its purpose is to prohibit a person in a position of authority or special trust from engaging in the same prohibited acts with a minor under the age of 18¹. Thus, it is clear that the legislature intended to prohibit ALL sexual contact between adults and the children in their care.

This should be compared with the purpose of 2008 Ky. Acts Ch. 72, which is cited by the Appellant- purportedly to demonstrate that the legislature considered his argument. That bill, which appeared as HB 485 in the 2012 legislative session, actually had nothing to do with the statute at issue. Instead, its purpose was to change the terms used in the Kentucky Revised Statutes to confer more respect for those with intellectual disabilities.

¹ A copy of the summary of HB 211 is appended hereto for the Court's reference.

That bill changed all references to intellectual disability from the term “mental retardation” to the term “intellectual disability².”

2. The More Specific Statute Prevails over the General Statute

Likewise, the second rule a statutory construction requires that this Court reject the Appellant’s argument. When two statutes may appear to conflict, the more specific statute will prevail over the general.

[W]here two statutes concern the same or similar subject matter, the specific shall prevail over the general. The Legislature is presumed to be aware of the existing law at the time of enactment of a later statute. Generally, when a later-enacted and more specific statute conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control.

Stogner v. Commonwealth, 35 S.W.3d 831, 835 (Ky. App. 2000); see also Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 763 (Ky. 2003). Here KRS 510.110(1)(d) is the more specific statute. It creates a narrow exception to the general rules of consent to sexual activity. Thus, KRS 510.110(1)(d) controls and consent does not apply when an adult in a position of authority or special trust attempts to persuade a minor under the age of eighteen to engage in a sexual activity.

3. The More Recent Statute Prevails over the Older Statute

A third rule of statutory construction also requires that the Court reject the Appellant’s argument and affirm the decision of the Court of Appeals. When two statutes appear to conflict the more recent statute prevails over the older statute. Porter v.

² A copy of the summary of HB 485 is appended hereto for the Court’s reference.

Commonwealth, 841 S.W.2d 166 (Ky. 1992); see also Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 763 (Ky. 2003). Since KRS 510.110(1)(d) is the most recent statute, being added to KRS 510 in 2008, it must prevail and act as an exception to KRS 510.020.

Since this case was decided by the Court of Appeals, that Court also decided another case with an identical argument. In Sprague v. Commonwealth the Court of Appeals held that the KRS 510.110 must prevail as it is the most recent and more specific statute. Thus, the Court of Appeals again held that consent was not element stating that “[i]n this case, KRS 510.110 must prevail as it was enacted after KRS 510.020(1) and is more specific.” Sprague v. Commonwealth, 2010-CA-001274-MR, 2011 WL 6275988 (Ky. App. Dec. 16, 2011)³. Although that Opinion is not final and is not published, it is referenced in the interest of presenting a complete history to the Court. As of the writing of this brief the matter is now pending before this Court on a Motion for Discretionary Review.

4. Statutes Must Be Construed so that One is Not Rendered Meaningless

A fourth rule of statutory construction requires that the Court reject the argument proffered by the Appellant. “[S]tatutes dealing with the same subject matter should be harmoniously construed so far as possible to allow both to stand and to give force and effect to each.” MPM Fin. Group, Inc. v. Morton, 289 S.W.3d 193, 198 (Ky. 2009); See also Commonwealth v. Phon, 17 S.W.3d 106, 108 (Ky.2000) (holding that construction of a statute that renders portions thereof meaningless or ineffectual must be avoided). As previously discussed, KRS 510.110(1)(d), as well as other portions of KRS 510, would be

³ As of the writing of this brief, this case is not final and is pending ruling on a Motion for Discretionary Review. A copy of the case is appended for this Court’s reference in an effort to provide all possible information on this issue for the Court’s consideration.

rendered meaningless by the Appellant's argument. Thus, the Appellant's suggestion must be abandoned and KRS 510.110(1)(d) must be construed as argued herein.

5. Statutes Must Be Construed To Avoid an Unreasonable Result

"Moreover, we have often stated that statutes will not be given a strict or literal reading where to do so would lead to an unreasonable result." Sisters of Charity Health Sys., Inc. v. Raikes, 984 S.W.2d 464, 470 (Ky. 1998). Thus, because the result of the Appellant's argument would create a situation in which teachers could solicit sexual partners from amongst consenting students, the Appellant's reading would create an absurd result.

6. Expressio Unius Est Exclusio Alterius

A sixth rule of statutory construction requires the Court to consider the negative implications of the express language of a statute. The rule is called *expressio unius est exclusio alterius*, and it "is most helpful when there is a strong, unmistakable contrast between what is expressed and what is omitted." Fox v. Grayson, 317 S.W.3d 1, 9 (Ky. 2010), reh'g denied (Aug. 26, 2010). "This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." Fox v. Grayson, 317 S.W.3d 1, 11 (Ky. 2010), reh'g denied (Aug. 26, 2010). Thus, in this case, the fact that KRS 510.110 prohibits anyone in a position of authority or special trust from subjecting a minor to sexual contact, it implies the exclusion of consent as an element.

The case of Baker v. Commonwealth, previously cited herein, is illustrative of this rule. In Baker v. Commonwealth, 103 S.W.3d 90,94 (Ky. 2003) the defendant suggested that a twelve year old consented to having nude photographs taken. In that case the Court stated that the language of the statute implied the possibility of a consenting minor by using the

terms “employs, consents to, authorizes or induces” in lieu of words that conveyed forcible compulsion. Here the same result is dictated by Baker. The use of the words “subjects a minor” implies the possibility of a consenting minor. This was the implication recognized by the Court of Appeals Opinion. The mention of the consenting minor implies that consent is excluded as a defense.

7. The Use of A Catch All Clause in KRS 510.020 Means that Similar Categories are Included.

Finally, where a statute utilizes a “catch all” clause, it should be read as “bringing within the statute categories similar in type to those specifically enumerated.” United States v. Brown, 536 F.2d 117, 121-22 (6th Cir. 1976). Here, KRS 510.020 includes a catch all provision allowing for the inclusion of other circumstances in which a person may lack the capacity to consent. As such, KRS 510.110(1)(d) creates a class of person that is incapable of consenting to sexual contact in a specific situation.

C. The Rule of Lenity Does Not Apply

The Court should also reject the Appellant’s invitation to apply the rule of lenity in this case. “The rule of lenity, however, is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act . . .’” Chapman v. United States, 500 U.S. 453, 463-464 (1991); Rodgers v. Commonwealth, 285 S.W.3d 740, 752 (Ky. 2009); Saxton v. Commonwealth, 315 S.W.3d 293 (Ky. 2010); Crouch v. Commonwealth, 323 S.W.3d 668 (Ky. 2010); Hearn v. Commonwealth, 80 S.W.3d 432 (Ky. 2002). “A conflict in the law is not an ambiguity which would involve the application of the rule of lenity.” Commonwealth v. White, 3 S.W.3d 353 (Ky. 1999).

II.

KRS 510.110(1)(d) IS NEITHER VAGUE NOR OVERLY BROAD

The Appellant suggests that, in the event that the Court believes that consent is not an element of KRS 510.110(1)(d), then the statute is either unconstitutionally vague or overly broad. It is neither. The statute allows for a person to discern what conduct is illegal. Further, there is no protected right to have sexual relations with children that would be impinged by an overly broad statute. Even if there were such a right to have sex with children, the Appellant lacks the standing to raise this argument.

A. The Statute is Not Unconstitutionally Vague

KRS 10.110(1)(d) clearly defines the conduct that is prohibited, thus it is not vague. In addition, because the conduct at issue herein is so clearly the type of conduct that is prohibited by the statute, the Appellant does not have standing to challenge the statute as constitutionally vague. Thus, the trial court must be affirmed.

1. The Appellant does not have Standing to Challenge the Statute for Vagueness

This Appellant does not have standing to challenge this statute on the basis that the statute is void for vagueness. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982); Commonwealth v. Kash, 967 S.W.2d 37 (Ky. App. 1998).

In this matter the Appellant was clearly in the category of special trust defined in the statute. KRS 532.045(1) defines the relationship as “occupied by a person in a position of authority[.]” Here, the child was placed in the home and the Appellant stood in the role of a parent. The Appellant may not speculate about hypothetical applications, as he does to present this argument, to justify his own clearly prohibited conduct. As such, the Appellant does not have the standing necessary to make this argument.

2. The Statute is Clear and Utilizes Plain and Unambiguous Language

Even assuming, for the purposes of argument only, that the Court is inclined to consider the merits of the Appellant’s assertion of vagueness, the statute is sufficiently clear and unambiguous. The vagueness doctrine arises from the due process clause and “incorporates notions of fair notice or warning[.]” Smith v. Goguen, 415 U.S. 566, 572, 94 S. Ct. 1242, 1247, 39 L. Ed. 2d 605 (1974). A statute is not void for vagueness unless it “either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” Raines v. Commonwealth, 731 S.W.2d 3, 4 (Ky. App. 1987) citing Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Here, the statute is clear and utilizes plain and unambiguous language that clearly forbids exactly the kind of conduct that the Appellant agrees occurred in this matter.

a. The Terms “Position of Authority” and “Special Trust” are Defined by Statute, Have been Used by the Legislature and Courts for Years, and Are Not Unique to the Penal Code

KRS 510.110(d) states that it is aimed at those persons that are “in a position of authority or position of special trust, as defined in KRS 532.045[.]” Thus, the plain language

refers the reader to KRS 532.045, and it is with this statute that the Appellant really takes issue. KRS 532.045(1)(a) defines “position of authority” with a list of non-exclusive examples such as those that stand in the position of a parent, a coach, a teacher, or similar adult that is placed in a role that requires mentoring of a child. KRS 532.045(1)(b) defines a position of special trust as “a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor[.]” These concepts are neither new nor elusive. In fact, these terms have been applied without difficulty by Kentucky Courts for many years in the criminal context. Outside of the criminal context they are substantially similar to ideas that form the very foundations of law - such as agency and fiduciary duty. In fact, the idea of duty and special trust form the foundation for common law rules governing agency, trusts, estates, probate, client privilege, and guardianship.

For many years the appellate courts of Kentucky have not struggled to apply these terms in criminal matters. In considering a constitutional argument based upon equal protection, this Court held that those in a “position of special trust” were distinct from a mere acquaintance or stranger. The Court stated “[w]e think there is a reasonable basis in the legislature's contrasting sexual offenders who are strangers or mere acquaintances of the abused child from those who abuse not only the child, but their advantageous position as a person who society teaches the child to regard as an adult role model.” Owsley v. Commonwealth, 743 S.W.2d 408, 410 (Ky. App. 1987). In Commonwealth v. Taylor, the Supreme Court of Kentucky held that an older sibling met the definition of someone in a position of special trust. Commonwealth v. Taylor, 945 S.W.2d 420 (Ky. 1997). The Courts

have also held parents and babysitters were in positions of authority over the children in their care. Porter v. Commonwealth, 841 S.W.2d 166 (Ky. 1992); Ebertshauser v. Commonwealth, 2003-CA-002707-MR (Ky. App. 2005)⁴.

As these examples demonstrate, the definitions utilize plain and unambiguous language that allow the common reader to clearly ascertain the type of behavior that is prohibited. In short, adults are not to prey upon or acquiesce in sexual activity with minors, especially when they are able to exercise some amount of control over that minor's behavior. As the adult caretaker and relative that controlled many aspects of L.P.'s life, the Appellant had substantial opportunity to exercise influence over L.P. The legislature clearly intended to distinguish this type of relationship from one in which a minor is able to exercise free will without the influence of the adult role model. In short, the Appellant was an influential adult with direct control of L.P.'s life and with a substantial ability to influence L.P.'s behavior. Adults should not be permitted to prey upon children that they can punish, influence, and control. No matter how the Appellant would choose to view what occurred (and apparently relieve himself of guilt by suggesting that it was L.P.'s fault), he was the adult trusted with her care and he should have refrained from using this advantage to influence L.P. As such, the trial court should be affirmed.

Contrary to the assertions of the Appellant, he is not being punished for L.P.'s behavior. In fact, this statement demonstrates the central problem that the trial court sought to voice when stating that the victim here has been forgotten. The Appellant is being

⁴ This unpublished decision is referenced pursuant to CR 76.28(4) to demonstrate the number of times that Kentucky appellate courts have considered arguments similar to the one at bar. A copy of this decision is attached pursuant to the rule .

punished because he abused his position as a caregiver for L.P., he violated the trust that was placed in him by L.P.'s parents, and he (the adult that should have known better) used that position and trust to coerce and pressure L.P. (assuming, of course, that L.P. did consent, a fact that is disputed by the Commonwealth). This is exactly the behavior that has been condemned by multiple cases that describe abuse by an adult in a position of authority or special trust. For years, the courts and the legislature have not struggled to define the evil that should be targeted by the statute. Thus, the statute is not vague.

b. The Statute Expressly Defines the Connection Between the Minor and the Adult

Further, the statute itself expressly states the connection required between the child and the adult in the position of authority or special trust. As the Appellant accurately notes, the statute expressly states that the contact between the adult and the child must be "a result of" the position of special trust or authority. The statute reads, "with whom he or she comes into contact as a result of that position." 510.110(1)(d). Thus, the statute again seeks to distinguish an adult that has the ability to influence the trusting child from the adult that is a mere acquaintance.

In Sprague v. Commonwealth, an unpublished case that was decided by the Court of Appeals while this case was pending before this Court, the Court of Appeals considered this exact argument and stated that "we cannot conclude that the phrase 'comes into contact as a result of that position' means anything other than what it says." Sprague v. Commonwealth, 2010-CA-001274-MR, 2011 WL 6275988 (Ky. App. Dec. 16, 2011)⁵.

⁵ As was previously stated above, Sprague v. Commonwealth is the only other case that has discussed the issues raised herein. As of the writing of this brief, the case is not final and is pending ruling on a Motion for Discretionary Review. A copy of the case

As previously noted, here, the Appellant has absolutely no standing to argue this point. He clearly had access to L.P. due solely to the position of trust. She was a relative that lived in another state. Her parents trusted the Appellant to act as a parent. Absent that position of trust the Appellant would not have been able to influence L.P. If the Court is inclined to consider this argument despite the Appellant's lack of standing, it should note the plain language of the statute.

B. KRS 510.110(1)(d) is not Overly Broad

Further, KRS 510.110(1)(d) is not overly broad because there is no protected constitutional right to engage in sexual contact with children. Because no such right exists no right is infringed by a statute that prevents certain persons from engaging in sex with children between the ages of 16 and 18. Typically, over breadth challenges arise from the First Amendment. Martin v. Commonwealth, 96 S.W.3d 38 (Ky. 2003). This statute is not afforded First Amendment protection as it does not restrict any constitutionally protected expression.

An assertion of over breadth is an assertion that the statute is facially invalid. Meaning that it suppresses legitimate expression in addition to the illegitimate activity.

Statutes are ordinarily challenged, and their constitutionality evaluated, "as applied"-that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative.

is appended for this Court's reference in an effort to provide all possible information on this issue for the Court's consideration.

Ada v. Guam Soc. of Obstetricians and Gynecologists, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992). To hold that the statute is facially invalid, the challenger must normally demonstrate that no set of facts exist under which the statute can be constitutionally applied. United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

In a First Amendment challenge, a statute may be facially challenged if it was so overly broad that it had the effect of chilling constitutionally valid speech. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11,108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). The doctrine, however, is not properly employed absent substantial consequence. Further, "it is an elementary principle that where the validity of a statute is assailed, and there are two possible interpretations, by one of which the statute would be constitutional, and by the other it would not, it is the duty of the court to adopt that construction which would uphold it." Hause v. Commonwealth, 83 S.W.3d 1, 8 (Ky.App. 2001). In short, over breadth requires that the statute be facially void, it is an extremely rare remedy that will not be utilized when the criminal sanction punishes conduct (rather than expression) that is not constitutionally protected. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L. Ed. 2d 830 (1973).

The doctrine of over breadth simply does not apply when the question is whether adults in positions of trust with minors should be permitted to prey upon children. A similar issue was recently raised in the context of statutes that prohibit the solicitation of sex from minors on the internet. The argument was substantially similar to that made here (i.e. legitimate expression was suppressed by the statute). Essentially it was alleged that the statutes would deter lawful sexual expression. However, there is simply no constitutional

protection for solicitations of sex from minors. Filzek v. Commonwealth, 309 S.W.3d 790 (Ky. App. 2009).

Additionally, the statute is sufficiently clear and narrow so that it does not chill any legitimate sexual expression. It defines a class of children between sixteen and eighteen that may have their ability to consent to sexual behavior impaired by the very influence that an adult in a position of authority may exercise over them. Kentucky Courts have examined similar challenges to other statutes involving the sexual exploitation of minors, and found that the statutes are constitutionally valid. See e.g. Hause v. Commonwealth, 83 S.W.3d 1 (Ky.App. 2001) (KRS 531.340 is constitutionally valid because it proscribes only the distribution of sexually explicit material that includes sexual performances by minors).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the decision of the Court of Appeals and affirm the decisions of the Madison Circuit Court.

Respectfully submitted,

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APPENDIX

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