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CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA
CHRIS PRIEST, CLERK

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
v.	)	**CASE NO.: CC-2016-001349.00**
	)	
CARRIE CABRI WITT,	)	
Defendant.	)	

STATE OF ALABAMA,	)	
	)	
v.	)	**CASE NO.: CC-2016-001264.00**
	)	
DAVID THOMAS SOLOMON,	)	
Defendant.	)	

ORDER

This cause comes before the Court on the motions for the Court to hold Ala. Code § 13A-6-81(a) unconstitutional filed by the Defendants in the above styled cases. The State filed a response to the motion and the parties appeared before the Court for a hearing on the motion on April 4, 2017. Upon consideration of the motions, the arguments of counsel, the record in each case, and the relevant legal authorities, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. These cases are before the Court strictly on the allegations in the indictments, no testimony or evidence was taken at the hearing. The indictments make allegations that are identical in all respects excepting the parties to each charge: "[…] [The Defendant,] a school employee, did engage in a sex act or deviate sexual intercourse with [the victim,] a student under the age of 19 years, in violation of Section 13A-6-81 of the Code of Alabama […]." That is the complete allegation. Accordingly, the Court cannot determine (1) whether the parties were consenting adults (2) whether the school employees were in any position of authority, in fact, over the students (3) whether the school employees, in fact, abused any position of authority they had to coerce, groom, or otherwise obtain the illegitimate consent of the alleged victims. Under Alabama law, students who have reached the age of 16 years have the capacity to consent to sex unless there is some circumstance that removes them from the pool of adults with capacity and places them in a situation where they might not easily refuse consent. It is

this Court's finding that the law grants these students the capacity to consent until and unless there is some showing that authority was used to obtain illegitimate or coerced consent. If no such position of authority is alleged, the Defendant must be permitted to show consent as a defense to the crime alleged.

2. The reasoning behind Lawrence v. Texas, 539 U.S. 558 (2003), is difficult to apply to the case at hand. In Lawrence, the Supreme Court of the United States held that any "legitimate state interest" advanced by legislation must "justify its intrusion into the personal and private life of [individual adults engaging in consensual, non-commercial sex]" and that the interest advanced by the State of Texas in that case did not so justify the intrusion, violating the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Lawrence opinion specifically called out that the holding would be more difficult to apply in situations where the both parties were not clearly adults or where consent could not be easily refused. However, it would be incorrect to confuse difficulty in applying with a lack of application.

3. In Alabama, "anyone 16 years of age is technically not a 'child,' but is one capable of consenting to sexual intercourse." Parks v. State, 565 So.2d 1265, 1273 (Ala. Crim. App. 1990). The Parks opinion removes 16-year-old to 18-year-old persons from 'child' for purposes of consent to sex, but it is unclear whether it casts these students as 'clearly adults' for purposes of Lawrence. What is clear from Parks is that the State of Alabama has established that 16-year-old persons are fully 'capable of consenting to sexual intercourse.' Accordingly, this Court is satisfied that, as a matter of law, every act covered by the statute at issue is one in which both parties have the capacity to consent, just as any person who was clearly an adult.

4. The Court recognizes that the State of Alabama has a legitimate purpose in protecting the people of Alabama from those who would use positions of authority (Teachers, Wardens, Clergy, Psychologists) to overwhelm those over whom they hold such authority (Students, Prisoners, Congregants, Patients) and thereby obtain coerced or illegitimate consent to sexual activity as well as from school environments where children or young adults are groomed or coerced into exploitive or abusive conduct. The statute at hand embeds an irrebuttable presumption that any sexual encounter between an employee of any school and any student in the state (without qualification as to class, school, or school system) is conclusively the result

of a misuse of authority. The law takes away the right of the employee to assert a defense that legal consent was freely and legitimately given—abrogating the student's capacity to consent.

5. State v. Edwards, 288 P.3d 494 (Kan. Ct. App. 2012), was helpful to this Court in deciding the cases at hand. The Kansas legislature implicitly recognized the disparity of power inherent in the teacher/student relationship and enacted legislation prohibiting sex between teachers or other school employees with positions of authority when the student was enrolled at the school where the offender was employed. This one key distinction separates the Kansas statute from Alabama's law. The Alabama statute has no requirement that the school employee had any position of influence or authority. The Alabama statute includes school employees "of any kind" without regard to school or system. In each of the cases cited by the State where similar statutes were at issue, the statue was expressly limited in scope to students who were in the same school or, at minimum, the same school system:

Paschal v. State, 388 S.W.3d 429 (Ark. 2012): Arkansas Code § 5–14–125(a)(6) expressly limited culpability to students in the same school as the employee:

> "a teacher in **a public school** in a grade kindergarten through twelve (K–12) and engages in sexual contact with another person who is [a] student **enrolled in the public school** and [l]ess than twenty-one (21) years of age."

As of 2013, Arkansas amended the statute to read as follows:

> "a teacher, principal, athletic coach, or counselor in a public or private school in a grade kindergarten through twelve (K-12), **in a position of trust or authority, and uses his or her position of trust or authority over the victim** to engage in sexual contact with a victim who is [a] student enrolled in the public or private school; and [l]ess than twenty-one (21) years of age."

In re Shaw, 204 S.W.3d 9 (Tex. Ct. App. 2006): Texas Penal Code § 21:12 expressly limited culpability to students in the same school as the employee:

> "An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is **enrolled in a public or private primary or secondary school at which the employee works** and who is not the employee's spouse."

State v. Hirschfelder, 242 P.3d 876 (Wa. 2010): RCW 9A.44.093(1)(b) expressly limited culpability to students in the same school as the employee:

> "the person is **a school employee** who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with **a registered student of the school** who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student."

Edwards, 288 P.3d 494: K.S.A. 21–3520(a)(8) (now repealed) expressly limited culpability to students in the same school as the employee:

> "the offender is a **teacher** or a **person in a position of authority** and the person with whom the offender is engaging in consensual sexual intercourse, [...] lewd fondling or touching, [...] or sodomy [...] is a student **enrolled at the school where the offender is employed**."

State v. McKenzie-Adams, 915 A.2d 822 (Conn. 2007): Conn. Gen Stat. § 53a-71(a) expressly limited culpability to students in the same school as the employee or students in the jurisdiction of the board that employees the actor:

> "the actor is a school employee and such other person is a student **enrolled in a school in which the actor works** or a school **under the jurisdiction of the local or regional board of education which employs the actor**...."

The courts in those cases were apparently satisfied that the statute was limited to where this disparity of power exists. This Court is not satisfied that Ala. Code §13A-6-81 is so limited:

> "A person commits the crime of a school employee engaging in a sex act or deviant sexual intercourse with a student under the age of 19 years if he or she is a school employee and engages in a sex act or deviant sexual intercourse with a student, regardless of whether the student is male or female. Consent is not a defense to a charge under this section."

6. This Court acknowledges that a disparity of power may inherently exist in a teacher/student relationship, but it clearly does not exist between every school employee and every student regardless of where that student is enrolled. By eliminating the requirement that the state show a position of authority, grooming, abuse, coercion, or lack of consent, the state criminalizes behaviors outside of the state's legitimate purpose.

In order for justice to be served, the State must prove that a defendant/employee was actually in a position of authority over the victim/student and that the position of authority was abused to obtain consent. Whether such consent was legitimate is traditionally a question of fact for a jury to decide.

7. The Court finds this statute unconstitutional as applied to these Defendants. In so finding, this Court does not endeavor to absolve any wrongdoing or to excuse the Defendants. Moreover, the Court does not encourage any similarly situated party to engage with impunity in what may very well be criminal behavior. The objective of this Court is to offer this Defendant the full measure of protection that has been offered to all accused throughout the history of this country and to see that justice is served.

To the casual observer, or the uninformed, the first question that comes to mind is, 'why is the motion before the court even being seriously considered?' The second question follows, 'doesn't everybody know that it is wrong for a school teacher to have sex with his or her student?' Let there be no mistake that this Court fully recognizes the Alabama Legislature's right to establish laws that protect minors, persons who might be injured or coerced, or persons who might not easily refuse consent. That is not the issue in this case. There is nothing in the statute that requires the State to show that a defendant ever had the student in class, had contact with the student, or ever had any authority or control over the student whatsoever while at school.

These cases are hereby **DISMISSED** without prejudice; the State is given leave to refile within the appropriate statute of limitations and under the proper statute(s).

The Clerk is directed to provide copies of this Order to the parties through their attorneys of record, to the District Attorney, and to the office of the Attorney General.

DONE this 10th day of August, 2017.

Glenn Thompson

GLENN E. THOMPSON
CIRCUIT JUDGE