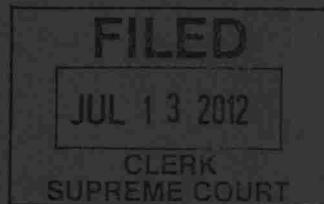


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-00615



MARK STINSON

APPELLANT

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2010-CA-001647

ON APPEAL FROM MADISON CIRCUIT COURT, HON. JEAN C. LOGUE, JUDGE
CASE NO. 09-CR-00316

COMMONWEALTH OF KENTUCKY

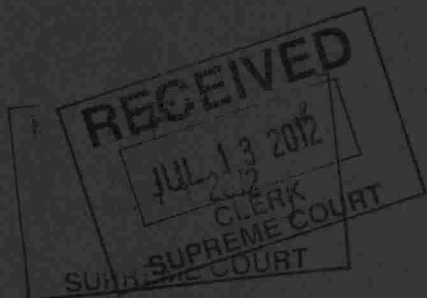
APPELLEE

BRIEF FOR APPELLANT, MARK STINSON

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Matthew R. Malone".

Matthew R. Malone, Esq.
Jacob K. Michul, Esq.
HURT, CROSBIE & MAY, PLLC
127 West Main Street
Lexington, Kentucky 40507
Telephone: (859) 254-0000
Facsimile: (859) 254-4763



CERTIFICATE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first-class U.S. Mail, postage prepaid, on this the 13th day of July, 2012: Honorable Jean C. Logue, Judge, Madison Circuit Court, Madison County Courthouse, 101 W. Main St., Richmond, KY 40475; Hon. David Smith and Hon. Jennifer Hall Smith, Commonwealth's Attorneys for the 25th Judicial Circuit, 101 N. 1st Street, P.O. Box 717, Richmond, KY 40475; Hon. Jack Conway, Kentucky Attorney General, Office of Criminal Appeals, 1024 Capitol Center Drive, Frankfort, KY 40601; and Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal was not removed from the Kentucky Supreme Court.

A handwritten signature in dark ink, appearing to read "Matthew R. Malone".

Matthew R. Malone, Esq.

INTRODUCTION

This is a criminal case in which appellant, Mark Stinson (“Mark”) is challenging the determination of the Madison Circuit Court, affirmed by the Kentucky Court of Appeals, that KRS 510.110(1)(d) is constitutional and that “lack of consent” is not an element of that offense. Mark contends that “lack of consent” is plainly an element of the offense and that, if not, the statute is unconstitutionally vague and overbroad.

STATEMENT CONCERNING ORAL ARGUMENT

Mark requests an oral argument. This appeal concerns the constitutionality, interpretation, and construction of KRS 510.110(1)(d). This Court has not previously considered KRS 510.110(1)(d), and an oral argument will enable counsel to adequately advise the Court as to the nature of the statute in question and the detailed legal arguments raised in this appeal.

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STATEMENT OF THE CASE

a. Factual Background

While this appeal turns strictly on questions of law rather than the facts of this case, the underlying facts assist with providing the proper context for this appeal.

On or about May 25, 2009, Mark's niece by marriage, L.P.,¹ came from Sacramento, California, to spend the summer in Berea, Kentucky, with Mark, Mark's wife, and Mark's four children.² When L.P. came to visit Kentucky in 2009, she was seventeen (17) years old. L.P.'s visit was temporary and she planned to return to California at the end of the summer to begin college. While L.P. was in Kentucky, she and Mark spent time together and eventually engaged in sexual contact together in July 2009. *Appendix, Tab B.* A short time later, L.P.'s mother and stepfather in California learned of the sexual contact and the stepfather notified the Berea Police Department.

b. Trial Court Proceedings

Following an investigation by the Berea Police Department, a Madison County grand jury indicted Mark on December 3, 2009 on one count of sexual abuse in the first degree under KRS 510.110(1)(d). *Appendix, Tab C.* The indictment specifically charged that Mark committed the offense by:

being a person in a position of authority and subjecting L.P. to sexual contact and engaging in masturbation in the presence of L.P., a minor less than eighteen years old.³

¹ As Mark's niece was seventeen (17) at the time of the events giving rise to this appeal, she is referred to herein as "L.P." to protect her privacy.

² L.P.'s mother and Mark's wife are sisters, meaning that Mark and L.P. are not biologically related.

³ KRS 510.110(1)(d) and the indictment refer to "sexual contact" and "engaging in masturbation"; however, the distinction between the two is not relevant to this appeal and for simplicity this Brief collectively refers to both as "sexual contact."

Id.⁴ On May 24, 2010, Mark filed a *Motion to Dismiss the Indictment* on the grounds that KRS 510.110(1)(d) is unconstitutionally vague and overbroad. The trial court heard the motion on May 27, 2010 and June 1, 2010 and denied the motion by written order entered August 17, 2010. *Appendix, Tab E.*

Mark has maintained at all times that the sexual contact with L.P. was consensual and that KRS 510.110(1)(d) does not criminalize consensual sexual contact. Mark submitted to the trial court *Defendant's Tendered Jury Instructions* incorporating "lack of consent" as an element of the charged offense. *Appendix, Tab F.* Mark also filed a *Motion for Court to Decide as a Matter of Law Whether "Lack of Consent" is an Element of KRS 510.110(1)(d).* The trial court heard the motion and considered Mark's proposed jury instructions at a hearing on June 1, 2010. By order dated August 17, 2010, the trial court denied the motion and rejected *Defendant's Tendered Jury Instructions* relating to lack of consent. *Appendix, Tab G.*

The trial court proceedings never progressed to a factual determination as to whether the sexual contact was consensual. While Mark maintains that he could prevail at trial with the jury properly being instructed as to the consent issue, he recognized that he could not prevail without consent instructions to the jury. Accordingly, on June 1, 2010, the morning trial would have started, the trial court permitted Mark to enter a conditional guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) and RCr 8.09. *See Appendix, Tab B.* In his plea, Mark admitted only that he and L.P. engaged in sexual contact. Id. He still maintained that the contact was consensual. Id. He reserved the right to appeal the constitutionality of KRS 510.110(1)(d) and the finding of the trial

⁴ A copy of KRS 510.110 is attached hereto at *Appendix, Tab D*, for reference.

court that “lack of consent” is not an element of the offense. Id. On August 12, 2010, the trial court sentenced Mark to one year in prison. Id.

c. Appellate Proceedings

Mark filed a timely notice of appeal on September 2, 2010 appealing (i) the denial of his *Motion To Dismiss the Indictment*; (ii) denial of *Motion for Court to Decide as a Matter of Law Whether “Lack of Consent” is an Element of KRS 510.110(1)(d)*; and (iii) denial of *Defendant’s Tendered Jury Instructions* relating to “lack of consent”. *Appendix, Tab H.* After briefing and oral argument, the Kentucky Court of Appeals affirmed the trial court on all issues in an opinion dated September 9, 2011. *Appendix, Tab A, Stinson v. Com.*, 2010-CA-001647. On October 7, 2011, Mark filed a timely *Motion for Discretionary Review* which this Court granted on May 16, 2012.

ARGUMENT

A. ISSUES PRESERVED FOR REVIEW.

Mark preserved the “lack of consent” question by raising the issue in the trial court through *Defendant’s Tendered Jury Instructions* and his *Motion for Court to Decide as a Matter of Law Whether “Lack of Consent” is an Element of KRS 510.110(1)(d)*. See Appendix, Tab A, Stinson v. Com., 2010-CA-001647, at 2. Mark preserved the constitutional questions through his *Motion to Dismiss the Indictment*. Id. at 2-3. The trial court can dismiss an indictment when there is a valid constitutional challenge. Id. at 3 (citing Commonwealth v. Isham, 98 S.W.3d 59, 61-62 (Ky. 2003); RCr 8.18; Commonwealth v. Hay, 987 S.W.2d 792, 795 (Ky. App. 1998)). The Kentucky Attorney General was also properly notified of the constitutional challenge. Id. at 2. Mark further

preserved all issues in his conditional guilty plea and all issues were addressed in Mark's appeal to the Kentucky Court of Appeals.

B. STANDARD OF REVIEW.

This appeal involves questions of statutory interpretation, which are reviewed de novo. Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 925 (Ky. 1997); Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky.2004); Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky. App. 2001). Errors regarding jury instructions are also treated as questions of law to be reviewed de novo. Peters v. Wooten, 297 S.W.3d 55, 64 (Ky. App. 2009).

C. "LACK OF CONSENT" IS AN ELEMENT OF KRS 510.110(1)(d).

(i) "Lack of Consent" is an express element of KRS 510.110(1)(d).

In 2008, the General Assembly amended KRS 510.110 to add a new section, (d), which defines the new offense constituting sexual abuse in the first degree. 2008 Ky. Acts ch. 72, sec. 1, effective July 15, 2008. That new provision provided that:

(1) A person is guilty of sexual abuse in the first degree when:

...

(d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact or engages in masturbation in the presence of the minor and knows or has reason to know the minor is present or engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate.

KRS 510.110(1)(d). This Court has not previously addressed this new provision. While KRS 510.110(1)(d) does not make any specific reference to lack of consent, the LRC Commentary to KRS Chapter 510⁵ clarifies that “lack of consent” is an element of sexual abuse in the first degree.⁶ In addition, KRS 510.020 expressly dictates that lack of consent is an element of every offense defined in KRS Chapter 510, even when not specifically stated:

Whether or not **specifically** stated, it is an element of every offense defined [in KRS Chapter 510] that the sexual act was committed without consent of the victim.

KRS 510.020(1)(emphasis added).⁷ KRS Chapter 510 includes KRS 510.110(1)(d) and therefore KRS 510.020 must apply.

KRS 510.020 goes on to define three specific situations that constitute lack of consent and clarifies that it applies to sexual abuse (the particular type of offense at issue in this case):

- (2) **Lack of consent results from:**
 - (a) Forcible compulsion;
 - (b) Incapacity to consent; or
 - (c) **If the offense charged is sexual abuse, any circumstances** in addition to forcible compulsion or incapacity to consent **in which the victim does not expressly or impliedly acquiesce** in the actor’s conduct.

⁵ “‘Lack of consent’ is an element of each degree of sexual abuse. However, in a prosecution for sexual abuse the term ‘lack of consent’ has a broader meaning than in a prosecution for rape or sodomy. ‘Lack of consent’ in any prosecution for sexual abuse includes any circumstances in addition to ‘forcible compulsion’ or ‘incapacity to consent’ in which the victim does not expressly or impliedly acquiesce in the actor’s conduct.” See *Kentucky Crime Commission/Legislative Research Commission (LRC) Commentary to KRS 510.110(1)(d)*, 1975(emphasis added).

⁶ A copy of *Kentucky Crime Commission/Legislative Research Commission (LRC) Commentary to KRS 510.110(1)(d)*, 1975 is attached hereto at *Appendix, Tab I*, for reference.

⁷ A copy of KRS 510.020 is attached hereto as *Appendix, Tab J*, for reference.

KRS 510.020(2)(a)-(c)(emphasis added). KRS 510.020(2) does not say that the presence of a person in a position of special trust or authority automatically results in no express or implied acquiescence.

One must read KRS 510.020 in harmony with KRS 510.110(1)(d). KRS 510.020 exists for the sole purposes of (i) uniformly supplying the “lack of consent” element for every offense defined in KRS Chapter 510 and (ii) specifically defining what constitutes “lack of consent.”

In addition, KRS 510.020 also defines incapacity to consent:

- (3) A person is deemed incapable of consent when he or she is:
 - (a) **Less than** sixteen (16) years old;
 - (b) Mentally retarded or suffers from mental illness;
 - (c) Mentally incapacitated;
 - (d) Physically helpless; or
 - (e) Under the care of custody of a state or local agency pursuant to court order and the actor is employed by or working on behalf of the state or local agency.

KRS 510.020(3)(a)-(e)(emphasis added). Per KRS 510.020(3)(a), it is clear that a person over the age of 16 is capable of consent. The involvement of a person in a position of authority or a position of special trust is conspicuously absent from the list. Therefore, in light of KRS 510.020, there is no violation of KRS 510.110(1)(d) when two consenting persons over the age of 16 engage in some sexual activity.

With the enactment of a new statute, “the legislature is presumed to take cognizance of the existing statutes and condition of the law.” Mitchell v. Kentucky Farm Bureau Mut. Ins. Co., 927 S.W.2d 343, 346 (Ky. 1996)(overruled on other grounds). “The plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any

other method or source.” Stopher v. Conliffe, 170 S.W.3d 307, 308-09 (Ky. 2005)(overruled on other grounds). There is no conflict between KRS 510.020 and KRS 510.110(1)(d). There is nothing in KRS 510.110(1)(d) to remove lack of consent as an element or to make KRS 510.020 inapplicable. Accordingly, based on the plain terms of KRS 510.110(1)(d) and the expressly applicable provisions of KRS 510.020, lack of consent is an element of KRS 510.110(1)(d).

(ii) **Any conflict or ambiguity must be resolved by recognizing “lack of consent” as an express element of KRS 510.110(1)(d).**

If there is any ambiguity, that ambiguity must be resolved by recognizing that lack of consent is an element of the offense.

It is well-settled that:

In enacting any law, the legislature is **presumed** to take cognizance of the existing statutes and condition of the law so that when the statute under consideration is ambiguous, **the new enactment is to be construed in connection and in harmony with the existing law as a part of the general and uniform system of jurisprudence.**

Mitchell, 927 S.W.2d at 346 (Ky. 1996)(emphasis added). KRS 510.110(1)(d) did not go into effect until 2008. 2008 Ky. Acts ch. 72, sec. 1, effective July 15, 2008. However, the relevant provisions of KRS 510.020 have been in effect since at least 1975. 1974 Ky. Acts ch. 406, sec. 82, effective January 1, 1975. The General Assembly is presumed to have been aware of the existence and effect of KRS 510.020 when it created KRS 510.110(1)(d) over three decades after the relevant portions of KRS 510.020. See Mitchell, 927 S.W.2d at 346. Harmonizing KRS 510.110(1)(d) with KRS 510.020 requires recognition that KRS 510.110(1)(d) includes the “lack of consent” element as defined in KRS 510.020, otherwise, KRS 510.020 is rendered meaningless. Any other

interpretation would create uncertainty as to the application of KRS 510.020. KRS 510.020 serves the sole purpose of making lack of consent an element of **every offense** defined in KRS Chapter 510, including KRS 510.110(1)(d). Notably, every single other provision of KRS Chapter 510 remains consistent with KRS 510.020 and reading KRS 510.110(1)(d) in harmony with KRS 510.020 results in consistency as well.

In addition to the presumption that the legislature was aware that that KRS 510.020 would automatically supply “lack of consent” as an element, the legislature has demonstrated actual awareness that an express exception is necessary to avoid the automatic application of KRS 510.020. For example, in defining sodomy in the fourth degree (created 1974 Ky. Acts ch. 406, sec. 90, effective January 1, 1975), the legislature specified:

Notwithstanding the provisions of KRS 510.020, consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense.

KRS 510.100(2)(emphasis added).⁸ However, KRS 510.110(1)(d) does not contain any similar exception and does not otherwise eliminate or address the lack of consent element. In KRS 510.110(1)(d), the legislature could have, but did not, employ the language necessary to “notwithstanding” KRS 510.020.⁹ The Court cannot construe KRS 510.110(1)(d) to exclude the lack of consent element when the legislature did not see fit to do so. KRS Chapter 510 contains a comprehensive set of statutes that one must interpret as a whole.

⁸ A copy of KRS 510.100 is attached hereto at *Appendix, Tab K*, for reference.

⁹ Likewise, the legislature could have amended KRS 510.020(3) to include persons who are less than eighteen (18) years old but who have sexual contact with a person in a position of authority or special trust; however, the legislature did not do so.

Furthermore, the legislature has actually amended KRS 510.020(3) since Mark instituted this appeal. 2012 Ky. Acts ch. 146, sec. 124, eff. July 12, 2012. *Still*, the legislature did not see fit to make any new class of persons incapable of consent or even mention positions of special trust or authority. By the 2012 amendment, KRS 510.020(3)(b) was modified to substitute “[a]n individual with an intellectual disability” in place of “[m]entally retarded”. There were no other changes. This amendment importantly demonstrates that (i) the legislature is still well aware of KRS 510.020 and (ii) the legislature has no intention of changing any substantive provisions of the statute.

Interpreting KRS 510.110(1)(d) without the “lack of consent” element from KRS 510.020 results in a conflict and that conflict must be resolved by giving meaning and effect to both statutes. See Hopkinsville-Christian County Planning Comm’n v. Christian Bd. of Educ., 903 S.W.2d 531, 532 (Ky. App. 1995); Kentucky Ins. Guar. Ass’n v. Natural Resources and Environmental Protection Cabinet, 885 S.W.2d 315, 317 (Ky. App. 1994)(citing Ledford v. Faulkner, 661 S.W.2d 475, 476 (Ky. 1983))(the court must harmonize its interpretation of the potentially conflicting statutes in question so as to give effect to both sections or statutes); Combs v. Hubb Coal Corp., 934 S.W.2d 250, 252 (Ky. 1996)(citing Brooks v. Meyers, 279 S.W.2d 764, 766 (Ky. 1955))(the reviewing court must construe the statute in such as manner that no part is meaningless or ineffectual).

Recognizing lack of consent as an element of KRS 510.110(1)(d) is the only way to fully give meaning and effect to both KRS 510.110(1)(d) and KRS 510.020. No other means exist by which to reconcile the conflict. Likewise, even with lack of consent as an element, the legislative intent of KRS 510.110(1)(d) still serves a very important purpose: it makes nonconsensual sexual contact a Class D Felony in situations where the offender

occupies a position of authority or a position of special trust. Otherwise, the nonconsensual sexual contact would only a Class B Misdemeanor pursuant to KRS 510.130 (sexual abuse in the third degree).¹⁰ KRS 510.110(1)(d) does not and should not be construed to redefine the long-standing concepts of consent and capacity to consent as set forth in KRS 510.020.

In addition, where statutory inconsistencies cannot be reconciled, the one containing express and positive language relating to the particular subject should take precedence over a provision dealing with a matter in general terms. Commonwealth v. Martin, 777 S.W.2d 236 (Ky. 1989). As discussed above, KRS 510.110(1)(d) serves to enhance the punishment for non-consensual sexual contact in certain cases by failing to specifically address consent. Meanwhile, KRS 510.020 uses express and positive language to uniformly apply the lack of consent element to every offense defined in KRS Chapter 510. Accordingly, KRS 510.020 controls as to consent.

(iii) The rule of lenity requires recognizing that lack of consent is an element of KRS 510.110(1)(d).

The Court must apply the rule of lenity to resolve any remaining ambiguity. The rule of lenity requires resolving any conflict or ambiguity in a penal statute in favor of the criminal defendant. See, e.g., White v. Com., 178 S.W.3d 470, 483-84 (Ky. 2005)(citing

¹⁰ KRS 510.130 provides that:

- (1) A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent.
- (2) In any prosecution under this section, it is a defense that:
 - (a) The other person's lack of consent was due solely to incapacity to consent by reason of being less than sixteen (16) years old; and
 - (b) The other person was at least fourteen (14) years old; and
 - (c) The actor was less than eighteen (18) years old.
- (3) Sexual abuse in the third degree is a Class B misdemeanor.

A copy of KRS 510.130 is attached hereto at *Appendix, Tab L*, for reference.

Haymon v. Com., 657 S.W.2d 239, 240 (Ky.1983)). The defendant is entitled to the benefit of any ambiguity. Id. In addition to favoring lenity, the conflict or ambiguity should also be resolved in a manner that avoids a harsh or incongruous result or a disproportionate punishment. See, e.g., Darden v. Com., 52 S.W.3d 574, 577 (Ky. 2005). If lack of consent is not an element, the statutes imposes an incredibly harsh punishment for lawful consensual sexual contact between persons over the age of 16. Though raised by Mark at page 18 of his Appellant's Brief in the Court of Appeals, the Court of Appeals Opinion Affirming did not address the rule of lenity.

(iv) Errors in the Court of Appeals opinion.

The Court of Appeals recognized that treating "an otherwise capable 16-17 year old child incapable of consent in certain situations when a person exercises influence over the child" is not consistent with the wording of KRS 510.110(1)(d) or the other provisions of KRS Chapter 510. See *Appendix, Tab A, Stinson v. Com.*, 2010-CA-001647, at 9. The Court of Appeals also correctly recognized that KRS 510.020 makes lack of consent an element of every offense defined in KRS Chapter 510 and specifies the persons deemed incapable of consent. Id. at 9-10. The Court of Appeals *agreed* with Mark that, given the language of KRS 510.020 used repeatedly throughout KRS Chapter 510, the legislature has specifically set out the classes of minors that are unable to consent. Id. at 10. Accordingly, the Court of Appeals decided that upholding the Commonwealth's reading of KRS 510.110(1)(d) (i.e. that lack of consent is not an element) would require the Court to impermissibly re-write the statute to include a new class of minors unable to consent. Id. And, in doing so, the Court of Appeals acknowledged that courts are not at liberty to add or subtract from the statutory language

to give the statute some other meaning. Id. (citing Commonwealth v. Froge, 962 S.W.2d 864, 866 (Ky. 1998)).

Nonetheless, the Court of Appeals decided that KRS 510.110(1)(d) *implicitly* excludes lack of consent as an element even though KRS 510.020 *expressly* makes lack of consent an element of KRS 510.110(1)(d). Id. at 10-11. The Court of Appeals reasoned that:

As noted above, the position of authority or special trust component of the offense is directed at individuals who occupy a position of authority or special trust with respect to a minor. Given the special nature of the relationship between a minor and a person who occupies a position of authority or special trust in such situations, the statute creates a presumption that any sort of sexual contact between such persons is inherently coercive.

...

Any sexual contact between such persons is presumed to be non-consensual. Moreover, we conclude that this presumption is not rebuttable.

Id.

As discussed above, the Court of Appeals was correct that the position of special trust or authority component is directed at the individual in that position. However, it does so for the purpose of enhancing the punishment when those persons engage in non-consensual sexual contact. Contrary to the Court of Appeals position, KRS 510.110(1)(d) does not render a capable 16-17 year old incapable of consent or alter the provisions of KRS 510.020. Further, a presumption that the contact is inherently coercive is no different than creating a new class of minors incapable of consent, which the courts are not at liberty to do.

The only relevant presumption is the presumption that the legislature was cognizant of the previously enacted KRS 510.020 and its effect. See Cook v. Ward, 381

S.W.2d 168, 170 (Ky. 1954); see also KRS 510.100(2). The **express** terms of KRS 510.020 must trump any implication to the contrary.

(v) **KRS 510.110(1)(d) does not and cannot contain an irrebuttable presumption of lack of consent.**

It is worth repeating that the legislature has deemed individuals over the age of 16 to be capable of consent. However, the Court of Appeals found an irrebuttable presumption of lack of consent. However, this is nothing more than an impermissible re-writing of KRS 510.020 to include a new class of minors deemed incapable of consent.

Nothing in KRS 510.110(1)(d) or elsewhere supports or justifies this irrebuttable presumption. And, even if the language of KRS 510.110(1)(d) does support an irrebuttable presumption, that presumption would be irrational and arbitrary in violation of the 14th Amendment to the U.S. Constitution. See Patterson v. Com., 556 S.W.2d 909, 911 (Ky. Ap. 1977). The standard for a presumption in a penal statute to satisfy due process is:

(1) There must be a rational connection between the fact proved and the ultimate fact presumed, *U.S. v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965).

(2) An inference is 'irrational' or 'arbitrary' and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary v. U.S.*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

(3) The evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. This is the most stringent test, *Barnes v. U.S.*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

Patterson, 556 S.W.2d at 911.¹¹ For the same reasons that KRS 510.110(1)(d) is unconstitutionally vague and/or overbroad (as set forth below), there is no “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend” and “[t]he evidence necessary to invoke the inference” is not “sufficient for a rational juror to find the inferred fact beyond a reasonable doubt.”

In other words, lack of consent of a person over 16 is not likely to flow from the fact that the other person might simply appear to fall within one of the broad definitions of a position of special trust or authority. Moreover, the involvement of a person deemed to be in one of those positions is not sufficient to irrebuttably establish beyond a reasonable doubt that another person over the age of 16 did not consent. As discussed below, simply relying on the classification of a person as being in a position of special trust or authority without any other consideration for the circumstances makes the presumption improper.

D. KRS 510.110(1)(d) IS OVERBROAD AND/OR VAGUE IN VIOLATION OF THE KENTUCKY AND UNITED STATES CONSTITUTIONS.

If it is not apparent from plain language of KRS 510.110(1)(d) and KRS 510.020 that that lack of consent is an element KRS 510.110(1)(d), then KRS 510.110(1)(d) is vague and overbroad as applied and on its face. Kentucky courts cannot amend a statute by means of an interpretation contrary to the statute’s plain meaning. City of Louisville v. Fidelity & Columbia Trust Co., 245 Ky. 704, 54 S.W.2d 40, 41-42 (Ky. 1932). Moreover, regardless of any perceived legislative intent, Kentucky Courts do not have authority to modify or introduce limiting language or guidelines to make an otherwise

¹¹ Notably, Patterson involved a rebuttable presumption rather than the stricter irrebuttable presumption suggested by the Court of Appeals with respect to KRS 510.110(1)(d). It would seem that an irrebuttable presumption must be subject to even more scrutiny.

unconstitutional statute constitutional. See Musselman v. Com., 705 S.W.2d 476, 477-78 (Ky. 1986).

(i) KRS 510.110(1)(d) is unconstitutionally vague.

Penal statutes must define the criminal offense with sufficient clarity that ordinary people can understand what conduct is prohibited. U.S. CONST. Amend XIV; Kolander v. Lawson, 461 U.S. 352, 357 (1983); see also Payne v. Com., 623 S.W.2d 867, 870-71 (Ky. 1981)(citing Grayned City of Rockford, 408 U.S. 104, 108 (1972)). A statute cannot be written in a manner that encourages or permits arbitrary or discriminatory enforcement. Id.; Com. v. McBride, 281 S.W.3d 799, 806 (Ky. 2009). Penal statutes must also establish minimum guidelines governing enforcement. Kolander, 461 U.S. at 359. KRS 510.110(1)(d) is simply too vague to permit an average citizen to understand what conduct is prohibited and it is therefore void for vagueness. See Kolander, supra, 461 U.S. at 358; see also City of Chicago v. Morales, 527 U.S. 41, 59-60 (1999).

First, KRS 510.110(1)(d) does not adequately define “position of authority” or “position of special trust.” KRS 532.045(1)(a)¹² identifies, “but is not limited to,” twenty-four (24) specific roles that supposedly constitute a “position of authority.” KRS 532.045(1)(a)(emphasis added).¹³ The definition of “position of special trust” is even less clear in that, with no further directions, it includes anyone in the:

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.

¹² A copy of KRS 534.045 is attached hereto at *Appendix, Tab M*, for reference.

¹³ “*Position of authority* means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility as defined in KRS 600.020, or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer;” KRS 532.045(1)(a)(emphasis added).

KRS 532.045(1)(b)(emphasis added). There is virtually no limitation whatsoever on the persons who may be prosecuted under the statute, and there is no way to be sure whether or when a person might somehow be classified as being in one of these positions. There is no guidance as to (i) whether a person who was formerly or may at times be considered a person in a position of special trust or authority is always in that position for purposes of that offense; (ii) whether it is possible for a person to stop being a person in a position of special trust or authority; or (iii) whether it is possible to be acting outside the scope of some position of special trust or authority at the time of the sexual contact. These definitions are so broad that they could be applied to virtually any person who ever came into contact with a minor. The Kentucky General Assembly has determined that persons over the age of 16 are capable of consent and making their own sexual decisions. KRS 510.110(1)(d), particularly in light of KRS 510.020, is impermissibly vague to the extent it prohibits or appears to prohibit consensual sexual contact between persons over 16 years old. The definitions of positions of special trust and authority could be applied narrowly or broadly to cover as many or as few persons as law enforcement officials and prosecutors desire, welcoming, if not encouraging, discriminatory and arbitrary enforcement of KRS 510.110(1)(d).

Besides failing to adequately define who is a person in a "position of authority" or a "position of special trust," is not clear whether the classification is based on an objective standard, based on the alleged offender's perspective, based on the alleged victim's perspective, or based on some other unknown standard. As the law is written, any or all of these standards could apply, making the law vague and as broad or as narrow as law enforcement officials and prosecutors desire.

Additionally, KRS 510.020(3)(a) makes all individuals over 16 capable of consent to sexual contact, and KRS 510.020(1) makes consent an element of every offense within KRS Chapter 510. However, KRS 510.110(1)(d) refers to all minors under 18 years old. As a result, it is impossible to know if (or when) a consenting individual over 16 can consent to sexual contact.

Likewise, it is impossible to know if (or when) another person (of any age) may be prevented from engaging in sexual contact with another consenting individual due to some purported position of authority or special trust occupied by that other person. KRS 510.110(1)(d), under the construction of the Court of Appeals, appears to punish one person (such as Appellant) for the lawful and consensual choices of another person (such as L.P.). If consent is truly irrelevant to KRS 510.110(1)(d), the legislature failed to criminalize the conduct herein by failing to account for KRS 510.020(3)(a). In other situations, the legislature has recognized the need to address KRS 510.020 where the legislature intended to alter the element of consent.¹⁴ Given the express language employed in statutes such as KRS 510.100(2) to “notwithstanding” or bypass KRS 510.020, there can be no inference that KRS 510.110(1)(d) bypasses KRS 510.020.

Finally, KRS 510.110(1)(d) fails to adequately define the required connection (if any) between the alleged position of special trust or authority and the sexual contact. KRS 510.110(1)(d) apparently applies only where the alleged offender “comes into contact [with the minor] as a result of” a position of special trust or authority. KRS 510.110(1)(d). This vague phrase is open to any number of different interpretations. It is

¹⁴ For example, KRS 510.100(2) provides with respect to sodomy in the fourth degree (an offense which, like KRS 510.110(1)(d), is defined by KRS Chapter 510) that “[n]otwithstanding the provisions of KRS 510.020, consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense.” KRS 510.100(2)(emphasis added).

not clear which, if any, of these interpretations is correct. As a result, it is impossible to know what conduct is or may be prohibited.

More particularly, it is not clear if the alleged offender must (i) use his or her position to initially meet the minor, (ii) abuse the position at the time of the sexual contact, (iii) happen to be around the minor because of the position, (iv) be in a position of authority at the time of the sexual contact, or (v) merely be arbitrarily classified as a person in a position of authority or special trust. Furthermore, the statute does not distinguish between situations where the defendant may have used his position to come into contact with the person and situations where the other person, a lawfully consenting individual initiates the contact. The statute raises far more questions than it answers. For example, is a camp counselor guilty of sexual abuse in the first degree if he or she meets a 17 year old camper at summer camp and later begins a consensual sexual relationship with that person? This situation is certainly not the same as the situation where a camp counselor abuses his or her position to make or force unwanted and nonconsensual sexual contact with the same 17 year old camper. Arguably, the consensual acts between the former camp counselor after the conclusion of the summer camp could be read to have occurred “as a result of” some “position of authority”, rather than as a result of personal decisions by two consenting individuals. If the latter, there should be no reason to impose criminal liability. Moreover, at what point must the accused come into contact with the other person as the result of the position of special trust or authority—at the initial acquaintance or at the time of the sexual contact? Both? Either? The following questions further highlight the vagueness of KRS 510.110(1)(d). For instance:

- i. Does the offender have to use the position of authority or special trust to get in contact with the victim at the time of the sexual contact?
- ii. Does the offender have to affirmatively assert the position to accomplish sexual contact?
- iii. Does the offender have to be acting in the position of authority or special trust at the time of the sexual contact occurred?
- iv. Does the offender have to know or believe that he is considered to be in a position of authority or special trust?
- v. Does it matter if the sexual contact would have occurred regardless of any position of authority or special trust?
- vi. Does it matter whether the alleged victim actually viewed the offender as being in a position of authority or special trust?
- vii. Does KRS 510.110(1)(d) prevent a person 16 years or older from making their own decisions about who to have sexual contact with?
- viii. Does KRS 510.110(1)(d) dictate who an otherwise legally consenting person over 16 years old can choose to engage in sexual contact with?

There is no clear answer to any of these questions based on the language of the statute. These concerns are particularly important since KRS 510.110(1)(d) appears to extend to those persons over 16 who are capable of making their own decisions.

For the foregoing reasons, this Court should recognize that KRS 510.110(1)(d) is unconstitutionally vague and should refuse to enforce the statute as an unconstitutional exercise of power by the legislature.

(ii) **KRS 510.110(1)(d) is unconstitutionally overbroad.**

Penal statutes are void where they are substantially overbroad. See New York v. Ferber, 458 U.S. 747, 769 (1982)(persons are entitled to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity). If KRS 510.110(1)(d) is not void for vagueness, it is so overbroad that it is unconstitutional. A statute is overbroad where it would criminalize or deter lawful conduct, even if it is attempting to control impermissible conduct.¹⁵ See, e.g., Purcell v. Com., 149 S.W.3d 382, 389-90 (Ky. 2004); Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982). KRS 510.110(1)(d) may be intended to protect minors from overbearing persons who might make the minor feel helpless to refuse sexual contact. However, by its terms, the statute may apply in far more situations. Consequently, it deters or criminalizes so much lawful conduct that it is unconstitutional.

KRS 510.110(1)(d) at least deters lawful, consensual contact between two persons who are both over 16 years old and legally capable of deciding with whom to have consensual sexual contact. KRS 510.110(1)(d) is therefore in direct and irreconcilable conflict with KRS 510.020 to the extent it appears to prohibit consensual sexual contact between persons over 16 years old, which is accepted as legal in the absence of incapacity or forcible compulsion. KRS 510.020. Besides deeming anyone over 16 capable of consent, KRS 510.020 in fact expressly enumerates the five specific conditions under which a person is incapable of consent and expressly enumerates the three specific circumstances under which consent does not exist. KRS 510.020(2) & (3).

¹⁵ This is true even if the statute is not unconstitutional as applied. Purcell, 149 S.W.3d at 389-90.

KRS 510.020(2) & (3) make no reference to the involvement of a person purportedly in a position of special trust or authority.

Because KRS 510.110(1)(d) does not define what connection the position of authority or special trust must have (if any) to the sexual contact or the minor, it is not clear if or when a person who may be a person of authority or special trust must refrain from otherwise lawful sexual contact with another consenting individual. It is easy to conceive a situation where a consenting individual over 16 will exercise the rights conferred by KRS 510.020(3)(a) and voluntarily choose to engage in sexual contact with a person over 18. This should not be prohibited. Regardless of whether such conduct is good or bad, the law condones that conduct. That sort of sexual contact has long been recognized as lawful. There is no other explanation for KRS 510.020.

KRS 510.110(1)(d) will also deter a person from engaging in lawful, consensual sexual contact out of fear of being arbitrarily classified as a person in a position of special trust or authority, or out of uncertainty as to what connection that position might or might not have to the minor or the sexual contact. The statute also fails to adequately define exactly (i) who cannot have sexual contact with a 16 or 17 year old; (ii) when they cannot have sexual contact with a person between the ages of 16 and 17; and (iii) what connection (if any) must exist between the sexual contact, the person between the ages of 16 and 17, and the position of the alleged offender. The age of consent being 16 under KRS 510.020 is what makes KRS 510.110(1)(d) impermissibly vague. Notably, KRS 510.110(1)(d) does not just outlaw conduct by adults—a person of *any* age can potentially be guilty under KRS 510.110(1)(d). That is, KRS 510.110(1)(d) could punish consensual sexual contact among peers when one of them is one day past their 18th

birthday and the other is one day away from their 18th birthday. These sorts of relationships are not criminal.

E. JURY INSTRUCTIONS RELATING TO CONSENT.

Appellants proposed Jury Instruction No. 5, entitled "Sexual Abuse in the First Degree," states as follows:

You will find the Defendant guilty of sexual abuse in the first degree if, and only if, based on the evidence admitted at trial, you believe beyond all reasonable doubt that in this county on or about July, 2009 and before the Indictment herein:

A. That the Defendant subjected [L.P.] to *sexual contact* or engaged in masturbation in the presence of [L.P.]

B. That [L.P.] was less than eighteen (18) years of age at the time of the *sexual contact*, if any; and

C. That [L.P.] viewed the Defendant was a person in a *position of authority* such that any alleged sexual contact, if any, was *a result of* the Defendant's *position of authority* as set forth in Instruction Number 6;

AND

D. That in doing so, the alleged victim did not *consent* to the sexual contact as set forth in Instruction Number 7.

Definitions:

"Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party. KRS 510.010(7).

"Position of authority" means, but is not limited to, the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility, or a detention facility, staff or volunteer with a youth services organization, religious leader, health-care provider, or employer. KRS 532.045(1)(a).

Appellants proposed Jury Instruction No. 7, entitled "Consent," states as follows:

Even if you would otherwise find the Defendant guilty of sexual abuse in the first or third degree, you will find him

not guilty if you believe from the evidence admitted at trial that [L.P.] consented to sexual contact by the Defendant. [L.P.] was capable of consent, even if the Defendant was a person in a position of authority. You shall find that [L.P.] consented to the Defendant's sexual contact or alleged masturbation if she expressly consented or if she merely impliedly consented by *acquiescing* to the contact or alleged masturbation. KRS 510.020(2)(c).

Definitions:

"Acquiesce" means to accept *tacitly* or *passively*; to give implied consent to an act. Black's Law Dictionary (8th ed. 2004).

"Tacit" means implied but not actually expressed; implied by silence or silent acquiescence. Black's Law Dictionary (8th ed. 2004).

"Passively" means not involving active participation. Black's Law Dictionary (8th ed. 2004).

As set forth above, "lack of consent" is an element of KRS 510.110(1)(d). to the extent that KRS 510.110(1)(d) is deemed constitutional, the jury in any trial of Mark for a violation of that statute should be instructed in accordance with Mark's proposed Jury Instruction Nos. 5 and 7, which appropriately incorporate the element of "lack of consent" and are consistent with the law.

CONCLUSION

Based on the foregoing, the Court should recognize that lack of consent is an element of KRS 510.110(1)(d), vacate the trial court judgment, and remand this matter to the trial court for a new trial properly taking lack of consent into account as set forth in Mark's proposed jury instructions. Alternatively, the Court should find KRS 510.110(1)(d) to be unconstitutional, vacate the trial court judgment, and remand to the trial court with instructions to dismiss the indictment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew R. Malone". The signature is fluid and cursive, with the first name "Matthew" and last name "Malone" clearly distinguishable.

Matthew R, Malone, Esq.
Jacob K. Michul, Esq.
HURT, CROSBIE & MAY, PLLC
127 West Main Street
Lexington, KY 40507
Telephone: (859) 254-0000
Facsimile: (859) 254-4763
COUNSEL FOR APPELLANT