No. 332853

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant

v.

JOHN THOMAS MUSIC,

Respondent

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY
THE HONORABLE JOHN W. LOHRMANN

APPELLANT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF APPELLANT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Appellant herein.

II. RELIEF REQUESTED

Appellant asserts the equitable doctrine of laches barred Respondent's Motion to Vacate his judgment, or alternatively, that his conviction for Sodomy should stand.

III. ISSUES

Was Respondent's Motion to Vacate his 1975 conviction time-barred under the equitable doctrine of laches?

Was Washington's Sodomy statute, now repealed, constitutional as applied to prison inmates such as Respondent?

IV. STATEMENT OF THE CASE

On November 1, 1974, John Music ("Respondent") and five other prison inmates sexually violated Jon Mathers, another prison inmate, against his will. Affidavit of Hon. Donald W. Schacht, CP 112-13. "Jon Mathers, an inmate and the victim of the incident, testified that he was forced to commit sodomy for 1½ hours with six members of the prison motorcycle club, including Music and [Leonard] Larson, during a movie in the prison theater . . . . Larson and two other inmates, identified only as

Doyle and Carlyle, confronted him in the prison's outdoor breezeway, and after threatening him, took him to the theater where the incident occurred." Dick Cockle, *Prisoners Found Guilty of Sodomy*, UNION BULLETIN, May 26, 1975, CP 95.

Respondent was convicted of Sodomy under RCW 9.79.100 (Repealed 1976) and was sentenced on April 23, 1975 to up to ten years in prison. CP 32. The duration of his confinement for this conviction, his later Pierce County (assault) and Walla Walla County (escape) convictions, and his prior King County murder conviction are all subject to the determination of the Indeterminate Sentence Review Board.

V. ARGUMENT

A. Respondent's Motion is Time-Barred Under the Equitable Doctrine of Laches

The threshold issue is whether Respondent is time-barred from raising constitutional issues under the doctrine of laches. Laches is an equitable doctrine based on estoppel. A defending party asserting the doctrine of laches must affirmatively establish: (1) knowledge by the moving party of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by the moving party in commencing an action; and (3) damage to defending party resulting from the delay in bringing the action. *See, e.g., Davidson v.*

State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). This doctrine is applicable to collateral attacks on criminal judgments. *See generally Fay v. Noia*, 372 U.S. 391, 438, 9 L. Ed. 2d 837, 83 S. Ct. 822, 848-49 (1963); *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1275 (1992); *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988), *cert. denied*, 493 U.S. 151 (1990). The most common prejudice to the defending party caused by a moving party's delay is the unavoidable loss of evidence. *Davidson*, 116 Wn.2d at 26. In *Davidson*, the plaintiff waited sixty-two years before challenging harbor lines drawn in 1921. *Id.* The court there recognized that "[a]ll those who surveyed, drew, and established the harbor area are now deceased," and no one could find "firsthand documents setting forth the basis for the placement of the lines." *Id.* at 26-27.

Applying the elements laid out in *Davidson*, laches is an appropriate remedy to bar Respondent's motion to vacate judgment. First, *Lawrence v. Texas* was decided in 2003, meaning Respondent has had over a decade to consider and pursue avenues opened by the United States Supreme Court's decision. Second, Respondent's motivation for the motion to vacate was presumably the parole order that took effect July 30, 2010. He has waited nearly five years since that date to bring the above motion. Third, and most importantly, most records relating to

Respondent's case and conviction have been destroyed long ago pursuant to common records-keeping practices. The State had to find newspaper articles and obtain an affidavit from an attorney who was present for the trial to recreate the facts. Respondent asserted in Defendant's Reply that the State was "disingenuous at best" for using what resources it could find, implying that newspapers and affidavits are unreliable, but it is unclear how the State could otherwise recreate the facts of the case since the transcripts have long ago been destroyed, along with most other records.

Concededly, even if Respondent had brought a motion to vacate immediately after *Lawrence* was decided, the records likely would still not have existed since the underlying offense would still have been over thirty years old in 2003. Nevertheless, the delay has further reduced the likelihood that anyone linked to the case is available or capable of responding. Respondent effectively agrees with this assertion by arguing that when the Honorable Judge Donald Schacht stated in his Affidavit that "I recall vividly the victim, John Mathers, testifying," Affidavit of Hon. Donald W. Schacht, CP 112, what he *actually* meant to say was all he had were "hazy recollections of a trial 40 years ago." Defendant'sResponse [sic] to State's Motion for Reconsideration, CP 126. Thus, according to Respondent, Judge Schacht's recollections are "hazy" — not "vivid," as he himself asserts. If the Court accepts Respondent's interpretation of

Judge Schacht's statement, then laches should apply because the matter should have been brought a decade ago when Judge Schacht's "hazy" recollections would have been harder to impugn. According to Respondent's own argument, the only witness the State can find cannot adequately recollect necessary information for the State to respond. Therefore, the challenge should be time-barred.

B. Washington's Sodomy Statute Has Never Been Found to be Facially Unconstitutional, and It Is Constitutional As Applied to Respondent

The second issue is whether Respondent's Sodomy conviction should be vacated. Respondent argues that Washington's Sodomy statute was facially unconstitutional. To prove facial unconstitutionality, there must be no circumstances under which the statute could be constitutionally applied. *Parmelee v. O'Neel*, 145 Wn. App. 223, 242, 186 P.3d 1094 (2008) *reversed on other grounds*, 168 Wn.2d 515; *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). Further, unless the issue turns on First Amendment freedoms, courts "will only consider whether a statute is constitutional as applied to the facts of the case." *In re Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d 1171 (1995) (citing *State v. Carver*, 113 Wn.2d 591, 599, 781 P.2d 1308, 789 P.2d 306

(1986)); *Seattle v. Yeager*, 67 Wn. App. 41, 44, 834 P.2d 73 (1992). Washington's Sodomy Statute read:

> Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:
>
> (1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.
>
> (2) In all other cases by imprisonment in the state penitentiary for not more than ten years.

RCW 9.79.100 (Repealed 1976). Washington's Sodomy statute has never been found to be facially unconstitutional. Therefore, this matter comes to the Court with the above facts, and the statute must be reviewed with reference to those facts. Here, because consent was not an element that had to be proven for prison sex crimes, rape and sodomy were synonymous, and therefore, the statute, as applied to Respondent, was constitutional.

First, it is necessary to recognize the limited scope of *Lawrence v. Texas*. In *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003), the Supreme Court addressed consensual conduct that occurred in the privacy of the home. Central to the Court's holding was liberty and autonomy: two freedoms explicitly denied to prison inmates.

Instead, prison inmates have a reduced expectation of privacy while incarcerated. *See State v. Babcock*, 168 Wn. App. 598, 279 P.3d 890 (2012) (recognizing limits on inmate's expectation of privacy in phone calls from the facility); *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) (no expectation of privacy in property inventoried into jail storage); *cf. Turner v. Safley*, 482 U.S. 78, 94, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987) ("[A] prison inmate 'retains those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" (quoting *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L.Ed.2d 495 (1974))). Further, prisoners have no cognizable right to sexual privacy in a jail cell. *See Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S. Ct. 2162, 156 L.Ed.2d 162 (2003) (recognizing legitimacy of limiting freedom of association between prison inmates); *People v. Santibanez*, 91 Cal. App.3d 287, 154 Cal.Rptr 74 (1979) (Inmates have "no absolute right to sexual privacy in jail.") (discussing reasons for restricting sexual contact in prison). Not only may prisoners not sexually assault other offenders, WAC 137-25-030(635), or use abusive sexual contact with other offenders, WAC 137-25-030(637), but prisoners may not engage "in any sexual act with others within the facility with the exception of approved conjugal visits," WAC 137-25-030(504). At the time of Respondent's offense, he was under similar

restrictions in prison. Therefore, the issue addressed in *Lawrence* is not dispositive to the case at bar because no sexual conduct is allowed in prison — consensual or not.

To the contrary, sex offenses in prison are a national concern and require particular attention separate and apart from the issues addressed in *Lawrence*, which revolved around private affairs of the home. Indeed, the Unite States Supreme Court decried the prevalence of prison rape and recognized the State's obligation to ensure the safety of its inmates from being sexually molested. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). In his concurrence in *Farmer v. Brennan*, Justice Stevens further recognized that the purpose of prison rape is to intimidate and punish, *Farmer*, 511 U.S. at 853, 114 S. Ct. 1970, 128 L.Ed.2d 811 (Stevens, J., concurring): it is not for any of the purposes enumerated in *Lawrence*.

Further, the United States Supreme Court has repeatedly recognized the broad latitude that prison administrations have in regulating their inmates. *Overton v. Bazzetta*, 539 U.S. at 140, 123 S. Ct. 2162, 156 L.Ed.2d 162 (Thomas, J. concurring) ("Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference

to such determinations.") (citing *Payne v. Tennessee*, 501 U.S. 808, 824, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991) and *Ewing v. California*, 538 U.S. 11, 24, 123 S. Ct. 1179, 155 L.Ed.2d 108 (2003)); *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S. Ct. 2254, 96 L.Ed.2d 64 (noting deference to prison administrations in regulating correspondence by prison inmates); *Pell v. Procunier*, 417 U.S. 817, 825-26, 94 S. Ct. 2800, 41 L.Ed.2d 495 (addressing right to limit communication by inmates to individuals outside the prison system). California's Court of Appeals addressed this issue squarely:

> Even if the homosexual relationship of consenting adults were deemed entitled to the cloak of privacy in life outside prison walls, appellant cannot don that cloak. It is common knowledge that homosexuality is the underlying cause of many instances of prison violence. To compel prison officials to afford privacy for such activities of inmates would be to dispel hope for discipline and order within the walls. Prisoners, of course, enjoy many constitutional guaranties, but the penumbral right of privacy enunciated in *Griswold* can have no more application in the setting here involved than could the right to bear arms (2nd Amendment to U.S.Const.).

People v. Frazier, 256 Cal. App.2d 630, 631, 64 Cal.Rptr. 447 (1967) (internal citation omitted). Therefore, the issue addressed in *Lawrence* was not intended to extend to penitentiaries, where "more troublesome prisoners" are housed, and where rape is a significant concern. *Farmer*, 511 U.S. at 830, 114 S. Ct. 1970, 128 L.Ed.2d 811. In light of the fact that courts should grant some deference to the State in administering a safe

environment to its inmates, and considering the exceptional danger that prison rape would present to all inmates, if left unchecked, the Court should find that the Sodomy statute could lawfully be applied to prison inmates.

Finally, even if Washington's Sodomy statute were facially unconstitutional as to the general public, Washington's Supreme Court has recognized that a separate analysis applies to prison inmates. In *Parmelee*, the court analyzed whether a libel statute was facially unconstitutional with reference to the defendant, who was a prison inmate at the time. 145 Wn. App. 223, 186 P.3d 1094. There, the court held that the statute was facially unconstitutional, but then went on to state that it could have analyzed whether the statute was constitutional as applied to the defendant but for the fact that there was insufficient evidence in the record. *Id.* at 246-47. The court stated, "even if we wanted to address whether the statutes were unconstitutional as applied to Parmelee, the record is insufficient to properly decide this issue. Thus, we cannot address whether Washington's criminal libel statutory scheme is unconstitutional as applied to Parmelee in this case." *Id.* The court made this comment immediately after restating that the libel statute was facially unconstitutional. Therefore, the logical inference is that the court recognizes that a statute that is facially unconstitutional generally may be

scrutinized through a different lens with respect to inmates. Otherwise, the court would have simply concluded that the underlying statute was facially unconstitutional and would have gone no further in its analysis. In other words, if the analysis was required to stop there, then the *dicta* would not only have been superfluous: it would have been wrong.

Where circumstances exist under which a statute can be constitutionally applied, the statute cannot be found facially unconstitutional. *Parmelee*, 145 Wn. App. at 242, 186 P.2d 1094. The State may regulate prison conduct, including by disallowing prison inmates from fellating or anally penetrating other inmates, regardless of consent. The Sodomy statute, as applied to prison inmates, did just that. Respondent was fellated by another inmate, who he also anally penetrated. Therefore, the Sodomy statute, as applied to Respondent, was constitutionally applied.

C. Sodomy as it Relates to Prison Rape is Identical to Rape Because Prison Inmates Cannot Consent, and Thus Defendant's Charge of Sodomy is Lawful as it Pertains to Him

The next issue is whether Defendant's prison rape was appropriately charged as sodomy under then-existing state law. When the Sodomy statute was still active, it made sense to apply it to prison rapes, rather than the Rape statute. Washington's Sodomy statute stated:

> Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:
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> (1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.
>
> (2) In all other cases by imprisonment in the state penitentiary for not more than ten years.

RCW 9.79.100 (Repealed 1976). On the other hand, rape was defined as follows: "Rape is an act of sexual intercourse with a person not the husband or wife of the perpetrator committed against his or her will and without his or her consent." RCW 9.79.010 (Supp. 1973) (Repealed 1975). The only applicable difference between the Sodomy and Rape statutes was the issue of consent. *State v. Levier*, 16 Wn. App. 332, 334, 555 P.2d 1003 (1976) (noting the sole distinction between sodomy and rape is consent). However, consent could not be validly given under any circumstances in prison, and thus consent was not an element the State needed to prove for sex offenses in prison.

At the time of charging, the State had two options: charge Defendant with rape, which would require introducing the element of consent to the jury, or charge sodomy, which did not include the element of consent. If the State chose to pursue a rape conviction, there was a

strong potential to confuse the jury, as the State would have had to introduce additional law demonstrating that consent was irrelevant to prison rape cases, which in turn might cause jurors to wonder why consent was brought up in the first place. Indeed, at the time of Defendant's conviction, it was not unusual for prison rape to be charged as sodomy in Walla Walla County, presumably for this very reason. *E.g., State v. Greene*, 15 Wn. App. 86, 546 P.2d 1234 (1976) (prison inmate convicted of sodomy after he raped another inmate at the Washington State Penitentiary in Walla Walla County).

Here, the State could have legally charged Respondent with rape. Not only was consent a non-issue, but based on the facts gleaned from newspaper articles from the time and from Respondent's own 1975 appeal, the offense was not consensual. According to the victim's testimony, he was forced to commit sodomy for an hour and a half with six members of a prison gang after he was threatened and then forced into the prison theater. Dick Cockle, *Prisoners Found Guilty of Sodomy*, UNION BULLETIN, May 26, 1975, CP 95. Furthermore, in Defendant's previous appeal, which was filed March 12, 1976, Defendant argued that he could not be convicted of sodomy because "the complaining witness was *forced* to commit sodomy upon the defendant and not that the defendant committed sodomy upon the complaining witness." *State v.*

Music, 1557-III, 14 Wn. App. 1038 (1976) (Unreported) (emphasis added), CP 98. Therefore, even in Defendant's own appeal, the act was characterized as a forcible rape rather than a consensual act.

Because the State could have charged Defendant with rape, and because sodomy and rape are identical but for consent — which is a non-issue for sex offenses in prison, the sodomy statute was lawful as applied to Defendant as an economical alternative to a rape charge.

D. Respondent's Arguments to the Superior Court Included Non-Binding Caselaw, Fallacious Arguments, and Concluded With a Misstatement of the Law

In the briefing to the lower court, Respondent relied heavily on *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), but that case is not dispositive. The issue before the *MacDonald* court was whether "Virginia Code section 18.2-361(A) [was] unconstitutional either facially or as applied in MacDonald's case, in light of the Supreme Court's *Lawrence* decision." 710 F.3d 154, 156 (4th Cir. 2013). In *MacDonald*, the defendant solicited sexual contact with a seventeen-year-old woman. He was convicted of solicitation, with the predicate offense being sodomy. *Id.* at 157. Specifically, he asked the woman to fellate him. *Id.* at157. Virginia's anti-sodomy law disallowed fellatio. *Id.* at 156. The court

there held, "the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional." *Id.* at 166.

The *MacDonald* court did not address Washington's Sodomy statute. It is no more controlling than the California cases the State has cited. The only difference is that *People v. Frazier* and *People v. Santibanez* actually address sodomy in the prison context, whereas *MacDonald* addresses a Virginia law with respect to private citizens performing private acts. The *MacDonald* court recognized that *Lawrence* was not all-encompassing and did not necessarily apply in every instance. *Id.* at 166. The court's decision there is limited to its facts, *see, e.g., Seattle v. Yeager*, 67 Wn. App. at 44, 834 P.2d 73 (limiting scope of constitutional analysis to the facts of each specific case), and those facts did not include prison rape. Instead, they dealt with the same private contacts discussed in *Lawrence*, which revolved around individuals whose liberties had not been limited by incarceration. *MacDonald* did not address prison rape, nor did *Lawrence*. Therefore, neither applies.

Furthermore, in Defendant'sResponse [sic] to State's Motion for Reconsideration, Respondent presented multiple fallacious arguments in one sentence: "The State asserts that, because prisoner's rights can be restricted, the Court may subject prisoners to unconstitutional laws." Defendant'sResponse [sic] to State's Motion for Reconsideration, CP 125.

First, this argument is begging the question: it asserts that a law that has not been found unconstitutional is unconstitutional because its application is unconstitutional. Such a conclusion is problematic since the whole reason the matter is before the Court is because the statute has not been found unconstitutional, and Respondent seeks to render the statute unconstitutional.

Second, it creates a straw man argument by boiling the State's position down to an overgeneralization about regulating prison inmates without regard to the fact that it contradictorily recognizes that prisoners face different standards when in prison, but then asserts that holding an inmate to such a standard would be unconstitutional if said regulation were to occur outside prison walls. The State does not assert that the Sodomy statute would be constitutional if it were being analyzed through the lens of private conduct within the privacy of the home. That is not before the Court, and thus it is not something the State needs to address. Further, the Court should not render an advisory opinion by speculating about such scenarios, which are not before it. What is before the Court is whether the statute is constitutional as applied to Respondent: and if so, then the statute cannot be facially unconstitutional. To support the fallacious argument, Respondent makes short shrift of any analysis by providing a cursory conclusion that "[The straw man argument being

attributed to the State] is plainly wrong." Rather than cite to any caselaw that demonstrates how the State's actual argument is "plainly wrong," Respondent moves on to attack the State's citation to *Parmalee v. O'Neel*, 145 Wn. App. 223, 186 P.3d 1094.

Respondent relies on *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2505, 96 L.Ed.2d 398 (1987) for the proposition that *Parmalee* does not apply because the *Hill* Court proposed caution when scrutinizing criminal laws. The State agrees that the Court should be diligent in all considerations. However, scrutiny does not equate to an automatic finding of unconstitutionality merely because the decision is difficult.

Respondent also asserts "the court must only look at the language of the statute and not the facts of any particular case." Defendant'sResponse [sic] to State's Motion for Reconsideration, CP 126. However, the case Respondent relies on for this proposition turns on a First Amendment issue. *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990) ("Facts are not essential for consideration of a facial challenge to a statute or ordinance *on First Amendment grounds*."). The Sodomy statute impacted conduct, not speech. Therefore, Respondent relies on the wrong standard of review. Facial constitutional challenges *do* require analyzing the facts of the case *except* in First Amendment challenges. *In re Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d

1171 (1995) (citing *State v. Carver*, 113 Wn.2d 591, 599, 781 P.2d 1308, 789 P.2d 306 (1986)); *Seattle v. Yeager*, 67 Wn. App. 41, 44, 834 P.2d 73 (1992). The lens the Court must use in analyzing the Sodomy statute is through the facts of the case at bar. The facts before this Court are that six prison inmates brutally raped another inmate for an hour and a half.

To support the claim that *Lawrence* applies to this case, Respondent asserted in Defendant's Reply that there was no proof of force or lack of consent, and therefore this violent prison rape was indistinguishable factually from the case in *Lawrence*. However, notwithstanding that both Judge Schacht and Dick Cockle of the Union-Bulletin both reported hearing testimony from the victim that he was forced into the situation, one need look no further than Respondent's previous appeal, which was filed March 12, 1976. There, Respondent argued that he could not be convicted of sodomy because "the complaining witness was *forced* to commit sodomy upon the defendant and not that the defendant committed sodomy upon the complaining witness." *State v. Music*, 1557-III, 14 Wn. App. 1038 (1976) (Unreported) (emphasis added), CP 98. Therefore, even in Respondent's own appeal, the act was characterized as a forcible rape rather than a consensual act.

VI. CONCLUSION

For the foregoing reasons, the State respectfully submits that the Order to Vacate Judgment & Sentence should be reversed.

Respectfully submitted this 1st day of July, 2015.

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James L. Nagle, WSBA# 9637

Certificate of e-mailing and Mailing

I CERTIFY that on this 1st day of July, 2015, I e-mailed and deposited in the mail of the United States of America properly stamped and addressed envelopes directed to the following:

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