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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT No. 93209-3

COURT OF APPEALS No. 332853-3-III

STATE OF WASHINGTON,

Respondent

v.

JOHN THOMAS MUSIC,

Petitioner

Corrected

ANSWER TO PETITION AND CROSS-PETITION FOR REVIEW

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

U.S. Supreme Court Cases

Federal Cases

California Cases

Statutes

Miscellaneous

I. IDENTITY OF RESPONDENT / CROSS-PETITIONER

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent / Cross-Petitioner herein.

II. RELIEF REQUESTED

The State respectfully asks this Court to deny review of the issues raised in Music's Petition for Review, but in the event this Court accepts review, then the State asserts the equitable doctrine of laches barred Music's motion to vacate his judgment.

III. COURT OF APPEALS DECISION

Music and the State seek review of different portions of the unpublished Court of Appeals decision in *State v. Music*, No. 332853-3-III, slip op. (Court of Appeals, Div. III, filed April 28, 2016). Appendix A. The State's motion to publish was denied. Appendix B and C.

IV. ISSUES PRESENTED FOR REVIEW IN PETITION AND CROSS-PETITION

1. Music's Petition

A. Where *Lawrence v. Texas* held the Due Process Clause prohibited the criminalizing of private sexual conduct, but not non-consensual relationships or relationships involving injury, does a conviction for a prison gang rape conflict with *Lawrence*?

B. Did the Court of Appeals err, after lengthy historical analysis of a statute repealed four decades ago, in determining the acts proscribed in the sodomy statute were not limited to private consensual sexual conduct such that the statute was not facially unconstitutional under *Lawrence*?

C. Is there any basis to the Music's allegation that his trial attorney's recollection of the general nature of the State's allegation and public trial testimony is privileged?

D. When a criminal defendant waits forty years to challenge his conviction such that no transcript or investigatory records exist, did the Court of Appeals err in reviewing a witness declaration regarding trial testimony?

2. The State's Conditional Cross-Petition

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

V. STATEMENT OF THE CASE

On November 1, 1974, John Music ("Defendant") 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.

Music 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 sentence would run consecutive to his murder conviction from 1969. 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. Music began serving his Sodomy sentence in 2010, after a parole order was entered with reference to his underlying murder conviction.

Music was convicted over forty years ago. He appealed, and his conviction was affirmed. No transcript of the trial exists anymore. None of the investigatory records remain. The prosecutor who handled the case is unavailable. The chief investigator is unknown. The defense attorney became a judge, serving Walla Walla County from 1989 to 2012, when he retired.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

Music equates a prison gang rape with consensual homosexual relations. This is offensive and contrary to the principles and holding of *Lawrence v. Texas* which championed the dignity of same-sex couples and their sexual intimacy. The Court of Appeals' decision is not in conflict with *Lawrence* or with a decision of this Court or other Court of Appeals decisions. There is no significant question of law under the state or federal constitutions. The issue here is not likely to re-arise in Washington as the statutes being addressed were repealed forty years ago. Therefore, there are no grounds to accept review under RAP 13.4(b).

The Court of Appeals provided a thorough historical analysis of Washington's Sodomy statute, delving into legislative history, statutory amendments, and terms of art. Based on that court's considerable research, the court concluded both Music and the State erred in assuming Music could have been tried for rape in 1974. *State v. Music*, No. 33285-3-III, at 6 n.8.

Although Music phrases his introduction to imply that he has been serving an unjust sentence for sodomy since 1969, Petition for Review, at 1, the reality is that he has been serving a sentence for murder since then, and he has only begun serving his sentence for sodomy in 2010. Music next asserts that the Court of Appeals entered into a fact-finding, implying

that the court was retrying Music, despite the fact that the Court of Appeals was merely performing the factual analysis required for a constitutional challenge. Music also accuses a long-seated and recently retired superior court judge of being "an elderly man who long ago decided he could no longer practice law," Petition for Review, at 1, impugning Judge Schacht's memory, his integrity, and his work ethic. Music then seems to rely on trial court rules of evidence to argue that public records may not be used to provide the factual background of the original conviction. Next, Music argues that the Court of Appeals' explanation of the Sodomy statute as it existed in 1974 amounts to the Court of Appeals creating a new crime. Music appears to get hung up on the word "sodomy" and asserts that any statute with that word is necessarily unconstitutional, irrespective of what the statute is actually criminalizing. Taken individually or collectively, none of the "issues" raised in the Introduction provide grounds to support any of the four considerations this Court considers under RAP 13.4(b), and therefore the petition should be denied.

A. State's Conditional Cross-Appeal: Music's Motion is Time-Barred Under the Equitable Doctrine of Laches

If the Court accepts review of this case, the threshold issue is whether Music 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 Music'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, Music'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 Music'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. Music 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 Music 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. Music 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's Response to State's Motion for Reconsideration, CP 126. Thus, according to Music, Judge Schacht's recollections are "hazy" — not "vivid," as he himself asserts. If the Court accepts Music'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 Music'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.

To reiterate, review of this issue is only necessary if the Court accepts review, and the State does not intend to submit this matter to the Court for review if the Music's petition is denied outright.

B. Answer to Petition for Review Issues 1-2: Review Should be Denied Because Washington's Sodomy Statute Has Never Been Found to be Facially Unconstitutional, and It Is Constitutional As Applied to Music

Music asserts Washington's Sodomy statute is 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). In other words, in the absence of a First Amendment challenge, the facts are relevant. Sodomy is not speech, so the facts of this particular offense are relevant to the Court's analysis. Washington's Sodomy statute has never been found to be unconstitutional. Therefore, the statute must be reviewed with reference to the facts presented.

Here, Music argues that the statute is facially unconstitutional, but he then concedes that there are factual scenarios where it would be constitutional, such as with respect to children, who cannot consent. Petition for Review, at 19. Based on that concession alone, it is apparent that Washington's Sodomy statute is not facially unconstitutional since there are factual scenarios that exist to which the statute can be constitutionally applied. Further, Music argues that a conviction for sodomy, when imposed alongside an assault and a rape conviction, is

somehow not inappropriate, as if sandwiching an allegedly unconstitutional law between constitutional laws gives an imprimatur of propriety. Petition for Review, at 18. Washington's Sodomy statute needs to be analyzed with respect to its own merits: it should not be expected to stand based on the strength of additional charges. In any event, *Lawrence v. Texas* was not intended to extend to prison rape, and Washington's Sodomy statute was the sole means of prosecuting male-on-male sex offenses in 1974, and therefore, the statute, as applied to Music, was constitutional.

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

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.

Further, as the court in *U.S. v. Brewer*, 363 F. Supp. 606, 608-09 (M.D. Pa. 1973), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), recognized, a defendant cannot raise the challenge on behalf of the general public or a hypothetical third party.

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

Id. at 609 (quoting *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 4 L.Ed.2d 524 (1960)) (internal quotation marks omitted). There are exceptions to this rule, as outlined in *United States v. Raines*, but the *Brewer* court found they did not apply.

The *Brewer* case is on all fours with the case at bar: the only difference is that while the defendant there demonstrated he had affirmative consent; Music had no such evidence. The *Brewer* court's analysis, even though fifty years old, is just as applicable today. Indeed, it even appears to have anticipated *Lawrence v. Texas*. 539 U.S. 558, 123 S Ct. 2475. Here, the exact same situation is before the Court. Like the *Brewer* court, this Court should ask: is Music the right person to challenge Washington's repealed Sodomy statute on behalf of *un*incarcerated people? The answer is "no" for the same reason.

C. Answer to Petition for Review Issue 3: The Honorable Judge Schacht's Affidavit Regarding Events That Occurred in Open Court Is Not Privileged Information

Music asserts that because the Honorable Judge Schacht was his defense attorney, Judge Schacht's affidavit regarding his observations from the open court proceedings are somehow a disclosure of private communications between client and counsel. Petition for Review, at 17. Under the Rules of Professional Conduct, a lawyer may relate information that has "become generally known." RPC 1.9(c)(1). Once a matter is on public record, it is generally known. Judge Schacht relayed information that was, at one point, on the record (even though that record has long since been destroyed per the court's standard record keeping practices). Since Judge Schacht did not disclose any confidential information,

Music's assertion fails, and information within the affidavit is properly before the Court.

D. Answer to Petition for Review Issue 4: This Appeal is Limited to Whether Washington's Sodomy Statute is Facially Unconstitutional: It Is Not a Time for Music to Appeal the Merits of His Case

Music seems to conflate the purpose of his appeal. Music argues that the statute that served as the basis for his conviction is facially unconstitutional, but then he also appears to argue the facts of the case, as if he expects this matter to be remanded for a new trial. The facts of this case are not up for debate. Neither the Superior Court nor the Court of Appeals did or could weigh evidence, exclude hearsay, or permit cross-examination of evidence. Here, Music went to trial and was convicted in 1975. Witnesses in the courtroom at the time included Dick Cockle of the Union-Bulletin and his then-defense attorney, Judge Schacht. Presumably, all witnesses were cross-examined ably, and all improper hearsay was excluded. Now, Music seems to be arguing that the records of that event are also hearsay subject to cross-examination. Music cites no authority supporting such a proposition.

As a general principle, a reviewing court will not consider matters outside the trial record in a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, this is not a direct appeal.

This is a collateral attack forty years after Music's conviction, which was not filed until almost all record and memory had disintegrated. Outside evidence may be considered within the context of a collateral attack. *Id.* It was not only appropriate and lawful for the Court of Appeals to consider these records because of the Music's impermissible delay and false representations of the nature of the case: it became a necessity.

VII. CONCLUSION

For the foregoing reasons, the State respectfully submits that the order to vacate judgment & sentence should be reversed.

Respectfully submitted this 16th day of June, 2016.

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James L. Nagle, WSBA# 9637

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Appendix A

Court of Appeals decision in *State v. Music*, No. 332853-3-III, slip op. (Court of Appeals, Div. III, filed April 28, 2016)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOHN THOMAS MUSIC, Appellant.	)	No. 33285-3-III UNPUBLISHED OPINION

KORSMO, J. — The trial court vacated John Music's 1975 conviction for sodomy, determining that the repealed former statute was facially unconstitutional. Concluding that it was not facially unconstitutional and that Mr. Music did not meet his obligation to establish that the statute was unconstitutional as applied to his conduct, we reverse and reinstate the conviction.

PROCEDURAL HISTORY

A one-day crime spree on January 17, 1969, culminated in Mr. Music, then 19, fatally shooting a 15-year-old boy who fled from an attempted robbery rather than turn over his leather jacket. Mr. Music was convicted of murder, robbery, and three counts of attempted robbery. The death penalty was imposed for the murder conviction. *State v. Music*, 79 Wn.2d 699, 700-703, 489 P.2d 159 (1971). That sentence was vacated when the United States Supreme Court invalidated Washington's death penalty in 1972, and

Mr. Music was resentenced to life in prison on the murder count and lesser concurrent sentences for the other crimes. *In re the Pers. Restraint of Music*, 104 Wn.2d 189, 190, 704 P.2d 144 (1985); *see also Music v. Washington*, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

On November 1, 1974, while serving his sentence in the state penitentiary, Mr. Music and several other prisoners engaged in a gang rape of another prisoner during a movie in the prison theater. From a later description, it appears that the victim, JM, was forced to fellate one prisoner at the same time another was anally penetrating him; this process continued with each of the six or more prisoners engaged in the assault. Mr. Music was convicted of one count of sodomy in April 1975, and sentenced to ten years in prison for that crime.[1]

Mr. Music was granted parole on the murder conviction in March 2010. He then began serving his sodomy sentence at the Airway Heights Correctional Center. On February 23, 2015, Mr. Music filed a motion to vacate his "consensual" sodomy

[1] Mr. Music appealed that conviction to this court, which assigned the case file no. 1557-III. His appointed counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). There is no discussion about the facts of the case in this court's opinion, but one of the issues noted by counsel involved a potential argument that the evidence did not support the sodomy conviction because the victim was forced to commit sodomy on the defendant rather than the defendant performing the action on the victim. This court rejected the claim. *See State v. Music*, No. 1557-III, slip op. at 1 (Wash. Ct. App. Mar. 12, 1976).

conviction on the basis that the former statute was facially unconstitutional because it violated "a substantive right and fundamental liberty." Clerk's Papers (CP) at 1.

The motion proceeded to oral argument in the Walla Walla County Superior Court. Mr. Music argued that all general sodomy statutes were unconstitutional on their face under *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). In response, the State argued that *Lawrence* did not extend as far as Music argued, that prisoners had no right of sexual privacy, and that his conduct constituted rape. By letter, the trial court ruled that the former statute was unconstitutional on its face and that the State could have, but failed, to prosecute Music for rape.

The State moved to reconsider, again arguing that prisoners could not engage in consensual sexual relations and appending an affidavit from Music's defense attorney, retired Judge Donald Schacht. The affidavit described the victim testifying to being raped by six members of a prison motorcycle gang; he did not consent to the encounter. The defense replied that the statute was unconstitutional on its face and that the prosecution should have charged rape instead of sodomy. The trial court denied reconsideration "for reasons set out in defendant's response brief." CP at 129.

The State timely appealed to this court. The matter was considered without oral argument.

ANALYSIS

This case is in the peculiar posture of requiring a lengthy historical analysis of a statute repealed four decades ago and applying that understanding to a recent seminal case of constitutional law. After initially noting the legal standards applicable constitutional challenges, we turn to the reach of our sodomy and rape statutes in 1974 before considering *Lawrence* and its application to this case.[2]

The fundamental difference between the parties' respective arguments involves the standard to be applied in weighing the former sodomy statute under *Lawrence*. In determining the constitutionality of a statute, this court starts with a presumption that the statute is constitutional and reviews challenges de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-258, 241 P.3d 1220 (2010). A party may challenge the constitutionality of a statute as-applied in the specific context of that party's actions, or alternatively may facially challenge that the statute as unconstitutional in all of its applications. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-669, 91 P.3d 875 (2004). To prevail on the former, the party must show a violation of a constitutional right. *Id.* at 669. To prevail on the latter, the party must show that no set of circumstances exists in which the statute can be constitutionally applied. *Id.* (citing *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000)). Holding a

[2] In light of our decision, we do not address the State's laches argument.

statute to be unconstitutional as-applied will prevent future application of that statute in similar circumstances, while holding a statute facially unconstitutional renders it totally inoperative. *Id.*

History of Rape and Sodomy Statutes

The statutes governing sex crimes in 1974 primarily were derived from chapter 6 of the Criminal Code of 1909, which defined a wide variety of crimes against morality and decency. LAWS OF 1909, ch. 249, §§ 183-247. There, rape was defined as "an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent" and was punishable by five years in prison.[3] LAWS OF 1909 ch. 249, § 183. "Sexual intercourse" was defined merely as any "sexual penetration." *Id.* at 186. While the modern meanings of the terms "sexual intercourse" and "sexual penetration" encompass a broad range of sex acts, those terms had a much narrower meaning under the older statutes. Historically, "sexual intercourse" was purely synonymous with the more scientific term "copulation," both referring only to the specific act biologically capable of reproduction.[4]

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[3] That law was amended by the Equal Rights Act of 1973 to be gender neutral by making it possible for a man to be a rape victim, without redefining "sexual intercourse." LAWS OF 1973, 1st Ex. Sess., ch. 154, § 122.

[4] *See State v. Snyder*, 199 Wash. 298, 300-301, 91 P.2d 570 (1939); BLACK'S LAW DICTIONARY 1541 (rev'd 4th ed. 1968) (defining sexual intercourse as "carnal copulation of male and female"); THE OXFORD ENGLISH DICTIONARY VOL. IX 582 (1970) (defining sexual intercourse as "copulation"); THE OXFORD ENGLISH DICTIONARY VOL. II 977-978 (1970) (defining copulation as "the union of the sexes in the act of generation").

The Code of 1909 defined sodomy as having carnal knowledge of "any male or female person by the anus, or with the mouth or tongue" and was punishable by ten years in prison.[5] LAWS OF 1909, ch. 249, § 204. This definition explicitly encompasses only sex acts that are outside the older meaning of "sexual intercourse." *See State v. Sawyer*, 12 Wn. App. 784, 785-787, 532 P.2d 654 (1975).[6] Consequently, in 1974 the legal meanings of sodomy and rape encompassed disjoint sets of sex acts, with the rape statutes only applying to instances of vaginal-penile intercourse and sodomy to other forms of sexual penetration.[7] The State could not have prosecuted Mr. Music for "rape" involving sexual conduct with a man.[8]

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[5] The definition of sodomy also included voluntarily submitting to such carnal knowledge, as well as bestiality and necrophilia. In 1937, the sodomy statute was amended to increase the maximum penalty for acts committed upon children. LAWS OF 1937, ch. 74, § 3.

[6] Sexual intercourse with children under 18 was punished under the carnal knowledge statute. LAWS OF 1909, ch. 249, § 184; former RCW 9.79.020 (1973); *State v. Cunday*, 57 Wn.2d 122, 356 P.2d 609 (1960).

[7] Rape was then codified at former RCW 9.79.010 (1973), while sodomy was located at former RCW 9.79.100 (1937).

[8] Because they look at cases involving later revisions in the law, both parties mistakenly believe that Mr. Music could have been tried in 1974 for rape.

The rape statute lost its narrow reach in 1975 when the legislature broadened the definition of "sexual intercourse" to include the sex acts previously defined as sodomy.[9] LAWS OF 1975, 1st Ex. Sess., ch. 14, § 1. In that same session, the legislature enacted a comprehensive new criminal code that repealed the sodomy statute. LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(209). However, the repealed laws remained effective into the next year. LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.92.020. Consequently, from September 7, 1975 until July 1, 1976, the new rape law and the old sodomy law were both in effect. That fact led to this court addressing—and rejecting—an argument that the new rape law implicitly repealed the sodomy statute by extending rape to cover substantially the same conduct as sodomy. *State v. Levier*, 16 Wn. App. 332, 333-334, 555 P.2d 1003 (1976). This court concluded that the sodomy statute covered a broader range of conduct than the rape statute did. *Id.* at 334.

At the time of Music's sexual encounter with JM on November 1, 1974, sodomy was the only offense that applied to the actions described by JM. Rape was inapplicable because the 1974 incident did not involve male-female copulation outside of the marital

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[9] "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and (b) also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and (c) also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex. LAWS OF 1975, 1st Ex. Sess., ch. 14, § 1.

relationship. The sodomy statute was applicable to both men[10] and women and was the only method of prosecuting non-consensual anal or oral penetration.

Lawrence v. Texas

In *Lawrence*, Texas officers had entered a private house in response to an allegation of a weapon being fired and discovered the petitioners engaged in anal intercourse with each other. 539 U.S. at 562-563. The two men were prosecuted under the Texas deviant sexual intercourse statute that prohibited oral and anal sexual contact between two persons of the same sex. *Id.* at 563. The United States Supreme Court ultimately granted certiorari to determine if the Texas statute violated either the equal protection or due process clauses, and to decide whether *Bowers v. Hardwick*[11] should be overruled. *Id.*

The five justice majority opinion resolved the case on due process grounds, framing the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[12] *Id.* at 564. The majority concluded that their case

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[10] Since there was no non-marriage element, sodomy was the only means of prosecuting a husband who anally or orally assaulted his wife. The non-marriage element was removed from our rape statutes by Laws of 1983, ch. 118.

[11] 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

[12] Justice O'Connor concurred in the result, finding the Texas statute violated the equal protection clause. 539 U.S. at 579-585.

law showed "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572. The majority overruled *Bowers* after criticizing the narrow scope of the issue addressed by that opinion: "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 566 (quoting *Bowers*, 478 U.S. at 190). *Lawrence* recognized that the narrow issue in *Bowers* "discloses the Court's own failure to appreciate the extent of the liberty at stake." *Id.* at 567. Those interests were far more involved than *Bowers* recognized:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id.

Finally, the majority concluded with the observation that its opinion did not address minors, public conduct, prostitution, or those "who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Id.* at 578. Instead, that case "does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives." *Id.* The due process clause prohibited the State from "making their private sexual conduct a crime." *Id.*

Application

With these historical forays, both recent and distant, in mind, it finally is time to apply this history to the arguments presented. The trial court concluded that the former sodomy statute was facially unconstitutional under *Lawrence*. We disagree that *Lawrence* cast its nets so widely.

First, *Lawrence* itself emphasized that it only addressed consensual, adult same sex relationships. It expressly exempted statutes involving minors, non-consensual relationships, public conduct, prostitution, and relationships involving injury. *Id.* Second, *Lawrence* addressed a very narrow statute that expressly applied only to same sex relationships. *Id.* at 563. In contrast, Washington's sodomy statute does not appear

to have historically been used to prosecute consenting adults; instead, it appears the statute was used in cases of assaultive conduct, frequently involving children.[13]

Accordingly, we conclude that *Lawrence* recognizes a personal liberty interest in consensual adult sexual behavior. It does not forbid sodomy prosecutions for non-consensual, public, or adult-child relationships. The reading of *Lawrence* urged by Mr. Music effectively treats that case as extending constitutional protections to specific sexual actions rather than according human dignity to private adult sexual relationships.

Lawrence does not support a facial challenge to Washington's former sodomy statute. That statute was the sole means of addressing certain forms of sexual abuse that the former rape statutes did not reach. The former statute also addressed criminal conduct that *Lawrence* expressly exempted from its holding; it was not addressed solely to consensual adult behavior. Since the former sodomy statute applied to criminal conduct beyond that invalidated in *Lawrence*, it is not facially invalid. *Moore*, 151 Wn.2d at 669.

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[13] *See, e.g.*, *State v. Harp*, 13 Wn. App. 239, 534 P.2d 842 (1975) (male defendant anally raped female victim); *State v. Sawyer*, 12 Wn. App. 784, 532 P.2d 654 (1975) (adult forced 10-year-old girl to fellate him); *State v. Paradis*, 72 Wn.2d 563, 434 P.2d 583 (1967) (adult had consensual sex with a 14-year-old boy); *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965) (adult sodomizing young boys); *State v. Little*, 149 Wash. 38, 270 P. 103 (1928) (carnal knowledge of a female child under 18); *State v. Beaudin*, 76 Wash. 306, 136 P. 137 (1913) (defendant committed sodomy on his 2-year-old daughter). Our review of over 100 published sodomy cases did not reveal any convictions stemming from private actions between consenting adults.

Thus, for Mr. Music to prevail here he needed to establish that the statute was unconstitutional as applied to his behavior. Although he alleged that his sexual encounter with JM was consensual, he made no effort to prove that point and the trial court did not enter any findings in support of that argument. In contrast, the evidence presented by the State through newspaper clippings and the affidavit of an attorney who recalled the victim's testimony indicated that Mr. Music engaged in non-consensual sexual contact that likely would be addressed under our modern rape statutes.

We conclude that Mr. Music did not establish that he was prosecuted for a consensual adult same sex relationship that is protected by *Lawrence*.[14] We reverse the order vacating the 1975 sodomy conviction.

Reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Sypolt, J.P.T.

[14] We therefore need not address the question of whether *Lawrence* applies to the prison setting.

Appendix B

Motion to Publish Court of Appeals Decision

NO. 33285-3-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN THOMAS MUSIC, Appellant.	))))))))	STATE'S MOTION TO PUBLISH OPINION

1. Identity of Moving Party:

State of Washington, Respondent, asks for relief designated in Part 2.

2. Statement of Relief Sought:

The State of Washington requests this Court publish its opinion in this matter.

3. Argument:

RAP 12.3 governs motions to publish court opinions. Publication is necessary because the opinion cogently digests significant history

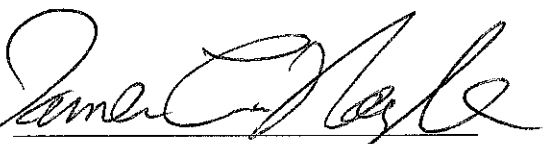
while succinctly distinguishing between protecting "specific sexual actions" and "according human dignity to private adult sexual relationships." The opinion serves both as an exceptional piece of legal research and as a reminder to all parties to make no assumptions when researching what the actual issues are.

4. Conclusion.

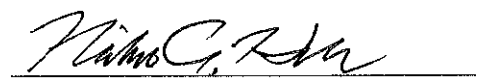
Based on the foregoing, the State urges this Court to publish its opinion.

DATED: May 6, 2016

Respectfully submitted:



By: James Lyle Nagle, WSBA# 9637
Prosecuting Attorney



Nicholas Alan Holce, WSBA# 46576
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Certificate of e-mailing and Mailing

I CERTIFY that on this 6th day of May, 2016, 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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each containing a copy of the foregoing Motion to Publish Opinion, and this Certificate, Postage Prepaid.

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Appendix C

Order Denying Motion to Publish Opinion

FILED
May 31, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN THOMAS MUSIC, Appellant.	)	No. 33285-3-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered appellant's motion to publish opinion and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to publish opinion of this court's decision of April 28, 2016, is hereby denied.

PANEL: Judges Korsmo, Siddoway, Sypolt J.P.T.

FOR THE COURT:

Fearing, C.J.

GEORGE FEARING, Chief Judge