IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT No. 93209-3

COURT OF APPEALS No. 33285-3-III

STATE OF WASHINGTON,

v.

JOHN THOMAS MUSIC,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the unlawful incarceration of an elderly defendant. Forty-one years ago, John Thomas Music Music was convicted of sodomy. That sodomy statute is unconstitutional on its face and as applied. Music has been incarcerated since 1969. He is being punished because of a long-abandoned law, one that has been ruled unconstitutional by the U.S. Supreme Court. Only this Court can end that unconstitutional punishment.

The decision below is a radical departure from the rule of law. Rather than considering the charge against Music and the jury's verdict, the court of appeals engaged in extra-record fact-finding. That fact-finding relied solely on inadmissible evidence. The decision relies on an affidavit from Music's former criminal defense counsel. Not only was this affidavit made against Music's interests in violation of RPC 1.9, it contains only hearsay: recollections from forty years ago by an elderly man who long ago decided he could no longer practice law. Those recollections were never subject to cross-examination, and no authority for their admission was cited by the court of appeals. The prosecutor's office also violated the RPCs by requesting that another lawyer violate the RPCs and offer testimony against the interest of a former client. Since Music's conviction is based solely on inadmissible evidence, it cannot stand.

The court of appeals created a new crime, took evidence, and then convicted Music. That crime, "forcible sodomy," has never been enacted in Washington. Washington's sodomy statute did not reference coercion. In Music's criminal case, the jury was not asked if the conduct was coercive. The state admitted below that "consent was a non-issue" at trial. The state also admitted below that it could have charged Music with a different crime, like rape or assault, but did not because it would "confus[e] the jury" to present evidence of coercion. But there is no exception to the rule of law for cases that are difficult to prove. Indeed, the state's concession that it would have been difficult to prove coercion is exactly why the court of appeals erred in finding coercion: a jury must convict based on evidence presented.

In 2016, no one should be punished because of a sodomy conviction. The court of appeals' error means Music is being punished for sodomy. That decision must be overturned.

II. IDENTITY OF PETITIONER

John Thomas Music asks this court to accept review of the court of appeals' decision terminating review, attached as Appendix A to this petition.

III. COURT OF APPEALS DECISION

A copy of the decision, No. 33285-3-III, is in Appendix A. The decision was entered on April 28, 2016. The state moved to publish on May 6, 2016. Appendix B.

IV. ISSUES PRESENTED FOR REVIEW

1. The United States Supreme Court has declared that general sodomy laws such as Washington's sodomy statute are, and were in 1975, unconstitutional on their face. Is the Supreme Court's opinion binding on Washington courts?

2. Where a criminal statute is facially unconstitutional, may a court affirm a conviction based on elements that were not presented to the jury?

3. Where a criminal statute is facially unconstitutional, may a court affirm a conviction based on evidence that was obtained in violation of the Rules of Professional Conduct?

4. May a court affirm a conviction solely based on hearsay evidence that was never submitted to the jury, was never subject to cross-examination, and which fits no recognized exception to hearsay rule?

V. STATEMENT OF THE CASE

This case is about a conviction for sodomy. The sodomy occurred while John Thomas Music was in prison. Music was charged with sodomy. The jury was presented with jury instructions that tracked the elements in Washington's sodomy statute. The jury convicted Music of sodomy. The jury made no finding regarding coercion.

In 2010, after decades in prison, Music was paroled on other charges. CP 36. After his parole, he began serving his sentence for sodomy.

A. The underlying conviction

In 1975, Music was charged with sodomy for "willfully, unlawfully, and feloniously [knowing] a human being and male person over the age of 15 years, with mouth and tongue, and [Defendant] did further know John Mathers per anus."[1] The jury

[1] Prosecutor's Information No. 64918, Walla Walla County Superior Court, Jan. 10, 1975, CP 13; RCW 9.79.100 (1974). The sodomy statute under which Mr. Music was convicted, RCW 9.79.100, was

instructions did not ask whether the conduct was consensual. CP 15. The jury instructions made no reference to coercion. CP 15-30. The jury instructions made no reference to the act occurring in prison. CP 15-30.

Below, the the state conceded that under the laws in place in 1975, forcible sodomy could be charged as rape. Appellant opening brief before the court of appeals at 13. No charge of rape or assault was brought at the time or at any time since.

Music was convicted of sodomy on April 23, 1975. CP 32. Music was sentenced to 7½ years, to be served consecutively to his previous sentences. CP 34. Music was paroled on his previous life sentence and began serving his sodomy sentence on July 30, 2010. CP 36.

B. Proceedings before the Superior Court

The Superior Court vacated Music's sodomy conviction by written order on March 18, 2015. CP 122-23. The Superior Court found it had jurisdiction under CrR 7.8 and RCW 10.73.090 and .100. CP 122. The Superior Court found that "RCW 10.73.100(2) removes the time-bar for a motion to set aside a conviction that is based on a statute that is unconstitutional on its face." CP 123. Finding that laches did not apply, and that *Lawrence* compelled a

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repealed on July 1, 1976. (Repealed by Laws 1975, 1st Ex. Sess., Ch. 260 § 9a.92.010).

finding that the sodomy statute is (and was) unconstitutional, the court had "little choice but to grant" Music's motion. CP 123. The Superior Court held that Music "was not" charged or convicted of another crime such as rape or assault, and, "notwithstanding its abhorrence of the act—this Court cannot pretend that he was." CP 123.

C. Proceedings before the Court of Appeals

Before the court of appeals, the state conceded that it could have charged Music with rape. State's court of appeal br. at 13. Because it charged Music with sodomy, the state argued that "consent was a non-issue." *Id.*

The court of appeals ruled that *Texas v. Lawrence*, 539 U.S. 558 (2003) did not facially invalidate invalidate Washington's sodomy statute. Appendix 10-11. The court of appeals wrote that "it appears the [sodomy] statute was used in cases of assaultive conduct, frequently involving children." Appendix 11. The court then ruled that Music had to prove that the conduct was consensual. Appendix 12. Since his former attorney's testimony—obtained in violation of the RPCs and recalled 40 years after the events—and a newspaper article offered some evidence that the sodomy was not consensual, the court of appeals ruled that Music's claim failed. Appendix 12. The court of appeals never discusses the elements of sodomy as presented to the jury.

The state moved to publish, arguing that the decision should be published "as a reminder . . . to make no assumptions when researching what the actual issues are." Appendix B at 2.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The United States Supreme Court held in *Texas v. Lawrence* that general sodomy statutes are unconstitutional. Music was convicted under the Washington general sodomy statute. The statute outlawed all sodomy. Music was not charged with assault or rape. The court of appeals ruled that the sodomy statute is constitutional as applied to Music because Music was "really" convicted for coercive sodomy.

In overturning the trial court, the court of appeals made two errors of law. First, a court may not save a facially invalid statute by holding that the jury would, beyond a reasonable doubt, have convicted the defendant of a hypothetical crime that was not passed by the legislature and was not decided by the jury. Where "a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face." *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

The United States and Washington Constitutions require that all "essential elements" of the crime—whether statutory or nonstatutory—be pleaded in the information and proved beyond a

reasonable doubt. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The to-convict instruction must also contain all essential elements, *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), and "a reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)

Here, coercion was an "essential element" of the crime. The jury was not instructed on coercion or asked to find coercion. If there was coercion, Music could have been charged with assault. Below, the state argued that it would have been hard to prove to coercion, but failed to cite any authority that difficulty in convincing a jury excused proving all the elements of a crime. This Court should reject the state's prosecutorial laziness defense of Music's unconstitutional conviction.

Second, to find coercion, the court of appeals did not refer to the record. Instead, it relied on hearsay. The "hearsay rule precludes admission of out-of-court statements to prove the truth of the fact asserted, except as provided by the Rules of Evidence, court rules, or statute." *State v. Davis*, 141 Wn.2d 798, 842, 10 P.3d 977 (2000). The court of appeals did not even use the word hearsay, much less justify its use of testimony that the trial court had rejected. Most of the hearsay was given by Music's former defense counsel. That

lawyer violated the Rules of Professional Conduct in giving his testimony. RPC 1.9. The state violated the Rules of Professional Conduct by inducing another to violate the RPCs. RPC 8.4(a). The state, in its motion to publish, admitted the "actual issues" decidedby the court of appeals to be distinct from the conviction in the record. Appendix B at 2. The testimony was also completely unreliable, untested by cross-examination, and was created forty years after the events.

A. Washington's 1975 Sodomy Statute is Unconstitutional Under *Lawrence*

1. *Lawrence* outlawed general prohibitions on sodomy

In *Lawrence*, the Court examined "the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Lawrence*, 539 U.S. at 578. The Court's opinion begins and ends with the facial constitutionality of the Texas statute. The holding is clear: "The Texas statute furthers no legitimate state interest which can justify intrusion into the personal and private life of the individual." *Id. Lawrence* "held that a state cannot enact laws that criminalize homosexual sodomy. *Lawrence* is a new substantive rule and is thus retroactive." *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005).

The *Lawrence* Court also contemplated, in dicta, about actions that a legislature might regulate: "The present case does not

involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." 539 U.S. at 578.

The court of appeals relied on that dicta to hold that Music's conviction fell under these possible exceptions—although these exceptions did not exist at the time of his conviction. The state chose not to charge Music with rape or assault.[2]

The dicta about the situations in which sodomy may be criminalized helps explain what kinds of existing statutes could survive *Lawrence* and guides the Legislature in writing future statutes. But Washington's sodomy law did not have any of these qualifiers. The Supreme Court struck down a sodomy law indistinguishable from Washington's. That means Music's conviction cannot stand.

While *Lawrence* does not apply to prison rape, Music was not charged or convicted of prison rape—or rape of any variety—and the record contains no substantive evidence that rape occurred. Rather,

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[2] It was possible, and perhaps common, to combine a sodomy charge with an assault charge if there was coercion. *See, e.g., State v. Harp*, 13 Wn. App. 239, 240, 534 P.2d 842, 843 (1975) (defendant was convicted of two counts of first degree assault, rape, and sodomy); *State v. Ragan*, 22 Wn. App. 591 (1979) (conviction for sodomy and assault in the second degree). *See also* footnote 6, below.

the issue before this Court is precisely the issue considered and decided by *Lawrence*. This case and *Lawrence* are about the constitutionality of general sodomy statutes.

The cases confirm Music's analysis of *Lawrence*. In *MacDonald v. Moose*, the court analyzed a general sodomy prohibition. *MacDonald* considered whether a predicate conviction for "carnal knowledge," that is, Virginia's general sodomy statute, survived *Lawrence*. The court held it did not. 710 F.3d 154, 163 (4th Cir.) cert. denied, 134 S. Ct. 200, 187 L. Ed. 2d 45 (2013).

In considering the *Lawrence* Court's "ruminations concerning the circumstances under which a state might permissibly outlaw sodomy," *MacDonald* noted that the Court "no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." *Id.* at 164. In other words, the legislature passes laws; the courts construe laws, but may not create new crimes. *Id.* at 167 (citing Supreme Court precedent condemning such judicial intervention); *Hinton*, 152 Wn.2d at 857 (holding that where "a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face").

Below, the state conceded that it could have charged rape in 1975. Appellant's Br. at 13. The court of appeals says that it could not, appendix A at 7-8, but that confusion only reinforces how hard

it is to relitigate this case today; to search, as the court of appeals did, for some reason outside the record to uphold the conviction, through the haze of time and in spite of *Lawrence*, is arbitrary and capricious.

The state admits it did not try to prove coercion because it would have been more difficult to prove. State opening brief before court of appeals at 12-13 (demonstrating coercion had "strong potential to confuse the jury").

In *MacDonald*, the state argued that "*Lawrence* did not establish the unconstitutionality of solicitation statutes generally" or MacDonald's actions in particular. *Id.* at 161. The state also argued "MacDonald lacks standing to pursue a facial challenge to the anti-sodomy provision . . . because the provision can be constitutionally applied in various circumstances, including those underlying this appeal." *Id.* Both arguments failed in *MacDonald* and they fail here.

Finally, *MacDonald* examined the Texas and Georgia statutes and found that, like Washington's sodomy statute, they were unenforceable under *Lawrence*. The Washington statute considered here is substantively identical to statutes that have been found to be unconstitutional.[3]

[3] *See* Respondent's brief before the court of appeals at 21-22 (analyzing the elements of the Georgia, Washington, and Texas sodomy laws).

Notwithstanding *Lawrence* and notwithstanding that Music was not charged or convicted of coercive sodomy, the court of appeals looked to extra-record evidence evidence proffered forty years after trial and decided that Music was, in fact, guilty of coercive sodomy.

The court of appeals did not address the threshold and fundamental fact that Music was not charged with or convicted of coercive sodomy at trial. Nor did the court of appeals address the foundational legal principle that an accused cannot be punished for a crime of which he was not given notice, an opportunity to defend against, and where the jury did not return a verdict based on a necessary element (coercion).

In lieu of a jury verdict finding coercive sodomy, the court of appeals, in effect, retried the case and found Music guilty of coercive sodomy based on a forty year old newspaper article and an affidavit of a defendant's own lawyer. That is error, as *MacDonald* shows.

MacDonald involved sodomy involving minors, which, of course, may be outlawed. What a court cannot do, however, is salvage a general sodomy statute by saying that "if an exception to the law existed, it would be constitutional," when that exception would require proving an element that was not presented to the jury. Music is not arguing that coercive sodomy cannot be legislatively

prohibited. But here, the statute did not provide for any such qualification. Music was never charged with or convicted of coercive sodomy. The court of appeals erred in trying and holding Music accountable for a crime with which he was never charged.

2. Washington's sodomy statute outlawed sodomy between adults, with no reference to consent, and that law is unconstitutional on its face.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015). "[I]n considering a facial challenge, we analyze the statutory language itself and do not rely on the facts of the case." *Parmelee v. O'Neel*, 145 Wn. App. 223, 235, 186 P.3d 1094, 1100 (2008) rev'd in part, 168 Wn.2d 515, 229 P.3d 723 (2010), as corrected (May 27, 2010).

Parmelee holds that "when a statute is facially unconstitutional, it follows that no set of circumstances exist in which the statute, as currently written, can be constitutionally applied." *Id.* at 242-43. The United States Supreme Court has ruled that sodomy statutes such as Washington's were unconstitutional. Just as in *Parmalee*, the court "need not determine whether Washington's statutory scheme is unconstitutional as applied to [Music] because the statutory scheme is facially unconstitutional." *Id.* at 246. *Parmelee* relies on *Houston v. Hill*, 482 U.S. 451, 459

(1987) for the proposition that "Criminal statutes must be scrutinized with particular care . . . those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." That is the case here.

Even if this Court rejects a facial challenge, the trial court decision must be upheld because the law was unconstitutional as applied to Music. We know how the law was applied in Music's case: we have the jury instructions, and we know that coercion was not presented to the jury. The jury decided only whether Music "willfully" engaged in sodomy. CP 20 (instruction 4). Willfully was defined as "intentionally and purposefully and not accidentally." CP 19 (Instruction 3). The jury was not instructed on consent, or the significance of Music being a prisoner. CR 15-30 (full set of jury instructions). Under the instructions given, any two Washingtonians who engaged in sodomy and did so "not accidentally" would have been found guilty. Under *Lawrence*, the sodomy statute was unconstitutional at the time Music was convicted. The State's jury instructions took advantage of the generalness of the sodomy statute and allowed the jury to convict simply if the sodomy was not accidental. The statute as applied to Music through the jury instructions was unconstitutional.

3. *Lawrence* is retroactive

Lawrence "held that a state cannot enact laws that criminalize homosexual sodomy. *Lawrence* is a new substantive rule and is thus retroactive." *Muth*, 412 F.3d at 817. Since Washington's sodomy law is unconstitutional, Music is serving an illegal sentence. "If it would be unconstitutional to punish a person for an act that cannot be subject to criminal penalties it is no less unconstitutional to keep a person in prison for committing the same act." *Id.*

Washington courts follow the federal retroactivity analysis. *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (noting that retroactive application is granted where "(a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe . . ."). Here, the rule announced in *Lawrence* places sodomy beyond the power of the state to proscribe and is plainly retroactive.

The "state cannot give legal effect to a conviction under an unconstitutional criminal statute." *Green v. Georgia*, 51 F. Supp. 3d 1304, 1313 (N.D. Ga. 2014) (granting habeas relief for conviction under Georgia's general sodomy statute). The action in *Green* considered the use of a sodomy conviction as an element to the crime of failing to register as a sex offender. As with Music, Green was convicted before Lawrence was decided. The *Green* court wrote that "Just as it is unthinkable that a conviction of miscegenation

entered before *Loving v. Virginia*, 388 U.S. 1 [] (1967), was decided could be used after that decision to establish an element of a crime," it is unthinkable to uphold a sodomy conviction entered "before . . . *Lawrence* was decided . . ." *Id.* at 1316. As in *Green*, Music was convicted of sodomy prior to the *Lawrence* decision. Because there was no proof of coercion, Music's conviction cannot stand.

B. The court of appeals relied on inadmissible evidence

The affidavit of Music's former criminal defense attorney purports to recreate a record from memory forty years after the fact. His assertions are not only inherently unreliable, they violate Music's right to confidentiality under the Washington Rules of Professional Conduct.

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client.

RPC 1.9(c). The state's actions in obtaining the declaration are a separate violation of the RPCs. RPC 8.4(a) ("It is professional misconduct for a lawyer to: (a) . . . knowingly assist or induce another to [violate the Rules of Professional Conduct].").

Under RPC 1.9 "former clients need not prove that actual confidences were divulged." *Teja v. Saran*, 68 Wn. App. 793, 799-

800 (1993). There is no question that Music is prejudiced: the court of appeals relied on "the affidavit of an attorney" who represented Music in the criminal case. Appendix A at 12.

The court of appeals ruled that Washington's sodomy statute was not used to punish to consensual sodomy. That is not supported by the historical record, and would shock gay rights groups, which were the force behind repealing the statute.[4] Scholarship relied on in *Lawrence* show that the "burgeoning gay liberation movement" was behind Washington's repeal of the sodomy statute.[5] Moreover, the fact that the court of appeals found some reported decisions with sodomy convictions that involved coercion does not change the law's text—or the jury instructions here, which did not include coercion.

The decisions cited by the court of appeals are distinguishable. Appendix A at 11, n. 13 (listing cases). For instance, the first case cited by the court is *State v. Harp*, 13 Wn. App. 239, 240, 534 P.2d 842, 843 (1975). But there, the defendant was convicted of two counts of assault in the first degree, rape, ***and*** sodomy.

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[4] William Eskridge, *Dishonable Passions: Sodomy Law in America* (2008) at 200 ("A gay-friendly legislator . . . Senator Pete Francis was open to arguments from Seattle's Dorian Society to deregulate sodomy solicitation as well as sodomy."). Available at https://books.google.com/books/about/Dishonorable_Passions.html?id=2kvrxp4TUYsC

[5] 539 U.S. at 571, citing William N. Eskridge, *Hardwick And Historiography*, 1999 U. Ill. L. Rev. 631.

Other cases are similarly inapplicable here. Although many sodomy prosecutions apparently involved minors, that is doubly irrelevant. First, minors could not consent; the age of consent was 18 at the time of Music's conviction. *State v. Randolph*, 12 Wn. App. 138, 528 P.2d 1008 (1974).[6] Second, that other cases might have involved coercion does not relieve the state of the burden here—if the conviction was for "coercive sodomy," the state must prove coercion. As the state conceded below, it did not choose to prove coercion because it had a "strong potential to confuse the jury." State's opening brief at 12-13. This concession cements what is clear from the jury instructions: coercion was not presented to the jury.

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[6] *See, e.g., State v. Paradis*, 72 Wn.2d 563, 434 P.2d 583 (1967) (adult had consensual sex with a 14-year-old boy); *State v. Sawyer*, 12 Wn. App. 784, 785, 532 P.2d 654, 655 (1975) (state alleged that the defendant "compel[ed] . . . a female of the age of ten years, to carnally know him the said defendant with the mouth or tongue."). Of course, since a ten year old is incapable of consent, there was no need to charge or prove consent.

VII. CONCLUSION

This Court should accept review, reverse the court of appeals, and reinstate the trial court decision vacating Music's conviction for sodomy.

May 26, 2016

Respectfully submitted

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Certificate of Service

I certify that on May 26, 2016, I emailed a copy of the foregoing Petition for Review to James Lyle Nagle and Nicholas Alan Holce at the Walla Walla Prosecuting Attorney's Office at jangle@co.walla-walla.wa.us and nholce@co.walla-walla.wa.us. A copy was also sent via United States mail.

Appendix A

DECISION OF THE COURT OF APPEALS

FILED
April 28, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE'S MOTION TO PUBLISH

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

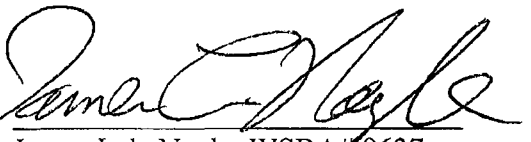
while succinctly distinguishing between protecting "specific sexual actions" and "according human dignity to private adult sexual relationships." The opinion serves both as an exceptional piece of legal research and as a reminder to all parties to make no assumptions when researching what the actual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

4. Conclusion.

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

DATED: May 6, 2016

Respectfully submitted:



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State v. John Thomas Music
Court of Appeals No. 33285-3-III
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Thank you,
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