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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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SUPREME COURT No. 93209-3

COURT OF APPEALS No. 332853-3-III

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STATE OF WASHINGTON,

Respondent

v.

JOHN THOMAS MUSIC,

Petitioner

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# ANSWER TO PETITION
# AND
# CROSS-PETITION FOR REVIEW

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Respectfully submitted:

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## 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Music and the State seek review of different portions of the unpublished Court of Appeals decision in *State v. Music*, No. 332853-3-III, slip op.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B. Did the Court of Appeals err, after lengthy historical analysis of a statute repealed four decades ago, in determining the acts proscribed in the sodomy statute were not limited to private consensual sexual conduct such that the statute was not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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**Certificate of e-mailing and Mailing**

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