No. 332853

Court of Appeals
Division III
Of The State of Washington

STATE OF WASHINGTON,
Appellant

v.

JOHN THOMAS MUSIC,
Respondent

Appeal from The Superior Court
Of Walla Walla County
The Honorable Judge John W. Lohrmann

RESPONDENT'S BRIEF

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I. STATEMENT OF FACTS

In 1969, when he was 20 years old, Respondent John Thomas Music was found guilty by a King County jury of one count of robbery, three counts of attempted robbery, and felony murder. The United States Supreme Court vacated his death sentence. *Music v. Washington*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 764 (1972). At resentencing, Mr. Music was sentenced to life imprisonment for the murder conviction, to run concurrently with the sentences for robbery and attempted robbery. *Petition of Music*, 104 Wn.2d 189, 190, 704 P.2d 144 (1985).

While serving his murder sentence, Mr. Music was charged with sodomy, RCW 9.79.100 (1974), 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." CP 13. The jury instructions did not ask whether the conduct was consensual. CP 15. Under the laws in place in 1975, forcible sodomy could be charged as rape. Appellants br. at 13. No

charge of rape or assault was brought at the time or at any time since.

Mr. Music was convicted of sodomy on April 23, 1975. CP32. The sodomy statute under which Mr. Music was convicted, RCW 9.79.100, was repealed on July 1, 1976. (Repealed by Laws 1975, 1st Ex. Sess., Ch. 260 § 9a.92.010).

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

The Superior Court vacated Mr. Music's sodomy conviction by written order on March 18, 2015. CP 122. 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 finding that the sodomy statute is (and was) unconstitutional, the court had "little choice but to grant" Mr. Music's motion. CP 123.

The State made the argument, again urged before this Court, that it might have had evidence that might have been enough to charge and convict Mr. Music of another crime, such as rape. But, as the Superior Court held, he "was not" charged or convicted of another crime, and, "notwithstanding its abhorrence of the act—this Court cannot pretend that he was." CP 123.

II. ISSUE

Should the Court of Appeals affirm the Superior Court decision to vacate Mr. Music's 1975 judgment and sentence because the United States Supreme Court has held that general sodomy statutes such as the one Mr. Music was convicted under are unconstitutional on their face as an impermissible infringement on fundamental liberty?

III. SUMMARY OF THE ARGUMENT

Lawrence v. Texas held that sodomy laws of general applicability are facially unconstitutional as an impermissible infringement on the fundamental, substantive right to due process under the Fourteenth Amendment to the Constitution. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003). Mr.

Music is serving a sentence for sodomy. *Lawrence* holds that Mr. Music's conviction is unconstitutional now and was unconstitutional when he was convicted.

Because new court decisions declaring substantive rights are applied retroactively, Mr. Music's claim is not time barred. And because the State has an interest in justice and fair treatment, parties convicted under statutes later found substantively unconstitutional are entitled to relief from their conviction and sentence.

Against this straight forward application of case law, court rules and statutes contemplating changes in substantive law, the State advances an extraordinary position. It claims that it could have charged and convicted Mr. Music of rape. It did not do so, however, because a rape conviction was more difficult to obtain. Appellant's Br. at 13 (to charge rape, "the State would have had to introduce additional law" and explain it jurors).

Since Mr. Music's conviction cannot stand under the unconstitutional sodomy statute, the State asks this Court to act as if Mr. Music had been charged with rape and then to convict

him of that crime. That position has no basis in law and must be rejected. This Court must affirm the trial court's vacation of Mr. Music's conviction and sentence.

IV. ARGUMENT

A. Standard of Review

A trial court's order on a CrR 7.8 motion to "vacate a judgment is reviewed for abuse of discretion." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27, 30-31 (2012). A "trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* (internal citations and punctuation omitted throughout this paragraph). A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id.* A "court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.* The "untenable grounds" basis applies "if the factual findings are unsupported by the record." *Id.*

A statute's constitutionality is a question of law reviewed de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008).

This court may affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

B. Mr. Music's Case is Not Time Barred

Mr. Music is entitled to relief under CrR 7.8, which provides relief from final judgments when "[t]he judgment is void; or [a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(4) and (5). While CrR 7.8 motions generally must be brought within a year, motions subject to RCW 10.73.100 may be brought later. CrR 7.8(b). Mr. Music's claims are exempt from the one-year limit under two sections of RCW 10.73.100.

First, because the "statute that [Mr. Music] was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct," RCW 100.73.100(3), Mr. Music's claim is not time-barred. Second, *Lawrence* is a "significant change in the law" that is "material to the conviction" and therefore is

"sufficient reason" to require retroactive application of the changed legal standard." RCW 10.73.100(6).

The State suggests Mr. Music's claim is barred by the equitable doctrine of laches. Appellant's Br. at 2. The State's argument fails for two reasons. First, the State admits that it was not prejudiced by the delay. Lack of prejudice is fatal to a claim for laches. Second, the equitable doctrine of laches does not apply where there is a statute governing time limits.

The State admits it was not prejudiced: "Concededly, even if Respondent had brought a motion to vacate, the records likely still would not have existed. . . ." *Id.* at 4. Therefore, on the earliest date which Mr. Music might have commenced action, the record available to the State would be substantially the same as it is today.

This concession is fatal to the State's argument. *Coalition on Gov't Spying v. King Cnty. Dep't of Pub. Safety*, 59 Wn. App. 856, 865, 801 P.2d 1009 (1990) (party asserting laches must show prejudice). It is the State's burden to show prejudice and the court may not assume prejudice from the mere fact of delay. *Cotton v. City of Elma*, 100 Wn. App. 685, 695, 998 P.2d 339

(2000). Since the State has admitted it was not prejudiced, it has failed to meet its burden and laches does not apply.

The "essence of the court's equity power" is "its duty to achieve fairness between the parties." *Proctor v. Huntington*, 169 Wn.2d 491, 503, 238 P.3d 1117, 1122 (2010). Equity and fairness do not favor barring a claim based on an unconstitutional statute where the State has conceded it is not prejudiced. *See also* 15A Wash. Prac., Handbook Civil Procedure § 1.4 (2014-2015 ed.) ("The purpose of laches is to prevent injustice and hardship . . . The most important factor in establishing laches is prejudice.").

The State could never show prejudice here. It is indisputable that it is far too late for the State to file new charges based on conduct in 1975. Since the question here is whether Mr. Music was convicted under an unconstitutional statute, additional facts would not change the analysis.

The State requires no record—no witnesses, no newspaper articles or affidavits from outside the record—to defend the validity of Washington's 1974 sodomy statute. The issue here is not whether the State has the ability to retry Mr.

Music, nor is the issue what crimes the State might have charged. Those matters are outside the scope of Mr. Music's motion to vacate, and certainly inadequate to establish an equitable defense.

The cases the State cites do not change the analysis. The State cites *Fay v. Noia* for the principle that laches "is applicable to collateral attacks on criminal judgments." Appellant's Brief at 3, citing *Fay v. Noia*, 372 U.S. 391, 438, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) (overruled in part by *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977), abrogated by *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

This brings us to the second reason laches does not apply: Mr. Music is using a rule and statutory scheme, CrR 7.8 and RCW 10.73.90 and .100. *Noia* does not mention laches and examines the question of what happens when a criminal defendant fails to properly navigate state procedures. Here, of course, Mr. Music is using the proper state procedures. *Noia* is irrelevant.

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990), and *Harris v. Pulley*, 885 F.2d 1497 (9th Cir. 1988), turn on the intricacies of federal habeas corpus procedures. Neither mentions laches because laches has long been superseded by rule in federal habeas. *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 446, 853 P.2d 424 (1993) (the "purpose of rule 9(a) was to codify equitable doctrine of laches which has always been applied to habeas petitions"). Similarly, laches does not apply here because a court rule and statute control. Mr. Music's challenge is timely.

C. Facial Challenges May Be Brought Under Any Enforceable Provision of the Constitution.

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

"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).

The State says that *Parmelee* requires consideration of possible constitutional applications of the challenged statute. Appellant's Brief at 5, 11. But *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 *Parmelee*, 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, 107 S.Ct. 2502, 96 L.Ed.2d 398 (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.

The State asserts that laws may only be facially attacked on First Amendment grounds. Appellant's Brief, 5, citing *In re Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d 1171, 1173 (1995).

This is simply not true, for at least three reasons. First, the statute under which Mr. Music challenged his conviction contemplates facial challenges and does not limit those challenges to First Amendment challenges. Second, as *C.B.* itself acknowledged, while most facial challenges are First Amendment challenges, that is not always the case, as is shown in other Washington cases. Third, *C.B.* cannot trump the federal Constitution, which requires finding that the sodomy statute was unconstitutional, and federal case law allows facial challenges to statutes beyond the First Amendment context.

First, as a matter of statutory interpretation, this Court should assume that the Legislature meant what it said: individuals may get relief from unconstitutional laws through facial challenges. RCW 100.73.100(2) (creating an exception to the one-year time limit where the "statute that the defendant was convicted of violating was unconstitutional on its face or as

applied to the defendant's conduct."). The State would read this "unconstitutional on its face" language out of the statute.

The decision in *In re C.B.* is not in tension with this statute. The *C.B.* court notes only a "general" rule about facial challenges, and goes on to cite *City of Seattle v. Yeager*, a case brought under Fourth Amendment arrest and seizure rights. *See also Robinson v. City of Seattle*, 102 Wn. App. 795, 804, 10 P.3d 452, 457 (2000) (Fourth Amendment facial challenge). These cases confirm what RCW 10.73.100(2) commands: facial challenges to unconstitutional laws are permitted.

Third, in a case alleging a facial challenge under the Fourth Amendment, the Supreme Court wrote that while such challenges "are the most difficult to mount successfully, the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015). Indeed, the Supreme Court has struck down a criminal law on a facial challenge under the Fourteenth Amendment. *Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Due Process Clause of the Fourteenth Amendment).

The issue before this Court is properly addressed as a facial challenge to an unconstitutional statute, and should be decided on the basis of the Supreme Court's decision in *Lawrence.*

Even if this Court rejects a facial challenge, the decision below must be upheld because the law was unconstitutional as applied to Mr. Music. We know how the law was applied in Mr. Music's case: we have the jury instructions, and we know that coercion was not presented to the jury. The jury decided only whether Mr. 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 Mr. Music being a prisoner. CP 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 Mr. 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 Mr. Music through the jury instructions was unconstitutional.

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

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 v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2475, 2484 (2003). 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.* at 578.

Between identifying the issue as the Texas statute and finding the statute unconstitutional, the *Lawrence* Court discusses the legal history of homosexuality, the punitive dangers of sodomy laws, and the source of substantive rights under the Due Process Clause of the Fourteenth Amendment. The Court also engages in some contemplative dicta about situations that were not before the Court: "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." *Id.*

The State relies on dicta to argue that Mr. Music's conviction might well have fallen under these possible exceptions—if they had existed at the time of his conviction. The problem is that the State chose not to allege that Mr. Music committed a rape or an assault, which were crimes at the time. The State's argument boils down to this: "it was standard practice to get a sodomy conviction in 1975, so that is what we did. We think that we might have been able to charge a rape, but that would have been harder to prove." Appellant's Br. at 12-13 (noting that rape had an additional element that would have made a conviction more difficult). Rape was a crime in 1975. Appellants Br. at 12-13. If the State had alleged rape in 1975 and convicted Mr. Music of rape, we would not be here. Appellant's Br. at 13.

The State is thus arguing an extraordinary position: that its choice to charge Mr. Music with a lesser offense means that his conviction under an unconstitutional statute should stand

because this Court should—as a fact-finder and without a jury—find that Mr. Music committed an uncharged crime with an element, consent, that the State admits it never submitted to a jury. The State must, using admissible evidence, prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068.

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. The State's problem here is that the Washington law under which Mr. Music was convicted did not have any of these qualifiers. The court struck down a sodomy law indistinguishable from Washington's. That means Mr. Music's conviction cannot stand.

The State argues *Lawrence* does not apply to prison rape. Appellant's Brief at 15. While true, again, Mr. 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, the issue before this Court is precisely the issue considered and decided by the *Lawrence* Court. This case and

Lawrence are about the constitutionality of general sodomy statutes.

Like sodomy, miscegenation laws are unconstitutional. Under the State's theory, a conviction for miscegenation could stand if—without any admissible evidence—the State was convinced that the real crime had been rape. Maybe, given the circumstances at the time, the State would argue that it would have been too difficult to convince a jury of rape between the races. But without a charge or evidence, the miscegenation conviction would not stand, and neither should Mr. Music's sodomy conviction.

The cases confirm Mr. Music's analysis of *Lawrence*. In *MacDonald v. Moose*, the court analyzed a general sodomy prohibition under *Lawrence*. There, the court found that "[i]n *Lawrence,* the Supreme Court plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment." *MacDonald v. Moose*, 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.

Here, however, there is no need to ruminate: rape was illegal in 1975. Appellant's Br. at 13. The State charged sodomy instead of rape. The State admits it did not charge rape because it would have been more difficult to prove. Appellant's Br. at 12-13.

The *MacDonald* court also rejected the "shoehorning" of certain behavior into unconstitutional statutes, as the State urges. Appellant's Br. at 10.

> We are confident, however, that we adhere to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional.

MacDonald at 166. The *MacDonald* court closes its opinion by acknowledging a narrowly tailored anti sodomy statute might survive *Lawrence*, but "[t]he anti-sodomy provision itself, however, which served as the basis for MacDonald's criminal

solicitation conviction, cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*." *Id.* at 167.

The State argues *McDonald* is distinguishable on the facts and the state statute considered. However, *MacDonald* is persuasive authority: well-reasoned and explicitly dealing with the issue of whether a general sodomy statute can survive *Lawrence*. It cannot. *MacDonald* demonstrates that a facial due process attack on a sodomy statute yields the result the trial court found here: a conviction under such a statute may not stand.

The state argued in *MacDonald* 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, the *MacDonald* court examined the Texas and Georgia statutes and found that, like Washington's sodomy statute, they were unenforceable under *Lawrence*. "The *Lawrence* Court thus recognized that the facial due process challenge in *Bowers* was wrongly decided. Because the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision." *Id.* at 163.

The Washington statute considered here is substantively similar to the Georgia statute the Court found unconstitutional in *Bowers*. Ex. B. The Washington statute is even broader than the Texas statute overturned in *Lawrence*, because it encompasses all sodomy, regardless of sexual orientation. Ex. C.

Texas	Georgia	Washington
A "person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual	(a) A "person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of	Every person who shall . . . carnally know any male or female person by the anus or with the mouth or tongue . . . RCW 9.79.100 (repealed)

intercourse" as follows: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object. § 21.01(1). *Lawrence*, 539 U.S. at 563.	another. . . . *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1, 106 S.Ct. 2841, 2842, 92 L.Ed.2d 140, 144 (1986).	

The Washington statute is the type of broad statutory scheme *Lawrence* proscribes. RCW 9.79.100, as it existed at the time of Mr. Music's conviction, is a facially unconstitutional restraint on substantive Due Process rights under the Fourteenth Amendment. Where "a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face." *In re Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). *Lawrence* means that sodomy was a nonexistent crime in Washington, and Mr. Music's conviction is invalid on its face.

E. New Substantive Constitutional Rights are Retroactive

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). Since the Washington sodomy law Mr. Music was convicted under is unconstitutional, Mr. 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.

When considering a sodomy conviction under the unconstitutional Georgia statute, the court determined "[t]he 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). 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. The court there found that the Georgia State Supreme Court and *Lawrence* had both invalidated the Georgia sodomy statute. As with Mr. Music, Green was convicted before *Lawrence* was decided.

> Just as it is unthinkable that a conviction of miscegenation entered before *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), was decided could be used after that decision to establish an element of a crime, so is it unthinkable that a conviction based on constitutionally protected private consensual sexual conduct entered before . . . *Lawrence* was decided could be so used.

Id., at 1316.

As with *Green*, Mr. Music was convicted of sodomy prior to the *Lawrence* decision. Maintaining his conviction is equally unthinkable. Because *Lawrence* defines general sodomy statutes as violations of a substantive right, Mr. Music is constitutionally entitled to have his conviction and sentence vacated.

F. The Constitutionality of Washington's Sodomy Statute is the Only Issue Properly Before the Court.

The sole issue before the court is the unconstitutionality of the Washington sodomy statute, as decided by *Lawrence*, and the subsequent validity of Mr. Music's conviction and sentence under that law. Matters outside the record are not properly considered and have no bearing on the issue before the Court.

This court should ignore, as did the trial court, the affidavit of Mr. Schatt that purports to recreate a record from memory forty years after the fact. His assertions are not only inherently unreliable, they violate Mr. 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.

WA R RPC 1.9(c).

Mr. Music further objects to the State's use of an unpublished case for substantive purposes as a violation of the

Washington Rules of Appellate Procedure. Appellant's Br. at 14. "A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports." WA GR 14.1(a). Regardless, the case does not say who "forced" the person to commit sodomy, and it would be extraordinary to take a single word out of an attorney's appeal brief to relieve the State of its burden to have alleged and proven rape.

Mr. Music objects to, and respectfully requests the Court to reject, any speculation about what may or may not be Constitutional if Mr. Music had been convicted of some other crime, or under some other statute or regulation. There is no conviction extant under any RCW. There is no record of administrative disciple for violating any WAC.

The suggestion that a person may be incarcerated for an unconstitutional conviction because that person might have been convicted of some other crime is antithetic to the American system of justice and the rule of law.

The elements of sodomy are very different from the elements of various kinds of rape. Indeed, the state does not even offer an assessment of which degree of rape, if any, might have applied to the conduct of Mr. Music in 1975. What we know from the record before this court is that neither the charging document nor the jury instructions included any notice or discussion about a forcible sex crime.

V. CONCLUSION

For the above reasons, and in the interest of justice, the Court should affirm the decision of the trial court to vacate the 1975 sodomy conviction and sentence of John Thomas Music.

RESPECTFULLY SUBMITTED on the 1st day of September, 2015.

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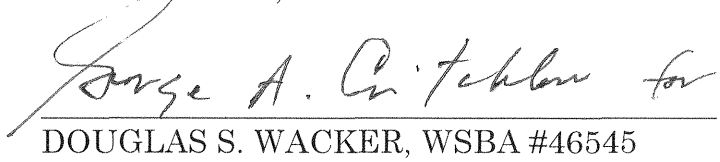

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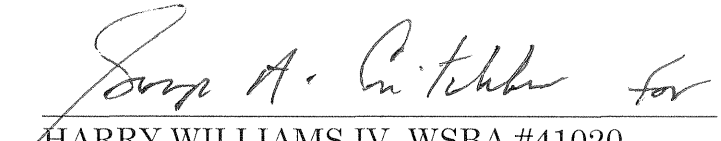

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Exhibit A

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shall be guilty of a misdemeanor. [1909 c 249 § 245; Code 1881 § 1267; RRS § 2497.]

9.76.040 Preventing religious act. Every person who by threats or violence shall wilfully prevent another person from performing any lawful act enjoined upon or recommended to him by the religion which he professes, shall be guilty of a misdemeanor. [1909 c 249 § 246; RRS § 2498.]

9.76.050 Disturbing religious meeting. Every person who shall wilfully disturb, interrupt, or disquiet any assemblage of people met for religious worship——

(1) By noisy, rude or indecent behavior, profane discourse, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting; or,

(2) By exhibiting shows or plays, or promoting any racing of animals, or gaming of any description, or engaging in any boisterous or noisy amusement; or,

(3) By disturbing in any manner, without authority of law within one mile thereof, free passage along a highway to the place of such meeting, or by maliciously cutting or otherwise injuring or disturbing a harness, conveyance, tent or other property belonging to any person in attendance upon such meeting;

Shall be guilty of a misdemeanor. [1909 c 249 § 247; Code 1881 § 865; RRS § 2499.]

Using indecent or vulgar language, etc.: RCW 9.68.040.

Chapter 9.78
SHOPLIFTING

Sections

9.78.010 Shoplifting. A person who wilfully takes possession of any goods, wares or merchandise of the value of less than seventy-five dollars offered for sale by any wholesale or retail store or other mercantile establishment without the consent of the seller, with the intention of converting such goods, wares or merchandise to his own use without having paid the purchase price thereof, is guilty of a gross misdemeanor of shoplifting. Upon a first conviction therefor, he shall be punished by a fine of not less than fifty dollars and not more than one thousand dollars, or by imprisonment in the county jail for not less than five days and not more than six months, or both such fine and imprisonment. Upon each subsequent conviction he shall be punished by a fine of not less than five hundred dollars and not more than one thousand dollars, or by imprisonment in the county jail for not less than thirty days and not more than one year, or both such fine and imprisonment. [1967 c 76 § 1; 1959 c 229 § 1.]

Civil action for being detained to investigate shoplifting, reasonable grounds as defense: RCW 4.24.220.

Criminal action for being detained to investigate shoplifting, reasonable grounds as defense: RCW 9.01.116.

9.78.020 Arrest without warrant authorized, when. A peace officer may, upon a charge being made and without a warrant, arrest any person whom he has reasonable cause to believe has committed or attempted to commit the crime of shoplifting. [1959 c 229 § 2.]

9.78.040 "Peace officer" defined. For the purposes of this chapter "peace officer" means a duly appointed city, county or state law enforcement officer. [1959 c 229 § 4.]

Chapter 9.79
SEX CRIMES

Sections

Action for falsely charging sex crimes: RCW 4.24.120.

Attempt to commit a felony while armed: RCW 9.01.080.

Sexual psychopaths: Chapter 71.06 RCW.

Telephone calls soliciting immoral act: RCW 9.61.230-9.61.250.

9.79.010 Rape. Rape is an act of sexual intercourse with a person not the wife or husband of the perpetrator committed against the person's will and without the person's consent. Every perpetrator of such an act of sexual intercourse with a person of the age of ten years or upwards not his wife or husband:

(1) When, through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, the person is incapable of giving consent; or

(2) When the person's resistance is forcibly overcome; or

(3) When the person's resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her or him; or

(4) When the person's resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anaesthetic agent administered by or with the privity of the defendant; or

(5) When the person is at the time unconscious of the nature of the act, and this is known to the defendant;

Shall be punished by imprisonment in the state penitentiary for not less than five years. [1973 1st ex.s. c 154 § 122; 1909 c 249 § 183; 1897 c 19 § 1; 1887 p 84 § 1; Code 1881 § 812; 1873 p 187 § 37; 1869 p 204 § 35; 1854 p 80 § 33; RRS § 2435.]

Severability——1973 1st ex.s. c 154: See note following RCW 2.12.030.

Punishment by prevention of procreation: RCW 9.92.100.

Unlawful possession and use of narcotic drugs: RCW 69.32.080, 69.32.100, 69.32.130.

Provided, That if at any time before judgment upon an information or indictment, a defendant shall marry such person, the court shall order all further proceedings stayed. [1973 1st ex.s. c 154 § 128; 1909 c 249 § 189; 1905 c 33 § 1; Code 1881 § 816; RRS § 2441.]

Severability——1973 1st ex.s. c 154: See note following RCW 2.12.030.

Action by parent for seduction of daughter: RCW 4.24.020.
Action by woman for her own seduction: RCW 4.24.030.
Wife testifying against husband: RCW 5.60.060.

9.79.080 Indecent liberties, exposure, etc. (1) Every person who takes any indecent liberties with, or on the person of any other person of chaste character, without the other person's consent, shall be guilty of a gross misdemeanor;

(2) Every person who takes any indecent liberties with or on the person of any child under the age of fifteen years, or makes any indecent or obscene exposure of his person, or of the person of another, whether with or without his or her consent, shall be guilty of a felony, and shall be punished by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year. [1973 1st ex.s. c 154 § 129; 1955 c 127 § 1; 1909 c 249 § 190; 1937 c 74 § 2; RRS § 2442.]

Severability——1973 1st ex.s. c 154: See note following RCW 2.12.030.

9.79.090 Incest——Penalties. Sexual intercourse between any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, shall constitute the crime of incest and shall be punished as follows:

(1) When such act is committed by any male or female person upon a child under the age of ten years, such male or female person shall be guilty of incest and be punished by imprisonment in the state penitentiary for life;

(2) When such act is committed by any male or female person upon a child of ten years and under fifteen years of age, such male or female person shall be guilty of incest and be punished by imprisonment in the state penitentiary for not more than twenty years;

(3) When such an act is committed by any male or female person upon a child of fifteen years of age and under eighteen years of age, such male or female person shall be guilty of incest and be punished by imprisonment in the state penitentiary for not more than fifteen years;

(4) When such act is committed by persons eighteen years of age or more, such persons shall both be guilty of incest and be punished by imprisonment in the state penitentiary for not more than ten years. [1943 c 111 § 1; 1909 c 249 § 203; 1895 c 149 §§ 1, 2; 1873 p 209 § 127; 1869 p 225 § 121; Rem. Supp. 1943 § 2455.]

9.79.100 Sodomy——Penalties. Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:

(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.

(2) In all other cases by imprisonment in the state penitentiary for not more than ten years. [1937 c 74 § 3; 1909 c 249 § 204; 1893 c 139 § 2; RRS § 2456.]

9.79.110 Adultery. Whenever any married person shall have sexual intercourse with any person other than his or her lawful spouse, both such persons shall be guilty of adultery and upon conviction thereof shall be punished by imprisonment in the state penitentiary for not more than two years or by a fine of not more than one thousand dollars: *Provided*, That no prosecution for violation of the provisions of this section shall be commenced except on complaint of the husband or wife made before a committing magistrate, or by filing an affidavit with the prosecuting attorney, nor after one year from the commission of the offense. [1917 c 98 § 1; 1909 c 249 § 205; 1895 c 149 §§ 3, 4; Code 1881 §§ 943, 944; 1873 p 209 § 126; 1869 p 225 § 120; RRS § 2457.]

Adultery grounds for divorce: RCW 26.08.020.

9.79.120 Lewdness. Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, shall be guilty of a gross misdemeanor. [1909 c 249 § 206; Code 1881 § 948; 1873 p 209 § 126; 1869 p 225 § 120; 1854 p 95 § 117; RRS § 2458.]

9.79.130 Solicitation of minor for immoral purposes. Every person who solicits, entices or otherwise communicates with a child under the age of eighteen years for immoral purposes shall be guilty of a gross misdemeanor. [1961 c 65 § 2.]

Sexual psychopaths and psychopathic delinquents——Communicating with child for immoral purposes: RCW 71.06.010.

Chapter 9.80
SUICIDE

Sections

9.80.010 Defined. Suicide is the intentional taking of one's own life. [1909 c 249 § 133; RRS § 2385.]

9.80.020 Attempting suicide. Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two

Exhibit B

§ 21.06. Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
(b) An offense under this section is a Class C misdemeanor.

Tex. Penal Code §21.06 (1994)

Exhibit C

§ 16-6-2. Sodomy; aggravated sodomy

(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

(2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.

(b)(1) Except as provided in subsection (d) of this Code section, a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years and shall be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.
(2) A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

(c) When evidence relating to an allegation of aggravated sodomy is collected in the course of a medical examination of the person who is the victim of the alleged crime, the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of Title 17, shall be financially responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

(d) If the victim is at least 13 but less than 16 years of age and the person convicted of sodomy is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

Ga. Code §16-6-2 (1997)

CERTIFICATE OF SERVICE

I, PETER RAMEY, do hereby certify that on the 1st day of September, 2015, a true and correct copy of the foregoing was delivered to the following person in the manner indicated:

Nicholas Holce Deputy Prosecuting Attorney 240 W Alder St Ste 201 Walla Walla, WA 99362-2807	[X] VIA FIRST CLASS MAIL [ ] VIA CERTIFIED MAIL [ ] VIA HAND-DELIVERY [ ] VIA FACSIMILE AT: [ ] VIA E-MAIL TO: holcena@gmail.com

EXECUTED this 1st day of September, 2015, at Spokane, Washington.

PETER RAMEY
of UNIVERSITY LEGAL ASSISTANCE
RULE 9 LEGAL INTERN
WSBA #924583