

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CRS _____

STATE OF NORTH CAROLINA

v.

Defendant

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BRIEF IN SUPPORT OF
MOTION TO DISMISS

The Defendant, through counsel, has moved the Court to dismiss the charge of Soliciting A Crime Against Nature based on the unconstitutionality of North Carolina statutes relating to said charge in light of Lawrence v. Texas 539 U.S. ____ (2003) and other applicable opinions of the United States Supreme Court. In support of his motion, the Defendant submits the following brief to the Court:

ISSUE

Can the State continue to enforce N.C.G.S. 14-177 and N.C.G.S. 14-2.6 to punish the crime of “Soliciting to Commit a Crime Against Nature” in light of the Supreme Court’s holding in Lawrence v. Texas and other cases involving free speech and the right to privacy?

DEFENDANT’S PROPOSED ANSWER

No, in light of Lawrence v. Texas, the North Carolina law against Soliciting a Crime Against Nature is unenforceable in cases involving consenting adults.

ARGUMENTS

[Note, all page references in *Lawrence v. Texas* are to the slip opinion currently available on the Supreme Court's official website.]

Introduction – *Lawrence v. Texas*

In *Lawrence v. Texas* the United States Supreme Court declared invalid a Texas statute the purported to proscribe certain forms of sexual intimacy between consenting adults. Writing for the Court, Justice Kennedy stated “when homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject the homosexual persons to discrimination both in the public and private spheres.” *Lawrence* at page14.

The Decision in *Lawrence* was almost universally thought to have invalidated N.C.G.S. 14-177¹, commonly referred to as North Carolina's “Crime Against Nature” law as well.² One reason for this belief was the fact that clear majority of five justices on the High Court chose to base their decision on “due process” rather than “equal protection” rationale. In the words of Justice Kennedy:

¹ N.C.G.S 14-177 reads: Crime Against Nature. If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.

² "The initial indication is that the Supreme Court ruling casts serious doubt on the constitutionality of the North Carolina statute," wrote John Bason, public information officer for the N.C. Department of Justice, in an e-mail. "We will continue studying the opinion, and we will confer with the North Carolina Conference of District Attorneys, who have jurisdiction to bring charges under this seldom-used law." (From the Daily Tar Heel in Chapel Hill, North Carolina June 3, 2003); North Carolina wasn't explicitly mentioned in the ruling, and Attorney General Roy Cooper's office still wasn't completely sure what effect it would have on the state's crime against nature statute. Cooper said a cursory examination appears to show the "opinion casts serious constitutional doubt on North Carolina's law." (From the Charlotte Observer, June 27, 2003.)

Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if -drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants. *Lawrence v. Texas*, p. 14

Thus, the Court went out of its way to establish a broad rule applicable to all states seeking to ban sodomy. The state suggests that *Lawrence* should be read narrowly on the facts before the Court, but Justice Kennedy makes it clear that the Court's intention was to reach broadly and invalidate laws in states other than Texas. Thus the Court refused to make a distinction between the Texas law, which by its very terms referred to homosexual conduct and N.C.G.S. 14-177, which theoretically prohibited certain sexual acts regardless of the gender or orientation of the participants. That was a deliberate act on the part of the Supreme Court to extend ensure that its ruling extended beyond the narrow fact situation in Lawrence.

Unfortunately, what appeared to many observers to be a rather straightforward death blow to North Carolina's archaic "Crime Against Nature" law has been interpreted by some law enforcement and prosecutorial authorities in a strained and selective manner that leaves N.C.G.S. 14-177 largely intact. This interpretation is at odds with established constitutional law, including but certainly not limited to *Lawrence v. Texas*, and should not be sustained in the courts of this state.

In a recent directive to officers, the Charlotte Mecklenburg Police Attorney asserts that

- 1) A SOLCAN [Soliciting Crime Against Nature] charge wherein a subject offers to commit a crime against nature for money in either a private or public place is a valid charge and
- 2) A SOLCAN charge wherein the subject offers to commit a crime against nature in a public or at an unspecified location is a valid charge. [emphasis added.]

The memo also asserts that the Supreme Court “did not directly address the solicitation of a crime against nature.”

All of these assertions are incorrect.

There is no specific statute criminalizing the solicitation to perform a Crime Against Nature in North Carolina. “Solicitation” is a general category of offense that is entirely derivative of the underlying crime.³ If one solicits another to violate a valid criminal statute, he or she is punished two steps lower in the state’s structured sentencing scheme than the underlying offense. There is no freestanding offense known as soliciting and the soliciting statute presumes a valid underlying offense that is the subject of the solicitation.

Given this statutory and practical reality, one must first inquire whether or not N.C.G.S. 14-177 remains a valid statute. If not, then neither the United States Supreme Court nor any other Court need “directly address” the validity of the offense of Soliciting to Commit a Crime Against Nature” (SOLCAN). One cannot be guilty under North Carolina law of soliciting violations of an invalid or unconstitutional statute.

Some law enforcement and prosecutorial authorities seem to have adopted the viewpoint that *Lawrence v. Texas* invalidated anti-sodomy laws only insofar as private conduct in one’s home was concerned. In this view, the law remains valid as a prohibition against the conduct proscribed with enforcement limited to non-private venues. This narrow interpretation misreads the substance and meaning of *Lawrence*.

³ N.C.G.S. 14-2.6. Punishment for solicitation to commit a felony or misdemeanor.

a) Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor

b) Unless a different classification is expressly stated, a person who solicits another person to commit a misdemeanor is guilty of a Class 3 misdemeanor. (1993, c. 538, s. 6.1; 1994, Ex. Sess., c. 22, s. 13, c. 24, s. 14(b).)

In Overruling Bowers v. Hardwick the Court Indicated the CAN Law is Unconstitutional

The right to privacy has never been held to encompass only the right to be left alone in one's home. For example one has the right to purchase contraceptives in a public drug store and to advertise such products in the public media. "Privacy" in the constitutional sense is not limited to "behind closed doors."

In Lawrence Justice Kennedy quoted from Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)

The heart of the liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State. Lawrence at page 13.

In other words, the "liberty" inherent in the right to privacy is much more than the mere right to do things behind closed doors. It includes the right to make one's own choices in life regarding personal relationships and morality and to have those choices respected by the state. As outlined in both Justice Kennedy's majority opinion and Justice O'Connor's concurring opinion, the Constitution does not allow the state to single out a class of individuals for punishment based on mere moral disapproval of their sexual choices.

Nothing in Lawrence suggests that the state may not prohibit public sexual conduct. In fact, the Court's majority opinion made it clear that the facts in Lawrence did not involve "public conduct or prostitution." Lawrence at 18. A statute that seeks to prohibit the public or commercial expression of sexuality may be constitutionally valid. That does not, however, mean that N.C.G.S. 14-177 is such a statute or that it can be "amended" by law enforcement or prosecutors to accomplish that constitutionally valid purpose.

A proper reading of the intended scope of Lawrence requires reference the previous United States Supreme Court ruling in Bowers v. Hardwick. In Bowers v. Hardwick, (1986) 487 U.S. 186 a narrowly divided Court upheld a Georgia sodomy statute. It is important to understand that Bowers was a declaratory judgment action. The Plaintiff,

Hardwick, was not being actively prosecuted for violating the Georgia statute. He challenged the law on its face. *Thus, the challenge in Bowers was a not based on any specific factual scenario.*

Knowing that Bowers was a facial challenge to the Georgia statute is highly important because in Lawrence v. Texas Justice Kennedy, writing for a clear majority of at least five justices, specifically announced that it was “necessary to reconsider the Court’s holding in Bowers.” Lawrence at page 3. After a lengthy discussion of Bowers (consisting of fourteen pages in the slip opinion), Justice Kennedy concludes on page 17:

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled. Lawrence at page 17.

Had the Court wished to limit it’s holding to the specific facts involved in Lawrence, it could easily have distinguished, rather than overruled Bowers. But the Court did not do that. It did not uphold the general ability of the state to criminalize certain forms of sexual conduct between consenting adults and limit its holding to the facts contained in Lawrence (which involved a private dwelling). Instead the Court agreed that the original Georgia statute should have been overruled as being unconstitutional *on it’s face*.

Interestingly, the Georgia statute in question was almost identical to the scope of N.C.G.S. 14-177. The Georgia law read:

(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 another.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.
[Former Georgia Code Section 16-6-2.]

The prohibition against sex *per anum* and *per os*, regardless of sexual orientation or location, is precisely the definition our state courts have given to the conduct prohibited by N.C.G.S. 14-177. Ironically, Lawrence v. Texas did not affect the Georgia statute previously upheld in Bowers because the Georgia Supreme Court invalidated the law on

state constitutional grounds in Powell v. State 2790 Ga. 327 (1998). It remains undisputed, however, that the statute was challenged facially, and not *as applied* in Bowers v. Hardwick, and Justice Kennedy, while not being required to do so to reach the result in Lawrence, specifically overruled the Court's prior refusal to invalidate the Georgia law *on its face*.

In light of the specific overruling of Bowers, it is hard to see how a North Carolina law, essentially identical to a Georgia statute that the Court now says should have been declared unconstitutional in 1986 on its face can be said to have any constitutional validity.

N.C.G.S. 14-177 Is Unconstitutionally Vague and Over Broad

Prosecutorial authorities have attempted to “rescue” N.C.G.S. 14-177 by indicating that it can still be enforced only in “public” and “non private” settings. The statute, however, does not speak to public or private acts and makes no distinction as to the place where the allegedly prohibited acts take place. It is a broad and unrestricted attempt to criminalize forms of sexual expression that the Court in Lawrence found are well within the purview of consenting adults to choose.

There is strong evidence from the Supreme Court itself that it did not intend for Lawrence to be limited to acts performed in private. The day after deciding Lawrence v. Texas, the United States Supreme Court accepted certiorari in the case of Limon v. Kansas (Petition for Certiorari 02-583) for the sole purpose of sending the matter back to the Kansas Court of Appeals.

In Limon, a defendant had been found guilty of improper sexual conduct with a minor. Under Kansas' so called “Romeo and Juliet law”, he would have received a lighter punishment had his victim been a person of the opposite gender. The “Romeo and Juliet” law was adopted to soften penalties for sex offenses when the parties of similar ages. It did so, however, only when the parties were of opposite genders.

Nobody seriously contends that the offender in Limon was engaged in protected private behavior. Yet, the United States Supreme Court accepted certiorari in the case for the explicit purpose of vacating the judgment against Mr. Limon and sending his back to the Kansas Court of Appeals “for further consideration in light of Lawrence v. Texas.”

The Supreme Court could have upheld the Kansas Court’s holding -- that the disparity in punishment imposed for homosexual sex and sex between parties of opposite genders was constitutional -- by merely declining to accept the case. By granting certiorari, vacating the judgment and immediately sending the case back to Kansas with the instruction to re-examine **it in light of Lawrence**, the Court clearly indicated that Lawrence involves far more than conduct behind closed doors in one’s home. It indicated that even when the state can prohibit sexual conduct, it must do so even handedly and not in a discriminatory manner.

Even if the Court intended to limit its holding to “private” conduct, and to allow the discriminatory prosecution of specific forms of sexuality in public places, such a statute would have to be narrowly drawn and strictly construed in order to pass constitutional muster.

Under every North Carolina appellate case construing N.C.G.S. 14-177, the only element of the offense has always been that a person engaged in a sexual act *per anum* or *per os*. The State Supreme Court added a limitation that the law not be enforced against married people, but there has never been a locational or spatial element to the offense.

Prosecutors now propose to add a locational (or “public”) element to the offense via prosecutorial discretion, law enforcement discretion or judicial interpretation. Such a radical modification of the purpose and scope of the statute, however, requires an act of the legislature. In State v. Richardson 307 N.C. 692 (1983) the North Carolina Supreme Court **refused** to judicially *amend* the state’s prostitution statute to include acts other than vaginal intercourse. The Court stated that “if the legislature wishes to include within G.S. 14-204 other sexual acts such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since G.S. 14-204 is a criminal statute.” The Crime

Against Nature law presents a similar situation where neither the courts nor law enforcement can summarily add a “locational” element to an offense when the legislature has not chosen to do so.

The requirement that any locational (or “public”) element of the offense be enacted by the legislature is firmly rooted in the right of individuals to know with some degree of certainty when their conduct may offend the law.

Overbreadth and vagueness doctrine requires that the law provide adequate standards for law enforcement and the public. The term “a private place” is nowhere defined in North Carolina law. It was not the product of legislative debate or definition. Is a private automobile parked in a secluded location a “public place”? Is a deserted field? A secluded beach? On a dark night in the middle of a lake? Is one’s back yard a public place? Is the key question ownership, or accessibility to public view? Without any legislative guidance on these matters, citizens are left to inconsistent decisions by courts and arbitrary enforcement by the police.

The North Carolina Supreme Court has recognized the right to free association as a *fundamental* constitutional liberty. In *State v. Sanders* 37 N.C. App. 53 (1978) the court invalidated a statute that purported to make it illegal for persons of the opposite sex to occupy the same bedroom in any hotel or public boarding house for “immoral purposes”. The Court conceded that “every presumption is to be indulged in favor of the constitutionality of a statute” and further concluded that the statute could be read to further a proper governmental purpose. Nonetheless, the Court invalidated the statute for being too vague and indefinite

If the legislative intent is to prescribe illicit sexual intercourse the statute could have specifically provided. Where the legislature declares an offense in language so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, citizens subject to the statute may not be required to guess at their peril its true meaning. Such a statute is too vague, and it fails to comply with constitutional due process standards of certainty. *Sanders* at page 55.

In this case the legislature has prescribed no standards whatsoever to define what constitutes a “public place”. Enforcement and prosecutorial discretion cannot substitute for a clear and precise definition.

Not only is the fundamental right to freedom of association implicated in Soliciting for Crime Against Nature (SOLCAN) prosecutions, the fundamental right to free speech under the First Amendment is also implicated. Charges under “SOLCAN”, involve what one says, not what one actually does.

Freedom of speech is a fundamental constitutional right and may be abridged only to advance a compelling state interest. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). In such cases, (as with the freedom of association recognized in *Sanders* by our state Supreme Court) a law that abridges speech must be narrowly drawn and not vague in any manner. Moreover, it must not attempt to regulate speech based on the content of the speech.

It is clear that the statute as now written could be used to punish constitutionally protected, as well as unprotected speech. On its face, the North Carolina law criminalizes the solicitation of any “Crime Against Nature” whether in public or private. Under the strict scrutiny analysis applied to First Amendment rights, a law that is overbroad on its face cannot be saved by selective enforcement designed to stay within constitutional parameters.

Furthermore, the enforcement parameters some prosecutors want to place on the law are inexact at best. For example, the Charlotte-Mecklenburg Police attorney suggests that it is a “valid charge” if one “offers to commit a Crime Against Nature at an unspecified place.”

Strict scrutiny analysis does not allow the state to place the burden on individuals to justify their speech. A person who engages in a conversation of a sexual nature with another consenting adult should not be required to affirmatively declare that any

encounter would not happen in a prohibited location. The law cannot presume that he or she is speaking of such a prohibited location, absent an affirmative statement to the contrary. An “unspecified place” is just that – unspecified.

To meet constitutional standards, the state must craft a law that infringes on the rights to free speech and free association only in the narrow parameters that are allowed by the Constitution. The North Carolina Court of Appeals addressed a similar issue in *Treants Enterprises v. Onslow County*, 94 N.C. App. 453 (1989). In *Treants*, the Court invalidated a local ordinance for both unconstitutional vagueness and overbreadth. The ordinance sought to regulate “escort bureaus” but the Court found that the definition of “escort” was not sufficiently definitive to be constitutional. Interestingly, the Court did not attempt to amend or remedy the deficiency by interpreting the term in a manner that would have made the law constitutional.

If the legislature wishes to limit public sexual activity, and more importantly, public discussions about proposed sexual activity, it must clearly define the prohibited conduct. The SOLCAN law, which recognized no distinction between public and private conduct, cannot be informally “amended” by law enforcement and/or prosecuting authorities or the Courts. Only the legislature can craft such a law, and in doing so it must do so clearly, narrowly and without ambiguity.

Perhaps it is unfortunate that North Carolina’s legislature, which can pass tax breaks for large corporations in a matter of days, has not addressed the law enforcement concerns that have arisen since the decision in *Lawrence v. Texas*. If N.C.G.S. 14-177 is indeed a constitutionally invalid law, there appears to be no specific prohibition against public sexual conduct that does not involve commercial intercourse or the exposure of one’s private parts to members of the opposite gender.⁴

⁴ N.C.G.S. 14-190.9 reads: Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

The current situation could be resolved by specific legislation, which does not implicate either the First Amendment or the right to privacy enunciated in Lawrence and prior Supreme Court decisions.

With regard to non-commercial public sexual expression, lawmakers could craft a narrowly drawn, well defined and specific law to limit or prohibit sexual conduct in public venues for all citizens regardless of orientation or preferred sexual activities.

It is understandable that law enforcement and prosecutors would seek some method within the existing legal framework to regulate a perceived problem with public sexual activity. N.C.G.S.14-177, which was not enacted for that purpose, and which never contained either a “commercial” or a “public” element of the offense, cannot be used as a substitute for properly drafted (and constitutional) legislation directly addressing the issue. If a problem exists, the remedy lies with the legislature, not in attempts to amend the unconstitutional Crime Against Nature law by prosecutorial discretion or *ad hoc* law enforcement interpretation

N.C.G.S. 14-177 Violates the Equal Protection Clause of the United States Constitution

In previous hearings, the State has made much of the fact that Lawrence was decided on Due Process rather than Equal Protection grounds. The implication is that Equal Protection analysis is not relevant in determining the constitutionality of North Carolina’s Crime Against Nature law. There is nothing in Lawrence to support the State’s position.

While the five-member majority in Lawrence did not utilize the Equal Protection Clause to invalidate the Texas law, nothing in their opinion suggests they found the equal protection arguments to be invalid. Indeed, Justice O’Connor based her concurring opinion on the Equal Protection Clause and Justice Kennedy, writing for the five-member majority, stated that the equal protection argument was “tenable”. He chose to invalidate the Texas law on the basis of the Due Process Clause in order to make it clear that states with allegedly “orientation neutral” anti-sodomy laws were also implicated in the decision.

The Court had already addressed the equal protection argument in *Romer v. Evans*, 517 U.S. 620 (1996). In that case the Court struck down a provision in the Colorado state constitution that “named as a solitary class persons who were homosexuals, lesbians, or bisexual either by orientation, conduct, practices or relationships...and deprived them of protection under state anti-discrimination laws.” *Lawrence* at page 14, quoting from *Romer*. In *Romer* the Court concluded that the provision was “born of animosity toward a class of persons affected” and that “it had no rational relationship to a legitimate governmental purpose.”

It is of critical importance to note that Justice Kennedy, the author of the majority opinion in *Lawrence* was also the author of the majority opinion in *Romer*. Nowhere in *Lawrence* does he repudiate *Romer*. In fact, he quotes *Romer* with approval numerous times. It is reasonable to conclude that the logic and rationale of *Romer*, which is universally acknowledged to be good law to this day, applies to North Carolina’s Crime Against Nature law as it does to every other statute enacted by the legislature.

What *Lawrence* did was to remove a perceived exception to the logic of *Romer*. As long as *Bowers* was good law, it was assumed that the equal protection principles discussed in *Romer* did not apply in the context of homosexual relations. Now that the Supreme Court of the United States has overruled *Bowers*, and concluded that consenting adults have a fundamental *constitutional* right to express intimacy *per anum* and *per os*, there is no logical reason to treat individuals differently based on their choice of sexual expression.

The very basis of North Carolina’s Crime Against Nature law has always been a value judgment that certain forms of sexuality are worthy of blanket condemnation. This is unconstitutional according the plain holding in *Romer*.

“..laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward a class of persons affected. [I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare....desire to harm a politically unpopular group cannot constitute a legitimate government interest” *Romer* at page 634

In her concurring opinion in *Lawrence*, Justice O'Connor stated clearly "moral disapproval of this group [homosexuals], like a bare desire to hurt the group, is an interest insufficient to satisfy the rational basis review under the Equal Protection Clause.

She added:

Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Lawrence v. Texas, concurring opinion of Justice O'Connor, p. 4-5*

North Carolina's "Crime Against Nature" law was clearly "*born of animosity toward a class of persons.*" In fact, prior to the 1980's the crime was referred to in the statutes as "the abominable and detestable crime against nature." *State v. Whittemore, 255 N.C. 583, 585, 122 S.E. 2d 396.* Although theoretically applied to heterosexual as well as homosexual individuals, it clearly exempts a common form of sexual expression among heterosexuals, to wit: vaginal intercourse. (Whether that remains the *most* common form of sexual expression among heterosexuals is debatable, but irrelevant.)

In this case, it matters not whether the group subject to moral disapproval is homosexuals in particular, or people who engage in oral sex (such as the 42nd President of the United States) in general. The mere fact that the some may disapprove of certain forms of consensual adult sexuality does not allow the State to codify that disapproval in the form of laws criminalizing such activities or laws discriminating against those who make such choices.

The state may further a legitimate governmental interest by prohibiting public sexual activity (to protect children and shield third parties from the unwanted viewing of sexual conduct, for example). In light of both *Lawrence* and *Romer*, however, it is impossible to

see how prohibiting the sexual acts common to homosexuals while exempting a common form of sexuality amongst heterosexuals (whether married or not), and exempting married people entirely, has any rational relationship to that governmental interest. Other than the very prejudice and animosity condemned in both Lawrence and Romer, there is no basis for the distinction.

In addition to clearing the way for Romer's equal protection analysis to be applied to the Crime Against Nature law (as it applies to every other state statute), the Court also specifically appears to have indicated that Lawrence should be applied in light of Equal Protection principles when it sent the Limon case back to Kansas.

Based on the Court's terse instructions in Limon it appears that a state cannot purport to punish one for engaging in oral and/or anal sex in public while not similarly punishing vaginal sex, solo masturbation, or mutual masturbation in the exact same setting. *In remanding Limon, the Court has indicated that even in situations where the conduct is not protected, there cannot be a disparity in punishment based on whether the sex act involves traditional vaginal intercourse or sexual practices common to homosexuals and others.*

The privacy liberty invoked in Lawrence is about much more than the right to do things behind closed doors (whether the door is to a closet or an entire bedroom). It is about the liberty to be who one is without undue interference by the government. There is no constitutional right to engage in sex acts in public settings. States can, and probably should, proscribe such activities. The state may not, however, proscribe the activity based on the nature of one's sexuality. A law such as N.C.G.S. 14-177 which prohibits nearly all forms of homosexual sexuality, while exempting the most common (and some would argue "normative") form of heterosexual sexuality cannot stand in the face of Romer, Lawrence, and Limon. This principal is important not only to homosexuals, but to heterosexuals who do not wish to limit their sexual options to those approved by state legislators.

To quote Justice O'Connor in her concurring opinion in Lawrence v. Texas:

A state can of course assign certain consequences to a violation of the criminal law. But the state cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. Lawrence v. Texas, concurring opinion, p. 6.

CONCLUSION

The statutes under which the Defendant was charged are no longer enforceable with regard to acts not involving animals or children and are in violation of the United States Constitution. This is based on no fewer than three independent arguments:

1. The Supreme Court considered a facial challenge to a nearly identical Georgia statute in Bowers v. Hardwick in 1986 and did not find the law unconstitutional. In Lawrence v. Texas, however, the Supreme Court declared that Hardwick was **wrongly decided at the time**. Therefore, the Court has stated in no uncertain terms that a practically identical prohibition in Georgia was unconstitutional on its face without the need to inquire into the facts or engage in an “as applied” analysis.
2. The law, if applied only to “public” acts is unconstitutionally vague and over broad. The Crime Against Nature statute contains no spatial or locational definitions or elements. Strict scrutiny is the appropriate standard by which to measure the constitutionality of laws implicating the fundamental right to freedom of association and the right to freedom of speech. SOLCAN prosecutions implicate both. Supplying the additional elements of the offense by prosecutorial or law enforcement discretion does not provide a constitutionally definitive definition of the crime.
3. With the reversal of Bowers v. Hardwick the equal protection principles outlined in Romer v. Evans apply to the Crime Against Nature law just as they apply to every other law. Non-commercial sexual choices by consenting adults are no longer an area in which states may constitutionally legislate. A law that, by its

very definition, criminalizes only certain forms of adult sexuality while exempting others cannot be said to fulfill a legitimate state interest. The state may not allow the vaginal sex in public while criminalizing other expressions of sexuality.

For each of the foregoing reasons, the charges against the Defendant must be dismissed.

Respectfully submitted, this ____ day of October 2003

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