

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
03 CRS \_\_\_\_\_

STATE OF NORTH CAROLINA

v.

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Defendant

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SUPPLEMENTAL  
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 previously appeared before the Court for oral arguments. The Court has now instructed counsel to address the issue of making a facial challenge to the statute in greater detail.

Question Presented

When is it appropriate for the Court to consider and rule upon a facial challenge to a statute rather than applying a factual “as applied” analysis?

Defendant’s Response

The Defendant respectfully shows the Court that:

*Argument One: The United States Supreme Court has already answered this question in Lawrence v. Texas.*

In the *Lawrence v. Texas*, as previously cited to the Court, Justice Kennedy, wrote that *Bower v. Hardwick* was “**wrongly decided at the time**”. *Bowers* was a facial challenge to a Georgia law that was virtually identical in scope and coverage to N.C.G.S. 14-177.

There was no ongoing prosecution in that matter and no facts to consider. By stating that *Bowers* was “wrongly decided at the time”, the Court has stated unequivocally that a facial challenge to such laws is proper and should be granted.

*Argument Two: Vagueness and Overbreadth challenges are by their very nature facial.*

Both federal and state constitutional law recognize that a criminal statute must be sufficiently clear and unambiguous so as to give law enforcement, prosecutors, the Courts and most importantly, citizens, a clear understanding of the conduct to be prohibited.

North Carolina Appellate Courts have addressed the vagueness and/or overbreadth issue a number of times. In the case of *Treants v. Onslow County*, 94 N.C. App. 453 (1989) the Court of Appeals voided an ordinance purporting to regulate escort businesses for vagueness and overbreadth even though there was no evidence the law had been applied in an unconstitutional manner.

In the case of *Affordable Care v. N.C. State Board of Dental Examiners* 153 N.C. App. 527 (2002), (brought to the attention of the parties by the Court in its request for these supplemental arguments) the Court of Appeals actually considered the vagueness issue. Although the Court found the rule in question in *that* case **not** to be impermissibly vague, the Court did not hesitate to consider the question and the Court did not suggest that a facial challenge on *vagueness* grounds was inappropriate in the matter.

In the present case there is no statutory language at all from which to construct the State’s desired additional elements of the offense (that the act solicited be in a public or undefined place or for money). It is harder to imagine how it could be *more* vague.

*Argument Three: Strict or heightened scrutiny is the proper standard in of review in this case.*

In the Affordable Care case the Court of Appeals took considerable pains to consider if a “fundamental right” was implicated by the rule challenged in that matter. The Court concluded that the right to engage in a business was not a “fundamental right.” Therefore, in the Affordable Care case, the court applied the much more difficult “rational basis” test to the facial challenge. The finding that the right to engage in business was *not* a fundamental right was the foundation of the Court’s language about the difficulty of mounting a facial challenge to the challenged regulation. It is indeed difficult to mount a facial challenge to a law or rule when the “rational basis” test is applied. When a fundamental constitutional right is implicated, however, the “rational basis” test is not applied.

It is settled constitutional law, however, that the Court should apply the “strict scrutiny” test when a law, rule or regulation affects a fundamental right. The State argues that Lawrence did not create a fundamental right for adults to engage in consensual sexual acts. That is debatable. The Supreme Court appears to have indeed created such a right.

At the very least, it is most likely that the United States Supreme Court views the right recognized in Lawrence in a similar light to the abortion right recognized in Roe v. Wade 410 U.S. 113 (1973). Both Roe and Lawrence are grounded in the Ninth and Fourteenth Amendment based right to privacy. The abortion right described in Roe and its progeny is somewhat less immune to regulation than traditional fundamental rights of free speech, free association and other First Amendment rights, but it is still accorded a great deal more protection than ordinary rights. The Court has never applied the “rational basis” or “as applied” tests to measure laws that regulate contraceptive or abortion rights.

It is arguable that the right in Lawrence is greater than the abortion right described in Roe since the countervailing state interest in the promotion of potential life, recognized in the abortion decisions, does not exist in the matter of regulating non procreative sex. At the very least, however, the right announced in Lawrence, arising from the same Ninth and Fourteenth Amendment roots as the right acknowledged in Roe, cannot be said to be *less* important than the abortion right announced in Roe. With that in mind, it is important to recognize that the nation’s Highest Court routinely upholds facial challenges to laws that

infringe on the right to abortion. Akron v. Akron Center for Reproductive Health 462 U.S. 416 (1983), Thornburgh v. Amer. Coll. of Obstetricians 476 US 747 (1986).

Nonetheless this Court need not decide whether the right announced in Lawrence is a *fundamental* right. A charge of “Soliciting A Crime Against Nature” implicates several other undeniably fundamental rights, including the right to free speech and the right to association. (See Treants v. Onslow County, wherein the North Carolina Court of Appeals recognized the right to association as a fundamental constitutional right).

Under the “strict scrutiny” test (and the slightly less restrictive “heightened scrutiny test applied in abortion cases) the State must show that it used the least restrictive and most narrowly drawn language to accomplish a legitimate state purpose. The current “Crime Against Nature Statute”, which was designed to restrict a broad range of conduct, cannot meet that test.

*Argument Four: Even Under the Rational Basis Test the law serves no rational governmental interest.*

Even under the rational basis test, N.C.G.S. 14-177 serves no legitimate governmental interest. The law was designed to criminalize all non marital consensual sexual relations *per anum* and *per os*. The United States Supreme Court has declared this to be unconstitutional. The State’s *new* proffered rationale for the law is apparently to protect the public from viewing public sex acts. Under the “rational basis test”, however, a law or regulation must be rationally related to the legitimate governmental interest it seeks to advance. It is conceded that regulating public sex acts may be a legitimate governmental interest. A law that prohibits sex acts *per anum* and *per os*, but not intercourse or masturbation, however, is not rationally related to the stated governmental purpose. As stated in Romer v. Evans, 517 U.S. 620 (1996), a law “born of an animosity toward a class of persons affected” can have “no rational relationship to a legitimate governmental purpose.” Romer at page 634.

Even under the difficult to meet “rational basis test” for a facial challenge, N.C.G.S.14-177 cannot in be said to be constitutional under any circumstances. The newly discovered governmental interest is legitimate, but the statute cannot be read under any set of circumstances to actually advance that governmental interest. There is no rational basis for allowing intercourse and masturbation in situations where oral sex is prohibited. There is only an impermissible *animus* towards a specific class of individuals, which is not a permissible governmental justification for a statute. Romer

Respectfully submitted, this \_\_\_\_ day of November 2003.

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