In the

Court of Appeals of Virginia

Appeals from the
Circuit Court of the City of Roanoke

RECORD NOS. 1587-99-3,
1595-99-3 THROUGH 1601-99-3,
1619-99-3, AND 1920-99-3

ELVIS GENE DePRIEST, *et al.*,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF AMICUS CURIAE THE LIBERTY PROJECT IN SUPPORT OF APPELLANTS

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v.	)	1595-99-3 through 1601-99-3, inclusive;
	)	1619-99-3; and
COMMONWEALTH OF VIRGINIA	)	1920-99-3.
	)	
Appellee.	)	
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BRIEF OF AMICUS CURIAE
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INTEREST OF AMICUS

Virginia's own Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The organization espouses vigilance over regulation of all kinds, as well as restriction of individual civil liberties such as the rights to free speech and to association, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to privacy, a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual. Laws prohibiting private sexual activity between consenting adults are of particular concern to The Liberty Project because they undermine or destroy the right to privacy. Because they are not consistently enforced, such laws also present a particular danger of misuse, with extremely severe consequences for targeted individuals. In addition to the direct

imposition on the right of privacy and the possible loss of physical liberty, conviction under the crimes against nature statute at issue in this case also limits other individual liberties, including the rights to vote, to bear arms, to raise one's children, and to practice certain professions. The Liberty Project's strong interest in the protection of this broad spectrum of liberties for all citizens will allow it to provide this Court with additional insight into the constitutional values at stake in this case.

STATEMENT OF THE CASE

This case involves constitutional challenges to the Virginia Crimes Against Nature Statute. Each appellant was indicted by the Grand Jury attending the Circuit Court of the City of Roanoke at its November, 1998 term, and charged with a single count of violating § 18.2-29 of the Code of Virginia by soliciting another person to commit the felony of "crime against nature" as defined in § 18.2-361A of the Code of Virginia. All appellants filed similar motions to dismiss the indictments against them on several State and Federal constitutional grounds, including (1) that the crimes against nature statute on its face violated the right to privacy guaranteed by the Virginia Constitution, and (2) that conviction under this statute for solicitation of consensual acts would violate the prohibition on cruel and unusual punishments embodied in the Eighth Amendment of the United States Constitution and analogous provisions of the Virginia Constitution. These constitutional issues were briefed and argued, and on May 3, 1999, the trial judge read from the bench his written opinion, dated April 29, 1999, denying appellants' motions to dismiss, to which rulings the appellants duly objected.

On June 8, 1999, the trial court accepted a plea of guilty entered by each appellant pursuant to a plea agreement with the Commonwealth, under which each appellant reserved his

right to seek appellate review of the judgment of conviction, including the trial court's denial of his motion to dismiss on constitutional grounds. Each appellant's appeal was timely noted, and a joint petition for appeal was filed on October 12, 1999. On December 13, 1999, the appeal was granted in part, including the questions of whether the Crimes Against Nature statute violates the fundamental right to privacy guaranteed by Article I of the Constitution of Virginia, and whether that statute violates the prohibitions on "cruel and unusual punishments" contained in Article I, Section 9 of the Constitution of Virginia and the Eighth Amendment of the United States Constitution. Appellants sought reconsideration of the denial of one additional issue raised by their petition, and on April 21, 2000, the court granted appeal on that additional issue.

QUESTIONS PRESENTED

1. Does the Virginia Crimes Against Nature statute, Va. Code § 18.2-361A, violate the fundamental right of privacy inherent in the Virginia Constitution insofar as it prohibits private, noncommercial sexual conduct between consenting adults? (Transcript of 5/3/99 hearing, pp. 26-27; Transcript of 6/8/99 Conditional Plea and Sentencing Hearing, pp. 7-8, 25-26, 33-34, 37, 51-52)

2. Does the classification of private, noncommercial sexual relations with another consenting adult as a Class 6 felony under the Virginia Code violate the protection against cruel and unusual punishments under the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Virginia Constitution? (Transcript of 5/3/99 hearing, pp. 26-27; Transcript of 6/8/99 Conditional Plea and Sentencing Hearing, pp. 7-8, 25-26, 33-34, 37, 51-52)

SUMMARY OF FACTS

Amicus curiae The Liberty Project adopts the statement of the facts included in the Brief of Appellants.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Virginia Crimes Against Nature statute, Va. Code § 18.2-361A, a person may be charged with and convicted of a felony for engaging in private, noncommercial sexual conduct with another consenting adult. Moreover, a person may be charged with and convicted of a felony for asking other adults if they are interested in engaging in such conduct. Va. Code

§ 18.2-29. A person convicted under either statute is classified as a Class 6 felon, subject to as much as five years imprisonment. See Va. Code § 18.2-10. In addition, as a result of being convicted of asking about or engaging in noncommercial, consensual, private sexual activity with another adult, an offender is stripped of the right to vote, the right to serve on a jury, and the right to possess firearms, among other hardships. An offender also suffers the stigma of being forever labeled a convicted felon.

An adult's right to engage in consensual sexual conduct in private is a matter of intimate personal concern at the heart of the fundamental right to privacy inherent in the Virginia Constitution's guarantee of personal liberty. Recognizing this right to privacy as encompassed by the guarantee of liberty, courts across the country have concluded that, even in the absence of express constitutional privacy provisions, laws criminalizing noncommercial, consensual sexual activity are unconstitutional. Section 18.2-361A of the Virginia Code likewise violates the right to privacy implicit in the Virginia Constitution.

Furthermore, the classification of asking about, or having, private, noncommercial sexual relations with another consenting adult as a Class 6 felony under the Virginia Code violates the protection against cruel and unusual punishments under the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Virginia Constitution, because the authorized term of imprisonment and the consequences of being labeled a felon are disproportionate to the offense.

For these reasons, this Court should declare section 18.2-361A of the Virginia Code unconstitutional, and reverse appellants' convictions.

ARGUMENT

I. Section 18.2-361A of the Virginia Code Violates the Fundamental Right to Privacy Implicitly Guaranteed by the Virginia Constitution.

Article I, Section 1 of the Virginia Constitution guarantees the right to liberty:

> Equality and rights of men – That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The Commonwealth's concern for liberty is further reflected throughout Article I of the Constitution. Section 10 prohibits general warrants, Section 11 protects against the deprivation of liberty without due process of law, Section 12 establishes freedom of speech and the press as "the great bulwarks of liberty," and Section 15 protects the "blessings of liberty." Together, these provisions indicate a strong commitment by the Commonwealth's citizens to the protection of individual liberty.

Consistent with this commitment, the courts of the Commonwealth read the liberty guarantee in Article I, Section 1 expansively:

> The word "liberty," as used in the Constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment.

Young v. Commonwealth, 45 S.E. 327, 328 (Va. 1903). Indeed, although Virginia's Constitution does not include an express right to privacy, the courts have recognized that liberty, as guaranteed by the Virginia Constitution, encompasses the notion of individual privacy. See, e.g., McClannan v. Chaplain, 116 S.E. 495, 499 (Va. 1923) ("It is the personal and political

liberty of the citizen, especially the privacy of his home and his papers, which is sought to be protected by the common-law rule against 'unreasonable' search and seizure."). Against this backdrop, and in light of this Court's freedom to interpret state constitutional provisions as according greater protection to individual rights than similar provisions of the United States Constitution, Arizona v. Evans, 514 U.S. 1, 8-9 (1995), this Court should recognize the Virginia Constitution's liberty guarantee as protecting private, noncommercial sexual activity between consenting adults from governmental intrusion.[1/]

Such recognition, "rather than being the leading edge of change, is but a part of the moving stream." Kentucky v. Wasson, 842 S.W.2d 487, 498 (Ky. 1992). Since Bowers v. Hardwick, 478 U.S. 186 (1986), every state supreme court to have reached the merits of the issue has concluded that laws against private, noncommercial sexual activity between consenting adults violate state constitutional privacy rights, and at least seven states and the District of Columbia have repealed or struck down such laws.[2/] Even states with constitutions that do not

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1/ Significantly, Bowers v. Hardwick, 478 U.S. 186 (1986) does not control this Court's analysis of the state constitutional issues. That court expressly recognized the fact that a federal constitutional decision "raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds." Id. at 190.

2/ See Nev. Rev. Stat. Ann.§ 201.190 (limiting application of statute to public acts); D.C. Code § 22-3502 (repealed by D.C. law 10-257, S 501(b), 42 DCR 53 (May 23, 1995)); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding Kentucky statute unconstitutional); Gryczan v. Montana, 942 P.2d 112 (Mont. 1997) (affirming unconstitutionality of Montana statute); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding Tennessee statute unconstitutional); R.I. Gen. Laws § 11-10-1 (amended by 1998 R.I. Pub. Laws 98-H 7585 to exclude sodomy); Powell v. Georgia, 510 S.E.2d 18 (Ga. 1998) (holding Georgia statute unconstitutional); Williams v. Maryland, No. 98036031/CC-1059 (Md. Cir. Ct. Baltimore City Jan. 20, 1999) (consent decree eliminating enforcement of Maryland sodomy statutes for private, noncommercial, consensual activity).

provide an express right of privacy have construed their liberty guarantees, among other provisions, to protect a fundamental right of privacy and to prevent governmental interference in people's private, noncommercial, consensual sexual decisions. These courts have concluded that sodomy laws, like section 18.2-361A of the Virginia Code, do not pass constitutional muster.

In Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996), for example, the court concluded that the Homosexual Practices Act, which criminalized private, consensual, non-commercial sexual activity, violated the right to privacy under the Tennessee constitution. The court reasoned that the right to privacy, "while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights," including provisions protecting against the deprivation of liberty, and guaranteeing freedom of worship, freedom from unreasonable searches and seizures, freedom of speech and press, and freedom from quartering soldiers in time of peace. Id. at 260-61. As discussed above, similar protections in the Virginia Constitution evince the same concern that a citizen's right to privacy be protected.

The Kentucky Constitution also contains no express right to privacy. See Kentucky v. Wasson, 842 S.W.2d 487, 492 (Ky. 1992). Nevertheless, the Kentucky Supreme Court held that a statute criminalizing sexual intercourse with someone of the same sex, even where consensual and noncommercial, violates the right to privacy as grounded in the constitutional guarantee of liberty. See id. at 492-95. In particular, Wasson construed portions of the Kentucky Bill of Rights, which closely resemble the language in Article I, Section I of the Virginia Constitution, to implicitly protect privacy rights. See id. at 494 (relying on the following declarations in the Kentucky Bill of Rights: "All men are, by nature, free and equal, and have certain inherent and

inalienable rights, among which may be reckoned: . . . [t]he right of enjoying and defending their lives and liberties. . . The right of seeking and pursuing their safety and happiness.").

More recently, in Powell v. Georgia, 510 S.E.2d 18 (Ga. 1998), the Supreme Court of Georgia concluded that a statute criminalizing "the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent" – the same statute challenged in Bowers v. Hardwick – violated the fundamental state constitutional right to privacy. The court ruled that "such activity is at the heart of the Georgia Constitution's protection of the right of privacy," stating that "[w]e cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." Id. at 24-26. Again, like the Virginia Constitution, the Georgia Constitution does not include an express right to privacy. The court instead held that the Georgia Constitution's liberty guarantee protected the right of privacy. See id. at 21.

In sum, there is nothing novel about recognizing that a law criminalizing private noncommercial sexual conduct between consenting adults violates a constitutional right to privacy. See also Pennsylvania v. Bonadio, 415 A.2d 47, 50 (Pa. 1990) (holding that "deviate sexual intercourse" statute regulating the private conduct of consenting adults "exceeds the valid bounds of the police power"); Gryczan v. Montana, 942 P.2d 112, 125 (Mont. 1992) (holding that private consensual, noncommercial sexual conduct is protected by constitutional right of privacy); Commonwealth v. Balthazar, 318 N.E.2d 478, 481-482 (Mass. 1974) (concluding that statute prohibiting "unnatural and lascivious" acts "must be construed to be inapplicable to private, consensual conduct of adults"); Louisiana v. Smith, 729 So. 2d 648, 652 (La. Ct. App.

1999) (holding that statute criminalizing "private, non-commercial sexual activity between consenting adults" violates the state constitutional right to privacy), review granted 746 So. 2d 612 (La. 1999); Texas v. Morales, 826 S.W.2d 201, 204-05 (Tex. Ct. App. 1992), overruled on other grounds, 869 S.W.2d 941 (Tex. 1994) (holding that, even in absence of express constitutional privacy provision, statute criminalizing private sexual relations between consenting adults of same sex, violated state constitution's guarantee of privacy); New Jersey v. Ciuffini, 395 A.2d 904, (N.J. Super. Ct. App. Div. 1978) (striking down statute criminalizing sodomy).

In keeping with the Virginia Constitution's guarantee that Virginia citizens have the inherent right to enjoy life and liberty and to pursue and obtain happiness and safety, and in line with other state courts across the nation construing similar state constitutions, this Court should conclude that section 18.2-361A of the Virginia Code violates the implicit right to privacy found in the Virginia Constitution's guarantee of personal liberty. Accordingly, the solicitation of such conduct cannot be constitutionally punished as criminal.[3/]

3/ This Court's opinion in Santillo v. Commonwealth, 30 Va. App. 470, 481, 517 S.E.2d 733, 738-739 (Ct. App. 1999), is not to the contrary. In that case, this Court declined to decide the constitutionality of section 18.2-361A of the Virginia Code as applied to heterosexual acts between consenting adults, concluding that the facts established that the sexual activity was not consensual.

II. Conviction under Section 18.2-29 of the Virginia Code in This Case Violates the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution and of Article I, Section 9 of the Virginia Constitution.

The "cruel and unusual punishments" clause of the Eighth Amendment of the United States Constitution "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277, 284 (1983). Three factors are relevant to the proportionality analysis: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction for other crimes; and (3) sentences imposed for commission of the same crime in other jurisdictions. See id. at 290-92; Harmelin v. Michigan, 501 U.S. 957 (1991).[4/] Here, appellants are punished as felons for asking other adults to engage in consensual, non-commercial sexual conduct. Under

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4/ In Harmelin v. Michigan, 501 U.S. 957 (1991), the multiple opinions of the Court expressed different views on the application of the factors identified in Solem, but the votes of seven justices left no doubt that proportionality review remains the rule. In an opinion concurring in the judgment, joined by two other justices, Justice Kennedy endorsed a narrow proportionality review that emphasizes the first Solem factor – the gravity of the offense and the harshness of the penalty – and would not engage in the intrajurisdictional and interjurisdictional comparisons unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 501 U.S. at 1005. The four Harmelin dissenters reaffirmed their commitment to the original Solem approach. Only two justices indicated that Solem was wrongly decided, see id. at 965, and Solem was not overruled.

Lower courts disagree about whether Solem or the Harmelin concurrence controls the analysis. See, e.g., United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 38-39 (2d Cir. 1992) (applying Solem); United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995) (noting the "continuing applicability of the Solem test"); Hawkins v. Hargett, 200 F.3d 1279, 1281-1283 (10th Cir. 1999) (applying Justice Kennedy's Harmelin concurrence). This disagreement is irrelevant for the present case, however, as under both theories, a grossly disproportionate penalty violates the Eighth Amendment and an inference of gross disproportionality warrants the intrajurisdictional and interjurisdictional comparisons. See Solem, 463 U.S. at 290-92; Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring).

each of Solem factors, Virginia Code § 18.2-361A in conjunction with Virginia Code § 18.2-29, clearly imposes an unconstitutionally disproportionate penalty.

A. The Gravity of the Offense Does Not Justify the Authorized Penalty and the Consequences of Conviction.

Under Virginia Code § 18.2-361A, private, noncommercial sexual activity between consenting adults is classified as a Class 6 felony. Because such activity is a felony, it is also a Class 6 felony to ask another person to engage in such conduct. Va. Code § 18.2-29. Thus, if § 18.2-361A did not classify the conduct described there as a felony, appellants could not be punished as Class 6 felons. Both the conduct and the solicitation are punishable by a term of imprisonment of up to five years. See Va. Code § 18.2-10. Neither the courts of the Commonwealth nor the United States Supreme Court have ever considered whether section 18.2-361A of the Virginia Code (or any similar statute) violates the Eighth Amendment.[5/] In his concurring opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), in which he cast the decisive vote to sustain Georgia's sodomy law against a federal privacy challenge, however, Justice Powell stated that a prison sentence for consensual sodomy would pose grave Eighth Amendment problems:

> In my view, a prison sentence for such conduct – certainly a sentence of long duration – would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first-degree arson, and robbery.

5/ It should be noted that the plaintiffs in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court), raised multiple constitutional challenges, including an Eighth Amendment argument, to section 18.2-361A of the Virginia Code. The district court, however, did not address the merits of the Eighth Amendment issue. The Supreme Court summarily affirmed dismissal of the case without issuing an opinion, Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).

Id. at 197-98 (Powell, J., concurring). Because a person soliciting or engaging in private, consensual conduct prohibited under section 18.2-361A of the Virginia Code faces the threat of serving five years in prison, the Eighth Amendment issue anticipated by Justice Powell arises here. And given the gravity of the offense of asking about or engaging in private, consensual, noncommercial sexual activity, the authorized penalty of up to five years imprisonment is disproportionately harsh.

The Eighth Amendment proportionality problem is compounded by the classification of the offense as a felony, instead of as a misdemeanor, because the felony designation has grave consequences. Felons are stripped of several important civil rights. Most critically, under Article II, Section 1 of the Virginia Constitution, a felony conviction results in disenfranchisement. See Va. Code § 24.2-427 ("The general registrar shall cancel the registration of (i) all persons known by him to be deceased or disqualified to vote by reason of a felony conviction . . ."). A consenting adult's private sexual activity therefore jeopardizes one of the most basic rights in a democratic society, the right to vote. See, e.g., Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

Furthermore, like all convicted felons, persons convicted of soliciting or engaging in conduct prohibited by section 18.2-361A of the Virginia Code are disqualified from jury service, see Va. Code § 8.01-338, and forfeit the right "to knowingly and intentionally possess or transport any firearm or to knowingly and intentionally carry about his person, hidden from

common observation, any weapon described in § 18.2-308A." See Va. Code § 18.2-308.2(A). A conviction under Va. Code section 18.2-361 may also directly impact a person's professional status. See Va. Code § 38.2-1831(9) (Insurance Commission can refuse to license or can revoke or suspend insurance license of convicted felon); Va. Code § 47.1-4 (convicted felon may not qualify for appointment and commission as notary). And even without a conviction, the fact that the private, noncommercial, consensual conduct at issue in this case is classified as felonious may result in someone who solicits or engages in that conduct being adversely affected in the context of a child custody dispute. See Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (stating that because homosexual conduct "is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361, . . . that conduct is another important consideration in determining custody").

Finally, section 18.2-361A of the Virginia Code punitively stigmatizes an offender or a solicitor as a felon. This "stigma of conviction . . . may, at some inopportune, unfortunate moment, rear its ugly head to destroy [a convict's] opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man." Jones v. Commonwealth, 185 Va. 335, 341-42, 38 S.E.2d 444 (Va. 1946); Commonwealth v. Ricker, CR. Nos. 4960-62, 1986 WL 401746, at *3 (Va. Cir. Ct. 1986) (noting that a felony "carries with it a greater stigma and civil disabilities" than a misdemeanor).

Taken together, the potential sentence of five years imprisonment coupled with the grave consequences of a felony conviction for seeking or engaging in private, noncommercial sexual conduct between consenting adults demonstrate gross disproportionality, in violation of the state and federal prohibitions of cruel and unusual punishment.

B. Sentences Imposed in Virginia for Other Crimes Demonstrate That the Punishment for Seeking or Engaging in Conduct Prohibited by Section 18.2-361A of the Virginia Code is Disproportionate to the Offense.

Examining sentences imposed for other crimes in Virginia supports the conclusion of gross disproportionality. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Solem, 463 U.S. at 291; see Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring) (observing that comparative analysis of sentences may "validate an initial judgment that a sentence is grossly disproportionate to a crime").

The penalty for seeking or engaging in consensual sexual activity in violation of the "crimes against nature" statute is the same or more severe than that applied to far more serious crimes. For example, the other sex-related crimes that are classified as Class 6 felonies are against children.[6/] Sex crimes involving children are, by their very nature, non-consensual and abusive, and punishment of them is justified by the Commonwealth's extremely strong interest in protecting children. Accordingly, these offenses are far more serious than private, noncommercial conduct between consenting adults.

Many of the other Class 6 felonies that are not sex-related are violent. "[A]s the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence." Solem, 463 U.S. at 292-93. Yet, under the Virginia Code, private, noncommercial

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6/ Taking indecent liberties with children, which is defined as an adult exposing his genitals to child under 14, proposing that a child touch his genitals, proposing that a child perform a sex act, or receiving money for allowing or encouraging a child to be the subject of sexually explicit visual material, is a Class 6 felony. See Va. Code § 18.2-370. Similarly, Taking indecent liberties with child by a person in a custodial or supervisory relationship, Va. Code § 18.2-370.1, and a person's second offense of Possession of child pornography, Va. Code § 18.2-374.1:1, are both Class 6 felonies.

sexual activity between consenting adults, and merely asking about the same, are subject to the same penalties as the following violent crimes: Shooting, stabbing, cutting or wounding with intent to maim, disfigure, disable or kill, if done unlawfully but not maliciously, Va. Code § 18.2-51; Shooting, stabbing, cutting or wounding in committing or attempting a felony, Va. Code § 18.2-53; Threatening the Governor or his immediate family, Va. Code § 18.2-60.1; A third conviction within five years for stalking, Va. Code § 18.2-60.3(C); Attempt to commit aggravated sexual battery, Va. Code § 18.2-67.5(B); Maliciously setting fire to woods, fences, grass or other things capable of spreading fire on land, Va. Code § 18.2-86; Breaking and entering a dwelling house with intent to commit a misdemeanor other than assault and battery or trespass, Va. Code § 18.2-92; Willfully discharging firearms in public places, resulting in bodily injury to another person, Va. Code § 18.2-280; and Setting a spring gun or other deadly weapon, Va. Code § 18.2-281.

Furthermore, numerous violent crimes are classified not as felonies at all, but as Class 1 misdemeanors, including Assault and battery, Va. Code § 18.2-57; Assault and battery by mob, Va. Code § 18.2-42; Assault and battery against a family or household member, Va. Code § 18.2-57.2; Reckless handling of firearms so as to endanger the life, limb or property of another, Va. Code § 18.2-56.1; Possession of marijuana, Va. Code § 18.2-250.1; and Knowingly selling drug paraphernalia, Va. Code § 18.2-265.3. Thus, an individual faces more severe penalties for engaging in private, noncommercial, consensual sex with a member of his household than for assaulting and battering the same person.

By contrast, other crimes involving sexual relations between consenting adults are, without exception, classified as misdemeanors. Adultery is a Class 4 misdemeanor, Va. Code §

18.2-365; Fornication is a Class 4 misdemeanor, Va. Code § 18.2-344; and Prostitution and the solicitation of prostitution, Va. Code § 18.2-346, are Class 1 misdemeanors. Indeed, even Indecent exposure, Va. Code § 18.2-387, and a person's first offense of Possession of child pornography, Va. Code § 18.2-374.1:1, are Class 1 misdemeanors. Because these offenses are classified under the Virginia Code as misdemeanors, offenders do not face potentially lengthy prison terms or lose the right to vote, to sit on juries, or to possess firearms, or suffer the other civil disabilities that attach to a felony conviction.

Moreover, the classification of soliciting noncommercial consensual oral sodomy as a felony creates an statutory anomaly: whereas soliciting oral sodomy for money (prostitution) under section 18.2-346 is a Class 1 misdemeanor, soliciting oral sodomy not for money under sections 18.2-29 and 18.2-361A is a Class 6 felony. Thus, appellants would actually face less severe penalties if they had asked for money in return for sex instead of soliciting noncommercial consensual sex. As this comparison illuminates, the classification of the conduct at issue in this case is not, when viewed in the overall context of Virginia's statutory penalties, properly classified as a felony. The sentences imposed for more serious crimes and for other consensual sex-related crimes in Virginia indicate that the punishment authorized by section 18.2-361A of the Virginia Code is disproportionately harsh.

C. The Majority of Other Jurisdictions Impose Less Severe Sentences for the Same Crime.

Not only is Virginia's punishment of seeking or engaging in private, noncommercial sexual activity between consenting adults grossly disproportionate to its punishment of other crimes, it is also far out of line with other jurisdictions' sentences for the same conduct. As

discussed above, the trend among courts is towards striking down sodomy laws altogether. Whereas all fifty states outlawed this type of private, noncommercial sexual conduct between consenting adults before 1961, see Bowers, 478 U.S. at 193, only eighteen states continue to do so.[7] And in one of the eighteen, Louisiana, an appeals court has ruled its statute unconstitutional. See Smith, 729 So. 2d at 654. Moreover, among those few states that criminalize such conduct, half classify it as a misdemeanor.[8] Virginia is therefore in the distinct minority of states that persist in treating seeking or engaging in private, noncommercial sexual activity between consenting adults as felonious. These comparisons further support the conclusion that section 18.2-361A of the Virginia Code, in conjunction with section 18.2-29, violates the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Virginia Constitution

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7/ States in which at least some acts of consensual sodomy appear still to be prohibited are Alabama, see Ala. Code § 13A-6-65; Arizona, see Ariz. Rev. Stat. Ann. § 13-1411 to 1412; Arkansas, see Ark Code Ann. § 5-14-122 (same sex only); Florida, see Fla. Stat. Ann. § 800.02; Idaho, see Id. Code 18-6605; Kansas, see Ks. Stat. § 21-3505 (same sex only); Louisiana, see La. Rev. Stat. § 14:89; Massachusetts, see Mass. Ch. 272 § 34; Michigan, see Mich. Stat. § 750.158; Minnesota, see Minn. Stat. Ann. § 609.293; Mississippi, see Miss. Stat. § 97-29-59; Missouri, see Mo. Ann. Stat. § 566.090 (same sex only); North Carolina, see N.C. Gen. Stat. § 14-177; Oklahoma, see 21 Ok. Stat. § 886 (judicially narrowed to exclude heterosexual acts); South Carolina, see S.C. Code § 16-15-120; Texas, see Tex. Penal Code Ann. § 21.06 (same sex only); Utah, see Utah Code Ann. § 76-5-403; and Virginia.

8/ See Ala. Code § 13A-6-65; Ariz. Rev. Stat. Ann. § 13-1411 to 1412; Ark. Code Ann. § 5-14-122; Fla. Stat. Ann. § 800.02; Kan. Stat. Ann. § 21-3505; Minn. Stat. Ann. § 609.293; Mo. Ann. Stat. § 566.090; Tex. Penal Code Ann. § 21.06; Utah Code Ann. § 76-5-403.

Of those states in which private, consensual sodomy remains a felony, the continuing viability of several of these statutes is in question. In addition to Louisiana, where intermediate appellate courts have ruled the statute to be unconstitutional, courts in Massachusetts and Michigan have issued rulings that strongly indicate that their laws should not be applied to private, consensual conduct. See Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (construing Mass. Ch. 272 § 35 not to apply to private, consensual acts of adults; no subsequent reported prosecutions under the companion statute, Ch. 272 § 34); Michigan Organization for Human Rights v. Kelley, N. 88-815829 CZ (Mich. Cir. Ct. July 9, 1990).

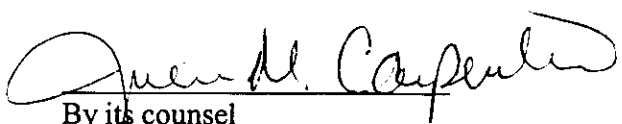
by imposing a disproportionately harsh penalty for seeking or engaging in noncommercial consensual sexual conduct.

CONCLUSION

Because conviction under section 18.2-29 for soliciting a violation of section 18.2-361A of the Virginia Code infringes upon the implicit right to privacy protected by the Virginia Constitution's liberty guarantee, and because it imposes a disproportionately harsh penalty on offenders in violation of the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Virginia Constitution, this Court should reverse appellants' convictions.

Respectfully submitted,

THE LIBERTY PROJECT



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CERTIFICATE OF COMPLIANCE
WITH RULE 5A:19-E

I hereby certify that, in compliance with Rule 5A:19-E, I have filed seven copies of the foregoing Brief of *Amicus Curiae* The Liberty Project with the Clerk of the Court of Appeals of Virginia, and have served three copies each on counsel for both the Appellants and Appellee, by placing the same in the United States mail, on May 30, 2000, postage prepaid, addressed to the following:

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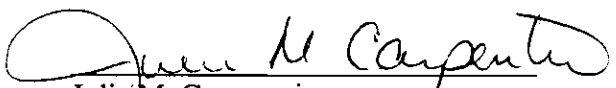


Julie M. Carpenter
VSB No. 30421

ADDENDUM

TAB 1

Commonwealth
v.
Ricker

CR. NOS. 4960-4962.

Circuit Court of Virginia, Frederick County.

March 7, 1986.

***1** The defendant is the subject of three felony indictments, each charging obtaining money from the Virginia Employment Commission in violation of the false pretense statute, Code Section 18.2-178. Defendant moves to quash the indictments on the ground the prosecutions be brought under Section 60.1-129 of the Virginia Unemployment Compensation Act by which knowingly making a false statement to obtain payment of unemployment compensation is, regardless of the amount involved, a misdemeanor only. Decision is on that motion.

Robert K. Woltz, Judge.

Section 18.2-178 in pertinent part provides:

If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny he shall be deemed guilty of larceny thereof. . .

Section 60.1-129 provides in part:

Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this title. . . shall be guilty of a misdemeanor and on conviction thereof shall be punishable accordingly.

The law in Virginia is as early as Anable v. Commonwealth, 65 Va. (24 Gratt.) 563, 567 (1873), that to constitute false pretenses the concurrence of four elements is required:

(1) There must be an intent to defraud;

(2) There must be an actual fraud committed;

(3) False pretenses must be used for the purpose of perpetrating the fraud; and

(4) The fraud must be accomplished by means of the false pretenses made use of for the purpose; that is, they must be in some degree the cause, if not the controlling and decisive cause, which induce the owner to part with his property.

To like effect are Quidley v. Commonwealth, 221 Va. 963 (1981); Cunningham v. Commonwealth, 219 Va. 399 (1978); Riegert v. Commonwealth, 218 Va. 511 (1977); and Bourgeois v. Commonwealth, 217 Va. 268 (1976).

Defendant avers the prosecution will endeavor to prove that he obtained cash from unemployment compensation checks received as a result of false statements or material omissions in respect of his claim for unemployment compensation. If the Commonwealth adequately bears that burden of proof, then certainly as to any false statement and possibly as to any failure to disclose material fact a false pretense is made out. The defendant maintains, however, that the General Assembly in enacting Section 16.1-129 made it the sole vehicle on which a prosecution could be mounted and launched for fraudulently obtaining unemployment compensation benefits.

Note that the Legislature in enacting Section 60.1-129 has made prosecution less difficult than for false pretenses. The knowing false statement or failure to disclose done with fraudulent intent is sufficient to constitute the crime without any showing that the miscreant received something of value from the perpetration of his fraud. The crime consists in the fraudulent endeavor, not in consummation of that endeavor. In this respect it amounts only to an attempted false pretense. The Legislature may have had this in mind as a trade- off when regardless of the amounts of money involved it made the crime a misdemeanor only and not a felony.

***2** By way of preliminary, there is no claim of "vindictive prosecution." See U.S. v. Heldt, 745 F.2d 1275 (9 Cir. 1984); 63A Am.Jur.2d, Prosecuting Attorney Section 28. The true issue is whether there exists prosecutorial discretion or whether there is a legislative intent to preempt that discretion and limit prosecution to Section 60.1-129.

The prosecuting attorney has a duty to prosecute public offenses and "[a]s a general rule, if a prosecutor has possible cause to believe that the

accused committed an offense defined by statute, the decision to prosecute or not to prosecute, and what charge to file or decision to prosecute or not to prosecute, and what charge to file or bring before a grand jury, rests entirely in his discretion." Id., Section 24. Research has not disclosed a Virginia case finding an abuse of prosecutorial discretion but there are cases approving it.

In Wheeler v. Commonwealth, 192 Va. 665 (1951), the defendant was convicted both of the felony of illegal manufacture of alcoholic beverages by use of a still and of the misdemeanor of possession of the same still. The Attorney General confessed error as to the double conviction, the misdemeanor conviction was reversed and the felony conviction was sustained, the Court treating the position of the Attorney General as an election, stating, "The Commonwealth has the election to prosecute the greater offense."

A defendant in Hensley v. Norfolk, 216 Va. 369 (1975), was convicted of maintaining a disorderly house. He contended that the ordinance had been applied to him in an unconstitutional manner as there were a number of other ordinances and statutes which could be used for offenses growing out of the operation of a massage parlor, and that other charges fit his crime more accurately. In rejecting his argument the Court said, "A prosecutor has the discretion to decide under which of several applicable statutes the charges shall be instituted."

In Mason v. Commonwealth, 217 Va. 321 (1976), the defendant was arrested on a charge of larceny and placed in the lockup in custody of the desk sergeant, escaping shortly afterward. Later he was convicted for escape under Section 53- 291 [now Section 53.1-203 (1)] appearing in the title Prisons and Other Methods of Correction, making escape from a "penal institution," as statutorily defined, a felony punishable by a one-year minimum and a five-year maximum. He maintained that he should have been tried under Section 18.1-290 [now Section 18.2-479] for escape from the custody of a "law enforcement officer on a charge or conviction of a criminal offense," a misdemeanor punishable by jail confinement not more than six months or fine not more than $500 or both. (Other escape statutes, Sections 18.2-477, 18.2-478 and 18.2-480, also deal with escapes of different types variously punishable as misdemeanors or felonies.)

*3 The Court per curiam said:

In our opinion it is a matter of prosecutorial election whether the Commonwealth proceeds under the misdemeanor statute or the felony statute against an accused in the defendant's situation. . . In this case, for some reason undisclosed by the record, the Commonwealth chose to press the more serious charge; but we cannot gainsay its right to make that election.

Other similar situations are not hard to find, e.g., whether prosecution should be under Section 63.1-124 of the welfare title for what is commonly referred to as "welfare fraud" or under one of the larceny statutes in Title 18.2 on crimes and offenses generally. A striking example is the possibility of prosecution under the remaining portion of the statute here involved, Section 18.2-178, and the last portion of the forgery statute, Section 18.2- 172 . The former makes obtaining by false pretense a signature to a writing, the false making of which would be forgery, a Class 4 felony. The latter declares that obtaining by false pretense a signature to a writing with intent to defraud a Class 5 felony.

The two possible offenses here are distinguishable in their elements. It is essential in a prosecution for false pretenses that title and possession of the property must pass from the alleged victim to the defendant. Cunningham and Quidley, supra. One being a felony and one a misdemeanor there is obvious possibility of greater punishment for the former, and it also carries with it a greater stigma and civil disabilities not pertaining to the latter, though both are crimes of moral turpitude, conviction under Section 60.1-129 being expressly declared so by C & O Railway Co. v. Hanes, Administrator, 196 Va. 806 , 813 (1955).

The Court in Mason found at page 323 that "nothing in the misdemeanor statute indicates it establishes the exclusive offense" and hence the matter was one for prosecutorial election. For the same reason this Court in this case makes the same finding.

END OF DOCUMENT

TAB 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

7-9-90

THE MICHIGAN ORGANIZATION FOR HUMAN RIGHTS, a Michigan not for profit corporation; LUCILLE PORTWOOD, RICHARD WALLACE, DAVID BANNOW, JOHN DOE, MAUREEN McGEE, JANE DOE, KAREN SUNDBERT, PETER ZEMAN, THOMAS RIDDERING, SUZANNE ROE, LEE SHEPARD and VERNA SPAYTH,

Plaintiffs,

vs

Case No. 88-815820 CZ
HON JOHN A MURPHY

FRANK KELLEY, Attorney General of the STATE OF MICHIGAN, in his official capacity, and JOHN O'HAIR, Wayne County Prosecuting Attorney, in his official capacity,

Defendants.
_____/

David Piontkowsky (P33584)
Attorney for Plaintiffs

Don Atkins (P23147)
Attorney for Defendant O'Hair

Becky Lamiman (P39758)
Attorney for Defendant Kelley
_____/

OPINION AND ORDER

GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION AND DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. BACKGROUND

This case came before the Court on March 1, 1990 on the defendants' and plaintiffs' cross motions for summary dispositi Plaintiffs, the Michigan Organization for Human Rights (M.O.H.R and twelve named individuals filed the instant action seeking declaratory and injunctive relief, from the state's sodomy and

gross indecency statutes (MCLA 750.158; 750.338; 750.338(a) and 750.338(b). Plaintiffs allege that the statutes are unconstitutional under the Michigan Constitution of 1963 in that the statutes are vague and overbroad and violates Plaintiffs' right of privacy, equal protection, speech and association. Plaintiff, the Michigan Organization for Human Rights (M.O.H.R.) is a statewide organization representing more than 1,500 members and with a mailing list of more than 10,000 persons. The named individual plaintiffs include homosexual males, lesbian women, a bisexual man and woman, heterosexual men and women, and a women with a physical disability. Plaintiff, Verna Spayth contracted polio as a child and is currently experiencing postpo syndrome which has required that she use an electric three-wheeled mobility device to be fully mobile. Ms Spayth indicated (by her affidavit) that her physical disability prevents her from engaging in penis-vaginal intercourse and that she and her male partner have engaged in mutual masturbation and oral sex. Ms. Spayth, expressed concerns "that prosecution under the sodomy and gross indecency laws might be used to prohibit people with disabilities from engaging in sexual contact . . . " Ms Spayth like the other individually named plaintiffs admit to having engaged in one or more of the sexual activities prohibite by the statutes, including oral sex, anal sex and mutual masturbation in private, and admit that they will continue to do so in the future.

II. STANDING

The first issue presented in this matter is whether there exists a case or controversy. MCR 2.605, subsection (A)(1) provides that:

> "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

The requirements of an "actual controversy" and "standing to sue" are intertwined in a declaratory judgment action and as a result, a plaintiff lacks standing to bring an action unless he plead facts showing the existence of a case or actual controversy Shavers vs Attorney General, 402 Mich 554 (1978). Defendants assert that the plaintiffs' Complaint for Declaratory Judgment must be dismissed because it fails to plead facts which show the existence of an actual controversy, and the plaintiffs lack standing to challenge the constitutionality of criminal statutes where they have not been arrested, charged, prosecuted or immediately threatened with arrest or prosecution.

This Court finds that plaintiffs have standing to challenge the statutes in question. Plaintiffs need not first violate the statutes before they may challenge their validity. The declaratory judgment rule was intended and has been liberally construed to provide a broad flexible remedy with a view to make the courts more accessible to the people. Comm'r of Revenue vs Grant Trunk W R Co., 363 Mich 37 (1949); 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Committee Comment, p 683. An "actual controversy", which is a condition precedent to the invocation of declaratory relief under the general court rule, exists where a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve his legal rights. Cavanaugh & Co vs Detroit, 162 Mich App 627 (1983); Updegraff vs Attorney General, 298 Mich 48 (1941); Flint vs Consumers Power Co., 290 Mich 305, 309-310 (1939); Welfare Employees Union vs

Civil Service Comm., 28 Mich App 342, 350-351 (1970). To hold, as defendants suggest, that the plaintiffs must wait until a criminal prosecution occurs, and then challenge the statutes, would render the Declaratory Judgment statute meaningless and would leave plaintiffs without an adequate remedy to challenge the constitutionality of the statutes. The requirement of an "actual controversy" prevents a court from deciding hypothetical issues, however a court is not precluded from reaching issues before actual injuries or losses have occurred. Merkel vs Long, 368 Mich 1 (1962).

In Kalamazoo Police Supervisors Association vs City of Kalamazoo, 138 Mich App 513 (1983), the court noted that:

> "Michigan courts have consistently upheld the right to seek declaratory relief where interested parties have sought the guidance of courts prior to there being an actual violation of a statute. See Grocer's Dairy Company vs Department of Agriculture Director, 377 Mich 71, 138 NW 2d 767 (1966); Arlan's Department Stores, Inc., vs The Attorney General, 374 Mich 70, 130 NW 2d 892 (1964); Levy v Pontiac, 331 Mich 100, 49 NW 2d 80 (1951); Carolene Products Company vs Thomson, 276 Mich 172, 267 NW 608 (1936); National Amusement Company v Johnson, 270 Mich 613, 259 NW 342 (1935).
>
> The fact that no party is yet in violation of the act does not deny the parties the right to declaratory relief. One test of the right to institute such proceedings is the necessity of present adjudication as a guide for interested parties' future conduct in order to preserve their legal rights. Bane v Pontiac Township, 343 Mich 481, 72 NW 2d 134 (1955); Village of Breedsville v Colombia Township, 312 Mich 47, 19 NW 2d 842 (1945); Updegraff v The Attorney General, 298 Mich 48, 298 NW 400 (1941); Rott v Standard Accident Insurance Company, 299 Mich 384, 300 NW 134 (1941).

The declaratory judgment rule provides for exactly the type of situation in which plaintiffs find themselves. The case law in Michigan has clearly anticipated and provided for the ability of a citizen of the state to file a declaratory judgment action to determine whether or not their conduct is criminal.

What is essential to an "actual controversy" under the rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. Shavers vs Kelley, 402 Mich 554 (1978). The individually named Plaintiffs in the instant case have all violated at least one of the statutes in question, and have testified by way of affidavit as to the fears and harm they face in their lives currently as a result of their continuous violations. Plaintiffs' fears are legitimate and real and constitute a basis for an actual controversy.

II. RIGHT TO PRIVACY

Plaintiffs challenge the constitutionality of Michigan's sodomy and gross indecency statutes as it applies to their conduc in the privacy of their homes. Plaintiffs assert that the statutes are overbroad and impinge on their constitutional right of privacy protected by the Michigan Constitution. The Michigan Constitution does not expressly recognize a right to privacy. Nevertheless in construing various provisions of the Constitution, Michigan Appellate Courts have expressly recognize that such a right is generally protected under the Michigan Constitution. In discussing the specific parameters of the righ to privacy, Michigan courts have done so within the context of two provisions of the Michigan Constitution: Const, 1963, Art 1, Section 11 (which provides, inter alia, that "The person, houses papers and possession of every person shall be secure from unreasonable searches and seizures") and Const 1963, Art 1, Sect 17 (which provides, inter alia, that "No person shall . . . be deprived of life, liberty or property without due process of law . . .")

Section 11 protects against unreasonable searches and seizures. Michigan courts have held that Section 11 interests are implicated when the governmental activity has infringed on a justifiable, or reasonable expectation of privacy. People vs Smith, 420 Mich 1 (1984) (holding that in order to have standing to contest the validity of a search or seizure by the government, a person must demonstrate an expectation of privacy in the object of the search and that the expectation is one that society is prepared to recognize as reasonable. Id., 28). Similarly other courts have attempted to list factors relevant t determining an individual's reasonable expectation of privacy. In People vs Taormina, 130 Mich App 73, 79 (1983), lv den., 419 Mich 858 (1984), quoting from People vs Dinsmore, 103 Mich App 660, 669 (1981), lv den, 411 Mich 1971 (1981), the Court summarized:

> "There is no single factor which is determinative of an individual's reasonable expectation of privacy. Among the factors mentioned by various courts are: whether the area is within the curtilage of a residence, whether it is open to view from a public area, whether the property was owned by the defendant or in some way controlled by him, whether the defendant had a subjective expectation of privacy, whether the area was enclosed, whether the area was posted against trespass, whether there were obstructions to vision, or whether the area was in fact frequented by neighbors or strangers. We also recognize that a person may permit or even invite intrusion by friends or neighbors into areas as to which he has a reasonalbe expectation of privacy regarding intrusion by authorities."

The Taormina factors, emphasize that the place where the governmental intrusion occurs is the key factor in determing whether a reasonable expectation of protected activity will be found. For example a person who conducts activities on his

own property, but which are in view of a passerby and neighbors, or those standing in an area of the person's property which is open to common use, will not be found to have a reasonable expectation of privacy from preventing governmental observation of those activities. People v Houze, 425 Mich 82, 84 (1986) (activities conducted in a detached garage which were visible to persons standing in a "common area" looking through an open window); People v Ward, 107 Mich App 38, 50 (1981), lv den, 417 Mich 938 (1983) (license plate of car parked in driveway visible from the street). Finally activities conducted in publi places which are fully open to public view enjoy no reasonable expectation of privacy. People v Heydenbert, 171 Mich App 494 (1988), lv den, 431 Mich 887 (1988) (homosexual acts performed in the common area of a public restroom).

The second major source of the right to privacy can be found in Section 17, relating to the protection of personal liberty. Michigan case law in this area, appears to take, as it starting point, developments in the right of privacy under the Fourteenth Amendment of the U.S. Constitution. The nature of th right to privacy under the Fourteenth Amendment was summarized in State ex rel Macomb Co. Prosecuting Attorney vs Mesk, 123 Mich App 111, 118-119 (1983), lv den 417 Mich 103 (1983):

> Although the right to privacy is not expressly provided for in the United States Constitution, such a right has been recognized as arising out of the Fourteenth Amendment's concept of personal liberty. Roe vs Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). Although the limits of this right have never been expressly defined, it is clear that the right extends to the right of persons to make certain decisions concerning marriage, procreation and child rearing. Griswold v Connecticut, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965); Loving v Virgina, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967) Eisenstadt v Baird, 405 US 438; 92 S Ct 869;

> 31 L Ed 349 (1972); Roe v Wade, supra. In Whalen v Roe, 429 US 589, 598; 97 S Ct 869; 51 L Ed 2d 64 (1977), the Court described the privacy right as protecting two differing kinds of interest in avoiding disclosure of personal matters. The other is the interest in independence in making certain kinds of decisions without governmental interference. (Footnote omitted).

In People v Holland, 49 Mich 76, 78-79 (1973) the Court commented on MCLA 750.338(b) which prohibits gross indecency between a male and a female. The Court decided the case on nonconstitutional grounds. The Court did indicate that the statute might be overruled, but only because it could act upon the marriage relationship.

Other privacy cases arising out of Section 17 involves privacy claims of persons involved in prohibited sexual activitie In People v Penn, 70 Mich App 638 (1976), the Court upheld MCL 750.338 (prohibiting acts of gross indecency between males) against a challenge that it violated a "fundamental right of privacy under Section 17, where the conduct at issue was not consensual and involved the use of force. In dicta, the Court's references to Doe vs Commonwealth's Attorney for Richmond, 403 F Supp 1199 (ED Va, 1975), aff'd 425 US 901; 96 S Ct 2191; 47 L Ed 2d 751 (1976) suggest that the Court would have reached the same result if the case had involved consensual, nonviolent, homosexual activity. However there are no Michigan cases dealing directly with consensual, nonviolent, prohibited sexual activity done in the privacy of the home.

The Michigan Supreme Court recognizes the autonomy of the Michigan Constitution, and in several areas has interpreted the state constitution as providing broader protection for individual rights than the federal constitution. People vs Beavers, 393 Mich 554 (1975); Manistee Bank & Trust Co vs McGown,

Included in the fundamental natural rights that Michigan constitutionally guarantees are the rights to personal liberty, personal security and individual autonomy. The United States Supreme Court in Bowers vs Hardwick, 487 US 86; 106 S Ct 2841; 92 L Ed 2d 140 (1986), held that the federal constitution does not confer a fundamental right upon homosexuals to engage in consensual sodomy, even in the privacy of their home. State courts, however, can and have defined state privacy guarantees more broadly than the Court in Bowers vs Hardwick, supra, because state constitutions are generally broader and more comprehensive than the federal constitution. See Developments in the Law, Sexual Orientation and the Law, Harvard Law Review, Vol 102, pg 1535 (1989). This is the case in our state particularly as it relates to acts occurring in the privacy of one's home.

Plaintiffs' claims must be anaylzed in light of the values that underlie Michigan's constitutional right to privacy. This case is not about a fundamental right to engage in homosexual sodomy, but about "the most comprehensive of rights and the right most valued by civilized men, namely "the right to be left alone." Bowers vs Hardwick, 487 US 186; 92 L Ed 2d 140; 106 S Ct 2841 (1986) (Blackmun, dissenting opinion, citing Olmstead vs United States, 277 US 438, 478 L Ed 944; 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J. dissenting).

The Michigan Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government. People vs Clark, 133 Mich App 619 (1984); People vs Ward, 107 Mich App 38 (1981); People v Artuso, 100 Mich App 396 (1980); People v Smith, 75 Mich App 64 (1977); Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich

Plaintiffs in the case at bar desire to engage privately in sexual activity with another consenting adult. This is not a case involving sexual activity with children or persons who are coerced either through physical force or commercial inducement The absence of any such public ramifications plays an important part in this Court's consideration of the privacy rights alleged by the plaintiffs. Every indiviudal has a right to be free from unwarranted governmental intrusion into one's decision on private matters of intimate concern. Carey vs Population Services International, 431 US 678 (1977); Eisenstadt vs Baird, 405 US 438; 316 L Ed 2d 349; 92 S Ct 1029 (1972);Roe vs Wade, 410 US 113; 93 S Ct 705, 726-27; 35 L Ed 2d 147 (1973); Morgan vs City of Detroit 389 F Supp 922 (1975)

The fact that the intimate concern occurs in private, within the home, seems to enhance its protection. The sanctity of the home noted by Justice Harlan in his dissent to Poe vs Ullman, 367 US 497 (1961), formed the basis for the U.S.Supreme Court's holdin in Stanley vs Georgia, 394 US 557; 22 LEd 2d 542; 895 S Ct 1243 (1969). In Stanley "privacy meant within the home, the Court late refused to extend that protection to other locales, holding, that obscene materials were not protected in a public movie theater, even though the patrons attended voluntarily and with knowledge of the nature of the films. Paris Adult Theatre I vs Slaton, 413 US 49 (1973). "The right of people to be secure in their . . . house expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy." Paris Adult Theatre I, supra, at 413 US 66; 37 L Ed 446; 93 S Ct 2628. The right to privacy extends protection to some activities that would not

normally merit constitutional protection simply because those activities take on added significance under certain limited circumstances. In particular, the constitutional protection of privacy reaches its height when the State attempts to regulate activity in the home. Payton vs New York, 445 US 573, 589-90; 100 S Ct 1371, 1381-82; 63 L Ed 2d 639 (1980). The Michigan constitution gives the plaintiffs a privacy interest with reference to their homes, and this interest does not vary depending on the activities engaged in.

A mature individual's choice of an adult sexual partner, ar sexual relations, in the privacy of his or her own home, appears to this Court to be an intensely personal matter. State regulations affecting "adult sexual relations" or personal decisions in matters of sex, done in one's home are subject to t strictest standard of judicial review. The state must demonstra a compelling interest in restricting these rights and must show that the sodomy and gross indecency statutes are properly restrained methods of safeguarding its' interest. This the State has not done.

The State appears to take the position that the statutes ar constitutional because they are rational expressions of the State's right to legislate in the area of morals. As a result, if one could think of any rational connection between the statutes and the State's right to legislate in this area, the statutes are constitutional. This follows, according to the State's position, because the plaintiffs do not have a fundamen right to engage in the conduct prohibited by the statutes, citi Bowers vs Hardwick, supra. As stated above, this Court finds that the Michigan constitutional right of privacy in certain situations not only protects specific activites but, more

This Court's analysis focuses on the place. The place in this context is the home. Michigan citizens have a fundamental rights to be secure in their homes and when the state prohibits activity within this context it must demonstrate a compelling state interest to justify the intrusion. The State has not made such a demonstration and as a result both statutes are unconstitutional to the extent that they prohibit activities between consenting adults taking place in the privacy of one's home.[1]

III. MICHIGAN'S SODOMY AND GROSS INDECENCY STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE

Michigan's sodomy statute, MCL 750.158; MSA 28.355 provides

> "Any person who shall commit the abdominable and destestable crime against nature of either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or is such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

The gross indecency statutes, MCL 750.338, MSA 28.570, states:

> "Any male person who, in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine

---

1 It may be suggested that this Court's ruling may lead to th protection of adultery, incest and other sexual crimes committed in the home. This does not follow. These crimes involve harms that the state has a compelling interest to prevent. See Justic Blackmun's dissent in Bowers vs Hardwick, supra, at 487 US 210,

> of not more than ... years, ... if such person at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

Gross indecency between female persons and between a male and a female person is also prohibited in identical language by MCL 750.338a; MSA 28.570(1) and MCL 750.338b; MSA 28,570(2), respectively.

Plaintiffs allege that the language of the statutes is unconstitutionally vague, in that the laws do not enumerate the specific sexual acts which are prohibited. As a result plaintiff alleges that they fail to provide sufficiently clear notice of what conduct is prohibited, provides unlimited discretion to the police and the trier of fact, and that the statutes' coverage impinges on First Amendment freedoms. The due process doctrine of vagueness requires that laws give a person of ordinary intelligence fair notice or warning of the criminal consequences of his conduct. Lanzetta vs New Jersey, 308 US 451; 59 S Ct 618; 83 L Ed 888 (1939). The due process standard under Michigan constitutional principles was set forth in People vs Howell, 396 Mich 16 (1976) where the Michigan Supreme Court stated:

> A statute may be challenged for vagueness on three grounds:
>
> 1. It does not provide fair notice of the conduct proscribed.
> 2. It confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.
> 3. Its coverage is overbroad and impinges on first admendment freedoms.

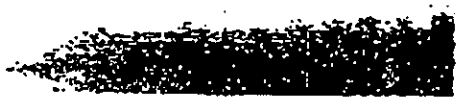
Plaintiffs in the case at bar challenges the statutes on all

three bases.

This Court finds that both statutes as they relate to conduct between consenting adults occurring outside the home are not unconstitutionally vague. (sodomy) People v Coulter, 94 Mich App 531 (1980), lv den 411 Mich 889 (1981); People v Stevenson, 28 Mich App 538 (1970), lv den 384 Mich 816 (1971); People v Green, 14 Mich App 250 (1968), lv den 381 Mich 815 (1969) (gross indecency) People v Howell, 396 Mich 16 (1976); People v Kalchik, 160 Mich App 40 (1987); People v Masten, 96 Mich App 127 (1980); and People v Clark, 68 Mich App 48 (1976).

In People v Howell, supra, the Michigan Supreme Court construed the term "act of gross indecency" to mean "oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public." The Howell plurality commenting on the imprecision of the "common sense of society" test in People v Dexter, 6 Mich App 247, 253 (1967) stated that:

> While it no doubt would be the "common sense of society" to regard as "indecent and improper' the commission of act of fellatio with a person under the age of consent or the forcible commission of such an act, there is no consensus regarding fellatio or other sexual acts between consenting adults in private. Some persons regard an ultimate sexual act other than intercourse between married persons for procreation as indecent and improper. However, a substantial segment of society believes it is neither indecent nor improper for consenting adults to engage in whatever sexual behavior they desire. Some would take that view only where the conduct is between persons of the opposite sex, while other would agree only if the persons were married.
>
> There being no "common sense of society" regarding sexual behavior between consenting adults in private, that test leaves the trier of fact "free to decide without any legally fixed standards, what is prohibted and what is not in each particular case" , Giaccio v Pennsylvania, 382 US 399, 402-403; 86 S Ct 518; 15 L Ed 2d 447 (1966). [396 Mich 23-24]



The Michgian Criminal Jury Instructions for gross indecency (CJI 20:7:01), adopted and approved by the Supreme Court, after Howell, incorporates the interpretation that consensual acts of oral or manual sex done in private are not prosecutable. Criminal Jury Instructions, p 20-101.

In light of the developing case authority and the adoption by our Supreme Court of the standard jury instructions relating to these statutes, citizens are sufficiently apprised of the conduct prohibited. With regard to plaintiffs' argument that the statutes are overbroad and impinges on first amendment freedoms, this Court will not rule on this issue at this time. The better approach would be to make such a ruling within the specific context of individual criminal prosecutions.

IV. CONCLUSION

The issues in this case do not center around morality or decency, but the constitutional right of privacy and sufficient due process. The exercise of that right in the context of the home may not be proscribed by state regulation absent compelling justification.

John A. Murphy
Circuit Court Judge

Dated: JUL 0 9 1990

A TRUE COPY
JAMES R. KILLEEN
CLERK
BY
DEPUTY CLERK

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE MICHIGAN ORGANIZATION FOR HUMAN RIGHTS, a Michigan not for profit corporation; LUCILLE PORTWOOD, RICHARD WALLACE, DAVID BANNOW, JOHN DOE, MAUREEN McGEE, JANE DOE, KAREN SUNDBERT, PETER ZEMAN, THOMAS RIDDERING, SUZANNE ROE, LEE SHEPARD and VERNA SPAYTH,

Plaintiffs,

vs

Case No. 88-815820 CZ
HON. JOHN A. MURPHY

FRANK KELLEY, Attorney General of the STATE OF MICHIGAN, in his official capacity, and JOHN O'HAIR, Wayne County Prosecuting Attorney, in his official capacity,

Defendants.
_____/

ORDER
GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION/
DENYING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on:

JUL 09 1990

Hon. JOHN A. MURPHY

This matter having come before the Court on Plaintiffs' an Defendants' cross motions for summary disposition,

The Court having set forth its reasoning in the foregoing Opinion,

IT IS HEREBY ORDERED that Plaintiffs' motion for summary disposition is hereby granted in part/denied in part.

A TRUE COPY
JAMES R. KILLEEN
CLERK
BY _____ DEPUTY CLERK

John A. Murphy

TAB 3

BRUCE WILLIAMS, et al., Plaintiffs	*	IN THE
	*	CIRCUIT COURT
V.	*	FOR
STATE OF MARYLAND, et al., Defendants	*	BALTIMORE CITY
	*	CASE NO. 98036031/ CC-1059

* * * * * * * * * * * * * * * *

ORDER

The court having heard the arguments and reviewed the papers of the parties, and having issued its Memorandum Opinion of October 15, 1998 with regard to Article 27, Section 554, and

The plaintiffs having filed an Amended Complaint alleging that the reasoning of said Memorandum Opinion applies equally to Article 27, Section 553, and requesting the Court to extend its ruling to include Article 27, Section 553, and

The Defendants, State of Maryland and Anne Arundel County, having consented to the filing of the Amended Complaint and to the relief requested therein, it is therefore this 20th day of January, 1999,

ADJUDGED, DECLARED and DECREED that Article 27, Sections 553 and 554 of the Annotated Code of Maryland do not apply to consensual, non-commercial, private sexual activities and it is further

ORDERED and DECLARED that the defendants, State of Maryland and Anne Arundel County, and all of their agents and employees, be, and hereby are,

enjoined from enforcing the Annotated Code of Maryland, Article 27, Sections 553 and 554 in cases of consensual, non-commercial, private sexual activity. And it is further

ORDERED and DECLARED that Article 27, Section 15 of the Annotated Code of Maryland is constitutional and may be enforced as to the conduct prohibited therein, and it is further

ORDERED that the Plaintiffs' request for class action certification is hereby **DENIED**, and it is further

ORDERED that each of the parties hereto will bear their own costs, including attorneys' fees.

JUDGE RICHARD T. ROMBRO
The Judge's signature appears on the original document.

RICHARD T. ROMBRO, JUDGE

TRUE COPY
TEST

FRANK M. CONAWAY, CLERK