No. _____

IN THE

Supreme Court of the United States

TIM MOOSE,

Petitioner,

v.

WILLIAM SCOTT MACDONALD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2003, this Court took up the question "[w]hether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment," in the context of a challenge to a Texas statute that prohibited "'deviate sexual intercourse with another individual of the same sex.'" *Lawrence v. Texas*, 539 U.S. 558, 563-64 (2003) (quoting Tex. Penal Code Ann. § 21.06(a) (2003)). This Court answered that question in the affirmative, but stressed what it was *not* deciding. *Id.* at 578. "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.*

The question presented in this case is whether the Virginia courts unreasonably applied *Lawrence* in determining that Virginia's "crimes against nature" statute is not facially unconstitutional or unconstitutional as applied to an adult male's solicitation of a minor female, outside the home, to perform oral sodomy.

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of Respondent below, Tim Moose, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION

This Petition concerns whether the courts of Virginia unreasonably applied clearly established federal law in concluding that the 14th Amendment's guarantee of due process as interpreted in *Lawrence v. Texas*, 539 U.S. 558 (2003), does not invalidate state sodomy statutes in all of their applications: here, to prohibit adults from soliciting minors outside the home to perform oral sodomy. The holding of a divided panel of the Fourth Circuit that Virginia's sodomy statute is facially unconstitutional finds no support in the holding or reasoning of *Lawrence*, is in conflict with decisions of other federal and state courts, and is all the more erroneous in light of the limited scope of habeas review: evaluating whether the Virginia courts' decision that *Lawrence* did not facially invalidate the Virginia statute "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254. If undisturbed, this holding threatens both to upset all post-*Lawrence* convictions under this statute and to restrain all future applications of this exercise of the police power to protect minors from adults that would prey upon them. Because the Virginia courts' decision plainly conformed with this Court's due process jurisprudence, certiorari should be granted and the decision of the Fourth Circuit reversed either summarily, Sup. Ct. R. 16(1), or in the ordinary course. Sup. Ct. R. 16(2).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, granting Respondent habeas relief, is reported as *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2012), and may be found at pages 1 through 33 of the Appendix. The unpublished decision of the Eastern District of Virginia rejecting Respondent's habeas petition is styled *MacDonald v. Holder*, No. 1:09-cv-1047, 2011 U.S. Dis. LEXIS 109749, 2011 WL 4498973 (E.D. Va. Sept. 26, 2011), and is reproduced in pages 35 through 50 of the Appendix. The unpublished decision of the Supreme Court of Virginia denying Respondent's Petition for Appeal of his conviction is styled as *MacDonald v. Commonwealth*, No. 070124 (Va. Sept. 7, 2007), and is reproduced on pages 161 and 162 of the Appendix. The unpublished decision of the Court of Appeals of Virginia affirming Respondent's conviction is also styled as *MacDonald v. Commonwealth*, No. 1939-05-2, 2007 Va. App. LEXIS 7, 2007 WL 43635 (Va. App. Jan. 9, 2007), and is reproduced on pages 179 through 184 of the Appendix. The letter opinion and Conviction Order of the Circuit Court of the City of Colonial Heights in the case of *Commonwealth v. MacDonald*, No. CR05-141-01 (Va. Cir. Ct. July 26, 2005), rejecting Respondent's constitutional challenge to the Virginia statute and finding him guilty of violating the same is reproduced at pages 225 through 228 of the Appendix.[1]

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[1] The Petition Appendix also includes, *inter alia*, the published decisions of the Court of Appeals of Virginia, (App. 185-94), and the Supreme Court of Virginia, (App. 163-78), explaining in greater depth those Courts' reasoning in rejecting Respondent's mirror due process challenges to similar convictions.

JURISDICTION

The decision and order of the United States Court of Appeals for the Fourth Circuit was issued on March 12, 2013, and the order denying Petitioner's petition for rehearing and rehearing *en banc* was issued on April 8, 2013. Sup. Ct. R. 13(1) & (3). This Court has jurisdiction to review this case from the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition indirectly concerns this Court's application of the following constitutional provision:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.

This petition directly concerns the Fourth Circuit's application of the following statutory provision:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . ."[2]

28 U.S.C. § 2254(d)(1).

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[2] Application of subsection (2) of 28 U.S.C. § 2254(d) is not at issue in this petition.

The portion of Virginia's "crimes against nature" statute held facially unconstitutional reads:

"If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony . . ." Va. Code Ann. § 18.2-361(A).

That statute was employed as the predicate felony under Va. Code Ann. § 18.2-29, which reprobates and punishes solicitation of a minor to commit a felony:

"Any person age eighteen or older who commands, entreats, or otherwise attempts to persuade another person under age eighteen to commit a felony . . . , shall be guilty of a Class 5 felony."

STATEMENT OF THE CASE

In late September of 2004, William Scott MacDonald, a forty-seven-year-old married man, telephoned a seventeen-year-old female and arranged to meet her in a Home Depot parking lot in Colonial Heights, Virginia, where he was "to run an errand for his wife." (App. 4-6, 180, 204, 206, 225.) MacDonald then rode in the young woman's vehicle to her grandmother's house, where she left MacDonald in the car to retrieve a book for school. (App. 5, 180, 201-02.) Upon her return, MacDonald solicited fellatio and suggested that they "have sex" in a shed in the backyard. (App. 5, 180.) The young woman refused, and insisted that they return to the Home Depot parking lot, where MacDonald had left his vehicle. (App. 5, 180.) Upon their return, MacDonald, who is six feet, two inches tall, weighs approximately two-hundred-thirty pounds, and is a U.S. Marine Corps and Army veteran, (App. 130, 241, 243, 245), "pushed her up against the hood of her car and started kissing and groping her.

She pushed him away and went home." (App. 36, 180.) MacDonald knew she was seventeen. (App. 5.)

The matter came to light when MacDonald "filed a report with the Colonial Heights police maintaining that [the young woman] had abducted and sexually assaulted him" by performing oral sodomy upon him "'against his will.'" (App. 5.) Because of this report, MacDonald subsequently was charged with and pled guilty to the misdemeanor offense of filing a false police report, Va. Code Ann. § 18.2-461. (App. 5-6, 227, 243.) For soliciting the minor female, MacDonald was indicted for violating Va. Code Ann. § 18.2-29, which criminalizes "[a]ny person age eighteen or over" "command[ing], entreat[ing], or otherwise attempt[ing] to persuade a[] person under age eighteen to commit a felony," making it a Class 5 felony.[3] (App. 241.) The predicate felony for the indictment was Virginia's "crimes against nature" statute, Va. Code Ann. § 18.2-361(A), in this case that portion making "carnally know[ing a] male . . . by or with the mouth," a Class 6 felony. (App. 241).

MacDonald challenged the solicitation of a minor charge on the ground that "Virginia Code § 18.2-361, Section A, [is not] a valid exercise of the police power of the state, surviving a substantive due process constitutional challenge." (App. 230.) MacDonald contended that the statute is "facially unconstitutional" because it "establishes a blanket prohibition of Sodomy for everyone, without regard to majority, marital status or other considerations," (App. 236), and also argued the statute is "unconstitutional *as applied* to [MacDonald], as it [criminalizes] constitutionally protected activity

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[3] MacDonald was also convicted of violating Va. Code Ann. § 18.2-371, (App. 225, 245), which criminalizes contributing to the delinquency of a minor as a Class 1 misdemeanor, and was sentenced to twelve months for that offense. (App. 199.)

between individuals with the capacity to consent."[4] (App. 239.)

The Circuit Court for the City of Colonial Heights denied MacDonald's Motion to Dismiss, reasoning "that a litigant may challenge the constitutionality of a law only as it applies to him or her" and noting that this Court "in *Lawrence* was mindful of this distinction" between facial and as-applied rulings. The circuit court thus concluded that *Lawrence* did not "extend the constitutionally protected zone to cases in which the defendant acts without the consent of a seventeen-year-old victim." (App. 227-28.) Accordingly, the circuit court rejected MacDonald's challenge to the constitutionality of Virginia's sodomy statute, and, following a bench trial, found MacDonald guilty of soliciting a minor to violate the same. (App. 6, 225, 228.) It subsequently sentenced MacDonald to ten years in prison, nine of which were suspended, a sentence that also "compelled [him] to register as a sex offender."[5] (App. 3, 6-7.)

MacDonald appealed his solicitation of a minor conviction to the Court of Appeals of Virginia,[6] maintaining the predicate statute's facial and as-applied unconstitutionality. (App. 199, 214-17.) The Court of

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[4] MacDonald contended that Virginia law establishes sixteen as the age of consent, citing Va. Code Ann. § 18.2-63, which punishes sexual conduct with persons under sixteen. (App. 237-38.) This contention was rejected in *McDonald v. Commonwealth*, 274 Va. 249, 260, 645 S.E.2d 918, 923-24 (2007), citing Va. Code Ann. § 1-207.

[5] *See* Va. Code Ann. § 9.1-902(B)(2) (listing "offense for which registration is required" as including "any . . . attempted violation of" 18.2-361 "[w]here the victim is a minor"); (App. 53-96).

[6] MacDonald also challenged the sufficiency of the evidence to convict him of violating Va. Code Ann. § 18.2-371, (App. 199, 217-21), a challenge the Court of Appeals also rejected. (App. 182-84.)

Appeals, by unpublished decision, disposed of these challenges, first by holding that, "[i]n accord with our previous decisions, . . . MacDonald lacks standing to assert [his facial unconstitutionality] claim. *See McDonald v. Commonwealth*, 48 Va. App. 325, 329, 630 S.E.2d 754, 756 (2006)." (App. 180-81.) The Court also rejected MacDonald's as-applied challenge—his argument "that his conduct with the seventeen-year-old victim was constitutionally protected"—"[f]or the reasons previously stated in our opinion in *McDonald*, 48 Va. App. at 329, 630 S.E.2d at 756-57." (App. 181-82.)

Those reasons stated in that related case[7] were: (1) "that a party 'has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights,'" and consequently MacDonald did not have standing to bring a facial challenge, (2) that a seventeen-year old is a minor under Virginia law, and (3) that "[t]he Supreme Court in *Lawrence* made quite clear that its ruling did not apply to sexual acts involving children." *McDonald*, 48 Va. App. at 329, 331-32, 630 S.E.2d at 756-58 (quoting *Cnty. Ct. of Ulster Cnty. v. Allen*, 442 U.S. 140, 154-55 (1979)). (App. 163-78, 190-92.) Therefore, the Court of Appeals both rejected MacDonald's facial challenge and held, as it had before, that "Code § 18.2-361(A) is constitutional as applied to appellant because his violations involved minors and therefore merit no protection under the Due Process Clause." *Id.* at 332, 630 S.E.2d at 758; (App. 194). MacDonald petitioned the Supreme Court of Virginia for review, which refused his *pro se* petition for appeal and petition for rehearing without opinion. (App. 8, 161-62.)

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[7] Although his surname is spelled differently in the two cases, Respondent here was defendant below in both *McDonald*, 48 Va. App. 325, 630 S.E.2d 754, and *MacDonald*, No. 1939-05-2, 2007 Va. App. LEXIS 7, 2007 WL 43635 (Va. App. Jan. 9, 2007).

MacDonald, acting *pro se*, then made application for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, which possessed jurisdiction to consider his application under 28 U.S.C. § 2254(a), *see* Sup. Ct. R. 14(1)(g)(ii), suing his North Carolina probation officer and the Attorney General of Virginia, (App. 97), both of whom were eventually replaced as Respondents by Tim Moose, Director of the North Carolina Division of Community Corrections.[8]

In that application, MacDonald reiterated his argument that Va. Code Ann. § 18.2-361(A) is facially unconstitutional. (App. 53-96, 97-110.) MacDonald's argument proceeds along these lines: premise one is that this Court "unmistakably held in *Lawrence* . . . that a statute that criminalizes sexual acts between consenting adults in private is facially invalid;" premise two is that subsection (A) of 18.2-361 "is indistinguishable from the Texas statute that the defendants were convicted of violating in *Lawrence*;" and, therefore, Virginia's statute is facially unconstitutional. (App. 64.) MacDonald, however, further noted that he did not "call into question the legislature's police power to enact narrower statutes specifically targeted towards sex that is forcible, commercial, truly public or with minors," but "[i]nstead" contended "that [Virginia's] sodomy statute was already invalid because it contains none of the elements that could make a sodomy law constitutional" under *Lawrence*. (App. 66.) In other words, although MacDonald's act of solicitation could be constitutionally

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[8] (No. 1:09-cv-00147, Doc. 18 at 4-5 (E.D. Va. Feb. 14, 2011)). After his August 2009 release from incarceration, MacDonald moved to North Carolina, which assumed his supervised probation term. He remains subject to that State's "mandatory sex offender registration for the . . . ten years" following his release. (App. 53.)

proscribed, MacDonald could not be constitutionally prosecuted because it "did not involve a law passed by the legislature to address the specific problem of sexual behavior with minors." (App. 72.)

The district court denied MacDonald's application, concluding that the Virginia Court of Appeals' holding that MacDonald "lacked standing" to challenge the statute facially was neither contrary to nor an unreasonable application of clearly established federal law because "[a] reasonable jurist could apply the principle from *Ulster* to conclude that . . . MacDonald lacked standing to challenge the facial constitutionality of Va. Code Ann. § 18.2-361(A) because MacDonald was an adult who was trying to engage in sodomy with a minor, and such behavior is not constitutionally protected." (App. 42-43, 50.) And the district court also rejected MacDonald's as-applied challenge, concluding that "[t]he Court of Appeals of Virginia's determination is based on clearly established federal law," as this Court "in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children." (App. 44-45.) MacDonald timely noticed an appeal and sought a certificate of appealability from the Fourth Circuit, which granted a certificate, identifying "the issue for appeal as whether Virginia Code section 18.2-361(A) is unconstitutional either facially or as applied in MacDonald's case, in light of the Supreme Court's *Lawrence* decision." (App. 3-4.)

A divided, three-judge panel of the Fourth Circuit vacated the district court's judgment and remanded "for an award of habeas corpus relief on the ground that the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment." (App. 3-4, 24.) Although reciting the standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (AEDPA), (App. 10), the Fourth

Circuit simply disagreed with the Court of Appeals of Virginia's application of *Ulster County*, and with its interpretation of *Lawrence*'s reach. (App. 14-18.) With regard to *Ulster County*, the majority reasoned that because, in its view, the Virginia statute was rendered facially unconstitutional by operation of this Court's decision in *Lawrence*, "the anti-sodomy provision is unconstitutional when applied to any person," and thus any person charged thereunder has standing to challenge that charge on the ground of its facial invalidity. (App. 16.)

Turning to *Lawrence*, the panel majority acknowledged that this Court "plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with" due process. (App. 16.) However, the Fourth Circuit found a basis for its facial ruling in the circumstance that this Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which it described as upholding "against facial challenge a Georgia statute criminalizing all sodomy." (App. 17.) Noting that the Georgia statute upheld in *Bowers* "was strikingly similar to [Virginia's] anti-sodomy provision," (App. 17 n.12), the panel majority reasoned that certain statements of the *Lawrence* Court regarding how *Bowers* was wrongly decided led invariably to the conclusion that Virginia's statute, like "the invalid Georgia statute in *Bowers*, . . . does not survive the *Lawrence* decision." (App. 18.)

The panel majority also faulted the Court of Appeals of Virginia for not extending the reasoning of a Virginia Supreme Court decision, also involving adults, to this case. (App. 19-20.) With respect to the conclusion of the state courts that the presence of a minor should matter for purposes of applying *Lawrence*, the majority rejected "[t]he dissent's finely honed distinction that, unlike *Lawrence* and *Bowers*, this 'case' involves minors," (App. 18 n.13), despite acknowledging that "the Supreme Court

implied in *Lawrence* that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor." (App. 20.)

Ultimately, the Fourth Circuit thought that only the legislative branch of the government of Virginia—not the state courts—could harmonize Virginia law with this Court's holding in *Lawrence*. Because it concluded that *Lawrence* utterly excised § 18.2-361(A) from the Code of Virginia, the majority could say "[t]he legal arm of the Commonwealth cannot simply wave a magic wand and decree by fiat conduct as criminal, in usurpation of the powers properly reserved to the elected representatives of the people." (App. 18-19 n.13.) Assuming certain knowledge of what the Court in *Lawrence* anticipated as legitimate state responses to its holding, the panel majority stated that this "Court's ruminations concerning the circumstances under which a state might permissibly outlaw sodomy . . . no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." (App. 20.) According to the majority, "although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older,"—the very act MacDonald is charged with soliciting—"it has not seen fit to do so."[9] (App. 21-22.)

Having taken up the facial constitutionality of the statute on behalf of a litigant who it conceded was not charged with doing anything *Lawrence* held to be protected, the Fourth Circuit reasoned that any other course was inappropriate because it would have required courts to engage in "too much meddling" to separate the constitutional from the unconstitutional applications, citing *Ayotte v. Planned Parenthood of*

[9] The Fourth Circuit's opinion failed to notice that the Commonwealth's representatives had re-enacted these provisions of the sodomy statute in 2005. 2005 Va. Acts 281.

Northern New England, 546 U.S. 320 (2006). (App. at 22-24.) In conclusion, the Fourth Circuit expressed its "confiden[ce]" that its decision "adheres to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional." (App. 23.) The panel majority did allow that subsection (B) of the statute, "which criminalizes incestuous sodomy involving both minors and adults[,] might well survive review under *Lawrence*, as may that part of section 18.2-361(A) that outlaws bestiality." (App. 24.)

The dissenting judge countered that the Virginia courts fairly interpreted *Lawrence* as "invalidating sodomy laws only as applied to private consenting adults," that federal courts are "bound to give Virginia courts the benefit of th[e] doubt on federal collateral review," and that "[t]he majority elides [the AEDPA] burden altogether, passing upon the constitutionality of the Virginia anti-sodomy provision as if it were presented in the first instance. In doing so," he said, the majority "fail[s] to account for the rigor of federal habeas review," and thus erred in reversing. (App. 25-26 & n.18.) Turning to *Lawrence*, he said "[n]owhere in the opinion does the Court" "facially invalidate[] all sodomy statutes." Furthermore, "[i]f it is difficult to discern from the *Lawrence* opinion whether it invalidated all sodomy statutes, it is even more of a stretch to do so by negative inference from the case it overturned," *Bowers*. (App. 29.) And, citing disagreement among the courts of appeals, the dissent concluded that "[r]easonable jurists could disagree on whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute," and thus, "[u]nlike the majority, the district court here remained

faithful to [AEDPA's requirements] in declining to issue the writ." (App. 30-31, 33.)

With respect to *Ayotte*, the dissent thought that the majority "misreads *Ayotte*" and that "[e]ven if *Ayotte* were instructive, . . . it simply invites the next question: 'Would the [Virginia] legislature have preferred what is left of its statute to no statute at all?'" (App. at 31) (quoting *Ayotte*, 546 U.S. at 330). Furthermore, "[t]he majority wrongly assumes, without the proof required by *Ayotte*, that the Virginia General Assembly did not intend for its anti-sodomy provision to apply to the conduct that *Lawrence* arguably exempted from constitutional protection," even though the statute had been in place long before *Lawrence* was decided or any application thereof had been held to be unconstitutional. (App. 31-32 & n.21.) Finally, the dissent took issue with the majority's application of what amounted to overbreadth analysis, contending that "to suggest that a state must excise the constitutional defects of a statute by legislative revision before enforcing those portions that pass constitutional muster would turn every as-applied ruling into a facial invalidation." (App. 32.)

Petitioner sought, and on April 8, 2013 the Fourth Circuit denied, rehearing *en banc* of the panel decision. (App. 51-52.)

REASONS FOR GRANTING THE PETITION

This Petition should be granted, and the decision of the Fourth Circuit reversed, for two reasons. First, the Court of Appeals plainly erred in determining that this Court's decision in *Lawrence*, 539 U.S. 558, "clearly established" that Virginia's sodomy statute was facially unconstitutional as a predicate for the prosecution and conviction in a Virginia court of soliciting a minor to engage in oral sodomy. This Court has repeatedly and

recently recognized that such errors call for issuance of a writ of certiorari. *See*, *e.g.*, *Marshall v. Rodgers*, 133 S. Ct. 1446, 1448 (2013). Second, the need for review is made all the more pressing by the collateral effects of the Fourth Circuit's decision on other cases. In view of that on-going harm, Petitioner requests that this reversal be granted without briefing on the merits or oral argument to limit the damage of this decision to the sovereign interests of the Commonwealth and other States in the Fourth Circuit.

I. The Fourth Circuit Erroneously Interpreted *Lawrence* as Facially Invalidating All State Sodomy Statutes and Failed To Properly Apply the Habeas Standard of Review in Erroneously Holding Its Idiosyncratic Interpretation to Be Clearly Established.

As relevant here, 28 U.S.C. § 2254(d)(1) restricts "[t]he statutory authority of federal courts to issue habeas corpus relief for persons in state custody" who are collaterally attacking their state court convictions to circumstances in which the applicant shows that the state court's "'adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by'" this Court. *Harrington v. Richter*, 131 S. Ct. 770, 783-84 (2011) (citation omitted). In so limiting the federal courts' power to issue habeas relief, the statute "preserves [their] authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Id.* at 786.

Therefore, "[t]he starting point for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's

claims." *Marshall*, 133 S. Ct. at 1449. And "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (citation omitted). "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer*, 538 U.S. at 71-72. And "a state court decision is 'contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Id.* at 73 (citation omitted). In sum, "[t]his is a difficult to meet, and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (quotation marks and citations omitted).

No one has questioned that the Virginia courts correctly identified *Lawrence* as providing the governing law in determining whether federal law facially invalidated, or invalidated as applied to the facts here present, Va. Code Ann. § 18.2-361(A). As there can also be no question that no "decision of this Court" presents a legal theory and "set of facts that are materially indistinguishable from" those presented the Virginia courts in this case, *see Lockyer*, 538 U.S. at 73, to grant habeas relief here, a federal court would have to conclude that the Court of Appeals of Virginia's interpretation of *Lawrence*'s holding was not simply "'an incorrect application of federal law,'" but "'an unreasonable application of federal law.'" *Harrington*, 131 S. Ct. at 785 (citation omitted); *see Yarborough*

v. Alvarado, 541 U.S. 652, 663 (2004) ("'Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" (citation omitted)).

Moreover, to conclude that the Virginia Court of Appeals' decision rose to the level of unreasonable, the correct decision had to be beyond the pale of good faith disagreement: "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 131 S. Ct. at 786 (citation omitted). That is, the *Lawrence* decision would have to be found to have squarely established an applicable, specific legal rule that all fairminded jurists would conclude invalidates Virginia's statute, for "'[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Id.* (citation omitted).

Lawrence did not squarely establish that all state statutes that could be applied to the conduct at issue in *Lawrence* were facially unconstitutional in all other applications. In fact, the *Lawrence* court went out of its way to limit its holding to the establishment of only one specific legal rule: that where "two adults who, with full and mutual consent from each other, engage[] in sexual practices common to a homosexual lifestyle, . . . [t]he State cannot demean their existence or control their destiny by making their sexual conduct a crime." *Lawrence*, 539 U.S. at 578. Instead of facially invalidating sodomy statutes, *Lawrence* is best read as an as-applied constitutional holding because it left no doubt that it does not address, among other applications, sexual

behavior between adults and minors. This interpretation of *Lawrence* is not only supported by a close analysis of the Court's decision, but by the overwhelming majority of courts to consider its holding. *See* Part II, *infra*.

A. *Lawrence* Did Not Declare Unconstitutional State Prosecutions of Adult Solicitation of Minors to Engage in Oral Sodomy, and thus Did Not Invalidate the Virginia Statute As Applied to MacDonald's Conduct.

The limited reach of *Lawrence*'s ruling regarding what conduct enjoys constitutional protection could not be more clear. The *Lawrence* Court made a point to note that it granted certiorari to consider three questions, two of which it actually decided: "'[w]hether Petitioners' criminal convictions for *adult* consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?'" and "'[w]hether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?'" *Lawrence*, 539 U.S. at 564 (emphasis added). And, immediately following its recitation of the questions presented, the *Lawrence* Court noted that "[t]he petitioners were *adults* at the time of the alleged offense. Their conduct was in private and consensual." *Id.* (emphasis added).

The Court began its analysis by declaring that "the case should be resolved by determining whether the petitioners were free *as adults* to engage in the private conduct" charged. Concluding that the Due Process Clause applies to that question, it found "it necessary to reconsider the Court's holding in *Bowers*." *Id.* The *Lawrence* Court then criticized the *Bowers* Court's framing of the issue, as whether the Constitution "'confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the

many States that still make such conduct illegal.'" *Id.* at 566 (quoting *Bowers*, 478 U.S. at 190). And the Court in *Lawrence* decided that the liberty protected by the Due Process Clause meant that "*adults* may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Id.* at 567 (emphasis added).

The *Lawrence* Court continued its focus on adults in its historical review, *id.* at 568-69, noticing that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting *adults* acting in private." *Id.* at 569 (emphasis added). The Court added that prosecutions instead appear to have been brought "for predatory acts against those who could not or did not consent, as *in the case of a minor*," and that "model sodomy indictments presented in a 19th-century treatise . . . addressed the predatory acts of *an adult man against a minor girl* or minor boy." *Id.* (emphases added) (citation omitted). In drawing its conclusions, the Court declared that it was "difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private *and by adults*." *Id.* at 569-70 (emphasis added).

Looking to more recent developments in the wider western world, the Court cited a decision contrary to *Bowers* of "the European Court of Human Rights" sustaining a challenge by "[a]n *adult* male resident . . . who desired to engage in consensual homosexual conduct" to a Northern Ireland law forbidding it. *Id.* at 573 (emphasis added). And, turning to the States, the Court cited the reduction in the number which had "laws prohibiting the relevant conduct referenced in the *Bowers* decision," and a "pattern of nonenforcement with respect to *consenting adults* acting in private." *Id.* (emphasis added).

It was only in this context that the Court overruled *Bowers*. *Id.* at 578. Furthermore, it then immediately made clear what it was not addressing:

> The present case *does not involve minors*. It does not involve persons who might be injured *or coerced or who are situated in relationships where consent might not easily be refused*. It does not involve *public conduct* or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two *adults* who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. (emphases added).

As the foregoing review establishes beyond all cavil, the *Lawrence* Court may not be fairly read as having clearly limited the power of States to criminalize solicitation of oral sodomy between a minor and an adult.

B. *Lawrence* Did Not Facially Invalidate the Texas Statute nor Does It Clearly Establish That All State Sodomy Statutes Are Facially Unconstitutional.

The Fourth Circuit interpreted *Lawrence* to clearly establish that a state statute "prohibiting sodomy between two persons without any qualification[] is facially unconstitutional" and thus held that the Virginia courts' affirmance of MacDonald's conviction for violation of soliciting a minor to violate Va. Code Ann. § 18.2-361(A) was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." (App. 23.) However, outside the speech area, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications. . . . [A] facial challenge must fail where the statute has a '"plainly

legitimate sweep."'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in the judgment)). A fair reading of *Lawrence* in light of these principles makes plain that it did not conclude that the Petitioners there had made the required showing, and, thus, a fair application of what *Lawrence* did decide to Virginia's statute leads to the conclusion that Va. Code Ann. § 18.2-361 remains facially valid, albeit unconstitutional if applied to circumstances not present in this case.

Lawrence does not speak to whether the decision is facial or as applied, and hence a court could reasonably conclude that it followed "the 'normal rule'" absent clear evidence to the contrary. *Ayotte*, 546 U.S. at 329. And there is strong indication in the *Lawrence* opinion that the Court did not intend to depart from an as-applied approach, as the challenge arose in the context of a particular criminal prosecution; the questions presented to the *Lawrence* Court were clearly as-applied, involving the "Petitioners' criminal convictions;" and the Court recited that "the case should be resolved by determining whether the petitioners were free *as adults* to engage in the private conduct." 539 U.S. at 564 (emphasis added). Furthermore, *Lawrence* cited and recited throughout the course of its decision the constitutionally significant facts that "petitioners were adults," that "[t]heir conduct was in private," and that it was "consensual." *See id.* ("free as adults to engage in the private conduct"); *see also id.* at 567, 569, 570, 571, 573, 575, 576, 578. Thus, the most natural interpretation of *Lawrence* is that it held unconstitutional only the State of Texas' attempt to criminalize the act of sodomy before the Court—consensual sodomy in private and between adults—

and thus laid down the "'specific legal rule'" that such prosecutions violate the Constitution. *See Harrington*, 131 S. Ct. at 786.

Because Texas' statute plainly reaches conduct that was not private, consensual, or done by adults, the Court's opinion may fairly be read as not intending to have invalidated those applications. *See Lawrence*, 539 U.S. at 563. Confirming this reading is the fact that the Texas Court of Appeals to which *Lawrence* was remanded interpreted the decision to be as applied. *See, e.g.*, *Lawrence v. State*, Nos. 14-99-00109-CR & 14-99-00111-CR, 2003 Tex. App. LEXIS 9191, 2003 WL 22453791 (Tex. App. Oct. 30, 2003) (describing this Court's decision as "[h]olding appellants' convictions under [the Texas statute to] violate the liberty and privacy interests of the Fourteenth Amendment," and so "order[ing] that the complaints be dismissed" and "judgments of acquittal" be rendered). Despite this, the statute remains on the books, unamended, Tex. Penal Code Ann. § 21.06, and continues to be understood by the Texas courts as only "unconstitutional *as applied* to private sexual conduct between consenting adults." *Ochoa v. State*, 355 S.W.3d 48, 53 (Tex. App. 2010) (emphasis added).

As a consequence, the decision below "conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), and should be reversed. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [respondent's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (quotation marks and citations omitted)).

C. The Fourth Circuit Failed To Analyze the Sole Question Presented on Habeas Review, Whether the Virginia Courts' Decision of These Issues Contravened Rules of Law Clearly Established by This Court's Decisions, and thus Exceeded Its Authority in Concluding That Habeas Relief Should Issue to MacDonald.

Further confirming the impropriety of the Fourth Circuit's decision is the absence from its opinion of any meaningful interaction with the standard of review established by 28 U.S.C. § 2254(d). To the extent the panel majority took note of the restrictions imposed by § 2254(d)(1), they "appear[] to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review." *Harrington*, 131 S. Ct. at 786; *see* (App. 23) ("We are confident, however, that we adhere to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision . . . is facially unconstitutional."). The panel majority entirely failed to "ask whether it is possible fairminded jurists could disagree that [the state court's *ratio decidendi* was] inconsistent with the holding in a prior decision of this Court." *Harrington*, 131 S. Ct. at 786. Instead, meaningful interaction with the limited reviewing role of a federal court was consigned to the dissent. (App. 24-33.)

II. Besides Not Enjoying Support in This Court's Case Law, the Fourth Circuit's Erroneous Conclusion That *Lawrence* Clearly Established the Facial Invalidity of All State Sodomy Statutes Conflicts With the Interpretation Placed on *Lawrence* by Other Federal Courts of Appeals and State Appellate Courts and So Merits This Court's Review.

In holding that *Lawrence* facially invalidates Virginia's statute, the Fourth Circuit adopted an interpretation of *Lawrence* that conflicts with what all the other federal courts of appeals and state appellate courts to consider the question have interpreted *Lawrence* to forbid. The First Circuit, *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) ("*Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy."), the Third Circuit, *Interactive Media Entertainment & Gaming Association v. Attorney General of the United States*, 580 F.3d 113, 118 (3d Cir. 2009) ("*Lawrence* . . . involved state laws that barred certain forms of sexual conduct between consenting adults in the privacy of the home."), the Fifth Circuit, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) ("[T]he right the Court recognized" was the right to "*adult consensual sexual intimacy in the home*."), the Seventh Circuit, *Muth v. Frank*, 412 F.3d 808, 812, 818 (7th Cir. 2005) ("[T]he Supreme Court held that a Texas statute prohibiting homosexual sodomy was unconstitutional insofar as it applied to the private conduct of two consenting adults." (footnote omitted)), the Ninth Circuit, *Anderson v. Morrow*, 371 F.3d 1027, 1032-33 (9th Cir. 2004) ("The *Lawrence* Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct. The holding does not affect a state's legitimate interest and indeed, duty, to interpose when consent is in doubt."), and the Eleventh Circuit, *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012) ("*Lawrence* concerned private conduct between consenting adults."), have all interpreted *Lawrence* as speaking exclusively to the facts there presented: private, consensual sexual behavior between adults.

Most, if not all, other courts have recognized that *Lawrence* was a limited ruling, preserving the States' reserved power to criminalize sexual acts not embraced in the description of conduct *Lawrence* held constitutionally protected. *See*, *e.g.*, *Lowe v. Swanson*, 663 F.3d 258, 264 (6th Cir. 2011) ("*Lawrence* did not address or clearly establish federal law regarding state incest statutes," even between consenting adults); *Seegmiller v. Laverkin City*, 528 F.3d 762, 770 (10th Cir. 2008) ("[T]he Court has never endorsed an all-encompassing right to sexual privacy under the rubric of substantive due process"); *Muth*, 412 F.3d at 818 (holding that *Lawrence* "did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct" (footnote omitted)); *McDonald v. Commonwealth*, 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007) ("Nothing in *Lawrence* . . . prohibits the application of the sodomy statute to conduct between adults and minors."); *State v. Senters*, 699 N.W.2d 810, 816 (Neb. 2005) ("[W]e conclude that when a law regulates sexual conduct involving a minor, *Lawrence* is inapplicable."). It appears that the Fourth Circuit is alone among courts in holding that the decision in *Lawrence* did not "confine[] the scope of constitutional protection to private sexual intimacy between consenting adults." (App. 28.)

Those courts which have squarely addressed similar "crimes against nature" statutes have affirmed their facial constitutionality. *State v. Hunt*, 722 S.E.2d 484, 490-91 (N.C. 2012) (holding that "[i]n response to the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the scope of section 14-177," North Carolina's sodomy statute, "has been narrowed," but still "may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place,

or conduct involving prostitution or solicitation," and affirming a conviction for "engag[ing] in nonconsensual or coercive sexual acts with a minor" (quotation marks and citations omitted)); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (upholding the facial constitutionality of Georgia's statute, Ga. Code Ann. § 16-6-2(a)(1), stating that only "insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent" does it run afoul of the Georgia Constitution); *accord Green v. State*, 692 S.E.2d 784, 786 (Ga. Ct. App. 2010).

And, finally, the only other federal court to consider what *Lawrence* means in the context of collateral review of a state court conviction has rejected the premises that the Fourth Circuit adopted here. In *Lowe*, 663 F.3d 258, the United State Court of Appeals for the Sixth Circuit reviewed an appeal of a petition for writ of habeas corpus that contended that the Supreme Court of Ohio had "unreasonably applied federal law as clearly established by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), when it upheld his incest conviction." *Id.* at 259. An Ohio man had been "charged with one count of sexual battery for engaging in sexual conduct by means of sexual intercourse with his 22-year-old stepdaughter," *id.* at 259-60, under a provision very similar to subsection (B) of the Virginia statute. *Compare* Ohio Rev. Code § 2907.03(A)(5), *with* Va. Code Ann. § 18.2-361(B) & (C). The stepfather "argued that the statute was unconstitutional as applied to him because the government had no legitimate interest in regulating sexual activity between consenting adults." *Lowe*, 663 F.3d at 260. Although the district court had refused the petition, the Sixth Circuit nonetheless took up the appeal, "explaining that 'the conflicting authority by our sister circuits establishes that the issues presented by

this habeas petition are substantial and warrant further review.'" *Id.*

The Sixth Circuit then affirmed the Ohio courts on two grounds. First, it held, "[i]n light of the disagreement among the circuits and the well-reasoned authority in favor of respondent [concluding that *Lawrence* did not recognize a fundamental right], . . . the Ohio Supreme Court did not unreasonably apply clearly established federal law" when it applied rational basis review to the statute under which the stepfather was charged. *Id.* at 263. And second, even "assuming that *Lawrence* clearly established a fundamental right and/or a higher standard of review, we hold that neither the right nor standard is implicated in the present case." *Id.* at 263-64. Citing the *Lawrence* Court's discussion of what that "'case d[id] not involve,'" the Sixth Circuit concluded that *Lawrence*'s passage distinguishing "'persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused'" exempted from its holding State criminalization of the "stepparent-stepchild relationship" at issue in *Lowe*, "regardless of age." *Id.* at 264 (quoting *Lawrence*, 539 U.S. at 578). Also noting that the State had a legitimate and weighty interest in "protecting the family from the destructive influence of intra-family, extra-marital sexual contact," the Sixth Circuit "h[e]ld that the Ohio Supreme Court's decision was not contrary to and did not involve an unreasonable application of clearly established federal law." *Id.*

The Fourth Circuit should have reached the same result, and should have held that the decisions of the Virginia courts interpreting *Lawrence* not to preclude prosecutions of adults who solicit minors to engage in oral sodomy outside the home are "not contrary to and did not involve an unreasonable application of clearly established federal law." *Id.* By holding otherwise, the

Fourth Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," meriting this Court's review. Sup. Ct. R. 10(a). And the decisions of federal courts of appeals and state courts collected above confirm, at the very least, that fair-minded jurists could disagree regarding the correct analysis.

III. The Fourth Circuit's Decision Threatens Significant, Harmful Collateral Effects.

In concluding that Va. Code Ann. § 18.2-361(A) was facially unconstitutional, the Fourth Circuit brings other cases into doubt. Although other Virginia statutes speak more directly to sexual crimes against children, *see*, *e.g.*, Va. Code Ann. § 18.2-63 ("Carnal knowledge of child between thirteen and fifteen years of age"); Va. Code Ann. § 18.2-64.1 ("Carnal knowledge of certain minors," i.e., those in custody); Va. Code Ann. § 18.2-370 ("Taking indecent liberties with children"); *id.*, § 18.2-370.1 ("Taking indecent liberties with child by person in custodial or supervisory relationship"), those statutes generally apply to very specific circumstances, enhance the penalties provided for by other background statutes such as Va. Code Ann. § 18.2-361(A) or, as in the case of the "indecent liberties with children" statutes, incorporate by reference the sodomy statute.[10] *See*, *e.g.*, Va. Code Ann. § 18.2-370(A)(4)(5); Va. Code Ann. § 18.2-370.1(A)(ii). Accordingly, the statute still remains an important tool for prosecuting sexual predators in Virginia. *See* Rusty McGuire, Letter to the Editor, *Virginia's children are in jeopardy*, RICHMOND TIMES-DISPATCH

[10] Several other criminal statutes rely on Va. Code Ann. § 18.2-361 as a predicate, including sections criminalizing prostitution and sex trafficking, Va. Code Ann. § 18.2-346; Va. Code Ann. § 18.2-356, as well as adults soliciting or procuring minors for acts of sodomy over "the Internet." *See* Va. Code Ann. § 18.2-374.3(C)(3).

(May 20, 2013), http://www.timesdispatch.com/opinion/article_ade14086-c08f-57a3-8aa7-59104dee5a79.html (letter from Commonwealth's Attorney in Louisa County, Virginia).

Enmeshed in the web of statutes designed to empower prosecutors and other state officials to protect children, Va. Code Ann. § 18.2-361(A) is cited by a number of them as an offense that disqualifies a person from sensitive employment with children or other vulnerable members of society. These include employment at a "licensed nursing home," Va. Code Ann. 32.1-126.01(A), "licensed home care organization," or "children's residential facility regulated or operated by the Departments of Education, Behavioral Health and Developmental Services, Military Affairs, or Social Services" if the violation was one "involving children." Va. Code Ann. § 63.2-1726; *see* Va. Code Ann. § 37.2-408.1. Also, any conviction of violating Va. Code Ann. § 18.2-361 disqualifies the convict from "resid[ing in], [being] employed by, or volunteer[ing] in" "a family day home." Va. Code Ann. § 63.2-1727.

Significantly, a violation of Va. Code Ann. § 18.2-361(A) "[w]here the victim is a minor, physically helpless or mentally incapacitated," Va. Code Ann. § 9.1-902(B)(2) & (E)(2), is one of the offenses that require the convicted "to register and reregister with the Department of State Police" and local law-enforcement agencies and provide them certain information. Va. Code Ann. § 9.1-903 ("Registration procedures"); *see* Va. Code Ann. § 9.1-901 (defining "[p]ersons for whom registration required"). Such registrations plainly "assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders and to protect children from becoming victims of criminal offenders by helping to prevent such individuals from being allowed to work directly with

children." Va. Code Ann. § 9.1-900. Were the Fourth Circuit's decision permitted to stand, those persons incarcerated for violations of § 18.2-361(A), either as a primary or predicate offense, or who are required to register for those same violations could be freed from prison and from any continuing duty to advise of their whereabouts. They also would be provided a claim to be permitted to serve in various state and private institutions serving children, undermining law-enforcement efforts to protect children. Also, 42 U.S.C. § 1983 suits against officers for enforcing Va. Code Ann. § 18.2-361(A) can be expected to proliferate, relying on the Fourth Circuit's "clearly established" holding to argue that those who have enforced the law in cases such as MacDonald's have "violate[d] clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

One recent case that invites notice is *Hamilton v. Commonwealth*, 738 S.E.2d 525 (Va. App. 2013), where the Court of Appeals of Virginia denied a challenge to the guilty plea of a man convicted of "five separate felony charges, consisting of two counts of aggravated sexual battery, two counts of indecent liberties, and one count of crimes against nature." *Id.* at 526-27. The man was so charged when it came to light that he had "sexually abused multiple boys while holding a position as a baseball coach and as a host to a foreign exchange student," including "sexually molest[ing]" a five-year-old boy, engaging in "'fellatio and anal intercourse'" with "a sixteen-year-old foreign exchange student," and sexually abusing three other young minors. *Id.* at 527. "[T]he victim in the felony offense pertaining to violation of Code § 8.2-361(A) . . . was sixteen," *id.*, and thus those acts were not covered by the terms of Va. Code Ann. §§ 18.2-63 or 18.2-64.1. And the other offenses for which

Hamilton was convicted did not require registration as a sex offender; "defendant's conviction for crimes against nature in violation of Code § 18.2-361 is the only [one of these] offense[s] for which registration is required." *Id.* at 529.

Plainly, Va. Code Ann. § 18.2-361(A) has not fallen into disuse,[11] and, contrary to the reasoning of the Fourth Circuit, the Virginia General Assembly has affirmed its continued vitality as applied to conduct not held protected by the decision in *Lawrence*. *See* 2005 Va. Acts 281-82 (reenacting Va. Code Ann. § 18.2-361(A) unchanged as well as a number of other provisions relying on its prohibition as applied to children and estimating that an additional appropriation of "$351,875 for periods of imprisonment in state adult correctional facilities" would be necessary); *see also Falls Church v. Protestant Episcopal Church, U.S.A.*, 285 Va. 651, 665, 740 S.E.2d 530, 538 (2013) (reciting that the Virginia General Assembly is presumed to have legislated with full knowledge of the law).

Virginia's statute is not the only one potentially affected by the Fourth Circuit's broad holding. North Carolina also maintains a sodomy statute, N.C. Gen. Stat. § 14-177. That State, like Virginia, regularly applies its

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[11] *See, e.g.*, *Mervin-Frazier v. Commonwealth*, No. 2114-08-4, 2010 Va. App. LEXIS 134, at *30, *33, 2010 WL 128651, at *10, *12 (Va. App. Apr. 6, 2010) (affirming the conviction of "non-forcible sodomy" and sexual intercourse with a seventeen-year old); *Singson v. Commonwealth*, 621 S.E.2d 682, 685, 694 (Va. App. 2005) (affirming a conviction for solicitation to commit oral sodomy in a public restroom); *Fisher v. Commonwealth*, No. 0278-00-4, 2001 Va. App. LEXIS 342, at *3-4, *8, 2001 WL 683954, at *1-2 (Va. App. June 19, 2001) (affirming a conviction for three counts of forcible heterosexual sodomy between adults); *Paris v. Commonwealth*, 545 S.E.2d 557, 558, 560 (Va. App. 2001) (affirming a conviction for two counts of oral sodomy of a fifteen-year-old).

statute to constitutionally unprotected conduct involving force, minors, or public acts. *See*, *e.g.*, *Hunt*, 722 S.E.2d 484 (affirming conviction of adult for oral sodomy with seventeen-year-old female who was mentally disabled); *State v. Shaffer*, 666 S.E.2d 856, 857-58, 859-60 (N.C. Ct. App. 2008) (affirming adult male's conviction for violation of "crime against nature" statute for "coerced fellatio" by an adult female); *In re R.L.C.*, 643 S.E.2d 920, 921, 925 (N.C. Ct. App. 2007) (affirming fourteen-year-old's juvenile delinquency adjudication "based upon his violation of the crime against nature statute," specifically fellatio with a twelve-year-old female, as not an as-applied violation of *Lawrence*); *State v. Pope*, 608 S.E.2d 114, 115, 116 (N.C. Ct. App. 2005) (affirming the constitutionality of charging four counts of violating crime against nature statute by publicly offering to "perform oral sex in exchange for money," noting that "the *Lawrence* Court expressly excluded prostitution and public conduct from its holding"). South Carolina similarly maintains a statute proscribing forms of sodomy. *See* S.C. Code Ann. § 16-15-120.

CONCLUSION

Given its clear failure to follow multiple decisions of this Court with respect to the habeas review standard, the decision below should be summarily reversed. *See*, *e.g.*, *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam) (summarily reversing erroneous grant of habeas relief); *Marshall*, 133 S. Ct. 1446 (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam) (same); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (per curiam) (same); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam) (same); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam) (same); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam) (same); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam) (same); *Bobby v. Mitts*, 131 S.

Ct. 1762 (2011) (per curiam) (same). In the alternative, because the decision also conflicts with multiple Federal and State decisions, a writ of certiorari should be granted and the decision below reversed in the ordinary course.

Respectfully submitted,

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June 25, 2013

APPENDIX

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PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

WILLIAM SCOTT MACDONALD,

Petitioner-Appellant,

v.

TIM MOOSE,

Respondent-Appellee,

and

KEITH HOLDER, Probation Officer,

Respondent.

No. 11-7427

DEAN AND PROFESSOR ERWIN CHEMERINKSY; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED,

Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:09-cv-01047-GBL-TRJ)

Argued: October 24, 2012

Decided: March 12, 2013

Before MOTZ, KING, and DIAZ, Circuit Judges.

Reversed and remanded by published opinion. Judge King wrote the majority opinion, in which Judge Motz joined. Judge Diaz wrote a dissenting opinion.

COUNSEL

ARGUED: Benjamin E. Rosenberg, DECHERT, LLP, New York, New York, for Appellant. Robert H. Anderson, III, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee. **ON BRIEF:** Joshua D. N. Hess, DECHERT, LLP, San Francisco, California, for Appellant. Kenneth T. Cuccinelli, II, Attorney General of Virginia, Richmond, Virginia, for Appellee. Rebecca K. Glenberg, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Susan L. Sommer, Gregory R. Nevins, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., New York, New York, for Amici Supporting Appellant.

OPINION

KING, Circuit Judge:

In 2005, William Scott MacDonald was convicted after a bench trial in the Circuit Court of the City of Colonial Heights, Virginia, of two offenses: the misdemeanor offense of contributing to the delinquency of a minor, in contravention of Virginia Code section 18.2-371; and the felony offense of violating the Commonwealth's criminal solicitation statute, found in section 18.2-29. The criminal solicitation statute provides that "[a]ny person age eighteen or older who commands, entreats, or otherwise attempts to persuade another person under age eighteen to commit [a predicate felony, i.e.,] a felony other than murder," shall be guilty of a felony. Va. Code § 18.2-29.

The predicate felony for MacDonald's criminal solicitation offense was the Commonwealth's "Crimes Against Nature" statute, which criminalizes, inter alia, "carnal knowledge" by one person of another by the anus or mouth, an act commonly known as sodomy. Va. Code § 18.2-361(A). MacDonald was sentenced to ten years in prison (with nine years suspended) for criminal solicitation, plus twelve months on the misdemeanor offense. Upon release, MacDonald was placed on probation and compelled to register as a sex offender.

In 2009, after failing to obtain relief on direct appeal and in state postconviction proceedings, MacDonald filed a 28 U.S.C. § 2254 petition in the Eastern District of Virginia. MacDonald alleged, among other things, that his criminal solicitation conviction, insofar as it was predicated on the anti-sodomy provision of Virginia Code section 18.2-361(A), contravened the Constitution. More specifically, MacDonald contended that the predicate anti-sodomy provision had been rendered invalid by the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas anti-sodomy statute as facially violative of Fourteenth Amendment's Due Process Clause). The district court rejected MacDonald's constitutional challenges to section 18.2-361(A) and dismissed his § 2254 petition. *See MacDonald v. Holder*, No. 1:09-cv-01047, 2011 WL 4498973 (E.D. Va. Sept. 26, 2011) (the "Opinion").[1]

On October 24, 2011, MacDonald filed a timely notice of appeal. He thereafter requested the issuance of a certificate of appealability ("COA") from this Court. *See* 28 U.S.C. § 2253(c)(1)(A). We granted his COA request on

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[1] The district court's unpublished Opinion is found at J.A. 400-12. (Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal. Citations to "S.J.A. ____" refer to the contents of the Supplemental Joint Appendix.)

April 17, 2012, identifying the issue for appeal as whether Virginia Code section 18.2-361(A) is unconstitutional either facially or as applied in MacDonald's case, in light of the Supreme Court's *Lawrence* decision. The COA circumscribes this appeal to an examination of the constitutionality of a single aspect of section 18.2-361(A), which provides:

> If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a [felony].

We herein use the term "anti-sodomy provision" to refer to the foregoing portion of section 18.2-361(A).[2] As explained below, we are constrained to vacate the district court's judgment and remand for an award of habeas corpus relief on the ground that the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment.

I.

MacDonald was forty-seven years old at the time of the events giving rise to his state court convictions.[3] On the evening of September 23, 2004, MacDonald telephoned seventeen-year-old Amanda Johnson, a young woman he had met through a mutual acquaintance. MacDonald and

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[2] The remainder of Virginia Code section 18.2-361(A) prohibits bestiality by criminalizing the carnal knowledge "in any manner [of] any brute animal." The constitutionality of the bestiality portion of subsection (A) is not challenged in this proceeding nor affected by today's decision.

[3] Our account of the facts is largely derived from the evidence presented at MacDonald's bench trial in state court. The facts are recited in the light most favorable to the Commonwealth, as the prevailing party in the trial. *See Roach v. Angelone*, 176 F.3d 210, 219 (4th Cir. 1999).

Johnson arranged to meet that night at a Home Depot parking lot in Colonial Heights. When they arrived at the parking lot, MacDonald got into the backseat of Johnson's vehicle and they drove to the nearby home of Johnson's grandmother. Johnson went into her grandmother's residence to retrieve a book, and when she returned to the vehicle MacDonald asked her to "suck his dick." J.A. 51. MacDonald also suggested that they have sex in a shed in Johnson's grandmother's yard. Johnson declined both proposals, however, and she drove MacDonald back to the Home Depot parking lot.

Nearly three months later, in December 2004, MacDonald filed a report with the Colonial Heights police maintaining that Johnson had abducted and sexually assaulted him. MacDonald thereafter met with and was interviewed by Detective Stephanie Early. MacDonald advised Early that, sometime in September, Johnson had paged him and asked that he meet her in the Home Depot parking lot. MacDonald stated that, once they met, he got into Johnson's car and she drove them away. When MacDonald asked Johnson where she was going, she did not respond. MacDonald told her, "[T]his has got to stop, lose my number, I'm married, don't call me anymore." J.A. 59. MacDonald also advised Detective Early that he and Johnson stopped at a location on Canterbury Lane in Colonial Heights, and "at that point Ms. Johnson forcibly removed his penis from his pants and performed oral sex against his will." *Id.* MacDonald acknowledged that he knew Johnson was only seventeen years old.

Soon thereafter, Detective Early met with and interviewed Johnson, who gave a sharply conflicting account of what had occurred. Crediting Johnson's version of the events, Early secured three arrest warrants for MacDonald, charging: (1) the felony criminal solicitation offense; (2) the misdemeanor offense of

contributing to the delinquency of a minor; and (3) the misdemeanor offense of "knowingly giv[ing] a false report as to the commission of a crime to the Police with the intent to mislead," in violation of Virginia Code section 18.2-461. *See* J.A. 4-6. MacDonald was arrested on January 25, 2005. He was prosecuted in the Juvenile and Domestic Relations Court of Colonial Heights on the false police report charge, and in the circuit court on the other two charges.

On May 25, 2005, MacDonald pleaded guilty to filing a false police report, in connection with his false complaint to Detective Early. As a result, he was sentenced to twelve months in jail, with six months suspended. On June 7, 2005, MacDonald moved in the circuit court to dismiss the criminal solicitation charge on the ground that the predicate felony—the anti-sodomy provision—violated his due process rights. Relying on *Lawrence v. Texas*, MacDonald asserted that the Supreme Court had invalidated all state statutes that prohibit "consensual sodomy between individuals with the capacity to consent." J.A. 24. A bench trial was conducted in the circuit court on July 12, 2005, where Johnson, Early, MacDonald, and MacDonald's wife testified.[4] After the trial had concluded, on July 25, 2005, the circuit court denied the motion to dismiss, ruling that the anti-sodomy provision was not being unconstitutionally applied to MacDonald. The following day, the court found MacDonald guilty of solicitation to commit a felony (i.e., the anti-sodomy provision), and deferred ruling on the misdemeanor offense of contributing to the delinquency of a minor. On August 2, 2005, the circuit court convicted

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[4] At his bench trial, MacDonald testified consistently with his initial version of the events of September 23, 2004, under which he had been abducted and sexually assaulted by Johnson. By its verdict, the trial court rejected that testimony.

MacDonald of the misdemeanor offense, and it sentenced him on both offenses.

II. A.

MacDonald appealed his circuit court convictions to the Court of Appeals of Virginia. In doing so, he argued that, in light of *Lawrence v. Texas*, the anti-sodomy provision was facially invalid "insofar as it relates to consensual sodomy between unrelated individuals who have reached the age of consent," by infringing on the liberty interests protected by "the Due Process Clause of the Fourteenth Amendment." S.J.A. 14. MacDonald thus maintained that the anti-sodomy provision could not serve as a predicate felony for the criminal solicitation offense.

In January 2007, the state court of appeals ruled that MacDonald lacked "standing to assert [the facial due process claim]" and dismissed his appeal. *See MacDonald v. Commonwealth*, No. 1939-05-2, 2007 WL 43635 (Va. Ct. App. Jan. 9, 2007). In that regard, the court relied on its ruling in *McDonald v. Commonwealth*, 630 S.E.2d 754 (Va. Ct. App. 2006).[5] The previous appeal related to other criminal proceedings involving petitioner MacDonald, specifically his prior convictions on four counts of violating Virginia's anti-sodomy provision, twice each with two young women who were sixteen and seventeen years old. There, the court of appeals had rejected MacDonald's Fourteenth Amendment due process claims, holding that, because his offenses involved minors, his as-applied claim failed and he thus lacked standing to pursue a facial challenge. *See McDonald*, 630 S.E.2d at 756 (citing *Ulster Cnty. v. Allen*, 442 U.S. 140, 154-55 (1979)

[5] Though the appellant's last name in the earlier appeal is spelled differently, it is clear that both appeals involved the same individual, known here as petitioner William Scott MacDonald.

("As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.")).[6] In the present case, on September 7, 2007, the Supreme Court of Virginia summarily denied MacDonald's pro se petition for appeal, and then, on November 9, 2007, denied his petition for rehearing.[7]

B.

On September 16, 2009, MacDonald, again proceeding *pro se*, filed his 28 U.S.C. § 2254 petition in the Eastern District of Virginia. Therein, MacDonald theorized that his conviction was "in violation of the *ex post facto* guarantee of the U.S. Constitution because [the anti-

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[6] After the state court of appeals affirmed his earlier sodomy convictions, MacDonald sought review in the Supreme Court of Virginia. *See McDonald v. Commonwealth*, 645 S.E.2d 918 (Va. 2007). MacDonald's efforts were to no avail, however, as the state supreme court rejected MacDonald's as-applied challenge. The court reasoned that the anti-sodomy provision was constitutional as applied because MacDonald's victims were minors, and it concluded that his facial claim had not been preserved in the trial court. *See id.* at 921, 924. Thereafter, MacDonald pursued his due process contentions in federal habeas proceedings, but the district court dismissed his 28 U.S.C. § 2254 petition. *See MacDonald v. Johnson*, No. 1:08-cv-00781, 2009 WL 3254444 (E.D. Va. Oct. 9, 2009). Our Court declined to issue a COA on June 24, 2010. *See MacDonald v. Johnson*, 384 F. App'x 273 (4th Cir. 2010).

[7] MacDonald subsequently sought state postconviction relief, raising claims of ineffective assistance of counsel and violations of his ex post facto guaranties. The state supreme court dismissed MacDonald's petition for appeal, however, ruling, inter alia, that his ex post facto claim was "barred because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus." *MacDonald v. Dir. of the Dep't of Corr.*, No. 348987, slip op. at 4 (Va. Oct. 21, 2008) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

sodomy provision] is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law." J.A. 292. MacDonald maintained, as he had at each previous opportunity, that the *Lawrence* decision invalidated all state anti-sodomy provisions, and that the Supreme Court "acted in accordance with numerous prior precedents that struck down laws impinging upon the liberty guarantees of the Fifth and Fourteenth Amendments." *Id.* at 301. The district court, "[i]n deference to petitioner's *pro se* status," trifurcated MacDonald's constitutional challenges into (1) an *ex post facto* claim; (2) a facial due process attack; and (3) an as-applied due process challenge to the anti-sodomy provision. *See* Opinion 5.[8]

In its Opinion, the district court dismissed MacDonald's *ex post facto* claim "to the extent that [it] differs from the facial attack," as procedurally barred under the rule of *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974). *See* Opinion 6; *see also supra* note 6. Proceeding to MacDonald's facial due process challenge, the district court employed the deferential § 2254(d) standard of review to withhold relief. *See infra* Part III. The court concluded that the Virginia Court of Appeals had reasonably applied *Ulster County* to decide that MacDonald lacked standing to pursue such a claim because his conduct was not constitutionally protected. *See* Opinion 8. Finally, determining that the anti-sodomy provision was constitutional as applied to MacDonald, the district court endorsed the state

[8] The Opinion does not specify that MacDonald's as-applied challenge was based on the Due Process Clause of the Fourteenth Amendment. The district court recognized, however, that MacDonald relied on the *Lawrence* decision for his pursuit of this claim, and *Lawrence* was decided on Fourteenth Amendment due process grounds.

court's rationale that, because the Commonwealth had properly treated seventeen-year-olds as children, and because the *Lawrence* decision had stressed that "[t]he present case does not involve minors," 539 U.S. at 578, the anti-sodomy provision could constitutionally serve as a predicate offense under the solicitation statute. *See* Opinion 8-9. The district court further explained,

> The Court of Appeals of Virginia's determination is based on clearly established federal law. Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children. Thus, the holding that Va. Code § 18.2-361 is not unconstitutional as applied to MacDonald is not contrary to, or an unreasonabl[e] application of, federal law.

Id. at 9 (citations omitted).

III.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs a federal court's handling of a 28 U.S.C. § 2254 petition filed by a state prisoner. We review de novo a district court's denial of a § 2254 petition. *See Deyton v. Keller*, 682 F.3d 340, 343 (4th Cir. 2012). Pursuant to AEDPA, however, when a habeas petitioner's constitutional claim has been "adjudicated on the merits in State court proceedings," we may not grant relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

IV. A.

In this appeal, MacDonald pursues both facial and as-applied due process challenges to the anti-sodomy provision. He contends not only that the anti-sodomy provision was unconstitutional as applied to him, but also that *Lawrence v. Texas* compels the facial invalidation of the anti-sodomy provision under the Fourteenth Amendment.[9] Even though, as the Supreme Court of Virginia emphasized, *Lawrence* did not involve minors, MacDonald argues that "[t]he *Lawrence* Court did *not* preserve those applications of Texas's [sodomy] law to the extent that it would apply to 'minors' or in any other circumstance. It invalidated the law *in toto*." Br. of Appellant 10. MacDonald maintains that he possesses standing to pursue his facial challenge under the Due Process Clause because the anti-sodomy provision was rendered unconstitutional by *Lawrence*. He relies on established Supreme Court authority for the proposition that standing exists

> "where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of cases it was originally designed to cover."

Br. of Appellant 14 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

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[9] MacDonald also seeks to invalidate his criminal solicitation conviction on equal protection and ex post facto grounds. Inasmuch as we conclude that MacDonald is entitled to relief on his primary due process claim, we need not consider the alternative bases he has asserted.

MacDonald next asserts that the Virginia courts have impermissibly interpreted *Lawrence* as authorizing them to recast the anti-sodomy provision—which by its terms bans all sodomy offenses—and apply the provision solely to sodomy offenses that involve minors. In explaining his position, MacDonald contends that

> [t]he courts' re-writing of the [anti-sodomy provision] wrongly "substitute[s] the judicial for the legislative department of the government" and creates a "dangerous" precedent to encourage legislatures to "'set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied."

Br. of Appellant at 17-18 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006)). MacDonald further argues that the Virginia courts' rewriting of the anti-sodomy provision was contrary to the intent of Virginia's General Assembly, because the judicially rewritten statute is at odds with other Virginia criminal statutes regulating the sexual conduct of persons over eighteen with younger persons. *Cf.* Va. Code § 18.2-63 (prohibiting carnal knowledge of a child between thirteen and fifteen); Va. Code § 18.2-370 (prohibiting persons over eighteen from certain "indecent" acts with children under fifteen, including soliciting sodomy).

More particularly, Virginia Code section 18.2-370(A) prohibits any person over eighteen from proposing certain sexual conduct (including sodomy) to "any child under the age of 15 years." The foregoing provision, MacDonald maintains, was plainly not intended to criminalize activity with minors fifteen or older. He thus contends that Virginia's judicial rewriting of the anti-sodomy provision, rendering it applicable to the solicitation of sodomy from a minor under eighteen, runs afoul of the age specification ("any child under the age of

15 years") embedded in section 18.2-370(A). MacDonald further asserts that the judicial redrafting of the anti-sodomy provision by the Virginia courts contravened his due process rights because he did not have—and could not have had—fair notice that the anti-sodomy provision would be construed in a way that renders it applicable to his conduct.

The Commonwealth responds to MacDonald's contentions by maintaining that *Lawrence* did not "establish the unconstitutionality of solicitation statutes generally . . . , or MacDonald's solicitation in particular." Br. of Appellee 8. Positing that *Lawrence* simply does not apply to statutes that criminalize sodomy involving a minor, Virginia emphasizes the district court's determination that the anti-sodomy provision is constitutional as applied to MacDonald. The Commonwealth then asserts that MacDonald lacks standing to pursue a facial challenge to the anti-sodomy provision under the Supreme Court's *Ulster County* decision, because the provision can be constitutionally applied in various circumstances, including those underlying this appeal.[10]

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[10] The Commonwealth also contends that the resolution of MacDonald's earlier case relating to his 2005 sodomy convictions—particularly our 2010 denial of a COA, *see supra* note 6—has become the law of the case, or, alternatively, is collaterally estopped from relitigation. We disagree. First, the doctrine of law of the case restricts a court to legal decisions it has made on the same issues in the same case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). As the Commonwealth admits, this case is not the same as MacDonald's earlier case, and thus, the law of the case doctrine does not apply. Second, collateral estoppel, which might preclude relitigation of an issue, is an affirmative defense that the Commonwealth waived by not first raising it in the district court.

Put succinctly, the *Ulster County* decision does not operate to deny standing for MacDonald to pursue a facial due process challenge to the anti-sodomy provision. Under the Article III case-or-controversy requirement, a litigant must assert a concrete interest of his own. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (explaining that Article III requires (1) that the plaintiff has suffered an "invasion of a legally protected interest," (2) that there is a causal connection between the injury "fairly traceable" to the challenged action; and (3) that it is likely that the injury will be "redressed by a favorable decision" (citations omitted)). The Virginia courts ruled that MacDonald had not asserted his own concrete interest in his facial challenge, but rather was pursuing the interests of third parties, in that the anti-sodomy provision is constitutional as applied to him. Under that theory, MacDonald could only pursue a facial challenge to the anti-sodomy provision as it applies to others. This determination of the jurisdictional predicate for standing to sue relied entirely on an unfavorable legal resolution of the merits of MacDonald's as-applied constitutional claim. In turn, our resolution of MacDonald's as-applied claim informs—at least under the theories propounded

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See Fed. R. Civ. P. 8(c). Finally, even if collateral estoppel was not waived, that doctrine requires that the issue be "actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate." *Va. Hosp. Ass'n. v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987). Our denial of a COA in the earlier case—in which MacDonald was proceeding pro se—is not precedent here, does not constitute a decision on the merits of MacDonald's constitutional claims, and did not afford MacDonald a full and fair opportunity to litigate. *See Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003) (recognizing that "a COA ruling is not the occasion for a ruling on the merit of petitioner's claim").

by the state and district courts—whether MacDonald possesses standing to assert a facial challenge to the anti-sodomy provision.

In *Ulster County*, the Supreme Court assessed a habeas petition filed by three state prisoners, challenging a New York statute that permitted a jury to presume that two firearms found in the vehicle in which they were riding had been jointly possessed by them all. The Second Circuit declared the statute facially unconstitutional, emphasizing its broad reach in potentially applying the presumption to vehicle occupants "'who may not know they are riding with a gun'" or "'who may be aware of the presence of the gun but not permitted access to it.'" 442 U.S. at 146 (quoting *Allen v. Cnty. Court, Ulster Cnty.*, 568 F.2d 998, 1007 (2d Cir. 1977)).

The Supreme Court reversed the court of appeals, however, ruling that the Second Circuit had unnecessarily addressed the issue of the statute's facial invalidity. According to the Court, the presumption was constitutionally applied to the three *Ulster County* petitioners, in that the firearms had been discovered in a handbag belonging to the vehicle's fourth occupant—a sixteen-year-old female. The Court explained the applicable principle as follows:

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

Ulster Cnty., 442 U.S. at 154-55. The Court's ruling on standing to pursue a facial challenge, as in this

case, depended on an unfavorable threshold resolution of an as-applied challenge. If the statute had been unconstitutionally applied to the petitioners in *Ulster County*, their own rights would have been adversely affected, and, therefore, reaching the merits of their facial challenge may have been appropriate.

Because, as we explain below, the anti-sodomy provision is unconstitutional when applied to any person, the state court of appeals and the district court were incorrect in deeming the anti-sodomy provision to be constitutional as applied to MacDonald. MacDonald is thus asserting his own concrete injury, and the state court's standing determination, as endorsed by the district court, was contrary to and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.[11]

2.

In *Lawrence*, the Supreme Court plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment. 539 U.S. at 578. The statute declared invalid in *Lawrence* provided that "[a] person

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[11] In our resolution of the standing issue, we are, of course, necessarily concluding that the Virginia courts wrongly decided MacDonald's as-applied challenge to the anti-sodomy provision. As explained below, however, we see the provision as not only unconstitutional as applied to MacDonald, but as facially invalid in light of *Lawrence v. Texas*, and we resolve the case on those grounds alone. See Richard H. Fallon, Jr., *As–Applied Challenges and Third–Party Standing*, 113 Harv. L. Rev. 1321, 1336–39 (2000) (recognizing that a statute's application will "sometimes unmistakably, even necessarily, yield the conclusion that a statute is invalid, not merely as applied to the facts, but more generally or even in whole").

commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Id.* at 563. The conduct for which the *Lawrence* defendants were prosecuted qualified as "deviate sexual intercourse," in that it amounted to "contact between any part of the genitals of one person and the mouth or anus of another person," that is, sodomy. *Id.* The Supreme Court granted certiorari on three issues: (1) whether the criminalization of strictly homosexual sodomy violated the Equal Protection Clause of the Fourteenth Amendment; (2) more broadly, whether criminalization of sodomy per se between consenting adults contravened the fundamental liberty and privacy interests protected by the Fourteenth Amendment's Due Process Clause; and (3) whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld against facial challenge a Georgia statute criminalizing all sodomy, should be overruled.

On the third question, relating to *Bowers v. Hardwick*, the Court readily concluded that "[t]he rationale of *Bowers* does not withstand careful analysis . . . *Bowers* was not correct when it was decided, and it is not correct today . . . *Bowers v. Hardwick* should be and now is overruled." *Lawrence*, 539 U.S. at 577-78.[12] Though acknowledging the equal protection argument as "tenable," the Court premised its constitutional holding on the Due Process Clause of the Fourteenth Amendment, surmising that if it were to invalidate the

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[12] The Georgia statute upheld in *Bowers*, and deemed unconstitutional by the Supreme Court in *Lawrence*, was strikingly similar to the anti-sodomy provision. It provided, in pertinent part, as follows:

> "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 . . . ."

Bowers, 478 U.S. at 188 n.1 (quoting Ga. Code § 16-6-2(a) (1984)).

statute "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." *Id.* at 574-75 (emphasis added). The Court underscored that, although the conduct proscribed by the Texas statute might be sincerely condemned by many as immoral, "[t]hese considerations do not answer the question before us . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* at 571. The *Lawrence* Court thus recognized that the facial due process challenge in *Bowers* was wrongly decided. Because the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision.[13]

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[13] Our good colleague in dissent accords controlling weight to a single instance of word choice in *Lawrence*, seizing upon Justice Kennedy's observation that the "case" then before the Court did not involve minors, rather than noting that the underlying "statute" failed to target minors specifically. *See post* at 25-26. Justice Kennedy could have accurately used both words interchangeably, as could have Justice White in *Bowers*, had he also chosen to write concerning what the dispute—or litigation, or matter, or issue, or case, or statute—was *not* about. The anti-sodomy provision in this case, being indistinguishable for all practical purposes from the statute that we now know should have been negated in *Bowers*, also does not involve minors. That is precisely why, in conformance with *Ayotte*, the provision cannot be saved through superhuman efforts. *See infra* at 20-22.

The dissent's finely honed distinction that, unlike *Lawrence* and *Bowers*, this "case" involves minors, is made possible solely by the Commonwealth's decision to institute prosecution of a man who loathsomely solicited an underage female to commit an act that is not, at the moment, a crime in Virginia. The Commonwealth may as well have charged MacDonald for telephoning Ms. Johnson on the night in question, or for persuading her to meet him at the Home Depot parking lot. The legal arm of the Commonwealth cannot simply wave a magic

The Commonwealth's efforts to diminish the pertinence of *Lawrence* in connection with MacDonald's challenge to the anti-sodomy provision—an enactment in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court—runs counter to *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005). In that case, the Supreme Court of Virginia evaluated the constitutionality of a state statute having nothing to do with sodomy, but instead outlawing ordinary sexual intercourse between unmarried persons. The state supreme court nonetheless acknowledged that *Lawrence* was sufficiently applicable to require the statute's invalidation.

The *Martin* decision reversed the trial court's judgment against the plaintiff, who sought damages because the defendant had infected her with herpes. The defendant had demurred to Martin's motion for judgment, pointing out that Virginia law barred tort recovery for injuries sustained while participating in an illegal activity. In its ruling, the state supreme court concluded that there was "no relevant distinction between the circumstances in *Lawrence*" and those in *Martin*, recognizing that, "but for the nature of the sexual act, the provisions of [the challenged statute] are identical to those of the Texas statute which *Lawrence* determined to be unconstitutional." *Martin*, 607 S.E.2d at 370 & n*.[14] The anti-sodomy provision, of course,

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wand and decree by fiat conduct as criminal, in usurpation of the powers properly reserved to the elected representatives of the people.

[14] It is worth noting that the *Martin* court rejected as waived the defendant's argument that the plaintiff lacked standing to contest the statute's constitutionality (in that she was unlikely to be prosecuted), but nonetheless assured itself that its ruling did not amount to an advisory opinion, inasmuch as "the Court's decision on the constitutionality of [the challenged statute] will determine Martin's

prohibits the same sexual act targeted by the Texas statute that failed constitutional muster in *Lawrence*.

Although both parties in the *Martin* case were adults, there is no valid reason why the logic of that ruling should not have applied with equal force to the ruling of the Court of Appeals of Virginia in MacDonald's case. It is not sufficient that the *Martin* plaintiff was doubtlessly more deserving of the court's sympathy than MacDonald. True enough, the Supreme Court implied in *Lawrence* that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor. *See Lawrence*, 539 U.S. at 572 (documenting "emerging awareness that liberty gives substantial protection to *adult* persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)); *id.* at 573 (pointing out that, in thirteen states where sodomy was yet proscribed, "there is a pattern of nonenforcement with respect to consenting adults acting in private" (emphasis added)); *id.* at 578 ("The present case *does not involve minors*. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." (emphasis added)). The Court's ruminations concerning the circumstances under which a state might permissibly outlaw sodomy, however, no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary.

Recently, we had occasion to consider a facial challenge to a much different statute, but the analysis in that case informs the issue presented here. *See United States v. Moore*, 666 F.3d 313 (4th Cir. 2012). Moore, who had been convicted under 18 U.S.C. § 922(g) for

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right to pursue her tort claim for damages." 607 S.E.2d at 369.

being a felon in possession of a firearm, asserted a facial challenge to § 922(g) under the Second Amendment and the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008).[15] We explained that, "[u]nder the well recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application." *Moore*, 666 F.3d at 318 (citations omitted). Moore contended that the Supreme Court's decision in *Heller*, which struck down the District of Columbia's general prohibition on the possession of handguns, rendered § 922(g)'s firearm restriction violative of the Second Amendment. The *Heller* Court took care to observe however, that certain prohibitions on handgun possession, such as the possession of firearms by felons, are "presumptively lawful." 554 U.S. at 627 & n.26. Seizing upon that language, we readily rejected Moore's Second Amendment facial challenge to § 922(g).

The *Lawrence* Court, as in *Heller*, struck down a specific statute as unconstitutional while reserving judgment on more carefully crafted enactments yet to be challenged. The salient difference between § 922(g) and the anti-sodomy provision, however, is that § 922(g), in a relatively narrow fashion, regulates the possession of firearms by felons, while the anti-sodomy provision, like the statute in *Lawrence*, applies without limits. Thus, although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit

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[15] Section 922(g) provides, in pertinent part, that "[i]t shall be unlawful for any person . . . who has been convicted in any court of[ ] a crime punishable for a term exceeding one year . . . to possess . . . any firearm or ammunition."

to do so.[16] The anti-sodomy provision does not mention the word "minor," nor does it remotely suggest that the regulation of sexual relations between adults and children had anything to do with its enactment. In these circumstances, a judicial reformation of the anti-sodomy provision to criminalize MacDonald's conduct in this case, and to do so in harmony with *Lawrence*, requires a drastic action that runs afoul of the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

In *Ayotte*, the Court recognized the important principle that, "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." 546 U.S. at 328-29. The Court also acknowledged, however, the dangers of too much meddling:

> [M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it . . . . [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain then we ought to undertake . . . . All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous

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[16] As explained heretofore, it is a felony in Virginia for an adult to solicit sodomy from "any child under the age of 15 years." Va. Code § 18.2370(A). Because Johnson was 17 years old when she was solicited by MacDonald, he could not be charged with violating that statute.

> if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 329-30 (citations, alterations, and internal quotation marks omitted); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997) (explaining, in upholding facial constitutional challenge, that "[t]his Court 'will not rewrite . . . law to conform it to constitutional requirements'" (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988))); *United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 479 (1995) (recognizing "[o]ur obligation to avoid judicial legislation"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964) (warning against judicial rewriting of statute to "save it against constitutional attack").

It is accurate for us to observe that facial constitutional challenges to state statutes are generally disfavored, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008), and the general rule when a defect appears is "partial, rather than facial, invalidation," *see Ayotte*, 546 U.S. at 329. We are confident, however, that we adhere to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional.[17]

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[17] The matter before us evidences a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore cannot stand. The restraints of AEDPA do not preclude federal intervention in these relatively infrequent instances where the petitioner's right to relief is manifest. *See Elmore v. Ozmint*, 661 F.3d 783, 872 (4th Cir. 2011) (rejecting

A consequence of the *Ayotte* decision could be that a statute closely related to the anti-sodomy provision—for example, Virginia Code section 18.2-361(B), which criminalizes incestuous sodomy involving both minors and adults—might well survive review under *Lawrence*, as may that part of section 18.2-361(A) that outlaws bestiality. *See supra* note 2. The anti-sodomy provision itself, however, which served as the basis for MacDonald's criminal solicitation conviction, cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*.

V.

Pursuant to the foregoing, we reverse the judgment of the district court and remand for an award of habeas corpus relief.

REVERSED AND REMANDED

DIAZ, Circuit Judge, dissenting:

In concluding that *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidated sodomy laws only as applied to private consenting adults, the Virginia Court of Appeals did not reach a decision that "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility

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suggestion that "our job is solely to rubber-stamp the state . . . court," notwithstanding state's "flouting of clear Supreme Court precedent," and envisioning "meaningful role for the federal courts in safeguarding the constitutional rights of state prisoners"). And though we have nothing but the utmost respect for the point of view expressed by our dissenting friend as to the proper sweep of *Lawrence*, the dissent's reliance for support on characterizations made in passing by our sister circuits, *see post* at 28, is unavailing. Those decisions did not address the salient issue in this appeal, and thus lack the demonstrated contemplation and logical force necessary to muddle what the Supreme Court clearly established in *Lawrence*.

for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011). The majority ultimately may be proven right that the Virginia "anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment." Maj. Op. at 4. But because the matter is not beyond doubt after *Lawrence*, and because the district court was bound to give Virginia courts the benefit of that doubt on federal collateral review, I respectfully dissent.[18]

I.

While we review a district court's denial of habeas relief de novo, *Wolfe v. Johnson*, 565 F.3d 140, 160 (4th Cir. 2009), in adjudicating a federal petition for habeas relief from a state court conviction, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "limit[s] the federal courts' power to issue a writ to exceptional circumstances" where the state court decision on the merits "'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012) (quoting 28 U.S.C. § 2254(d)). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 131 S. Ct. at 786.

The majority elides this burden altogether, passing upon the constitutionality of the Virginia anti-sodomy provision as if it were presented in the first instance. In doing so, my colleagues fail to account for the rigor of federal habeas review, which is not intended to be "a substitute for ordinary error correction through appeal." *id.* Because MacDonald's conviction does not rise to the

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[18] For the reasons stated by the district court, I would also affirm the denial of habeas relief on the additional constitutional claims asserted by MacDonald.

level of an "extreme malfunction[ ] in the state criminal justice system[ ]," *id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)), I would affirm the district court's judgment.

II. A.

The majority grants MacDonald federal habeas relief on the basis that the Virginia anti-sodomy provision[19] facially violates the Due Process Clause. The Virginia Court of Appeals, citing its own precedent, concluded that *Lawrence* did not facially invalidate all sodomy statutes,[20] but rather only the application of such statutes to private, consensual sexual activity among adults. *See MacDonald v. Commonwealth*, No. 1939-05-2, 2007 WL 43635, at *1 (Va. Ct. App. Jan. 9, 2007) (citing *McDonald v. Commonwealth*, 630 S.E.2d 754, 756-57 (Va. App. 2006)). Accordingly, the Virginia Court of Appeals concluded that the Virginia anti-sodomy provision was

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[19] I refer to the statute in question, Va. Code § 18.2-361(A), as the Virginia anti-sodomy provision. Section 18.2-361(A) provides: "If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony."

[20] The Virginia Court of Appeals also ruled that MacDonald lacked standing to advance such a facial challenge under *Ulster County*, which held that a litigant can not raise a facial attack to a statute that is constitutional as applied to him. *Ulster County Court v. Allen*, 442 U.S. 140, 155 (1979). The majority dismisses this principle, reasoning that because the Virginia anti-sodomy provision is facially unconstitutional, the law cannot be constitutional as applied to MacDonald.

While this analysis is circular, I do not believe the standing principle set forth by *Ulster County* matters here. The as-applied and facial challenges brought by MacDonald entail the same inquiry—whether *Lawrence* invalidated sodomy statutes on an as-applied or facial basis.

constitutional as applied to MacDonald because his sexual conduct involved a minor. *Id.*

The majority appears to disagree with this "as-applied" interpretation of *Lawrence* on two unrelated grounds. First, *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which dismissed a facial challenge to the constitutionality of a sodomy law. Because the Virginia anti-sodomy provision is indistinguishable from the statute in question in *Bowers*, the majority reasons that MacDonald's facial challenge must succeed just as—according to *Lawrence*—the facial challenge in *Bowers* should have. Second, the majority contends that allowing the Virginia anti-sodomy provision to apply to minors would entail rewriting the statute in a manner forbidden by *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006). I address each ground in turn.

B.

In *Lawrence*, Texas police officers responding to an alleged weapons disturbance entered a private residence where two men were engaged in a sexual act. *Lawrence*, 539 U.S. at 562-63. The state charged the men with violating a Texas sodomy statute criminalizing "any contact between any part of the genitals of one person and the mouth or anus of another person." *Id.* at 563 (citing Tex. Penal Code Ann. § 21.01).

Overruling *Bowers*, *Lawrence* explained that decisions made in private by consenting adults "concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 578 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)). In the penultimate paragraph of the opinion, however, *Lawrence* prefaced its holding with the following qualification:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id.

The majority characterizes this segment of the opinion as "ruminations concerning the circumstances under which a state might permissibly outlaw sodomy" that "no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." Maj. Op. at 19. I do not see how the majority can be so certain. If anything, the commentary on what "the present case does not involve" is characteristic of an as-applied ruling, particularly because the Court used the words "this case," not "this statute," to limit its holding. *See Lawrence*, 539 U.S. at 578.

This language arguably confines the scope of constitutional protection to private sexual intimacy between consenting adults. In fact, the Court repeatedly emphasized these distinctions throughout its historical and legal analysis of sodomy laws. *See id.* at 567-69, 571-73. In defending its view that sodomy laws were never applied to private sexual conduct among consenting adults, *Lawrence* recounted the historical enforcement of sodomy statutes:

> Laws prohibiting sodomy do not seem to have been *enforced* against consenting adults acting in private. A substantial number of sodomy

> prosecutions . . . *were for predatory acts against those who could not or did not consent, as in the case of a minor* or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. . . . Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

Id. at 569 (emphasis added). This historical discussion also evinces an as-applied ruling to private consenting adults, for it is only relevant inasmuch as it identifies the valid applications of sodomy laws outside this zone of constitutionally protected liberty.

In any event, in order for MacDonald to prevail on his federal habeas petition, it must be *clear* that *Lawrence* facially invalidated all sodomy statutes. *See Harrington*, 131 S. Ct. at 786-87. Nowhere in the opinion does the Court do that. The majority nevertheless infers the unconstitutionality of Virginia's anti-sodomy provision from the fact that *Lawrence* expressly overruled *Bowers*. Again, this is a bridge too far. If it is difficult to discern from the *Lawrence* opinion whether it invalidated all sodomy statutes, it is even more of a stretch to do so by negative inference from the case it overturned.

The majority also relies on *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005), which invalidated the Virginia fornication statute as contrary to *Lawrence*. Despite the fact that *Ziherl* involved the private sexual conduct of adults, the majority sees "no valid reason why the

logic of that ruling should not have applied with equal force to the ruling of the Court of Appeals of Virginia in MacDonald's case." Maj. Op. at 18. However, *Ziherl* undercuts the majority's conclusion entirely, because in that case the Supreme Court of Virginia reached the same "as-applied" interpretation of *Lawrence* as the Virginia Court of Appeals did in this case, and invalidated the Virginia fornication statute only as applied to the conduct protected by *Lawrence*:

> It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct.

Ziherl, 607 S.E.2d at 371. Furthermore, *Ziherl* was a Virginia civil case on direct appeal—a far cry from federal collateral review of a state court conviction—and is not "clearly established" federal law. It has no place in the analysis, and to the extent it does, it undermines the majority's reasoning.

Given the opaque language of *Lawrence*, I do not share the majority's conviction concerning the facial unconstitutionality of Virginia's anti-sodomy provision. Reasonable jurists could disagree on whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute. In fact, they already have. *Compare Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 n.4 (1st Cir. 2012) (characterizing *Lawrence* decision as facial invalidation of statute), and *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006) (same), *with D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir.

2004) (explaining that *Lawrence* "invalidat[ed] Texas' sodomy statute as applied to consensual, private sex between adults"), *and Muth v. Frank*, 412 F.3d 808, 812 (7th Cir. 2005) (characterizing *Lawrence* as holding that Texas sodomy statute "was unconstitutional insofar as it applied to the private conduct of two consenting adults").

C.

The majority also misreads *Ayotte*, effectively turning the "normal rule" of "partial, rather than facial, invalidation" on its head. *Ayotte*, 546 U.S. at 329 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). The exception to an as-applied invalidation is just that—an exception to that "normal rule" which, as evidenced by the cases cited by the majority, applies almost exclusively to challenges to overbroad statutes on First Amendment free-speech grounds.

Furthermore, the majority overlooks that *Ayotte* actually declined to facially invalidate the New Hampshire statute at issue in that case because there was "some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such [an as-applied] remedy." *Ayotte*, 546 U.S. at 331. Concluding "that the lower courts need not have invalidated the law wholesale," the Court "recognize[d] the possibility of a modest remedy: . . . . an injunction prohibiting unconstitutional applications." *Id.* at 331-32.

Even if *Ayotte* were instructive, therefore, it simply invites the next question: "Would the [Virginia] legislature have preferred what is left of its statute to no statute at all?" *Id.* at 330. The majority wrongly assumes, without the proof required by *Ayotte*, that the Virginia General Assembly did not intend for its anti-sodomy provision to apply to the conduct that *Lawrence* arguably exempted from constitutional protection, despite the fact that

Lawrence itself acknowledged that "one purpose for the [sodomy laws]" could be to cover "predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault." *Lawrence*, 539 U.S. at 569.[21]

In order for the Virginia anti-sodomy provision to escape facial invalidity, it need not criminalize only conduct that falls outside constitutional protection. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). Indeed, to suggest that a state must excise the constitutional defects of a statute by legislative revision before enforcing those portions that pass constitutional muster would turn every as-applied ruling into a facial invalidation.

III.

If a federal court is to grant a writ of habeas corpus to a state prisoner incarcerated under Virginia law, it needs to be more than "confident" that the underlying criminal conviction violates the Constitution. The foundation for the issuance of the writ requires a certainty, not just a likelihood, that a state court ruling "reached a decision contrary to clearly established federal law." *See*

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[21] Virginia's anti-sodomy provision was in place (in one form or another) long before *Lawrence* was decided. *See Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975). Accordingly, there is no support for the majority's suggestion that the Virginia General Assembly enacted an impermissibly broad statute with the specific intent that the judiciary would subsequently sort out the proper constitutional limitations of enforcement, for none then existed.

Harrington, 131 S. Ct. at 786-87. Unlike the majority, the district court here remained faithful to that distinction in declining to issue the writ.

I respectfully dissent.

IN THE

United States District Court for Eastern District of Virginia

Alexandria Division

WILLIAM SCOTT MACDONALD,
Petitioner,
v.
KEITH HOLDER,
Respondent.

1:09cv1047 (GBL/TRJ

MEMORANDUM OPINION

William Scott MacDonald, who is paroled in North Carolina and is proceeding *pro se*, has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the validity of his conviction in the Circuit Court for the City of Colonial Heights, Virginia of soliciting a minor to commit a felony and contributing to the delinquency of a minor.[1] Respondent filed a Motion to Dismiss and Rule 5 Answer, with a supporting brief. MacDonald was given the opportunity to file responsive

[1] This is MacDonald's second habeas petition filed in this Court. His habeas petition in case number 1:08cv781 (GBL/TRJ) challenged his conviction in the Circuit Court for Prince George's County, Virginia. Thus, the instant petition is not successive, although the convictions arise from related factual circumstances.

materials, pursuant to *Roseboro v Garrison*, 528 F.2d 309 (4th Cir. 1975), and he has filed a response. By Order dated February 14, 2011, respondent's Motion to Dismiss was denied without prejudice, and respondent was directed to file a pleading addressing the concerns raised in that Order. Respondent filed a Supplemental Brief in Support of the Motion to Dismiss on March 25, 2011, and petitioner has filed a reply as well as a Motion for Discovery. For the reasons that follow, respondent's Renewed Motion to Dismiss will be granted and petitioner's Motion for Discovery will be denied as moot.

I. Background

Forty-seven-year-old MacDonald had been introduced to seventeen-year-old A.J. through a mutual acquaintance. Late one evening, MacDonald and A.J. met in a parking lot in Colonial Heights. MacDonald then rode with A.J. to her grandmother's house, and she went inside to retrieve a personal item. *See* Va. Ct. App., Jan. 9, 2007, at 1-2, ECF No. 2-9. When A.J. returned to the car, MacDonald first asked her to "suck his dick," then pointed to a shed in the backyard and suggested they go back there to "have sex." *Id.* at 2. A.J. said she was tired and wanted to take MacDonald back to his truck, so they returned to the parking lot. There, MacDonald pushed A.J. against the hood of her car and began to kiss and grope her. A.J. pushed him away and went home. *Id.*

On August 2, 2005, following a bench trial, MacDonald was found guilty of soliciting a minor to commit a felony and contributing to the delinquency of a minor. *See* Va. Code Ann. § § 18.2-29, 18.2-371. The underlying felony for MacDonald's solicitation offense was Virginia's statute concerning "crimes against nature," which reads

> If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B.[2]

See Va. Code Ann. § 18.2-361(A). The trial court found that on September 23, 2004, when MacDonald was forty-seven years old, he had solicited sodomy from a seventeen-year-old girl. MacDonald was sentenced to twelve months incarceration for contributing to the delinquency of a minor, and ten years with nine years suspended for solicitation. *Commonwealth v. MacDonald*, Case No. CR05000141-Ol, CR05000141-02. MacDonald appealed his conviction to the Court of Appeals of Virginia, arguing that there was insufficient evidence to convict him and that § 18.2-361(A) is unconstitutional. The Court of Appeals affirmed MacDonald's convictions on January 9, 2007. *MacDonald v. Commonwealth*, Case No. 1939-05-2. MacDonald appealed to the Supreme Court of Virginia, which refused the appeal on September 7, 2007 and denied his petition for rehearing on November 9, 2007. *MacDonald v. Commonwealth*, Case No. 070124.

MacDonald filed a state petition for writ of habeas corpus in the Supreme Court of Virginia on February 4, 2008, raising claims of ineffective assistance of counsel, violation of the Ex Post Facto Clause of the United States

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[2] Subsection B states "Any person who performs or causes to be performed cunnilingus, fellatio, anilingus or anal intercourse upon or by his daughter or granddaughter, son or grandson, brother or sister, or father or mother is guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least 13 but less than 18 years of age at the time of the offense, such parent or grandparent is guilty of a Class 3 felony." *See* Va. Code Ann. § 18.2-361(B).

Constitution, and insufficiency of the evidence. The court held that counsel was not ineffective and the Ex Post Facto Clause argument was procedurally barred under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (holding that a claim is procedurally defaulted if the petitioner could have raised it on direct appeal but did not). The court also held that the insufficient evidence claim was not cognizable in a state habeas petition because it had been raised and decided in the trial court and on direct appeal. Thus, the petition was refused on October 21, 2008. *MacDonald v. Dir. Dept of Corr.*, Case No. 080260.

In this petition for § 2254 habeas corpus relief, MacDonald challenges his conviction by arguing that (1) § 18.2-361 is unconstitutional (a) on its face, (b) as applied in this case, and (c) because it violates the Ex Post Facto Clause, and (2) there was insufficient evidence to convict MacDonald of contributing to the delinquency of a minor.

III. Standard of Review

When a state court has addressed the merits of a claim raised in a federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudications are contrary to, or an unreasonable application of, clearly established federal law, or are based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The evaluation of whether a state court decision is "contrary to" or "an unreasonable application of" federal law is based on an independent review of each standard. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court determination runs afoul of the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts."

Id. at 413. Under the "unreasonable application" clause, the writ should be granted if the federal court finds that the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Importantly, this standard of reasonableness is an objective one. *Id.* at 410. Moreover, in evaluating whether a state court's determination of the facts is unreasonable, a federal court reviewing a habeas petition "presume[s] the [state] court's factual findings to be sound unless [petitioner] rebuts 'the presumption of correctness by clear and convincing evidence.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. 2254(e)(1)); *see*, *e.g.*, *Lenz v. Washington*, 444 F.3d 295, 300-01 (4th Cir. 2006).

IV. Analysis

A. Va. Code § 18.2-361 violates the Ex Post Facto Clause, is Facially Unconstitutional, is Unconstitutional As Applied to Petitioner, and Carries Punishments that Violate Equal Protection

Respondent asserts that MacDonald's Ex Post Facto Clause claim must be dismissed as procedurally defaulted. In the alternative, respondent asserts that this claim

> . . . contains little in the way of an *ex post facto* argument, and instead amounts to a mishmash of non-cognizable state law claims and discrete constitutional contentions neither advanced on direct appeal nor properly offered in support of any *ex post facto* argument. Moreover, petitioner has made no claim or showing that he is entitled to relief either under 28 U.S.C. 2254(d) or the 'new rule' doctrine articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. *See* Brief in Supp. of Mot. to Dismiss at 4, ECF No. 11. Respondent

> emphasizes "the extremely difficult burden a state prisoner such as M[a]cDonald bears in seeking federal habeas corpus relief." *See* Supp. Brief at 3, ECF No. 22.

MacDonald argues that he "asserts all three claims: an *ex post facto* clause claim, a facial attack, and an as-applied attack on the now defunct Virginia Code 18.2-361(A)[.]"[3] *See* Resp. at 1, ECF No. 23. He asserts that "[t]he *ex post facto* claim was properly preserved for appeal at trial and was perfected as a facial attack against VA Code § 18.2-361(A)." *See* Resp. at 2-3, ECF No. 14. Upon review of the state court records, it appears that the facial attack was properly raised in the trial court and on direct appeal. *See* Trial Tr. of the Circuit Ct. for Colonial Heights 36-42, 41 ECF No. 2-4 (". . . I have both as applied argument to him and the facial argument"); Op. of the Court of Appeals of Va. 2-3, ECF No. 2-9; Pet. for Appeal in Supreme Ct. of Va. 15-18. In deference to petitioner's *pro se* status, these three claims have been analyzed separately in this Memorandum Opinion.

1. Ex Post Facto Clause

MacDonald argues that the Virginia courts "assume[d] an age requirement on [Va. Code § 18.2-361], where none [existed], and then convicted [MacDonald] on activity alleged to have occurred prior to the modification of the statute" in violation of the Ex Post Facto Clause. *See* Mem. in Supp. of Pet. at 36, ECF No. 23. MacDonald's Ex Post Facto Clause claim is barred from federal review as a result of the Supreme Court of Virginia's finding of procedural default. A state court's finding of procedural default is entitled to a presumption of correctness,

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[3] It is unclear why MacDonald refers to Va. Code § 18.2-361(A) as "now defunct."

Clanton v. Muncy, 845 F.2d 1238, 1241 (4th Cir. 1988) (citing 28 U.S.C. § 2254(d)), provided two foundational requirements are met, *Harris v. Reed*, 489 U.S. 255, 262-63 (1989). First, the state court must explicitly rely on the procedural ground to deny petitioner relief. *Id.* Second, the state procedural rule furnished to default petitioner's claim must be an independent and adequate state ground for denying relief. *Id.* at 260; *Ford v. Georgia*, 498 U.S. 411, 423-24(1991). When these two requirements have been met, federal courts may not review the barred claims absent a showing of cause and prejudice or a fundamental miscarriage of justice, such as actual innocence. *Harris*, 489 U.S. at 260.

Here, the Supreme Court of Virginia dismissed MacDonald's Ex Post Facto Clause claim as defaulted pursuant to *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (holding that a claim is procedurally defaulted if the petitioner could have raised it on direct appeal but did not). *See* Va. Sup. Ct., Oct. 28, 2008, at 4, ECF No. 2-19. The Fourth Circuit has held consistently that "the procedural default rule set forth in *Slayton* constitutes an adequate and independent state law ground for decision." *Mu'min v. Pruett*, 125 F.3d 192, 196-97 (4th Cir. 1997). Respondent raised the issue of procedural default in the Brief in Support of the Motion to Dismiss, and MacDonald was provided the opportunity to respond. *See Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir. 1999) (finding a federal habeas court's *sua sponte* dismissal of procedurally defaulted claims permissible where petitioner is provided notice and an opportunity to argue against dismissal). In his reply, MacDonald argues, "[t]he *ex post facto* claim was properly preserved for appeal at trial and was perfected as a facial attack against VA Code § 18.2-361 (A)." *See* Reply at 2, ECF No. 14. MacDonald's facial attack on Va. Code § 18.2-361(A) has

been analyzed as a separate claim in this Memorandum Opinion. Therefore, to the extent that the Ex Post Facto Clause claim differs from the facial attack, this argument does not provide the requisite showing of cause and prejudice or a fundamental miscarriage of justice for this Court to review MacDonald's Ex Post Facto Clause claim. Accordingly, this claim will be dismissed.

2. Facial

MacDonald argues that Va. Code § 18.2-361 is facially unconstitutional, and he relies on the United States Supreme Court case *Lawrence v. Texas*, 539 U.S. 558 (2003) (rendering a Texas homosexual sodomy law invalid under the Due Process Clause of the Fourteenth Amendment), to support his argument. Specifically, MacDonald argues that

> The U.S. Supreme Court, as confirmed by the Virginia Supreme Court in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005), unmistakably held in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), that a statute that criminalizes sexual acts between consenting adults in private is facially invalid. [and in] this key respect, Virginia's "Sodomy Statute" § 18.2-361, is indistinguishable from the Texas statute that the defendants were convicted of violating in *Lawrence* or the fornication law struck down in *Martin*.

See Pet'r Mem. at 10, ECF No. 2.

The Court of Appeals held that MacDonald lacked standing to assert this claim.[4] *See* Va. Ct. App., Jan. 9,

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[4] Notably, the Court of Appeals of Virginia referred to MacDonald's previous case, *McDonald v. Commonwealth*, 630 S.E.2d 754 (2006), to explain its reasoning. *See* Va. Ct. App., Jan. 9, 2007, at

2007, at 3, ECF No. 2-9 (citations omitted). Its reasoning is imputed to the Supreme Court of Virginia, which refused the appeal without explanation. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). In reviewing the state court's decision as to this claim, MacDonald fails to show that the result was either contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

When the Court of Appeals of Virginia held that MacDonald lacked standing to challenge the facial constitutionality of Va. Code § 18.2-361(A), it explicitly relied on the United States Supreme Court case *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979) (noting that a party "has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights"), as the basis for its holding. Because the principle relied upon was drawn directly from a United States Supreme Court case, this decision was not contrary to federal law. *See Williams*, 529 U.S. at 413.

A reasonable jurist could apply the principle from *Ulster* to conclude that a MacDonald lacked standing to challenge the facial constitutionality of Va. Code § 18.2-361(A) because MacDonald was an adult who was trying to engage in sodomy with a minor, and such

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2, ECF No. 2-9 ("In accord with our previous decisions, we hold that MacDonald lacks standing to assert this claim") (citing *McDonald v. Commonwealth*, 48 Va. App. 325, 329,630 S.E.2d 754, 756 (2006) ("[W]e will only consider the constutitionality of Code § 18.2-361(A) as applied to appellant's conduct) (other citations omitted)). Therefore, that is the reasoning that has been analyzed here under the *Williams* standard.

behavior is not constitutionally protected.[5] Therefore, the Court of Appeals of Virginia's holding was not an unreasonable application of federal law.

Finally, MacDonald has not provided clear and convincing evidence to rebut the presumption that the Court of Appeals of Virginia's relevant factual findings were sound. *See Miller-El*, 545 U.S. at 240. Therefore, MacDonald's challenge to the facial constitutionality of Va. Code § 18.2-361(A) will be dismissed.

3. As Applied

MacDonald argues that Va. Code § 18.2-361 is unconstitutional as applied in this case, and he again relies on *Lawrence* to support his argument. The Court of Appeals rejected this claim on the merits, and its reasoning is imputed to the Supreme Court of Virginia, which refused the appeal without explanation. *See Ylst*, 501 U.S. at 803. In reviewing the state court's decision as to this claim, MacDonald fails to show that the result was either contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

The Court of Appeals of Virginia's determination is based on clearly established federal law. Virginia considers persons aged 16 and 17 to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children. *See* Va. Ct. App., Jan. 9, 2007, at 1-3, ECF No. 2-9

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[5] MacDonald has not exhausted the argument that there is a distinction between a direct conviction of sodomy and a conviction for solicitation of sodomy for the purposes of analyzing the facial constitutionality of Va. Code § 18.2-361. *See* Supp. Brief at 14, ECF No. 22.

(citations omitted).[6] Thus, the holding that Va. Code § 18.2-361 is not unconstitutional as applied to MacDonald is not contrary to, or an unreasonably application of, federal law. Because MacDonald has also not provided clear and convincing evidence to rebut the state court's factual findings, this claim will be dismissed.

4. Va. Code § 18.2-361 Carries Punishments that Violate Equal Protection

MacDonald argues that his punishment violates Equal Protection because of the disparity in potential sentences between similar offenses. Specifically, he argues that the potential sentence for soliciting sodomy with a minor—the offense for which he was convicted—is too long when compared to the potential sentence for intercourse with a minor aged 16 or 17 and/or the potential sentence for all persons who participate in oral sex. *See* Mem. in Supp. of Pet. at 27, ECF No. 2.

Upon review of the state court records, it is clear that MacDonald did not pursue an Equal Protection claim in the state court proceedings as required. MacDonald would now be precluded from bringing these claims in state court because they would be procedurally defaulted under Virginia Code § 8.01-654(B)(2) (barring successive state habeas petitions). Because this claim would therefore be simultaneously exhausted and defaulted for the purposes of federal habeas review,

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[6] Again, the Court of Appeals of Virginia referred to MacDonald's previous case, *McDonald v. Commonwealth*, 630 S.E.2d 754 (2006), to explain its reasoning. *See* Va. Ct. App., Jan. 9, 2007, at 3, ECF No. 2-9 ("For the reasons previously stated in our opinion in *McDonald*, 48 Va. App. at 329, 630 S.E.2d at 756-57 (Code § 18.2-361(A) does not violate defendant's due process rights), we reject [MacDonald's argument]."). Therefore, that is the reasoning that has been analyzed here under the *Williams* standard.

See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), a federal court is not permitted to review these claims absent a showing of cause and prejudice or a fundamental miscarriage of justice, such as actual innocence. *See Harris v. Reed*, 489 U.S. 255, 260 (1989). In the November 30, 2009 Order, MacDonald was thus given an opportunity to show cause why his claim should not be dismissed.[7]

In his response to the November 30 Order, MacDonald argues that "MacDonald asked the Virginia Supreme Court to thoroughly examine the statute under which he had been convicted and specifically apply the U.S. Supreme Court's holdings (not dicta) in *Lawrence v. Texas* to Virginia Code 18.2-361(A) and they chose not to do so neither on direct review nor on habeas review." *See* Resp. at 2, ECF No. 4. MacDonald has properly demonstrated that his facial and as-applied attacks to the constitutionality of Va. Code § 18.2-361(A) were preserved on direct appeal, but the Equal Protection Clause was never mentioned in the circuit court. Therefore, this argument does not provide a showing of cause and prejudice or a fundamental miscarriage of justice that would result from the dismissal of his Equal Protection Clause claim.

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[7] MacDonald was directed to show cause why his claim under the Ex Post Facto Clause should not be dismissed, however, MacDonald has consistently included this Equal Protection claim as part of his Ex Post Facto Clause claim. *See* Pet. at 5, ECF No. 1 ("MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S. Constitution because Virginia's Sodomy Statute is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law."). Therefore, his response to the November 30 Order is properly considered as an argument as to why his unexhausted Equal Protection claim should not be dismissed as procedurally defaulted.

MacDonald also argues that "[t]he U.S. Supreme Court's decision in *Williams v. Taylor* should take precedence over Virginia's older decision in *Slayton v. [Parrigan]*." *Id.* at 4. As explained above, current caselaw bars a federal court from reviewing claims that have been procedurally defaulted, and the Fourth Circuit has held consistently that "the procedural default rule set forth in *Slayton* constitutes an adequate and independent state law ground for decision." *Mu'min*, 125 F.3d at 196-97. Therefore, MacDonald's argument is without merit. MacDonald has therefore failed to make a showing of cause and prejudice or a fundamental miscarriage of justice that would result from the dismissal of his Equal Protection claim as procedurally defaulted, and it will be dismissed.

B. Insufficient Evidence

MacDonald argues that the evidence was insufficient to convict him of contributing to the delinquency of a minor. *See* Mem. in Supp. of Pet. at 31, ECF No. 2. The Court of Appeals of Virginia rejected this claim on the merits, and the circuit court's reasoning is imputed to the Supreme Court of Virginia, which refused the appeal without explanation. *See Ylst*, 501 U.S. at 803. In reviewing the state court's decision as to this claim, MacDonald fails to show that the result was either contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts.

The Court of Appeals recognized that it must "view the evidence and all reasonable inferences flowing therefrom in the light most favorable to the Commonwealth," and that the trial court's conviction must be affirmed "unless it is plainly wrong or unsupported by the evidence." *See* Va. Ct. App., Jan. 9, 2007, at 3, ECF No. 2-9 (citing *DeAmicis v. Virginia*,

524 S.E.2d 151, 152 (Va. 2000) (*en banc*)). The court then affirmed MacDonald's conviction forcontributing to the delinquency of a minor by reasoning that

> MacDonald's solicitation of oral sex from the victim was prohibited behavior, i.e., he willfully encouraged her to engage in a criminal act. [Va.] Code § 18.2-29. His solicitation was clearly designed to encourage A.J. to commit that act, which would render her delinquent under [Va.] Code § 16.1-228, in violation of [Va.] Code § 18.2-371.

See id. at 4-5.

It is well established that the scope of federal habeas review is limited to questions of either the federal Constitution or laws, and it does not extend to reexamination of a state court's interpretation and application of a state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Wright v. Angelone*, 151 F.3d 151, 157 (4th Cir. 1998). The Supreme Court of Virginia rejected MacDonald's argument as to the proper interpretation of these Virginia statutes and dismissed his petition. Therefore, to the extent that MacDonald argues that his conduct does not fit within the definitions in the Virginia statutes, his argument is not cognizable in a federal habeas proceeding and will be dismissed.

To the extent that MacDonald raises a federal due process claim that the evidence was insufficient to support his conviction, his argument also fails. The standard for analyzing a claim of insufficiency of the evidence for purposes of a federal due process analysis is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*,

443 U.S. 307, 319 (1979). Although the Court of Appeals of Virginia used a standard from Virginia state law, that standard is clearly in line with the federal standard. Therefore, because the Court of Appeals did not arrive at a different conclusion than the Supreme Court of the United States on a question of law, its determination was not "contrary to" clearly established federal law. *See Williams*, 529 U.S. at 412-13.

Furthermore, the Court of Appeals of Virginia's decision was not an unreasonable application of clearly established federal law because the court both identified the correct legal principle and applied that principle reasonably to the facts of the case. *See Williams*, 529 U.S. at 413. The evidence showed MacDonald asked A.J. "to suck his dick," then suggested they go to a shed to "have sex." *See* Va. Ct. App., Jan. 9, 2007, at 2, ECF No. 2-9. The Court of Appeals reasonably concluded that a rational juror could conclude that these actions "encouraged" A.J. to commit a delinquent act by encouraging her to violate Va. Code § 18.2-371, and that MacDonald was therefore guilty of contributing to the delinquency of a minor. MacDonald has not rebutted this determination of the facts by clear and convincing evidence, so this Court must presume that the state court's factual findings are sound. *See Miller-El*, 545 U.S. at 240 (quoting 28 U.S.C. 2254(e)(1)). Because MacDonald has failed to demonstrate that the state court's conclusion was contrary to, or an unreasonable application of, clearly established federal law, his claim that the evidence was insufficient to support his conviction fails and will be dismissed.

V. Conclusion

For the above stated reasons, this petition will be dismissed and MacDonald's Motion for Discovery will be denied as moot. An appropriate Order shall issue.

Entered this 26th day of September 2011.

Alexandria, Virginia

/s/
Gerald Bruce Lee
United States DistrIct Judge

App. 51
FILED: April 8, 2013

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11-7427
(1:09-cv-01047-GBL-TRJ)

WILLIAM SCOTT MACDONALD,

Petitioner-Appellant,

v.

TIM MOOSE,

Respondent-Appellee,

and

KEITH HOLDER, Probation Officer,

Respondent.

DEAN AND PROFESSOR ERWIN CHEMERINKSY; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED,

Amici Supporting Appellant.

ORDER

The court denies the petition for rehearing and rehearing *en banc*. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing *en banc*.

Entered at the direction of the panel: Judge Motz, Judge King, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRCT COURT:

EASTERN DISTRICT OF VIRGINIA
AT RICHMOND

William Scott MacDonald, *pro se* *Petitioner* v.		Record No. 1:09CV1047
The Attorney General of the Commonwealth of Virginia	Keith Holder Probation Officer Harnett County, NC	
	Respondents	

MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUSTICES OF THE
U.S. DISTRICT COURT IN VIRGINIA:

1. **COMES NOW** *pro se* Petitioner **William Scott MacDonald** (hereinafter referred to as MacDonald) asserting that he is aggrieved by the Virginia Supreme Court's dismissal of his Petition for Habeas Corpus and for the following reasons requests that this honorable court assess the facts brought forth below and to provide an independent determination as to whether MacDonald's federal constitutional rights have been violated.

2. MacDonald completed an active incarceration at Brunswick Correctional Center, Lawrenceville, Virginia, on August 3, 2009, is now on supervised probation in Harnett County, North Carolina, following an approved application for Interstate Compact Agreement. Now allowed only to move within the state of North Carolina,

MacDonald is also subject to mandatory sex offender registration for the next ten years.

Jurisdiction and Venue

3. Under 28 U.S.C. § 2241(d), venue is appropriate in both the district in which the prisoner is in custody and the district in which he was convicted and sentenced. MacDonald has elected to file this Petition for Writ of Habeas Corpus in the district in which he was convicted primarily because he has a sister case filed in the same District (1 :08-cv-0078 I -GBL-TRJ).

"In Custody" Status for the Purpose of Habeas Relief

4. Although no longer physically incarcerated, the relief available to MacDonald is not negated, nor is this case "moot." Relying on *Carafas v. La Vallee*, 391 U.S. 234 (1968) MacDonald claims that the habeas statute does not limit the relief that may be granted solely to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that "[t]he court shall . . . dispose of the matter as law and justice require." 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statue seem specifically to contemplate the possibility of relief other than immediate release from physical custody.

5. MacDonald continues to suffer serious disabilities and hindrances because of the law's complexities and not because of his fault. If his claim, that he has been illegally convicted, is meritorious, there is no need in the statute, the Constitution, or sound jurisprudence for further denying MacDonald his requested relief. In consequence of his conviction, he cannot engage in certain businesses; he cannot make his residence in certain areas; he cannot vote; he cannot serve as a juror, and the opportunities for

employment are quite narrow with the labels of "felon" and "sex offender."

6. Because of these "disabilities" or burdens which flow from MacDonald's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed upon him." *Fiswick v. United States*, 329 U. S. 211, 222 (1946). On account of these "collateral consequences," this habeas case is not moot simply because of MacDonald's release from the State Prison system.

Background and History of Instant Case

7. On December 8, 2004, MacDonald spoke at length with Detective Stephanie Early of the Colonial Heights Police Department regarding a complaint he had filed a few days prior for Abduction and Assault against his person. After interviewing MacDonald and the alleged perpetrator, Detective Early swore out warrants on MacDonald. On January 25, 2005, MacDonald was summoned to the Colonial Heights Police Department where he was arrested and charged with 1 misdemeanor count of Filing a False Police Report (VA Code § 18.2-461), 1 Class 5 Felony count of Soliciting a Minor to Commit a Felony (VA Code § 18.2-29), the underlying felony being Oral Sex (VA Code §18.2-361), and 1 count of Contributing to the Delinquency of a Minor (VA Code § 18.2-371). (See Enclosures at TAB A)

8. In Juvenile and Domestic Relations Court on May 12, 2005, MacDonald agreed to a Plea Agreement when less than an hour before trial his court-appointed attorney, Mr. Driskill came to the holding cell area and told MacDonald that the judge had said that if he did not plead guilty, sentencing would be much worse. Mr. Driskill told MacDonald that no one in Colonial Heights was going to believe him anymore than they had in Prince George.

9. Therefore, as part of a Plea Agreement, MacDonald entered a plea of Guilty to one Misdemeanor count of Making a False Report, in exchange for the *Nolle Prosequii* of the one Misdemeanor count of Contributing to the Delinquency of a Minor. The Plea Agreement required MacDonald to plead guilty to the Class 5 felony count of Solicitation and allowed MacDonald leave to appeal his conviction solely on the issue of the constitutionality of Virginia Code § 18.2-361, the underlying offense alleged to have been solicited.

10. May 16, 2005, a Plea Agreement was prepared by the Commonwealth Attorney, and the case was further docketed in Circuit Court for June 14, 2005 to hear the Plea Agreement. However, on May 19, 2005, MacDonald made his intent to refuse to sign the agreement known to Mr. Driskill (See Tab B) and sent the following message to Mr. Driskill:

> *Dear Terry,*
>
> *The morning of May 12th, I entered that Court building determined to tell the truth the whole truth and nothing but the truth. After I met with you, I was very scared You convinced me that no one would believe me there in Colonial Heights any more than they did in Prince George.*
>
> *When I went in the courtroom that day and I lied and told Judge Bryce that I was guilty and then she believed I was, I got a pit in my stomach that hasn't gone away. I can still hear her saying she couldn't believe that I would waste the taxpayer's money by filing a false police report." I have been sick to my stomach ever since and it is because I lied to her.*
>
> *Terry, for some reason I always try to please everybody else—even you—over what I know*

in my gut is right. I never want to disappoint anybody–I always try to please everybody—that's why I was an easy mark for what happened to me, she said she needed to talk to me and I didn't want to let her down. So, I am very sorry that l pled guilty on the 12th of May because that was not the truth. I let myself get talked into going against what I know is right because I don't understand all the legal talk and words. All I DO know is that my conscious is killing me—worse than jail is right now.

I cannot plead guilty on the 14th, because I am not guilty. Not because the sodomy law is unconstitutional, but because plain and simple—I told Detective Early the truth. I came to the Colonial Heights Police Department to get off my chest something that had been done to my marriage and me. My wife and I both had complete trust in the system when we came there to file what they said was only an information Report.

I believe that you have only my best interest at heart and that you only want me to plead guilty so that maybe I can be home with my family one day soon, and I really do respect you for that. But my family and my faith come first before what anybody else tries to force me to do. I am going to tell the truth and if telling the truth there doesn't set me free, then at least I will be able to sleep again, and my family says they will be proud of me for having the courage and integrity to face this court knowing when I leave that day that I have told the whole truth I want to appeal the False Report to Circuit Court and withdraw my guilty plea because of not really wanting

to plead guilty back then but agreeing with my lawyer that at that time it was my best interest at your heart I want a possibility to have that charge brought back up and hope it will get dismissed or me be not guilty because if not my conscious is still not clear. Please push for me on that ok? That's my final decision. Sincerely, Mac

11. In response to the above communication from MacDonald, Mr. Driskill notified the Commonwealth Attorney of MacDonald's decision to withdraw the Guilty Plea and the case was re-docketed for July 12, 2005.

12. Counsel for MacDonald filed a Motion to Dismiss (See Enclosure at TAB C) on the grounds that VA Code 18.2-361, the predicate offense of the alleged solicitation, was unconstitutional in light of recent U.S. Supreme Court and Virginia Supreme Court Decisions. A hearing on the issue was scheduled immediately prior to trial on July 12, 2005.

13. Trial was held July 12, 2005, (Complete transcripts from the July 12, 2005 trial are enclosed at TAB D) and the case was continued in order that MacDonald's Motion to Dismiss could be further evaluated by the Trial Judge. On July 26, 2005, the Motion to Dismiss was denied and MacDonald was found guilty of Soliciting a Minor to Commit a Felony. Testimony was heard on the matter of the misdemeanor count of Contributing to the Delinquency of a Minor. (Complete transcripts from July 26, 2005 are enclosed at TAB E) The matter was taken under advisement and the case was continued until August 2, 2005.

14. On August 2, 2005, MacDonald was found guilty of Contributing to the Delinquency of a Minor and was also sentenced the same day to 10 years in prison (with 9 years suspended) for the felony, 20 years probation, and

Sex Offender Registration as well as 1 year in jail for the misdemeanor. (See Transcripts at Enclosure at TAB F)

15. A Notice of Appeal was timely filed and MacDonald's direct criminal appeal followed in the Virginia Court of Appeals (See enclosed Petition for Appeal at TAB G). In an unpublished opinion, The Virginia Court of Appeals affirmed. (See Enclosure at TAB H) The Virginia Court of Appeals summed up the totality of MacDonald's "crimes" on page 1 of their opinion found at Enclosure TAB 1)

> "Forty-seven-year-old MacDonald and seventeen-year-old A.J. were introduced through a mutual acquaintance. They met in a parking lot in Colonial Heights late one evening. MacDonald rode with A.J. from there to her grandmother's house to retrieve a personal item. When she returned to her car, MacDonald asked her "to suck his dick." He then pointed to a shed in the backyard and suggested they go back there to "have sex." A.J. said she was tired and wanted to take him back to his truck. When they returned to the parking lot, MacDonald pushed her up against the hood of her car and starting kissing and groping her. She pushed him away and went home."

16. An appeal was noted and a Petition for Appeal was filed in the Virginia Supreme Court in September 2007 (See Tab J) but they refused the appeal altogether, twice. (See Enclosure at TAB K).

17. A Petition for Writ of Habeas Corpus was timely filed in the Virginia Supreme Court (See Enclosure at TAB L) on February 4, 2008 and a Show Cause Order was issued on February 15, 2008.

18. The Attorney General for Virginia filed a Motion to Dismiss on March 21, 2008. (See Enclosure at TAB M) And on March 25, 2008, MacDonald filed a Motion for

Leave of Court to File a Response (Petitioner's Traverse) to the Respondent's Motion to Dismiss (See Tab N) however, on April 11, 2008, the Habeas Court denied MacDonald the right to file a Traverse. (See Enclosure at TAB O) However, MacDonald has already filed a Traverse (See Tab P) which fortunately proved useful to the Clerk of Court who was able to use to clarify the Respondent's confusion over a matter (not at question today). (See Enclosure at TAB Q)

19. The Respondent filed an untimely subsequent Supplemental Motion to Dismiss on May 27, 2008 (See Enclosure at TAB R) which included an untimely filed Affidavit from trial counsel.

20. On October 21, 2008, the Virginia Supreme Court dismissed MacDonald's Petition and granted the Respondent's Motion to Dismiss (See Enclosure S) choosing only to consider MacDonald's Claims of Ineffective Assistance of Counsel, determining that MacDonald's other claims are procedurally barred.

21. MacDonald now files this Petition for Writ of Habeas Corpus forwarding the following two Grounds: 1. MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S. Constitution because Virginia's "Sodomy Statute" (the underlying felony he was alleged to have solicited) is facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law; and 2. Insufficient Evidence to Convict. The Commonwealth of Virginia was given full opportunity to settle this matter at State level, however, in their October 21, 2008 Opinion, the Supreme Court of Virginia chose not address these Claims citing that they are non-jurisdictional as well as procedurally barred due to the fact that they were raised in direct appeal citing Virginia case law in S*layton v. Parrigan*,

215 Va. 27, 29, 205 S.E.2nd 680, 682 (1974), *cert. denied*, 419 U.S. 1108 (1975).

22. 28 U.S.C. § 2254(d) provides: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. In *Henry v. Mississippi*, 379 U.S 443 85 S.Ct. 564, 13 L.Ed.2d 408, reh. denied, 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed.2d 813 (1965), Justice Brennan wrote:

> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case, we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

Standing to Attack

23. The Court of Appeals was incorrect in stating that Virginia Code 18.2-361, Section A can only be challenged on an "As Applied" basis. The statute is unconstitutional on its face not only because there are other statutes in place to protect minors, but also due to the resulting disparate sentencing schemes and disparity in post-conviction Sex Offender Registration requirements.

24. The policies underlying *prudential* standing concerns were not served by denying standing to MacDonald. Prudential standing is a judicially-created set of rules that a court applies or relaxes depending on whether judicial interests are served. *See Cottee v. Commonwealth*, 31 Va. App. 546, 553, 525 S.E.2d 25, 29 (2000); *Devlin v. Scardelletti*, 536 U.S. 1, 7, 122 S. Ct. 2005, 2009 (2002); *Eisenstadt v. Baird*, 405 U.S. 438, 444-45, 92 S. Ct. 1029, 1034 (1972). The purpose of the prudential standing rules is to ensure that the rights of others are not adversely affected because an inappropriate party is attempting to vindicate those rights as an abstract matter. *Tucek v. Commonwealth*, 44 Va. App. 613, 606 S.E.2d 537 (2004) (sex offender had no standing to challenge registration requirements under which, if applied to him, he "would have had exactly the same registration duties" making an alleged disparity "entirely hypothetical" as to him). The concern of prudential standing is to ensure that the wrong litigant is not attempting to vindicate the uncertain rights of others:

> This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation. It represents a 'healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed,' [citation], the courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

Kowaiski v. Tesmer, 543 U.S. 125, 125 S. Ct. 564, 567 (2005); *Elk Grove Unified Sch. Dist v. Newdow*, 542

U.S. 1, 15, 124 S. Ct. 2301, 2311 (2004) ("There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.") (citation omitted). MacDonald's argument presented no danger of undermining the claim of a right of persons to engage in private sexual intimacy because the Virginia courts could not fail to enforce *Lawrence* to protect that right.

25. MacDonald simply sought and still seeks to enforce the main holding of *Lawrence* because doing so was and is of great consequence to him and not just to other persons engaged in oral sex. "[A] person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This principle has no application to the instant case... in which a judgment against respondent would constitute a direct, pocketbook injury to her." *Borrows v. Jackson*, 346 U.S. 249, 255-56, 73 S. Ct. 1031, 1034-35 (1953). Because MacDonald faced prison time below, he had standing to ask the courts to recognize that *Lawrence* had already facially invalidated the sodomy law in June 2003 under which he was charged in January 2005.

GROUND ONE

MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S. Constitution because Virginia's Sodomy Statute is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law.

The Statute Was Already Dead

26. The U.S. Supreme Court, as confirmed by the Virginia Supreme Court in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005), unmistakably held in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), that a statute that criminalizes sexual acts between consenting adults in private is facially invalid. In this key respect, Virginia's "Sodomy Statute" § 18.2-361, is indistinguishable from the Texas statute that the defendants were convicted of violating in *Lawrence* or the fornication law struck down in *Martin*. *Lawrence* explicitly chose to rely on the constitutional guarantee of due process to invalidate *all* sodomy laws (not merely those addressing only same-sex conduct). The Court overturned *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), unequivocally stating that that Court should have sustained the facial challenge to the Georgia sodomy statute that mirrors Virginia's law. Instead of affording proper deference to the United States Supreme Court, the Court of Appeals took the view that McDonald does not have standing to invoke *Lawrence*, even though he personally is harmed by the statute being treated as valid. In doing so, the Court of Appeals relied on prudential standing concerns that are wholly out of place in the present context.

27. *Lawrence*'s facial invalidation of Texas's sodomy statute comports with a long line of cases holding that courts cannot add words to broadly unconstitutional statutes to salvage them. Instead, courts are obliged to leave it to the legislature to determine specifically to whom laws apply. This, of course, is a basic principle of separation of powers and the properly limited role of the judiciary in a democratic society.

28. *Lawrence* made clear the unconstitutionality of all remaining sodomy laws similarly reaching private intimate conduct. The decision noted that "[t]he 25 States with laws prohibiting the relevant conduct . . . are

reduced now to 13 [including Virginia], of which 4 enforce their laws only against homosexual conduct." 539 U.S. at 573. The Court chose to decide the case on due process instead of equal protection grounds because otherwise "some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex partners." 539 U.S. at 575. The Court plainly intended not to leave on the books any of the remaining sodomy laws because "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.*

29. The U.S. Supreme Court thus elected to decide the case on due process rather than equal protection grounds to effect the exact result of voiding all consensual sodomy statutes and avoid the very real harms of leaving any such laws in force. The Court's opinion in *Lawrence* cannot be read to permit any continued enforcement of the sodomy statute because the Court's intent was to remove these laws from the books to prevent any abuses. Thus, the Court issued a broader ruling invalidating all sodomy statutes. Indeed, in the wake of *Lawrence*, several state Attorneys General—including Virginia's—publicly acknowledged that their states' sodomy statutes are unconstitutional. Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, WASH POST, June 27, 2003, at Al ("Virginia Attorney General Jerry W. Kilgore (R) expressed disappointment with the ruling, which he said invalidates a state statute banning oral and anal sex between consenting gay and heterosexual couples.").[1]

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[1] *See also* Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003, at C3 ("Utah Attorney General Mark Shurtleff readily admits a U.S.

30. The position advanced by MacDonald was quite narrow and did not call into question the legislature's police power to enact narrower statutes specifically targeted towards sex that is forcible, commercial, truly public or with minors. Instead, MacDonald's position was that the sodomy statute was already invalid because it contains none of the elements that could make a sodomy law constitutional. There is a crucial difference between acknowledging that the legislature has the police power to criminalize certain sexual conduct and the legislature actually having done so through valid means.

31. Unfortunately, the Virginia Court of Appeals ignored the holding of the Virginia Supreme Court's decision in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). The Virginia Supreme Court ruled in *Martin* that the fornication statute must be declared unconstitutional in the wake of Lawrence, without casting doubt on the Commonwealth's police power to regulate fornication "involving minors."

32. In *Martin*, the trial court had held "that *Lawrence* did not 'strike down'" the existing, broad fornication law. *Martin*, 269 Va. at 38, 607 S.E.2d at 368. The Virginia Supreme Court reversed and, finding the defect in the fornication law and in the Texas sodomy statute indistinguishable, flatly held "that Code § 18.2-344 is unconstitutional . . ." 269 Va. at 42, 607 S.E.2d at 371. This Court compared Virginia's fornication law to "the Texas statute which *Lawrence* determined to be unconstitutional" and found them legally "identical." *Id.*, 269 Va. at 41, 607 S.E.2d at 370 n.1. *Martin* recognized that the Virginia fornication law, like the Texas sodomy law, was an unconstitutional "attempt by the state to

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Supreme Court ruling issued last month has already nullified both [sodomy and premarital sex laws"].).

control the liberty interest which is exercised in making these personal decisions."[2]

33. *Martin* recognized the concerns raised by the Commonwealth here but still struck down the broad fornication statute. This Court noted "that state regulation of" public conduct may be different from its powers over private conduct and did not rule on the Commonwealth's "police power regarding regulation of public fornication."[3] Similarly, this case does not concern the Legislature's police power to regulate sodomy with minors by passing a properly drawn statute; indeed Sections 18.2-63 and 18.2-67.1—not challenged here—are examples of statutes targeted to advance the Commonwealth's specific interest of regulating sodomy with minors. However, *Martin* makes clear that a broad statute that permits conviction based solely on evidence of constitutionally protected sexual activity must be struck down.

34. The intriguing yet tragic history of Virginia's Sodomy Law is now almost humorus in light of our society's ever-evolving sense of decency. Where at one time, 400 years ago, Virginia sent a man to the gallows and hung him for committing sodomy, a male citizen of the United States can now legally marry another male in a government-recognized civil union. The current Sodomy law in Virginia is the only one left in the entire United States simply because all of the other 49 states acted upon the *Lawrence* decision and pulled the laws off the books. Virginia has held onto this dead law which was birthed during an era when blacks could not marry whites, unmarried persons of the opposite sex could not live together, and, of course, lumped into the same law

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[2] *Id.* 269 Va. at 42, 607 S.E.2d at 370.

[3] *Id.* 269 Va. at 43, 607 S.E.2d at 371.

for good measure is the forbidden taboo of bestiality. You hardly ever hear anybody talk about that part, but it definitely should remain illegal.

35. Prior to *Lawrence*, litigants attempted to challenge the sodomy laws in Virginia, but the courts held that the right to engage in private sex should be decided in a case brought by parties engaging in private sex. *DePriest v. Commonwealth*, 33 Va. App. 754, 762, 537 S.E.2d 1, 4 (2000) (those "consenting adults engaging in private sexual conduct . . . retain an 'effective avenue of preserving their rights themselves.'"); see also *Pedersen v. City of Richmond*, 219 Va. 1061, 1066, 254 S.E.2d 95, 99 (1979). Pedersen had been arrested by an undercover police officer, Kenneth Palmer, who was working for Richmond's "Selective Enforcement Unit," a police unit whose name alone suggests much. Palmer was working "a known area for homosexuals" when he was approached by Pedersen in his car and invited in on a cold winter night. Palmer testified that, once inside the car, Pedersen said "that I looked nice in my blue jeans and that he would like to see me naked." Palmer also testified that he answered Pedersen's questions about "what type of things [sexual acts] did I like" and when Pedersen popped the question, Palmer arrested him. Pedersen was convicted for solicitation of a felony, and Virginia Appellate Courts Affirmed.

36. In 1990, the Virginia Court of Appeals decided *Ford v. Commonwealth*, 391 S.E.2d 603, (1990.) In this case of heterosexual solicitation, the words "I want to lick your pussy" were found not to constitute a solicitation, distinguishing the case from *Pedersen*. How this differed from Pedersen's statement that the undercover officer looked nice in his blue jeans and that he wanted to see him naked is difficult to understand.

37. In 1997, the Virginia Court of Appeals, deciding *Branche v. Commonwealth*, 489 S.E.2d 692, decided Sep. 2, 1997, unanimously rejected a challenge to a solicitation law. Earl Branche had been arrested for soliciting an undercover police officer, Edgar Cruz, who had, through eye contact, led Branche to believe that he was looking for sex. When Branche suggested mutual oral sex and reached for Cruz's crotch, he was arrested. Under Virginia law, the solicitation is a felony. Had Branche asked for money, the solicitation would have been a misdemeanor. Curiously, Cruz, after arresting Branche, asked him if he would have demanded money. Branche said that he wouldn't, thereby unwittingly passing up the chance for prosecution for a less serious offense. Branche challenged this dichotomy as unconstitutional discrimination in that females soliciting sex were arrested under the prostitution section and Gay men under the felony provision, but the Court of Appeals noted that there was neither sex nor sexual orientation discrimination in these laws.[4] The Court also rejected Branche's selective enforcement argument, even though Cruz testified that, to his knowledge, no female undercover officers ever had been assigned to arrest Lesbians.[5]

38. Post-*Lawrence* challenges to Virginia's Sodomy statute that have risen to the Virginia appellate court level such as *Singson*, *Tjan*, and *McDonald*[6] have been

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[4] *Id.* at 695.

[5] *Id.* at 696-697.

[6] *Singson v. Commonwealth*, 46 Va. App. at 734, 621 S.E.2d at 686 (sodomy statute survives due process challenge); *Tjan v. Commonwealth*, 46 Va. App. at 712-13. 621 S.E.2d at 676 (sodomy statute survives due process and Equal Protection Clause challenge); *McDonald v. Commonwealth*, 48 Va. App. 325, 630 S.E.2d 754 (Sodomy Statute is constitutional when applied to acts involving minors aged 16 and 17).

affirmed, not because our own Legislature has spoken, but because it hasn't spoken to appropriately amend the statute to adequately inform the common man what is a crime and what is not post-*Lawrence*. The Court of Appeals in *Commonwealth v. Singson*, 46 Va. App. 724 (2006), even mistakenly relied on a footnote in *Bowers* purporting to limit that case to a challenge as applied to consensual homosexual sodomy.[7] The procedural posture of *Bowers* makes clear that Hardwick was bringing a declaratory relief action to have the sodomy statute declared facially unconstitutional. Indeed, *Lawrence* specifically criticized the attempt of the *Bowers* Court to limit the interest at stake to homosexual sodomy, by holding instead that the right at issue was a broad right of each individual, regardless of sexual orientation, to engage in personal relationships of one's choice.[8]

39. It has now come to this point, where we must realize that even if the Statute is still valid in certain cases, i.e., with minors, in public, or prostitution, we must look at the punishment that attaches to convictions under this statute and realize that we are no longer balanced in this area, and thus the statute cannot be salvaged.

40. The *Lawrence* Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) and struck down the Texas Sodomy statute.[9] Lawrence declared unconstitutional all sodomy laws and not just those that, like the Texas statute before it, applied only to same-sex conduct. As the Court explained, it elected to decide the case on Due Process grounds rather than Equal Protection grounds to effect this exact result and avoid an argument that there

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[7] *Singson*, 46 Va. App. at 737-38.

[8] 539 U.S. at 566.

[9] *Lawrence* at 578.

are continuing vestiges of the sodomy statute that would continue to be valid:

> "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 . . . If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable for Equal Protection reason." *Lawrence*, 539 U.S. at 575, 123 S. Ct. at 2482.

41. The Court's opinion in *Lawrence* is not limited to the statute or the facts before it. The Court did not resolve the case as an "as applied" challenge, leaving similar sodomy statute enforceable in other contexts, but instead recognized the potential for abuse that such statutes represent. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is the *validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.[10] In short, the Court found that the reach of the Texas statute was unacceptable, and the law was unsalvageable. Thus the Court concluded its *Lawrence* decision in unmistakably facial terms: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[11]

42. There is no element in the section of the Virginia statute at issue that requires that the act be forcible, commercial, public, or with a minor. Virginia has statutes

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[10] *Id.* at 562, 123 S. Ct at 2475 (emphasis added).

[11] *Id.* at 578, 123 S. Ct. at 2484.

prohibiting such conduct, but MacDonald was not convicted under those statutes.

43. The Virginia Court of Appeals misunderstood the difference between a statute that properly targets specific ills as compared to a broad statute intended to abridge personal liberty. This misunderstanding is evident by that court's reliance on cases that upheld convictions for violating statutes that specifically target child pornography. *McDonald*, 48 Va. App. at 331. In these cases, the defendant argued that he had a constitutional right to make or possess child pornography, despite narrow laws that criminalized only depictions of minors. *United States v. Bach*, 400 F.3d 622, 629 (8th Cir.2005); *United States v. Sherr*, 400 F. Supp. 2d 843, 850 (D. Md. 2005); *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810, 817 (2005). These courts reached the unremarkable conclusion that liberty rights are not violated by enforcement of a law that criminalizes pornography only when it includes children.

44. The prosecution of MacDonald for oral sex did not involve a law passed by the legislature to address the specific problem of sexual behavior with minors. By way of analogy, it is obvious that if the statute in question in *Bach* provided that no adult could download *any* sexually explicit pictures, that such a statute would be unconstitutional and could not be "applied" to the situation in which an adult downloaded pictures of minors. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 859, 117 S. Ct. 2329 (1997). In short, MacDonald was not quarreling with the Court of Appeals' statement that *Lawrence* "leav[es] states free to define people under age eighteen as children."[12] But that is the point—Virginia actually must define the crime of oral sex

[12] *McDonald*, 48 Va. App. at 331.

involving minors and specify the offense. Since the Commonwealth has not yet done so with regard to minors of the ages involved in this case, MacDonald should not have been prosecuted under some other statute that is unconstitutional because it includes no elements other than the commission of sodomy itself.

45. It is important to note that Virginia Code §18.2-63 prohibits sodomy, or other contact, between adults and minors who are younger than sixteen years of age. It is important to remember that Virginia Code § 18.2-371 prohibits only "intercourse" between adults and children between sixteen and seventeen years old. This statute does not include sodomy between adults and children between the ages of sixteen and seventeen. The statute specifically and solely mentions "intercourse." This is unlike Virginia Code § 18.2-63 which specifically mentions other sex acts including sodomy committed on minors under sixteen.

46. Virginia Code § 18.2-361(A), therefore does not in any way include an age restriction, or indicate that the legislature intended to prohibit sodomy between adults and children between the ages of sixteen and seventeen. When Virginia Codes § 18.2-63 and 18.2-361(A) are read together, as we are compelled to do, it is clear that there was no specific prohibition against sodomy for individuals over fifteen.

47. *Lawrence*'s holding facially invalidating the "sodomy" statutes was consistent with extensive precedent striking down laws that broadly infringe protected rights. In facially invalidating all sodomy statutes, *Lawrence* acted in accordance with numerous prior precedents that struck down laws impinging upon the liberty guarantees of the Fifth and Fourteenth Amendments. *See*, *e.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500, 514, 84 S. Ct. 1659, 1668 (1964) ("In our view, the foregoing considerations

compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section . . . sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1859 (1983); *Griswold v. Connecticut*, 381 U.S. 479, 498, 85 S. Ct. 1678, 1689 (1965) (concurring opinion of Goldberg, Warren, and Brennan) ("it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."). *Lawrence*'s facial invalidation of the sodomy statute also comports with longstanding principles of the adjudication of the constitutionality of statutes.

48. In *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006), the Supreme Court unanimously summarized several principles for determining whether a statute should be facially invalidated. *Ayotte* first reiterated the basic premise, applicable to most laws, that courts should try not to nullify more of a statute than is necessary.[13] In the *Ayotte* case, as with most legislative enactments, this approach is perfectly reasonable, given that legislatures generally act with legitimate intent and, when their enactments occasionally overreach, it is usually in a small number of instances. *Ayotte* involved New Hampshire's statute requiring minors to notify their parents before obtaining an abortion. The statute did not include an exception if the minor's health is in danger, which is constitutionally required. It was uncontested that the state was pursuing a legitimate goal in passing

[13] *Id.* at 967.

the notification statute.[14] It also was uncontested that, in failing to provide an exception for the health of the minor, the statute would operate unconstitutionally only in "some very small percentage of cases."[15] Thus, the Court asked the lower court to consider carefully whether the entire statute should be invalidated.

49. These aspects of the New Hampshire law are, of course, the opposite of the situation pertaining to the sodomy statute, which has an unconstitutional purpose and operates unconstitutionally in the great majority of the situations it covers. Sodomy statutes are invalid because they "seek to control a personal relationship that . . . is within the liberty of persons to choose." *Lawrence*, 558 U.S. at 567; *accord Martin*, 269 Va. at 42, 607 S.E.2d at 370 (the fornication statute, "like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions."). In passing a law making all sodomy, even private sodomy, a Class 6 felony, the legislature attempted to advance an improper government interest to visit moral condemnation on particular adults and their consensual sexual conduct. *See Lawrence*, 539 U.S. at 578; *Martin*, 269 Va. at 42, 607 S.E.2d at 370.

50. Moreover, the statute's applicability to all oral sex in the vast majority of cases to which the statute applies targets conduct that is fully protected under the Constitution, since it is recognized that oral sex is widely practiced among consenting adults. *See Mohammed v. Slate*, 561 So.2d 384, 386 n.1 (Fla. Ct. App. 1990) (citing surveys showing 85% of adults engage in oral sex);

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[14] *Id.* at 966 ("States unquestionably have the right to require parental involvement" in decisions relating to abortions.)

[15] *Id.* at 967.

Edward O. Laumann et al., The Social Organization of Sexuality 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex). Given that the sodomy statute has an unconstitutional purpose and operates unconstitutionally in most of the instances it covers, it is facially unconstitutional. *See generally State v. Guice*, 141 N.C. App. 177, 197-98, 541 S.E.2d 474, 487 (2000) (a statute that, in most cases, imposes a criminal penalty improperly is not saved constitutionally merely because there are some instances in which it could be applied validly).

51. The Virginia Supreme Court recognized the judiciary's proper role in confronting a broadly unconstitutional statute in *Makarov v. Commonwealth*, 217 Va. 381, 228 S.E.2d 573 (1976). There, an employer was convicted of a statute requiring the payment of wages. The statute on its face criminalized the nonpayment of wages "with no qualifications or exceptions" thus encompassing "noncriminal behavior." 217 Va. at 385. The Attorney General argued that "a statute should be interpreted 'so as to uphold its constitutionality if this can be reasonably done'" and thus requested the Virginia Supreme Court to "read into the statute" a *mens rea* requirement.[16] The Virginia Supreme Court declined, because "the statute on its face deals with a naked civil debt and we cannot say the [Virginia] General Assembly implicitly meant to include proof or an intent to defraud as an essential element of the offense."[17] The court struck down the statute on its face, leading to the proper result—a legislative solution of amending the statute to

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[16] *Id.* at 383.

[17] *Id.* at 386.

include the *mens rea* requirement. *See Early Used Cars, Inc. v. Province*, 218 Va. 605, 611 n.4, 239 S.E.2d 98, 102 (1977).[18]

52. This case is even more compelling that *Makarov* because the Virginia courts specifically rejected pre-*Lawrence* efforts to limit the scope of Virginia Section 18.2-361. *E.g.*, *Paris v. Commonwealth*, 35 Va. App. 377, 385, 545 S.E.2d 557, 561 (2001) ("The statute does not require proof that the defendant knew the victim did not consent. The intentional commission of the act is the sole element that must be proven."). Simply put, the courts recognized that the language and intent of the statute was to punish all sodomy without limitation. For the Commonwealth now to suggest that the Legislature intended to reach only specific areas of concern, such as sex with minors, is intellectually dishonest. Such judicial legerdemain should not occur when a statute was intended to trample on protected liberty interests. Additionally, MacDonald's case is more compelling than *Ayotte* because it involves an actual conviction under what, due to the activism of the lower courts, was a judicially rewritten statute, implicating procedural due process concerns. Courts emphasize that a criminal statute must be definite for a citizen constitutionally to be prosecuted for its

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[18] A good example of the proper balance between the courts and the legislature is illustrated in *People v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62 (1983). After New York's highest court had ruled its sodomy law unconstitutional, that court was asked to save the state's statute against loitering for the purpose of sodomy by adding elements to the language. *Id.*, 58 N.Y.2d at 937, 447 N.E.2d at 62. The *Uplinger* court rejected the invitation, noting that "the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others," and that a "properly drafted" statute addressing offensive conduct would present a different question. *Id.*

violation. *See Sharp v. Commonwealth*, 213 Va. 269, 271, 192 S.E.2d 217, 218 (1972); *Berry v. City of Chesapeake*, 209 Va. 525, 526, 165 S.E.2d 291, 292 (1969) ("A penal statute is always strictly construed against the State and in favor of the liberty of the citizen"); *Milteer v. Commonwealth*, 267 Va. 732, 738, 595 S.E.2d 275, 278 (2004). A statute that does not afford a defendant this basic element of due process is plainly invalid, and a court should not engage in judicial legislation to change this. *Helton v. Hunt*, 330 F.3d 242, 248-49 (4th Cir. 2003) ("[The government] argue[s] that we should construe the statute as providing due process protections, . . [but] any savings construction here would be at odds with the statute, whose language encourages defiance of, not compliance with, due process guarantees. Although a court will 'often strain to construe legislation so as to save it against constitutional attack,' it will not do so to the point of 'judicially rewriting' the legislation.

53. Second, the *Ayotte* Court cautioned against rewriting a law to conform to constitutional requirements "even as we strive to salvage it." *Id.* at 968, citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). This concern is especially acute when legislative "line-drawing" is more appropriate. *Ayotte*, 126 S. Ct. at 968; *see also Torres v. N. Y. State Bd. of Elections*, 462 F.3d 161, 205-06 (2d Cir. 2006).[19]

54. The Virginia legislature has passed two separate provisions criminalizing sodomy with minors under age thirteen, Virginia Code § 18.2-67, and sodomy with minors age thirteen or fourteen. Virginia Code § 18.2-63.

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[19] (Upholding court's refusal to act as "a one-person legislative superchamber—precisely what is forbidden"—in declining to salvage election statute where the "constitutionally permissible options are numerous, [and the] 'linedrawing is inherently complex' for a host of policy reasons.").

The Court of Appeals' decision would draw its own line in classifying sodomy with those persons ages fifteen to seventeen. This is problematic, in that Virginia Code § 18.2-371, which deals with intercourse involving a participant ages 15-17, specifies that only a person age 18 or older is criminally liable, and then only for a misdemeanor. The logic of the Virginia Court of Appeals' holding would eviscerate this requirement that, for such sexual offenses, the defendant be an adult and would make oral or anal sex, in these circumstances, unlike intercourse, a felony. In other words, the logical import of the Court of Appeals' decision is that every time sodomy involves a minor, both participants have committed a felony. Thus, two minors a day shy of their eighteenth birthday would be felons for consensual sodomy. Furthermore, a fifteen year old who engages in oral sex would be a felon, whether the other participant was thirteen, seventeen, or forty. The role of the judiciary is to let the legislature define the offenses and punishments, and then weigh in on whether the legislature acted constitutionally—it is not to enact the offenses and punishments in the first place.

55. Also notable is *Ayotte*'s command that, even if the legislature does intend a particular result, courts should be "wary of legislatures who would rely on [judicial] intervention" to rewrite broad statutes. 126 S. Ct. at 968. "'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied."[20] As *Ayotte* explained,

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[20] *Id.*; *accord Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 n.49,117 S. Ct. 2329, 2351 n.49 (1997), (*both quoting U.S. v. Reese*, 92 U.S. 214, 221 (1875)).

"this would, to some extent, substitute the judicial for the legislative department of the government."[21]

56. In cautioning against judicial rewriting of broadly unconstitutional statutes, *Ayotte* was reiterating the holding of many prior cases. "Courts cannot save a penal statute by imposing *post facto* limitations on official discretion through case-by-case adjudications where no such restraints appear on the face of the legislation." *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985). A statute cannot broadly proscribe an entire category of activity that includes constitutionally protected conduct, and leave it for the judicial system to decide who can be charged. *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S. Ct. 298, 300 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."); *accord State v. Hill*, 189 Kan. 403, 412-13, 369 P.2d 365, 372-73 (1962).

57. A court cannot "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Eubanks v. Wilkinson*, 937 F.2d, 1118, 1125 (6th Cir. 1991) (*quoting Hill v. Wallace*, 259 U.S. 44, 70 (1922)). Virginia case law strongly rejects resorting to statutory rewrites to prosecute defendants. "Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied."' *Holsapple v. Commonwealth*, 39 Va. App. 522, 534-35, 574 S.E.2d 756, 762 (2003) The lower courts should have declined to construe the sodomy statute to create a

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[21] *Ayotte*, 126 S. Ct. at 968.

dichotomy between certain instances of sodomy, where the "statute nowhere sets up this suggested dichotomy." *Eubanks v. Wilkinson*, 937 F.2d at 1125 (*quoting Sloan v. Lemon*, 413 U.S. 825, 834 (1973)); *Pacesetter Homes, Inc. v. Vill. of S. Holland*, 18 Ill.2d 247, 251, 163 N.E.2d 464, 467 (1960) ("the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.") (*quoting U.S. v. Ju Toy*, 198 U.S. 253, 262 (1905)).

58. Avoiding judicial rewriting is especially important here, where the Commonwealth was asking the courts to insert words ("with minors") to a sodomy statute that has no such language. If, in order to make a statute constitutional, a court "would be required not merely to strike out words, but to insert words that are not now in the statute," that is asking the court "to make a new law, not to enforce an old one. This is no part of our duty." *Marchetti v. U.S.*, 390 U.S. 39, 60 n.18 (1968); *Butts v. Merch & Miners Transp. Co.*, 230 U.S. 126, 135, 33 S. Ct. 964, 966 (1913) ("To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do."). In short, "if the legislature wishes to include" certain "sexual acts" within a statute's reach, "it should do so with specificity since [it] is a criminal statute." *State v. Richardson*, 307 N.C. 692, 693, 300 S.E.2d 379, 381 (1983).

59. The principle in Virginia law against judicial rewriting of statutes applies with even greater force to reject attempts to add elements to criminal statutes. *Johnson v. Commonwealth*, 37 Va. App. 634, 639-40, 561 S.E.2d

1, 3 (2002) ("In determining the elements established by such statutes, '[w]e may not add . . . language which the legislature has chosen not to include.'") (citing cases); *Holsapple v. Commonwealth*, 39 Va. App. at 535, 574 S.E.2d at 762 ("If the legislature intended to require a showing of [a particular element], it presumably would have used language to do so."); *Toliver v. Commonwealth*, 38 Va. App. 27, 32-33, 561 S.E.2d 743, 746 (2002) (refusing to limit the reach of a criminal statute, holding that "if the legislature had intended" to add such a limitation, "it could have done so."); *see also Cent Va. Obstetrics & Gynecology Assocs., P.C. v. Whitfield*, 42 Va. App. 264, 280-81, 590 S.E.2d 631, 640 (2004) ("To advocate a statutory interpretation that, if accepted, would essentially rewrite the legislative text 'presupposes a power in the judiciary that simply does not exist.' We thus reject appellants' invitation to judicially graft into the statute an unwritten provision . . .").

Disparate Sentencing Schemes and Post-trial Requirements

60. The Eighth Amendment embraces a requirement that a prison sentence be proportionate to the offense. MacDonald claims that he has suffered Unequal Protection of the Law due to the disparity which exists between a 10 year prison sentence required for merely suggesting that a 17-year-old participate in oral sex versus the 5 year prison term required for all persons who participate in oral sex, when it's only a 1 year city jail sentence for persons convicted of intercourse with a 16 or 17-year-old. The three offenses are similar and therefore the three convictions are similarly situated but punished much differently.

61. MacDonald was charged with and convicted of a Class 5 felony for solicitation in that he allegedly leaned

up from the back seat of the victim's car and said the words, "suck my dick" to the 17-year-old. Testimony in light most favorable to the Commonwealth also indicated that MacDonald then pointed to a shed and said, "Let's have sex." and because of that comment alone, and nothing else, he was convicted of Contributing to the Delinquency of a Minor.

62. This is an extreme case of Double Jeopardy. The law has been reworded and rewritten from the bench and through case law, so much to the point that now, as an attempt to salvage and save Virginia Code § 18.2-361, it now simply creates a case of double jeopardy, and worse, just saying the words, "let's have sex," can land a person in jail for 1 year, and "suck my dick" (in violation of Virginia Code §18.2-29 "Solicitation") can send you to prison for 10 years, but only the words "suck my dick" require Sex Offender Registration. MacDonald contends that the slang, "suck my dick" is commonly heard on the streets when used in anger and is sometimes used as a means of challenging another person to leave them alone or "forget it—it's not happening," just like the slang "kiss my ass" is usually not said with the hope that the person being spoken to will truly kiss the buttocks of the person doing the talking.

63. MacDonald denies ever saying the words "suck my dick," but that if he had indeed said the words they certainly were not in the context of hoping that his penis would be taken from his pants and put in the accuser's mouth, for it was not his intention to be there with her in the first place. He had begged her to stop the car and testified that he asked her to take him back to his truck. It is unimaginable that words from our mouth, taken out of context can put us in prison for 10 years! At this time oral sex with any person carries only a maximum

of 5 years in prison, but asking a 16 or 17-year-old for it carries 10 years in prison.

64. Virginia Code § 9.1-902, Offenses requiring (Sex Offender) Registration requires every person convicted of oral sex with a 16 or 17-year-old to register as a sex offender. Virginia Code § 9.1-902 does not require a person convicted of sexual intercourse with a 16 or 17-year-old (Virginia 18.2-371) to register as a sex offender. MacDonald claims that this distinction violates his right to equal protection.

> "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. It is often stated that [t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714, citations and quotation marks omitted.)

65. Virginia Code § 9.1-902, exempts consensual sexual intercourse with a 16 or 17-year-old Virginia Code § 9.1-902 (in violation of Virginia Code § 18.2-371) from its mandatory registration scheme. On the other hand, those who engage in consensual oral copulation with a 16 or 17-year-old must register as sex offenders. MacDonald is

challenging the disparate treatment of similarly situated groups as well as the disparity of making "Solicitation" of oral sex a Class 5 felony when the actual act of oral sex is only a Class 6 felony. The Supreme Court in the 1958 case of *Trop v. Dulles*,[22] expressly endorsed the view that what are prohibited "cruel and unusual punishments" should change over time, being those punishments which offend society's "evolving sense of decency."

66. The classification structure in Virginia Code § 9.1-902, which affords favorable treatment to sexual intercourse as compared with oral copulation, is grounded in the historical antipathy against acts which were viewed as crimes against nature and sexual perversions. There is no other reasonable explanation. While this is the logical explanation for the disparate treatment afforded those who engage in consensual oral copulation with a 16 or 17-year-old, it does not meet the rational basis standard. Virginia Code § 9.1-902 is about controlling recidivism and protecting the public from recidivist sexual offenders. It is not concerned with protecting the morals of society, or to protect the public from "unnatural" sexual acts. The Commonwealth is therefore, treating similarly situated groups differently "on the basis of criteria wholly unrelated to the objective of that statute."[23] That is prohibited under the equal protection clause. The preservation of morality, or the protection

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[22] *Trop v. DulIes*, 356 U.S. 86 (1958), was a federal court case in the United States that was filed in 1955, and finally decided by the Supreme Court in 1958. The Supreme Court decided, 5-4, that it was unconstitutional for the government to cancel the citizenship of a U.S. citizen as a punishment. The ruling's reference to "evolving standards of decency" is frequently cited precedent in the court's interpretation of the Eighth Amendment's prohibition on "cruel and unusual punishment."

[23] *Eisensiadt v. Baird*, *supra*, 405 U.S. at p. 447.

of society against acts historically viewed as unnatural, is not found in any statute or case which addresses the purpose underlying Virginia Code § 9.1-902. "The state cannot treat similarly situated groups differently "on the basis of criteria wholly unrelated to the objective of that statute."[24]

67. The Fourteenth Amendment to the U.S. Constitution provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. The question is whether the legislative distinction between oral copulation with a 16 or 17-year-old and sexual intercourse with a 16 or 17-year-old "bear[s] some rational relationship" to the purpose of Virginia Code § 9.1-902—the prevention of repetition of the sexual offense. It follows that requiring MacDonald to register as a sex offender in this case was a violation of his right to equal protection.

68. The disparate treatment of those who orally copulate with someone between the ages of 16 and 17 and those who engage in sexual intercourse with someone 16 or 17 "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The *People of the State of California v. Hofsheir*, 2004 WL 2823286.

GROUND TWO
Insufficient Evidence to Convict

69. At his July 12, 2005 trial, the Clerk of Circuit Court read to MacDonald the charges against him. "That the Grand Jury charges that on or about September 23rd 2004, (MacDonald) did unlawfully being a person 18

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[24] *Eisenstadt v. Baird*, *supra*, 405 U.S. at p. 447.

years of age or older willfully contribute to, encourage, or cause any act, omission or condition *which* ***rendered*** *[A.J.,]* a minor less than 18 years of age, ***delinquent***, *in need of services*, *in need of supervision or abuse or neglected* (emphasis added), in violation of Virginia Code § 18.2-371 of the 1950 Code of Virginia as amended, this being a Class 1 misdemeanor."

70. MacDonald argues that the evidence failed to prove that he caused A.J. to be delinquent as the Grand Jury had charged, and that *Hubbard v. Commonwealth*,[25] from 1967 was not the appropriate controlling case law for the decision of the Virginia Court of Appeals when it affirmed his conviction. MacDonald also states that he was not guilty of Contributing to the Delinquency of a Minor because in the instant case he was convicted based only on the victim's testimony which alters the requirement that the evidence rise to a *mens rea* level. MacDonald relies on *Carmell v. Texas*, 120 S.Ct. 1620, (2000)[26] in challenging a finding of guilt where less evidence was required to obtain a conviction than what is required by the rules of evidence. The issue presented is whether the evidence is sufficient to prove MacDonald

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[25] *Hubbard v. Commonwealth*, 207 Va. 673, 677, 152 S.E.2d 250, 253 (1967).

[26] Case involving 14 sexual charges against children by a defendant. The Court held that an amendment to Texas statute authorizing conviction of certain sexual offenses on victim's testimony alone, was law that altered the legal rules of evidence and required less evidence to obtain conviction; laws that alter legal rules of evidence and require less evidence to obtain conviction are *ex post facto* law; and convictions that rested solely on testimony of victim who was 14 or 15 years of age at time of offense were barred by *ex post facto* clause, abrogating *New York v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197, 535 N.E.2d 250; *Murphy v. Sowders*, 801 F.2d 205; and *Murphy v. Kentucky*, 652 S.W.2d 69.

willfully encouraged conduct that rendered the victim delinquent in violation of Virginia Code § 18.2-371.

71. To have a crime, there needs to be a victim, to have a delinquency, there has be a delinquent. MacDonald asks for Rule 5:18A ends of justice revisiting to this incredible reach of producing criminals from "crystal ball—what if" scenarios. Either it happened or it didn't.

72. A crime requires a *mens rea* element, and to say that "if she had of done it she would have been guilty," does not satisfy even one of the *mens rea* elements. MacDonald asks this court to expressly consider the question whether the due process standard recognized in *Winship*, 397 U.S. 358 (1970) "(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property, constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal claim, it is this abuse that the federal writ of habeas corpus stands ready to correct even if ignored by state appellate review. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the U.S Supreme Court created a new rule of law—one that had never prevailed before. According to the *Jackson* court, the Constitution now prohibits the criminal conviction of any person except upon proof sufficient to convince

a *federal judge* that a "rational Trier of fact could have found the essential elements of a crime beyond a reasonable doubt."

73. Virginia Code § 18.2-371 Causing or Encouraging Acts Rendering Children Delinquent, Abused, etc., provides in pertinent part that:

> Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228, or (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor. This section shall not be construed as repealing, modifying, or in any way affecting §§ 18.2-18, 18.2-19, 18.2-61, 18.2-63, 18.2-66, and 18.2-347.

74. Virginia Code § 16.1-228 defines a "child in need of services" as a "child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child." The statue further provides,

> [however, to find that a child falls within these provisions, (i) the conduct complained of must present a clear substantial danger to the child's life or health or (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.

75. Virginia Code § 16.2-228 also defines a delinquent child as a child who *has committed* a delinquent act . . . (emphasis added).

> Virginia Code § 16.2-228 defines a delinquent act as *inter alia*, an act designated a crime under the laws of the Commonwealth, or an ordinance of any city, county, town or service district or under Federal law . . .

76. The Virginia Court of Appeals in 1999 considered the requirement of a child being in the need of services in *DeAmicis v. Commonwealth*, 29 Va. App. 751, 514 S.E. 2d 788 (1999). In *DeAmicis*, an adult who had undertaken to counsel a troubled teen was convicted of Contributing to the Delinquency of a Minor after taking revealing photographs of the minor. Upon discovering the photographs, the minor's parent ended all contact between the minor and DeAmicis. The minor subsequently returned to school and made remarkable improvement. DeAmicis argued that there was insufficient evidence that his actions caused the child involved to be "in need of services," an element of Code § 18.2-371. The Virginia Court of Appeals decision noted that Virginia Code §18.2-371 explicitly refers to the definition of a "child in need of services" in Virginia Code § 16.1-228. *Id.* At 757. The Virginia Court of Appeals then observed that the definition of a child in need of services" found in Virginia Code § 16.1-228 includes a requirement that Court intervention was essential to resolve the child's difficulty. After finding that DeAmicis had criminally violated his custodial relationship with the child, which had presented a clear and present danger to the child, it went on to observe:

> "However, the Commonwealth's evidence must also establish that judicial intervention was "essential" to relieve the child's plight, a proof belied by the instant record. Fortunately, [the

> parent of the child] uncovered defendant's crime before further harm came to the child and resolved the immediate threat be removing her from defendant's control. Subsequently, *without* the necessity of court intervention, [the child's] situation quickly improved. Thus the evidence established that [the child] was not a child in need of services contemplated by [Virginia] Code § 18.2-371."[27]

77. Thus, an essential element of the offense of Contributing to the Delinquency of a Minor, is that Court services were essential to relieve the child's plight.

78. At MacDonald's trial the Commonwealth presented no evidence that A.J. suffered a clear and present danger to her life or health. There was no evidence that A.J.'s family was in need of treatment, rehabilitation or services not presently being received. Similarly, there was no evidence that the intervention of the court was essential to provide the treatment, rehabilitation or services needed by her or her family. Therefore, Virginia Code § 16.1-288 explicitly prohibits A.J. from being considered a child in need of services.

79. What is really confusing is that despite their decision that MacDonald was indeed guilty of Contributing to the Delinquency of a Minor, in their opinion affirming MacDonald's conviction, The Virginia Court of Appeals wrote:

> "The Commonwealth did not seek to prove, nor did the evidence establish, that MacDonald's solicitation rendered the victim in need of services, in need of supervision, or abused or neglected, as defined in Code § 16.1-228."

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27 *Id.* at 758.

So, then why was MacDonald found guilty of Contributing to the Delinquency of a Minor?

80. Under the *Winship* decision, it is clear that a citizen who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational Trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim.

CONCLUSION

81. MacDonald had standing to ask the trial court in July 2005, and the Virginia Court of Appeals in October 2006 to recognize a simple fact that the Virginia Supreme Court already recognized in January, 2005 in *Martin*: *Lawrence* facially invalidated laws, like the one under which MacDonald was convicted, that criminalize sodomy without requiring proof of additional elements that justify state regulation of sexuality.

82. Instead of immediately amending the Statute "*in keeping with Lawrence*" as was presented to the Lawmakers in House Bill 1054 presented to the 2004 General Assembly, the Bill was tabled and then died, leaving our citizens and law enforcement officials leaning only on the words found in *Lawrence* "the present case does not involve minors, . . ." We can only speculate what the difference would be had the *Lawrence* opinion read, "the present case does not involve *persons over the age of consent*." The Courts are not supposed to have to determine was the laws are, that is the job of the lawmakers. However, ever since *Lawrence v. Texas* was decided by the U.S. Supreme Court in June 2003, the Virginia Courts have had to rely solely on the verbiage in *Lawrence* to assist them in deciding what is the Legislature's post-*Lawrence* intent.

83. MacDonald challenges his conviction under the overbroad sodomy law but does not challenge the specific law criminalizing intercourse with minors. He does, however, challenge that the evidence was not sufficient to convict him for contributing to A.J.'s delinquency especially because she was not even deemed to have been delinquent.

84. It is pure speculation as to whether a future legislative act would prohibit sodomy between an adult and a person between the age of consent (16) and adulthood (18). It is abundantly clear, however, that the Commonwealth cannot assume such a prohibition before it is written into law. Further, it is in violation of the *ex post facto* guarantee of the U.S. Constitution to assume an age requirement on a statute, where none now exists, and then convict the defendant on activity alleged to have occurred prior to the modification of the statute.

85. There was, therefore, a valid statute commanding MacDonald to refrain from oral sex with a minor under sixteen. There was also a valid statute commanding him to refrain from intercourse with persons between the ages of sixteen and seventeen on pain of conviction of a misdemeanor. The Commonwealth cannot now successfully argue that a remnant of the Sodomy statute, applying to oral sex between adults and persons between sixteen and seventeen survives Constitutional scrutiny, as it is in conflict with other statutes. Application of the Virginia Sodomy statute to MacDonald is therefore a violation of the *ex post facto* prohibition contained in the U.S. Constitution.

86. The Supreme Court of Virginia's Dismissal Opinion refusing to address these claims stating their position that these non-jurisdictional claims are barred because they were already raised on Direct Appeal cites only a Virginia case. While the Commonwealth of Virginia is

sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are the supreme law of the land and when they conflict with the laws of the Commonwealth of Virginia, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved in this Petition have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

87. It is for all of these reasons that I respectfully ask that this Writ be granted and all powers vested in the same. I pray for every possible relief available to me.

/s/

William Scott MacDonald, *pro se*
463 Carolina Way
Sanford, NC 27332

Schedule of Enclosures:

TAB A	Copies of 3 Warrants for Arrest
TAB B	Request to Withdraw Guilty Plea/Cancel Plea Agreement
TAB C	Brief in Support of Motion to Dismiss
TAB D	Trial Transcripts from July 12, 2005
TAB E	Trial Transcripts from July 26, 2005
TAB F	Transcripts from Sentencing Hearing on August 2, 2005
TAB 0	Petition for (Direct) Appeal filed in the Court of Appeals of Virginia
TAB H	Virginia Supreme Court Direct Appeal Case Information
TAB I	Unpublished Opinion of the Court of Appeals of Virginia affirming convictions
TAB J	Brief in Support of a Petition for Rehearing, filed in the Virginia Supreme Court, September 13, 2007
TAB K	Virginia Supreme Court (Direct Appeal) Case Information Sheet
TAB L	Petition for Writ of Habeas Corpus filed in Virginia Supreme Court, and Memorandum in Support of same, filed February 4, 2008
TAB M	Respondent's Motion to Dismiss filed March 21, 2008
TAB N	Petitioner's Motion for Leave (to file Traverse)
TAB O	Supreme Court of Virginia's denial of Motion for Leave to File a Response to Respondent's Motion to Dismiss, dated April Il, 2008

TAB P Petitioner's Traverse filed before receipt of Denial of Motion for Leave to File Response

TAB Q Letter from Clerk of Supreme Court to Respondent, dated April 28, 2008

TAB R Respondent's Supplemental Motion to Dismiss, filed May 2008

TAB S Virginia Supreme Court's Opinion Dismissing the Petition and Granting the Respondent's Motion to Dismiss

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STATE OF NORTH CAROLINA

CITY/COUNTY OF CUMBERLAND

The petitioner being first duly sworn, says he signed the foregoing petition, and that the facts stated in the petition are true to the best of his knowledge and belief.

/s/
Signature of Petitioner

Subscribed and sworn to before me

this 8th day of September, 2009

/s/
Notary Public

My commission expires: October 30, 2013

K NICOLE VICK
CUMBERLAND COUNTY, NC
NOTARY PUBLIC
My Comm.Expires
October 30, 2013

**PETITION UNDER 28 U.S.C. § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

Filed Sep. 16, 2009

William Scott MacDonald
Hamett County Probation
and Parole
708 S. Main Street
Lillington, North Carolina 27546

Petitioner

v.

The Attorney General
of the State
of Virginia

Keith Holder
Probation Officer
Harnett County, NC

Respondents

Case No.
1:09CV1047
GBL/TRJ

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Circuit Court, Colonial Heights, Virginia

(b) Criminal docket or case number (if you know):
(1) 570JA-CH2051087 - (Soliciting a Minor to Commit a Felony)
(2) 570JA-CH2051088 - (Contributing to the Delinquency of a Minor)

2. (a) Date of judgment of conviction (if you know): August 2, 2005
   (b) Date of Sentencing: August, 2 2005

3. Length of sentence:
   1.(b)(1) 10 years in prison with 9 years suspended, Sex Offender Registration
   1.(b)(2) 12 months in jail with 6 months suspended, court costs, fines and fees.

4. In this case, were you convicted on more than one count or more than one crime?
   Yes ■ No ❑

5. Identify all crimes of which you were convicted and sentenced in this case:
   Soliciting a Minor to Commit a Felony, and Contributing to the Delinquency of a Minor

6. (a) What was your plea? (Check one)
   (1) Not guilty ■ (3) Nolo contendere (no contest) ❑
   (2) Guilty ❑ (4) Insanity Plea ❑
   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what you plead not guilty to? Not applicable
   (c) If you went to trial, what kind of trial did you have? (Check one)
   Jury ❑ Judge only ■

7. Did you testify at a pre-trial hearing, trial, or a post-trial hearing?
   Yes ❑ No ■

8. Did you appeal from the judgment of conviction?
   Yes ■ No ❑

9. If you did appeal, answer the following:
   (a) Name of Court: Virginia Court of Appeals
   (b) Docket or case number (if you know): 1939052
   (c) Result: Affirmed
   (d) Date of result (if you know): January 9, 2007
   (e) Citation to the case (if you know): unpublished (See Enclosure at TAB 1)
   (f) Grounds raised: Sufficiency of the Evidence and Unconstitutionality of VA Code 18.2-361
   (g) Did you seek further review by a higher state court? Yes ■ No ❑
   If yes, answer the following:
      (1) Name of Court: Virginia Supreme Court
      (2) Docket or case number (if you know): 070124
      (3) Result: Refused
      (4) Date of result (if you know): September 7, 2007, and November 9, 2007
      (5) Citation to the case (if you know): Not applicable
      (6) Grounds raised: Sufficiency of the Evidence and Unconstitutionality of VA Code 18.2-361
   (h) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ■
   If yes, answer the following:
      (1) Docket or case number (if you know): Not applicable
      (2) Result: Not applicable
      (3) Date of result (if you know): Not applicable
      (4) Citation to the case (if you know): Not applicable

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?
    Yes ■ No ❑
11. If your answer to Question 10 was "Yes," give the following information:
    (a) (1) Name of court: Supreme Court of Virginia
    (2) Docket or case number (if you know): 080260
    (3) Date of filing (if you know): February 4, 2008
    (4) Nature of proceeding: Petition for Writ of Habeas Corpus
    (5) Grounds raised:
    a. Ineffective Assistance of Counsel for:
    (Note: none of (5)a.1-5 are being forwarded)
    1. Coerced Guilty Plea, Failure to Withdraw Guilty Plea, Failure to Object to Inadequate Plea Colloquy May 12, 2005 J&DR Court, Colonial Heights, VA
    2. a. Promoting the Appearance of Judicial Impropriety and Misconduct, May 12, 2005, J&DR Court, Colonial Heights, VA
       b. Failing to Object to Judicial Misconduct of Direct Cross-Examination from the Bench, July 12, 2005, Circuit Court, Colonial Heights, VA
    3. Failing to Object to Unconstitutional Statute on the Grounds that it violates the 1st Amendment of the U.S. Constitution

4. Failing to object to Double Jeopardy in the combining of the charges, unfair sentencing both causing Double Jeopardy against the 5th Amendment, as well as failing to object to the Sentencing Court's denial of Equal Protection of the Law resulting in cruel and unusual punishment against the 8th Amendment of the U.S. Constitution

b. MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S. Constitution because Virginia's Sodomy Statute is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law.

c. Insufficient Evidence to Convict

(6) Did you receive a hearing where evidence was given to your petition, application, or motion? Yes ❑ No ■

(7) Result: Petition Dismissed

(8) Date of result (if you know): October 21, 2008

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Not applicable

(2) Docket or case number (if known): Not applicable

(3) Date of filing (if known): Not applicable

(4) Nature of the Proceeding: Not applicable

(5) Grounds Raised: Not applicable

(6) Did you receive a hearing where evidence was given to your petition, application, or motion? Yes ❑ No ❑ N/A ■

(7) Result: Not applicable

(8) Date of result (if you know):
Not applicable

(c) If you filed any third petition, application, or motion give the same information:
(1) Name of court: Not applicable
(2) Docket or case number (if known): Not applicable
(3) Date of filing (if known): Not applicable
(4) Nature of the Proceeding: Not applicable
(5) Grounds Raised: Not applicable
(6) Did you receive a hearing where evidence was given to your petition, application, or motion? Yes ❑ No ❑ N/A ■
(7) Result: Not applicable
(8) Date of result (if you know): Not applicable

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?
(1) First petition: Yes ■ No ❑
(2) Second Petition: Yes ❑ No ❑ N/A ■
(3) Third Petition: Yes ❑ No ❑ N/A ■

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:
Not applicable

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts and law supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies each ground on which you request action by the federal court. Also if you fail to set forth all the arounds in this petition, you may be

barred from presenting additional grounds at a later date.

GROUND ONE:

(a) Supporting facts and law (State the specific facts and law that support your claim.):
(5.b. above) MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S. Constitution because Virginia's Sodomy Statute is Facially Unconstitutional and also because it carries punishments that are in direct conflict with Equal Protection of the Law.
Specific facts and law that support this claim are included in enclosed Memorandum in Support of Petition for Writ of Habeas Corpus

(b) If you did not exhaust your state remedies on Ground One, explain why: Not Applicable

(c) **Direct Appeal of Ground One:**
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes ■ No ❑
(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**
(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ■ No ❑
(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: Petition for Writ of Habeas Corpus
Name and location of the court where the motion or petition was filed: Supreme Court of Virginia

Docket of case number (if you know): 080260

Date of the court's decision: October 21, 2008

Result (attach a copy of the court's opinion or order, if available): (See Enclosure at TAB S)

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ■

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ■

(5) If your answer to Question (d)(4) is "Yes," did you raise the issue in the appeal?

Yes ❑ No ■

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of court where the appeal was filed: Not Applicable

Docket of case number (if you know): Not Applicable

Date of court's decision: Not Applicable

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Not able to locate an attorney willing to take the case to the US Supreme Court for us pro bono.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: None

GROUND TWO:

(a) Supporting facts and law (State the specific facts and law that support your claim.):

(5.c. above) Insufficient Evidence to Convict

Specific facts and law that support this claim are included in enclosed Memorandum in Support of Petition for Writ of Habeas Corpus

(b) If you did not exhaust your state remedies on Ground Two, explain why: Not Applicable

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes ■ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ■ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Writ of Habeas Corpus

Name and location of the court where the motion or petition was filed: Virginia Supreme Court

Docket of case number (if you know): 080260

Date of the court's decision: October 21, 2006

Result (attach a copy of the court's opinion or order, if available): (See Enclosure at TAB S)

(3) Did you receive a hearing on your motion or petition?
Yes ❑ No ■

(4) Did you appeal from the denial of your motion or petition?
Yes ❑ No ■

(5) If your answer to Question (d)(4) is "Yes," did you raise the issue in the appeal?
Yes ❑ No ■

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of court where the appeal was filed: Not Applicable
Docket of case number (if you know): Not Applicable
Date of court's decision: Not Applicable
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Not able to locate an attorney willing to take the case to the US Supreme Court for us pro bono.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: None

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ■ No ❑

If your answer is "No," state which ground have not been presented and give your reasons(s) for not presenting them: Not Applicable

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which grounds have not been presented, and state your reasons for not presenting them: Not Applicable

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ■

15. Do you have any petition or appeal now pending, (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ■

If yes, state the name and location of the court, the docket or case number, the type of proceeding, and the issue raised. Not Applicable

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:
    (a) At preliminary hearing: none
    (b) At arraignment and plea: none
    (c) At trial: Terry Driskill, P.O. Box 597, Prince George, VA 23875
    (d) At sentencing: Terry Driskill, P.O. Box 597, Prince George, VA 23875
    (e) On appeal: Terry Driskill, P.O. Box 597, Prince George, VA 23875
    (f) In any post-conviction proceeding: Terry Driskill, P.O. Box 597, Prince George, VA 23875

(g) On any appeal from any ruling against you in a post-conviction proceeding: Terry Driskill, P.O. Box 597, Prince George, VA 23875

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ■ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: Circuit Court, Prince George, Virginia

(b) Give the date the other sentence was imposed: May 5, 2005

(c) Give the length of the other sentence: 15-1/2 years remaining on 17 years suspended sentence, mandatory sex offender registration, and supervised probation

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* Not applicable—(the expiration date for seeking direct review in the United States Supreme Court was February 8, 2009, but Petitioner's family

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*The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

was unable to find an attorney who could or would agree to petition for certiorari in the U.S. Supreme Court pro bono and otherwise had no money to do so the expiration date for filling a Petition for Writ of Habeas Corpus at State level was also February 8, 2009. Petitioner's *pro se* Petition for Writ of Habeas Corpus was timely filed on February 4, 2008 in the Virginia Supreme Court and was dismissed on October 21, 2008. This Petition is being filed within the one-year statute of limitations restriction of the AEDPA.

Therefore, petitioner asks that the Court grant the following relief: evidentiary hearing, release From probation/parole, release from Sex Offender Registry, expungement of the record and/or any other relief to which petitioner may be entitled.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under the subsection.

I declare under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the U.S. Postal Service on September 8, 2009.

Executed on September 8, 2009

/s/
William Scott MacDonald

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. Not applicable

VIRGINIA:

In The Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 21st day of October, 2008

William Scott MacDonald, No. 348987, *Petitioner*, against Director of the Department of Corrections, *Respondent*.	Record No. 080260

Upon a petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed February 4, 2008, and the respondent's motion to dismiss, the Court is of the opinion that the motion should be granted and the writ should not issue.

Petitioner was convicted in the Circuit Court of the City of Colonial Heights of solicitation to commit a felony and was sentenced to ten years' imprisonment with nine years suspended, and of contributing to the delinquency of a minor and was sentenced to twelve months in jail. The Court of Appeals of Virginia affirmed petitioner's convictions by unpublished opinion, and his subsequent appeal to this Court was refused. Petitioner now challenges the legality of his confinement pursuant to these convictions.

In claim (a), petitioner alleges he was denied the effective assistance of counsel because counsel failed to

object to judicial misconduct that he contends occurred when the trial judge asked petitioner questions during petitioner's testimony. Petitioner argues that, by asking him questions, the trial judge took on the role of a prosecutor.

The Court holds that claim (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The record, including the trial transcript and the affidavit of counsel, demonstrates that the questions appeared to generally elicit information helpful to the defense. Petitioner fails to articulate how the judge's questions were improper or necessitated an objection by counsel. "A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both." *Eckhart v. Commonwealth*, 222 Va. 213, 216, 279 S.E.2d 155, 157 (1981). Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (b), petitioner alleges he was denied the effective assistance of counsel because counsel failed to challenge Code § 18.2-361 as violating the First Amendment.

The Court holds that claim (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to articulate a legal basis for his contention that Code § 18.2-361 violates the First Amendment. The record, including the trial transcript, the affidavit of counsel, and the Court of Appeals' unpublished opinion, demonstrates

that counsel challenged the constitutionality of the statute pursuant to *Lawrence v. Texas*, 539 U.S. 558 (2003). Counsel weighed and researched the possibility of raising a First Amendment challenge and rejected that course of action as having very little likelihood of success. Instead, counsel made a tactical decision to focus on the strongest constitutional argument available. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (c), petitioner alleges he was denied the effective assistance of counsel because counsel failed to argue that petitioner's double jeopardy rights were violated when he was charged with contributing to the delinquency of a minor and solicitation to commit a felony. Petitioner contends also that counsel should have argued that petitioner's sentence was unfair.

The Court holds that claim (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the affidavit of counsel, demonstrates that counsel concluded that raising a double jeopardy challenge would have been futile, as the two offenses did not violate the *Blockburger* test. "In determining whether a defendant who has been convicted of two offenses may receive multiple punishments, the test to be applied is 'whether each [offense] requires proof of a fact which the other does not.'" *West v. Director, Dept. of Corrections*, 273 Va. 56, 63, 639 S.E.2d 190, 195 (2007) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Moreover, petitioner has failed to articulate a valid legal basis upon which counsel could have argued that petitioner's sentence was unfair, as petitioner was sentenced within the range set by the legislature. Counsel

is not required to raise futile arguments or objections. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (d), petitioner alleges that his convictions amounted to an *ex post facto* violation.

The Court holds that claim (d) is barred because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), *cert. denied*, 419 U.S. 1108 (1975).

In claim (e), petitioner alleges that the evidence was insufficient to support petitioner's convictions.

The Court holds that claim (e) is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction, and therefore, it cannot be raised in a habeas corpus petition. *Henry v. Warden*, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003).

Petitioner's motion for the appointment of counsel is denied.

Accordingly, the petition is dismissed, the rule is discharged and the respondent shall recover from the petitioner the costs expended in his defense herein.

Respondent's costs:

Attorney's fee $50.00

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk

IN THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

William Scott Macdonald, *Pro Se*
Inmate #348987

v.

Gene Johnson, Director,
Virginia Department
of Corrections

Case No.: 080260

PETITION FOR WRIT OF HABEAS CORPUS

Place of detention: Brunswick Correction Center, Lawrenceville, VA 23868

Petitioner (hereinafter referred to as MacDonald) is serving an active incarceration through March 19, 2008,[1] which will be followed by 7 more years of suspended sentence on the instant case, 20 years probation and mandatory sex offender registration. Provided this case is not settled prior to March 18, 2008, the relief available to MacDonald is not negated, nor does this case become "moot." Relying on *Carafas v. LaVallee*, 391 U.S. 234 (1968) MacDonald claims that the habeas statue does not limit the relief that may be granted solely to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted.

[1] Part of MacDonald's incarceration stems from a companion case in the neighboring County of Prince George under very similar circumstances with the same "victim" as in this case. Question C. 13(a)-(d) pertain to that case whose Federal Habeas will be following on the heels of this state habeas. MacDonald received a 21 year prison sentence with 17 years suspended, followed by 10 years on probation and Sex Offender Registration.

It provides that "[t]he court shall . . . dispose of the matter as law and justice require." 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statue seem specifically to contemplate the possibility of relief other than immediate release from physical custody.

MacDonald will continue to suffer serious disabilities and hindrances because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying petitioner his ultimate day in court. In consequence of his conviction, he cannot engage in certain businesses; he cannot make his residence in certain areas; he cannot vote; he cannot serve as a juror, and the opportunities for employment are quite narrow with the labels of "felon" and "sex offender."

Because of these "disabilities" or burdens which flow from MacDonald's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed upon him." *Fiswick v. United States*, 329 U. S. 211, 222 (1946). On account of these "collateral consequences," this habeas case will not be moot upon MacDonald's release from the State Prison system.

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:

a. Juvenile and Domestic Relations Court, Colonial Heights, Virginia

b. Circuit Court, Colonial Heights, Virginia

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

a. Filing a False Police Report (1.a above 570JA-CH20510189

b. Contributing to the Delinquency of a Minor (1.b. above) 570JA-CH20510188

c. Soliciting a Minor to Commit a Felony (1.c. above) 570JA-CH20510187

3. The date upon which sentence was imposed and the terms of the sentence:

a. (1.a. above) May 12, 2005. 12 months in jail with 6 months suspended, court costs, fines and fees

b. (1.b. above) August 2, 2005. 12 months in jail, court costs, fees and fines

c. (1.b. above) August 2, 2005. 10 years in prison with 9 years suspended, Sex Offender Registration, and court costs, fees and fines

4. Check which plea you made and whether trial by jury:

a. May 12, 2005 (1.a. above) __✓__ Plea of guilty, Trial by judge without a jury

b. July 12, 2005 (1.b. above) __✓__ Plea of not guilty, Trial by judge without a jury

5. The name and address of each attorney, if any, who represented you at your criminal trial: Terry Driskill, 6345 Courthouse Rd., Prince George, VA 23875

6. Did you appeal the conviction?

For 2.a. above: No. attorney stated it could not be done

For 2.b. above: Yes

For 2.c. above: Yes

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:

a. Affirmed by the Virginia Court of Appeals, January 9, 2007

b. Refused by the Virginia Supreme Court, September 7, 2007 and November 9, 2007

Citations of the appellate court opinions or orders:

a. (7.a. above) MacDonald v. Commonwealth – unpublished (COA Case No.: 1939052)

b. (7.b. above) MacDonald v. Commonwealth (SC Case No.: 070124)

8. List the name and address of each attorney, if any, who represented you on your appeal: Terry Driskill, 6345 Courthouse Rd., Prince George, VA 23875

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court? No

10. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed: Not Applicable

11. Did you appeal from the disposition of your petition for habeas corpus? Not Applicable

12. If you answered "yes" to 11, state: the result and the date of each petition: Not Applicable

Citations of court opinions or orders on your habeas corpus petition: Not Applicable

The name and address of each attorney, if any, who represented you on appeal of your habeas corpus: Not Applicable

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name, and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.

(NOTE FROM PETITIONER—If #13's instructions are intended to solicit information regarding any other Petitions, Motions, or Applications only as they apply to the present Habeas, then please disregard. However, if the above instructions mean that even unrelated cases are to be listed, then we are listing 13.a-d below for that reason.

a. Notice of Appeal, May 10, 2005, Prince George Circuit Court, Prince George, Virginia
attorney: Terry Driskill, Affirmed by Virginia Court of Appeals, June 13, 2006, Affirmed by Virginia Supreme Court, June 8, 2007

b. Motion for Appeal Bond, Prince George Circuit Court, motion denied, July 7, 2005
attorney: Terry Driskill

c. Petition for Writ of Habeas Corpus, Prince George Circuit Court, Prince George, Virginia, filed September 14, 2005, relief denied, March 16, 2006

d. Petition for Appeal for Habeas Corpus, Case No.: 060854 filed in Supreme Court of Virginia, May 2, 2006, refused, August 15, 2006

D. Present Petition

14. State the grounds which make your detention unlawful:

Page:

including the facts upon which you intend to rely:

a. Ineffective Assistance of Counsel / Coerced Guilty Plea / Failure to Withdraw Plea / Failure to Object to Inadequate Plea Colloquy, May 12, 2005, J&DR Court, Colonial Heights, Virginia.

(1) On January 25, 2005 in the City of Colonial Heights, Virginia, MacDonald was charged with one (1) Class 5 Felony count of Soliciting a Minor to Commit a Felony (VA Code § 18.2-29), the underlying felony being Oral Sex (VA Code §18.2-361), one (1) misdemeanor count of Filing a False Police Report (VA Code § 182-461), and one (1) count of Contributing to the Delinquency of a Minor (VA Code § 18.2-371). MacDonald was arraigned, and MacDonald's wife advised the Court that the services of MacDonald's previously hired attorney, Mr. Sheldon had been terminated and that she was unable to afford an attorney. The J&DR Court appointed Terry Driskill to represent MacDonald.

(2) The proper sketch orders were drafted and filed in the Clerk's Office and Mr. Sheldon turned over his complete file to Mr. Driskill. (Tab 1) Mr. Sheldon's file

included the results from a mental evaluation Mr. Sheldon had requested. MacDonald had been tested and evaluated in February 2005 by Dr. James Correll, a licensed clinical psychologist who reported that MacDonald's "current level of intellectual functioning was in the very lower limits of the Low Average range." Of particular concern to Dr. Correll were "problems with reasoning and conceptualizing." The testing also indicated "difficulties with listening and mental concentration," and Dr. Correll noted that "(MacDonald) seems more likely to make inappropriate or bad decisions in different kinds of social situations." Lastly, but not all inclusive of the report, Dr. Correll found that "For a multitude of reasons, this man does not really have very good insight and certainly his judgment about how to make decisions in difficult circumstances is certainly questionable." (Full Report at Exhibit A) (Tab 2)

(3) On the morning of May 12, 2005, MacDonald spoke at length by telephone, from Riverside Regional Jail, with his wife who states that at no time was it indicated during their conversation that MacDonald would be pleading guilty, but that MacDonald specifically stated that he felt confident and was ready to testify. MacDonald stated that it was only just before his scheduled trial that Mr. Driskill came to the holding cell area and told him that the Judge had said that if he did not plead guilty, sentencing would be much worse. Mr. Driskill told MacDonald that no one was going to believe him anymore than they did in Prince George.

(4) MacDonald's wife states that she arrived at the Courthouse approximately 25 minutes before trial and went into the ladies room, upon exiting, she rounded a corner near the restroom inside the hallway of the Courthouse and heard Mr. Driskill's voice talking about "*MacDonald's paperwork . . . would be faxing.*", as

she came up behind Mr. Driskill, who she noted was talking to the Prosecutor, and now within clear earshot of MacDonald's wife, Mr. Driskill jokingly said, *"You can't tell me a man won't have sex if he has a chance."* MacDonald's wife tapped him on the shoulder and said, *"I'm here."* Mr. Driskill then had at least 20 minutes to advise MacDonald's wife that MacDonald was pleading guilty. Mr. Driskill asked if the MacDonalds' friend, Reverend Bruce Bevans was coming to support her, and seemed anxious when he didn't show up. It was only after the Deputy led everyone into the courtroom that then, and only then, Mr. Driskill asked MacDonald's wife to step back out into the hallway where he advised MacDonald's wife of the Plea. MacDonald's wife had only enough time to ask, *"Is this an Alford Plead?"* to which Mr. Driskill stated, *"No, we don't know what he's thinking."* It was too late for her to speak at length about the last minute change and the Deputy was asking everyone to come inside and be seated. MacDonald's wife wrote a note and walked it over to Mr. Driskill and asked him to please give it to MacDonald. The note implored MacDonald to please take more time in this decision as it also affected their family. MacDonald was never handed the note by Mr. Driskill. And because MacDonald had been instructed not to make any eye contact with anyone in the courtroom except the court officials he was unable to see the horror on his wife's face and she was unable to get his attention.

(5) Therefore, as part of a Plea Agreement, MacDonald entered a plea of Guilty to one (1) Misdemeanor count of Making a False Report, in exchange for the *Nolle Prosequi*[i] of the one (1) misdemeanor count of Contributing to the Delinquency of a Minor. The Plea Agreement required MacDonald to plead guilty to the Class 5 felony count of Solicitation and allowed MacDonald leave to appeal his

conviction solely on the issue of the constitutionality of Virginia Code § 18.2-361, the underlying offense alleged to have been solicited.

(6) May 16, 2005 a Plea Agreement was prepared by the Commonwealth Attorney, and the case was further docketed in Circuit Court for June 14, 2005 to hear the Plea Agreement. However, MacDonald made his intent to refuse to sign the agreement known to Mr. Driskill.

(7) On May 19, 2005 MacDonald sent the following message to Mr. Driskill:

(See Exhibit B)

Dear Terry,

The morning of May 12th, I entered that Court building determined to tell the truth the whole truth and nothing but the truth. After I met with you, I was very scared. You convinced me that no one would believe me there in Colonial Heights any more than they did in Prince George.

When I went in the courtroom that day and I lied and told Judge Bryce that I was guilty and then she believed I was, I got a pit in my stomach that hasn't gone away I can still hear her saying she couldn't believe that I would waste the tax payer's money by filing a false police report." I have been sick to my stomach ever since and it is because I lied to her.

Terry, for some reason I always try to please everybody else—even you—over what I know in my gut is right. I never want to disappoint anybody—I always try to please everybody—that's why I was an easy mark for what happened to me, she said she needed to talk to me and I didn't want to let her down. So, I am very sorry

that I pled guilty on the 12th of May because that was not the truth. I let myself get talked into going against what I know is right because I don't understand all the legal talk and words. All I DO know is that my conscious is killing me—worse than jail is right now.

I cannot plead guilty on the 14th, because I am not guilty. Not because the sodomy law is unconstitutional, but because plain and simple—I told Detective Early the truth. I came to the Colonial Heights Police Department to get off my chest something that had been done to my marriage and me. My wife and I both had complete trust in the system when we came there to file what they said was only an Information Report.

I believe that you have only my best interest at heart and that you only want me to plead guilty so that maybe I can be home with my family one day soon, and I really do respect you for that. But my family and my faith come first before what anybody else tries to force me to do. I am going to tell the truth and if telling the truth there doesn't' set me free, then at least I will be able to sleep again, and my family says they will be proud of me for having the courage and integrity to face this court knowing when I leave that day that I have told the whole truth. I want to appeal the False Report to Circuit Court and withdraw my guilty plea because of not really wanting to plead guilty back then but agreeing with my lawyer that at that time it was my best interest at your heart. I want a possibility to have that charge brought back up and hope it will get dismissed or me be not guilty because if not my

conscious is still not clear. Please push for me on that ok? That's my final decision. Sincerely, Mac

(8) In response to the above communication from MacDonald, Mr. Driskill notified the Commonwealth Attorney of MacDonald's decision to withdraw the Guilty Plea and the case was re-docketed for July 12, 2005. (Tab 4) However, Mr. Driskill responded by email on June 9, 2005 that *"The original charge of false report, already tried, cannot be tried again. They can, however, bring back the Contributing Charge. It was Nolle Prossed and can be brought back at any time."* (See Tab 3) MacDonald argues that the law did not bar him from a right to appeal his previous conviction and that he had notified Mr. Driskill in plenty of time to do so. MacDonald could have also received assistance in filing a Motion to Rehear, but Mr. Driskill did not do so.

(9) Code § 19.2-296 provides that "[a] motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea." Under the express terms of the statute, when the motion is made after entry of a final order imposing sentence or deferring the imposition of sentence, a defendant will be allowed to withdraw a guilty plea only while the case remains under the trial court's jurisdiction for twenty-one days and only "to correct [a] manifest injustice. *Justus v. Commonwealth*[2] citing *Parris v. Commonwealth* noted:

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[2] FROM THE COURT OF APPEALS OF VIRGINIA, June 8, 2007, In this appeal, we review a judgment of the Court of Appeals of Virginia upholding the denial by a circuit court of a criminal defendant's motion to withdraw her guilty pleas to various charges filed pursuant to Code § 19.2-296.

> "The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisably, if any reasonable ground is offered for going to the jury." Id. at 325, 52 S.E.2d at 874 (quoting 14 Am. Jur., Criminal Law, sec. 287, 961 (1938)). Thus, "'the accused should be permitted to withdraw a plea of guilty entered [i]nadvisedly when application thereof is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty.'" *Id.* at 32526, 52 S.E.2d at 874 (quoting Abbott, Criminal Trial Practice 212 (4th ed. 1939)).

(10) MacDonald states that his point in this habeas is not that he now wants to use this habeas to "undo his guilty plea." To the contrary, he states that had Mr. Driskill's initial handling of the case in Juvenile and Domestic Relations (J&DR) Court in Colonial Heights on May 12, 2005 been different no rational Trier of the facts could have found MacDonald guilty beyond a reasonable doubt, and his felony charge would not have been certified to the Grand Jury. MacDonald's claim is that Mr. Driskill's ineffective assistance costs him the ability to withdraw his plea.

(11) Mr. Driskill used his influence as MacDonald's court-appointed attorney—the last attorney to whom MacDonald would have access—to convince him to plead guilty at the last minute. As a retired enlisted

soldier, MacDonald had great respect for Mr. Driskill, a retired Army officer. MacDonald's trust in Mr. Driskill as a fellow infantryman, and his respect for him as an Army officer swayed him to an unnecessary compromise, instead of requiring the Court to hear both sides and make the decision.

(12) Of even greater concern is that Mr. Driskill also ignored the fact that in March 2005, just one (1) month after the testing by Dr. Correll was done, the Veterans Administration determined that MacDonald indeed suffers from Acute Stress Disorder and Post Traumatic Stress Disorder (ASD/PTSD) generally from his tours of duty in the U.S. Marine Corps, and the U.S. Army, and more specifically from his tour of duty in the war in Bosnia. (See complete report at Exhibit C) (Tab 5) MacDonald was not able to make an intelligent decision to plead guilty without the assistance and guidance of professionals trained in this area, and MacDonald's plea of guilty was not made voluntarily and intelligently.

(13) It was at MacDonald's sentencing hearing on August 2, 2005 that these mental health issues became of particular concern to Mr. Driskill but only as mitigating evidence (Tr. August 2, 2005 Page 28) (Tab 8) Mr. Driskill specifically surmised to the Sentencing Court:

> *"(MacDonald) is a man that like a lot of us who have been in the same situation that he's overseas, he has some demons and they come back to haunt at odd times . . . if you would take into account the sort of things people bring home with them; not so much the Gulf War, but in Bosnia."* Mr. Driskill continued on to say, *"Those things stay with a person forever. They are not something we can shake. It's one of those things where I can be laughing and talking in the middle of the day and the middle of the night*

and some of those things that his wife testified to, I know can come back."

(14) MacDonald states that he and his wife went to the Police Department together to file the report that MacDonald had been abducted by vehicle and physically assaulted, and testified to the events that led them to file the report with the Colonial Heights Police Department. But because Mr. Driskill had previously coerced MacDonald into pleading guilty to something he did not do, when Mr. Driskill knew MacDonald was suffering horrible symptoms of depression including sleep deprivation, was completely incapable of making major decisions under extreme pressure, Mr. Driskill impeached his own client. There can be no possible sound trial strategy for doing so.

(15) The Commonwealth Attorney ensured that the July 12, 2005 Circuit Court knew of the previous plea of guilty in J&DR Court (Tr. July 12, 2005 Page 56) (Tab 6) and despite the fact that it had been a part of a cancelled plea agreement, used it against MacDonald, therefore, none of MacDonald's testimony in court on July 12, 2005 carried any credibility. The Commonwealth Attorney asked: *"When you talked with [Detective Early], didn't you say this is the truth and all these things really happened?" "Do you remember being in court, May 12th I believe, in Juvenile and Domestic Relations Court?" "You remember that you pled guilty to filing a false police report?"* MacDonald states that he still didn't understand what the question was when he was asked: *"And you acknowledge that, in fact, you filed a false police report and the evidence that Detective Early recited to the Court that that was true?"* MacDonald states he thought he was being asked if the evidence Detective Early recited to the Court was true, when he responded, *"Correct, Sir."*

(16) Mr. Driskill was not professionally trained in the field of psychology to solely assist MacDonald who was clinically diagnosed as being impaired by the effects of depression and untreated PTSD in making a snap decision. Mr. Driskill did however, have professional resources immediately available to him for assistance in such an important action but he chose not to avail himself to them. However, Dr. Correll and MacDonald's personal friend, Reverend Bruce S. Bevans have both indicated that they would not have advised MacDonald to plead guilty in the first place. *Strickland's* prejudice prong requires only that counsel's errors ". . . deprive the defendant of a substantive or procedural right to which the law entitles him."[3]

(17) At second issue is the absence of a protective Plea Colloquy in the J&DR May 12, 2005 trial. VSCR 3A:f-6 provides a thorough list of suggested questions in order that the court can be certain of the defendant's ability to make an informed and voluntary decision and had the specific question below been asked by the Court before accepting the guilty plea, MacDonald states that Mr. Driskill's coercion would have been revealed. MacDonald states that if he had been specifically asked: *"Are you entering the plea of guilty because you are, in fact, guilty of the crime charged?"* He would have answered *"no."*

(18) This issue is similar to the case of *Nara v. Frank*, 488 F.3d 187 (3rd Cir. 2007) where in *Nara*, the State had appealed the District Court's granting of Nara's Habeas, the Circuit Court of Appeals found that Nara's pleas were accepted in violation of due process due to incompetence, and affirmed the granting of the Writ.[4]

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[3] *Glover*, 531 U.S. at 203 (citing *Williams*; internal cites omitted).

[4] District court did not commit plain error by concluding that prisoner's pleas were accepted in violation of due process due to

(19) An informed decision to plead guilty must assess the likelihood of a conviction at trial; therefore, investigation by counsel is required to determine the strength of the prosecutor's case. Witnesses must be interviewed, possible defenses explored, and viability of motions to suppress assessed.[5] Counsel who has failed to investigate the facts and law surrounding the charges against his client may also have failed in his obligation to properly communicate with his client. The Model Code of Professional Conduct's Disciplinary Rule entitled "Failing to Act Competently"[6] mandates that a lawyer not "[h]andle a legal matter without preparation adequate in the circumstances"[7] nor "[n]eglect a legal matter entrusted to him.[8]

(20) Not only, of course, should a judge *never* pressure an attorney to get his client to plead guilty when the lawyer has not done what is required for competent

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incompetence; although prisoner indicated that he understood what was transpiring during plea colloquy, prisoner had been recently hospitalized and medicated at state mental health institutions, and examining physician testified that prisoner was psychotic and out of touch with reality during relevant time period.

[5] *See Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983) (stating that counsel must have become knowledgeable about the facts and relevant law in order to appropriately advise the defendant of the available options).

[6] Model Code of Prof'l Responsibility DR 6-101 (1980).

[7] *Id.* DR 6-l0l(A)(2).

[8] *Id.* DR 6-10l(A)(3). Most of the Formal and Informal Opinions of thc ABA Commission on Professional Ethics which interpret the Code as to issues of competence, focus on neglect. *See* ABA Comm. on Prof'l Ethics, Lafomud op. 1442 (1979). Neglect is explained in ABA Comm. On Ethics and Prorl Responsibility, Informal Op. 1273 (1973): "Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client . . . ."

representation, but the judge should not even *permit* an attorney who is an officer in his court to violate professional standards. And that means that, at times, the judge should simply refuse to entertain the plea deal which is presented to her. Professional standards clearly indicate that any decision to plead guilty and not risk trial is one that the defendant, and not counsel, must make.[9] It is mandatory that the defendant's attorney, therefore, devote time with the defendant communicating what counsel's investigation has revealed regarding the strength of the prosecutor's case and the applicable issues of law, and advising his client of the possible results of the various options open to him.[10]

In this case, if MacDonald had proceeded to trial, pleading not guilty as originally planned, and been found guilty, the strongest sentence MacDonald could have received in J&DR Court would have been for two misdemeanors (Filing a False Police Report, and Contributing to the Delinquency of a Minor). MacDonald was not even advised that the felony would not be heard in J&DR Court, but was told that if he didn't plead guilty to the felony, the judge would make sentencing harsher. Court appointed counsel should be expected to protect his client just as fervently as privately retained counsel. MacDonald states that the plea agreement was premature because had MacDonald's trial in J&DR Court not gone in his favor, then a subsequent offer of a plea

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[9] *See id.* R. 1.2(a) (mandating that "In a criminal case, the lawyer shall abide by the client's decision . . . as to a plea to be entered. . . ."). *See also* Model Code of Prof'l Responsibility EC 7-7(1980).

[10] Model Rules of Prof'l Conduct R. 1.2(a) (1983) (explaining that the decision of the client to enter a plea of guilty is to be made "after consultation with the lawyer"). *See also* Model Code of Prof'l Responsibility EC 7-7 (1992) (stating that counsel has the obligation to advise his client about the desinibility of any plea).

agreement in Circuit Court would have been more timely. There can be no logic to Mr. Driskill's conceding so early in the proceedings or his unwillingness to insist that the Commonwealth prove its charge that MacDonald had simply made up a story that he had been abducted and assaulted.

(21) The response of the trial court ought to be clear. The ABA Standards for Criminal Justice relating to "Pleas of Guilty"[11] instruct the judge that "the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel."[12]

b. (1) Ineffective Assistance of Counsel in Promoting the Appearance of Judicial Impropriety and Misconduct

(May 12, 2005 In J&DR Court, Colonial Heights, Virginia)

(22) Just minutes before trial, Mr. Driskill told MacDonald that the Judge had said that sentencing will be much harsher if MacDonald didn't plead guilty. The Supreme Court, in *Boykin v. Alabama*,[13] concluded that even subtle threats from the judge concerning what might occur were the defendant to reject a proposed plea bargain, voids any subsequent plea.[14] In *Glasser v. United States*,[15] the Court declared that "[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."[16]

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[11] ABA Standards For Criminal Justice: Special Functions of the Trial Judge, Standard 14 (2d ed. 1986).

[12] *Id.* Standard 14-1.4(d).

[13] 395 U.S. 238 (1969).

[14] *See generally id.* at 239-44, *superseded by* Fed. R. Crim. P. 11(C) (codifying the plea bargain admonishments stated in *Boykin*).

[15] 315 U.S. 60 (1942).

[16] *Id.* at 71

The Court used even stronger language in *Lakeside v. Oregon*[17] when it stated that "[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial."[18] The ABA has designated similar obligations for the trial judge in its Standards for Criminal Justice: Special Functions of the Trial Judge.[19] The very first of the enumerated "Basic Duties" charges the judge with the responsibility for safeguarding the rights of the accused.[20]

(23) The Supreme Court, in *Brady v. United States*, determined that a valid guilty plea must have been both "voluntary" and "intelligent."[21] Justification of the defendant's choice to plead guilty instead of proceeding to trial must rely on the premise that a defendant is knowledgeable to make a rational decision, contrasting the sentence he will receive for pleading guilty with what he would be likely to receive after a trial. Knowledge clearly requires that the defendant understand the elements of the offense with which he is charged, including the requisite "*mens rea*," without which there would be no criminal conduct.[22] However, the actual

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[17] 435 U.S. 333 (1978).

[18] *Id*. at 341–42.

[19] Special Functions. *supra* note 93.

[20] *Id.* Standard 6-1.1.

[21] 397 U.S. 742, 748 (1970).

[22] *See*, *e.g.*, *Henderson v. Morgan*, 426 U.S. 637,646 (1976) (plea was not one which was knowingly and voluntarily entered when the defendant was unaware that "intent" was an element of the crime to which he pled guilty). The ABA Standards for Criminal Justice, Pleas of Guilty, require that the judge, before accepting any guilty plea, determine that the defendant understands the nature and elements of the offense that he is pleading guilty to. Pleas of Guilty, *supra* note 120, at Standard 14-1.4 cmt.

inquiry by the judge before whom the plea is to be entered is minimal indeed.[23] The landmark analysis of what occurs during the plea allocution, which was conducted by the National Institute of Justice,[24] concluded that the court typically just asks the defendant "if he committed the offense" to which he is pleading.[25] MacDonald states that the J&DR Court did not even go that far, and that if it had, he would have said, "*No.*"

(24) It is simply irrational to expect that the very judge who may have been the source of the pressure, the initiator of the threats, can then proceed to sit in judgment to determine the voluntariness of the plea. It is barely conceivable that the judge will be able, neutrally and impartially, to assess whether she herself had improperly pressured MacDonald to enter his plea of guilty. The Supreme Court in *Von Moltke v. Gillies* emphasized the need for the judge, when determining the propriety of the guilty plea, to conduct "a penetrating and comprehensive examination of all the circumstances under which such plea is tendered."[26]

(25) There are some unfortunate truths about much of our criminal justice system. The expectation, more than 40 years ago when the Supreme Court decided *Gideon*, that indigent defendants would be provided with effective and competent counsel to represent them

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[23] Pleas of Guilty, *supra* note 120. at Standard 14-1.4 cmt. (emphasizing the importance of the judge addressing the defendant in order to ensure that the plea is made with appropriate knowledge and understanding).

[24] William F. McDonald, Plea Bargaining: Critical Issues and Common Practices (1985).

[25] *Id.* at 135.

[26] 332 U.S. 708. 723 (1948).

has not been realized.[27] The overwhelming majority of prosecutions result in plea bargains,[28] and all too often, counsel for the defendant has not engaged in the preparation and investigation that is constitutionally and professionally mandated before counseling the defendant on the advisability of the plea.[29] The only information available to the defense counsel at that time typically comes from the prosecutor and may consist of little more than the police report. The Commonwealth Attorney's office is overwhelmed with cases and may indicate to the defendant that if no guilty plea is entered, the prosecutor will seek a high bail, and a lengthy period of incarceration were the defendant to be convicted at trial.

b. (2) Ineffective Assistance of Counsel for not Objecting to Judicial Misconduct of Direct Cross-Examination from the Bench

(26) July 12, 2005 in Circuit Court, Colonial Heights, Virginia. Against the Canons of Judicial Conduct, the Judge specifically took on the role of prosecutor when he asked MacDonald specific questions not elicited by of the Prosecution. After MacDonald had been examined by Mr. Driskill, cross-examined by the Prosecution, and re-examined by Mr. Driskill, the Judge performed his own cross-examination which was finally interrupted by the Prosecution. (Tr. July 12, 2005, Page 64-66) (Tab 6)

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[27] *See supra* note 2.

[28] *See supra* note 3.

[29] *Supra* text accompanying notes 19-23.

THE COURT: I'm looking at your statement, Mr. MacDonald, that you gave to the deputy and I don't see where you mention anywhere about the porch light coming on, did you forget that part?

[MACDONALD]: Yes Sir, I did.

THE COURT: Why did you forget that?

[MACDONALD]: Because at the time, sir, with the state of mind I was in, I tried to see what was around me and to try to break this so it would not go any further than what it had. Only way to break it without doing any physical injury to her, hit her, knocking her out, causing a big stink, I looked around to see who was around then. When one of the family members next door to her grandmother's house stepped on the back porch and asked who's out there.

THE COURT: All right. Ms. Johnson testified that she called you in October at the behest of Detective Young. Do you recall the conversation with in October?

[MACDONALD]: She called me quite a few times after that incident of 23rd of September.

THE COURT: Do you recall the conversation in October?

[MACDONALD]: It depends on what it was—

THE COURT: What she said was that you asked her to deny everything.

[MACDONALD]: I received a phone call on roughly the 18th of October from her saying what are you messing around with another individual, you're my man; no I'm not, I'm a married man. It wasn't a day after that when all this started hapening with her, she called me back which was about 19th, 20th of October. She called me up and said her girlfriend's daddy was sneaking around and I did not know that I was being recorded at the time. She said, do you want me to deny everything? Yes, deny everything, I never slept with you. That's what I told her.

THE COURT: Does that—

[PROSECUTOR]: So you were asking Ms. Johnson to deny the fact that you had slept with her?

[MACDONALD]: Yes, sir, because we never did sleep together.

[PROSECUTOR]: Your testimony today, just so I'm clear, is that you never slept with Amanda Johnson?

[MACDONALD]: Correct.

[PROSECUTOR]: All right. That's all I have.

(27) Mr. Driskill did not object to the above grossly partial dialogue. As the Court stated in *Francolino v. Kuhlman*, "the mere *appearance* of partiality, even if unfounded, greatly undermines the credibility of the

criminal justice system."[30] The trial judge is expected to be "the system's bastion of neutrality."[31] It is a given in our criminal justice system that "the Bench must be scrupulously free from and above even the appearance or taint of partiality."[32] The judge who presides over the trial of the defendant for the crime for which the judge has assumed guilt and promoted a guilty plea, may find it difficult to be impartial when judging the recalcitrant defendant whose mere decision to go to trial can be looked upon by the court as an act of defiance. There certainly is an appearance of impropriety which becomes all the more magnified when, upon a conviction, the judge makes it clear to the defendant that the sentence of the court is to be the maximum authorized by law and one that may well be perceived of as retaliation for the defendant's refusal to have pled guilty. In *Herman v. United States*, 289 F.2d 362 (5th Cir. 1961) (quoting *Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932)), the Court said: The trial judge "should never assume the role of prosecuting attorney and lend the weight of his great influence to the side of the Government." . . . He must be above even the appearance of being partial to the prosecution.

c. Ineffective Assistance of Counsel for Failing to Object to Unconstitutional Statute on the Grounds that it Violated MacDonald's 1st Amendment Rights to Protected Speech

(28) Even though the Virginia Court of Appeals in MacDonald's direct appeal found that the Sodomy statute, as applied to MacDonald, is constitutional, MacDonald borrows from his own opinion *McDonald*

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[30] *Froncolino v. Kulman*, 224 F. Supp. 2d 615, 630 (S.D.N.Y. 2002).

[31] *Hawkins v. LeFevre*, 758 F.2d 866, 875 (2d Cir. 1985).

[32] *People v. DeJesus*, 369 N.E.2d 752, 755 (N.Y. 1977).

v. Commonwealth[33] claiming that his First Amendment rights were violated and that his attorney should have also objected at trial on 1st Amendment Grounds:

> "claims that citizens are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. Accordingly, MacDonald has standing, in the narrow context of his First Amendment arguments, to challenge the facial constitutionality of Virginia Code § 18.2-361. *See Stanley v. City of Norfolk*, 218 Va. 504, 507, 237 S.E.2d 799, 801 (1977) ("Even when a defendant's conduct [is] not constitutionally protected and could have been proscribed by a properly drawn statute, he may have standing to assert a facial challenge based upon overbreadth which 'chills' the exercise of First Amendment rights by others." (citing *Thornhill v. Alabama*, 301 U.S. 88, 98 (1940))).

(29) A statute that is vague is barred by Due Process of the 14th and 15th Amendments, and a statute that is overbroad is barred by the 1st Amendment. MacDonald claims that Mr. Driskill should have included the Equal Protection Clause and the First Amendment Rights to object to the Solicitation of Sodomy charge and that under the *Connally* Test—there are three tests for examining Vagueness: (1) does the statute in question give fair and advance notice to those persons potentially subject to it—otherwise trap the innocent by not providing fair

[33] MacDonald in *McDonald v. Commonwealth* is one and the same, the trial court spelled his name incorrectly and it has stayed that way even into the Department of Corrections records system.

warning? (2) does it adequately guard against arbitrary and discriminatory enforcement? (3) does it provide sufficient breathing space for First Amendment rights? If "men of common understanding" must necessarily guess at its meaning and differ as to its application, and where there are no definitions of the terms in the statute under the Principal of Construction—where each word is meant to mean something different, but they should be mutually exclusive, then it is also overbroad on First Amendment grounds.

d. Ineffective Assistance of Counsel for Failing to Object to Double Jeopardy in the Combining of the Charges, as well as Unfair Sentencing both causing Double Jeopardy Against the 5th Amendment, as well as failing to object to the Sentencing Court's denying of MacDonald's Rights of Equal Protection under the Law resulting in Cruel and Unusual Punishment against the 8th Amendment.

(30) Double Jeopardy prohibits prosecution for both crime and attempt of that crime. In the instant case, MacDonald was convicted for both crimes when the Commonwealth's evidence and testimony indicated that neither crime was committed; oral sex or intercourse.

(31) The Eighth Amendment embraces a requirement that a prison sentence be proportionate to the offense. MacDonald claims that he has suffered Double Jeopardy due to Unequal Protection when defense counsel failed to object to the initial charges as well as failing to object at Sentencing to the disparity which exists between a five (5) year prison term required for persons over the age of 18 who participate in oral sex with a 16 or 17 year old versus only one (1) year city jail sentences for persons convicted of intercourse with a 16 or 17 year old when the two offenses are similar and therefore the two convicted persons are similarly situated. Even more tragic is the ten (10) year prison sentences required for

persons convicted of merely suggesting that a minor 16 or 17 years old participate in oral sex.

(32) MacDonald was charged with and convicted of a Class 5 felony for solicitation in that he allegedly leaned up from the back seat of the victim's car and said the words, "suck my dick" to the 17-year-old. Testimony in light most favorable to the Commonwealth also indicated that MacDonald then pointed to a shed and said, "Let's have sex." and because of that comment, he was convicted of Contributing to the Delinquency of a Minor.

(33) This is an extreme case of Double Jeopardy. The Virginia Supreme Court has even gone so far as to say that the law has been construed.[34] And it has; the law has been reworded and rewritten from the bench and through case law, so much to the point that now, as an attempt to salvage and save Virginia Code § 18.2-361, it now simply creates a case of double jeopardy, and worse, just saying the words, "let's have sex," and "suck my dick" (in violation of Virginia Code §18.2-29 "Solicitation") can land a person in jail for 1 year and in prison for 10, but only the words "suck my dick" require Sex Offender Registration. MacDonald contends that the slang, "suck my dick" is commonly heard on the streets when used in anger and is sometimes used as a means of challenging another person to leave them alone

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[34] As we have noted, '[t]he term 'carnal knowledge' has been construed to include 'any sexual bodily connection, not simply sexual intercourse.'" *Santillo v. Commonwealth*, 30 Va. App. 470, 483, 517 S.E.2d 733. 740 (1999) (quoting *Shull v. Commonwealth*, 16 Va. App. 667, 669, 431 S.E.2d 924, 925 (1993), aff'd, 247 Va. 161, 440 S.E.2d 133 (1994)). Because "[c]arnal knowledge 'with the mouth' is another term for cunnilingus, and carnal knowledge 'by the mouth' includes fellatio," *id.* (citation omitted). Code 18.2-361 prohibits any sexual act "involv[ing] contact between the mouth and genitals, including . . . oral sex." *Id.* at 484, 517 S.E.2d at 740.

or "forget it—it's not happening," just like the slang "kiss my ass" is usually not said with the hope that the person being spoken to will truly kiss the buttocks of the person doing the talking.

(34) MacDonald states that if he had indeed said the words, "Suck my dick," they certainly were not in the context of hoping that his penis would be taken from his pants and put in the accuser's mouth, for it was not his intention to be there with her in the first place. He had begged her to stop the car and testified that he asked her to take him back to his truck. It is unimaginable that words from our mouth, taken out of context can put us in prison for 10 years! Oral copulation with a person 16 or 17 carries only a maximum of five (5) years in prison, but asking for it carries ten (10) years in prison.

(35) Virginia Code § 9.1-902 requires every person convicted of oral copulation with a minor to register as a sex offender. Virginia Code 9.1-902 does not require a person convicted of sexual intercourse with a minor (Virginia 18.2-371) to register as a sex offender. MacDonald claims that this distinction violates his right to equal protection. "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. It is often stated that [t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.

The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the

distinction is justified." (*People v. Nguyen* (1997) 54 Cal. App.4th 705, 714, citations and quotation marks omitted.)

(36) Virginia Code § 9.1-902 exempts consensual sexual intercourse with a minor from its mandatory registration scheme. On the other hand, those who engage in consensual oral copulation with a minor must register as sexual offenders. MacDonald is challenging Mr. Driskill's failure to object to this disparate treatment of similarly situated groups as well as the disparity of making "Solicitation" of oral sex a Class 5 felony when the actual act of oral sex is only a Class 6 felony. The Supreme Court in the 1958 case of *Trop v. Dulles*,[35] expressly endorsed the view that what are prohibited "cruel and unusual punishments" should change over time, being those punishments which offend society's "evolving sense of decency."

(37) Applying the Rational Basis Test to an Equal Protection Challenge requires the reviewing court to engage in a serious and genuine inquiry to determine the challenged classification is rationally related to a realistically conceivable legislative purpose and has a basis in fact.

(38) The classification structure in Virginia Code § 9.1-902, which affords favorable treatment to sexual intercourse as compared with oral copulation, is grounded in the historical antipathy against acts which were viewed as crimes against nature and sexual

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[35] *Trop v. Duller*, 356 U.S. 86 (1958), was a federal court case in the United Stales that was filed in 1955, and finally decided by the Supreme Court in 1958. The Supreme Court decided, 5-4, that it was unconstitutional for the government to cancel the citizenship of a U.S. citizen as a punishment. The ruling's reference to "evolving standards of decency" is frequently cited precedent in the court's interpretation of the Eighth Amendment's prohibition on "cruel and unusual punishment."

perversions. There is no other reasonable explanation. While this is the logical explanation for the disparate treatment afforded those who engage in consensual oral copulation with a minor under the age of 18, it does not meet the rational basis standard. Virginia Code § 9.1-902 is about controlling recidivism and protecting the public from recidivist sexual offenders. It is not concerned with protecting the morals of society, or to protect the public from "unnatural" sexual acts. The Commonwealth is therefore, treating similarly situated groups differently "on the basis of criteria wholly unrelated to the objective of that statute."[36] That is prohibited under the equal protection clause. The preservation of morality, or the protection of society against acts historically viewed as unnatural, is not found in any statute or case which addresses the purpose underlying Virginia Code § 9.1-902. "The state cannot treat similarly situated groups differently "on the basis of criteria wholly unrelated to the objective of that statute."[37]

(39) The Fourteenth Amendment to the U.S. Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The question is whether the legislative distinction between oral copulation with a minor and sexual intercourse with a minor "bear[s] some rational relationship" to the purpose of Virginia Code § 9.1-902 —the prevention of repetition of the sexual offense. It follows that requiring MacDonald to register as a sex offender in this case was a violation of his right to equal protection.

(40) The disparate treatment of those who orally copulate with someone between the ages of sixteen

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[36] *Eisenstadt v. Baird*, *supra*, 405 U.S. at p. 447.

[37] *Eisenstadt v. Baird*, *supra*, 405 U.S. at p. 447.

(16) and seventeen (17) and those who engage in sexual intercourse with someone sixteen (16) or seventeen (17) "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[38]

e. MacDonald's Conviction is in violation of the *ex post facto* guarantee of the U.S Constitution. The Court of Appeals was incorrect in Stating that Virginia Code 18.2-361 Section A can Only be Challenged on an "As applied" Basis. The Statute is Unconstitutional On Its Face Not Only Because There Are Other Statutes In Place to Protect Minors but Also Due to the Resulting Disparate Sentence Schemes and Disparity in Post-Conviction Sex Offender Registration Reauirements.

(41) Ever since *Lawrence v. Texas* was decided by the U.S. Supreme Court in 2003, it appears that Virginia's Courts have had to rely solely on the verbiage in *Lawrence* to assist them in deciding what the Legislature's post-*Lawrence* intent is. Instead of amending the Statute "*in keeping with Lawrence*" as was presented to the Lawmakers in House Bill 1054 presented to the 2004 General Assembly, the Bill was tabled and then died, leaving our citizens and law enforcement officials leaning only on the words found in *Lawrence* "the present case does not involve minors,..." We can only speculate what the difference would be had the *Lawrence* opinion read, "the present case does not involve *persons over the age of consent*."

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[38] *The People of the State of California v. Hofsheir*, 2004 WL 2823286.

(42) Cases that have risen to the Virginia appellate court level such as *Singson*, *Tjan*, and *McDonald*[39] have been affirmed, not because our own Legislature has spoken, but because it hasn't spoken to appropriately amend the statute to adequately inform the common man what is a crime and what is not post-*Lawrence*. It has now come to this point, where we must realize that even if the Statute is still valid in certain cases, i.e., with minors, in public, or prostitution, we must look at the punishment that attaches to convictions under this statute and realize that we are no longer balanced in this area.

(43) The *Lawrence* Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) and struck down the Texas Sodomy statute.[40] *Lawrence* declared unconstitutional all sodomy laws and not just those that, like the Texas statute before it, applied only to same-sex conduct. As The Court explained, it elected to decide the case on Due Process grounds rather than equal protection grounds to effect this exact result and avoid an argument that there are continuing vestiges of the sodomy statute that would continue to be valid:

> "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 . . . If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even

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[39] *Singson v. Commonwealth*, 46 Va. App. at 734, 621 S.E.2d at 686 (sodomy statute survives due process challenge); *Tjon v. Commonwealth*, 46 Va. App. at 712-13, 621 S.E.2d at 676 (sodomy statute survives due process and Equal Pmtection Clause challenge).

[40] *Lawrence* at 578.

if it were not enforceable for Equal Protection reason." *Lawrence*, 539 U.S. at 575, 123 S. Ct. at 2482.

(44) The Court's opinion in *Lawrence* is not limited to the statute or the facts before it. The Court did not resolve the case as an "as-applied" challenge, leaving similar sodomy statute enforceable in other contexts, but instead recognized the potential for abuse that such statutes represent. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is the *validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.[41] In short, the Court found that the reach of the Texas statute was unacceptable, and the law was unsalvageable. Thus the Court concluded its *Lawrence* decision in unmistakably facial terms: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[42]

(45) There is no element in the section of the Virginia statute at issue that requires that the act be forcible, commercial, public, or with a minor. Virginia has statutes prohibiting such conduct, but MacDonald was not convicted under those statutes.

(46) It is important to note that Virginia Code § 18.2-63 prohibits sodomy, or other contact, between adults and children who are younger than sixteen (16) years of age. It is important to remember that Virginia Code § 18.2-371 prohibits only "intercourse" between adults and children between sixteen (16) and seventeen (17) years old. This statute does not prohibit sodomy between adults and children between the ages of sixteen (16) and seventeen

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[41] *Id.* at 562, 123 S. Ct. at 2475 (emphasis added).

[42] *Id.* at 578,123 S. Ct. at 2484.

(17). The statute specifically and solely mentions "intercourse." This is unlike Virginia Code § 18.2-63 which specifically mentions other sex acts including sodomy committed on minors under sixteen (16).

(47) Virginia Code §§ 18.2-361(A), therefore does not in any way include an age restriction, or indicate that the legislature intended to prohibit sodomy between adults and children between the ages of sixteen (16) and seventeen (17). When Virginia Codes § 18.2-63 and 18.2-361(A) are read together, as we are compelled to do, it is clear that there was no specific prohibition against sodomy for individuals over fifteen (15).

(48) It is pure speculation as to whether a future legislative act would prohibit sodomy between an adult and a person between the age of consent (16) and adulthood eighteen (18). It is abundantly clear, however, that the Commonwealth cannot assume such a prohibition before it is written into law. Further, it is in violation of the *ex post facto* guarantee of the U.S. Constitution to assume an age requirement on a statute, where none now exists, and then convict the defendant on activity alleged to have occurred prior to the modification of the statute.

(49) There was, therefore, a valid statute commanding MacDonald to refrain from sodomy on a minor under sixteen (16). There was also a valid statute commanding him to refrain from intercourse with persons between the ages of sixteen (16) and eighteen (18) on pain of conviction of a misdemeanor. The Commonwealth cannot now successfully argue that a remnant of the Sodomy statute, applying to sodomy between adults and persons between sixteen (16) and seventeen (17) survives Constitutional scrutiny, as it is in conflict with other statutes. Application of the Virginia Sodomy statute to MacDonald is therefore a violation of the *ex post facto* prohibition contained in the U.S. Constitution.

f. Insufficient Evidence to Convict (Tab 7)

(50) The Clerk of Circuit Court read to MacDonald the charges against him. "That the Grand Jury charges that on or about September 23rd 2004, (MacDonald) did unlawfully being a person 18 years of age or older willfully contribute to, encourage, or cause any act, omission or condition *which rendered [A.J.,] a minor less than 18 years of age, delinquent, in need of services, in need of supervision or abused or neglected* (emphasis added), in violation of Virginia Code § 18.2-371 of the 1950 Code of Virginia as amended, this being a Class 1 misdemeanor."

(51) MacDonald argues that the evidence failed to prove that he caused A.J. to actually be delinquent as the Grand Jury had charged, and that *Hubbard v. Commonwealth*,[43] from 1967 was not the appropriate controlling case law for the decision of the Court of Appeals when it affirmed his conviction. MacDonald also states that he was not guilty of Contributing to the Delinquency of a Minor because in the instant case he was convicted based only on the victim's testimony which alters the requirement that the evidence rise to a *mens rea* level. MacDonald relies on *Carmell v. Texas*, 120 S.Ct. 1620, (2000)[44] in challenging a finding of guilt

[43] *Hubbard v. Commonwealth*, 207 Va. 673, 677, 152 S.E.2d 250, 253 (1967).

[44] Case involving fourteen sexual charges against children by a defendant. The Court held that an amendment to Texas statute authorizing conviction of certain sexual offenses on victim's testimony alone, was law that altered the legal rules of evidence and required less evidence to obtain conviction; laws that alter legal rules of evidence and require less evidence to obtain conviction are *ex post facto* law; and convictions that rested solely on testimony of victim who was 14 or 15 years of age at time of offense were barred by *ex post facto* clause, abrogating *New York v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197, 535 N.E.2d 250; *Murphy v. Sowders*, 801 F.2d 205; and *Murphy v. Kentucky*, 652 S.W.2d 69.

where less evidence was required to obtain a conviction than what is required by the rules of evidence.

(52) The issue presented is whether the evidence is sufficient to prove MacDonald willfully encouraged conduct that rendered the victim delinquent in violation of Virginia Code § 18.2-371. To have a crime, there needs to be a victim, to have a delinquency, there has be a delinquent. MacDonald asks for Rule 5:18A ends of justice revisiting to this incredible reach of producing criminals from "crystal ball–what if" scenarios. Either it happened or it didn't.

(53) A crime requires a *mens rea* element, and to say that "if she had of done it she would have been guilty," does not satisfy even one of the *mens rea* elements. MacDonald asks this court to expressly consider the question whether the due process standard recognized in *Winship*[45] constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal claim, it is this abuse that the federal writ of habeas corpus stands ready to correct even if ignored by state appellate review, in *Jackson v. Virginia* the U.S Supreme Court created a new rule of law—one that had

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[45] In Re: *Winship*, 397 U.S. 358 (1970) '(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

never prevailed before. According to the *Jackson* court, the Constitution now prohibits the criminal conviction of any person except upon proof sufficient to convince *a federal judge* that a "rational Trier of fact could have found the essential elements of a crime beyond a reasonable doubt."

(54) Virginia Code §18.2-371 Causing or Encouraging Acts Rendering Children Delinquent, Abused, etc., provides in pertinent part that:

> Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228, or (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor. This section shall not be construed as repealing, modifying, or in any way affecting §§ 18.2-18, 18.2-19, 18.2-61, 18.2-63, 18.2-66, and 18.2-347.

Code § 16.1-228 defines a "child in need of services" as a "child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child." The statue further provides,

> [h]owever, to find that a child falls within these provisions, (i) the conduct complained of must present a clear substantial danger to the child's life or health or (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.

Code § 16.2-228 also defines a delinquent child as a child who *has committed* a delinquent act . . . (emphasis added).

Code § 16.2-228 defines a delinquent act as *inter alia*, an act designated a crime under the laws of the Commonwealth, or an ordinance of any city, county, town or service district or under Federal law. . .

(55) The Virginia Court of Appeals in 1999 considered the requirement of a child being in the need of services in *DeAmicis v. Commonwealth*.[46] In *DeAmicis*, an adult who had undertaken to counsel a troubled teen was convicted of Contributing to the delinquency of a Minor after taking revealing photographs of the minor. Upon discovering the photographs, the minor's parent ended all contact between the minor and DeAmicis. The minor subsequently returned to school and made remarkable improvement. DeAmicis argued that there was insufficient evidence that his actions caused the child involved to be "in need of services," an element of Code § 18.2-371. The Court of Appeals decision noted that Code § 18.2-371 explicitly refers to the definition of a "child in need of services" in Code § 16.1-228. Id. At 757. The Court then observed that the definition of a child in need of services" found in Code § 16.1-228 includes a requirement that Court intervention was essential to resolve the child's difficulty. *Id.* After finding that DeAmicis had criminally violated his custodial relationship with the child, which had presented a clear and present danger to the child, it went on to observe:

> "However, the Commonwealth's evidence must also establish that judicial intervention was "essential" to relieve the child's plight, a proof

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[46] *DeAmicis v. Commonwealth*, 29 Va. App. 751, 514 S.E. 2d 788 (1999).

> belied by the instant record. Fortunately, [the parent of the child] uncovered defendant's crime before further harm came to the child and resolved the immediate threat be removing her from defendant's control. Subsequently, *without* the necessity of court intervention, [the child's] situation quickly improved. Thus the evidence established that [the child] was not a child in need of services contemplated by Code §18.2-371."[47]

Thus, an essential element of the offense of Contributing to the Delinquency of a Minor, is that Court services were essential to relieve the child's plight.

(56) The Commonwealth presented no evidence that A.J. suffered a clear and present danger to her life or health. There was no evidence that A.J.'s family was in need of treatment, rehabilitation or services not presently being received. Similarly, there was no evidence that the intervention of the court was essential to provide the treatment, rehabilitation or services needed by her or her family. Therefore, Virginia Code § 16.1288 explicitly prohibits AJ. from being considered a child in need of services. In their opinion affirming MacDonald's conviction, The Virginia Court of Appeals noted:

> "The Commonwealth did not seek to prove, nor did the evidence establish, that MacDonald's solicitation rendered the victim in need of services, in need of supervision, or abused or neglected, as defined in Code § 16.1-228."

15. List each ground set forth in 14, which has been presented in any other proceeding:

> a. (14.e. above) Virginia Code 18.2-361(A) Is A Facially Unconstitutional Statute

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[47] *Id.* at 758.

b. (14.f. above) Insufficient Evidence to Convict

List the proceedings in which each ground was raised:

a. Trial July 12, 2005, Continued July 26, 2005, Circuit Court, Colonial Heights, VA Case No. CR05000141-01.02

b. Virginia Court of Appeals, January 9, 2007, Affirmed. COA Record No. 1939-05-2

c. Refused by the Virginia Supreme Court on September 7, 2007 and November 11, 2007

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a. (14.a. above) Ineffective Assistance of Counsel/ Coerced Guilty Plea/Failure to Withdraw Plea/Failure to Object to Inadequate Plea Colloquy, May 12, 2005. **Reason:** No attorney available willing to assist pro bono—also In Accordance with Virginia Code 8.01-654. To have Petitioned the Court for Writ of Habeas Corpus would have forfeited MacDonald's right to further communication with counsel. Counsel being court-appointed for an ongoing case, therefore, Habeas relief was not available to MacDonald

b. (14.b.(1) above) Ineffective Assistance of Counsel in Promoting the Appearance of Judicial Impropriety and Misconduct
(14.b.(2) above) Ineffective Assistance of Counsel in Promoting the Appearance of Judicial Impropriety and Misconduct/Ineffective Assistance of Counsel for not Objecting to Judicial Misconduct **Reason:** No attorney available willing to assist pro bono

c. (14.c. above) Ineffective Assistance of Counsel for Failing to Object to Unconstitutional Statute on the Grounds that it Violated MacDonald's 1st Amendment

Rights to Protected Speech **Reason:** No attorney available willing to assist pro bono

d. (14.d. above) Ineffective Assistance of Counsel for Failing to Object to Double Joepardy in the Combining of the Charges, as well as Unfair Sentencing both causing Double Jeopardy Against the 5th Amendment, as well as failing to object to the Sentencing Court's denying of MacDonald's Rights of Equal Protection under the Law Resulting in Cruel and Unsual Punishment against the 8th Amendment. **Reason:** No attorney available willing to assist pro bono

I respectfully ask that this Writ be granted and all powers vested in the same.

William Scott MacDonald, *pro se*
please use the below address for subsequent correspondence, filings, responses, orders, etc.

c/o Carolynn E. MacDonald, *wife*
340 Burkewood Drive
Winston-Salem, NC 27104
(336) 813-0420

Signature of Petitioner

_____

Inmate #348987, Brunswick Correctional Center
1147 Planters Road, P.O. Box 207C
Lawrenceville, VA 23868

STATE OF VIRGINIA

CITY/COUNTY OF _____

The petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

_____

Signature of Petitioner

Subscribed and sworn to before me

this _____ day of _____, 2008

Notary Public

My commission expires: _____

SEP 12 2007, CRIMINAL LITIGATION SECTION
OFFICE OF THE ATTORNEY GENERAL

VIRGINIA:

In The Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of September, 2007

William S. MacDonald, *Appellant*, against Commonwealth of Virginia, *Appellee.*	Record No. 070124 Court of Appeals No. 1939-05-2

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Colonial Heights shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $950.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk

William S. McDONALD, a/k/a William S. MacDonald

v.

COMMONWEALTH of Virginia.

Record No. 061456.

Supreme Court of Virginia.

June 8, 2007.

Background: Defendant was convicted in the Circuit Court, Prince George County, James F. D'Alton, Jr., J., of four counts of sodomy. Defendant appealed, and the Court of Appeals, 48 Va.App. 325, 630 S.E.2d 754, affirmed. Defendant appealed.

Holding: The Supreme Court, Donald W. Lemons, J., held that sodomy statute was not unconstitutional as applied to defendant who engaged in sodomy with minors aged 16 and 17.

Affirmed.

1. Criminal Law

Defendant was not entitled to Supreme Court review of claim that the Court of Appeals erred in holding that he lacked standing to bring facial constitutional challenge to sodomy statute, where issue was not raised or addressed by trial court. West's V.C.A. § 18.2–361(A); Sup.Ct.Rules, Rules 5A:12, 5:17, 5:25, 5:30(c).

> negligence or willful misconduct, it shall be presumed that there has been substantial compliance with these provisions." *See* 2007 Acts ch. 876.

2. Criminal Law

An appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon an issue that was not presented. Sup.Ct.Rules, Rules 5:17, 5:25, 5:30(c), 5A:12.

3. Constitutional Law
Sodomy

Sodomy statute did not violate due process clause, as applied to defendant who committed sodomy with minors aged 16 and 17, notwithstanding United States Supreme Court's decision in *Lawrence v. Texas*, which held that there was no legitimate state interest justifying intrusion into personal and private life of consenting individuals, or defendant's claim that age of consent in Virginia was 16 under contributing to delinquency of minor and carnal knowledge statutes; real issue was status of victims as minors, *Lawrence* holding did not apply to acts involving minors, and sodomy was separate statute that expressed no age of consent. U.S.C.A. Const. Amend. 14; West's V.C.A. § 18.2–361(A).

4. Criminal Law
Double Jeopardy

The fact that separate statutes may overlap in their proscription of specific conduct does not detract from their independent enforcement except when double jeopardy concerns are implicated. U.S.C.A. Const. Amend. 5.

5. Criminal Law

When an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.

6. District and Prosecuting Attorneys

Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.

7. Constitutional Law

The Supreme Court construes the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit.

8. Constitutional Law

When there is an as-applied challenge to a statute, the Supreme Court must interpret the statute in such a manner as to remove constitutional infirmities.

Erwin Chemerinsky (Terry Driskill, on brief), Prince George, for appellant.

William E. Thro, State Sol. Gen. (Robert F. McDonnell, Atty. Gen.; Stephen R. McCullough, Deputy State Sol. Gen.; William C. Mims, Chief Deputy Atty. Gen., on brief), for appellee.

Professor Erwin Chemerinsky (John L. Squires; Nachman & Squires, on brief), amicus curiae, in support of appellant.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS, and AGEE, JJ., and RUSSELL, Senior Justice.

OPINION BY Justice DONALD W. LEMONS.

In this appeal, we consider a constitutional challenge to Code § 18.2–361 prohibiting sodomy.

I. Facts

The facts of this case are not in dispute. William S. McDonald ("McDonald"), a man who was 45 to 47 years old during the years when the subject events took place, engaged in private, sexual intercourse and oral sodomy with a 16–year–old female, L.F., on two occasions. McDonald also had private, sexual intercourse and engaged in oral sodomy with a different female, A.J., who was 17 years of age at the time. In a non-jury trial, McDonald was found guilty of one count of contributing to the delinquency of a minor under Code § 18.2–371 and four counts of sodomy under Code § 18.2–361. Only the sodomy convictions are before this Court on appeal.

II. Proceedings

a. Trial Court

Prior to trial, a written "Motion to Dismiss on Due Process Grounds" was filed asserting that "Code Section 18.2–361 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution" and further citing to this Court's opinion in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). Significantly, the written motion did not state whether the constitutional challenge was facial or as applied to McDonald. There were no memoranda of law or briefs filed in support of the motion to dismiss. Additionally, the Commonwealth filed no written response.

The record does not reveal whether this written motion was the subject of a pre-trial consideration; however, the matter was brought to the trial court's attention at the conclusion of the Commonwealth's case-in-chief. In the oral motion to dismiss, McDonald and the trial court made reference to the written motion previously filed. McDonald's argument at this time was entirely predicated upon his contention that the victims

were both "of the age of consent." Counsel for McDonald stated:

> My argument would be you have testimony from these two girls they consented, they were not forced, they were not threatened, they were not paid. These were not public acts, they were private, concealed from other people. My argument would be that I believe that the age of consent in Virginia would be sixteen.

Continuing, in an apparent reference to the only case that had been mentioned, *Martin*, counsel stated:

> My argument here would be based on the testimony that you heard thus far that these are two people who are old enough to consent, who have consented, who have not been forced to do anything, who have not been threatened in any way and who are willing participants in these activities. And my argument is that because they are of the age of consent—the court there doesn't say specifically if they are minors this ruling wouldn't apply. It says it may—state regulation of this type of activity might support a different result. But, at the same time we do not have people who are under the age of consent, we have people who are of the age of consent. One girl being seventeen-and-a-half years old at the time and one girl being sixteen at the time. They have not detailed that they have been forced to commit any of these acts. In fact, what Mr. McDonald is accused of is consensual sodomy. And so what I would argue is that because they are of the age of consent and they're old enough to give that consent, there is no crime here, and to punish him would be in violation of the due-process

> clause of the 14th Amendment, just taking the Commonwealth at its evidence.

At no point in this argument to the trial court did McDonald claim that Code § 18.2–361 was facially unconstitutional nor did he expressly argue that the statute was unconstitutional as applied to him. By implication, McDonald makes an as-applied argument maintaining that on the facts of this case, because the victims were of the age of consent, it would violate the Due Process Clause of the 14th Amendment to find him guilty of the offenses charged. In an apparent reference to *Martin* wherein we stated, "It is important to note that this case does not involve minors, nonconsensual activity, prostitution, or public activity," 269 Va. at 42, 607 S.E.2d at 371, McDonald sought to bring his case within the scope of our decision in Martin by arguing that the specific exceptions we noted did not apply in this case because the age of consent for sodomy was sixteen years old and both victims were "of age." As presented to the trial court, McDonald's objections were quite narrowly stated.

Addressing the only argument made by McDonald, the trial court stated:

> I don't find that the due-process clause or the case that you cite would abrogate the law as it relates to juveniles and the code section that they're charged under, and I don't find any constitutional violation.

The trial court denied the motion to dismiss. After presentation of McDonald's evidence, counsel for McDonald stated, "Your Honor, the defense at this time will rest and renew its motion to dismiss on the grounds previously stated." No additional arguments were offered in support of the motion to dismiss on constitutional

grounds, and the trial court ruled as follows: "I would overrule your motions at the conclusion of all the evidence and hear argument at this point." The court then heard closing arguments on the merits of the case.

b. Court of Appeals

After conviction, McDonald noted his appeal to the Court of Appeals of Virginia and in his petition stated the Question Presented as follows:

> Did the trial court err in finding that Virginia Code § 18.2–361 Section A remains a valid exercise of the police power of the state, surviving a substantive due process constitutional challenge?

For the first time, McDonald included in his argument: "Virginia Code Section 18.2–361 Section A, insofar as it relates to consensual sodomy between unrelated individuals who have reached the age of consent is facially unconstitutional, as a violation of the Due Process Clause of the Fourteenth Amendment." At the petition stage in the Court of Appeals, McDonald also argued that "the statute is also unconstitutional *as applied* to the Defendant, as it prohibits constitutionally protected conduct between individuals who have reached the age of consent for such acts." Once again, McDonald's argument was predicated upon the age of consent. Upon grant of the petition for appeal, McDonald filed his opening brief reciting the same question presented and making arguments identical to those contained in his petition.

The Court of Appeals in a published decision, *McDonald v. Commonwealth*, 48 Va. App. 325, 630 S.E.2d 754 (2006), affirmed the judgment and conviction of the trial court. The Court of Appeals appeared to hold that McDonald lacked standing to mount a facial challenge to the constitutionality of a statute because a party "has

standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *Id.* at 329, 630 S.E.2d at 756 (quoting *County Court of Ulster County v. Allen*, 442 U.S. 140, 154–55, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)). The Court of Appeals appeared to hold that "only an as-applied challenge was appropriate." *Id.* Nonetheless, the Court of Appeals also appeared to decide the facial challenge to the statute by holding that "nothing in *Lawrence* or the Supreme Court of Virginia's opinion in *Martin* . . . facially invalidates Code § 18.2– 361(A)." *Id.*

The Court of Appeals then considered an as-applied challenge to the constitutionality of Code § 18.2–361(A). Recognizing that McDonald predicates his argument upon his contention that the victims had reached the "age of consent," the Court of Appeals concluded that the statute "is constitutional as applied to McDonald because his violations involved minors and therefore merit no protection under the Due Process Clause." *Id.* at 332, 630 S.E.2d at 758.

c. Supreme Court of Virginia

Upon appeal to this Court, McDonald assigns error as follows:

Mr. McDonald assigns as error Judge Haley's decision denying his appeal, and specifically his findings that:

1. That Mr. McDonald did not have standing to mount a facial attack on the constitutionality of Virginia Code § 18.2–361(A).

2. That Virginia Code § 18.2–361(A) survives an as applied constitutional attack where the conduct alleged involved an adult and a minor who is above the age of consent in Virginia.

While assignment of error 2 is worded somewhat differently than the content of McDonald's Question Presented in the Court of Appeals, it nonetheless fairly encompasses his argument to that court. Assignment of error 1 is directed to the judgment of the Court of Appeals. In his brief before this Court, McDonald makes the same arguments he did in the Court of Appeals. He is aided in his arguments by a brief amicus curiae.

[1, 2] But the efforts of the amicus are to no avail because the arguments of the parties on appeal and thus the aid of amicus must be limited to issues preserved in the trial court, Rule 5:25, and to issues presented before the appellate courts, Rule 5A:12, Rule 5:17 and Rule 5:30(c). Of course, an appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon an issue that was not presented. The trial court in this case never had before it a claim of facial invalidity of Code § 18.2–361(A). Consequently, we will not consider McDonald's first assignment of error. We will consider his limited argument concerning the constitutionality of the statute as applied to him.

III. Analysis

[3] The very narrow issue preserved in the trial court and presented by McDonald for our review is quite simple. McDonald maintains that our decision in *Martin* governs this case, because, he alleges, the victims were of the age of consent and not excepted from the scope of our opinion.

The *Martin* case involved two unmarried adults in a sexually active relationship. 269 Va. at 38, 607 S.E.2d at 368. Martin became infected with the herpes virus allegedly because of sexual contact with Ziherl. *Id.* After their relationship ended, Martin sued Ziherl in

tort alleging that he knew he was infected with the sexually transmitted herpes virus when they engaged in unprotected sexual conduct, knew that the virus was contagious, and failed to inform her of his condition. *Id.* Ziherl filed a demurrer asserting that Martin's injuries were caused by her participation in an illegal act under Virginia law and therefore, under *Zysk v. Zysk*, 239 Va. 32, 404 S.E.2d 721 (1990), the motion for judgment did not state a claim upon which relief could be granted. *Id.* The trial court sustained Ziherl's demurrer. *Id.*

On appeal we considered the effect of the decision of the Supreme Court of the United States in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), upon our prior decision in *Zysk* and further considered whether Code § 18.2–344, the fornication statute, ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor."), could continue to provide a public policy basis for not permitting civil recovery for the conduct presented in both *Zysk* and *Martin*.

Lawrence had been convicted of violating a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct described as the act of sodomy. Tex. Penal Code Ann. § 21.06(a)(2003). The Court of Appeals for the Texas Fourteenth District rejected Lawrence's constitutional challenge to the statute relying on *Bowers v. Hardwick*, 478 U.S. 186, 189, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). The Supreme Court in *Bowers* had previously held that a Georgia statute making it a crime to engage in homosexual sodomy, was constitutional. *Lawrence v. State*, 41 S.W.3d 349, 360–62 (Tex.App.2001). Reversing its prior decision in *Bowers*, the Court in *Lawrence* held that the Texas sodomy statute was unconstitutional

because it furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578, 123 S.Ct. 2472. The Court in *Lawrence* noted that:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Id.

Upon consideration of the decision in *Lawrence*, we observed in *Martin* that:

> We find no relevant distinction between the circumstances in *Lawrence* and the circumstances in the present case . . . We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2–344, like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions, it violates the Due Process Clause of the Fourteenth Amendment.

269 Va. at 41–42, 607 S.E.2d at 370.

First, it is necessary to state that our holding in *Martin* was that, under the circumstances presented, the

statute at issue, Code § 18.2–344, was unconstitutional. *See Id.* at 42, 607 S.E.2d at 371. We further stated that:

> It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct. Our holding does not affect the Commonwealth's police power regarding regulation of public fornication, prostitution, or other such crimes.

Id. at 42–43, 607 S.E.2d at 371. Clearly, the declaration that the holding did not affect the Commonwealth's police power regarding other crimes is the essence of an as-applied analysis of constitutionality of the statute. After *Martin*, Code § 18.2–344 still has efficacy as noted; consequently, it was not facially invalidated by our opinion.

McDonald's as-applied constitutional challenge to Code § 18.2–361, the sodomy statute, involves McDonald's proposed construction of several statutes. Except for certain conduct between specified related persons, the sodomy statute does not contain age restrictions. See Code § 18.2–361. McDonald seeks to "borrow" age restrictions from the contributing to the delinquency of a minor statute, Code § 18.2–371 and the carnal knowledge statute, Code § 18.2–63.

In pertinent part, the contributing to the delinquency of a minor statute states:

> Any person 18 years of age or older, including the parent of any child, who . . . (ii) engages in consensual sexual intercourse with a child 15 or

> older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor.

Code § 18.2–371.

> In pertinent part, the carnal knowledge statute states:
>
> If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.
>
> . . . .
>
> For the purposes of this section, (i) a child under the age of thirteen years shall not be considered a consenting child and (ii) "carnal knowledge" includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration.

Code § 18.2–63.

McDonald contends that the contributing to the delinquency of a minor statute refers only to sexual intercourse and penalizes such acts as a misdemeanor for an adult to commit such acts upon children aged fifteen, sixteen, or seventeen. Because the statute does not mention sodomy, McDonald argues that the contributing statute does not apply to acts of sodomy. He further infers from the carnal knowledge statute that because prosecution under its provisions includes both sexual intercourse and specified forms of sodomy, that this "puts the age of consent for sexual activity in Virginia at 15 years old." McDonald is incorrect for two reasons: (1) the sodomy statute stands alone and without age restrictions concerning consent in this case, and (2) the real issue in this case is the victims' legal status as minors.

[4–6] First, the fact that separate statutes may overlap in their proscription of specific conduct does not detract from their independent enforcement except when double jeopardy concerns are implicated. "[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123–24, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *see also Muhammad v. Commonwealth*, 269 Va. 451, 501–02, 619 S.E.2d 16, 45 (2005). "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *Batchelder*, 442 U.S. at 124, 99 S.Ct. 2198. McDonald raises no double jeopardy issues. Furthermore, there is no basis for engrafting provisions or perceived implications from the carnal knowledge statute and the laws governing the crime of contributing to the delinquency of a minor into the sodomy statute. Such matters are for legislative consideration, and here the provisions are simply different.

Second, the real issue is the legal status of the victims as minors. Determining the age of majority is the province of the General Assembly. *Mack v. Mack*, 217 Va. 534, 537, 229 S.E.2d 895, 897 (1976) (holding "minority is a legal status subject to change by the legislature"). The Code is quite specific concerning the dividing line between minors and adults. Code § 1–203 ("'*Adult*' means a person 18 years of age or more."), Code § 1–204 ("For the purposes of all laws of the Commonwealth including common law, case law, and the acts of the General Assembly, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age, and shall reach the age of majority when he becomes 18 years of age."), Code § 1–207 ("'*Child*,' '*juvenile*,' '*minor*,'

'*infant*,' or any combination thereof means a person less than 18 years of age.").

The sodomy statute has no express age of consent; however, it must be applied in a constitutional manner in conformity with *Lawrence* and *Martin*. The Court in *Lawrence* was explicit in its declaration of the scope of its opinion: "The present case does not involve minors." 539 U.S. at 578, 123 S.Ct. 2472. We were equally explicit in our opinion in *Martin*: "It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. . . . . Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct." 269 Va. at 42–43, 607 S.E.2d at 371.

[7, 8] As we have previously held, we "construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit." *Virginia Society for Human Life v. Caldwell*, 256 Va. 151, 157 n. 3, 500 S.E.2d 814, 817 n. 3 (1998). Therefore, when there is an as-applied challenge to a statute, we must interpret the statute in such a manner as to remove constitutional infirmities.

The only issue preserved at the trial court and presented to this Court is an as-applied constitutional challenge to the sodomy statute. McDonald's statutory construction argument is faulty and furthermore, it misses the real issue. The victims in this case were minors, defined by the Code of Virginia as persons under the age of eighteen. See Code § 1–207. Nothing in *Lawrence* or *Martin* prohibits the application of the sodomy statute to conduct between adults and minors.

IV. Conclusion

For the reasons stated, we will affirm the judgment of the Court of Appeals.

Affirmed.

Court of Appeals of Virginia

Present: Chief Judge Felton, Judge McClanahan and Senior Judge Fitzpatrick

Argued at Richmond, Virginia

WILLIAM SCOTT MACDONALD

v.

COMMONWEALTH OF VIRGINIA

Record No. 1939-05-2

MEMORANDUM OPINION* BY
JUDGE ELIZABETH A. MCCLANAHAN
JANUARY 9, 2007

FROM THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS
Herbert C. Gill, Jr., Judge

Terry R. Driskill for appellant.

Robert H. Anderson, III, Senior Assistant Attorney General
(Robert F. McDonnell, Attorney General, on brief), for appellee.

The trial court convicted William Scott MacDonald of solicitation to commit a felony, Code §§ 18.2-29

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* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

and -361(A), and contributing to the delinquency of a minor, Code § 18.2-371. MacDonald contends that Code § 18.2-361(A)[1] violates the Due Process Clause of the United States Constitution. He also challenges the sufficiency of the evidence supporting his conviction of contributing to the delinquency of a minor, a misdemeanor. For the following reasons, we affirm.

BACKGROUND

Forty-seven-year-old MacDonald and seventeen-year-old A.J. were introduced through a mutual acquaintance. They met in a parking lot in Colonial Heights late one evening.

MacDonald rode with A.J. from there to her grandmother's house to retrieve a personal item. When she returned to her car, MacDonald asked her "to suck his dick." He then pointed to a shed in the backyard and suggested they go back there to "have sex." A.J. said she was tired and wanted to take him back to his truck. When they returned to the parking lot, MacDonald pushed her up against the hood of her car and starting kissing and groping her. She pushed him away and went home.

ANALYSIS

A. Constitutionality of Code § 18.2-361(A)

MacDonald contends the sodomy statute, Code § 18.2-361(A), is facially unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment. In accord with our previous decisions, we hold that MacDonald lacks standing to assert this claim. *See McDonald v. Commonwealth*, 48 Va. App. 325, 329,

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[1] Code § 18.2-361(A) provides that: "If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B."

630 S.E.2d 754, 756 (2006)[2] ("[W]e will only consider the constitutionality of Code § 18.2-361(A) as applied to appellant's conduct."); *Singson v. Commonwealth*, 46 Va. App. 724, 734, 621 S.E.2d 682, 686 (2005) (defendant lacks standing to challenge statute generally); *Tjan v. Commonwealth*, 46 Va. App. 698, 706, 621 S.E.2d 669, 673 (2005) (same); *see also Grosso v. Commonwealth*, 177 Va. 830, 839, 13 S.E.2d 285, 288 (1941) ("It is well settled that one challenging the constitutionality of a provision in a statute has the burden of showing that he himself has been injured thereby."); *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241 (1988) ("generally, a litigant may challenge the constitutionality of a law only as it applies to him or her").

MacDonald also challenges the constitutionality of the sodomy statute as it applies to him. He maintains that his conduct with the seventeen-year-old victim was constitutionally protected. In support of his argument, he contends the age of consent for sexual behavior is fifteen under Code § 18.2-63[3] and Code § 18.2-371.[4] He then asserts that because the sodomy statute, Code § 18.2-361(A), contains no age restriction, sodomy involving people fifteen and older should be viewed as no different from

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[2] The appellant in that case, William Scott McDonald, a/k/a William Scott MacDonald, is the same person who is the appellant in the instant case, in the name of William Scott MacDonald.

[3] "If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony." Code § 18.2-63. "'[C]arnal knowledge' includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration." *Id.*

[4] "Any person 18 years of age or older . . . who . . . engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor." Code § 18.2-371.

sodomy involving those eighteen and older, for purposes of constitutional analysis regarding the proscription of such behavior. For the reasons previously stated in our opinion in *McDonald*, 48 Va. App. at 329, 630 S.E.2d at 756-57 (Code § 18.2-361(A) does not violate defendant's due process rights), we reject this contention. *See Singson*, 46 Va. App. at 734, 621 S.E.2d at 686 (sodomy statute survives due process challenge); *Tjan*, 46 Va. App. at 712-13, 621 S.E.2d at 676 (sodomy statute survives due process and Equal Protection Clause challenge); *see also Paris v. Commonwealth*, 35 Va. App. 377, 384, 545 S.E.2d 557, 560 (2001) (homosexual sodomy, consensual or not, with a fifteen year old is not a constitutionally protected right); *Santillo v. Commonwealth*, 30 Va. App. 470, 481, 517 S.E.2d 733, 739 (1999) (nonconsensual sodomy between adult defendant and sixteen-year-old female is not constitutionally protected conduct between two consenting adults).

B. Sufficiency of the Evidence

On appeal, we view the evidence and all reasonable inferences flowing therefrom in the light most favorable to the Commonwealth. *DeAmicis v. Commonwealth*, 31 Va. App. 437, 440, 524 S.E.2d 151, 152 (2000) (*en banc)*. The trial court's judgment will be affirmed unless it is plainly wrong or unsupported by the evidence. *Id.*

MacDonald argues the evidence failed to prove he contributed to the delinquency of a minor. Code § 18.2-371 provides, in part, that "[a]ny person 18 years of age or older, . . . who (i) willfully *contributes to*, *encourages*, *or causes* any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228 . . . shall be guilty of a Class 1 misdemeanor." (Emphasis added).

The sole issue presented is whether the evidence is sufficient to prove MacDonald willfully encouraged conduct that renders the victim delinquent in violation of Code § 18.2-371.[5] In this regard, the statute specifically incorporates Code § 16.1-228, which defines a "delinquent child" as one "who has committed a delinquent act . . . ." A "'[d]elinquent act' means (i) an act designated a crime under the law of this Commonwealth . . . ." Code § 16.1-228. Based on these definitions, MacDonald maintains that his conduct, consisting solely of sexual solicitation, did not render the victim delinquent because she did not engage in any delinquent (criminal) act. Thus, he contends, the evidence fails to prove he violated Code § 18.2-371.

Code § 18.2-371 clearly prohibits conduct that "causes" a minor to engage in a delinquent act where she commits the delinquent act. However, the statute also prohibits conduct that "encourages" a minor to commit a delinquent act. *See Hubbard v. Commonwealth*, 207 Va. 673, 677, 152 S.E.2d 250, 253 (1967); *Bibbs v. Commonwealth*, 129 Va. 768, 771, 106 S.E. 363, 364 (1921). The operative language in the statute is in the disjunctive, making it a crime for any person who "causes *or* encourages" a child to be rendered a delinquent. *See Hendrick v. Commonwealth*, 257 Va. 328, 340, 513 S.E.2d 634, 641 (1999).

MacDonald's solicitation of oral sex from the victim was prohibited behavior, i.e., he willfully encouraged her to engage in a criminal act. Code § 18.2-29. His solicitation was clearly designed to encourage A.J. to commit that act, which would render her delinquent under Code § 16.1-228, in violation of Code § 18.2-371.

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[5] The Commonwealth did not seek to prove, nor did the evidence establish, that MacDonald's solicitation rendered the victim in need of services, in need of supervision, or abused or neglected, as defined in Code § 16.1-228.

Thus, we affirm MacDonald's conviction for contributing to the delinquency of a minor.

Accordingly, we affirm MacDonald's felony conviction under Code §§ 18.2-29 and -361(A) and his misdemeanor conviction under Code § 18.2-371.

Affirmed.

App. 185

48 Va. App. 325

William S. McDONALD, a/k/a William S. MacDonald

v.

COMMONWEALTH of Virginia.

Record No. 1180–05–2.

Court of Appeals of Virginia, Richmond.

June 13, 2006.

Background: Defendant was convicted following a bench trial Circuit Court, Prince George County, James F. D'Alton, Jr., J., of four counts of sodomy, and he appealed.

Holdings: The Court of Appeals, James W. Haley, Jr., J., held that:

(1) defendant lacked standing to challenge statute criminalizing sodomy as being facially unconstitutional, and

(2) statute criminalizing sodomy did not violate due process rights of defendant.

Affirmed.

1. Criminal Law

Court of Appeals would not consider on appeal defendant's argument that statute criminalizing sodomy violated Equal Protection Clause, as he failed to present this argument in his writ petition or his brief. U.S.C.A. Const.Amend. 14; West's V.C.A. § 18.2–361(A); Sup. Ct.Rules, Rule 5A:20.

2. Criminal Law

Appellate court reviews arguments regarding the constitutionality of a statute de novo.

3. Constitutional Law

All acts of the general assembly are presumed to be constitutional; in applying this principle, the appellate court is required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity.

4. Constitutional Law

Appellate court will declare a statute null and void only when it is plainly repugnant to a state or federal constitutional provision.

5. Constitutional Law

Defendant lacked standing to challenge statute criminalizing sodomy as being facially unconstitutional pursuant to United States Supreme Court's decision in *Lawrence v. Texas*, which held that statute that prohibited homosexual sodomy violated Due Process Clause; defendant could only challenge constitutionality of statute insofar as it had an adverse impact on his own rights. U.S.C.A. Const.Amend. 14; West's V.C.A. § 18.2–361(A).

6. Constitutional Law

A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.

7. Constitutional Law
Sodomy

Statute criminalizing sodomy did not violate due process rights of defendant who had been convicted of engaging in oral sodomy with a 16-year-old and a

17-year-old minor; victims were "children" for purposes of statute, given that "adult" was defined as a person aged 18 or more, unless a statute specifically provided otherwise, and statute criminalizing sodomy did not change standard definition of "adult," this was the case even though statute setting forth crimes against children allowed for people aged 15 to 17 to consent to sexual intercourse, as such ability did not equate with being an "adult," and defendant's acts with children were excepted from due process protection pursuant to United States Supreme Court case of *Lawrence v. Texas*, which invalidated law prohibiting homosexual sodomy between adults. U.S.C.A. Const.Amend. 14; West's V.C.A. §§ 1-203, 1-204, 1-207, 18.2–361(A), 18.2–371.

See publication Words and Phrases for other judicial constructions and definitions.

Terry Driskill, Prince George, for appellant.

William E. Thro, State Solicitor General (Judith Williams Jagdmann, Attorney General; D. Mathias Roussy, Jr., Associate State Solicitor General, on brief), for appellee.

Present: CLEMENTS and HALEY, JJ., and OVERTON, S.J.

HALEY, Judge.

[1] William Scott McDonald (appellant) appeals his conviction in a bench trial of four counts of sodomy in violation of Code § 18.2–361(A). His only contention is that Code § 18.2–361(A) is unconstitutional because it violates the Due Process Clause of the Fourteenth

Amendment.[1] Finding that the statute, as applied, does not violate the Constitution, we affirm.

I. Facts

As appellant does not challenge the sufficiency of the evidence against him, only a brief discussion of the facts is necessary. On December 31, 2002 and again on April 27, 2003, appellant and L.F. engaged in private, consensual sexual intercourse and oral sodomy, as defined by Code § 18.2–361(A). Appellant was forty-five years old at the time of the first encounter and forty-six at the time of the second, and L.F. was sixteen years old at the time of both encounters. Then, in June 2004 and again in August 2004, appellant participated in private, consensual sexual intercourse and oral sodomy with A.J. A.J. was seventeen years old at the time of both encounters, while appellant was forty-seven. After the prosecution rested its case and again after the defense rested, appellant moved to strike, claiming that Code § 18.2– 361(A) is unconstitutional. The trial court denied both motions and convicted appellant of all counts. Appellant then appealed to this Court.

II. Analysis

Neither party disputes the timing of these encounters; what acts took place then; that the female participants were ages sixteen and seventeen, respectively; or that Code § 18.2–361(A) clearly prohibits the conduct. The only question presented on appeal is if Code § 18.2–361(A) violates the Due Process Clause of the Fourteenth Amendment. Appellant challenges the

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1 At oral argument, appellant also presented an equal protection argument. However, as he failed to present this argument in his writ petition or his brief, we will not consider it. Rule 5A:20; *Parker v. Commonwealth*, 42 Va.App. 358, 373, 592 S.E.2d 358, 366 (2004).

constitutionality of the statute both on its face and as applied to him.

[2–4] We review arguments regarding the constitutionality of a statute *de novo*. *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (citing *Wilby v. Gostel*, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002)), *cert. denied*, —— U.S. ——, 126 S.Ct. 626, 163 L.Ed.2d 509 (2005). Furthermore,

> We are guided by the established principle that all acts of the General Assembly are presumed to be constitutional. In applying this principle, we are required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity . . . . [W]e will declare a statute null and void only when it is plainly repugnant to a state or federal constitutional provision.

In re Phillips, 265 Va. 81, 85–86, 574 S.E.2d 270, 272 (2003) (internal citations omitted).

A. Facial Challenge

Appellant contends that Code § 18.2–361(A) is facially unconstitutional because it bans private, consensual sodomy between adults. In *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the Supreme Court held that the right to liberty under the Due Process Clause of the Fourteenth Amendment rendered invalid a Texas law prohibiting homosexual sodomy. In reaching that decision, the Court held that a state may not criminalize such sexual conduct when it is private, non-remunerative, and engaged in between mutually consenting adults. *Id.* at 578, 123 S.Ct. at 2484.

[5, 6] We note, however, that a party "has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154–55, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). In *Singson v. Commonwealth*, 46 Va.App. 724, 734, 621 S.E.2d 682, 686 (2005), we applied that language to a facial challenge to Code § 18.2–361(A) under the Due Process Clause and held that only an as-applied challenge was appropriate. We continue to hold, as previously stated in *Singson*, that nothing in *Lawrence* or the Supreme Court of Virginia's opinion in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005), facially invalidates Code § 18.2–361(A). 46 Va. App. at 737, 621 S.E.2d at 688. As was the case in *Singson*, therefore, we will only consider the constitutionality of Code § 18.2–361(A) as applied to appellant's conduct. *See also Tjan v. Commonwealth*, 46 Va.App. 698, 621 S.E.2d 669 (2005) (citing *Singson* as preventing a facial challenge to Code § 18.2–361(A) on due process grounds).

B. As-Applied Challenge

Appellant maintains that Code § 18.2–361(A) is unconstitutional as applied to him because Virginia has established fifteen as the age of majority for consensual sexual acts and that, therefore, his oral sodomy with A.J. and L.F. was consenting behavior between adults entitled to due process protection under *Lawrence*.

Appellant cites the interaction of three different statutes to build his case. Code § 18.2–361(A), at issue in this case, reads, in pertinent part, "A. If any person . . . carnally knows any male or female person . . . by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony. . . ." This provision, then, serves to outlaw the behavior at issue in this case between any parties,

regardless of age or consent. Code § 18.2–63 prohibits the "carnal knowledge" of a child either thirteen or fourteen years old. The statute specifically includes within the term "carnal knowledge" oral sodomy in the manner present in this case. The third statute, Code § 18.2–371, declares that when a person eighteen or older "engages in consensual *sexual intercourse* with a child 15 or older not his spouse" that person has committed a misdemeanor. (Emphasis added).

Appellant contends that these statutes establish an age of consent of fifteen for sexual behavior in Virginia and that, therefore, sodomy involving people fifteen and older should be viewed as no different from sodomy involving those eighteen and older. In support, he notes that Code § 18.2–371 specifically refers to "consensual sexual intercourse," thus establishing both 1) people fifteen and older can consent to intercourse and 2) the statute does not apply to sodomy. He also notes that Code § 18.2–63 bans all intercourse and sodomy involving children younger than fifteen. Finally, he points out that Code § 18.2–361(A) has no age limitation whatsoever. Thus, for consent purposes, anyone age fifteen and older is an "adult" in Virginia with regard to sexual behavior. Drawing on this reasoning, appellant cites *Lawrence* for its protection of private, consensual behavior between adults as establishing the unconstitutionality of Code § 18.2–361(A) as applied to him.

[7] Appellant errs, however, in his interpretation of the statutes as defining "adult." The Supreme Court of Virginia has established that determining the age of majority is within the power of the legislature. *Mack v. Mack*, 217 Va. 534, 537, 229 S.E.2d 895, 897 (1976). While Code § 18.2–371 allows for people aged fifteen to seventeen to consent to sexual intercourse, the statute itself still refers to those people as "children."

Additionally, Code §§ 1–203, 1–204, and 1–207 together define "adult" as a person aged eighteen or more, unless a statute specifically provides otherwise. Code § 18.2–361(A) does not change this standard definition of "adult." Therefore, appellant's equation of the ability to consent to sexual intercourse with being an "adult" fails.[2]

Other jurisdictions presented with a similar argument, although in different contexts, have reached the same conclusion. In *United States v. Bach*, 400 F.3d 622, 629 (8th Cir.2005), the Eighth Circuit rejected the argument that child pornography was protected under the reasoning of *Lawrence* when the child at issue was over the age of consent to engage in the depicted behavior. *See also United States v. Sherr*, 400 F.Supp.2d 843, 850 (D.Md.2005) (adopting the reasoning of *Bach*). Similarly, the Supreme Court of Nebraska held that the *Lawrence* holding clearly does not apply to children, leaving states free to define people under age eighteen as children. *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810, 817 (2005).

Because Virginia still considers people aged sixteen or seventeen to be children, we must determine whether Code § 18.2–361(A) can constitutionally be applied to acts between an adult and a child, rather than between adults, as appellant wishes. Viewed in this posture, appellant's challenge necessarily fails.

The Supreme Court in *Lawrence* made quite clear that its ruling did not apply to sexual acts involving children. The Court specifically notes that "[t]he present case does not involve minors." 539 U.S. at 578, 123 S.Ct.

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[2] Furthermore, the distinction between Code § 18.2–63 and the other statutes is not a dividing line between "adults" and "children" but between a Class 4 felony in the case of Code § 18.2–63, a Class 6 felony in the case of Code § 18.2–361(A), and a misdemeanor in the case of Code § 18.2–371. Appellant reads a different distinction into the statutes than actually exists.

at 2484. Instead, "[t]he case does involve two adults." *Id.* That its holding does not apply to minors is one of four exceptions to the Court's holding. The Supreme Court found that acts involving minors along with non-consensual acts, public conduct, and prostitution do not merit due process protection. *Id.* The Supreme Court of Virginia recognized the importance of these exceptions when it noted in *Martin* that "this case does not involve minors, non-consensual activity, prostitution or public activity. . . . [S]tate regulation of that type of activity might support a different result." 269 Va. at 42–43, 607 S.E.2d at 371.

Other jurisdictions have found these stated exceptions to be situations where the behavior is not a protected liberty interest. *See North Carolina v. Whiteley*, 616 S.E.2d 576 (N.C.Ct.App.2005) (upholding constitutionality of "crimes against nature" statute in situations involving minors, non-consensual acts, prostitution, and public acts); *North Carolina v. Oakley*, 167 N.C.App. 318, 605 S.E.2d 215 (2004) (holding *Lawrence* did not prohibit admission of evidence of defendant's homosexuality in case involving prosecution under a sodomy statute for contact with a minor); *Ohio v. Freeman*, 155 Ohio App.3d 492, 801 N.E.2d 906 (2003) (finding no constitutionally protected right to engage in incest with adult daughter under *Lawrence*); *Washington v. Clinkenbeard*, 130 Wash.App. 552, 123 P.3d 872 (2005) (upholding statute preventing sexual contact between school employee and student aged sixteen or older).

Furthermore, we have cited the exceptions noted in *Lawrence* to uphold the constitutionality of Code § 18.2–361(A) in other settings. In *Singson*, we found this same law constitutional in affirming the conviction of a man accused of *public* sodomy based on the public acts exception in *Lawrence*. 46 Va.App. at 738, 621

S.E.2d at 688. In keeping with our decision in *Singson*, we conclude that Code § 18.2–361(A) is constitutional as applied to appellant because his violations involved minors and therefore merit no protection under the Due Process Clause.

Affirmed.

App. 195

IN THE

COURT OF APPEALS OF VIRGINIA

AT RICHMOND

WILLIAM SCOTT MACDONALD,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee

BRIEF IN SUPPORT OF A PETITION FOR APPEAL

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IN THE
COURT OF APPEALS OF VIRGINIA
AT RICHMOND

WILLIAM S. MACDONALD,

APPELLANT,

V. RECORD NO. 1939 05 2

COMMONWEALTH OF VIRGINIA,

APPELLEE.

BRIEF IN SUPPORT OF A
PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF APPEALS OF VIRGINIA

STATEMENT OF THE CASE

William S. Macdonald was charged with one felony count of Soliciting a Minor to Commit a Felony, under Virginia Code § 18.2-29, with the underlying Felony being under Virginia Code § 18.2-361(A) Crimes against Nature, to wit: Oral Sex (Case No. CR05-141-0l), and one count of Contributing to the Delinquency of a Minor in violation of Virginia Code § 18.2-371, (Case No. CR05-141-02)

On July 12, 2005, in the Circuit Court of Colonial Heights, Mr. MacDonald pleaded not guilty to the charges and the case was heard by the Court without a jury. Upon

completion of the case, the Defense made a Motion to Dismiss on Constitutional grounds. The Court took the matter under advisement and continued the case to July 26, 2005 to issue a ruling on the Constitutional challenge. On July 26, 2005 the Judge of the trial court overruled the Motion to Dismiss and continued the case for sentencing. On August 2, 2005, the Court sentenced Mr. MacDonald to ten (10) years on the felony count, suspending nine (9) of those years for a period of twenty (20) years on condition that he keep the peace, be of good behavior, not violate the laws of the Commonwealth or sister states or the United States. The Court placed Mr. MacDonald on supervised probation for a period of time required by his probation officer. The Court required that Mr. MacDonald register as a sex offender, required that Mr. MacDonald submit to a DNA test and pay the costs of the proceeding.

In addition, the Court found him guilty on the misdemeanor charge of Contributing to the Delinquency of a Minor and sentenced him to twelve (12) months in the city jail.

QUESTIONS PRESENTED

1. Did the trial court err in finding that Virginia Code § 18.2-361 Section A (the underlying felony of the Soliciting charge) remains a valid exercise of the police power of the state, surviving a substantive due process constitutional challenge?

2. Did the trial court err in finding that Mr. MacDonald was guilty of Contributing to the Delinquency of a Minor, where no evidence was presented to the Court to indicate that the minor involved was delinquent, placed in need of services or supervision, or abused or neglected?

STATEMENT OF THE FACTS

The Court noted that there was a Motion to Dismiss based on the Constitutionality of Virginia Code Section 18.2-361 Section A in the file. (Tr. of July 12 Page 7). The Court decided to hear the motion after evidence had been introduced into the record. (Tr. of July 12 Page 80).

The Commonwealth first called Amanda Johnson to the stand. Ms. Johnson testified that she was born on February 17, 1987. She said that in September of 2004 she was seventeen (17) years old, and at that time she was familiar with Mr. MacDonald. (Tr. of July 12 Page 14).

Ms. Johnson testified that on September 23, 2004 she noticed that she had missed a telephone call from Mr. MacDonald. In response, she paged Mr. MacDonald on his county-issued Fire Department pager. She stated that after making contact with Mr. MacDonald she agreed that she would call him again as soon as she got off work that night. She agreed that she had paged him at that number before. (Tr. of July 12 Page 15).

Ms. Johnson then testified that she did make contact with Mr. MacDonald later that night. She spoke to him on a cellular phone and he told her to meet him at Burcham's Cycles in Colonial Heights. Ms. Johnson stated that she arrived at Burcham's Cycles at around 9:30 p.m. and when she saw that he wasn't there she called him and asked where he was. Ms. Johnson stated that Mr. MacDonald told her to meet him at the Home Depot in Colonial Heights. She stated that she then drove to the Home Depot and found him there in the parking lot. (Tr. of July 12 Page 16).

According to Ms. Johnson, Mr. MacDonald stuck his head in her car and asked what she was doing. She told Mr. MacDonald that she "had to go across the street to Sheetz to get gas." She said that she told him to get in the

backseat of her car. She said that he got into the back seat of her car and she drove the car to get gas. (Tr. of July 12 Page 17).

Ms. Johnson testified that after paying for the gas, she told Mr. MacDonald that she had to go to her Grandmother's house so that she could retrieve a book for school from another car that was there. She then drove up the street to her grandmother's house at 1301 Canterbury Lane in Colonial Heights, with Mr. MacDonald in her back seat. (Tr. of July 12 Page 18). She said that she left Mr. MacDonald in the car as she "ran in real quick" and got her book, and then got back into the ear. She testified that Mr. MacDonald then leaned forward to her front seat and "asked me to suck his dick." (Tr. of July 12 Page 18). She said that Mr. MacDonald pointed to a shed in the back yard and suggested that they go back there and have sex. (Tr. of July 12 Page 18). She said that her answer to him was that she was tired and wanted to take him back to his truck. (Tr. of July 12 Page 18).

Ms. Johnson testified that she took Mr. MacDonald back to the Home Depot parking lot where his truck was parked. She said that he pushed her up against the hood of her car and started kissing her and groping her. (Tr. of July 12 Page 18-19). She said that she then drove home. (Tr. of July 12 Page 19).

Ms. Johnson also testified that she had a telephone conversation with Mr. MacDonald in the latter part of October of 2004. The conversation was made at the request of Detective Eric Young of the Prince George Police Department. She said that during that conversation Mr. MacDonald told her to deny everything that happened. (Tr. of July 12 Page 20).

On cross-examination Ms. Johnson stated that the weather on September 23, 2004 was "real calm" and that

she had her sunroof down. Ms. Johnson stated that she remembered that "Mr. MacDonald came and peered into the sunroof." (Tr. of July 12 Page 20). When asked if she went inside the residence at Canterbury Lane, she stated that she had not. She said that "the other car was parked outside, and I just went to that real quick." (Tr. of July 12 Page 20).

Ms. Johnson reiterated that Mr. MacDonald had pushed her against the hood of her car. (Tr. of July 12 Page 22). She was then asked if she had ever told an investigator that he had pushed her against the hood of his truck. She answered that she could not recall, but stated that she believed that it was the hood of her car, but that it could have been the hood of his truck. (Tr. of July 12 Page 22). Ms. Johnson stated that she believed that Mr. MacDonald was referring to events that happened in Prince George, as well as the incident in Colonial Heights on September 23, 2004 when he asked her to deny everything. (Tr. of July 12 Page 23). Ms. Johnson then said that she voluntarily met with Mr. MacDonald and voluntarily allowed him to sit in her vehicle. (Tr. of July 12 Page 22).

The Commonwealth next called Detective Early, of the Colonial Heights Police Department, to the stand. She testified that she met with Mr. MacDonald on December 8, 2004. This meeting, she said, occurred a few days after Mr. MacDonald had made a report to the Colonial Heights Police Department about events that occurred on September 23, 2004. (Tr. of July 12 Page 25). She said that Mr. MacDonald reported that he had received a page from Ms. Johnson and he eventually called her back. Detective Early said that Mr. MacDonald reported that he had met with Ms. Johnson later that night. Detective Early said that Mr. MacDonald reported that he got into Ms. Johnson's car and she then took off. He said that

he told Ms. Johnson that "this has got to stop, lose my number, I'm married, don't call me anymore." (Tr. of July 12 Page 26).

Detective Early stated that Mr. MacDonald went on to describe a sexual assault committed on him by Ms. Johnson. He reported that Ms. Johnson forcibly removed his penis from his pants and performed oral sex on him. (Tr. of July 12 Page 26). Detective Early testified that Mr. MacDonald reported that he told Ms. Johnson that "this is wrong, I'm married, lose my number and don't call me anymore." (Tr. of July 12 Page 27).

The Commonwealth then admitted into evidence portions of a statement made by Mr. MacDonald and given by him to the Colonial Heights Police Department. (Tr. of July 12 Page 28).

On cross-examination, Detective Early stated that she chose to believe the reports of Amanda Johnson and to disbelieve those of Mr. MacDonald. She also stated that there would be no physical evidence involved in a case such as this. (Tr. of July 12 Page 30). Detective Early also said that she had visited the address at 1301 Canterbury Lane. She opined that a person could be secluded in that shed if the door was shut. (Tr. of July 12 Page 31).

The Commonwealth next called Detective Eric Young, of the Prince George Police Department, to the stand. He testified that he interviewed Mr. MacDonald at Mr. MacDonald's home in Prince George County on October 20, 2004. He said that Mr. MacDonald made no statements about any incident that happened between him and Ms. Johnson in Colonial Heights. (Tr. of July 12 Page 33).

The Defense renewed the Motion to Strike the Solicitation to Commit Sodomy count on Constitutional grounds. (Tr. of July 12 Page 34). The Defense made a

Motion to Strike with respect to the Misdemeanor Count of Contributing to the Delinquency of a Minor. The grounds for the motion included an argument that the statement allegedly made by Mr. MacDonald was a mere statement of desire, and not an entreaty, inducement or solicitation. (Tr. of July 12 Page 43). The Court decided to take both motions under advisement. (Tr. of July 12 Page 43).

The Defense called the Defendant, Mr. William S. MacDonald to the stand. He stated that on September 23, 2004, he had received several pages from Amanda Johnson on his fire department pager. He returned her first call, and told her to leave him alone. He stated that she paged him again a short time later but he did not answer her call. (Tr. of July 12 Page 45). He said that he attended John Tyler Community College where he had a computer class that night. He said that he got out of class until roughly 9:30p.m. or quarter to 10:00p.m. He then went to the Home Depot in Colonial Heights to run an errand for his wife. He said that he got there around 10:00 p.m. and at that time received a call from Ms. Johnson. (Tr. of July 12 Page 46). He said that Ms. Johnson implored Mr. MacDonald to meet with her and he told Ms. Johnson that he was on his way to the Home Depot. He said that on that night it had rained, the roads were wet and it was still misting. (Tr. of July 12 Page 47).

Mr. MacDonald testified that shortly after reaching the Home Depot parking lot, Ms. Johnson drove into the Home Depot parking lot and parked beside his truck. Mr. MacDonald testified that Ms. Johnson then got out of her car and attempted to give him a hug, but he told her "no, we need to stop." (Tr. of July 12 Page 48). He said that it then began to mist, and she got into the driver's seat of her car and invited him to sit beside her in the passenger seat of her car. He said that he was aware that the keys

to his truck where still in the ignition and that the doors were unlocked. He testified that he did not intend to leave with her. (Tr. of July 12 Page 48).

Mr. MacDonald testified that he told Ms. Johnson to lose his number and not call him anymore. He said that she then got mad and drove off the parking lot. He said that he asked her twice to take him back, but she took him to her grandmother's house. He said that she parked beside a fence and grabbed the front of his jeans and attempted to perform oral sex on him. (Tr. of July 12 Page 50). He said that someone turned on a porch light and shouted, at which time he told Ms. Johnson to stop. (Tr. of July 12 Page 51).

Mr. MacDonald stated that Ms. Johnson took him back to the Home Depot parking lot where he got back into his truck and drove home. Mr. MacDonald stated that Ms. Johnson followed him all the way to his turn off to his residence. Mr. MacDonald stated that he did not ask Ms. Johnson for sex of any kind and did not consent to have sex with her. (Tr. of July 12 Page 51-52).

On Cross-examination Mr. MacDonald said that Ms. Johnson had called him and come by his house in Prince George. He had asked her to stop doing that. (Tr. of July 12 Page 54). He denied placing Ms. Johnson on the hood *of* his truck or pushing her against her car. (Tr. of July 12 Page 55). He also said that he did not immediately report Ms. Johnson's attack on him because she had told him that her father was a Colonial Heights police officer and he was afraid of retaliation. (Tr. of July 12 Page 62).

On re-direct examination, Mr. MacDonald said that a written statement he had prepared and presented to the Prince George Police Department was made on November 1, 2004, before his arrest in Prince George County. (Tr. of July 12 Page 63). He identified a journal

that he habitually used to write down his thoughts. He read an entry he made shortly after the incident. The substance of the statement was that something had happened to him around 10:30 p.m. and that he was sick to his stomach about it. (Tr. of July 12 Page 63-64).

The Court questioned Mr. MacDonald directly. The Court asked Mr. MacDonald if he recalled a conversation he had in October. Mr. MacDonald stated that during that conversation Ms. Johnson accused him of seeing another individual, which he denied. He said that all the legal problems he had with Ms. Johnson started the day after the telephone call that was overheard by Detective Young of the Prince George Police Department. He also said that she asked him if he wanted her to deny everything. He said that he told her "yes, deny everything, I never slept with you." MacDonald testified that he told her that because "we never did sleep together." (Tr. of July 12 Page 66).

The Defense called Mrs. Carolynn MacDonald to the stand. She testified that Mr. MacDonald, the Defendant, was her husband. She said that on September 23, 2004, she and her husband had spent much of the day building a fence at their home. She said that Mr. MacDonald had a class that evening at John Tyler Community College. She said that she asked him to go to Home Depot on an errand after his class was over. (Tr. of July 12 Page 66-67). She authenticated a receipt to show that she had paid for a bucket of wood stain on September 23, 2004 with a written note that it would be picked up between 10:00 and 11:00 p.m. on that date. She also stated that her habit was to have coffee with her husband between the time he came home from class and when she left for work around 11:30 p.m. (Tr. of July 12 Page 68). She testified that on the night of September 23, 2004, Mr. MacDonald came home, slammed the door, went straight

to the coffeepot and then went out to his shed without speaking to her. She stated that his behavior was not normal for him. (Tr. of July 12 Page 69).

Mrs. MacDonald said that the weather that night was wet, as Tropical Storm Gaston had just come through. She read from a report published by the National Weather Service which indicated that there was drizzle and fog that night that started around 9:00 p.m., with fog alone at 11:00p.m. (Tr. of July 12 Page 69-70).

The Defense renewed a Motion to Strike the Solicitation to Commit Sodomy count based on Mr. MacDonald's rights under the Virginia and United Stales Constitutions. (Tr. of July 12 Page 73). The Defense also made a Motion to Strike the Solicitation to Commit Sodomy count on the grounds that the allegations did not rise to the level of an entreaty or command, but was merely the expression of a desire. (Tr. of July 12 Page 73-74). The Defense also made a Motion to strike with respect to the Misdemeanor count of Contributing to the Delinquency of a Minor based on sufficiency of the evidence.

The Court denied the Defense Motion to Dismiss based on the Constitutionality of Virginia Code Section 18.2-361(A). (Tr. of July 26 Page 4). The Court noted the Defense objection and exception to the Court's ruling. (Tr. of July 26 Page 4). The Defense renewed a Motion to Strike the Misdemeanor count of Contributing to the Delinquency of a Minor. (Tr. of July 26 Page 4). The grounds were that the Commonwealth failed to present any evidence to prove either that Ms. Johnson was placed in need of services or supervision, was delinquent, or that Mr. MacDonald and Ms. Johnson had intercourse. (Tr. of July 26 Page 4-5). The Commonwealth argued that if Ms. Johnson had indeed performed the act that she alleged Mr. MacDonald requested, she would have been

delinquent. (Tr. of July 26 Page 7). The Court took the Motion to Strike the Misdemeanor count of Contributing to the Delinquency of a Minor under advisement and continued the case to August 2, 2005 for sentencing. (Tr. of July 26 Page 9).

On August 2, 2005, the Court denied the Motion to Strike the Misdemeanor count of Contributing to the Delinquency *of* a Minor. The Defense noted an objection for the record. (Tr. of August 2 Page 7).

LAW AND AUTHORITIES APPLICABLE TO QUESTION PRESENTED #1

The Supreme Court of the United States has made a number of broad statements concerning the substantive reach of Liberty under the Due Process Clause. (*See Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)). The Court has recently observed, however, that the most pertinent starting point in a Due Process analysis is the decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). (*See Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (*See also* U.S. Const. Amend. XIV).

In *Griswold*, the Court struck down a state law prohibiting the use of contraception. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Griswold*, at 485.

After *Griswold*, the Court extended thc right to engage in sexual conduct beyond the marital relationship. *Eiscnstadt v. Baird*, 405 U.S. 438 (1972). In *Eisenstadt*, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The Court followed an Equal Protection analysis in reaching its conclusion. *Id.* At 454. The Court went on, however, to state that

the law in question impaired the exercise of unmarried persons' individual rights. *Id.* The Court stated:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship . . . If the right of privacy means anything, it is the right of the *Individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. (emphasis added)

These decisions provided the background for the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). (*See Lawrence* at 565). *Roe*, of course, concerned a Texas law prohibiting abortion. The Court held that a woman's right to an abortion, though not absolute, deserved real and substantial protection as an exercise of liberty under the Due Process Clause. As the *Lawrence* Court pointed out, "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny, and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* At 565.

In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court struck down a state law prohibiting the sale or distribution of contraceptives to persons under 16. This confirmed that the reasoning in *Griswold* would not be limited to the protection of married persons, or adults, but would extend, presumably, to unmarried persons and even minors. *Lawrence*, 566.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision confirmed that decisions

relating to marriage, procreation, contraception, family relationships, child rearing, and education will enjoy constitutional protection. *Id.* at 851.

The next major step in the Supreme Court's application of Due Process analysis occurred in *Lawrence v. Texas*, 539 U.S. 538 (2003). The issue in *Lawrence* was the validity of a Texas statute prohibiting two persons of the same sex from engaging in sexual conduct, described as sodomy. Tex. Penal Code Ann. § 21.06 (a) (2003). The Court defined the issue as whether or not individuals could engage in the prohibited conduct "in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* 564. *Lawrence* had been convicted under the statute, had appealed his conviction in the Texas Courts, which rejected his challenge by relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Lawrence* at 363. The Court in *Bowers* had upheld a Georgia statute making it a crime to engage in sodomy, regardless of the sex of the participants. *Bowers* at 189.

The *Lawrence* Court expressly overruled *Bowers* and struck down the Texas Sodomy Statute. *Lawrence* at 578. The Court observed that decisions by married or unmarried persons regarding their intimate physical relationships are entitled to due process protection. The Texas statute, therefore, abridged a relationship that was within the liberty interest of persons to choose. *Id.* At 578-79. The Court made it clear that the liberty interest at issue was not a fundamental right to engage in the specific conduct, but was the right to enter and maintain a personal relationship without governmental interference. *Id.* At 567. The Court held that liberty interests protect a right to maintain a personal relationship and that an element *of* that relationship is its "overt expression in intimate conduct. *Id.* At 567. *Lawrence* declared unconstitutional

all sodomy laws and not just those that, like the Texas statute before it, applied only to same-sex conduct. As the Court explained, it elected to decide the case on Due Process grounds rather than equal protection grounds to effect this exact result and avoid an argument that there are continuing vestiges of the sodomy statute that would continue to be valid:

> "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 . . . If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable for Equal Protection reasons.
>
> *Lawrence*, 539 U.S. at 575, 123 S. Ct. at 2482.

The Court's opinion in *Lawrence* is not limited to the statute or the facts before it. The Court did not resolve the case as an "as applied" challenge, leaving similar sodomy states enforceable in other contexts, but instead recognized the potential for abuse that such statutes represent. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is the *validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. *Id.* At 562, 123 S. Ct. at 2475 (emphasis added). In short, the Court found that the reach of the Texas statute was unacceptable, and the law was unsalvageable. Thus, the Court concluded its *Lawrence* decision in unmistakably facial terms: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* At 578, 123 S. Ct. at 2484.

The *Lawrence* decision's explicit holding that *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), was wrong when it was decided further illustrates that the Court invalidated all consensual sodomy statutes. The majority opinion flatly states "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484. Virginia's Sodomy law is substantively identical to the Georgia Law that, per *Lawrence* should have been held facially unconstitutional in 1986.[1]

Like Georgia's sodomy prohibition, the text of Virginia's sodomy law prohibits all acts of sodomy, even if committed in private between consenting adults with no money involved. Virginia Code Section 18.2-361 states as follows:

> A. If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B.
>
> B. Any person who performs or causes to be performed cunnilingus, fellatio, anilingus or anal intercourse upon or by his daughter or granddaughter, son or grandson, brother or sister, or father or mother is guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least 13 but less than 18 years of age at the time of the offense,

[1] Compare GA. Code Ann. § 16-6-2A (1984) (One commits sodomy who "performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." with VA. Code Ann. 18.2-361 ("If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge . . .").

such parent or grandparent is guilty of a Class 3 felony.

C. For the purposes of this section, parent includes step-parent, grandparent includes stepgrandparent, child includes step-child and grandchild includes step-grandchild.

(Code 1950, § 18.1-212; 1960, c. 358; 1968, c. 427; 1975, cc. 14, 15; 1977, c. 285; 1981, c. 397; 1993, c. 450; 2005, c. 185.)

There is no element in the section of the Virginia statute at issue that requires that the act be forcible, commercial, public, or with a minor. Virginia has statutes prohibiting such conduct, but the Appellant was not convicted under those statutes.

The Virginia Supreme Court recently applied *Lawrence* in *Martin v. Ziherl*, 269 Va. 35, 607 S.E. 2d 367 (2005). *Martin* involved a private tort suit alleging transmission of the herpes virus in consensual sexual contact between unmarried adults. The trial court sustained a demurer based on prior Virginia case law that barred recovery for injuries suffered in private sexual contact that was illegal under Virginia Code § 18.2-344, the former foniication statute. The Virginia Supreme Court held that the fornication statute, which prohibited sexual intercourse between unmarried persons, was unconstitutional under *Lawrence*. *Martin* at 42. The Virginia Court in *Martin* observed the following:

> "As described in Justice Stevens' rationale adopted by the Court in *Lawrence* decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationships that are entitled to due process protection . . . We find no principled way to conclude that the specific act of intercourse is not an clement of a personal relationship between

two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2-344, like the Texas statute at issue in *Lawrence* is an attempt by the state to control the liberty interest which is exercised in making these personal decision, it violates the Due Process Clause of the Fourteenth Amendment."

ARGUMENTS WITH RESPECT TO QUESTION PRESENTED #1

Virginia Code Section 18.2-361 Section A, insofar as it relates to consensual sodomy between unrelated individuals who have reached the age of consent is facially unconstitutional, as a violation of the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court's ruling in *Lawrence v. Texas* made it clear that sodomy, as an expression of intimacy between individuals who enjoy the capacity to consent, enjoys constitutional protection from state interference. The Court made it clear that private, consensual sexual relations between persons with the capacity to consent are an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. The reasoning of *Lawrence* compels a finding that Section A of Virginia's sodomy statute is likewise unconstitutional, inasmuch as it relates to consensual sodomy between individuals with the capacity to consent. There is nothing severable about the statute. In establishes a blanket prohibition of sodomy for everyone, without regard to majority, marital status or other considerations. It would apply, logically, even to married individuals past the age of majority. It is precisely for this reason that the statute cannot withstand

constitutional scrutiny. The statute is, therefore, *facially* unconstitutional.

The Virginia Supreme Court ruling in *Martin v. Ziherl* also compels a finding that the Virginia sodomy statute, insofar as it relates to consensual sodomy between individuals who possess to ability to consent, is an unconstitutional infringement on an individual's Due Process rights. The Virginia Court in *Martin* held that the reasoning in *Lawrence* invalidated the Virginia fornication statute, even when applied to unmarried individuals of the opposite sex. The facts of the present case are even closer to the facts presented in *Lawrence* than the facts presented in *Martin.* This is because here, as in *Lawrence*, we are dealing with the question of sodomy and not adultery. It is abundantly clear, therefore, that a statute that prohibits sodomy between unrelated consenting individuals is unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

It is important to note that Virginia Code § 18.2-63 prohibits sodomy, or other sexual contact, between adults and children who are younger than sixteen (16) years of age. This puts the age of consent for sexual activity in Virginia at sixteen (16) years old. The Virginia Legislature has, therefore, made it clear that sexual contact, including sodomy and other acts, between adults and children less than sixteen (16) is specifically prohibited. The complete expression of Virginia law with respect to sodomy, when an adult and a minor are specifically involved, other than 18.2-361(B) and (C), is 18.2-63. It is respectfully submitted that the Commonwealth cannot, therefore, "save" the sodomy statute with respect to Mr. Macdonald by assuming or imposing an age requirement of eighteen (18) years upon 18.2-361(A). The legislature has already spoken with respect to sodomy between adults and

minors, and the result is the prohibition of sodomy and other sexual activity between adults and minors under sixteen (16) in Virginia Code Section 18.2-63.

It is also important to remember that Virginia Code § 18.2-371 prohibits only "intercourse" between adults and children between sixteen (16) and eighteen (18) years old. This is punished as a Class 1 Misdemeanor and is considered "Contributing to the Delinquency of a Minor." This statute does not prohibit sodomy between adults and children between the ages of sixteen (16) and eighteen (18). The statute specifically and solely mentions "intercourse." This is unlike § 18.2-63 which specifically mentions other sex acts including sodomy committed on minors under sixteen (16).

Code Section 18.2-361(A), therefore, does not in any way include an age restriction, or indicate that the legislature intended to prohibit sodomy between adults and children between the ages of sixteen (16) and eighteen (18). When Virginia Code Section 18.2-63 and Section 18.2-361(A) are read together, as we are compelled to do, it is clear that there was no specific prohibition against sodomy for individuals over fifteen (15).

The statute is also unconstitutional *as applied* to the Defendant, as it prohibits constitutionally protected conduct between individuals who have reached the age of consent for such acts. The Supreme Court in *Carey v. Population Services International*, 505 U.S. 833 (1992), it should be remembered, made it clear that Due Process rights can be enjoyed by minors. Virginia has established the age of consent for such acts and that age is sixteen (16). It is pure speculation as to whether a future legislative act would prohibit sodomy between an adult and a person between the age of consent sixteen (16) and adulthood (eighteen) (18). It is abundantly clear,

however, that the Commonwealth cannot assume such a prohibition before it is written into law.

Further, it would be in violation of the *ex post facto* guarantee of the U.S. Constitution to assume an age requirement on a statute, where none now exists, and then convict the defendant on activity alleged to have occurred prior to the modification of the statute. This is especially so, when there is a current, valid statute that prohibits sodomy on a minor only if the minor is under sixteen (16).

There was, therefore, a valid statute commanding Mr. Macdonald to refrain from sodomy on a minor under sixteen (16). There was also a valid statute commanding him to refrain from intercourse with persons between the ages of sixteen (16) and eighteen (18) on pain of conviction of a misdemeanor. It is respectfully submitted that the Commonwealth cannot now successfully argue that a remnant of the Sodomy statute, applying to Sodomy between adults and persons between sixteen (16) and eighteen (18), survives Constitutional scrutiny, as it is in conflict with other statues. Application of the Virginia's Sodomy statute to Mr. Macdonald would, therefore, be unconstitutional as applied to him, as it involved constitutionally protected activity between individuals with the capacity to consent, and would be a violation of the *ex post facto* prohibition contained in the U.S. Constitution.

LAW AND AUTHORITIES APPLICABLE TO QUESTION PRESENTED #2

Virginia Code Section 18.2-371 provides, in pertinent part, that:

> Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes

> to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228, or (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor. This section shall not be construed as repealing, modifying, or in anyway affecting § 18.2-18,18.2-19, 18.2-61, 18.2-63, 18.2-66**,** and 18.2-347.

(Code 1950, § 18.1-14; 1960, c. 358; 1975, cc. 14, 15; 1981, cc. 397, 568; 1990, c. 797; 1991, c. 295; 1993, c. 411; 2003, cc. 816, 822.)

Code § 16.1-228 defines a "child in need of services" as "a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child." The statute further provides,

> [h]owever, to find that a child falls within these provision to, (i) the conduct complained of must present a clear and substantial danger to the child's life or health or (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.

Code § 16.1-228 also defines an "abused or neglected child" as, *inter alia*, any child:

1. *Whose parents* or *other person responsible for his care* creates or inflicts, threatens to create or inflict or allows to be created or inflicted upon such a child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions: . . . (emphasis added).

Code § 16.2-228 also defines a delinquent child as a child who *has committed a* delinquent act . . . (emphasis added).

Code § 16.2-228 defines a delinquent act as *inter alia*, an act designated a crime under the law of the Commonwealth, or an ordinance of any city, county, town or service district or under Federal law.

The Virginia Court of Appeals considered the requirement of a child being in need of services in *DeAmicis v. Commonwealth*, 29 Va. App. 751, 514 S.E. 2d 788 (1999). In *DeAmicis* an adult who had undertaken to counsel a troubled teen was convicted of Contributing to the Delinquency of a Minor after taking revealing photographs of the minor. Upon discovering the photographs, the minor's parent ended all contact between the minor and the Appellant. The minor subsequently returned to school and made remarkable improvement. The Appellant argued that there was insufficient evidence that his actions caused the child involved to be "in need of services," an element of Code § 18.2-371.

The Court of Appeals decision noted that Code § 18.2-371 explicitly refers to the definition of a "child in need of services" in Code § 16.1-228. *Id.* At 757. The Court then observed that the definition of a "child in need of services" found in Code § 16.1-228 includes a requirement that Court intervention was essential to resolve the child's difficulty. *Id.* After finding that the Appellant had criminally violated his custodial relationship with the child, which had presented a clear and present danger to the child, it went on to observe:

> "However, the Commonwealth's evidence must also establish that judicial intervention was "essential" to relieve the child's plight, a proof

> belied by the instant record. Fortunately, [the parent of the child] uncovered defendant's crime before further harm came to the child and resolved the immediate threat by removing her from defendant's control. Subsequently, *without* the necessity of court intervention, [the child's] situation quickly improved. Thus, the evidence established that [the child] was not a child in need of services contemplated by code § 18.2-371." *Id.* At 758.

Thus, an essential element of the offense of Contributing to the Delinquency of a Minor, is that the Court services were essential to relieve the child's plight.

ARGUMENT WITH RESPECT TO QUESTION PRESENTED #2

The Commonwealth presented no evidence that Ms. Johnson suffered a clear and present danger to her life or health. There was no evidence that Ms. Johnson's family was in need of treatment, rehabilitation or services not presently being received. Similarly, there was no evidence that the intervention of the court was essential to provide the treatment, rehabilitation or services needed by her or her family. Therefore, Code § 16.1-228 explicitly prohibits Ms. Johnson from being considered a child in need of services.

Similarly, the Commonwealth failed to present any evidence that Mr. MacDonald was either a parent or a person responsible for the care of Ms. Johnson. Therefore, Ms. Johnson cannot be considered an abused or neglected child under the definition imposed by Code § 16.1-228.

There was absolutely no evidence presented during the trial that Ms. Johnson committed a delinquent act.

Therefore, she was not proven to be delinquent. Mr. MacDonald cannot, therefore, be convicted of rendering her a delinquent.

The Commonwealth's argued that "if" Ms. Johnson had committed the act alleged to have been solicited of her, she would have been rendered a delinquent. The statute, however, is clear. It prohibits an act, omission, or condition *which renders* the child delinquent, in need of services or abuse or neglected. True, a person need only be proven to have contributed to or encouraged the delinquent act. However, a completed act is required. In point of fact, Ms. Johnson was not proven to have committed the act. Indeed, she was not even alleged by the prosecution to have committed the act.

In the matter of being rendered in need of Court services, there was no evidence that Ms. Johnson was rendered in need of services. There was no evidence whatsoever that Ms. Johnson suffered from a mental injury or any other injury from Mr. MacDonald's conduct. There was no evidence that Mr. MacDonald was a parent or a person responsible for the care of the child involved. There was no evidence that Ms. Johnson committed any act that was a crime under the laws of the Commonwealth or any other entity.

CONCLUSION

Mr. Macdonald stands convicted of Soliciting a Minor to Commit a Felony (18.2-29), to wit; oral sex. The offense he is convicted of soliciting the minor to commit, oral sex (sodomy) is under Section A of Virginia's Sodomy Statute (18.2-361) Section A of Virginia's Sodomy statute is facially unconstitutional in light of recent U.S. Supreme Court and Virginia Supreme Court rulings. It is unconstitutional because it infringes on an individual's Due Process rights. A conviction under 18.2-361(A)

is also unconstitutional as applied to Mr. Macdonald for two reasons. One reason is that "reading" an age restriction into the sodomy statute and then applying it to the Defendant's alleged actions is in violation of the *ex post facto* prohibition and is in direct conflict with other statutes. The second reason is that Virginia law makes it clear that sixteen (16) is the age of consent for such an act. A person over sixteen (16), therefore, enjoys the same Due Process right, in this regard, as any adult.

In addition, Mr. MacDonald should not be convicted of Contributing to the Delinquency of a Minor, as there was no evidence introduced that Ms. Johnson met the requirements of Code § 16.2-228. Specifically, she was not proven to have committed a delinquent act, was not endangered, and was not proven to be abused or neglected, and was not proven to have been placed in need of Court services to relieve any difficulty.

Mr. Macdonald, therefore, respectfully moves this Court to Dismiss the Felony charge against him of Soliciting a Minor to Commit a Felony, and the misdemeanor charge against him for Contributing to the Delinquency of a Minor.

Respectfully Submitted,

_____

William S. MacDonald
By Counsel

Terry R. Driskill
VA Bar No. 45326
6345 Courthouse Road
PO Box 597
Prince George, VA 23875
(804) 861-0030
(804) 861-8503 Facsimile
Counsel for the Defendant

CERTIFICATE

I hereby certify that I have complied with Rule 5A:12 in all respects. The requisite copies have been sent via first class mail on this day of November, 2005, to the Honorable Patrick Dorgan, Esquire, Commonwealth's Attorney for the City of Colonial Heights, 401 Temple Avenue, Colonial Heights, Virginia 23834. Counsel does not desire to state orally the reasons this petition should be granted. Counsel was appointed by the Court in this matter.

_____

Terry Driskill

Appellant: William S. MacDonald
c/o Terry Driskill,
Attorney at Law
6345 Courthouse Road
Post Office Box 597
Prince George, VA 23875
(804) 861-0030
Facsimile (804) 861-8503

Appellee: Commonwealth of Virginia
Patrick Dorgan, Esquire
Attorney for the Commonwealth
401 Temple Avenue
Colonial Heights, VA 23834
(804) 520-9293
Facsimile (804) 520-9229

650

CONVICTION ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS

FIPS CODE: 570

Hearing Date: July 26, 2005
Judge: Herbert C. Gill, Jr.

COMMONWEALTH OF VIRGINIA

v.

WILLIAM SCOTT MACDONALD, DEFENDANT

The defendant came before the Court and appeared in person with counsel, **Terry Driskill**. The Commonwealth was represented by **Patrick W. Dorgan**.

On July 12, 2005, the Court, heard the evidence and argument of counsel, and recessed the trial of the following offense(s), pending a ruling on defendant's Motion to Dismiss and Motion to Strike. The Court, as outlined in an opinion letter dated July 25, 2005, overrules the defendant's motion as to the constitutionality of §18.2-361(A). Therefore, the Court finds the defendant **GUILTY** of the following offense(s) and continues the disposition to August 2, 2005 at 2:00 p.m.:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION	VCC CODE
CR05-141-01	**Solicitation to Commit Felony-Adult Solicits Juvenile (F)**	**09-23-2004**	**18.2-29**	**SOL7201F5**

The Court takes the motion to strike on the following manner under advisement until August 2, 2005 at 2:00 p.m.:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION	VCC CODE
CR05-141-02	**Contribute to Delinquency of Minor (M)**	**09-23-2004**	**18.2-371**	**FAM3805M1**

Departure. The defendant is remanded to custody pending his next appearance in Court.

Court Reporter. These proceedings were reported by Capitol Reporting, Inc., Court Reporters.

August 2, 2005 ENTER: H. C. Gill
DATE JUDGE

DEFENDANT IDENTIFICATION:

SSN Redacted DOB: 01/01/1957 Sex: Male

Commonwealth of Virginia

TWELFTH JUDICIAL CIRCUIT

July 25, 2005

Patrick W. Dorgan
Assistant Commonwealth's Attorney
City of Colonial Heights
401 Temple Avenue
Colonial Heights, VA 23834

Terry Driskill, Esquire
P. O. Box 597
Prince George, VA 23875

Re: *Commonwealth of Virginia v. William S. MacDonald*
Case No. CR05-141-01

Dear Counsel:

The Court has concluded its review of case law as highlighted by memoranda in the above-styled case. The Court thanks counsel for its exhaustive and thorough research.

The defendant, MacDonald, assails the constitutionality of § 18.2-361 of the 1950 Code of Virginia (as amended). He cites as his authority *Lawrence v. Texas*, 539 US 558; 123 S.Ct. 2472, 156 L Ed. 2nd 508 (2003) wherein the Supreme Court of the United States declared a Texas statute unconstitutional. MacDonald further bolsters his argument with the case of *Martin v. Ziherl*, 269 VA. 35, 607 S.E. 2nd 367 (2005) wherein the Virginia Supreme Court declared § 18.2-344 of the 1950 Code of Virginia (as amended) unconstitutional.

One basic tenet in testing the constitutionality of a statute is that a litigant may challenge the constitutionality of a law only as it applies to him or her. *Coleman v.*

City of Richmond, 5 Va. App. 459 (1988); *Grosso v. Commonwealth*, 177 Va. 830 (1941) "(T)hat the statute may apply unconstitutionally to another is irrelevant; one cannot raise third party rights." *Id.* at 463. The Court in *Lawrence* was mindful of this distinction and was quick to differentiate the factual application. The Court stated "(T)his case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution." The result is clear when considered in light of the rationale applied in *Lawrence*. *Lawrence* is premised on the theory that liberty (a fundamental right conferred by the Federal Constitution) protects the person from unwarranted government intrusions. The facts of this case would extend the constitutionally protected zone to cases in which the defendant acts without the consent of a seventeen-year-old victim. This Court, while adopting the rationale of *Lawrence* will not extend a liberty to one who violates another's liberty.

Therefore, the Court will overrule defendant's motion as to the constitutionality of § 18.2-361 (A).

Very truly yours,

Herbert C. Gill, Jr.
Judge

IN THE

CIRCUIT COURT OF COLONIAL HEIGHTS

WILLIAM SCOTT MACDONALD,
DEFENDANT,

v.

COMMONWEALTH OF VIRGINIA,
PLANTIFF

CASE NO. C05-141-01

BRIEF IN SUPPORT OF A

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF THE
CIRCUIT COURT OF COLONIAL HEIGHTS

STATEMENT OF THE CASE

William Macdonald, hereinafter referred to as the Defendant, was charged in Colonial Heights with one count of Contributing to the Delinquency of a Minor, under Virginia Code § 18.2-371, one count of Making a False Report, under Virginia Code § 18.2-461, and one count of Solicitation, under Virginia Code § 18.2-29. On May 12, 2005, the Defendant entered a plea of Guilty to one Misdemeanor count of Making a False Report in the Juvenile and Domestic Relations Court of Colonial Heights. The court found the Defendant Guilty and imposed a sentence.

One Misdemeanor count of Contributing to the Delinquency of a Minor was disposed of *by Nolle Prosequi*, on motion of the Attorney for the Commonwealth, in the Juvenile and Domestic Relations Court on May 12, 2005. The Motion to *Nolle Prosequi* the Misdemeanor count was made pursuant to a plea agreement which required the Defendant to plead Guilty to the felony count of Solicitation. The plea agreement allowed the Defendant leave to appeal his conviction solely on the issue of the constitutionality of Virginia Code § 18.2-361, the underlying offense alleged to have been solicited. Subsequent to the May 12 Court date, the Defendant expressed a desire to plead Not Guilty. Counsel for the Defendant filed a Motion to Dismiss on the grounds that 18.2-361, the predicate offense of the alleged solicitation, was unconstitutional in light of recent US Supreme Court and Virginia Supreme Court decision.

A hearing was scheduled on June 14, 2005 in the Circuit Court of Colonial Heights, before the Honorable H. C. Gill Jr. Judge Gill ordered Counsel for the Defendant to present a brief on the issue of constitutionality to the Court and the Attorney for the Commonwealth within ten days. A hearing on the issue was scheduled immediately prior to trial on July 12, 2005.

QUESTION PRESENTED

Is Virginia Code § 18.2-361, Section A, a valid exercise of the police power of the state, surviving a substantive due process constitutional challenge?

STATEMENT OF THE FACTS

On May 12, 2005 Detective S.E. Early, Colonial Heights Police Department, testified in the Juvenile and Domestic Relations General District Court on May 12, 2005. She stated that the Defendant and a Juvenile met

in the parking lot of the Home Depot in Colonial Heights, Virginia. The Defendant and the Juvenile got into one vehicle and left that location. They then traveled to other locations within Colonial Heights. The testimony offered by Detective Early, and that to be proffered by the Defendant, will differ as to which locations the two reached. Detective Early testified that the defendant, at some point during the meeting, asked the Juvenile to perform oral sex on him. The Juvenile victim's birth date is February 17, 1987. The Defendant and the Juvenile are not related by blood or marriage. The Warrant against the Defendant reads: "Command, entreat, or attempt to persuade a person under the age of eighteen years to commit a felony crime, to wit; Crimes Against Nature.

LAW AND AUTHORITIES

Virginia Code Section 18.2-361 states as follows:

> *Crimes against nature*—A. If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony. Except as provided in subsection B.
>
> B. Any person who carnally knows by the anus or by or with the mouth his daughter or granddaughter, son or grandson, brother or sister, or father or mother shall be guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least thirteen but less than eighteen years of age at the time of the offense, such parent or grandparent shall be guilty of a Class three felony.

Virginia Code Section 18.2-63 states, in relevant part, as follows:

> *Carnal knowledge of child between thirteen and fifteen years* of *age*—If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years *of* age, such person shall be guilty of a Class 4 felony.
>
> *(ii) "carnal knowledge"* includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration.

Virginia Code Section 18.2-371 states, in relevant part, as follows:

> *Causing or encouraging acts rendering children delinquent, abused, etc.*—Any person 18 years of age or older, including the parent of any child, who (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild. Shall be guilty of a Class 1 Misdemeanor.

The Supreme Court of the United States has made a number of broad statements concerning the substantive reach of Liberty under the Due Process Clause. (*See Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)). The Supreme Court has recently observed, however, that the most pertinent starting point in a Due Process analysis is its decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). In *Griswold*, the Court struck down a state law prohibiting the use of contraception. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Griswold*, at 485.

After *Griswold*, the Court extended the right to engage in sexual conduct beyond the marital relationship. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Eisenstadt*,

the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The Court followed an Equal Protection analysis in reaching its conclusion. *Id.* At 454. Thc Court went on, however, to state that the law in question impaired the exercise of unmarried persons' individual rights. *Id.* The Court stated:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship . . . If the right of privacy means anything, it is the right of the *Individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* At 453.

These decisions provided the background for the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). (*See also Lawrence* at 565). *Roe*, of course, concerned a Texas law prohibiting abortion. The Court held that a woman's right to an abortion, though not absolute, deserved real and substantial protection as an exercise of liberty under the Due Process Clause. As the *Lawrence* Court pointed out, "*Roe* recognized the right of a woman to make certain fundamental decision affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* At 565.

In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court struck down a state law prohibiting the sale or distribution of contraceptives to persons under 16. This confirmed that the reasoning in *Griswold* would not be limited to the protection of married persons, or adults, but would extend to unmarried persons and even minors. *Lawrence*, 566.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision confirmed that decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education enjoy constitutional protection. *Id.* At 851.

The next major step in the Supreme Court's application of Due Process analysis occurred in *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). The issue in *Lawrence* was the validity of a Texas statute prohibiting two persons of the same sex from engaging in sexual conduct, described as sodomy. Tex. Penal Code Ann. § 21.06 (a) (2003). The Court defined the issue as whether or not individuals could engage in sodomy "in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* 564. *Lawrence* had been convicted under the statute, and had appealed his conviction in the Texas Courts. The Texas Court rejected his challenge by relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Lawrence* at 363. The U.S. Supreme Court in, *Bowers*, had upheld a Georgia statute making it a crime to engage in sodomy, regardless of the sex of the participants. *Bowers* at 189.

The *Lawrence* Court expressly overruled *Bowers* and struck down the Texas Sodomy statute. *Lawrence* at 578. The Court observed that decisions by married or unmarried persons regarding their intimate physical relationships are entitled to due process protection. The Texas statute, therefore, abridged a relationship that was within the liberty interest of persons to choose. *Id.* At 578-79. The Court made it clear that the liberty interest at issue was the right to enter and maintain a personal relationship without governmental interference. *Id.* At 567. The Court held that liberty interests protect a right

to maintain a personal relationship and that an element of that relationship is its "overt expression in intimate conduct." *Id.* At 567.

The Virginia Supreme Court recently applied *Lawrence* in *Martin v. Ziherl*, 269 Va. 35, 607 S.E. 2d 367 (2005). *Martin* involved a private tort suit alleging transmission of the herpes virus in consensual sexual contact between unmarried adults. The trial court sustained a demurer based on prior Virginia case law that barred recovery for injuries suffered in private sexual contact that was illegal under Virginia Code § 18.2-344, the former fornication statute. The Virginia Supreme Court held that the fornication statute, which prohibited sexual intercourse between unmarried persons, was unconstitutional under *Lawrence*. *Martin* at 42. The Virginia Court in *Martin* observed the following:

> "As described in Justice Stevens' rationale adopted by the Court in *Lawrence*, decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationships that are entitled to due process protection . . . . . We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2-344, like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decision, it violates the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

Virginia Code Section 18.2-361 Section A, insofar as it relates to consensual sodomy between unrelated individuals who have reached the age of consent is unconstitutional, as a violation of the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court's ruling in *Lawrence v. Texas* made it clear that sodomy, as an expression of intimacy between individuals who enjoy the capacity to consent, enjoys constitutional protection from state interference. The Court made it clear that private, consensual sexual relations between persons with the capacity to consent are an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. The reasoning of *Lawrence* compels a finding that Section A of Virginia's sodomy statute is likewise unconstitutional, inasmuch as it relates to consensual sodomy between individuals with the capacity to consent. There is nothing severable about the statute. In establishes a blanket prohibition of Sodomy for everyone, without regard to majority, marital status or other considerations. It would apply, logically, even to married individuals past the age of majority. It is precisely for this reason that the statute cannot withstand constitutional scrutiny. The statute is, therefore, *facially* unconstitutional.

The Virginia Supreme Court ruling in *Martin v. Ziherl* also compels a finding that the Virginia sodomy statute, insofar as it relates to consensual sodomy between individuals who possess to ability to consent, is an unconstitutional infringement on an individual's Due Process rights. The Virginia Court in *Martin* held that the reasoning in *Lawrence* invalidated the Virginia fornication statute, even when applied to unmarried individuals of the opposite sex. The facts of the present case are even closer to those presented in *Martin*, as

they involve a sodomy statute. It is abundantly clear, therefore, that a statute that prohibits sodomy between unrelated consenting individuals is unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

It is important to note that Virginia Code § 18.2-63 prohibits sodomy, or other sexual contact, between adults and children who are younger than 16. This puts the age of consent for sexual activity in Virginia at 16 years old. The Virginia Legislature has, therefore, made it clear that sexual contact, including sodomy and other acts, between adults and children under 16 is specifically prohibited. The complete expression of Virginia law with respect to sodomy, when an adult and a child are specifically involved, is 18.2-63. It is respectfully submitted that the Commonwealth cannot, therefore, "save" the sodomy statute with respect to the Defendant by assuming or imposing an age requirement of 18 years upon 18.2-361. The legislature has already spoken with respect to sodomy between adults and children, and the result is the prohibition of sodomy and other sexual activity between adults and children under 16 in Virginia Code Section 18.2-63.

It is also important to remember that Virginia Code § 18.2-371 prohibits only "intercourse" between adults and children between 16 and 18 years old. This is punished as a Class 1 Misdemeanor and is considered "Contributing to the Delinquency of a Minor." This statute does not prohibit sodomy between adults and children between the ages of 16 and 18. The statute specifically and solely mentions "intercourse." This is unlike § 18.2-63 which specifically mentions other sex acts including sodomy committed on children under 15.

Code Section 361, therefore, does not in any way include an age restriction, or indicate that the legislature

intended to prohibit sodomy between adults and children between the ages of 16 and 18. When Virginia Code Section 18.2-63 and Section 18.2-361 are read together, as we are compelled to do, it is clear that there was no specific prohibition against Sodomy for individuals over 16.

The statute is also unconstitutional *as applied* to the Defendant, as it prohibits constitutionally protected conduct between individuals who have reached the age of consent for such acts. The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it should be remembered, made it clear that Due Process rights can be enjoyed by minors. Virginia has established the age of consent for such acts and that age is 16. It is pure speculation as to whether a future legislative act would prohibit sodomy between an adult and a person between the age of consent (16) and adulthood (18). It is abundantly clear, however, that the Commonwealth cannot assume such a prohibition before it is written into law.

Further, it would be in violation of the *ex post facto* guarantee of the U.S. Constitution to assume an age requirement on a statute, where none now exits, and then convict the defendant on activity alleged to have occurred prior to the modification of the statute. This is especially so, when there is a current, valid statute that prohibits sodomy on a child only if the child is under 16.

There was, therefore, a valid statute commanding the defendant to refrain from sodomy on children under 16. There was also a valid statute commanding him to refrain from intercourse with persons between the ages of 16 and 18 on pain of conviction of a misdemeanor. It is respectfully submitted that the Commonwealth cannot now successfully argue that a remnant of the Sodomy statute, applying to Sodomy between adults and persons between 16 and 18, survives Constitutional scrutiny,

as it is in conflict with other statues. Application of the Virginia's Sodomy statute to the defendant would, therefore, be unconstitutional *as applied* to him, as it involved constitutionally protected activity between individuals with the capacity to consent, and would be a violation of the *ex post facto* prohibition contained in the U.S. Constitution.

CONCLUSION

The Defendant stands accused of Solicitation. The predicate offense he is alleged to have solicited is Sodomy under Section A of Virginia's Sodomy Statute. Section A of Virginia's Sodomy statute is facially unconstitutional in light of recent U.S. Supreme Court and Virginia Supreme Court rulings. It is unconstitutional because it infringes on an individual's Due Process rights. A conviction for Solicitation of Sodomy is also unconstitutional as applied to the Defendant for two reasons. One reason is that Virginia law makes it clear that 16 is the age of consent for such an act. A person over 16, therefore, enjoys the same Due Process right, in this regard, as any adult. The second reason is that "reading" an age restriction into the sodomy statute and then applying it to the Defendant's alleged actions is in violation of the *ex post facto* prohibition and is in direct conflict with other statutes. The Defendant cannot be convicted of solicitation of a legal act.

The Defendant, therefore, respectfully moves this Court to Dismiss the Felony charge of Solicitation against him.

Respectfully Submitted,

_____

William MacDonald
By Counsel

Terry R. Driskill
VA Bar No. 45326
6345 Courthouse Road
PO Box 597
Prince George, VA 23875
(804) 861-0030
(804) 861-8503 Facsimile
Counsel for the Defendant

I hereby Certify that a copy of the foregoing Brief in Support of a Motion to Dismiss was delivered by Facsimile at (804) 520-9229, to: Mr. Patrick Dorgan, Assistant Commonwealth's Attorney, City of Colonial Heights on this 21st day of June, 2005.

_____

Terry Driskill

VA. CODE §§ 19.2-71, 37 — CASE NO.

Colonial Heights
CITY OR COUNTY

☐ General District Court ☐ Criminal ☐ Traffic

☒ Juvenile and Domestic Relations District Court

HEARING DATE AND TIME

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 09/23/2004 (DATE) did unlawfully and feloniously in violation of Section 18.2-29, Code of Virginia:

command, entreat, or attempt to persuade a person under the age of eighteen years to commit a felony crime, to wit: Crimes Against Nature.

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of

Early, S. E. CHPD #602, Complainant.

01/19/2005 10:56 AM
DATE AND TIME ISSUED

☐ CLERK ☐ MAGISTRATE ☐ JUDGE

Dorsey A. Howard, Magistrate

CCRE Is Required

SOLICITATION FOR FELONY

FORM DC-312 9/94 PC (-010 4/03)

ACCUSED:

MacDonald, William Scott
LAST NAME, FIRST NAME, MIDDLE NAME

5501 Silver Fox Circle
ADDRESS/LOCATION

Prince George, VA 23875

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO.	BORN DAY	BORN YR.	HT FT.	HT IN.	WGT.	EYES	HAIR
W	M	01	01	57	6	02	229	BR	BR

SSN: SSN Redacted

Commonwealth of Virginia

WARRANT OF ARREST

FELONY Class 5

☒ EXECUTED by delivering a copy to the Accused named above on this day:

1/25/05 1307
DATE AND TIME OF SERVICE

ARRESTING OFFICER

602 CHPD 105
BADGE NO., AGENCY AND JURISDICTION

for _____
SHERIFF

Attorney for the Accused:

VA Crime Code: 50/-720/ F5

War/Sum

WARRANT OF ARREST—MISDEMEANOR (STATE) VA. CODE §§ 19.2-71, 72

Colonial Heights
CITY OR COUNTY

☐ General District Court ☐ Criminal ☐ Traffic
☒ Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 12/05/2004 (DATE) did unlawfully in violation of Section 18.2-461, Code of Virginia:

knowingly give a false report as to the commission of a crime to the Police with the intent to mislead (Juvenile Accused Falsely of Sexual Assault & Abduction).

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of Early, S. E. CHPD-1602, Complainant.

Execution by summons ☐ permitted at officer's discretion. ☒ not permitted.

01/19/2005 11:01 AM
DATE AND TIME ISSUED

☐ CLERK ☐ MAGISTRATE ☐ JUDGE
Dorsey A. Howard, Magistrate

SUMMONS (If authorized above and by serving officer)
You are hereby commanded to appear before this court located at

on ____ at ____ AM/PM

I promise to appear in accordance with this Summons and certify that my mailing address as shown at right is correct.

ACCUSED

WARNING TO ACCUSED: You may be tried and convicted in your absence if you fail to appear in response to this Summons. Willful failure to appear is a separate offense.
SIGNING THIS NOTICE DOES NOT CONSTITUTE AN ADMISSION OF GUILT.

FORM DC-314 9/94 PC (114-3-410 12/03)

CASE NO.

ACCUSED:
MacDonald, William Scott
LAST NAME, FIRST NAME, MIDDLE NAME
5501 Silver Fox Circle
ADDRESS/LOCATION
Prince George, VA 23875

To be completed upon service as Summons
Mailing address ☐ Same as above

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO.	BORN DAY	BORN YR.	HT FT.	HT IN.	WGT.	EYES	HAIR
W	M	01	01	57	6	02	229	BR	BR

SSN: SSN Redacted

Commonwealth of Virginia

WARRANT OF ARREST

CLASS 1 MISDEMEANOR

☒ EXECUTED by arresting the Accused named above on this day:
☐ EXECUTED by summoning the Accused named above on this day:
☐ For legal entities other than individuals, service pursuant to Va. Code § 19.2-76.

12/5/05 1308
DATE AND TIME OF SERVICE

S Early
ARRESTING OFFICER

#602 CHPD 105
BADGE NO., AGENCY AND JURISDICTION

for ____
SHERIFF

Attorney for the Accused:

HEARING DATE AND TIME

VA Crime Code: JUS-1812-117

War/Sum
570JA-CH20510189

WARRANT OF ARREST–MISDEMEANOR (STATE) VA. CODE §§ 19.2-71, 72

Colonial Heights
CITY OR COUNTY

General District Court ☐ Criminal ☐ Traffic

☒ Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 09/23/2004 (DATE) did unlawfully in violation of Section 18.2-371, Code of Virginia:

willfully contribute to, encourage, or cause any act or omission, or condition which rendered AMANDA JOHNSON, a child under the age of eighteen, delinquent, in need of services, in need of supervision, abused, or neglected.

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of

Early, S. E. CHPD #602, Complainant.

Execution by summons ☐ permitted at officer's discretion. ☒ not permitted.

01/19/2005 10:59 AM
DATE AND TIME ISSUED

☐ CLERK ☐ MAGISTRATE ☐ JUDGE

Dorsey A. Howard, Magistrate

SUMMONS (If authorized above and by serving officer)
You are hereby commanded to appear before this court located at

on ____ at ____ AM/PM

I promise to appear in accordance with this Summons and certify that my mailing address as shown at right is correct.

Contr. to Del of Minor

ACCUSED

WARNING TO ACCUSED: You may be tried and convicted in your absence if you fail to appear in response to this Summons. Willful failure to appear is a separate offense.
SIGNING THIS NOTICE DOES NOT CONSTITUTE AN ADMISSION OF GUILT.

FORM DC-314 9/94 PC (114:3-010 12/03)

CASE NO.

ACCUSED:
MacDonald, William Scott
LAST NAME, FIRST NAME, MIDDLE NAME
5501 Silver Fox Circle
ADDRESS/LOCATION
Prince George, VA 23875

To be completed upon service as Summons
Mailing address ☐ Same as above

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO	BORN DAY	BORN YR	HT FT.	HT IN.	WGT.	EYES	HAIR
W	M	01	01	57	6	02	229	BR	BR

SSN: SSN Redacted

Commonwealth of Virginia

WARRANT OF ARREST

CLASS 1 MISDEMEANOR

☐ EXECUTED by arresting the Accused named above on this day:
☐ EXECUTED by summoning the Accused named above on this day:
☐ For legal entities other than individuals, service pursuant to Va. Code § 19.2-76.

1510 1506
Sept
DATE AND TIME OF SERVICE

Fox (CHPD) 105
ARRESTING OFFICER

BADGE NO., AGENCY AND JURISDICTION

for
SHERIFF

Attorney for the Accused:

HEARING DATE AND TIME

VA Crime Code: FTHM-3805-MJ

War/Sum
570JA-CH2051018800