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1. The trial court improperly held that the Virginia Sodomy Law, Virginia Code Section 18.2-361, is constitutionally valid after *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), even though the statute on its face permits convictions based only on adult sexual conduct that is private, noncommercial, and consensual.

2. The trial court improperly rejected Appellant's argument that a conviction for solicitation of sodomy violates the First Amendment as the plain language of the statutory offense encompasses a substantial amount of speech that unquestionably is protected by the First Amendment.

3. The trial court violated Appellant's procedural due process rights by convicting him under a statute that the court judicially rewrote after Appellant's offense.

4. The trial court unlawfully usurped the legislative function in rewriting the sodomy statute.

5. Appellant's felony conviction, prison term, and permanent disenfranchisement violate the proscription against cruel and unusual punishment.

QUESTIONS PRESENTED

Whether a statute that permits convictions for sodomy, based only on proof of private, intimate, noncommercial sexual conduct by unmarried adults is unconstitutional on its face after *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003) and *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005)? (Assignment of Error No. 1) (App. 63, lines 12-16; App. 43-49)

Whether, under the First Amendment, the Commonwealth can prosecute and convict under a law that makes it a crime to solicit sodomy based only on the act of soliciting private, intimate, adult, noncommerical conduct? (Assignment of Error No. 2) (App. 49-51; App. 77, lines 12-21)

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Whether Appellant can be convicted of a felony, sentenced to prison, and permanently disenfranchised consistent with the Eighth Amendment and the Virginia constitution for asking someone to have sex in a public, secluded location? (Assignment of Error No. 5) (App. 57, note 8)

INTRODUCTION

Appellant Joel Singson has been wrongfully convicted of solicitation to violate a sodomy statute that is facially unconstitutional under the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003) and the Virginia Supreme Court's decision in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). Virginia Code Annotated § 18.2-361 allows convictions for constitutionally protected behavior by criminalizing certain sexual acts without any statutory requirement that the Commonwealth prove that the conduct was public, commercial, nonconsensual, and/or with minors. Therefore, the statute is unconstitutional under *Lawrence* and *Martin* and cannot be the basis of a conviction for solicitation of sodomy. Despite the Commonwealth's futile attempts to circumvent the holding of *Lawrence*, the Supreme Court instructed that statutes that criminalize sodomy in this manner are facially invalid. Indeed, *Lawrence* explicitly held that the Court should have sustained the facial challenge to the Georgia sodomy statute in *Bowers v. Hardwick*, 478 U.S. 186,106 S. Ct. 2841 (1986). The Virginia Supreme Court recognized this principle earlier this year in facially invalidating the state's fornication law in reliance on *Lawrence.* The Commonwealth may not convict Appellant for solicitation to engage in a "crime," the elements of which comprise conduct protected as a fundamental right under the liberty guarantee of the Due Process Clause.

Appellant's conviction for solicitation violates First Amendment protections as well. Even under the Commonwealth's faulty theory that certain acts of sodomy can still be charged under VA. CODE ANN. § 18.2-361, the First Amendment forbids convicting an individual for solicitation under a statute that does not distinguish between protected and

unprotected expression. The trial court, in rewriting the statute after the fact to make Appellant's speech criminal by including an element not statutorily specified, violated his First Amendment rights.

The trial court's judicial rewriting of the statute also improperly usurped the legislative function. Additionally, prosecuting and convicting Appellant under this rewritten statute violated his due process rights.

Moreover, the penalties imposed on Appellant, which include a felony conviction, prison sentence, and permanent disenfranchisement, amount to unconstitutional cruel and unusual punishment.

The trial court erred in not dismissing the case against Appellant. Appellant respectfully requests this Court to reverse the trial court's decision and correct the nonconformity with the law of the United States Supreme Court.

STATEMENT OF THE FACTS

Appellant was detained on March 20, 2003, in Virginia Beach for solicitation of sodomy. App. 12, lines 17-21; App. 18, lines 8-11. He was later indicted for solicitation of a felony. App. 3; VA. CODE ANN. § 18.2-29 ("Any person who commands, entreats, or otherwise attempts to persuade another person to commit a felony other than murder, shall be guilty of a Class 6 felony."). The underlying felony charge was sodomy. App. 3; 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, he or she shall be guilty of a Class 6 felony . . .").

It is undisputed that Appellant had a discussion in a public restroom with a man who turned out to be an undercover police officer about having oral sex. App. 17, lines

6-23; App. 32, lines 8-14. The dispute at the preliminary hearing before the Circuit Court concerned the officer's testimony that Appellant intended the act to occur in public and Appellant's contention that he neither had nor indicated any such intention. App. 17, line 22 - 18, line 7; App. 32, lines 15-24.

STATEMENT OF THE CASE

Appellant moved to dismiss the charges against him. App. 2, 5. The matter was briefed and came on for oral argument on October 29, 2003. App. 43, 61. The defense raised the argument that Section 18.2-361, like all sodomy laws encompassing consensual, private conduct by adults, was invalidated by *Lawrence v. Texas*. App. 63, lines 12-16; App. 43-49. The defense also argued that the solicitation of sodomy offense is unconstitutionally overbroad, and that judicially narrowing the statute to prosecute Appellant would violate his First Amendment and due process rights and would usurp the legislative function. App. 49-51; App. 51-53; App. 67, line18 - 69, line 6; App. 77, line 12 - 78 line 13. The court denied the motion on the basis that the *Lawrence* holding was limited, in its view, to private conduct in the home and this case concerns alleged public conduct. App. 93; App. 79, line 4 - 80, line 11. The Court did not address the defense's other arguments. *Id*. At the time of the Court's ruling, the Virginia Supreme Court had not issued its ruling in *Martin v. Ziherl*, holding that *Lawrence* mandated a finding that Virginia's fornication law was facially unconstitutional.

At the hearing on the motion to dismiss, the trial court stated that it had "resolved the credibility questions in favor of" the undercover police officer. App. 78, line18 - 79, line3. Subsequent to that hearing, Appellant elected to enter a conditional plea of guilty, preserving his right to challenge the trial court's legal conclusions that the sodomy statute

remains valid and that a prosecution for solicitation of sodomy was constitutionally permissible. App. 84, lines 18-25. The Circuit Court convicted Appellant of the felony of solicitation of sodomy, and sentenced him to three years' imprisonment, with two-and-a-half years suspended. Singson appeals this conviction. App. 105, line 17 – 106, line 4.

Singson timely petitioned this Court for an appeal. The Petition for Appeal was granted by a three-judge panel on March 18, 2005. The same day, this Court issued an order consolidating this case for the purposes of argument with the appeal of Andy Joe Tjan, Record No. 3221-03-1.

ARGUMENT

I. VIRGINIA'S SODOMY STATUTE IS A NULLITY; THERE CAN BE NO PROSECUTION UNDER THAT STATUTE.

A. *Lawrence* Facially Invalidates the Sodomy Statute.

The Supreme Court's decision in *Lawrence* invalidated the statute before it and all remaining consensual sodomy laws in this country. This Court should reverse Appellant's conviction because Virginia's sodomy law has been declared unconstitutional by our nation's highest court. There is no sodomy law to enforce, and solicitation of sodomy is not a crime in Virginia. It is immaterial to the present case whether Virginia lawfully could enforce statutes that include an additional element of public conduct. This prosecution involves no such law, but only a law intruding unacceptably, and fatally, on personal liberty.

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 rather than equal protection grounds to effect

this exact result and avoid the very arguments raised here about the continuing validity of these laws:

> 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 as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres . . . The stigma this [misdemeanor] criminal statute imposes, moreover, is not trivial.[1]

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 statutes 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). Throughout its analysis, the Court addressed the constitutional deficiencies of *laws* targeted at intimate sexual behavior. *See, e.g., id*. at 567, 123 S. Ct. at 2478 ("*The laws* involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences. . . .") (emphasis added)); *id*. at

[1] Notably, *Lawrence* held that the relatively minor fines and penalties under the Texas statute – a Class C misdemeanor -- imposed an intolerable burden on the petitioners' liberty interest. Virginia's statute, by contrast, makes both sodomy and solicitation of sodomy a felony punishable by up to five years in prison. VA. CODE ANN. §§ 18.2-10, 18.2-29, 18.2-361. Singson was convicted of a felony and sentenced to three years, with a requirement that he serve six months in prison.

571, 123 S. Ct. at 2480 ("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."). The Court recognized that the deficiency of these laws is their threat to control and demean the sexual intimacies of adults who are free to exercise their liberty to engage in such conduct in their relationships without government interference.

The aim and reach of the Texas statute was unacceptable, and the law was unsalvageable. Thus, the Court concluded its *Lawrence* decision in unmistakable, 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 (emphasis added). Justice O'Connor, concurring on Equal Protection grounds, expressly recognized that the majority opinion was based on the constitutionality of the *statute*: "I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional." *Id*. at 579, 123 S. Ct. at 2484 (O'Connor, J., concurring).

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 dealt a fatal blow to all consensual sodomy statutes. Virginia's sodomy law is substantively identical to the Georgia law that, per *Lawrence*, should have been held facially unconstitutional in 1986, long before Appellant's arrest.[2] *Bowers* was a declaratory relief action raising a facial challenge to the constitutionality of Georgia's

[2] *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…").

sodomy statute, which applied to all couples regardless of gender. *Bowers*, 478 U.S. at 188, 106 S. Ct. at 2842-43; *See also id*. at 198, 106 S. Ct. at 2847-48 (Powell, J., concurring); *Lawrence*, 539 U.S. at 566, 123 S. Ct. at 2477 ("Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid."). The *Lawrence* Court did not distinguish *Bowers* based on particular facts or the different reach of the two laws, nor did *Lawrence* hold that *Bowers* is only now wrong, given the evolution of law. *Compare Atkins v. Va.*, 536 U.S. 304, 315-16, 122 S. Ct. 2242, 2249 (2002) (forbidding execution of the mentally retarded, citing the "national consensus [that] has developed against" such executions since the Court's prior decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989)). Instead, the Court flatly stated that *Bowers* was wrong in 1986: "*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.[3]

Like Georgia's sodomy prohibition, the text of Virginia Code Annotated Section 18.2-361 prohibits all acts of sodomy, even if committed in private between consenting adults with no money involved. The statute provides simply: "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. § 18.2-361A. There is no element in VA. CODE ANN. § 18.2-361 requiring that the sex be forcible, commercial, public, or with a minor. Virginia has crimes

[3] The Court explained its disapproval of *Bowers* by citing that Court's "failure to appreciate the extent of the liberty interest at stake" and fundamental mischaracterization of the history of the country's jurisprudence on the subject of consensual sex. *Lawrence*, 539 U.S. at 566-70, 123 S. Ct at 2478-80.

encompassing each of these elements, but Appellant was not charged or convicted under any of those statutes.[4]

In the wake of *Lawrence*, several state Attorneys General, including Virginia's, have publicly acknowledged, either to the press or in court filings, 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 A1 ("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."); 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. Supreme Court ruling issued last month has already nullified both [sodomy and premarital sex] laws").

Lawrence's ruling that sodomy statutes are facially unconstitutional is explicit, and the Commonwealth's contention that Virginia's law survives *Lawrence* is untenable. The specific contention that *Lawrence* applies only to conduct within the home is also contrary to the plain language of the decision. *Lawrence* repeatedly emphasizes that the liberty interest in personal autonomy in intimate matters is not defined in spatial terms or protected only within one's home. *Lawrence*'s very first paragraph dispels the notion that the liberty interest is so limited: "And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds." *Lawrence*, 539 U.S. at 562, 123 S. Ct. at 2475.

[4] *See* VA. CODE ANN. §§ 18.2-346 (prostitution); 18.2-387 (indecent exposure); 18.2-63 (carnal knowledge of minor); 18.2-67.1 (forcible sodomy).

The Court rejected the notion that the important liberty interest was limited to a confined space, such as one's home. Rather, the protection of "private lives" and "intimate and personal choices" is much broader. "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." *Id.*

B. The Sodomy Statute Must Be Declared Unconstitutional Under the Virginia Supreme Court's Holding in *Martin v. Ziherl*.

The error of the trial court was made clear by the Virginia Supreme Court's later ruling in *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). The *Martin* court ruled that the fornication statute must be declared unconstitutional in the wake of *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). The *Martin* court's holding follows Appellant's argument here: courts after *Lawrence* must declare the invasive fornication and sodomy statutes unconstitutional, but need not address the Legislature's power to pass statutes addressed specifically to conduct that is commercial, truly public, nonconsensual, or involving minors.

In *Martin*, the trial court made the same mistake the lower court here made, holding "that *Lawrence* did not 'strike down'" the existing, broad fornication law. *Martin*, 269 Va. at 38, 607 S.E.2d at 368. *Martin* reversed and held flatly "that Code § 18.2-344 is unconstitutional . . . " 269 Va. at 42, 607 S.E.2d at 371. The 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. The *Martin* court recognized that the Virginia fornication law, like the Texas

sodomy law, was an unconstitutional "attempt by the state to control the liberty interest which is exercised in making these personal decisions." *Id*. 269 Va. at 42, 607 S.E.2d at 370.

Martin recognized the concerns raised by the Commonwealth here but still struck down the broad fornication statute. The 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." *Id*. 269 Va. at 42-43, 607 S.E.2d at 371. Similarly, this case does not concern the Legislature's police power to regulate truly public sodomy by passing a properly drawn statute; indeed the indecent exposure statute is already addressed to public conduct. However, *Martin* makes clear that a broad statute that permits conviction based on constitutionally protected sexual activity must be struck down.

C. Appellant May Not Be Prosecuted Under a Statute Declared Facially Invalid.

Because the Supreme Court has decisively ruled that sodomy statutes such as Virginia's are facially invalid, Appellant should never have been prosecuted under it. *Fisher v. King*, 232 F.3d 391, 395 n.4 (4th Cir. 2000) ("If a facial challenge is upheld, the sovereign cannot enforce the statute against anyone"); *see generally*, *Robinson v. Commonwealth*, 217 Va. 684, 687, 232 S.E.2d 742, 745 (1977); *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988) (finding evidence supporting specific intent to engage in prostitution but invalidating conviction under facially unconstitutional law).

Given that there is no valid sodomy statute in Virginia, there can be no crime of solicitation to commit sodomy. *See Pedersen v. City of Richmond*, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979) ("It would be illogical and untenable to make solicitation of a non-criminal act a criminal offense."); *see also People v. Uplinger*, 58 N.Y.2d 936, 938, 460 N.Y.S.2d 514, 515 (N.Y. 1983) (invalidating statute prohibiting loitering for sodomy; "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose."). The trial court erred in not dismissing the case against Appellant. The Court should correct this error of law by reversing Appellant's conviction and dismissing this case.

II. EVEN IF VIRGINIA'S SODOMY STATUTE HAD SURVIVED *LAWRENCE*, THE SOLICITATION TO COMMIT SODOMY OFFENSE IS OVERBROAD, AND IT WAS UNCONSTITUTIONAL TO ADD AN UNWRITTEN ELEMENT TO THE STATUTE TO JUSTIFY PROSECUTING APPELLANT.

This case should be disposed of on the straightforward ground that the sodomy statute has been declared facially unconstitutional. However, even if this Court were to disagree and hold that the statute survives *Lawrence*, it was unconstitutional for the trial court to allow the Commonwealth to prosecute Appellant for the offense of solicitation of sodomy.[5]

[5] As used herein, "solicitation of sodomy offense" refers to a charge under VA. CODE ANN. § 18.2-29, which makes it a felony to attempt to persuade another to commit a felony, in this case, to violate VA. CODE ANN. § 18.2-361, which makes sodomy a felony.

A. The Solicitation of Sodomy Offense Is Unconstitutionally Overbroad.

The solicitation to commit sodomy offense is unconstitutional because a law "is overbroad if it deters constitutionally protected conduct as well as unprotected conduct." *Coleman*, 5 Va. App. at 465, 364 S.E.2d at 243. It is now resolved that private, noncommercial sodomy between unmarried consenting adults is constitutionally protected. It is undisputed that speech requesting legal acts is also protected. *See Pedersen*, 219 Va. at 1064-65, 254 S.E.2d at 97-98. It is also undisputed that Virginia's solicitation and sodomy statutes on their face criminalize such protected speech. This criminalizing of all requests for sodomy is unconstitutional. "Criminal statutes must be scrutinized with particular care [citation]; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 2508 (1987).

A statute proscribing solicitation targets speech and thus can be upheld only if it passes strict scrutiny under the First Amendment, *i.e.*, if it is narrowly tailored to serve a compelling governmental interest. *LaRose v. State*, 820 N.E.2d 727, 730 (Ind. Ct. App. 2005); *People v. Arndt*, 351 Ill.App.3d 505, 523, 814 N.E.2d 980, 996 (2004); *State v. Turner*, 156 Ohio App.3d 177, 185-86, 805 N.E.2d 124, 131 (2004). This Court followed the same approach in applying a First Amendment overbreadth analysis to the Commonwealth's stalking statute and to a Richmond loitering ordinance. *Parker v. Commonwealth*, 24 Va. App. 681, 691, 485 S.E.2d 150, 155 (1997); *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988). The ordinance failed in *Coleman* because it prohibited not only criminal activity but also legal hitchhiking and window-

shopping. *Id.*, 5 Va. App. at 467, 364 S.E.2d at 244. The stalking statute survived review only because the Court held that the legislature had mandated the finding of elements that ensured that constitutionally-protected speech was not proscribed. *Parker*, 24 Va. App. at 691, 485 S.E.2d at 155 (the statute does not "compromise the First Amendment rights" because it "permits all communications between individuals that are conducted in a time, place and manner that do not intentionally or knowingly cause the receiver of the message reasonably to fear for his or her physical safety.").

Last year, the Supreme Court emphasized the importance of defending protected speech in affirming a preliminary injunction against the enforcement of the Child Online Protection Act. *Ashcroft v. Am. Civil Liberties Union*, 124 S. Ct. 2783 (2004). Despite the plainly salutary purpose of the legislation, the Court enjoined its enforcement due to the criminal penalties that the statute, by its words, would impose upon protected speech. "A statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 2791. Courts rigorously scrutinize content-based speech restrictions "to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished." *Id.*

Ashcroft reaffirms a longstanding principle that a law prohibiting a substantial amount of protected speech will be struck down, irrespective of whether the specific prosecution serves appropriate goals or whether the person before the court engaged in

speech that legitimately can be criminalized.[6] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875, 117 S. Ct. 2329, 2346 (1997) ("the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."); *Bolles v. People*, 189 Colo. 394, 397, 541 P.2d 80, 82 (1975) (striking down statute that permissibly could punish obscene communication, "[y]et the crucial factor is that this statute could also be used to prosecute for communications that cannot be constitutionally proscribed."); *U.S. ex rel. Holder v. Cir. Ct. of 17th Judicial Cir., Winnebago County, Ill.*, 624 F. Supp. 68, 71 (N.D. Ill. 1985) ("While this court has no doubt the State of Illinois could prohibit the conduct complained of pursuant to a more narrowly drafted statute, this court finds the instant statute was not sufficiently restricted."); *People v. Boomer*, 250 Mich. App. 534, 541-42, 655 N.W.2d 255, 259 (2002) (". . . the Legislature, if so inclined, could enact a properly

[6] The United States Supreme Court and Virginia courts have repeatedly recognized that a person like Singson has standing to assert an overbreadth challenge under the First Amendment that a statute chills speech; this would be so regardless of whether he even argues that his own speech falls within a protected zone. *Forsyth County, GA v. Nationalist Movement*, 505 U.S. 123, 129, 112 S. Ct. 2395, 2401 (1992) ("This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court."); *Bigelow v. Virginia*, 421 U.S. 809, 815-16, 95 S. Ct. 2222, 229-30 (1975); *Perkins v. Commonwealth*, 12 Va. App. 7, 11-12, 402 S.E.2d 229, 232 (1991); *Coleman*, 5 Va. App. at 463, 364 S.E.2d at 242 ("…litigants may challenge a statute on first amendment grounds even when their own speech is unprotected."). An overbreadth challenge is an exception to general rules of standing. For example, Virginia courts have both held that a defendant in a sodomy case could not assert the *privacy* rights of others, but never held that the defendant lacked standing to bring an overbreadth challenge under the First Amendment. *See Pedersen*, 219 Va. at 1066, 254 S.E.2d at 99; *DePriest v. Commonwealth*, 33 Va. App. 754, 757-58, 537 S.E.2d 1, 2 (2000). Neither *Pedersen* nor *DePriest* casts doubt on Singson's right to challenge the solicitation of sodomy statute as overbroad in violation of the First Amendment. *See Pedersen*, 219 Va. at 1068, 254 S.E.2d at 99-100; *DePriest*, 33 Va. App. at 757-58, 537 S.E.2d at 2. *DePriest* itself explicitly states that there was no First Amendment challenge there, and "[t]his is not a First Amendment case." 33 Va. App. at 762, 537 S.E.2d at 4.

drawn statute to protect minors from such exposure. . . . Here, we find it unquestionable that [the statute], as drafted, reaches constitutionally protected speech, and it operates to inhibit the exercise of First Amendment rights."); *Wurtz v. Risley*, 719 F.2d 1438, 1442 (9th Cir. 1983) ("We reiterate that Wurtz's behavior is an extremely serious matter that Montana has the right to outlaw through a narrowly drawn or narrowly construed statute. . . . however, Montana has acted far more broadly than that. . . . A statute that violates this principle by substantially abridging protected expression is invalid on its face and cannot be enforced against anyone.[7]

Several courts that have invalidated overbroad restrictions on speech have pointed out that the government had other means at its disposal to address its stated concerns. *Ashcroft*, 124 S. Ct. at 2794 (" . . . the Government in the interim can enforce obscenity laws already on the books."); *Coleman*, 5 Va. App. at 467, 364 S.E.2d at 244 (voiding overbroad ordinance on first amendment and due process grounds, noting that "[t]here are already in place statutes and ordinances prohibiting" the type of conduct that the government intended to target); *NAACP Anne Arundel County Branch v. Annapolis*, 133 F. Supp. 2d 795, 812 (D. Md. 2001) ("It is unclear, however, what the ordinance would add to the drug and loitering laws already in place . . ."); *N. Va. Chapter, Am. Civil Liberties Union v. City of Alexandria*, 747 F. Supp. 324, 329 (E.D. Va. 1990) ("Although

[7] *Accord City of Everett v. Moore*, 37 Wash. App. 862, 865-66, 683 P.2d 617, 619 (1984) (even though government "unquestionably has a legitimate and substantial interest in protecting its residents from fear and abuse at the hands of persons who employ the telephone to torment others," ordinance was struck down because it "does not have the 'precision of regulation' required by the First Amendment.") *quoting NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340 (1963).); *People v. Klick*, 66 Ill.2d 269, 273-74, 362 N.E.2d 329, 331 (1977) (even though the state has a "legitimate interest in protecting the privacy of citizens from certain types of perverse telephone calls," the court struck down a statute that was "not limited to only these or similar types of unreasonable conduct. . . .").

the court respects Alexandria's efforts to curb drug trafficking on city streets, it may not do so at the expense of chilling protected conduct and expression."); *see also Squire v. Pace*, 516 F.2d 240 (4th Cir. 1975) (defendant conceded that he could be prosecuted for trespass but successfully challenged his conviction under disorderly conduct statute that court held to be unconstitutionally overbroad under the First Amendment). No challenge is raised here either to Virginia's indecent exposure statute (VA. CODE ANN. § 18.2-387) or to the ability of the legislature to take reasonable action against truly public sex acts. This seems to be the area in which Virginia wants to preserve the right to regulate, and obviously it has alternative routes to do so. Its attempt to save the sodomy statute is unnecessary to serve its stated ends.

In sum, even if the sodomy statute were held not to be facially invalid, this Court should reverse the holding that Singson could be prosecuted under the unconstitutionally overbroad offense of solicitation to commit sodomy.

B. The Trial Court Erred In Rewriting The Statute In Order To Prosecute Singson.

The Commonwealth argues that the statute's constitutional infirmity can be ignored and the overbroad statute saved by judicial addition of elements to the crime of soliciting sodomy that are found nowhere in the statute. All the Commonwealth requires for conviction under the legislated language of its sodomy statute is a showing of *constitutionally protected conduct*. The "element" that the government says permits it to prosecute – the alleged intention to engage in sodomy in a public setting – is simply not an element of the statutory offense. The Commonwealth proposes to add a locational (*i.e.*, "public") element to the offense via prosecutorial discretion, law enforcement discretion or judicial action. This is especially problematic here in that the sworn

testimony at the pretrial hearings disputed the location of the proposed conduct, leaving Singson's fate to turn on proof either of constitutional conduct, or of an additional, disputed factor that forms no part of the announced offense. Rewriting the statute to prosecute Singson (1) violates the First Amendment overbreadth doctrine; (2) improperly usurps the legislative function; and (3) violates Singson's due process rights.

1. Courts May Not Save a Statute That Is Unconstitutionally Overbroad Under the First Amendment By Rewriting It.

Where, as here, a statute is unconstitutionally overbroad under the First Amendment, the remedy is to strike it down and permit the legislature, should it choose, to draft appropriate legislation addressing the needs of the citizenry. The very essence of the overbreadth doctrine is the facial invalidation of laws that unconstitutionally chill protected speech. "Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S. Ct. 3028, 3036 (1989). The solicitation of sodomy statute's "constitutionality cannot 'turn upon a choice between one or several alternative meanings.'" *Houston*, 482 U.S. at 468, 107 S. Ct. at 2513. "If the statute or ordinance violates the federal or the Virginia constitution, however, and judicial severance of the invalid sections is impossible, it will fail and any conviction based thereon must also fail." *Coleman*, 5 Va. App. at 462, 364 S.E.2d at 241. The courts have applied this principle consistently, invalidating the statute and leaving it to legislative bodies to devise an appropriate solution. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258, 122 S. Ct. 1389, 1406 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571, 121 S. Ct. 2404, 2430 (2001)

("The obvious overbreadth of the outdoor advertising restrictions suffices to invalidate them.") (Kennedy, J., concurring); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875, 117 S. Ct. 2329, 2346 (1997); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 131, 109 S. Ct. 2829, 2839 (1989); *City of Houston v. Hill*, 482 U.S. at 467, 107 S. Ct. at 2512 ("We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid."); *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 577, 107 S. Ct. 2568, 2573 (1987); *Coleman*, 5 Va. App. at 462, 364 S.E.2d at 241.

The public cannot be left to guess what the statute's reach is, as the effect is to curtail highly protected speech to avoid prosecution. "Content-based prohibitions [on speech], enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 124 S. Ct. at 2788.

2. The Court Should Not Usurp the Legislative Function of Determining Whether and How to Proscribe Public Sex Acts.

The Commonwealth asks this court to rewrite the statute to add a "public conduct" element that is found nowhere in the solicitation of sodomy statute. The sweeping language of the solicitation of sodomy statute is "plain and its meaning unambiguous." *City of Houston v. Hill*, 482 U.S. at 468, 107 S. Ct. at 2513. Anyone trying to persuade another to commit sodomy – even in private – falls within the statute's broad sweep. VA. CODE ANN. §§ 18.2-29; 18.2-361. There is simply no principled way to excise the constitutionally offensive provisions. A court would have to add new language to narrow its scope, not simply interpret existing language. The trial court

should have declined this invitation and affirmed the invalidity of a statute that trounces protected speech interests.

The Commonwealth asked the trial court to interfere with the legislative process by rewriting a criminal statute. "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *U.S. v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 2902 (1985) (refusing to limit a statute to avoid a First Amendment question). In the First Amendment context, the Supreme Court has repeatedly held that a court "may impose a limiting construction on a [criminal] statute only if it is 'readily susceptible' to such a construction." *Reno*, 521 U.S. at 884, 117 S. Ct. at 2350 (1997) (citation omitted).

New York's highest court faced the same situation after it declared the state's sodomy statute unconstitutional as applied to private, consensual, adult behavior in 1980. *See Uplinger*, 58 N.Y.2d at 937, 447 N.E.2d at 62, 460 N.Y.S.2d at 515. The court then held that a state law banning loitering for the purpose of soliciting sodomy was unconstitutional. The court noted that a "properly drafted" statute addressing solicitations for public acts would present a different question. *Id.*

Virginia case law 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.' [citation]." *Holsapple v. Commonwealth*, 39 Va. App. 522, 534-35, 574 S.E.2d 756, 762 (2003). Courts apply this principle with greater force to 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 as requested, 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.' [citation]. We thus reject appellants' invitation to judicially graft into the statute an unwritten provision . . .").

Virginia is in accord with federal and state courts that refuse to "substitute the judicial for the legislative department of the government" in ruling upon criminal laws. *Reno*, 521 U.S. at 885 n.49, 117 S. Ct. at 2351; *see also City of Houston v. Hill*, 482 U.S. at 469, 107 S. Ct. at 2513-514 (rejecting the government's attempt to do "a remarkable job of plastic surgery upon the face of" the law to save it). "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *U.S. v. Albertini*, 472 U.S. at 680, 105 S. Ct. at 2902; *see also State v. Dronso*, 90 Wis.2d 110, 115-16, 279 N.W.2d 710, 713 (1979) (striking down statute as overbroad on First Amendment grounds; rejecting state's request to limit "intent to annoy" to mean obscenity, threats of harm, or extortion, because it would be "judicial legislation in its worst form."); *People v. Klick*,

66 Ill.2d 269, 274, 362 N.E.2d 329, 331 (1977) (same; "[t]o adopt the State's position, it would be necessary to supply an additional provision to the otherwise clear and unambiguous language of section 26--1(a)(2). This we cannot do."); *State v. Richardson*, 307 N.C. 692, 693-94, 300 S.E.2d 379, 381 (1983) (refusing to amend judicially the state's prostitution statute to include acts other than vaginal intercourse; "if the legislature wishes to include within [the statute] other sexual acts such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since [it] is a criminal statute."). The current Virginia solicitation statute and sodomy statute present a similar situation where neither the courts nor law enforcement can summarily add a 'locational' element to an offense when the legislature has chosen not to do so.

Nor can the Court rely on the argument that limiting the solicitation statute comports with a legislative intent to criminalize only public sodomy. Essentially, the Commonwealth's argument is that the legislature wanted to ban all sodomy, so this Court should save as much of that prohibition as possible in applying the solicitation law. However, the legislature's desire to condemn all sodomy is an improper government interest. *Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484. If the Commonwealth is arguing that the legislature had a specific interest in condemning *public* sodomy, the facts are to the contrary, including the legislature's refusal to pass two bills in 2002 (HB 1081 and HB 1140) that would have decriminalized private sodomy. The legislature has addressed indecent exposure but did not criminalize any *particular* public sexual act -- including vaginal intercourse or sodomy -- to any greater extent beyond the indecent exposure law. *Compare* TENN. CODE ANN. § 39-13-511; UTAH CODE ANN. § 76-9-702.

The Supreme Court of Florida faced a similar situation regarding a statute proscribing insurance solicitation. *State v. Bradford*, 787 So.2d 811 (Fla. 2001). The court held that solicitations without fraudulent intent were protected by the First Amendment, and that the statute in question was invalid "because the Legislature did not include" the element that made the solicitation criminal." *Id*. at 814. *Bradford* refused to engage in the judicial rewriting of an unconstitutional statute. The court held that "the plain language of the statute clearly and unambiguously indicates that intent to defraud is simply not an element of the offense as established by the Legislature. To this end, we have held that '[w]here the language of the statute is plain and unambiguous, there is no need for judicial interpretation.'" *Id.* at 817 (citation omitted).

This case is even stronger than *Bradford*. There, the court relied on the legislature's mere failure to amend the statute to include fraudulent intent as an element. Here, not only has an element of public conduct remained absent, but the Virginia legislature and the courts specifically have rejected efforts to limit the sodomy statute to non-private conduct. *See Paris v. Commonwealth*, 35 Va. App. 377, 385, 545 S.E.2d 557, 561 (2001) ("The statute [Va. Code § 18.2-361] 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.").[8] In short, the Legislature did not want to do what the Attorney General now asks this court to do. *See Bradford*, 787 So.2d at 818 ("the

[8] In 2002, the Legislature failed to pass two bills (HB 1081 and HB 1140) that would have changed the sodomy law to apply only to sex with minors while adding a separate offense for public sodomy.

Legislature, having had ample opportunity to do so, did not include fraudulent intent as an element of the offense . . .").[9]

By contrast, in the other contexts in which the Commonwealth claims that sodomy still may be proscribed – when it is commercial, nonconsensual, or with minors -- the legislature made a specific determination as to how sodomy will be treated in statutes separate from the general, overbroad sodomy law. VA. CODE ANN. § 18.2-346 (treating all prostitution acts, including sodomy, the same); VA. CODE ANN. § 18.2-67.1(A)(2) (creating crime of forcible sodomy where consent is lacking); VA. CODE ANN. § 18.2-67.1(A)(1) (creating crime of forcible sodomy where victim is under thirteen). In contrast, Virginia does not have a law prohibiting solicitation to engage in sodomy in "public," and it is not the Court's role to enact one.

3. Prosecuting Singson Under a Judicially Rewritten Statute Would Violate His Due Process Rights.

The prosecution of Singson under a judicially rewritten law would violate not only the First Amendment, but also procedural due process principles. Courts emphasize that a criminal statute must be definite if a defendant is to be prosecuted constitutionally

[9] This case does not present the issue of whether, consistent with due process, the Commonwealth can convict under a statute that was narrowed judicially prior to the offense. Of course, no court had narrowed Virginia's sodomy statute prior to Singson's arrest or the Lawrence decision. Prior to Lawrence, the federal and state courts in Virginia interpreted Section 18.2-361 to apply even to private, consensual, adult conduct. In 1975, a three-judge federal court in Richmond held that Virginia could, to promote "morality and decency," ban sodomy "even when committed in the home." *Doe v. Commonwealth's Att'y for City of Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975). This decision was summarily affirmed by the United States Supreme Court. 425 U.S. 901, 96 S. Ct. 1489 (1976). Ten years later, the Supreme Court held sodomy laws to be constitutional in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986). The Virginia courts never held that VA. CODE ANN. § 18.2-361 was limited to any particular set of facts, but rather applied the statute as written. *See, e.g., Paris v. Commonwealth*, 35 Va. App. at 385, 545 S.E.2d at 561.

for its violation. *See Sharp v. Commonwealth*, 213 Va. 269, 271, 192 S.E.2d 217, 218 (1972) ("We have often said that a penal statute must be definite and certain to be valid, and it denies due process of law if it is vague or ambiguous."); *Squire*, 516 F.2d at 241 (statute violated the "constitutional value" because "it did not inform a defendant what conduct is proscribed"); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d at 493-94 (E.D. Va. 1999) ("…where a statute imposes criminal penalties, the consequences of imprecision are more severe and the standard of certainty that due process requires is correspondingly higher."). Here, the Commonwealth is prosecuting under a law that aims directly at protected speech about conduct that has been definitively declared to be a constitutional right. Defendants are left to guess how the statute may be applied to them; this Court should not countenance such an approach. *See Reno*, 521 U.S. at 885 n.49, 105 S. Ct. at 2351 n.49. ("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 and say who could be rightfully detained, and who should be set at large.").

This problem has special force here, in that the alleged "public" nature of the offense was disputed. Conviction for "public" acts under this law could well turn on judicial definitions, which could vary widely. Nowhere in the Virginia Code is 'a private place' or 'a public place' defined. Absent such a legislative definition to provide guidance in these matters, citizens are left with inconsistent decisions by the courts and arbitrary enforcement by the police. Individuals have the right to know with some degree of certainty when their conduct may offend the law by transgressing elements set forth in that law. Courts have repeatedly declined invitations, particularly when criminal liability is at stake, to add or subtract elements of a statute, or to rewrite overbroad statutes that

regulate protected conduct. Notably, several courts have found that a stall in a bathroom, the alleged site of the solicitation activity here, does not constitute a public place, as the Commonwealth contends. *See Bielicki v. Super. Ct. of L.A. County*, 57 Cal.2d 602, 609, 371 P.2d 288, 292 (1962) (conviction for oral sex in a toilet stall overturned, stating the police have no authority "to invade the personal right of privacy of the person occupying [a toilet] stall" and condemning police toilet spies as abusive police tactics); *see also Brown v. Md.*, 3 Md. App. 90, 238 A.2d 147 (1968); *People v. Dezek*, 107 Mich. App. 78, 308 N.W.2d 652 (1981); *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970); *Buchanan v. Tex.*, 471 S.W.2d 401 (Tex. Crim. App. 1971).

III. THE PENALTIES IMPOSED ON APPELLANT, INCLUDING A FELONY CONVICTION, CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellant is accused of soliciting to engage in a consensual sex act in a public place. For better or worse, this type of activity happens frequently between all types of couples, be it in drive-in theaters or so-called lovers' lanes. Appellant's conviction of a felony, with its prison sentence and permanent disenfranchisement, is a drastic sanction for his verbal solicitation of intimacy. These penalties run afoul of the proscription against cruel and unusual punishment in the Eighth Amendment to the federal constitution and Article I, Section 9 of the Virginia Constitution. Courts must examine punishment to ensure that it is not disproportionate to the offense so as to violate constitutional principles. *Ewing v. Cal.*, 538 U.S. 11, 23, 123 S. Ct. 1179, 1186-87 (2003) (plurality opinion); *id.*, 538 U.S. at 33, 123 S. Ct. at 1192 (Stevens, J., dissenting).[10] Even if Appellant actually had engaged in sexual conduct in a stall that

[10] In *Ewing*, seven of the nine justices agreed that the Eighth Amendment contains a proportionality principle.

was nonetheless considered public, instead of simply engaging in speech, he would have been committing the misdemeanor of indecent exposure, which constitutionally cannot warrant disenfranchisement. *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 973-76 (S.D. Miss. 1995).[11]

Arguments that sodomy punishments were cruel and unusual have been rejected in cases pre-dating *Lawrence*, but that decision's recognition of a protected liberty interest in one's sexual choices casts those earlier cases into question. *See, e.g.*, *DePriest*, 33 Va. App. at 764, 537 S.E.2d at 5-6. Courts applying the "expansive language" of the Eighth Amendment face "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (striking down juvenile death penalty) (citation omitted). The Eighth Amendment also requires a court to employ more careful scrutiny of government action that threatens the exercise of a fundamental right. *See Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 339 (3d Cir. 1987). *DePriest*'s rejection of the cruel and unusual punishment argument was rendered when it was still thought that even private, consensual sodomy could be criminalized pursuant to *Bowers*. What was once thought a legitimate punishment can now be seen as an unconscionable and draconian infringement of liberty. "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution

[11] The Commonwealth responded to this argument in the Petition for Appeal by arguing that it was not raised below. That is incorrect, as Singson specifically briefed this argument below (App. 57). An argument raised in briefing to the trial court is preserved for appeal. VA. CODE ANN. § 8.01-384; *Chawla v. BurgerBusters, Inc.*, 499 S.E.2d 829, 255 Va. 616 (1998).

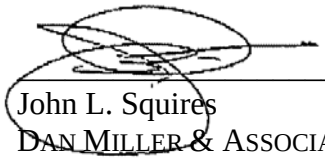
endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579, 123 S. Ct. at 2484.

CONCLUSION

The statute under which Appellant was charged violates the United States Constitution and is no longer enforceable. Appellant cannot be charged or convicted for soliciting actions that can no longer be criminalized, nor may the courts validly "save" the sodomy statute by rewriting it. This Court should reverse the trial court's denial of Singson's Motion to Dismiss.

Dated: April 27, 2005

Respectfully Submitted,
JOEL DULAY SINGSON



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CERTIFICATE

(Va. Sup. Ct. Rule 5A:19(f))

Counsel for appellant Joel Singson, hereby certifies:

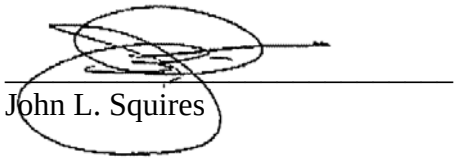
1. The appellant in this action is Joel Dulay Singson. Counsel for the appellant in this action is John L. Squires, Esq., Dan Miller & Associates, P.O. Box 25691, Richmond, VA 23260, (804) 355-9070; and Gregory R. Nevins, Esq., Lambda Legal Defense and Education Fund, Inc., 1447 Peachtree Street N.E. #1004, Atlanta, GA 30309, (404) 897-1880. The appellee in this case is the Commonwealth of Virginia. Counsel for the appellee is William E. Thro, State Solicitor General, 900 East Main Street, Richmond, VA 23219, (804) 786-2436.

2. This date, seven (7) copies of the foregoing Brief of Appellant and Appendix were hand-filed with the Clerk of the Court of Appeals of Virginia, and a copy of each were sent, via U.S. Mail, postage prepaid, to the above-listed counsel for the appellee.

3. Counsel for appellant has been retained privately.

4. Counsel for appellant desires oral argument.

Dated: April 27, 2005



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