

11-7427

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM SCOTT MACDONALD,
Petitioner-Appellee

v.

TIM MOOSE,
Respondent-Appellant

and

KEITH HOLDER,
Respondent-Appellant

On Appeal From The United States District Court
For The Eastern District Of Virginia
Alexandria Division

RESPONDENT'S PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND STATEMENT OF PURPOSE

Seven times in the last two years the United States Supreme Court has made the same striking ruling. Specifically, in those seven cases the Supreme Court has issued *per curiam* opinions in which it summarily granted the government's petition for writ of certiorari and reversed the lower federal court's grant of habeas corpus relief, on the ground that its ruling contravened 28 U.S.C. § 2254(d). These dramatic rulings, which are all the more remarkable in the aggregate, vividly demonstrate the substantial limitations § 2254(d) mandates on federal habeas review of presumptively valid state court judgments. These and other recent decisions of the Supreme Court make clear the fundamental distinction between direct review of a criminal conviction and federal habeas review of a state court judgment.

In disregard of these fundamental, clear-cut principles, a majority of a panel of this Court has reversed the ruling of the federal district court and granted federal habeas corpus relief to the petitioner, William S. MacDonald. *MacDonald v. Moose*, 2013 U.S. App. LEXIS 4921 (4th Cir. March 12, 2013). MacDonald, who was 47 at the time of the offenses, was indicted for and convicted of soliciting an underage girl to commit a felony. The solicitation occurred in a car on a public street. There can be no serious dispute that such conduct is not constitutionally protected.

According to the panel majority, *Lawrence v. Texas*, 539 U.S. 558 (2003), wholly invalidated Virginia Code § 18.2-361(A), Virginia's sodomy statute, a statute

under which MacDonald was *not* indicted or convicted, and that, in contrast to the solicitation statute under which he was indicted and convicted, does not contain the victim's status as a minor as an element of the offense. Further, according to the panel majority the state appellate courts erred on direct appeal by narrowing the sodomy statute in order to render it constitutional under *Lawrence*. Thus, absent some post-*Lawrence* legislative enactment of a new state sodomy statute, Virginia may not properly prosecute anyone for any act of sodomy, no matter how far removed such act may be from the conduct involved in *Lawrence*.

The correctness of this conclusion would certainly be debatable if rendered on direct appeal. This, however, was not a direct appeal, but a federal collateral review of a state court judgment under the standard of review *mandated* by § 2254(d). The panel majority merely recited that the state court rulings were contrary to and involved an unreasonable application of clearly established federal law, but offered next to no justification or explanation for its conclusion. As Judge Diaz correctly pointed out in his dissent, it was only “the district court here [that] remained faithful to” the standard of review established in § 2254(d). 2013 U.S. App. LEXIS 4921 at *48.

Pursuant to this Court's Local Rule 40(b), it is certified that material factual and legal matters were overlooked in the panel's decision, that the panel opinion is in conflict with numerous decisions of the United States Supreme Court and/or this

Court that were not addressed in the opinion, and that the proceeding involves questions of exceptional importance. Rather than adhering to such a decision that cannot be reconciled with repeated decisions of the United States Supreme Court, the panel should agree to rehear its decision, or the full Court should hear the case so that this Circuit may comply with repeated and controlling Supreme Court precedent.

Reasons Why a Rehearing or Rehearing *en banc* Should be Granted

The panel majority concluded that § 18.2-361(A) is facially invalid under *Lawrence v. Texas*, and also unconstitutional as applied to MacDonald. 2013 U.S. App. LEXIS 4921 at * 22-36 and * 22-23 n.11. Because, according to the panel majority, “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.” *Id.* at 22 (emphasis added). Further, relying primarily on *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the panel majority held that the state appellate courts could not properly accord Virginia’s sodomy statute a narrowing construction in order to render it constitutional under *Lawrence*. *Id.* at *31-36. Instead, the panel majority stated that no act of sodomy is currently punishable as a crime in Virginia under any circumstances and some future legislative enactment is necessary to provide otherwise. *Id.* at *25 n.13 (Commonwealth prosecuted “a man who loathsomely solicited an underage female to commit an act that is not, at the moment,

a crime in Virginia”) and *31-36. The panel majority concluded thusly: “We are confident ... 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.” *Id.* at *34.

None of this comes close to providing sufficient justification for holding that the state courts’ rulings had been unreasonable within the meaning of § 2254(d). (App. 402-408). Based only on its de novo conclusions regarding the proper scope of *Lawrence* and *Ayotte*, the panel majority asserted in cursory fashion that the state court rulings were contrary to and involved an unreasonable application of clearly established federal law. 2013 U.S. App. LEXIS 4921 at *22.¹

In his dissent, Judge Diaz correctly identified this fundamental failing in the panel majority opinion:

The majority elides this burden [under § 2254(d) of showing a state court error “well understood and comprehended in existing law beyond any possibility for fair minded disagreement”] altogether, passing upon the constitutionality of the Virginia anti-sodomy provision as if it were presented in the first instance. In doing so, [the panel majority opinion does not] account for the rigor of federal habeas review, which is not intended to be ‘a substitute for ordinary error correction through appeal.’”

¹ It is telling that early in its opinion the panel majority stated that it was granting federal habeas relief “on the ground that [§ 18.2-361(A)] facially violates the Due Process Clause of the Fourteenth Amendment,” *not* on the ground that the state court rulings had been unreasonable under § 2254(d). 2013 U.S. App. LEXIS 4921 at *4.

Id. at *36, 37. The dissent also aptly noted that if a federal habeas court is to grant relief to a state prisoner, “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.” *Id.* at 48.

Repeated recent decisions of the Supreme Court bear out Judge Diaz’s criticism of the panel majority. Judge Diaz’s dissent quoted from *Harrington v. Richter*, 131 S.Ct. 770 (2010), where the Supreme Court, reversing the grant of federal habeas relief by the Ninth Circuit, made clear that relief under § 2254(d) is unavailable if there is “any possibility for fairminded disagreement” regarding a state court ruling. 131 S.Ct. at 786-787. The Supreme Court also has recently emphasized that § 2254(d)(1)’s “standard of ‘contrary to, or involv[ing] an unreasonable application of, clearly established Federal law’ is ‘difficult to meet,’ because the purpose of AEDPA is to insure that federal habeas relief functions as a ‘guard against extreme malfunctions in the state criminal justice systems,’ and not as a means of error correction.” *Greene v. Fisher*, 132 S.Ct. 38, 43 (2011) (alteration in original).

As noted, the Supreme Court has repeatedly emphasized the substantial impact of § 2254(d) on federal habeas review of state judgments by summarily granting certiorari in seven cases and reversing the lower federal court’s grant of federal

habeas relief as improper under the statute. For example, in *Felkner v. Jackson*, 131 S.Ct. 1305 (2011) (*per curiam*), the Supreme Court reversed the Ninth Circuit's grant of federal habeas relief on a *Batson* claim and stated that "[o]n federal habeas review, AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Id.* at 1307. See also *Parker v. Matthews*, 132 S.Ct. 2148 (2012) (*per curiam*) (§ 2254(d) disallowed relief on claims challenging sufficiency of evidence and prosecutor's closing argument in death penalty case); *Coleman v. Johnson*, 132 S.Ct. 2060 (2012) (*per curiam*) (on sufficiency claim § 2254(d) "does not permit the type of fine-grained factual parsing in which the Court of Appeals engaged"); *Wetzel v. Lambert*, 132 S.Ct. 1195, 1199 (2012) (*per curiam*) (*Brady* issue remanded for review of state court's ruling that "may well be reasonable"); *Hardy v. Cross*, 132 S.Ct. 490 (2011) (*per curiam*) (federal habeas court could not properly reverse state court's ruling that prosecution had made sufficient effort to secure presence of victim at retrial, based merely upon federal court identifying additional steps that could have been taken); *Bobby v. Dixon*, 132 S.Ct. 26 (2011) (*per curiam*) (regarding *Miranda* issue, it was not clear that state court "erred at all, much less erred so transparently that no fairminded jurist could agree without court's decision"); *Bobby v. Mitts*, 131 S.Ct.

1762 (2011) (*per curiam*) (state court did not unreasonably reject petitioner's arguments in death penalty case challenging penalty phase instructions).²

Plainly, the scope of the Supreme Court's decision in *Lawrence* was not so evident that it necessarily invalidates sodomy convictions even where no expectation of privacy among consenting adults is involved. Thus, there is no basis to conclude that the state courts "erred so transparently that no fairminded jurist could agree" with their rulings. *Dixon*, 132 S.Ct. at 27. Rather, as Judge Diaz pointed out in his dissent, "the matter is not beyond doubt after *Lawrence*, and ... the district court [thus] was bound to give Virginia courts the benefit of that doubt on federal collateral review." 2013 U.S. App. LEXIS 4921 at *36.

Literally from start to finish, *Lawrence* distinguished the conduct at issue from that *not* at issue. As discussed more fully in respondent's brief at pages 25-30, the Supreme Court in *Lawrence* reversed the convictions of the two adult defendants for consensual sodomy in a home under a state law that criminalized such activity by two people of the same sex. The opening paragraph of *Lawrence* signaled the concerns that the Court's holding addressed. The Supreme Court stated: "Liberty protects the person from unwarranted government intrusions *into a dwelling or other private places*. In our tradition the State is not omnipresent *in the home*....The instant case

² Remarkably, the panel majority opinion did not cite or discuss a single Supreme Court case addressing the availability of federal habeas relief under § 2254(d).

involves *liberty of the person* both in its spatial and more transcendent dimensions.” 539 U.S. at 516 (emphasis added). One of the three questions upon which the Supreme Court granted certiorari reflected a similar focus: “Whether 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?” *Id.* at 564 (emphasis added). Another question was whether the petitioners’ “criminal convictions” constituted an equal protection violation. *Id.* The introductory portion of the Supreme Court’s opinion also carefully noted: “The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.” *Id.*³

Concluding that consenting adults have a due process right to engage in the kind of private conduct at issue in *Lawrence*, the Supreme Court reversed the petitioners’ convictions. The Court’s conclusion plainly confirmed the significant limitations upon its holding:

³ One legal commentator has properly noted that the panel majority opinion’s summary of the three questions upon which the Supreme Court granted certiorari in *Lawrence* was in important respects inaccurate. See Walsh, Kevin C., Walshlaw, “Perspectives on Law,” <http://walshslaw.wordpress.com/2013/03/13/the-fourth-circuits-obviously-and-profoundly-mistaken-habeas-grant-premised-on-the-alleged-facial-unconstitutionality-of-virginias-anti-sodomy-provision/>. That is, the Supreme Court’s recitation of the questions at issue in *Lawrence* reflects that “the alleged violations of the Constitution inhere in petitioners’ convictions, not in the state’s legislation. And the Court’s supporting reasoning throughout the opinion is all about the petitioners’ personal interests in liberty and privacy.” *Id.*

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. The petitioners are entitled to respect for ***their private lives.*** The State cannot demean their existence or control their destiny by making ***their private sexual conduct*** a crime. ***Their right to liberty*** under the Due Process Clause gives them ***the full right to engage in their conduct*** without intervention of the government....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 (emphasis in original).

Despite this repeated language in *Lawrence*,⁴ this Court held as unreasonable under § 2254(d) the state appellate courts' rulings that: (1) MacDonald did not have standing to challenge the facial constitutionality of the state sodomy statute under such authority as *County Court of Ulster v. Allen*, 442 U.S. 140 (1979); and (2) the statute as applied to him was constitutional because *Lawrence* did not invalidate criminal prosecutions involving a minor. Yet, like MacDonald in his brief, the panel

⁴ The panel majority referred to the Supreme Court's repeated descriptions regarding the liberty interests at issue in *Lawrence* as "ruminations." 2013 U.S. App. LEXIS 4921 at *30. Manifestly, a reasonable state court could regard the Supreme Court's references throughout *Lawrence* about the due process rights it was addressing as establishing the nature and limits of its holding, not mere idle thought. Indeed, Judge Diaz's dissent noted that *Lawrence*'s "commentary on what 'the present case does not involve' is characteristic of an as-applied ruling" 2013 U.S. App. LEXIS 4921 at *41.

majority did not cite a single post-*Lawrence* opinion to support its own conclusions regarding the impact of *Lawrence*, much less one that struck down a sodomy statute under *Lawrence*.

Yet, if *Lawrence*'s command were so unambiguous as to demonstrate the state court rulings in this case were flagrantly incorrect, then it should be a simple task to cite cases elsewhere that have reached the same conclusion as did the panel majority. Significantly, the Supreme Court has pointed out in this regard that where "our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008). *See also Casey v. Muslidin*, 549 U.S. 76-77 (2006) (§ 2254(d) barred relief on claim that victim's family improperly wore victim's image during trial; fact that "lower courts have diverged widely in their treatment of" similar claims reflected "lack of guidance from" Supreme Court).

The fact is that numerous courts have construed *Lawrence* in a manner much more in keeping with the state appellate courts' rulings in this case than with the panel majority's. As discussed more fully in respondent's brief at pages 32-35, numerous courts have read *Lawrence* narrowly and in particular have concluded that it does not extend to cases involving criminal conduct with a minor. Indeed, several cases have upheld sodomy convictions or sodomy statutes on grounds much like

those advanced by the state appellate courts in this case. *See, e.g., United States v. Bazar*, 2012 CCA LEXIS 242 (A.F.C.C.A. July 12, 2012); *Cook v. Reinke*, 2012 U.S. App. LEXIS 10860 (9th Cir. May 30, 2012), *aff'g* 2011 U.S. Dist. LEXIS 52330 (D. Id. May 16, 2011); *United States v. Useche*, 70 M. J. 657 (N. M. C. C. A. Feb. 29, 2012) ; *Mauk v. Goodrich*, 2009 U.S. Dist. LEXIS 82674 at *5-6 (S.D.Ga. Sept. 10, 2009); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004); *D.L.S. v. State*, 374 F.3d 971 (10th Cir. 2004); *State v. Thomas*, 891 So.2d 1233 (La. 2005); *State v. Whitely*, 616 S.E.2d 576, 580-581 (N.C. App. 2005).

The panel majority opinion disregarded another critical factor in this case. Throughout its opinion, the panel majority considered the constitutionality, both facially and as applied, of § 18.2-361(A). Among other things, the panel majority's opinion states that the "anti-sodomy provision in this case ... does not involve minors." 2013 U.S. App. LEXIS 4921 at *25 n.13. Similarly, the panel majority opinion states that although the state legislature "might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so. 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." *Id.* at *31-32. The panel majority did allow, however, that *Lawrence* "implied" a state may criminalize sodomy between an adult and a minor. *Id.* at *29.

The fatal flaw in this analysis is that it overlooks the actual statute under which MacDonald was indicted, tried, and convicted. MacDonald was charged under Virginia Code § 18.2-29, which generally makes it a Class 6 felony for someone to solicit another person to commit a felony (other than murder). That statute, however, makes it a Class 5 felony upon proof of the additional element that the solicitation is by someone at least 18 years old of another person who is under the age of 18, *i.e.*, a minor. In this vein, the indictment referred only to § 18.2-29, not § 18.2-361(A), and expressly charged MacDonald, “while being over the age of 18,” with soliciting “another under the age of 18 to commit a felony, in violation of § 18.2-29” (App. 29). Similarly, the sentencing order recited that MacDonald had been convicted of “Solicitation to Commit Felony – Adult Solicits Juvenile,” in violation of § 18.2-29. (App. 124).

Thus, one element of the offense for which MacDonald was convicted was the minor status of the victim. This additional element readily distinguishes it from *Lawrence*, which contained no equivalent element of the offense. More to the point, a reasonable state court under § 2254(d) could regard *Lawrence* as inapplicable to MacDonald’s solicitation conviction for that reason.

Given that a reasonable state court could conclude that *Lawrence* did not wholly invalidate Virginia’s sodomy statute, the panel majority’s ruling that the state courts unreasonably relied upon *Ulster County* to reject MacDonald’s facial

challenge is necessarily wrong. (App. 153, 407). 2013 U.S. App. LEXIS 4921 at *19-22. In turn, the state appellate courts reasonably concluded that MacDonald's "as applied" argument failed because the victim here was a minor, and *Lawrence* had "made quite clear that its ruling did not apply to sexual acts involving children."⁵ *MacDonald v. Commonwealth*, 630 S.E.2d 754, 758 (2006).

Finally, the panel majority's reliance upon *Ayotte* to hold that the state appellate courts acted unreasonably in limiting the state sodomy statute to apply only to the circumstances not addressed in *Lawrence* (an act with a minor, an act in public, etc.) is odd. 2013 U.S. App. LEXIS 4921 at *32-36. There, after both lower courts had wholly nullified a state parental notification abortion statute, the Supreme Court *vacated* the First Circuit's ruling, so it might determine whether the statute could be invalidated only in part, not in *toto*. 546 U.S. at 328-332. The Supreme Court's discussion of the relevant principles governing whether an appellate court may properly "enjoin only the unconstitutional applications of a statute while leaving other applications in force" plainly establishes that the wholesale invalidation of a

⁵ *Ulster County* is hardly the Supreme Court's sole authority for the proposition that a party normally may challenge the constitutionality of a statute only as it concerns his own rights. In *Clements v. Fashing*, 457 U.S. 957 (1982), which respondent discussed in his brief but which went unmentioned in the panel majority opinion, the Supreme Court again made clear that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id.* at 966 n.3.

statute is the exception, not the rule. *Id.* at 329. Among other things, where a case does not involve “making distinctions in a murky constitutional context, or where line-drawing is inherently complex,” partial invalidation of a statute is appropriate. *Id.* at 330. Here, far from some exercise of “superhuman efforts,” 2013 U.S. App. LEXIS 4921 at *25 n.13, no complexity attached to the state appellate courts’ ruling limiting the reach of the state sodomy statute to comply with *Lawrence*.

Judge Diaz’s dissent cogently described the panel majority’s misplaced reliance upon *Ayotte*:

The majority ... misreads *Ayotte*, effectively turning the “normal rule” of “partial, rather than facial, invalidation” on its head. The exception to an as-applied invalidation is just that – an exception to that “normal rule” which ... applies almost exclusively to challenges to overbroad statutes on First Amendment free-speech grounds. [T]o 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.

2013 U.S. App. LEXIS 4921 at *45-46, 47-48 (citation omitted).⁶

⁶ Respondent’s brief pointed out that a panel of this Court previously denied a certificate of appealability and dismissed MacDonald’s separate appeal from his Prince George sodomy convictions. *MacDonald v. Johnson*, No. 09-7973 (June 24, 2010). Then, on July 27, 2010, this Court denied a petition for rehearing. Although the panel majority opinion discussed respondent’s law of the case and collateral estoppel arguments, it made no mention of his additional argument that under any circumstances, the prior panel rulings (which rejected the very same contentions that underlie the panel majority opinion) were entitled to significant weight. 2013 U.S. App. LEXIS 4921 at *18 n.10; Resp. Br. 44-45. See *United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (“A court has the power to revisit prior decisions of its own ..., although as a rule courts should be loathe do so in the absence of extraordinary circumstances.”) Considering that a prior panel of this Court rejected identical

In sum, it would be a truly extraordinary case in which a state court's reliance upon a general rule, rather than an exception to that rule, was so beyond the pale as to authorize federal habeas relief under § 2254(d). *See also* Richter, 131 S.Ct. at 786 (“The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.”). The present appeal certainly is not such a case.

CONCLUSION

The panel should grant rehearing or the full Court should grant rehearing *en banc*.

Respectfully submitted,
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arguments by the very same litigant in a closely related case, it makes no sense to accord the prior panel orders no weight at all.

Certificate Of Compliance With Page,
Typeface, and Type Style Requirements

This petition is 15 pages in length. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman.

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Certificate Of Service

On March 26, 2013, this petition was electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users: Benjamin E. Rosenberg and Joshua D. N. Hess, counsel for Petitioner-Appellee.

/s/ Robert H. Anderson, III
Senior Assistant Attorney General