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## Better Late Than Never?

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**BY ARTHUR LEONARD** | Fifty-one years after Governor George Wallace stood in a schoolhouse door in defiance of a federal mandate to integrate his state's educational system, Alabama continues its slow crawl to membership in what, in intervening years, has sometimes been termed the New South.

In 2003, the US Supreme Court in its Lawrence v. Texas sodomy decision ruled that state laws making it a crime for two men or two women to have consensual sex violate the 14th Amendment of the Constitution by impairing individual liberty without adequate justification.

At that time there were many states, especially in the southeast, that continued to treat such conduct as a crime, and they did not rush to take these unconstitutional laws off the books. One holdout has been Alabama, which did not repeal its sexual misconduct statute, one that punishes consenting adults for having gay sex.

## *Alabama appeals court nixes consensual sodomy conviction*

On June 13, the Alabama Court of Criminal Appeals put an end to that, ruling that the state must comply with the Lawrence sodomy precedent.

The defendant in this case, Dwayne Williams, was charged with sodomy in the first degree, a felony offense, after a complainant identified as A.R. alleged to police he had forced him to have anal sex.

According to the unsigned opinion by the appeals court, Williams was hanging around in the lobby of the Jameson Inn motel in Selma and evidently became sexually interested in A.R., the 23-year-old reception clerk. According to A.R.'s complaint, Williams followed him into the motel office and "pushed him into the bathroom in the office," holding him by his throat and telling A.R. "to not say anything or scream and that if A.R. did, Williams would choke A.R. harder." After locking the bathroom door, A.R. alleged, according to the court opinion, Williams told him to pull Williams' pants down and then to pull down his own, and Williams began groping A.R., bent him over, and entered him while biting him on the neck.

After Williams left, A.R. texted a co-worker to come to the motel, and told her what Williams had done. The next day, A.R. also told his mother what had happened and "the police were notified." A.R. went to the hospital for a sexual assault exam, and the police lab confirmed that rectal and genital swaps showed evidence of Williams' DNA.

In his trial, Williams presented character evidence and testified in his own defense, admitting the sexual act but stating that A.R., an adult, had consented. The prosecutor asked the judge during a "charge conference" to instruct the jury on both the sodomy count and "sexual misconduct" as a lesser-included offense.

Williams objected, saying that this would "disregard" the 2003 Supreme Court sodomy ruling, but the judge granted the state's request. The judge told the jury that if it believed Williams' testimony that A.R. had consented, it could not convict Williams of first-degree sodomy, but that "consent is not a defense to prosecution under the charge of sexual misconduct."

Williams again objected on the record, citing the Lawrence sodomy ruling. The jury then convicted him of sexual misconduct.

Williams filed a post-trial motion, again arguing that he should have been acquitted and that the sexual misconduct law is unconstitutional under the Supreme Court's Lawrence precedent.

The Court of Criminal Appeals agreed with Williams.

"To date," it wrote, "no Alabama court has ruled on the constitutionality of [the sexual misconduct law] in light of the United States Supreme Court's holding in Lawrence. Because 'the only federal court whose decisions bind state courts is the United States Supreme Court,' Lawrence controls our decision."

The court also mentioned an unrelated case in which a federal appeals court noted that Alabama's attorney general had "specifically conceded" that the sexual misconduct law "is unconstitutional, in his words, 'to the extent that it applies to private, legitimately consensual anal and oral sex between unmarried persons.'"

Somehow the word hadn't gotten to the local prosecutor in Selma.

The state argued, however, that the court should not declare the statute unconstitutional, but instead simply strike down the sentence stating that consent was not a defense. Rejecting this request, the Criminal Appeals Court said its role is limited to interpreting the law, not amending it.

The state also asked for a chance to retry Williams, but the court concluded this would violate the Constitution's double jeopardy clause, which prohibits trying somebody twice for the same offense.

Given that the jury refused to convict Williams on first-degree sodomy, the Court of Criminal Appeals concluded it must have found that the sex was consensual and that Williams' conviction had to be vacated.

The remaining question is whether the Alabama Legislature will now take the common sense approach recently taken by the Virginia Legislature, which had rejected attempts to revise its sex crimes law in light of the Lawrence sodomy decision for more than a decade, but finally did so earlier this year after a federal appeals court found the state's sodomy law unconstitutional. The Supreme Court refused to review that decision.