No. 05- _____

In the
Supreme Court of the United States

IGNACIO SERGIO ACOSTA,
Petitioner,

v.

STATE OF TEXAS
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals Eighth District of Texas, El Paso, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Texas Penal Code Section 43.34(c)(1), which, among other things prohibits the giving of a dildo to another person, violate the Ninth Amendment and substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Is the utilization by an adult in private of a dildo a fundamental right under the Constitution?

3. Is the right to sexual privacy a right which was retained by the People in the Ninth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner: Ignatio Sergio Acosta is the defendant in the underlying criminal case.

Respondent: The State of Texas, by the El Paso County District Attorney, is prosecuting Petitioner Acosta.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ignacio Sergio Acosta ("Acosta") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals, Eighth District of Texas, filed on August 31, 2005, which reversed the order of dismissal of October 11, 2004. The Court of Criminal Appeals of Texas denied discretionary review on March 22, 2006.

OPINIONS BELOW

The unpublished opinion (August 31, 2005) of the Court of Appeals, Eighth District of Texas, is not reported. State v. Acosta, 2005 Tex. App. LEXIS 7170 (Tex. App.-El Paso 2005). It is Appendix A at 1a-7a.

The October 11, 2004 order of the County Criminal Court Number One, El Paso County, Texas dismissing the complaint, is not reported. It is Appendix B at 10a.

On March 22, 2006 the Court of Criminal Appeals of Texas denied discretionary review without a written order. It was delivered per curiam, en banc, with no judges dissenting. A copy of the post card notifying Petitioner of the action taken by the Court of Criminal Appeals of Texas is Appendix C at 11a.

A letter from the Chief Clerk of the Texas Court of Criminal Appeals dated April 20, 2006 confirming that the court denied discretionary review on March 22, 2006 without a written order is Appendix D at 12a.

STATEMENT OF JURISDICTION

The Court of Appeals, Eighth District of Texas, issued its Opinion on August 31, 2005, which reversed the dismissal by the County Criminal Court Number One, El Paso County, Texas.

On March 22, 2006, the Court of Criminal Appeals of Texas denied discretionary review. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Discretionary Review. See Rule 13(1) of the Supreme Court Rules. This Court's jurisdiction is invoked pursuant to 28 United States Code Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.

U.S. Const. amend XIV, sec.1

> . . . No state . . . shall deprive any person of life, liberty, or property, without due process of law. . . .

Texas Penal Code Section 43.23(c)(1) provides, in part, as follows:

> (c) A person commits an offense if, knowing its content and character, he:
>
> (1) Promotes or possesses within intent to promote any obscene material or obscene device. . . ."

Texas Penal Code Section 43.21(a)(7) provides as follows:

> "'Obscene Device' means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."

Texas Penal Code Section 43.21(a)(5) provides as follows:

> "'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit , or advertise, or to offer or agree to do the same."

STATEMENT OF THE CASE

The following summary of the evidence is taken directly from the opinion of the Court of Appeals. On September 15, 2003, two undercover officers, a male and female, entered the Trixx Adult Bookstore. Various sexual devices were on sale in the store. The officers saw a crystal cock vibrator displayed behind the store counter. They questioned Acosta, a store employee, with regard to the possible uses of the device. He showed them the device and stated that the device would arouse and gratify the female undercover officer in that it would give her an orgasm. The officers purchased the device. Ten days later Acosta was arrested for violating Texas Penal Code Ann. §43.23(c)(1)(Vernon Supp. 2004-05) which proscribes an individual from promoting an obscene device. On October 11, 2004 a hearing was held on Acosta's motion to dismiss the complaint. The parties' respective arguments centered around whether the statute in question was unconstitutional because it prevents individuals from using dildo type devices in violation of the right to sexual privacy.

The court granted the motion to dismiss the complaint on the ground the statute was unconstitutional.

STATEMENT OF PROCEDURAL HISTORY

On August 31, 2005 The Eighth District Court of Appeals reversed the Order of Dismissal and remanded the case for trial. The State requested publication of the decision because no Texas appellate courts have addressed the constitutionality of the statute after the decision by this Court in Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). On September 14, 2005 the Eighth District denied the State's motion to publish the decision. On March 22, 2006 the Court of Criminal Appeals denied Acosta's Petition for Discretionary Review.

REASONS FOR GRANTING THE WRIT

I. There Is A Split Among The State Courts On The Federal Constitutional Question Regarding The Validity Of Anti-Dildo Statutes

The highest courts of Colorado, Kansas, and Louisiana have held unconstitutional anti-dildo statutes of their states, whereas the highest courts of Georgia, Mississippi, and Texas have upheld such statutes. These states' highest courts did not limit their rulings to the commercial distribution of dildos. Rather, they agreed that the issue was whether the statutes interfered with the private use of such devices. They disagreed with each other on the constitutional result, but not on the effect of the statutes.

Recently, the identical Alabama anti-dildo statute was examined by the United States District Court for the Northern District of Alabama. That court concluded that the Alabama

anti dildo statute was unconstitutional, Williams v. Pryor, 220 F.Supp.2d 1257 (N.D. Ala. 2002). Even though the statute, like the Texas statute in the instant case, did not, on its face, specifically prohibit individuals from actually using dildos, the District Court concluded that the statute's restrictions effectively interfered with the private use of dildos; therefore the District Court reached the issue of the constitutional right of privacy.

Although the Eleventh Circuit reversed the District Court's invalidation of the Alabama anti dildo statute (identical to the Texas anti dildo statute here) in a split opinion, even the majority agreed that the Alabama statute had to be examined in terms of its impact on private use. That is, the majority reached the question of whether adults do have a constitutional right of sexual privacy. Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004). The dissent agreed with the majority that the statute impacted the private use of dildos and that it would have to be considered in the context of the alleged private right of sexual privacy. The dissent concluded that the Alabama anti dildo statute was unconstitutional. It interfered with the right to engage in sexual activity in private. This Court denied certiorari sub nom Williams v. King, __ U.S. ___, 125 S.Ct. 1335 (2005).

In People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colorado Supreme Court 1985), the Colorado Supreme Court struck down virtually the identical statute. In the case the State of Colorado filed a civil action for injunctive relief to have certain "sex toys" declared obscene.

The Colorado Supreme Court dealt directly with the same statutory provision included in the Texas Penal Code, a prohibition against the promotion of obscene devices. The

Colorado statute in question made it illegal to promote or possess with intent to promote any obscene device and an obscene device was defined as a dildo designed or marketed as useful primarily for the stimulation of human genital organs. 697 P.2d at 369. The Colorado Supreme Court stated,

> "The statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices. The effect of the statute now written is to equate sex with obscenity. The state has demonstrated no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways. Thus, we hold the statutory prohibition against the promotion of obscene devices to be unconstitutional." 697 P.2d at 370.

It must be emphasized that the Colorado statute in question was identical to the Texas statute herein. Specifically, the statute attempted to reach the commercial distribution of dildos, not simply the private possession of dildos. Still the Colorado Supreme Court held the statute violated the right of privacy.

In addition to the Colorado Supreme Court invalidating the identical statute at issue here, the Louisiana Supreme Court did the same thing in State of Louisiana v. Brenan, 772 So. 2d 64 (2000).

In the Brenan case Ms. Christine Brenan was arrested three times for selling dildos. Ms. Brenan was convicted at trial but the State Court of Appeal reversed her conviction, 739 So. 2d 368. The Louisiana Supreme Court granted the

state's writ application and then affirmed the decision of the Court of Appeal. The Louisiana Supreme Court noted that the Kansas and Colorado Supreme Courts had struck down their statutes but that the Texas Court of Criminal Appeals and the Georgia Supreme Court had rejected similar challenges. The Louisiana Supreme Court went on to conclude that the prohibition against the promotion of obscene devices such as dildos bore no rational relationship to any legitimate state interest. Thus, the statute was held to be in violation of the Due Process Clause of the Fourteenth Amendment. The Court stated that vibrators " . . . remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships. . . ."

The Louisiana Supreme Court noted that " . . . there are many medical and health journals which discuss sex therapy and the medical uses of sexual devices in the course of treatment of sexual dysfunction." 772 So. 2d at 76.

In State of Kansas v. Hughes, 792 P.2d 1023 (Kan. 1990) the Kansas Supreme Court also held unconstitutional a Kansas statute prohibiting the dissemination of obscene devices. Just as Mr. Acosta in the instant case was arrested and prosecuted, so too was Mr. Randy Hughes arrested and prosecuted for promoting obscenity by selling two obscene devices in violation of a Kansas statute. Specifically, he was arrested in his store in Wichita, Kansas for selling a vibrator kit with a dildo attachment. Just as the trial court below dismissed the case, the trial court in the Kansas case also dismissed the case and the state appealed. Likewise, the statute at issue in Kansas was a statute that prohibited the commercial distribution of dildos.

In contrast the high courts of Colorado, Kansas, and Louisiana, are to the decisions of the high courts of Texas, Georgia, and Mississippi. In Yorko v. State of Texas, 690 S.W. 2d 260 (1985), the Texas Court of Criminal Appeals (the highest criminal court in Texas) upheld the constitutionality of the anti dildo statute, the same one which is the subject of this case.

The majority of the Texas Court of Criminal Appeals in Yorko v. State of Texas, supra, stated that the issue presented was the following:

> "Does the Due Process Clause of the Fourteenth Amendment guarantee a citizen the right to stimulate his, her or another's genitals with an object designed or marketed as useful primarily for that purpose?. . ." Id. at 263.

The four justice majority went on to state,

> ". . . We hold it is also appropriate for the state to act to protect the 'social interest in order and morality' . . . or 'decency' . . . by restraining traffic in non-communicative objects designed or marketed as useful primarily for the stimulation of human genital organs."

The four justice majority stated that there was a distinction between contraceptives and obscene devices.

In conclusion, the four justice majority of the Texas Court of Criminal Appeals stated,

> "We hold that the rationale justifying the State's exercise of the police power against obscene

> expression - that is, the protection of the social interest in order and morality - also justifies the State in criminalizing the promotion of objects designed or marketed as useful primarily for the stimulation of human genital organs. . . ." Id. at 266.

The three justices who dissented stated the issue was different. Justice Clinton stated the question presented in a different way:

> "Whether the constitutional right of personal privacy is broad enough to encompass a person's decision to engage in private consensual sexual activity that includes stimulating human genital organs with an object designed to be primarily useful for that purpose?" Id. at 267.

Justice Clinton went on to conclude,

> ". . . It is sufficient that there is a constitutional right to personal privacy broad enough to encompass a person's decision to engage in private consensual sexual activity in any manner or means not proscribed by law." Id. at 268

Justice Teague filed a separate dissenting opinion. Justice Teague stated,

> "If the state may not deny access to contraceptive devices, how can it deny access to human sexual devices that, as a matter of common knowledge, have much therapeutic value, and are harmless in themselves." Id. at 272.

Justice Teague went on to say,

"It is common knowledge today that a person who has problems dealing with sexual behavior can suffer from depression and anxiety reaction, to such an extent that such a problem can cause an identity problem as far as self-image and self- confidence is concerned. It is also common knowledge today that trained experts in the field of human sexual behavior use sexual aids such as a dildo, in their endeavors to cure their male and female patients' sexual problems. . . . ." Id. at 273.

Justice Teague continued,

". . . [I]n this instance, appellant had the right to privacy and the dildo he possessed within intent to sell. Thus, such falls without the prohibitive zone of the police power of the state." Id. at 273.

Justice Teague concluded,

"The statutes, encompassing dildos, are unconstitutional. . . ." Id. at 273.

Justice Miller also filed a separate dissenting opinion. Thus, ever since May 22, 1985, the Texas Court of Criminal Appeals' decision in Yorko v. State of Texas, has stood by the narrowist of margins, a four to three vote.

Strangely, the four judge majority of the Texas Court of Criminal Appeals did not mention the decision of the Colorado Supreme Court in People v. Seven Thirty -Five East Colfax, Inc., 697 P.2d 348 (Colorado Supreme Court 1985). Not only did the majority fail to cite the Colorado Supreme

Court case , which was handed down on February 25, 1985, the dissenting judges ignored it also.

The Texas Court of Criminal Appeals did not mention this Colorado Supreme Court case even though it was decided on February 25, 1985. Perhaps the Texas Court of Criminal Appeals was not aware of the Colorado case because the Supreme Court of Colorado did not get around to denying a rehearing petition until April 15, 1985, about five weeks before the Texas Court of Criminal Appeals decided the Yorko case. The Texas Court of Criminal Appeals was not adverse to citing other state court decisions because it did rely on Sewell v. State, 233 S.E.2d 187 (Ga. 1977), where the Georgia Supreme Court held constitutional a similar statute, even though that case was not as close to the Texas statute as was the Colorado statute invalidated by the Colorado Supreme Court. A year later the Georgia Supreme Court upheld the statute again in Kametches v. State of Georgia, 242 Ga. 721, 251 S.E. 2d 232 (Supreme Court of Georgia 1978).

Likewise, the Supreme Court of Mississippi in PHE v. State of Mississippi, 877 So. 2d 1244 (Mississippi Supreme Court 2004) upheld the Mississippi statute prohibiting the distribution of dildos. Given this split among the high courts of the states of Colorado, Kansas, Louisiana on the one hand and Georgia, Mississippi, and Texas on the other, it is extremely important for this court to grant certiorari to resolve this important issue.

There are three intermediate Texas appellate court decisions that have been published which have reaffirmed the Yorko decision.

Regalado v. State of Texas, 872 S.W.2d 7 (1994) is a decision by the Fourteenth District Court of Appeals of

Texas. A jury found a defendant guilty of possessing obscene devices with intent to sell them. The defendant received a 30 day jail sentence and a $250 fine. Believing it to be constrained by the Texas Court of Criminal Appeal's decision in Yorko v. State, the three judge panel upheld the conviction. Justice Curtis Brown filed the following concurring opinion:

> "Here we go raising the price of dildos again. Since this appears to be the law in Texas I must concur."

In T.K.'s Video, Inc. v. State of Texas, 891 S.W. 2d 287 (1994) a three judge panel of the Court of Appeals in Fort Worth affirmed a conviction. The defendant violated the anti dildo statute and was sentenced to pay a fine of $10,000. Again the Texas intermediate appellate court was bound by Yorko v. State.

Finally, in Webber v. State of Texas, 21 S.W. 3d 726 (2000), the Court of Appeals affirmed a conviction for the promotion of an obscene device (a dildo). The defendant was sentenced to 30 days in jail and ordered to pay a fine of $4,000.00.

Justice Bea Ann Smith filed a concurring opinion joining the court in affirming the conviction. However Justice Smith stated,

> "I do not understand why Texas law criminalizes the sale of dildos. As Justice Brown so aptly noted, 'Here we go raising the price of dildos again.' Regalado v. State, 872 S.W. 2d 7, 11 (Tex. App.- Houston [14th Dist.] 1994, pet. ref'd) (Brown, J., concurring). Even less do I understand why law enforcement officers and prosecutors expend limited resources to prosecute

such activity. Because this is the law, I reluctantly concur."

II. The Recent Decision By This Court in Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) Justifies A Reexamination Of The Anti Dildo Statutes

As the United States of America fights more and more for freedom in foreign countries we recognize that we need to preserve our freedoms at home. This Court has been at the forefront in recognizing the fundamental right of personal freedoms and the importance of those freedoms in a pluralistic society.

For at least the past eighty years, the concept of a right to privacy as an integral part of substantive due process and constitutionally protected liberty, interpreted by this Court has existed to restrain the reach of government into the personal lives of the people. As early as 1923 this Court said in Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed.2d 1042 (1923):

> "While this court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long

recognized at common law as essential to the orderly pursuit of happiness by free men."

Since that time, substantive due process has evolved to specifically include a right of privacy in the sanctity of the home, a right of sexual privacy for unmarried persons, a right of privacy to make choices regarding childbirth, a right of privacy in the body, and ultimately a right of consenting adults to make all choices regarding sexuality without fear of prosecution.

As society's perception of and attitudes toward sexuality have become more tolerant and more liberal, so have this Court's interpretation of the Due Process Clause in this context. The liberties guaranteed by substantive due process have moved out of the martial bedroom and into the public sphere of commercial interactions and private interactions between consenting adults.

A substantive due process right to sexual privacy, as interpreted by the courts, can be traced back at least as far as the 1960s, in cases involving the right to possess and use contraceptives. In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), this Court invalidated a state statute that criminalized aiding and abetting the use of contraceptives. The Court held that this statute unconstitutionally invaded the right of privacy of married couples in the marital bedroom, a "right of privacy older than the Bill of Rights–older than our political parties, older than our school system." Id. 486. The opinion of this Court focused on a zone of privacy created by the penumbras of several fundamental guarantees, including the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution. Id., 483-85. Justice Harlan's and Justice White's separate concurrences, however, argued vehemently that this right of

privacy was to be found in the Due Process Clause of the Fourteenth Amendment. Id., 500, 502; see also Poe v. Ullman, 367 U.S. 497, 522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), (Opinion of Harlan, J., dissenting). Several years later, in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), this Court extended this right to include within its scope certain decisions regarding sexual conduct by non-married persons. Although the decision to strike down the law prohibiting distribution of contraceptives to unmarried persons was premised on the Equal Protection Clause, this Court also recognized that the law impaired the exercise of a fundamental personal right of privacy in this context: "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., 453. The substantive due process right of sexual privacy was thus begun.

The Griswold and Eisenstadt opinions formed the basis for the landmark decision in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). This Court stated: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. 153. However, this Court noted that this "fundamental right" to privacy was not absolute, and that the "compelling state interest" in protecting the heath of the mother and the potential human life could justify a state's limitations on the right to an abortion at later stages of the pregnancy. Id., 153-63.

In Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), this Court held unconstitutional a New York state law prohibiting the sale or distribution of contraceptives to anyone under sixteen years of age, prohibiting the display or advertisement of contraceptives, and the distribution of contraceptives by anyone other than a pharmacist. In striking down this law, this Court explicitly stated that the personal privacy rights involving marriage, procreation, contraception, family relationships, child rearing, and child education all derived from the liberty interest inherent in the Due Process Clause. Id. 684-685. Importantly, this Court said, ". . . A total prohibition against the sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use." This Court continued, ". . . [T]he same test must be applied to state regulations that burden an individual's right... by substantially limiting access to the means of effectuating that decision as applied to state statutes that prohibit the decision entirely." This Court significantly stated, ". . . [S]uch access is essential to the exercise of the constitutionally protected right." Id. 687-88 (emphasis added).

This Court further expounded upon these concepts in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), stating:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. As the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

> Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

This Court's cases discussed above establish the framework for the landmark ruling by this Court in Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). It is this recent decision by this Court, which reversed the Texas Court of Appeals, which undermines the narrow four to three decision by the Texas Court of Criminal Appeals 20 years ago in Yorko v. Texas, 690 S.W. 2d 260 (1985). In Lawrence v. Texas, this Court had the occasion to review the judgment of the Texas Court of Appeal (41 S.W. 3d 349), which affirmed a conviction of the defendants engaging in homosexual conduct. The case arose from the County Criminal Court at Law Number Ten in Harris County Texas. This Court held unconstitutional the Texas statute which made it a crime for two persons of the same sex to engage in certain intimate sexual conduct. This Court in Lawrence v. Texas overruled its prior decision in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which had sustained a Georgia statute involving homosexual conduct.

Justice Kennedy, writing for the majority in Lawrence v. Texas, 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. 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. Liberty presumes an autonomy of self that includes** freedom of

> thought, belief, expression and **certain intimate conduct."**

Justice Scalia dissented in Lawrence and acknowledged that the majority's decision called into question all state laws based upon traditional "morals," including "state laws against . . . obscenity." Justice Scalia, in his dissent, correctly acknowledged that the majority's decision effectively decreed the end of all morals legislation. The promotion of majoritarian sexual morality is not a legitimate state interest.

This Court in the Lawrence case explicitly recognized that the right of privacy derived from the Due Process Clause is no longer confined – if it ever was – solely to the sanctity of the home. Rather, this Court suggested, "liberty of the person [involves] both... spatial and more transcendental dimensions." Id. 2474. Furthermore, in striking down Texas's sodomy law, this Court reiterated that ,"[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." In light of this Court's holding in Lawrence, as well as the liberalization of both society's attitudes regarding adult sexuality in general and court rulings on this subject in particular, Petitioners urge this Court to rule that the Texas statute which outlaws the sale and distribution of sexual devices violates the substantive right of liberty as guaranteed by the Due Process Clause of the United States Constitution and as retained by the People under the Ninth Amendment.

In suggesting that the majority power of a state may not enforce its own views of morality on the whole of society through criminal sanctions without some compelling justification, this Court reiterated its belief that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." Id. (quoting Casey, 505 U.S. at 833)

(emphasis added). Moreover, in overruling Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), the Lawrence Court noted that the history and tradition of sexual mores and sexual control by the state were in fact more ambiguous and complicated than previously thought; this Court stated furthermore that "[h]istory and tradition are the starting point but not in all cases the ending point of substantive due process inquiry." Lawrence, 2479 (citation omitted). In "defining the liberty of all," this Court ultimately ruled that consensual sodomy was a practice that the states could not prohibit because the private sexual lives of adults is a matter encompassed within the protections of substantive due process as implicated by the Fourteenth Amendment to the Constitution. Id. 2484. Again, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Id.

This Court in the Lawrence case added,

> "Had those who drew and ratified the Due Process Clauses of the Fifth and Fourteenth Amendments known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that **laws once thought necessary and proper serve only to oppress.** As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Id., 2482 (Emphasis added).

That the State of Texas is wrong in its assertion that the statute is constitutional because it only prohibits commercial transactions involving dildos is evident from the recent federal litigation in Alabama involving the Alabama dildo statute. In

an excellent opinion by U.S. District Court Judge Smith, the United States District Court for the Northern District of Alabama struck down the Alabama statute which prohibited the commercial distribution of dildos. See Williams v. Pryor, 220 F.Supp.2d 1257 (N.D. Alabama 2002). The District Court concluded that the statute unconstitutionally burdened the dildo users' fundamental right to employ sexual devices within her private, adult, consensual sexual relationship. In a two to one decision, the Eleventh Circuit Court of Appeals in Williams v. Attorney General, 378 F.3d. 1232 (11th Cir. 2004), reversed the District Court and ruled that the statute was constitutional. However, the two judge majority which reversed the District Court agreed with the District Court that if there is a constitutional right to use a dildo in private (which it refused to recognize), a statute prohibiting the sale of the dildo to the user would be unconstitutional.

Circuit Judge Rosemary Barkett filed a persuasive dissenting opinion which relied heavily upon this Court's decision in Lawrence v. Texas, supra. Circuit Judge Barkett noted that the Alabama statute in question made it a crime to sell sexual devices. The statute in question in Williams v. Attorney General of Alabama, supra, was a statute that did cover the commercial distribution of sexual devices. While it is true Lawrence v. Texas involved a criminal conviction for sexual activity conducted in private, Circuit Judge Barkett's dissenting opinion was not limited to private sexual activity. Rather, as stated, the case wherein she dissented dealt specifically with the commercial distribution of sexual devices.

The major argument made by the State of Texas was that the State of Texas has the right to ban the commercial distribution of dildos even if the private use of a dildo could

not be made a crime. However, as dissenting Circuit Judge Barkett noted in footnote 2 of her dissenting opinion, even the two judge majority of the Eleventh Circuit acknowledged there was no real difference between a ban on the distribution of dildos and the prohibition against using dildos. The Eleventh Circuit majority stated,

> " . . . For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. . . . Because a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects the right to sell and buy sexual devices, but whether it protects a right to use such devices." (Emphasis in original). 378 F.3d at 1242.

Accordingly, all three circuit judges of the Eleventh Circuit were in agreement that it was constitutionally irrelevant whether the devices in question were sold or being used.

If the State of Texas were correct, that it can distinguish the sale of sexual devices from the use of sexual devices, then this Court was wrong in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), which held unconstitutional a Massachusetts statute that prohibited the distribution of contraceptive devices. This Court held that the distributor of the contraceptive device did have standing to challenge the statute with respect to its impact on private conduct. This Court noted that the statute in question for Massachusetts did prohibit the distribution of contraceptive devices. It is also noteworthy to recognize this Court in Eisenstadt v. Baird rejected the desperate attempt by

Massachusetts to support its statute by contending that it was a health measure. This Court saw through the argument and concluded that the purpose of the statute was to deter certain sexual relations. This Court emphasized that it was irrelevant whether the recipient of the materials was married or not.

This Court in Lawrence v. Texas, supra, also noted its prior decision in Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), which struck down a state of New York statute which forbid the sale or distribution of contraceptive devices to persons under 16 years of age. The Carey decision completely destroys the State's argument in the instant case that the dildo statute in question does not prohibit the private use of the dildo and therefore must be constitutional. If this argument were valid the Carey decision would have been different.

This Court in Carey responded to a similar argument as follows:

> "Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives , for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. . . ." 431 U.S. at 687; 97 S.Ct. at 2017.

In summary, the State of Texas may not get around Lawrence v. Texas, supra, by attempting to distinguish private conduct from the distribution of devices which

facilitate such conduct. Indeed, the decision of the Texas Court of Criminal Appeals in Yorko v. State of Texas did not limit its holding to commercial sales. The Texas high court reached the ultimate issue of sexual privacy and resolved the issue against such an asserted right.

It was the Yorko decision on sexual privacy (that it is not protected by Due Process) which the Court of Appeals (Eighth District) followed in its decision below.

Acosta is not asking this Court to do what it did in Lawrence v. Texas, which was to overrule a prior decision. There is no prior decision by this Court upholding an anti dildo statute. This Court did in Sewell v. Georgia, 435 U.S. 982 96 S.Ct. 1635, 56 L.Ed.2d 76 (1978) dismiss for want of a substantial federal question the appeal in that case involving the Georgia anti dildo statute but that refusal to hear the case certainly cannot be deemed to be the functional equivalent of a decision on the merits such as this Court had in Lawrence v. Texas, supra, when it had to deal with the prior decision of Bowers v. Hardwick, supra. Nevertheless, if this Court does feel Sewell v. Georgia, supra, set a national precedent, this Court should not hesitate to reexamine that decision by granting certiorari in this case.

The State of Texas may not assert that its citizens, unable to purchase dildos in Texas, may purchase them in some other state (where they are legal) and bring them to Texas to use. If the State of Texas can outlaw them, so could any other state. Texas may not rely upon other states to supply dildos. If the right to use a dildo to masturbate in private is fundamental, it cannot be restricted by forcing persons to travel to other states. Each state is obligated to follow the Constitution.

It should also be remembered that the statute extends beyond commercial transactions. It prohibits one person from giving, providing, lending, or transferring a dildo to another person. While the statute may not directly and expressly prohibit the use of a dildo, the effect of the statute is to prohibit its use. Even the courts which have upheld these types of statutes have acknowledged their effects upon use. Thus, the right to use the dildo is squarely presented by this Petition.

CONCLUSION

For the foregoing reasons, Petitioner Ignacio Sergio Acosta respectfully requests that this Court grant certiorari to decide whether Texas can constitutionally interfere with the fundamental right of sexual privacy.

Respectfully submitted,

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