IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
ARTHUR GILBERT, JUDGE

TELEPHONE
(213) 974-6111

September 13, 1979

To: All Judges and Commissioners

From: Arthur Gilbert, Judge

The recent Supreme Court decision (September 7, 1979) in Pryor v. Municipal Court declared previous interpretations of Penal Code §647(a) (the lewd conduct statute) to be unconstitutional. The Court specifically found the phrase "lewd or dissolute conduct," as defined by past decisions, to be unconstitutionally vague. Such cases as People v. Williams, 59 C.A. 3d 225, and Silva v. Municipal Court, 40 C.A. 3d 733, among others, have been effectively overruled. The Court redefines the statute and, in particular, the phrase "lewd and dissolute" so as to overcome previous constitutional infirmities.

In addition, the Court found previous judicial interpretations regarding the solicitation portion of the statute to be unconstitutional, and limited that portion of the statute to the solicitation of lewd acts only if those lewd acts are to take place in a public place. This, among other reasons, was based on the Brown Act, which decriminalizes sexual acts between consenting adults in private.

The decision for the first time finally sets out with sufficient clarity the elements of the offense so as to avoid discriminatory enforcement and to further avoid a conviction for those offenses being based on the subjective moral view of the judge or jury.

As a result of this important decision, the existing CALJIC jury instructions 16.400, 16.401 and 16.402 are no longer applicable. Until the CALJIC Committee drafts new instructions, I plan to modify the existing instructions so as to conform with the Pryor decision.

Inasmuch as my recent rulings on the constitutionality of 647(a) in a number of cases anticipated the Pryor decision, a number of my colleagues asked me to circulate my revision of the CALJIC instructions. Perhaps they may be useful to you. If you have any further suggestions for further revisions, I'm sure the CALJIC Committee would like to hear from you.

CALJIC 16.400

Every person who with the specific intent of engaging in lewd or dissolute conduct solicits anyone to engage in such conduct where such conduct is to occur in any public place, in any place open to the public, or exposed to public view, or who engages in lewd or dissolute conduct in any public place or in any place open to the public, or exposed to public view, is guilty of a misdemeanor.

CALJIC 16.401

The term "public place," as used in the foregoing instruction, means any place which is open to common or general use, participation and enjoyment by members of the public, and occurs at a time and under circumstances where there are persons present who may be offended.

NOTE: The last clause was added to the first paragraph in CALJIC 16.401, because the decision specifically says at the bottom of page 25 . . . "even if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the State has little interest in prohibiting that conduct if there are no persons present who may be offended."

Also note that the second bracketed paragraph of CALJIC 16.401 is deleted.

CALJIC 16.402

In the foregoing instruction, the words "lewd" and "dissolute" are synonymous and refer to conduct which involves the touching of genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct.

NOTE: It may be in the estimation of some unnecessary to include the last clause I suggested for CALJIC 16.401 in view of the knowledge requirement stated in CALJIC 16.402. Nevertheless, I think the language I have suggested should be included in both CALJIC instructions.

Particular commendation should be given to attorneys Thomas Coleman and Jay Kohorn, who represented defendant Pryor and many of the defendants charged with 647(a) in those cases in which I ruled on the statute, and Terso Rosales, of the City Attorney's office, who represented the City in all of these cases. All three attorneys epitomize the profession at its finest. Their incisive analysis of the statute and their excellent presentation of the issues, both in their briefs and argument, made this decision possible.

AG:if

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
ARTHUR GILBERT, JUDGE

TELEPHONE
(213) 974-6111

M E M O R A N D U M

February 22, 1980

TO: All Judges and Commissioners of the Los Angeles Municipal Court

FROM: Judge Arthur Gilbert

RE: Caljic Instruction 16.400

The Caljic Committee has reconsidered its earlier 1979 instruction, Caljic 16.400 - Lewd Conduct, and offered a new version which I am told is at the printers and will soon be distributed to all members of the court. A copy of the revision is attached for your consideration.

The use note indicates that some members of the Caljic Committee may still subscribe to the earlier 1979 version. The earlier version provided that a person could be guilty of lewd conduct if that person knows or should know that a person will be present who may be offended by such conduct. In my opinion there is nothing in the Pryor decision (Pryor v. Municipal Court, 25 Cal. 3d 236) which suggests either directly or by way of implication that such language is appropriate. The Supreme Court denied an application by the City Attorney to modify the language of the Pryor decision so that conduct that takes place in a setting where people might be present but actually are not present would be affected.

The Court in Pryor points out that the statute is primarily designed to protect onlookers who might be offended by the prescribed conduct. "Onlookers" means persons who actually are present. The case does not state that the statute is designed to prohibit conduct from taking place in a setting where there is likelihood of the presence of people who might be offended. Actual presence is required.

AG:jb
Enclosure

CALJIC 16.400 (1980 Revision)

LEWD CONDUCT

Penal Code, § 647(a)

Every person is guilty of violating Penal Code, § 647(a), a misdemeanor, who:

(1) With the specific intent to sexually arouse, gratify, annoy or offend,

(2) [Solicits anyone to engage] [engages] in conduct which involves the touching of the genitals, buttocks or female breast in any public place, or a place open to the public or exposed to public view, and

(3) Knows or should know that there is present a person who may be offended by such conduct.

USE NOTE

Strike inappropriate bracketed parts depending on whether the prosecution is for engaging in or for soliciting lewd conduct.

There is a difference of opinion among the CALJIC Committee as to whether actual presence of a person who may be offended is required, or whether a likelihood of such presence is sufficient. See Pryor v. Municipal Court, 25 Cal.3d 238 (1979), 158 Cal.Rptr. 330, 599 P.2d 636; In re Anders, 25 Cal.3d 414, 158 Cal.Rptr. 661, 599 P.2d 1364.

The Committee believes it may be proper and within the meaning of Pryor v. Municipal Court, supra, to add the words "or will be" after the word "is" in the last paragraph of the instruction

in certain situations where the prosecution is based on soliciting.

COMMENT

The terms "lewd" and "dissolute" in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view. Pryor v. Municipal Court, supra.

Place of proscribed conduct is disjunctive. In re Steinke, 2 Cal.App.3d 569, 82 Cal.Rptr. 789.

Solicitation to engage in lewd conduct requires a specific intent to engage in such conduct. Pryor v. Municipal Court, supra.

B:M

filed OCT 16, 1980

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KENNETH SOMMERS, Defendant and Appellant.	Superior Court No.CR A 17482 Municipal Court of the Los Angeles Judicial District Case No. 31120612 OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court.

Michael T. Sauer, Judge

Judgment is reversed, with directions.

For Appellant - Samuel M. Weiss, Esq.

For Respondent - BURT PINES, City Attorney
JACK L. BROWN, Deputy City Attorney
Supervisor, Appellate Section,
John D. O'Loughlin, Deputy City Attorney

-oOo-

Defendant appeals from a judgment of conviction entered against him after an adverse jury verdict on a trial of alleged violation of Penal Code Section 647 subdivision (a).

The conduct on which the conviction was based took place inside an automobile which was parked in a residential neighborhood in the Hollywood Hills at approximately 3:00 a.m. on a Friday

[illegible] was 36 feet away and the nearest but [illegible] there were no people on the street except [illegible] who had followed the automobile in which [illegible] from another part of town.

Defendant [illegible] sharpened definition of section 647 [illegible] decided after the trial in this case [illegible] the trial judge erred in [illegible] to find defendant guilty only if [illegible] would have known, of the [illegible] by his conduct. Pryor v Municipal Court [illegible] Cal 3d 238, 256. We agree.

[illegible] element of the offense, as set out by the [illegible] as the People urge, that [illegible] the possibility of the [illegible] Even if conduct [illegible] a public place, a place [illegible] public view, the state has little [illegible] conduct if there are no persons who may be offended [illegible] The People's construction of the requisite [illegible] would render this element [illegible] from the separate requirement that the conduct [illegible] a public place. We believe that the Supreme Court [illegible] said that the jury must find that defendant knew or should have known [illegible] persons who might have been offended were present.

It cannot be presumed that [illegible] finding was made from the fact that the jury reached [illegible] guilty verdict, because the instruction given to the jury precluded it from considering any issue

morning. The nearest street light was 36 feet away and the nearest house was 80 feet away. There were no people on the street except for the two arresting officers, who had followed the automobile in which defendant was a passenger from another part of town.

Defendant urges that under the newly sharpened definition of section 647 subdivision (a) set forth last year after the trial in this case by the California Supreme Court, the trial judge erred in failing to instruct that the jury should find defendant guilty only if it found that he knew, or should have known, of the presence of persons who might be offended by his conduct. Pryor v. Municipal Court (1979) 25 Cal.3d 238, 256. We agree.

This is a necessary element of the offense, as set out by the Pryor decision. Ibid. Nor do we think, as the People urge, that the requirement is met whenever there is the possibility of the presence of persons who may be offended. "... [E]ven if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons who may be offended." Ibid. The People's construction of the requisite state of mind of the defendant would render this element virtually indistinguishable from the separate requirement that the conduct be engaged in in a public place. We believe that the Supreme Court meant what it said and that the jury must find that defendant knew, or should have known, that persons who might have been offended were present.

It cannot be presumed that such a finding was made from the fact that the jury reached a guilty verdict, because the instructions given to the jury precluded it from considering any issue

other than whether or not defendant engaged in the sexual activity in the time and place alleged. A positive finding on this issue is no longer sufficient to sustain a guilty verdict. As the Pryor opinion says, supra, at 25 Cal.3d 238, 258, "...[c]onduct which a trier of fact might have found criminal under the older vague definition may clearly fall beyond the scope of the statute as construed in the present case." This is also true in the case at bench.

It was error for the trial court to fail to instruct, sua sponte, on all elements of the crime charged. People v. Peabody (1975) 46 Cal.App.3d 43, 49. Although the judge can hardly be blamed for his failure to forsee the Pryor holding, its rule is nevertheless applicable to cases, such as this one, which were pending on appeal at the time of the decision. Pryor v. Municipal Court, supra, (1979) 25 Cal.3d 238, 258. When instructional error permits the jury to convict the defendant upon a state of facts which do not constitute a crime, it is prejudicial error. People v. Chapman (1977) 72 Cal.App.3d 6, 12. Accordingly, we reverse.

There is no evidence on the record now before this court to suggest that defendant knew or should have known of the presence of the police officers or anyone else. In the absence of evidence to the contrary it is reasonable to assume that the officers tried to be inconspicuous before the arrest. Because the present record contains insufficient evidence of the fourth element of the offense to sustain the conviction, retrial is barred. People v. Pierce (1979) 24 Cal.3d 199, 210.

The case is reversed and the trial court is directed to dismiss.

Bigelow
Acting Presiding Judge

I concur.

Judge

485 5452

S:jo

CERTIFIED FOR PUBLICATION

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs JOHN ARTHUR McCONVILLE, Defendant and Appellant.	Superior Court No. CR A 18021 Municipal Court of the Whittier Judicial District No. M134830 OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, James A. McKechnie, Judge.

JUDGMENT REVERSED WITH DIRECTIONS TO ACQUIT.

For Appellant - Marjorie Rushforth
Garrett, Norris & Rushforth

Thomas F. Coleman

For Respondent - John K. Van De Kamp, District Attorney
Appellate Division
By Arnold T. Guminski
Deputy District Attorney

-oOo-

Defendant was charged with violating two subdivisions of Penal Code Section 647: In Count I he was charged and convicted of lewd conduct in violation of subdivision (a); in Count II he was charged and acquitted of loitering in a public toilet in violation of subdivision (d). On appeal defendant raises several contentions which touch on the proper application of Pryor v.

Municipal Court (1979) 25 Cal.3d 238, the recent seminal case in this field, as well as a claim of discriminatory enforcement of the law. The latter claim is disposed of by reference to another leading case, Murguia v. Municipal Court (1975) 15 Cal.3d 286. In Murguia the Supreme Court stated that a claim of invidious discrimination should be made not at trial but, rather, pretrial. Id, at 293-294, fn. 4. Defendant did not timely make his attack on this ground.

The facts of this silent drama, as revealed by the reporter's transcript of the testimony of the vice officer who observed defendant's actions, are as follows. Officer Carlisle, in plain clothes, entered a May Co Department Store restroom open to the public and proceeded to a urinal. Defendant was the sole occupant of the restroom at this time. Both men remained in the restroom observing each other for from five to 15 minutes. Carlisle went immediately to a urinal, unzipped his pants and stood there for at least five minutes with his penis out but not touching same with the one exception of a 45-second sojourn at a nearby wash basin. On Carlisle's entry, defendant went to a wash basin, leaving the urinal, paused in front of a doorless toilet stall, and returned to the same urinal from where he had come. When both men returned to their respective urinals (four apart along the same wall) Carlisle observed defendant masturbate for five minutes. During this time no conversation or gestures were made by either man. However, they glanced at each other occasionally. At the end of this five minutes defendant asked the officer to come over to his urinal; Carlisle asked what defendant had in mind; defendant said what did Carlisle

have in mind; Carlisle said, "Nothing," and that ended the conversation in the restroom.

A third man entered and went to a urinal, apparently observing nothing amiss. Defendant returned to a wash basin and motioned to Carlisle with his head that he was going to leave. Carlisle asked defendant to meet him in a lower level of the store; both left; and Carlisle signaled his partner officers to arrest defendant.

Pryor v. Municipal Court, supra, set forth a new definition of lewd conduct as follows:

> "[Penal Code section 647, subdivision (a) is construed] to prohibit only the solicitation or commission of conduct in a public place or one open to the public or to public view, which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct." (25 Cal.3d at 244.)

Not at issue in our case is defendant's conduct in a conceded public place which involved the touching of his genitals for the purpose of sexual arousal. The crucial issue is the last part of the Pryor definition: "by a person who knows or should know of the presence of persons who may be offended by the conduct." Counsel, in analyzing this part of Pryor in a light favorable to their clients, assert the following: Defendant says the question is whether the defendant knew or, from the circumstances, should have known the officer was such a person who may be offended and not whether the officer was subjectively

offended; the People say we should construe Pryor so as to apply the statute in question to a defendant who is not in the presence of a person who may be offended but who is in a place where he has no expectation of privacy and where it is likely that his conduct would be viewed by a third person entering that place.

The Supreme Court, in Pryor, did not apply the law as interpreted by them to the facts of that case. Mr. Pryor stood accused of soliciting an officer to perform oral sex acts in a parking lot. The Supreme Court declined to prohibit the trial on the asserted ground of the statute's unconstitutionality. The Court, therefore, did not analyze the "person to be offended" part of its statutory definition. Nor did it do so in the next case concerning Penal Code section 647, subdivision (a) it considered, In re Anders (1979) 25 Cal.3d 414. In Anders the court noted an important question for the trial court of whether the defendant should have known of the presence of the officer who was looking at the defendant through a wire mesh grate in a door of a toilet stall. Id. at 417. Pryor, however, does have instructive language on the point crucial to our case. "The statute thus serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct." (Id. at 255) "Finally, in In re Steinke, supra 2 Cal.App.3d 569, 576, the court stated that 'the gist of the offense proscribed in [Penal Code section 647] subdivision (a) . . . is the presence or possibility of the presence of someone to be offended by the conduct.' We agree; even if conduct occurs in a location that is technically a public place, a place open to the public, or

one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended. The scope of section 647, subdivision (a), should be limited accordingly." (Id. at 256). (Other parts of In re Steinke were disapproved in footnotes 12 and 13.)

The People seize on the above-quoted language of agreement with Steinke of the "possibility of the presence of someone to be offended" as meaning that there may be a likelihood of someone coming into the May Co restroom.[1/] However, construing the extracts quoted together, it is our view that the focus of the Supreme Court is first on the presence of such a person and second on the defendant's knowledge of that presence. Taking the People's view, a person who thoroughly checks a public place to be sure that no one is present and then commits a lewd act would be guilty as other people might enter his location. We think it more reasonable to construe the Supreme Court's language as requiring the person to be offended to be present during defendant's conduct. The duty on a person under this interpretation is to be aware of who is present and not blind his eyes to those about him. Thus, a defendant could not commit a lewd act with his eyes closed in the presence of others and claim that he did not know others might be offended.

1. The CALJIC Committee has a difference of opinion on this issue. The use note to the 1980 Revision of CALJIC 16.400 recites that difference but the most recent recommended instruction deletes the words "or will be" from the prior instruction which read: "Knows or should know that there is [or will be] present a person who may be offended by such conduct." We agree with the present formulation requiring the presence of the persons to be offended.

In In re Anders, supra, the trial court was to determine whether defendant should have known of the presence of the officer behind him looking into defendant's toilet stall. The officer was "present" in Anders, not outside the restroom and preparing to come in.

Returning to the facts of our case, the third person who entered the restroom does not enter into the equation. The trial judge stated that the third person "was really irrelevant" as there was no testimony of any lewd conduct in the presence of that person. The essence of the court's finding of guilt was that under the Pryor court's approval of In re Steinke, supra (quoted by Pryor) there was a possibility of someone entering the May Co restroom and Officer Carlisle could be offended by defendant's conduct in the restroom.

We have already noted that Steinke cannot be read as broadly as the judge and the People would have us read it. Pryor requires the actual presence of onlookers, not the possibility of persons entering that do not in fact enter the place where defendant is performing his lewd act. Turning to the second foundation of the judge's decision, could the officer be deemed by defendant to be a person who may be offended by his masturbation? There was no testimony that the officer was offended. We agree with the defendant that the officer's testimony that he was or was not offended would not determine the issue, as the focus of our inquiry must be on the reasonable person standing in defendant's shoes, not the subjective feelings of the officer. However, we note that if the officer had testified on this issue, such testimony would be circumstantial

evidence on the issue of what defendant should have perceived. Had the officer spoken or gestured to the effect that he was offended it would be reasonable to believe that the defendant knew or should have known of the presence of one who may be offended.

But our record is barren of any evidence to show that the defendant was giving or could be giving offense to the one person present in the restroom, Carlisle. The defendant was in the presence of a person who was standing at the urinal for upwards of eight minutes, not urinating, not talking, glancing from time to time at defendant and giving no indication whatsoever that he was or might be offended by defendant's masturbation. Had Carlisle worn a sign around his neck saying, "It is okay to perform lewd acts in my presence," it could hardly be said that defendant could not, under the circumstances present here, have taken such a sign at face value. Absent any other evidence to show offense or annoyance, Carlisle's conduct was tantamount to wearing such a sign. (See People v. Adult World Bookstore (1980) 108 Cal.App.3d 404, 410, fn. 4.)

There being insufficient evidence to show that defendant's acts were committed in the presence of anyone who might be offended by them, the defendant must be acquitted. People v. Pierce (1979) 24 Cal.3d 199, 209-210.

The judgment is reversed with directions to the trial court to acquit the defendant of the charges in Count I.

Judge

I concur.

Acting Presiding Judge

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, v. ROBERT F. JOSEPH, Defendant & Appellant.	2 Crim 40025 (VCSC No. APP 1109) (VCMC No. MM07547) MEMORANDUM

THE COURT:

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Ventura, which was certified to this court, was examined by this court within 20 days after the record on transfer was filed here, and the Court determined that transfer under California Rules of court, Rule 62(c) was not necessary.

FILED

DATE: APR 13 1981

ROBERT L. HAMM, County Clerk

By Annette Stiller

Deputy County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

APPELLATE DEPARTMENT

per clerk ct of appeal 4-__-81

2 Crim No. _____

Assigned to Div. 2

NO. APP 1109

(Municipal Court No. MM07547)

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

ROBERT F. JOSEPH,

Defendant/Appellant.

O R D E R

(On appeal from the Municipal Court of Ventura County

Criminal Department)

Respondent's application for rehearing is denied. Respondent's application for certification of the within case to the Court of Appeal is granted. Accordingly, this case is ordered transferred to the Court of Appeal, Second Appellate District, pursuant to Rule 63 of the California Rules of Court.

LAWRENCE STORCH
Presiding Judge of the Superior Court
Appellate Department

STEVEN J. STONE
Judge of the Superior Court
Appellate Department

CHARLES R. McGRATH
Judge of the Superior Court
Appellate Department

DATED: April 13, 1981

FILED

DATE: MAR 20 1981
ROBERT L. HAMM, County Clerk
By Annette Stewart
Deputy County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. ROBERT F. JOSEPH, Defendant/Appellant.	NO. APP 1109 (Municipal Court No. MM07547) JUDGMENT (On appeal from the Municipal Court of Ventura County Criminal Department)

The above-entitled cause having been fully argued, submitted and taken under advisement, IT IS ADJUDGED that the judgment is reversed with directions to the trial court to enter an order dismissing the complaint.

In our opinion Pryor v. Municipal Court, 25 Cal.3d 238 (1979) requires the actual presence of a person who may be offended by the prohibited conduct. We are of the further opinion the officer was not present within the meaning of Pryor, supra, at the time he made the observation through his binoculars. Upon reexamination of the record, in the light most favorable to the judgment, we cannot say that there is substantial evidence to support the finding that appellant was still engaged in the act of mutual masturbation at the time the officer arrived at the scene to make the arrest.

Since the evidence is insufficient to support the judgment of conviction, dismissal of the complaint is mandatory. People v. Bonner, 97 Cal.App.3d 573 (1979).

LAWRENCE STORCH
Presiding Judge of the Superior Court
Appellate Department

STEVEN J. STONE
Judge of the Superior Court
Appellate Department

I dissent. In my opinion the record sufficiently supports the trial court's implied finding that the officer observed the act at close range (20 - 30 feet) and without binoculars.

CHARLES R. McGRATH
Judge of the Superior Court
Appellate Department

Dated: MAR 20 1981