CRIM. 22595

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In the Matter of Application of ALLEN EUGENE REED for a Writ of Habeas Corpus.	NO.

PETITION FOR WRIT OF HABEAS CORPUS
AND
APPLICATION FOR STAY

EXHIBITS

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State of California

DIVISION OF CRIMINAL IDENTIFICATION AND INVESTIGATION

P. O. Box 1859, Sacramento 9, Calif.

CII No. ______

NOTICE OF REGISTRATION REQUIREMENT

Pursuant to Sec. 290 Penal Code

Local No. ______ *by which known to Notifying Officer*

L.A. Co. MARSHAL'S DEPT — NOTIFYING OFFICER OR AGENT

23747 W. VALENCIA BL. VALENCIA CAL. 91355 — ADDRESS

STATEMENT OF NOTIFYING OFFICER

I certify that on 3-14-80 (DATE) the below-named subject was informed of his duty to register under the provisions of Section 290 Penal Code. Notification was predicated on the fact that on 3-14-80 (DATE) subject will be RELEASED ON FORMAL PROBATION

DISCHARGED, PAROLED, RELEASED, GRANTED LEAVE, RELEASED ON PROBATION, DISCHARGED UPON PAYMENT OF FINE, OR OTHER CONDITION

FULL NAME OF PERSON NOTIFIED: ALLEN EUGENE REED

TYPE OR PRINT—FIRST, MIDDLE, AND LAST NAMES, INCLUDING ANY ALIASES KNOWN

Hair BRN Eyes BRN Height 5-7 Weight 175 Age 52 Descent CAUC Occupation SR. APPLICATIONS SPEC

Date of birth 3-5-28 Place of birth DRAVOSBURG, PA Scars, tatoos, deformities DOUBLE HERNIA SCARS

NOTIFYING OFFICER: James R. Crickard
Deputy Marshal - L.A. County

SIGNATURE AND TITLE

STATEMENT OF PERSON NOTIFIED

I was arrested on 4-10-79 (DATE) under the name of ALLEN EUGENE REED

booked at SANTA CLARITA VALLEY SHERIFF'S STATION VALENCIA, CA

TYPE AND LOCATION OF JAIL, HOSPITAL, OR OTHER PLACE OF DETENTION

convicted of / or committed as 647(a) P.C. (OFFENSE OR REASON FOR COMMITMENT) on 4-10-79 (DATE)

paid a fine of $ 500.00 and/or was confined at N/A (NAME OF PLACE OF CONFINEMENT) as Number N/A

for ____ years, 24 months ____ days. I WAS (WAS OR WAS NOT) placed on FORMAL PROBATION (PROBATION OR PAROLE) until 3-14-82 (DATE)

FORMAL PROBATION

UPON MY DISCHARGE, PAROLE, OR RELEASE I EXPECT TO RESIDE AT:

26404 BENT GRASS SAUGUS CAL L.A. COUNTY

APARTMENT OR ROOM NUMBER — STREET ADDRESS — CITY — COUNTY

Name of nearest relative (or friend) JAMES MAYTUM Relationship FRIEND

Residence 26404 BENT GRASS SAUGUS CAL

I understand that as a result of the above-described conviction and/or commitment I am required to register immediately or within 30 days of coming into any other city or county of California under the provisions of Section 290 Penal Code with the chief of police of the city or the sheriff of the county, if unincorporated area, in which I reside or am temporarily domiciled for such length of time. Upon changing my residence address I understand that I shall inform in writing, within 10 days, the law enforcement agency with whom I last registered of my new residence address. I ACKNOWLEDGE RECEIPT OF A COPY OF THIS FORM.

SIGNATURE OF PERSON NOTIFIED: Allen Eugene Reed

FIRST — MIDDLE — LAST NAME

SECTION 290 PENAL CODE IS PRINTED ON THE REVERSE OF THIS FORM

Original (orange) } to be sent to
Duplicate (canary) } Division of Criminal Identification and Investigation
Triplicate (pink): for Notifying Officer
Quadruplicate (white): for Person Notified

EXHIBIT A

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Rolled Fingerprint
Right Index Finger of Person Notified
(if amputated, use next available finger)

CII-4 (REV. 1955)
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judgment rule by making possible separate appeals from the judicial determinations on the two counts of the second amended complaint, but also insured that the two appeals would be taken in separate appellate districts. There is no authority for thus splitting a case in two.

[4] Real party's assertion that should it result that the two counts were to be tried in different counties, the action would be subject to coordination runs afoul of its earlier assertion that the two counts raise separate and distinct issues. Coordination is available only with respect to actions involving common issues of law or fact. (See Code Civ.Proc., § 404.) In any event, there is simply no authority for first splitting a case in two for purposes of appeal and then reunifying it by coordination if it turns out that the two halves are to be tried in different counties. The argument is inventive but unpersuasive.

Let a peremptory writ of mandate issue to the Orange County Superior Court commanding it to vacate its orders severing counts one and two of the second amended complaint and changing venue in the action to Yolo County and to make and enter a new order denying real party's motion for change of venue. Petitioners shall recover their costs on this proceeding.

McDANIEL and MORRIS, JJ., concur.

PEOPLE, Plaintiff and Respondent,

v.

Allen Eugene REED, Defendant and Appellant.

Crim. A. No. 18087.

Appellate Department, Superior Court, Los Angeles County.

Oct. 31, 1980.

Defendant was convicted in the Municipal Court for the Newhall Judicial District of Los Angeles County, Jack B. Clark, J., of engaging in lewd conduct, and he appealed. The Appellate Department of the Superior Court, Saeta, J., held that: (1) the evidence was sufficient to sustain the conviction; (2) defendant's proposed instruction did not have to be given, in that the instructions given correctly instructed jury and focused its attention on defendant's theory that there was no one to be offended by his conduct in the restroom; and (3) the verdict form was sufficient, in that it made reference to the complaint.

Affirmed.

1. **Lewdness** ⇐10

Evidence was sufficient to sustain defendant's conviction of engaging in lewd conduct for masturbating in a public restroom. West's Ann.Pen.Code, § 647(a).

2. **Criminal Law** ⇐829(1)

While court must instruct on defendant's theory of the case, duplicative instructions need not be given and court is not required to give each instruction offered by the parties, even if such instructions are correct statements of the law, if it otherwise instructs fully and fairly on each material issue.

3. **Criminal Law** ⇐829(3)

In prosecution for engaging in lewd conduct, proposed instruction by defendant on his theory of the case did not have to be given, in that the instructions given correctly instructed jury and focused its intention on defendant's theory that there was no one to be offended by his conduct in the restroom. West's Ann.Pen.Code, § 647(a).

4. **Criminal Law** ⇐798½

In prosecution for engaging in lewd conduct, verdict form was not deficient for omitting element of the offense of the offended person present, in that verdict form contained phrase "guilty of the offense charged," and thus form sufficiently made

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Thomas F. Coleman, Los Angeles, for defendant and appellant.

John K. Van De Kamp, Dist. Atty., Donald J. Kaplan and Dirk L. Hudson, Deputy Dist. Attys., for plaintiff and respondent.

SAETA, Judge.

[1] Defendant was convicted of engaging in lewd conduct in violation of Penal Code section 647, subdivision (a) on the testimony of an officer that he observed defendant masturbating in a public restroom. He attacks the sufficiency of that evidence by attacking the proof on the element of the offense articulated in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636 that a defendant must know or reasonably should know that another person is present who may be offended by his lewd acts. He highlights the evidence that the officer, although offended, tried to give the appearance that he was not offended by defendant's act. Defendant also recounts the evidence that this was an experienced vice officer, ostensibly hardened to conduct such as defendant's and that defendant took some care to hide his activities from the other persons who entered the restroom while the officer was observing him.

However, there was other evidence which is sufficient to support the jury's verdict. The officer testified that defendant started masturbating shortly after entering the restroom and before any conversation with the officer other than a salutation. It can reasonably be inferred from this evidence that defendant's acts were performed before he could reasonably have observed that the officer was not likely to be offended by his conduct. Given the different reasonable inferences that can be drawn from the evidence, and viewing the whole record in the light most favorable to the judgment, we hold that the jury as the trier of fact had before it sufficient substantial evidence—that is evidence which is reasonable, credible and of solid value—that it could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 562, 162 Cal.Rptr. 431, 606 P.2d 738.)[1]

Defendant raises what he believes are several instructional errors, again centered on the element of the presence of one to be offended. Besides giving the standard instruction (CALJIC No. 16.000/14) that the People must prove all elements of the offense beyond a reasonable doubt, the court also instructed as follows:

> "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.
>
> "Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful." (CALJIC No. 4.35.)
>
> "Every person is guilty of violating Penal Code, section 647(a), a misdemeanor, who:
>
> "1) With the specific intent to sexually arouse, gratify, annoy or offend,
>
> "2) Engages in conduct which involves the touching of the genitals, in any public place, or 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." (CALJIC No. 16.400.)
>
> "If you find that there was a single onlooker to the alleged sexual conduct, you must then determine whether the defendant knew or should have known that the onlooker might have been offended by the conduct.

1. Under a fact situation different than presented by our record, i. e., one where a defendant observes the other persons present and as a reasonable person believed that no one present could be offended by his conduct, this element of *Pryor, supra*, may not be proved beyond a reasonable doubt. For example, if the only occupant of the restroom is a vice officer who initiates lewd conduct, a defendant may convince a jury that his responding lewd acts could not have offended the officer.

"In making such a determination, you may consider the following factors, and each of these factors, either alone or collectively, if found to be true, may give rise to a reasonable doubt as to whether a crime was committed:

"1) whether the onlooker acted in a sexually suggestive manner,

"2) whether the onlooker went out of his way to view the conduct,

"3) whether it reasonably appeared to the defendant that the onlooker was pursuing him or was otherwise interested in observing or participating in some sexual activity." (Defendant's No. 5)

[2, 3] Defendant claims that his proposed instruction No. 7 should have been given, as follows:

"If you find that the officer was actually offended by the conduct of the defendant, but that he acted in a way so as to reasonably appear to the defendant that he would not be offended, then you must find the defendant not guilty."

It is true, as defendant claims, relying on *People v. Sears* (1970) 2 Cal.3d 180, 190, 84 Cal.Rptr. 711, 465 P.2d 847, that the court must instruct on defendant's theory of the case, but it is also true that duplicative instructions need not be given and the court is not required to give each instruction offered by the parties, even if such instructions are correct statements of the law, if it otherwise instructs fully and fairly on each material issue. (*People v. Cathey* (1960) 186 Cal.App.2d 217, 221, 8 Cal.Rptr. 694.) In our view, the instructions given, especially defendant's No. 5, correctly instructed the jury and focused its attention on the defendant's theory that there was no one to be offended by his conduct in the restroom. The People having the burden of proof under CALJIC Nos. 16.400 and 16.000/14 of proving that someone may be offended, and the court highlighting the factors which the jury could consider in deciding if it was reasonable that the defendant should know that the officer may be offended, the court fully and fairly instructed the jury on this element of the offense.

Similarly, defendant complains of the court's refusal to give defendant's proposed instruction No. 6 as follows:

"It is not the burden of the defendant to prove that he was reasonable in believing that there was no onlooker present who might have been offended. It is the burden of the prosecution to prove beyond a reasonable doubt that there was an onlooker and to prove beyond a reasonable doubt that the defendant knew or should have known that the onlooker might be offended."

This proposed instruction adds nothing to those given by the court. (*People v. Cathey, supra.*)

[4] Defendant also contends that the verdict form signed by the jury foreman was deficient. That form reads as follows:

"We, the jury in the above-entitled [illegible]

find the defendant Allen Eugene Reed

GUILTY
(Guilty or Not Guilty)

of the offense charged, to wit: violation of section 647(a) Penal Code engage in conduct which involves touching of genitals in public place

Dated Jan. 23, 1990 [signature] Foreman
(please print your name below)
ROLF N. [illegible] FOREMAN"

EXHIBIT B

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Relying on *People v. Small* (1905) 1 Cal. App. 320, 82 P. 87, which in turn relies on *People v. Tilley* (1901) 135 Cal. 61, 67 P. 42, defendant asserts that the handwritten portions omit the element of the offense of the offended person present. *Tilley* is not persuasive for two reasons: (1) it has been distinguished many times so that its authority it not great (*People v. Bratis* (1977) 73 Cal.App.3d 751, 763, 141 Cal.Rptr. 45); and (2) the verdict form in *Tilley* did not contain the phrase, as our form does, "of the offense charged." It is sufficient if the verdict makes reference to the complaint as our verdict does. (*People v. Reddick* (1959) 176 Cal.App.2d 806, 820–821, 1 Cal.Rptr. 767.) The handwritten portions of the verdict can be ignored as surplusage. We are not persuaded on the record presented in this case that the jury, not having been given the written jury instructions in the jury room, was confused by the verdict form. Although allowing the jury to read the instructions is a commendable practice, it is not yet required by law. We cannot say that the verdict form confused the jury as we assume that the jury followed the instructions on "presence of one to be offended" given orally by the judge.

The judgment is affirmed.

BIGELOW, Acting P. J., concurred.

PEOPLE, Plaintiff and Respondent,

v.

Ronald D. BACHRACH, Defendant and Appellant.

Cr. A. No. 17780.

Appellate Department, Superior Court, Los Angeles County.

Nov. 4, 1980.

Defendant was convicted in the Municipal Court for the Los Angeles Judicial District of Los Angeles County, Michael T. Sauer, J., of violating municipal code provisions, and he appealed. The Appellate Department of the Superior Court, Ibanez, P. J., held that: (1) offenses with which defendant was charged, violations of municipal code provisions relating to public safety and fire prevention as applied to multiple residents' apartments, were against public health and safety and against the public welfare and, as such, did not require proof of intent nor of criminal negligence, but were governed by rules of strict liability; (2) due process did not require that notice be an element of offense when doctrine of strict liability applied; (3) jury was not incorrectly instructed as to offense of failure to provide garbage bins with heat-activated closing devices; (4) ordinance which was subject of prosecution was not void for vagueness; and (5) probation and fine imposed on defendant were neither shocking to conscience nor offensive to any fundamental notion of human dignity.

Affirmed.

1. Municipal Corporations ⟹640

Offenses with which defendant was charged, violations of municipal code provisions relating to public safety and fire prevention as applied to multiple residents' apartments, were against the public health and safety and against the public welfare and, as such, did not require proof of intent nor of criminal negligence, but were governed by rules of strict liability.

2. Statutes ⟹241(2)

Whether a legislative body intended doctrine of strict liability to apply to a given statute is determined by subject matter, language, and evil sought to be prevented.

3. Municipal Corporations ⟹643

Though defendant was correct in noting that strict liability offenses resulted in light sentences and did little damage to

EXHIBIT B

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70 sitting in 73
DEPT. 73

Date April 07, 1981 SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

HONORABLE PHILIPP M. SAETA JUDGE | C ULWELLING , Deputy Clerk
NONE Deputy Sheriff | NONE , Reporter

(Parties and counsel checked if present)

1.

APHC 000 095
In the matter of the application of
THOMAS . COLEMAN
on behalf of
ALLEN EUGENE REED

Counsel for Plaintiff

RECEIVED APR 8 1981

Counsel for Defendant

NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

The petition for writ of habeas corpus was filed July 22, 1980. On July 25, 1980, ruling was defered pending the disposition of the case of People vs. Reed , CRA 18087, with the Sheriff, Probation Department and Municipal Court of the Newhall Judicial District being restrained from enforcing registration of defendant Reed under Penal Code Section 290. The Reed appeal was decided by an affirmance in an opinion and judgment filed October 31, 1980.

The matters raised by the petition of habeas corpus have been considered and the writ is denied. Most of the arguments raised by the petition should be addressed to the legislature, not the courts. The justiciable arguments are met by People vs. Mills (1978) 81 CA 3d 171 and People vs. Rodriguez (1976) 63 CA 3d Supp. 1, Supp. 5 (disapproved on other grounds in Pryor vs. Municipal Court (1979) 25 C 3d 238, 257, fn 13).

All restraints on the enforcement of the registration requirement are hereby vacated.

A copy of this minute order is transmitted to all parties as follows:

THOMAS F. COLEMAN
1800 N. Highland Ave.
Suite 106
Los Angeles, Ca. 90028

DISTRICT ATTORNEY
849 So. Broadway
11th Floor
Los Angeles, Ca. 90014

HONORABLE JACK B. CLARK
Newhall Municipal Court
23747 W. Valencia Blvd.
Valencia, Ca. 91355

EXHIBIT C

DEPT. 70 IN

MINUTES ENTERED
4-7-81
COUNTY CLERK

E-6

THOMAS F. COLEMAN
1800 N. Highland
Los Angeles, CA 90028
(213) 464-6669

Attorney for Defendant

MUNICIPAL COURT OF THE NEWHALL JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -v- ALLEN EUGENE REED, Defendant.	No. M-9186 OBJECTION TO REGISTRATION PURSUANT TO SECTION 290 P.C.; MOTION TO DECLARE REGISTRATION UNCONSTITUTIONAL AS APPLIED; REQUEST FOR EVIDENTIARY HEARING

1. On March 14, 1980 the defendant was convicted of a violation of subdivision (a) of Section 647 P.C.

2. The Court, having read and considered a probation report in this matter (see Exhibit A) sentenced the defendant to serve 3 years formal probation, with a condition of probation that he "obey all laws" and a further condition that he obey all rules and regulations of the probation officer.

3. After having been sentenced and while still present in the courtroom, defendant was required by the bailiff to read and sign a "Notice of Registration Requirement Pursuant to Section 290 P.C." (see Exhibit B).

4. Defendant then filed a Notice of Appeal from the Judgment of Conviction on March 14, 1980.

5. On March 24, 1980, defendant was given written instructions by his probation officer to "register per 290 P.C. at Hall of Justice, 211 W. Temple St. L.A." (see Exhibit C).

6. On March 27, 1980, the Court entered an order staying execution of sentence pending the appeal from the conviction.

7. On October 31, 1980 the Appellate Department filed an

EXHIBIT D

Opinion and Judgment affirming the judgment of conviction. (see People v. Reed (1980) 170 Cal.Rptr. 770). That appeal did not involve the issue of the constitutionality of the registration requirement (Section 290 P.C.) as applied to this defendant or as applied to 647(a) cases generally. It did not involve any issues concerning conditions of probation which require such registration.

8. On April 16, 1981 the Clerk of this Court sent notice to defendant that there would be a hearing on "condition of probation re: duty to register under provisions of Section 290 Penal Code" on May 1, 1981 at 9:30 a.m. in Division I of this Court.

9. This hearing on May 1, 1981 will be the first time the defendant has been before a judge of the Municipal Court on the issue of registration.

10. Defendant objects to registration as applied to him as being unconstitutional.

GROUNDS FOR OBJECTION

11. Registration of this defendant, taking into consideration the fact that he has no prior criminal record, the facts underlying this conviction, the fact that one year has passed since his original conviction and there have been no further brushes with the law, the defendant's personal history, the unlikelihood that the defendant would repeat this type of offense in the future, and the fact that registration would not be helpful to the police in enforcing the lewd conduct statute against the defendant in the future or in deterring future criminal activity of this nature, would constitute a violation of due process of law under the state and federal constitutions.

12. Requiring this defendant to register as a sex offender, without first affording him an opportunity to demonstrate at a hearing that he is not likely to repeat a similar offense in the future, that he is not in need of constant police surveillance, that registration would not subject him to constant police surveillance, and that registration does not aid the police in

deterring or apprehending lewd conduct violators (as opposed to other sex crimes where it is helpful, e.g., indecent exposure, child molestation, rape, where identity of the offender is often not known by the private citizen victim) constitutes a violation of due process of law. Insofar as Section 290 P.C. requires such a defendant to automatically register without affording an evidentiary hearing to persons convicted of 647(a) P.C., it creates an unconstitutional conclusive presumption.

13. Registration for persons convicted of Section 647(a) P.C. constitutes a violation of equal protection of the law under the state and federal constitutions in that persons committing similar or identical conduct for money or other consideration and who are convicted under Section 647(b) P.C. do not suffer the disability of registration under Section 290 P.C.

14. The uneven and selective application of registration for persons convicted of 647(a) P.C. violates Article IV, Section 16 of the State Constitution which requires that all laws of a general nature shall be uniform in operation. The Court in Newhall requires registration for all persons convicted of a violation of 647(a) P.C. while courts in other parts of Los Angeles County (e.g., Long Beach Municipal Court) do not require such registration.

15. Taking into consideration the facts underlying this conviction (adult behavior, plainclothes officer as the only observer), that defendant has no prior criminal record, unlikelihood that defendant will commit a similar offense in the future, Article I, Section 1 of the California Constitution (right to privacy) will be violated if this defendant is required to register as a sex offender, without a compelling state interest.

16. Taking into consideration the facts mentioned in paragraph 15, requiring this defendant to register as a sex offender will violate his right to intrastate travel, without a compelling state interest.

17. Imposition of registration as a sex offender on this defendant, taking into consideration defendant's background and the facts of the case, constituted cruel or unusual punishment. (see Exhibit D as an example of how this principle has been applied.)

REQUEST FOR EVIDENTIARY HEARING

17. Since the defendant is objecting to registration as being unconstitutional as applied to him (taking certain facts into consideration as mentioned above), defendant requests that this Court afford him an evidentiary hearing at which he may offer evidence to establish the points raised above. The Court could then rule as to whether registration would be unconstitution as applied to defendant in this factual context. This type of an evidentiary hearing would then create an adequate record for any appellate review of any rulings of this Court on those constitutional issues.

18. "Due process requires that a party sought to be affected by a proceeding shall have a right to raise such issues or set up any defense which he may have in the cause . . . A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law . . . " 16A Am.Jur.2d, section 843.

19. A judge's denial of a hearing at which evidence could be received and argument heard regarding the constitutional validity of section 290 as applied to defendant's particular case is error. (see People v. Ripley, Appellate Department of the Los Angeles Superior Court, CR A 16440, Opinion and Judgment filed August 20, 1980).

20. It would not only constitute a violation of procedural due process to deny such a hearing to the defendant, but it would also constitute a violation of equal protection of the law, in that other defendants (i.e. Jay Ripley) were afforded an opportunity for such an evidentiary hearing. (This Court is requested to take judicial notice of the Opinion and Judgment in the case of People v. Ripley, supra, attached as Exhibit E, not for its precedential value but rather on the issue of equal protection just raised).

///

///

///

OFFER OF PROOF

21. At the evidentiary hearing, defendant would offer the following evidence:

a) defendant's personal history as stated in the probation report filed in this Court on March 10, 1980;

b) defendant has no prior criminal history or record other than for this case;

c) defendant has no arrests or criminal record in the past year, i.e., in the year following his conviction;

d) judicial notice of the facts underlying this conviction;

e) psychiatric testimony that it is unlikely that the defendant would commit another violation of the lewd conduct law in the future;

f) testimony by police and sheriff officials that registration of persons convicted of 647(a) does not assist the police in apprehending violators of the lewd conduct law in that virtually all persons arrested for such an offense are arrested at the scene of the crime by an undercover vice (although registration of persons convicted of indecent exposure, child molestation, and rape usually assist the police in apprehending suspects because the defendant is not arrested at the scene of the crime, the victims of these offenses are private citizens, and that registration photographs can assist the victim in helping the police identify and locate the suspect).

g) statistics to show that most persons prosecuted for 647(a) do not repeat that offense;

h) expert testimony to show that most 647(a) cases involve only adults and not children and only a plainclothes vice officer as the sole observer of the lewd conduct;

i) the registration requirement of Section 290, as applied to 647(a) offenses, is being enforced in a manner that violates Article IV, Section 16, in that it is not being uniformly applied by the courts and prosecutors in

different judicial districts throughout Los Angeles County.

Dated: May 1, 1981

Respectfully submitted:

THOMAS F. COLEMAN

NO.............. DIV.

FILED
MUNICIPAL COURT

MAR 10 1980

NEWHALL JUDICIAL DISTRICT
FREDERICK K. OHLRICH, JUDGE
BY
DEPUTY

MUNICIPAL COURT OF NEWHALL JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PROBATION OFFICER'S REPORT

REPORT SEQUENCE NO. 1

HE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff

vs.

ALLEN EUGENE REED

Defendant

DIV.	ATTY.	JUDGE
11	COLEMAN	CLARK
HEARING	C.I.I. NO.	COURT CASE NO.
3-14-80	A06529290	M-9186
DPO	AREA OFFICE	
MC MILLEN	ESFV-VAL	

TRUE NAME	ADDRESS	PROB. NO.
SAME	26404 BENTGRASS WAY, SAUGUS, CA. 91350	X-821858

CHARGED WITH THE CRIME(S) OF

647(A) P.C. (LEWD CONDUCT)

CONVICTED OF THE CRIME(S) OF	BY (PLEA, COURT JURY)	DAYS IN JAIL THIS CASE
647(A) P.C. (LEWD CONDUCT)	JURY	NONE

☐ Pre-conviction invest. (131.3 C.C.P.) ☐ Drug Diversion invest. (1000.1(a) P.C.)

COMPANION CASES	DISPOSITIONS
NONE	

PERSONAL HISTORY

AGE	BIRTHDATE	RACE	FORMAL EDUCATION		AGE LEFT SCHOOL
52	3-5-28	CAUCASIAN	COLLEGE GRADUATE		44
MARITAL STATUS	HOME INCLUDES				NO. OF DEPENDENTS
DIVORCED	JIM MAYTUM				NONE
OCCUPATION		INCOME PER MONTH	WHERE EMPLOYED		
SR. APPLICATIONS SPEC.		$1,250.GROSS	MONROE, CANOGA PARK		
HEALTH	CAME TO STATE	CAME TO COUNTY	BRANCH MILITARY SERVICE	KIND OF DISCHARGE	
GOOD	1978	1978	U.S.A.F.	HONORABLE	

AS SUPPLIED BY

1 (AS SUPPLIED BY DEFENDANT.)

2 DEFENDANT IS THE YOUNGER OF TWO BOYS BORN TO

3 GEORGE AND LAURA (SCHNIEDER) REED IN DRAVOSBURG, PENNSYLVANIA.

4 HIS FATHER COMMITTED SUICIDE IN 1938 WHEN DEFENDANT WAS TEN

5 YEARS OF AGE. DEFENDANT WAS THEN RAISED BY HIS MOTHER IN

6 DRAVOSBURG UNTIL HE WAS TWENTY.

7 DEFENDANT GRADUATED FROM MC KEESPORT HIGH SCHOOL

EXHIBIT D

E-14

1 IN MC KEESPORT, PENNSYLVANIA IN 1946. LATER IN LIFE,
2 HE FURTHERED HIS EDUCATION AND GRADUATED FROM THE
3 UNIVERSITY OF NEBRASKA IN OMAHA IN 1970 WITH A
4 BACHELOR OF GENERAL STUDIES DEGREE. BETWEEN 1971 AND
5 1972 HE COMPLETED TWENTY TO THIRTY UNITS TOWARD HIS
6 MASTERS IN BUSINESS ADMINISTRATION DEGREE AT
7 CREIGHTON UNIVERSITY IN OMAHA.
8 DEFENDANT ENTERED THE UNITED STATES AIR FORCE
9 MAY 1, 1948 AND RETIRED FROM SERVICE AS A SENIOR MASTER
10 SERGEANT JUNE 30, 1969. HE INDICATES THAT HE WAS IN KOREA
11 DURING THE KOREAN WAR FROM JUNE TO NOVEMBER 1950.
12 FOLLOWING DEFENDANT'S RETIREMENT FROM THE
13 AIR FORCE, HE ATTENDED SCHOOL THROUGH 1972. FROM 1972
14 TO 1976 HE WAS A BRANCH MANAGER FOR BOOKKEEPERS BUSINESS SERVICE
15 IN HOUSTON, TEXAS. HE LEFT THIS JOB TO ACCEPT EMPLOYMENT WITH
16 HIS PRESENT EMPLOYER, MONROE, THE CALCULATOR COMPANY IN
17 HOUSTON, TEXAS. HE IS PRESENTLY EMPLOYED AS SENIOR APPLICATIONS
18 SPECIALIST EARNING $1,259.00 GROSS PER MONTH. IN JULY OF 1978
19 HE WAS MOVED BY HIS EMPLOYER FROM NEW ORLEANS, LOUISIANA TO
20 LOS ANGELES. HE IS PRESENTLY WORKING OUT OF THEIR OFFICES AT
21 8020 DEERING AVENUE, CANOGA PARK. DEFENDANT'S INCOME IS
22 SUPPLEMENTED BY HIS MILITARY RETIREMENT OF $717.00 PER MONTH.
23 DEFENDANT MARRIED ALICE THELMA RAY, NOW 52,

1 JUNE 15, 1950 IN PITTSBURG, PENNSYLVANIA. THEY WERE
2 SEPARATED IN 1971, DEFENDANT STATES, BECAUSE THEY HAD
3 PROBLEMS GETTING ALONG BECAUSE HE WAS A HOMOSEXUAL.
4 THE DIVORCE WAS FINAL IN 1974. THREE CHILDREN HAVE
5 RESULTED FROM THIS UNION, A BOY AND TWO GIRLS NOW
6 RANGING IN AGE FROM 24 TO 28 YEARS.
7 FOR THE LAST TEN YEARS, DEFENDANT HAS BEEN
8 LIVING IN A HOMOSEXUAL RELATIONSHIP WITH JIM MAYTUM, NOW
9 30. SINCE SHORTLY AFTER HIS ARREST IN THE PRESENT OFFENSE,
10 IN APRIL, 1979, DEFENDANT AND HIS "LOVER" HAVE BEEN
11 LIVING AT THE ADDRESS OF RECORD, A TWO-BEDROOM MOBILE
12 HOME VALUED AT $44,000.00. THEY EACH PAY ONE HALF OF THE
13 $650.00 MORTGAGE PAYMENT AND PRESENTLY OWE A BALANCE OF
14 $43,000.00. HE HAS A 1979 DATSUN 310 AUTOMOBILE VALUED
15 AT $6,200.00 ON WHICH HE PAYS $166.00 A MONTH. HIS
16 BALANCE IS PRESENTLY $5,500.00. HE HAS OTHER VARIOUS
17 DEBTS TOTALLING APPROXIMATELY $13,000.00 ON WHICH HE PAYS
18 OVER $500.00 A MONTH. HE HAS APPROXIMATELY $200.00 IN
19 BONDS AND ALSO OWNS TWO VACANT LOTS IN OCEANSPRINGS, MISSISSIPPI
20 WITH A TOTAL VALUE OF $5,000.00.
21 DEFENDANT INDICATES HE IS IN FAIR HEALTH AT THE
22 PRESENT TIME. HE HAD ENCEPHALITIS IN 1950 AND 1951 AND HAS
23 ALSO SUFFERED FROM HERNIAS. IN 1964 AND 1965 AND AGAIN IN 1974

EXHIBIT D

E-16

1 HE UNDERWENT MAJOR SURGERY ON HIS FEET.

2 DEFENDANT IS OF THE CHRISTIAN SCIENCE FAITH
3 AND ATTENDS CHURCH ONCE OR TWICE A MONTH.

4 SUBSTANCE USE:

5 DEFENDANT DENIES ANY INVOLVEMENT WITH THE
6 USE OF CONTROLLED SUBSTANCES. HIS USE OF ALCOHOLIC
7 BEVERAGES IS LIGHT STATING THAT HE DRINKS ONLY UP TO TWO
8 BEERS A WEEK AND AN OCCASIONAL GLASS OF WINE WITH DINNER.

9 ARREST RECORD:

10 SOURCES OF INFORMATION:

11 CII (1-30-80), FBI (2-13-80), LACO,
PROBATION INDEX, DEFENDANT.
12

13 ALL OF THE ABOVE REVEAL NO PRIOR ARREST HISTORY.

14 PRESENT OFFENSE:

15 DEFENDANT WAS ARRESTED BY OFFICERS OF THE
16 LOS ANGELES COUNTY SHERIFF'S DEPARTMENT APRIL 10, 1979 AT
17 11:00 PM AT THE GAVIN PASS REST STOP OFF OF INTERSTATE 5
18 For Violation ~~PROVIDED IN~~ SECTION 647(A) PENAL CODE (DISORDERLY CONDUCT--LEWD).
19 THIS OFFENSE WAS FILED UNDER THE PRESENT INFORMATION AND, AFTER
20 A NUMBER OF CONTINUANCES, DEFENDANT WAS FOUND GUILTY OF THE
21 OFFENSE AS CHARGED BY JURY TRIAL ON JANUARY 23, 1980. THE
22 MATTER WAS THEN CONTINUED TO THE INSTANT DATE FOR PROBATION
23 AND SENTENCE HEARING.

EXHIBIT D

1 ACCORDING TO THE ARREST REPORT, THE
2 CIRCUMSTANCES OF THIS OFFENSE APPEAR TO BE AS FOLLOWS:
3 AS A RESULT OF COMPLAINTS THAT MALES WERE
4 COMMITTING LEWD ACTS IN THE MEN'S PUBLIC RESTROOM AT THE
5 GAVIN PASS REST AREA, AN INVESTIGATION WAS CONDUCTED BY
6 DEPUTIES FROM THE SHERIFF'S VICE BUREAU. APPROXIMATELY
7 TEN MINUTES AFTER DEPUTY GARCIA ENTERED THE RESTROOM,
8 THE DEFENDANT ENTERED AND OCCUPIED THE URINAL ADJACENT
9 TO WHERE DEPUTY GARCIA WAS. DEFENDANT IMMEDIATELY BEGAN
10 MASTURBATING HIS ERECT PENIS. DEFENDANT AND THE DEPUTY
11 THEN HAD A SHORT CONVERSATION REGARDING THE WEATHER AND
12 DESTINATION OF TRAVEL. DURING THIS CONVERSATION,
13 DEFENDANT CONTINUED TO MASTURBATE. A SHORT TIME LATER,
14 DEFENDANT TURNED TOWARD THE DEPUTY WHILE CONTINUING TO
15 MASTURBATE AND ASKED, "YOU WANT TO MESS AROUND?"
16 DEPUTY GARCIA REPLIED, "WHAT DO YOU MEAN?" DEFENDANT
17 STATED, "YOU WANT TO GO DOWN ON ME?" THE DEPUTY REPLIED,
18 "SOMEONE'S IN THE TOILET STALL." DEFENDANT THEN WALKED
19 OVER TO AND LOOKED INTO THE TOILET STALL AND SAID,
20 "NO ONE IS IN HERE, WE CAN GO IN HERE." THE DEPUTY
21 STATED, "I'LL CHECK AND SEE IF IT IS CLEAR." DEPUTY GARCIA
22 THEN EXITED THE LOCATION AND GAVE A PRE-ARRANGED SIGNAL TO
23 DEPUTY MANSKIR WHO THEN RESPONDED TO THE LOCATION. THE

EXHIBIT D

1 DEPUTIES IDENTIFIED THEMSELVES TO THE DEFENDANT AND
2 PLACED HIM UNDER ARREST.
3 DEFENDANT'S STATEMENT:
4 DEFENDANT SUBMITTED THE ATTACHED TWO
5 PAGE TYPEWRITTEN LETTER IN WHICH HE DISCUSSES IN
6 DETAILS THE CIRCUMSTANCES OF THE PRESENT OFFENSE. IN
7 HIS WRITTEN AND ORAL STATEMENTS, DEFENDANT REPORTS THAT
8 HE HAD GONE OUT FOR A DRIVE BECAUSE HIS "LOVER" HAD GONE
9 OUT WITH OTHER FRIENDS THAT NIGHT. THEY WERE LIVING IN
10 SEPULVEDA AT THE TIME BUT WERE IN THE PROCESS OF MOVING
11 OUT TO THEIR PRESENT RESIDENCE IN SAUGUS. HE DOES NOT
12 REMEMBER HOW FAR UP INTERSTATE 5 HE WENT BEFORE TURNING
13 AROUND, BUT HE WAS ON HIS WAY HOME WHEN HE STOPPED AT THE
14 GAVIN PASS REST AREA TO USE THE FACILITIES. FROM THE
15 MOMENT HE ENTERED THE RESTROOM, THE UNDERCOVER OFFICER
16 "NEVER TOOK HIS EYES OFF MY PENIS." DEFENDANT DENIES
17 ANY INTENTIONS OF DOING ANYTHING WITH THE OFFICER STATING
18 THAT THE OFFICER WAS "COMING ON TOO STRONG." HOWEVER,
19 HE DOES ADMIT THAT HIS PENIS BECAME ERECT AS A RESULT OF
20 THE OFFICER'S STARING AT HIM AND, "...I DID'MASTURBATE'
21 FOUR OR FIVE STROKES...." HE WAS TRYING TO LEAVE THE
22 RESTROOM, AND, IN FACT, DID LEAVE THE RESTROOM BEFORE
23 BEING ARRESTED.

EXHIBIT D

E-19

1 DEFENDANT ADMITS THAT HE IS A HOMOSEXUAL
2 AND FEELS THAT BECAUSE OF THIS FACT, "...THE JURY COULD
3 NOT ACCEPT ANYTHING I SAID UNDER OATH AS THE TRUTH."
4 HE FIRST REALIZED THAT HE WAS A HOMOSEXUAL WHEN HE WAS
5 IN HIGH SCHOOL BUT DID NOT HAVE HIS FIRST EXPERIENCE UNTIL
6 AFTER HIGH SCHOOL.
7 INTERESTED PARTIES:
8 DEFENDANT SUBMITTED THE ATTACHED CHARACTER
9 REFERENCE LETTERS FROM RICHARD EUGENE MILLER, CRAIG M. JAMIESON
10 (SALES MANAGER AT DEFENDANT'S WORK), AND FR. THOMAS MEYER, O. CARM.
11 DIRECTOR OF PASTORAL CARE AT HOLY CROSS HOSPITAL IN MISSION HILLS.
12 THESE LETTERS ALL SPEAK FAVORABLY OF THE DEFENDANT AND ARE
13 ATTACHED FOR THE CONSIDERATION OF THE COURT.
14 PROBATION OFFICER ALSO SPOKE WITH JIM MAYTUM,
15 DEFENDANT'S "LOVER". HE IS CONVINCED THAT THE DEFENDANT IS
16 INNOCENT OF ANY WRONGDOING. HE FEELS THAT THE ALLEGATIONS
17 PRESENTED AGAINST HIM ARE TOTALLY OUT OF CONTEXT FOR HIS
18 BEHAVIOR. DEFENDANT IS TOO TIMID TO ENGAGE IN ACTIVITY LIKE
19 THIS. FURTHER HE KNOWS THAT THE DEFENDANT WOULD NOT LIE TO HIM.
20 HE ALSO KNOWS THAT OFFICER GARCIA IS NOT THE DEFENDANT'S
21 "TYPE."
22 EVALUATION:
23 THE DEFENDANT IS AN ADMITTED HOMOSEXUAL WITH

1 NO PRIOR ARREST HISTORY. ALTHOUGH HE DENIES SOLICITING THE
2 UNDERCOVER OFFICER, HE DOES ADMIT IN HIS WRITTEN STATEMENT
3 THAT HE BRIEFLY MASTURBATED HIMSELF WHILE STANDING AT THE
4 URINAL. ALTHOUGH THE DEFENDANT MAY NOT POSE A GREAT
5 THREAT TO THE COMMUNITY BASED UPON HIS ARREST RECORD, IT
6 IS FELT THAT HE SHOULD BE SUPERVISED BY THE PROBATION
7 DEPARTMENT AND ORDERED TO PAY A SUITABLE FINE. HE IS, OF
8 COURSE, AWARE OF THE REQUIREMENT TO REGISTER AS A SEX
9 OFFENDER PURSUANT TO SECTION 290 OF THE PENAL CODE. THE
10 FOLLOWING RECOMMENDATION IS THEREFORE RESPECTFULLY SUBMITTED.
11 RECOMMENDATION:
12 IT IS RECOMMENDED THAT THE COURT FIND THAT
13 THIS OFFENSE IS NOT A VIOLENT CRIME RESULTING IN INJURY OR
14 DEATH TO THE VICTIM; THAT THE DEFENDANT IS, THEREFORE,
15 SUBJECT TO A $5.00 PENALTY ASSESSMENT FOR EACH CONVICTION
16 OF A MISDEMEANOR TO BE PAID THROUGH THE PROBATION OFFICER TO
17 BE REMITTED TO THE STATE INDEMNITY FUND PURSUANT TO
18
19
20
21
22
23

SECTION 13967 GOVERNMENT CODE; THAT PROBATION BE GRANTED FOR A PERIOD OF THIRTY-SIX MONTHS AS PER THE ATTACHED MEMORANDUM.

RESPECTFULLY SUBMITTED,

KENNETH F. FARE, ACTING
CHIEF PROBATION OFFICER

BY [signature]
J. GARY MC MILLEN, DEPUTY
EAST SAN FERNANDO VALLEY AREA OFFICE-VALENCIA
TELEPHONE: 984-0610

READ AND APPROVED

[signature]
W. C. MARTIN, SDPO

TRANSCRIBED: 3-6-80/4:25PM
(DICTATED: 3-5-80)
JGM:GB (4)

I HAVE READ AND CONSIDERED THE FOREGOING REPORT OF THE PROBATION OFFICER.

JUDGE

76C692G - PROB 5A - 11/76

EXHIBIT D

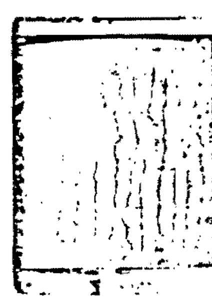
E-22

Probation Officer - 14414
Delano Street
Van Nuys. Calif. 91401

Dear Sir:

Mr. Al Reed and his family and myself and family have been friends for several years, around 7-8 years. We have shared much Church activities. He was and still is a highly respected person of our community and Church.

Mr. Reed has held a responsible job in a managerial possision since our friendship began. Living next door to him our families spent a lot of time together and we have always felt his integrity was very strengthing. In visiting their home in New Orleans and yet later in Calif. we have yet to feel anything but respect for Mr. Reed.



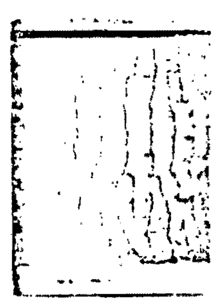
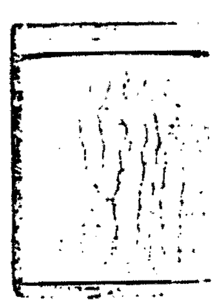


EXHIBIT D



Mr. Reed has called me many times to help with problems, as a Christian Science practitioner we have searched the scriptures together, he has worked to keep his life closely with Christ, and to find healing truths to strength his life. As we know God never condemns but uplifts. When Jesus was confronted with the people condeming Mary Magdelyn, he said, the man who is free from Sin cast the first stone, each man left the circle, leaving only Jesus and Mary together. Jesus looked up. and saw that only the two of them were left. And he said, "Go and Sin no more"! But he didn't label her as a sex offender nor did he mark her for Life. And she did become a soldier for Christ. I know if Mr. Reed is given this opportunity he also will begin a New bridge with God and will be stronger than

before and will move forward with God! A man must be allowed to maintain his integrity in order to be a productive citizen of America. Mr. Reed was a part of our military for many years. He served his country to keep its integrity as well.

I have been a Christian Science practioner for several years. We work with human problems every day, we search the scriptures for our life from God. And his message is always do not condemn! Love with and open heart, and strengthen your fellow man or fellowwoman. Do not push them in a dark corner. Give them the insight to move forward to be the Christ Child.

With Much Sincerity

Richard Eugene Miller C.S.

3600 MONTROSE BLVD
PARC V NUMBER 904
HOUSTON, TX 77006

EXHIBIT D

Monroe, The Calculator Company
8020 Deering Ave., Canoga Park, Calif. 91303 213 884-0321

Feb. 7, 1980

Probation Officer
14414 Delano Street,
Van Nuys, Ca. 91401

Dear Sir,

As per your request, Allen Reed has asked me to write you this letter regarding his employment with Monroe, the Calculator Co..

I personally have know Al on both a social and professional basis for about a year and a half now, ever since his transfer to our office from our New Orleans branch. Al came to us from that office under very high recommendations and has since performed far beyond our expectations.

As an applications specialist, Al plays a very integral part in our business and in the opinion of myself, our customers, and the hundreds of other employees of our companywho he comes in contact with, he is highly efficient, trustworthy, and honest. As the senior application specialist for the Pacific Region offices, Al is responsible for all work in progress as well as handling special projects, yet despite his heavy work load he is always happy to help in any phase of our business that he may be able to.

I have been aware of Al's lifestyle for approximately one year now. When Al first told me that he was gay I was very surprised to say the least, as nothing had led me to suspect even that possibility. Before meeting Al I, like many others, had my own preconceived beliefs concerning the morality, desireability, etc. of gay people, however, Al has consistently proved my previous thoughts to have been wrong.

In short I have the highest respect for Al as both a friend and as a co-worker and I hope that this letter will help you in making your necessary recommendations.

Sincerely,

Craig M. Jamieson .
Sales Manager
Monroe, the Calculator Co.

EXHIBIT D

E-26

Holy Cross Hospital

February 6th, 1980

To Whom it may concern;

Probation Officer,

I am writing this letter for Allen Reed who is to see you on Monday February 11th. I have known Allen for a couple of years now, since he moved to California. Socially we have gone out together and I have had dinner at his home a number of times.

Needless to say I was very shocked when the whole incident came about and even more shocked when I heard the results of the trial. I sometimes wonder where justice really begins for the innocent person. Because we sure know quite well how the real criminal is protected by the law. God must be totally confused with our laws, justice and moral acts. But when a person whom I feel is a good person like Al, is totally exposed to embarrasment by the law, then I am truly distrubed with our justice system.

During the time of our association and friendship which I highly cherish, I have never known Al to deliberately hurt anyone. I have always known Allen to be a very friendly and honest person, who likes good times and things, but does not interfer into other peoples affiars. This present situation has made Al become very tense and really withdrawn from friends. It is changing Al into an entirely different person. Al is not one to go around breaking laws and if you look at his outstanding military record even you would come to the same conclusion that Allen is a good man.

I really feel that with all the good that Allen has done for our country, that we in turn can help him and not allow Him to be unjustly persecuted at this time. I certainly hope and pray that you as his probation officer will feel the same way and ask the judge to dismiss all charges.

Thank you for taking the time to read this letter and I will pray that God guides you in your decision.

Sincerely yours,

Fr. Thomas Meyer, O.Carm.

Fr. Thomas Meyer, O.Carm.
Director of Pastoral Care

EXHIBIT D

15031 Rinaldi Street • Mission Hills • California 91345 • (213) 365-8051

E-27

February 4, 1980

On the night of the incident I had been out driving, going north a way on Interstate 5. After awhile I doubled back to head south and back home. I stopped at the rest stop on Interstate 5 near the Calgrove exit. On entering the men's rest room I saw a man, who later proved to be Officer Garcia, standing at the urinal about a foot back from the usual position. He watched over his shoulder as I entered. He continued watching me as I removed my penis from my trousers to use the facilities. I was aware out of the corner of my eye that he was fingering his penis, ie, pulling it outward and skinning it, as he watched me. I turned my head toward him and we commented back and forth about the weather, etc. All the while he stared at my penis which soon became erect. I did 'masturbate' four or five strokes. At this point Officer Garcia asked, "What do you want to do?" I shrugged my shoulders in an 'I don't know' manner. Then he said, "Someone else is in here." I knew that was not true and zipped up and stepped back from the urinal in preparation to leave. Officer Garcia then said, "Let me check to see if the coast is clear." He then opened the outside door, stepped half way out, then came back in and said, "We can go in here." -- pointing to the toilet stall. But I was on my way out and said, "No, I"m leaving". At this point Officer Garcia tried to get me to go into the stall and when he saw I was heading for the door he stepped forward as if to block my exit. But I brushed passed and went outside. As I was walking toward my car I noticed two guys walking toward me. One shouted, "Is this the guy?" A glance over my shoulder confirmed that he was calling to Officer Garcia who was standing in the doorway of the rest room and his answer was "Yes". The officer coming toward me then placed me under arrest. It was after I was in the second officer's car and on the way out of the parking lot before I realized that no one had identified themselves to me. I said to the driver, "I assume you are police." He immediately stopped the car, showed

EXHIBIT D

E-28

me a folder. I accepted them as police eventhough I could not really see what I was shown due to lighting and lack of reading glasses. The officer asked me if I had been informed of my rights. I said, "NO", so he did that.

I chose to bring the case to trial rather than pleading guilty to a lesser offense because I felt strongly that I was innocent of the charges by the Officer. I could not arbitrarily accept the lesser offense to establish a record on myself because I felt no offense had been committed. It would be absurd and fool hearty for me to walk up beside a stranger at a urinal and immediately masturbate, as the officer has stated. This would only lead to a bruised head or missing teeth most of the time. All the way the Officer acted as an interested person, encouraging me to do things I would not have done without plenty of indication that the onlooker was not to be offended.

The guilty verdict has me completely baffled and still stunned. I can only justify in my mind that simply because I am gay the jury could not accept anything I said under oath as the truth. If I were going to lie, or had to lie to make it look good to the jury, I would not have gone as far as I have with this case.

My reaction now is that I can never again, let myself be placed in such a compromising position, no matter what. In the times since when I have had to use public rest room facilities, I have all but been unable to relax sufficiently to urinate, even under pressing need. I have the greatest fear that at anytime I, or anyone, (straight or gay) could be falsely accused of such an offense and have very slim odds, if any, of disproving the accusations or having anyone believe anything but what the accuser says.

Allen E Reed

EXHIBIT D

	Date	Initi
Cal.		
D.S.		
Revdx.		

MUNICIPAL COURT OF NEWHALL JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA
P&S MEMORANDUM OF COURT ORDER - PROBATION

People of the State of California vs.

Name: ALLEN EUGENE REED

Area Office: ESFV-VALENCIA Date of Order: 3-14-80
Judge: CLARK
Division: 11 Offense: 647(A) P.C.
Case No.: M-9186 Probation No. X 521358

☐ Probation/Diversion denied.
☐ Sentence imposed as follows: ☐ ______ days imprisonment in the Co. Jail. ☐ $ ______ or ______ days in the Co. Jail.

☐ Imposition of sentence suspended. ☐ Execution of said sentence suspended.
☐ Placed on formal/summary probation with/without supervision of the Probation Officer with/without prior referral.
☐ Probation/Diversion granted for ______ months.

TERMS AND CONDITIONS IMPOSED AS TO COUNT (S) ______.

REC.		ORDERED	
☐	1.	☐	Spend first ____ days in Co. Jail. ☐ Defendant shall serve ______ consecutive week-ends in the Co. Jail of Los Angeles County, each week-end period to be from ____ M. on ______ to ______ M. on ______ beginning on ______, 19__. ☐ Credit for ______ days served (includes GT/WT).
☒	2.	☐	Pay a fine of $ ______ and assessment(s) for: ☐ Or serve ______ days in the Co. Jail. ☐ Peace Officer Training $ ______ ☐ Night Court $ ______ ☐ Lab fee of $25.00 included. ☐ Driving Training $ ______ ☐ Victim Indemnity Fund $ ______ ☐ through Court Clerk/Probation Officer as follows: $ ______ forthwith; $ ______ on the ______ of each month commencing ______ until paid; ☒ in the manner directed by the Probation Officer.
☐	3.	☐	Minimum payment of fine/restitution to be $ ______.
☐	4.	☐	Make restitution through the Probation Officer in such amount and manner as officer shall prescribe.
☐	5a.	☐	Abstain from use of all alcoholic beverages, including beer and wine, and stay out of places where they are the chief item of sale.
☐	5b.	☐	Cooperate with Probation Officer in any program designed to curb defendant's drinking habit.
☐	6.	☐	Not use or possess any narcotics, dangerous, or restricted drugs or associated paraphernalia, except with valid prescription, and stay away from places where users congregate.
☐	7.	☐	Not associate with persons known by you to be narcotic or drug users or sellers.
☐	8.	☐	Submit to periodic anti-narcotic tests, as directed by the Probation Officer.
☐	9.	☐	Not have blank checks in possession, not write any portion of any checks, not have bank account upon which you may draw checks.
☐	10.	☐	Not gamble or engage in bookmaking activities or have paraphernailia thereof in possession, and not be present in places where gambling or bookmaking is conducted.
☐	11.	☐	Not (associate with), (harass, molest, or annoy) ______
☐	12.	☐	Cooperate with Probation Officer in a plan for ______
☐	13.	☐	Support dependents as directed by Probation Officer.
☒	14.	☐	Seek and maintain training, schooling, or employment as approved by Probation Officer.
☒	15.	☐	Maintain residence as approved by Probation Officer.
☐	16.	☐	Surrender driver's license to clerk of court to be returned to D.M.V.
☐	17.	☐	Not drive a motor vehicle unless lawfully licensed to drive, and then only when PL & PD insurance has been obtained and evidence thereof shown to the Probation Officer.
☐	18.	☐	Not own, use or possess any dangerous or deadly weapons.
☐	19.	☐	Submit his (her) person and property to search or seizure at any time of the day or night by any Law Enforcement Officer or by the Probation Officer with or without a warrant.
☒	20.	☐	Obey all laws, orders of the Court, and rules and regulations of the Probation Officer.
☐	21.	☐	Spend ______ days/hours in Community Service and show proof of completion to ______ by ______.
☐	22.	☐	Continued to ______ at ______ M. for ______. ☐ Defendant ordered to return.
☐	23.	☐	Remain away from the premises at ______
☐	24.	☐	Not associate with children under 14 years, except in presence of responsible adults.
☒	25.	☐	Stay out of places where homosexuals congregate.
☐	26.	☐	Other:

(handwritten margin note: 3-1 mo 500 fine ...)

	Date	Init
Cal.		
D.S.		
Revdx.		
Insur.		
Krdx.		
Cse Ft.		
Audit Cd		
Cli		
Lstr.		

EXHIBIT D

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Clerk of the above named court By ______ Deputy

P&S MEMORANDUM OF COURT ORDER - PROBATION

State of California

DIVISION OF CRIMINAL IDENTIFICATION AND INVESTIGATION

P. O. Box 1859, Sacramento 9, Calif.

CII No.

NOTICE OF REGISTRATION REQUIREMENT

Pursuant to Sec. 290 Penal Code

Local No. ..... by which known to Notifying Officer

L.A. Co. Marshal's Dept — 23747 W. Valencia Bl. Valencia Cal. 91355
NOTIFYING OFFICER OR AGENT — ADDRESS

STATEMENT OF NOTIFYING OFFICER

I certify that on 3-14-80 (DATE) the below-named subject was informed of his duty to register under the provisions of Section 290 Penal Code. Notification was predicated on the fact that on 3-14-80 (DATE) subject will be RELEASED ON FORMAL PROBATION

DISCHARGED, PAROLED, RELEASED, GRANTED LEAVE, RELEASED ON PROBATION, DISCHARGED UPON PAYMENT OF FINE, OR OTHER CONDITION

FULL NAME OF PERSON NOTIFIED: ALLEN EUGENE REED
TYPE OR PRINT—FIRST, MIDDLE, AND LAST NAMES, INCLUDING ANY ALIASES KNOWN

Hair BRN Eyes BRN Height 5-7 Weight 175 Age 52 Descent CAUC Occupation SR. APPLICATIONS SPEC

Date of birth 3-5-28 Place of birth DAVENPORT, PA Scars, tatoos, deformities DOUBLE HERNIA SCARS

NOTIFYING OFFICER: [signature]
SIGNATURE AND TITLE
Deputy Marshal - L.A. County

STATEMENT OF PERSON NOTIFIED

I was arrested on 4-10-79 (DATE) under the name of ALLEN EUGENE REED

booked at SANTA CLARITA VALLEY SHERIFF'S STATION VALENCIA, CA
TYPE AND LOCATION OF JAIL, HOSPITAL, OR OTHER PLACE OF DETENTION

convicted of or committed as 647(a) P.C. on 4-10-79
OFFENSE OR REASON FOR COMMITMENT — DATE

paid a fine of $ 500.00 and/or was confined at N/A (NAME OF PLACE OF CONFINEMENT) as Number N/A

for ..... years, 24 months, ... days. I WAS (WAS OR WAS NOT) placed on FORMAL PROBATION (PROBATION OR PAROLE) until 3-14-82 (DATE)
FORMAL PROBATION

UPON MY DISCHARGE, PAROLE, OR RELEASE I EXPECT TO RESIDE AT:

26464 BENT GRASS — SAUGUS CAL — L.A. COUNTY
APARTMENT OR ROOM NUMBER — STREET ADDRESS — CITY — COUNTY

Name of nearest relative (or friend) JAMES MAYTUM Relationship FRIEND

Residence 26464 BENT GRASS SAUGUS CAL

I understand that as a result of the above-described conviction and/or commitment I am required to register immediately or within 30 days of coming into any other city or county of California under the provisions of Section 290 Penal Code with the chief of police of the city or the sheriff of the county, if unincorporated area, in which I reside or am temporarily domiciled for such length of time. Upon changing my residence address I understand that I shall inform in writing, within 10 days, the law enforcement agency with whom I last registered of my new residence address. I ACKNOWLEDGE RECEIPT OF A COPY OF THIS FORM.

SIGNATURE OF PERSON NOTIFIED: [signature]
FIRST — MIDDLE — LAST NAME

SECTION 290 PENAL CODE IS PRINTED ON THE REVERSE OF THIS FORM

Original (orange) } to be sent to
Duplicate (canary) } Division of Criminal Identification and Investigation
Triplicate (pink): for Notifying Officer
Quadruplicate (white): for Person Notified

CII-4 (REV. 1955)

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EXHIBIT D

Rolled Fingerprint
Right Index Finger of Person Notified
(if amputated, use next available finger)

COUNTY OF LOS ANGELES

KENNETH F. FARE
ACTING CHIEF PROBATION OFFICER

PROBATION DEPARTMENT

INSTRUCTIONS TO ADULT PROBATIONER.

NAME Reed, Allen Eugene PROBATION NO. X821858

COURT NO. M-9186 COURT DATE 3/14/80

With these instructions you are receiving a copy of the court order

XX	GRANTING
	MODIFYING
	RESTORING

[X] PROBATION
OR
[ ] DIVERSION

In addition to the conditions of your grant of probation or diversion which are contained in the Court Order, you are instructed by the Probation Officer as follows:

1. To notify the Probation Officer before changing your address or employment.
2. To remain in Los Angeles County or county of residence unless permitted by the court or Probation Officer to go elsewhere. Request to leave the State should be made two months in advance.
3. To report to the Probation Officer in person as directed. The office is closed Saturdays, Sundays and holidays.
4. To obey all laws.
5. To notify the Probation Officer of any arrests no more than 24 hours after they occur.
6. Other directions:

Register per 290 PC at Hall of Justice 211 W. Temple St.

EXHIBIT D

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FILED
Robert D. Zumwalt, Clerk
OCT 8 1980
BY [illegible], DEPUTY

RECEIVED OCT 10 1980

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED OCT 8 1980

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHN EDWIN WYATT, Defendant and Appellant.	SUPERIOR COURT NO. CR 50555 MUNICIPAL COURT NO. M 316117 (San Diego Judicial District) ORDER

Judgment affirmed. The matter is remanded to the trial court to strike the registration requirements, it being cruel and unusual punishment in this case.

BY THE COURT

[signature], P.J.

[signature], J.

_______________, J.

TRL/rml

EXHIBIT D

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COPY

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/ Respondent, -vs- JOHN EDWIN WYATT, Defendant/ Appellant.	No.: M316117 SETTLED STATEMENT ON APPEAL

On December 3, 1979 in Department Eight, Judge Ernest Borun presiding and jury having been waived, trial proceeded as set forth below. Opening statements were waived.

The prosecution called as its only witness Edward A. MacConaghy, who testified that he has been a San Diego police officer for about one year. He is now a uniformed patrol officer assigned to the State College area of San Diego.

On August 24, 1979 Officer MacConaghy was on a special plainclothes assignment in Balboa Park. It was his first and last such assignment. He did not think much of such duty; it offended him.

EXHIBIT D

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3 At approximately 1:00 A.M. on August 24, 1979, he was in the
4 Marston Point area of Balboa Park. He first saw the appellant
5 (whom he identified at trial) inside the men's public restroom b
6 a picnic area at Juniper Street.

7 Briefly thereafter, while Officer MacConaghy was leaning
8 against a wall outside the bathroom, appellant Wyatt approached
9 him. A short conversation followed and names were exchanged.
10 Wyatt suggested they go for a walk together; MacConaghy agreed.
11 They walked across the grass to the south of the restroom. Ther
12 at Wyatt's suggestion, the two sat on a public bench in an area
13 known for homosexual activity. No one was in the immediate
14 vicinity. It was not totally dark as some light from the
15 restroom area reached them. MacConaghy could see Wyatt's face.
16 Wyatt offered MacConaghy a cigarette. After a conversation of
17 two to three minutes Wyatt reached over putting his left hand o
18 MacConaghy's knee and immediately moved it up and gently touche
19 MacConaghy's trousers in the genital area. (The trousers were
20 properly zipped closed.)

21 MacConaghy stood up and advised Wyatt he was under arrest.
22 Wyatt resisted MacConaghy's attempt to handcuff him. MacConagh
23 attempted to apply the standard police sleeper hold but failed. Wy
24 was eventually subdued on the ground and placed under arrest wi
25 the assistance of Officer DeVries.

26 Appellant's motion for judgment of acquittal (Penal Code
27 §1118) was denied as to both counts.

28 Appellant Wyatt took the stand as his only witness. He

EXHIBIT D

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3 testified that on August 24, 1979 at about 1:00 A.M. he was walk-
4 ing past the restroom near Juniper Street but did not go in. He
5 saw a man, identified as Officer MacCongaghy at trial but unknown
6 to appellant when he first saw him. The man was leaning against
7 the west wall at the northwest corner, looking toward Sixth
8 Street, staring around the corner. The man spoke to Wyatt, com-
9 menting on what a nice evening it was, and offered him a cigarett
10 They conversed for five to ten minutes. The man (not the appell
11 then suggested they take a walk.

12 They proceeded, with appellant in the lead, toward the sout
13 At the park bench the officer (not known to be an officer) said,
14 "Let's sit." They did, with the officer on appellant's left.
15 They were facing north toward the restroom structure. There was
16 very little light. The officer sprawled (sic) his legs apart.
17 Appellant talked about his school, his job, his recent breakup
18 with his male lover, and the end of his two-week vacation.
19 Appellant assumed the officer was also gay. The officer moved
20 closer and touched appellant's knee with his knee. Appellant's
21 legs were crossed.

22 Appellant believed the officer was gay due to the suggestic
23 to walk away from the light coupled with what appellant recogni
24 as a typical line: "Nice evening, want a cigarette?" "Want to
25 for a walk?"

26 After talking to the officer for a total of about one half
27 hour, ten minutes at the building and twenty minutes on the benc
28 appellant thought the officer was tired of listening because he

EXHIBIT D

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/ / /

was looking off and not replying. He felt at this point that he knew the officer pretty well and that he (the officer) wanted something besides talk. The officer had said where he lived, gi\ his first name and had discussed not liking his job. As a gay m with experience in other situations, appellant "could gather wha the man was after" and proceeded to offer it; he reached over an stroked the officer's thigh two or three times, then moved his hand up to the officer's crotch. The officer identified himself as a cop at this point.

Appellant felt panicky (sic) and stood up. He was upset. He started to apologize as soon as the officer identified himsel The officer again said to turn around, that he was a police offi The officer struck appellant in the back; he went down with his hands on his knees. The officer struck appellant several times; appellant was crying and asked to be taken to the car and to jai The officer reacted by hitting appellant again and applying the sleeper hold. Further struggling occurred. Appellant was final cuffed by the other officer who had just arrived.

Officer MacConaghy again testified in rebuttal. Appellant, not the officer, suggested the walk. The conversation on the park bench lasted five to ten minutes, not twenty. The officer did not move closer to cause knees to touch. Appellant did not stroke the officer's leg before touching his crotch. The offic did not hit appellant in the back; appellant was on the ground due to the sleeper hold. He did not kick appellant nor see his partner knee him in the face.

EXHIBIT D

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3 The Judge found appellant not guilty of count two, Penal Co
4 §148, and guilty of count one, Penal Code §647(a).

5

6 Approved as to form and content.

7 DATED: May 13, 1980

8

9 GEORGE HAVERSTICK, Attorney f
Defendant/Appellant.

10 DATED: May , 1980

11

12

FRAN F. McINTYRE, Deputy City
13 Attorney for Plaintiff/Respon

14 The above Statement is hereby settled as setting forth fai
15 and truly the evidence and proceedings in this action, and the
16 same is hereby certified to the Appellate Department, San Diego
17 Superior Court.

18 DATED:

19

20

ERNEST BORUNDA
21 Judge of the Municipal Court

22

23

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EXHIBIT D

THOMAS F. COLEMAN
1800 North Highland Avenue
Suite 106
Los Angeles, CA 90028
(213) 464-6669

Attorney for Defendant

MUNICIPAL COURT OF THE NEWHALL JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
ALLEN EUGENE REED,
Defendant.

Case No. M-9186

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTION, MOTION AND REQUEST RE: REGISTRATION UNDER P.C. §290

I

THERE IS NO BINDING PRECEDENT ON THE CONSTITUTIONALITY OF SECTION 290 AS APPLIED TO DEFENDANTS CONVICTED OF VIOLATING SECTION 647(a) P.C.

In the case of In re Anders (1979) 25 Cal.3d 414, the constitutionality of Section 290 P.C. (sex registration) as applied to 647(a) defendants was presented to the Supreme Court. That issue had not been raised in the Municipal Court or in the Superior Court. The Supreme Court disposed of Anders without even a reference to Section 290 or its constitutionality. In the case of Pryor v. Municipal Court (1979) 25 Cal.3d 238, the Court acknowledged that the issue had been raised but stated:

> "Defendant's attack on the constitutionality of Penal Code section 290, the sex registration law, is premature; he has not yet been convicted and is not presently subject to registration." Pryor, supra, at footnote 14.

There is no California Supreme Court decision in which the constitutionality of Section 290 as applied to 647(a) defendants has been discussed or decided.

The California Court of Appeal refused to deal with the constitutionality

EXHIBIT E

of sex registration under 290 for those who were convicted of Section 288a P.C. (oral copulation). Previous to 1976, the oral copulation statute prohibited consenting adult sex in private. In the case of People v. Zeihm (1974) 40 C.A.3d 1085, the trial judge declared Section 288a unconstitutional and the People appealed. The Court of Appeal reversed the dismissal and, because the defendant had not yet been convicted, refused to consider the issue of the constitutionality of Section 290.

In the case of People v. Mills (1978) 81 C.A.3d 171, the defendant had been convicted of Section 288 (lewd and lascivious acts with a child under 14). On appeal he challenged the constitutionality of Section 290 as applied to his conviction. The Court of Appeal rejected his constitutional objections, as applied to a conviction of 288 P.C. and, particularly, to the facts of his case. The Court specifically pointed out that it was not deciding the constitutionality of 290 as applied to 647(a) defendants. The Court recognized that the constitutional arguments would be much stronger in such a context.

Only one case has held that sex registration for 647(a) defendants is not cruel and unusual punishment. People v. Rodriguez (1976) 63 C.A.3d Supp. 3. In that case the Appellate Department of the San Bernardino Superior Court upheld a conviction under 647(a) of two men who had been kissing in a parked car at 1:00 a.m. This case is not controlling for three reasons. First, the decision of one appellate department is not binding on a court in another county. Secondly, Rodriguez has been criticized by the Supreme Court in Pryor and has been effectively overruled. Finally, other constitutional issues were not raised and decided by that court.

Therefore, the issues herein presented come to this Court without binding or controlling precedent, and this Court is free to decide the issues freshly.

II

SEX REGISTRATION FOR 647(a) DEFENDANTS WORKS AN INJUSTICE ON HOMOSEXUAL MALES

It is common knowledge throughout the legal system that Section 647(a) has traditionally been used to regulate homosexual conduct and speech — almost exclusively so. In the case of People v. Dudley (1967) 58 Cal.Rptr. 557, the Court indicated that both homosexual solicitation and homosexual conduct is prohibited by 647(a). Similarly, in People v. Mesa (1968) 71 Cal.Rptr. 594, 597, it was stated:

"It is manifest that the Legislature believed that

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subjection in public to homosexual advances or observation in public of a homosexual proposition would engender outrage in the vast majority of people."

Virtually all published opinions concerning 647(a) have involved homosexual conduct or speech. People v. Rodriguez, supra, (homosexual kissing); People v. Williams (1976) 59 C.A.3d 225 (masturbation in a homosexual cruising spot); Pryor v. Municipal Court, supra (homosexual solicitation); People v. Mesa, supra (homosexual solicitation); People v. Dudley, supra (homosexual solicitation); People v. Woodworth (1956) 147 C.A.2d Supp. 831 (homosexual solicitation). Although the court records in Silva v. Municipal Court (1947) 40 C.A.3d 733, and People v. Deyhle (1977) 76 C.A.3d Supp. 1, do not reflect the speech or conduct in question because the only issue in each case involved a demurrer to the complaint, counsel can represent that each involved homosexual situations since counsel was either attorney of record or amicus in each case. This Court may also take judicial notice of unpublished opinions of the Appellate Department of the Los Angeles Superior Court which show that the overwhelming majority of those cases involved homosexual situations. (See People v. James (1977) CR A 15320; People v. Forshbach (1972) CR A 10813; People v. Correa (1970) CR A 9250; People v. Tyson and McDonald (1967) CR A 7112-7113.)

The California Supreme Court noted that:

"Three studies of law enforcement in Los Angeles County indicate that the overwhelming majority of arrests for violation of Penal Code section 647, subdivision (a) involved male homosexuals." Pryor, supra at 252.

This Court can also take judicial notice that for many years it was a standard practice in the Los Angeles Judicial District to impose conditions of probation on persons convicted of 647(a) or of a lesser offense arising out of a plea bargain in a 647(a) prosecution which stated, "Do not publicly associate with known homosexuals. Do not frequent places where homosexuals congregate." This Court may take judicial notice of the documents on file in the case of In re Edwin Eugene Womble, petition for a writ of habeas corpus, case number HC-203886, dismissed as moot October 13, 1977, by Department 70 of the Los Angeles Superior Court because those conditions of probation, under challenge in that petition, were vacated.

The fact that 647(a) has resulted in a disproportionate number of prosecutions of homosexual offenders, as opposed to heterosexual men committing lewd conduct, takes on added significance because of the requirement to register under 290. Automatic registration of all persons convicted of 647(a) has a disparate

impact on a particular class of people — homosexual males. Furthermore, since most people in law enforcement and the legal system assume or have assumed that a 647(a) defendant is a homosexual, automatically requiring registration in the community in which the defendant lives or moves into is tantamount to requiring him to announce to the police that he is a homosexual, and thereby subjects him to possible harrassment because of his sexual orientation (as opposed to his status as a misdemeanant).

Forcing someone to disclose his sexual orientation is a violation of the right to privacy guaranteed by the California Constitution, absent a compelling state interest. Of what possible benefit could this be to the police? Certainly, any benefit would not involve a valid or legitimate state interest. On the rare occasion when a person is convicted of violating 647(a) for heterosexual conduct, automatically requiring him to register in his local community of residence will create an equally cruel result. He will be labeled by the police as a homosexual even though he is not.

Therefore, because forced registration of 647(a) defendants is tantamount to forced disclosure of either actual or perceived sexual orientation thereby infringing on the right to privacy, this Court should strictly scrutinize automatic registration and uphold it only upon a showing that there is some compelling state interest and that there is no narrower manner than registration by which the legitimate interest in registering such persons—if there is a legitimate purpose— could be achieved. The Mills Court recognized that a defendant's right to privacy was invaded by registration, but found that as applied to a convicted child molester, there were sufficient state interests to invade that right. Here, where the gist of the offense is consenting adult sexual behavior which merely offends the sensibilities of plainclothes vice officers in most situations, what compelling interest could there be for registration?

III

ALTHOUGH HOMOSEXUALS HAVE HISTORICALLY BEEN SUBJECTED TO AUTOMATIC PENALTIES AND DISABILITIES, THE LEVEL OF JUDICIAL SCRUTINY AND PROTECTION HAS CHANGED IN RECENT YEARS

Historically, and particularly in America, homosexuals have been subjected to a tremendous amount of discrimination from both the government and private individuals. Until recently, there was little or no recourse against such discrimination.

Homosexuality was an automatic bar to civil service employment (see Morrison v. State Board of Education (1969) 1 C.3d 214, 226, at footnote 17) for many years. Now, however, sexual orientation is not a ground for dismissal (see Singer v. United States Civil Service Commission (1977) 97 S.Ct. 725).

Homosexuality has traditionally been an automatic bar to service in the military. Now, however, "fitness hearings" are being required in many cases before a discharge will be permitted. Saal v. Middendorf (N.D.Cal., 1977) 427 F.Supp. 192; ben Shalom v. Scretary of Army (U.S.D.C., E.D.W.S., 1980) 22 Fed Cases 1396.

Previously, all homosexual conduct, though not shown to relate to fitness, warranted disciplining of a teacher (see Sarac v. Board of Education (1957) 249 C.A.2d 58, 63-64). This type of automatic penalty for homosexuality was finally disapproved and precluded in 1969 by the California Supreme Court in Morrison, supra.

Homosexuals had no recourse from automatic termination of employement in the private sector until last year. In Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979) 156 Cal.Rptr. 14, the Supreme Court broke new ground and interpreted a section of the Labor Code to authorize both civil and criminal penalties against a private employer who so discriminates.

The point being made here is rather simple and direct. The level of judicial scrutiny regarding sex registration should be greater than it has been in the past. Although strict scrutiny has applied de facto regarding registration of 647(a) defendants because many, if not most, judges simply do not order defendants to register, it is time that this silent policy becomes de jure.

IV
THE REQUIREMENT TO REGISTER IS AUTOMATIC

Section 290 of the Penal Code requires persons convicted of certain enumerated crimes to register with the Chief of Police in the city in which he resides or into which he moves. "The section applies automatically. . . and imposes a lifelong requirement of registration and re-registration absent a court order releasing the registrant from the penalties and disabilities of his conviction under section 1203.4 . . ." Barrows v. Municipal Court (1970) 1 C.3d 821, 825.

Failure to comply with the registration requirement is a misdemeanor and may subject the defendant to an additional prosecution for such a violation.

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Kelly v. Municipal Court (1958) 324 P.2d 990. If a defendant has been properly given notice of his duty to register and has been ordered by the sentencing court to register, he might also be subject to revocation of probation if he fails to comply with 290. People v. Buford (1974) 42 C.A.3d 975. If the sentencing judge fails to properly comply with the notice requirements of section 290, it would be an abuse of discretion to hold the defendant in violation of probation for his failure to register. Buford, supra, at 986-987.

All persons convicted of 647(a) must register. There are no exceptions. A fifty-year-old man with a perfect record who engaged in a single indiscretion with another consenting adult must automatically register even though there is no likelihood that he will ever commit the same or similar offense. He is barred from presenting evidence to a judge that registration will work a severe hardship on him, damage him psychologically by lumping him with rapists and child molesters, that the incident did not harm anyone, or that it is unlikely that he will ever commit such an offense in the future. Although a judge might be sympathetic to these issues, the law does not provide for any hearing on the interest to society or lack of it in having this particular man register.

V

NO PROCEDURE EXISTS TO EXPUNGE THE RECORD OF REGISTRATION

"The duty to reregister upon changing one's place of address is a continuing duty, a burden the convicted person carries with him until his dying day. Being thus severely limited in his freedom of movement and continuously under police surveillance . . . the conclusion seems irresistible that this registration requirement is one of the 'penalties and disabilities resulting from the offense or crime of which he has been convicted' from which as a faithful and successful probationer, he is thereafter 'released' by the mandate of section 1203.4" Kelley, supra, at 992.

But, the Kelley Court noted:

> "This release obviously operates prospectively and not retroactively. It does not necessarily revoke or expunge the record of any registration or reregistration

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that took place during the probationary period." Kelley, at 992, footnote 2.

What does this mean in practical terms? A homeowner who lives in Los Angeles but who is convicted of lewd conduct arising out of a "raid" on a gay bathhouse in San Diego, must register as a sex offender with the Chief of Police in Los Angeles. After his probationary period, he can apply for relief under 1203.4 in the San Diego court. However, he will continue to be a registered sex offender in Los Angeles until his dying day, and as long as he does not move to another address, all the information on file with the Los Angeles police remains current. Relief under 1203.4 does not help this man vis-a-vis registration. Another man lives in a small community of 1,000 people. He goes to the "big city" and gets into trouble when he solicits an undercover vice officer to have sexual relations with him. He can't afford to stay and fight his case and so he pleads guilty to the charge. Although he was told of the duty to register by the judge accepting the plea, he simply didn't realize the significance of registration. When he arrives home and comes to his senses, he understands that he must register with the police department in this little community or worry about being prosecuted for failing to do so. Rather than going on record with the police as "the local pervert", he opts to move to a larger city where registration will not work as serious a hardship on him or his family. The hardship stories are almost as numerous as the number of defendants who are required to register.

Once registered, always registered! The defendant's name, photograph, and other relevant information goes on record with the local police and is sent to the state Department of Justice within three days after the local registration occurs. Although a defendant may be relieved from giving the local authorities updated information concerning his new residence, he will nonetheless continue to be registered with the governmental entities regardless of relief under 1203.4.

VI

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES EQUAL PROTECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS

Persons convicted of soliciting a lewd act must register; persons convicted of such a solicitation for money or other consideration never have to register. Persons who engage in lewd conduct in a public place and who are so convicted

must register; persons who do the same act for money or other pecuniary gain—even as a business—need not register. All those who violate 647(a) must always register; all those convicted of 647(b) never have to register.

In discussing an equally absurd situation, the Supreme Court refused to interpret 647(a) as applying to live theatrical performances. "[A] serious equal protection problem would evolve if we were to interpret section 647, subdivision (a) as respondent urges. . . It would be arbitrary and vexatious to require that persons in petitioner's position should be subject to the registration requirement, while those who have violated the laws against obscenity by selling and exhibiting obscene movies, books, and pictures to minors or who employ minors for the purpose of such distribution (§§ 311.2, 311.3, 311.4) should not be subject to such a burden." Barrows, supra at 827.

This same constitutional problem emerges in a comparison of the duty to register under 647, subdivision (a) and the lack of it under subdivision (b). It is arbitrary to require registration for all 647(a) defendants and not for any 647(b) defendants. Such arbitrariness violates the equal protection provision of the state and federal constitutions.

VII

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES THEIR RIGHT TO TRAVEL

The California Court of Appeal has recognized the existence of a right in intrastate travel. In the case of In re White (1979) 158 Cal.Rptr. 562, 567, the Court stated:

> "We conclude that the right to intrastate travel (which includes instramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law . . . It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowldge a correlative constitutional right to travel within a state." Citing King v. New

Rochelle Municipal Housing Authority (2nd Cir., 1971) 442 F.2d 646, 648.

"Many other fundamental rights such as free speech, free assembly, and free association are often tied in with the right to travel. It is simply elementary in a free society. Freedom of movement is basic in our scheme of values." White, supra at 567.

Noting that the right to travel is not absolute, the court in White strictly scrutinized a condition of probation restricting the free movement of a convicted prostitute and held the restriction unconstitutional because it was not the least restrictive alternative to accomplish the goal sought to be achieved.

Having to register as a sex offender, a person is "thus severly limited in his freedom of movement." Kelley v. Municipal Court, supra at 992. (Emphasis added).

The Court in Mills, supra, also acknowledged that registration severely limits a person's right to travel, but in the context of that case (sexual molestation of a seven-year-old girl), a defendant may forfeit his right to travel.

Many persons convicted of 647(a) would undoubtably prefer not to move into a small community if they would have to register as a sex offender upon arrival. Hence they would give up their right to intrastate travel in order to avoid the additional embarrassment and possible harrassment that would accompany such a move. Although the registration record is supposed to be confidential, the Mills Court recognized that "its public availability to a degree" invades the registrant's right to privacy. Mills, supra, at 181.

Particularly in rural areas police officers may serve many dual functions in the community. If someone comes into the department to register, all of the officers will know this. No doubt this knowledge will affect their interactions with the registrant when they meet him at the grocery store, church, and at other times and places in the community when those officers are off duty.

Such an invasion of the right to travel should not be condoned or mandated by law, absent a compelling state interest. While such a compelling interest may exist for knowledge of the whereabouts of child molesters (Mills, supra, at 180), what interest can there be to know the whereabouts of someone who solicited an undercover vice officer to engage in consenting adult activity, albeit in a quasi public place, or who massaged his penis for five seconds in a restroom with only an undercover officer watching, albeit a touching for a sexual purpose?

VIII

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES DUE PROCESS OF LAW

VIII(A)

Registration as a Collateral Disability Based Upon an Invalid Conclusive Presumption

If registration is a collateral disability, then the analysis and arguments regarding its constitutionality must be drawn in a certain way; if it is punishment, then the analysis and arguments are different. For this reason, we begin by explorin the legislative intent in enacting the registration statute and including P.C. 647(a) within its ambit, particularly looking for a legitimate legislative purpose other than mere punishment. Once found, that legislative purpose must be supported by actual practical application. And if actual practice does not support the legislative purpose then the effect of the registration requirement would be merely punishment, only then bringing into issue the standards for cruel or unusual punishment. If the legislative purpose is legitimate and supported by actual practice, then registration would be a collateral disability, and the requisites for determining the constitutionali of such a collateral disability would apply.

What purpose did the Legislature determine would be served by imposing automatic registration on certain classes of persons, viz., persons convicted of certain crimes?

> "Individuals convicted of one of the enumerated crimes have been deemed by the Legislature to have a propensity to commit such anti-social crimes in the future and thus are the subject of continual police surveillance. Whenever any sex crime occurs in his area, the registrant may very well be subjected to investigation." In re Birch, 10 C3d 314 supra, at 321.

Registration was thus intended to serve the purpose of having certain people subjected to constant police surveillance, "in order to prevent them from committing similar crimes against society in the future." Barrows, supra, at 827. It appears that the Legislature based its enactment of §290 P.C. on three underlying premises: first, that persons convicted of certain crimes are likely to be recidivists:

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second, that constant police surveillance of those persons would help deter future criminal activity by them; and third, that requiring those persons to register would in fact, subject them to the necessary police surveillance to accomplish the intend result.

The Legislature also determined that there could be no exceptions to th registration requirement, that all 647(a) defendants are likely to be recidivists and are in need of this constant police surveillance. Petitioner contests this determination—actually a conclusive presumption—but has been denied a forum in which to present facts as to how the Legislature's basic premises are faulty with regard to automatic registration in general for all convicted 647(a) defendants, how those premises are faulty with regard to application of the registr requirement to him in particular, and how those faulty premises create important constitutional infirmities. Petitioner could not have presented such facts in the lower court during a criminal trial because such facts would be irrelevant as to his guilt or innocence. He is precluded from raising such facts for the first time on appeal because he is bound by the factual record created in the trial court below. Where is the proper forum? Or is this one of those "Catch 22" situations in which there is no remedy for this injustice? Our view of the legal system is not so cynical; the old maxim, "For every wrong there is a remedy" has meaning here. In other words, when the validity of the conclusive presumption described above is challenged, there must be a forum in which to present evidence regarding its inval Since none was provided in the trial court and no hearing is possible on appeal, thi petition for a writ is the only apparent alternative.

A statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Leary v. United States (1960) 395 U.S. 6, 36. Does the statut presumption created by §290 meet this constitutional test as applied to 647(a) defendants? What information is necessary for the court to resolve this constituti challenge? First, we must determine whether 647(a) defendants, as a class, are more likely than not to repeat the offense. Studies conducted by counsel for petit suggest that a majority of 647(a) defendants do not repeat the offense. If the evidence (to be found in the court records and records of the police and prosecuto offices) show that a majority of persons convicted of 647(a) do not repeat, then th conclusive presumption established by the Legislature with respect to registration c all 647(a) defendants is based upon a false premise and is therefore unconstitutiona

If the evidence shows that a majority of 647(a) defendants do repeat or the evidence is inconclusive on this point, the second factual area of inquiry with respect to the statutory presumption is whether registration of these defendants has any effect on deterring future crimes of this type. Counsel for Petitioner would like to present evidence that the police simply do not use registration as a tool for deterring the conduct proscribed by 647(a). If this is true, the conclusive presumption again fails.

"On the whole, modern courts of justice are slow to recognize presumptions as irrebutable, and are disposed rather to restrict than to extend their number. To preclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be justified by the clearest expediency and the soundest policy; and some presumptions of this class ought never to have found their way into it." Bull v. Bray (1891) 89 C. 286, 295.

In the trial court, Petitioner was not afforded a hearing prior to being ordered to register by the court so that he could show that that forced registration would work an injustice on him and would be of no great benefit to the state.

It is a violation of due process for the Legislature to employ a conclusive presumption that is not adequately supported by the facts and is, therefore, unwarranted. Atkisson v. Kern Housing Authority (1976) 59 C.A.3d 89; Stanley v. Illinois (1972) 405 U.S. 645.

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."
> Leary v. United States (1969) 395 U.S. 6, 36.

In People v. Stevenson (1962) 58 C.2d 794, a rebuttable presumption in a criminal case was held to be unconstitutional since it applied to many situations where there was no rational basis for the fact presumed.

In one situation the California Supreme Court recognized that:

> "It would be irrational to impose upon an actor in a theatrical performance or its director a lifetime requirment of registration as a sexual offender because he may have performed or aided in the performance of an act, perhaps an obscene gesture, in a play. It is an errant concept we cannot attribute to the Legislature that persons

convicted of such an offense will require constant police surveillance in order to prevent them from committing similar crimes against society in the future." Barrows, supra, at 826-827.

The United States Supreme Court has established a method of analyzing whether a statute creates an unconstitutional conclusive presumption. In Bell v. Burson (11971) 402 U.S. 539 the Court established a five-step process. If we apply it to forced registration for all 647(a) offenders, it appears as follows:

(1) Assumption of some statutory purpose by the court (person is likely to commit similar serious crime in the future and in order to protect society the person should register so he can be under constant police surveillance);

(2) Identification of some characteristic by the statute (convicted of an enumerated crime such as section 647(a));

(3) Attachment of certain consequences which flow from this characteristic by the statute (automatic duty to register with local police);

(4) Determination by court that all persons with this characteristic need not be subjected to this burden in order to achieve the state's purpose, assuming the purpose is legitimate;

(5) Court's conclusion: the individual must be allowed a hearing as to the appropriateness of his bearing the burden under the statute.

Using this analysis it is clear that Section 290 creates an unconstitutional conclusive presumption as applied to Section 647(a). All 647(a) convicted defendants are not in need of constant police surveillance—probably none are.

The Court should declare Section 290 unconstitutional as applied to Section 647(a). If the Legislature agrees with the decision of the Court, that will end the matter. If it determines that some 647(a) defendants should register, it can set up procedures for hearings on the issue and establish criteria as to who should register and who should not.

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VIII(B)

Requiring 647(a) Defendants to Register is
Arbitrary and Irrational by Today's Standards

If the purpose behind forced registration for 647(a) defendants has been illegitimate, then it should be declared unconstitutional for this reason. However, assuming that the purpose was some unknown legitimate reason, we must still inquire into whether it is rational by today's standards. The traditional test for the validity of an enactment is whether the ends sought are appropriate and the regulations described reasonable. Galyon v. Municipal Court (1964) 40 Cal.Rptr. 446, 448.

> "As applied to a law, 'reasonableness' is manifestly not what extremists upon one side or the other would deem fit and fair . . . reasonableness is what 'from the calm sea level' of common sense, applied to the whole situation, is not illegitimate in view of the end attained." In re Hall (1920) 50 C.A. 786, 790.

A statute valid when enacted may become invalid by change in conditions to which it is applied. Gaylon v. Municipal Court (1964) 40 Cal.Rptr. 446, 449. Due weight must be given to new and changed conditions when a court is reviewing the constitutionality of a statute. As the court in Gaylon stated, "The reasonable objective of the statute upon its enactment may have been a valid exercise of the police power but because of the changed conditions (changed concept of public morality in the enumerated areas) during the last 91 years perforce requries us to determine that there is no reasonable objective to be reached by the statute." Gaylon, supra, at 449. A similar approach should be taken with respect to the present validity of §290 as applied to 647(a).

Four major changes have occured since the registration law was first enacted, which changes make it appropriate for this court to declare automatic registration for all convicted 647(a) defendants unconstitutional, thereby giving the Legislature the opportunity to redraft the law in light of these changes.

The first major change is in the area of technology. As the Report of the Joint Legislative Committee for Revision of the Penal Code (attached hereto as an Exhibit) states:

> "In this respect registration is outmoded by the availability of computerized information systems concerning the modus operandi of offenders . . ." Penal

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Code Revision Project, "The Criminal Procedure Code."
Maurice H. Oppenheim, Project Director (Introductory Notes by the Staff, page vi)

The second major change concerns the transformation of public policy regarding homosexuality. Prior to 1976, most forms of private homosexual conduct were criminal and, in fact, felonious. Landlords and employers were free to arbitrarily discriminate against homosexuals. Today, private homosexual conduct is not illegal because of the passage of the Consenting Adults Act, and homosexuality is a protected status with respect to housing (the F.E.P.C. protects homosexuals in this area under their Unruh Act jurisdiction) and employment (see Gay Law Students Association v. Pacific Telephone Company (1979) 156 Cal.Rptr. 14). The public policy of protecting the rights and encouraging the realization of human potential of homosexuals was further boosted by Governor Edmund G. Brown Jr., in his Executive Order B-54-79, which Order bans discrimination within state government under the Governor's jurisdiction. The voters of the state also made their feelings known by the defeat of Proposition 6 in 1978, which proposition would have banned homosexual teachers from the classroom. The Legislature has also furthered this public policy by enacting legislation in 1976 to allow the licensing of teachers convicted of 647(a) violations, after 1203.4 relief is granted (see Education Code §87215)

The third major change concerns the legal status of public sexual behavior or public sexual soliciation. Whereas all such speech or conduct was criminal when 290 was enacted and applied to 647(a), now, public sexual conduct is not per se a violation of law. Pryor v. Municipal Court (1979) 25 C.3d 238 says that there is little state interest in prohibiting such conduct unless a person is present who may be offended. Just as Pryor limits 647(a) to situations in which the state has an interest, namely, the prohibition of public sexual conduct where someone is present who may be offended, so too should this court limit §290 as applied to 647(a) to situations in which the state has a legitimate interest in imposing a requirement of registration. Just as the Supreme Court required the facts and circumstances of each case to be taken into consideration by the trier of fact, thereby disallowing automatic convictions for public sexual conduct, the trial judge should be allowed to consider relevant facts and circumstances as to whether forcing a particular defendant to register will advance a legitimate state interest.

The last major change has to do with the right of privacy which was greatly expanded in California by constitutional amendment in 1972. Article I Section 1 of the California Constitution states:

1 "All people are by nature free and independent, and
2 have certain inalienable rights. Among these are en-
3 joying and defending life and liberty, acquiring,
4 possessing, and protecting property, and pursuing and
5 obtaining safety, happiness, and <u>privacy</u>." (Emphasis
6 added).

7 The argument in favor of this 1972 Amendment to the State Constitution
8 stated:

9 "The right of privacy is the right to be left alone.
10 It is a fundamental and compelling interest. It protects
11 our homes, our families, our thoughts, our emotions, our
12 expressions, our personalities, our freedom of communion,
13 and our freedom to associate with people we choose."

14 See also White v.Davis (1975) 13 C.3d 757, 774-775, in which the Supreme Court
15 acknowledged the propriety of judicial resort to such ballot arguments as an aid in
16 construing such amendments.

17 There are several recent California appellate cases which discuss the
18 scope of the federal and state constitutional right to privacy. With respect to the
19 state constitution, the Supreme Court, in City of Santa Barbara v. Beverly Adamson,
20 (1980) 164 Cal.Rptr. 539, laid to rest the argument that the right to privacy contained
21 in Article I, Section 1 of the California Constitution was intended only as a protectior
22 against electronic surveillance practices. The court noted that the right to privacy
23 protects also against state intrusions into personal decisions such as the choice as
24 to with whom one will live. The freedom to make such a decision without government
25 infringement is fundamental and cannot be overriden absent a compelling state
26 interest.

27 California appellate courts have recognized that the right to privacy,
28 apparently under the federal constitution, protects against governmental involvement
29 into personal decisions as to the circumstances of one's private sexual conduct. In
30 Wellman v. Wellman (1980) 164 Cal.Rptr. 148 it was noted:

31 "Our state Supreme Court has referred to a con-
32 stitutional right of privacy in matters related to
33 marriage, family, and sex." Wellman, supra, at footnote
34 5.

35 Speaking of private sexual conduct between consenting adults, the Court
36 in Wellman stated, "[S]uch conduct has been held to be within the penumbra of

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constitutional protection afforded rights of privacy. . . so that intrusion by the state in this sensitive area is not a matter to be taken lightly." As the court in Wellman noted, "At least one decision of the California Court of Appeal appears to be in accord." In that case, Fults v. Superior Court (1979) 88 C.A.3d 899, 904, the court considered "one's sexual relations" as a "well established zone of privacy."

Also, in the case of Baby Lasher v. Stephen Kleinberg (1980) 164 Cal.Rptr. 618, the Court of Appeal held that it would be an unwarranted governmental intrusio into an individual's right to privacy if the court were to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct.

Thus, sexual orientation and private sexual activity no longer create a class of persons to be distrusted, harrassed, viewed as criminal, scrutinized by the state, or treated differently from other citizens in any way.

Prior to all of these changes, it could have been argued that the state did have an interest in having lists of homosexual offenders. After these changes, the state interest has become severely and constitutionally limited.

What then—given the present state of the laws and public policy—could be a legitimate legislative purpose for including 647(a) within the 290 requirement? Following or harrassing homosexuals can no longer be condoned. The answer lies with the underlying premises discussed earlier. If 647(a) offenders are in fact recidivists, if recidivism or the occurrence of the crime in general is lessened by police surveillance, and if registration results in that type of surveillance, then the reduction of crime would be a legitimate legislative motive. We can think of no other proper purpose. Whether this alleged purpose is in reality supported by the registration procedure can only be determined after an evidentiary hearing.

IX
REGISTRATION AS PUNISHMENT

Do the police actually put 647(a) registration records to any good use? If no valuable purpose is served by requiring automatic registration of 647(a) defende or if such registration is virtually useless in the overall police procedures used to curb lewd conduct, then it would appear that such registration occupies no position in the scheme of the criminal law than to punish those convicted under 647(a). If

a court were to come to the conclusion that the only rational purpose of registratio by today's standards is punishment (because no other important purpose is being served), then it would be appropriate for the court to invalidate registration for 647(a) defendants.

Registration was not originally intended by the Legislature to be punishm However, it may be serving no other pupose today. If the court reaches such a conclusion, it should void the registration requirement for 647(a) defendants rather than analyze the issue as to whether the imposition of such punishment would be cruel or unusual. If the Legislature reinacted registration for 647(a) defendants after this court voided that requirement, and it appeared that the new legislative purpose was to impose a punishment, only then would the issue of cruel or unusual punishment be squarely before the court.

However, so that the court will have all legal arguments before it, even if the court only uses it as background material at this time, Petitioner is attaching arguments as to why the registration requirement for 647(a) defendants is cruel or unusual. Petitioner incorporates by reference, as though fully set forth hereat, the arguments contained at pages 23 through 37 of the Amicus Curiae brief of the Pride Foundation which was submitted to the California Supreme Court in the case of In re Anders.

X
A HEARING IS NECESSARY TO DETERMINE IF THE CONSTITUTIONAL REQUIREMENT THAT LAWS OF A GENERAL NATURE BE UNIFORM IN OPERATION IS BEING VIOLATED

Because forced registration of all persons convicted of 647(a) is considere by most participants in the legal system to be harsh, numerous methods are being used to avoid this consequence whenever possible. Some prosecutors file a battery charge, that is, §242 P.C., instead of a lewd conduct charge even though the arrest was made under 647(a). A good example of this is demonstrated by People v. Sanchez (1978) 147 Cal.Rptr. 850. Other prosecutors refuse to file a battery charge and even object to battery as a lesser included offense in a "grope" case. Therefor whether a defendant will have to register as a sex offender because he "groped" a vice officer will often depend on the city in which his conduct occurred.

Some prosecutors have established "disposition guidelines" which allow for a plea to a nonregisterable offense if the defendant does not have a prior similar offense within five years. The disposition guidelines of the Los Angeles City Attorn presently allow for such "reductions" in most cases. The present disposition guidelin of the Los Angeles County District Attorney allow for reductions, but in fewer cases. If a defendant "gropes" a vice officer in the city of Los Angeles, he is treated more leniently by the prosecutor; in Long Beach he is treated more harshly. For example, in Long Beach, the City Prosecutor has guidelines which disallow a reduction to a nonregisterable offense if an officer was "groped." Yet, in Long Beach, where the prosecutor's office is more harsh, the trial court judges have established a policy of refusing to order registration of persons convicted of 647(a).

So, while facially it appears that registration is automatic for all persons convicted of 647(a), many participants in the legal system have found ways to avoid registration. First, filing guidelines in some jurisdictions cause filings for other than 647(a) whenever possible. Secondly, the disposition guidelines of some prosecutors encourage more "plea bargins" and thus fewer convictions for lewd conduct. Thirdly, where the filing and disposition guidelines have failed to avoid the registra requirement, many judges will often sentence the defendant in a manner so as to avoid registration. Sometimes, judges will simply fail to mention the matter at all. If the sentencing judge fails to inform the defendant, on the record, of his duty to register, the defendant may not be held in violation of probation for not registeri People v. Buford (1974) 42 C.A.3d 975, 985. Other judges will place the defendant on probation for less than 30 days and grant a motion to dismiss under §1203.4 P.C. immediately thereafter. Such relief terminates any duty to register (Kelley v. Munici Court (1958) 324 P.2d 990), although once registered, there is no provision for remo of a name from the police registration files.

While the Legislature passed a bill last year (S.B. 13) to put "teeth" into the registration law by requiring mandatory jail for those who should register but who fail to do so, it did not include §647(a) in this bill. Although the Legislature has not yet repealed the registration provisions for 647(a) it has lately refused to treat 647(a) in the same manner in which it has treated rapists or child molesters. Hence we see a growing recognition in the Legislature that all sex crime should not be lumped into the same category.

If a hearing is held on the constitutionality of §290 as applied to 647(a), prosecutors can be subpoened to testify about their filing and disposition guidelines, judges can be subpoened to testify about their sentencing practices and as to how

many 647(a) defendants register in their courts or in their judicial districts. Counsel for Petitioner believes that such testimony and supporting documents will be relevant on at least two legal points material to the constitutionality of registration for lewd conduct defendants. First, it would establish a lack of the uniformity of operation of the law which is required by Article IV, Section 16 of the California Constitution. Secondly, it would show that registration is "unusual"; if registration is determined to be punishment, imposition of such a punishment is "unusual" under the California Constitution which prohibits the imposition of cruel or unusual punishment because it is imposed in only a limited number of 647(a) cases.

XI

AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE IF REGISTRATION IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT

"Due process requires that a party sought to be affected by a proceeding shall have a right to raise such issues or set up any defense which he may have in the cause . . . . A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law . . . ." 16A Am.Jur.2d, section 843.

A judge's denial of a hearing at which evidence could be received and argument heard regarding the constitutional validity of section 290 as applied to defendant's particular case is error. See People v. Ripley, Appellate Department of the Los Angeles Superior Court, CR A 16440, Opinion and Judgment filed August 20, 1980).

Not only procedural due process, but also equal protection demands that the defendant not be denied an evidentiary hearing. Other defendants, including Jay Ripley, were afforded an opportunity for such a hearing; there is no rational excuse for giving some defendants such a hearing and denying the same to the defendant in this case. The Ripley case is not cited as precedent, but this court is asked to take judicial notice of it as evidence on the issue of equal protection. (See Exhibit E attached to the original Objection, Motion and Request, filed by the defendant in this case.)

XII

CONCLUSION

It appears that the preponderance of the legal profession which has been

called upon to address the issue of registration for 647(a) defendants is now of the opinion that such an automatic requirement should be eliminated. Many of these positions and policies are matters of which this court may take judicial notice.

The Los Angeles City Attorney testified during a hearing in the Senate Judiciary Committee in 1979 and recommended that registration be eliminated for 647(a) and 647(d) cases.

In dealing with the issue of registration for 647(a) defendants, the Supreme Court has limited the scope of such registration whenever possible. See Barrows v. Municipal Court (1970) 1 Cal.3d 821; In re Birch (1973) 10 Cal.3d 314.

The Joint Legislative Committee for Revision of the Penal Code recommended repeal of registration in its report to the Legislature. (See exhibit attached hereto.)

The Senate Judiciary Committee, after hearing hours of testimony on the subject, voted 6 to 2 in 1979 to recommend repeal of the registration provision for 647(a) cases which do not involve children. Even Senator Richardson, who is traditionally conservative on such matters, favored the bill. (See S.B. 539, introduced March 1979, by Senator Sieroty.)

Senate Bill 13, authored by Senator Richardson, was passed by the Legislature in 1979. That bill requires judges to impose manditory jail terms of 90 days for persons who fail to register as required by law. However, §647(a) was intentionally omitted from the scope of this bill, thereby allowing current practices by many members of the legal profession and the judiciary of non-enforcement of mandatory registration of 647(a) defendants to continue as usual. This is the first time the Legislature has acknowledged that registration requirements for rapists and child molesters are different issues from registration of lewd conduct defendants.

At the 1975 Annual Meeting of the California State Bar, Resolution 9-15 was adopted, which appointed a committee to study and make recommendations to the State Bar with respect to sexual privacy and sexual orientation issues. After one year of study, the committee issued a report and presented it to the 1976 Conference of Delegates. The full text of that report, which calls for the elimination of registration for lewd conduct offenders, is found at 2 Sex.L.Rptr. 66 (Nov./ Dec., 1976). That report was approved by the Conference of Delegates that year.

A recent Law Review article supports the position that automatic registration of 647(a) defendants is unconstitutional. Note, "Sex Offender Registration for §647(a) Disorderly Conduct Convictions Is Cruel and Unusual Punishment." 13 San Diego Law Review 391 (1976). The Appellate Department of the San Diego Superior

Court recently declared §290 unconstitutional as applied to a specific 647(a) case. See Exhibit D attached to the original Objections, Motion and Request filed by the defendant in this case.

California appellate courts have been reluctant to impose probation violations for persons failing to register. People v. Buford, supra. They have been liberal in applying remedies to terminate future registration. Kelly v. Municipal Court, supra. They have indicated a willingness to look at registration for 647(a) defendants in a different light from registration for child molesters. People v. Mills (1978) 81 Cal. App.3d 171.

The mental health profession, when called upon to address the issue, called for the repeal of the registration statute. See "Report of the Subcommittee on Homosexuality and the Law to the San Francisco Mental Health Advisory Board" adopted by the Board on April 10, 1973 (attached hereto as an exhibit). While ordinarily the positions of these various legal institutions and offices would be matters of interest to the Legislature and not the courts, the fact that such a wide spectrum of the legal profession (academic, judicial, prosecutorial, legislative, etc.) disfavors registration, may affect the level of examination used by this court to assess the problem. For this reason and because fundamental rights are involved (privacy and travel), strict scrutiny would be appropriate.

In balancing the purpose served by forced registration of all 647(a) defendants, the conclusiveness of the presumption created by automatic registration, the change of conditions since the statute was first enacted, the disapproval demonstrated by a large segment of the legal community, and the infringement on the rights of individual defendants, it might be appropriate for this court to declare §290, as applied to this case, to be unconstitutional for the reasons set forth in the Objections filed in this case, and more fully set forth in this Memorandum.

DATED: Respectfully submitted,

Thomas F. Coleman
Attorney for Defendant

STATE OF CALIFORNIA

JOINT LEGISLATIVE COMMITTEE FOR
REVISION OF THE PENAL CODE

PENAL CODE REVISION PROJECT
STAFF DRAFT

THE CRIMINAL PROCEDURE CODE

Joint Legislative Committee for Revision of the Penal Code

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Lewis F. Sherman
Judge of the Municipal Court, Alameda County
(Appointed to the Superior Court on September 16, 1974)

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INTRODUCTORY NOTES BY THE STAFF

THE DISPOSITION TABLE OF PENAL CODE SECTIONS; Repeal of Sex Registration Laws

A disposition table of Penal Code sections relating to criminal procedure follows these introductory notes and contains references to these notes. The table should be useful in comparing the present code with the proposed code. In addition, it also reflects basic recommendations since it suggests the repeal of certain statutes.

Probably the most controversial change would be the repeal of Penal Code Sections 290 and 290.5, relating to the registration of sexual offenders. These provisions were originally designed to assist in the prevention and investigation of sex crimes. (See *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825-826 [83 Cal. Rptr. 819, 464 P.2d 483].) In this respect registration is outmoded by the availability of computerized information systems concerning the modus operandi of offenders, such as PATRIC—Pattern Recognition and Information Correlation developed by the Los Angeles Police Department. The expense involved in the maintenance and use of the present registration files, which must be searched by hand, should be considered. Since sex offenders make up less than five percent of the reported criminal activity in California, it is questionable whether retention and maintenance is justified by the expense. The ease of travel from city to city within a county further reduces the importance of such files. It is unlikely that a sex offender who intends to commit further sex offenses would live and register in the city in which he intends to engage in further criminal activity. In addition, it seems illogical to register sex offenders but not robbers, burglars, and others who pose a greater statistical threat to the safety and well-being of the population than sex offenders.

TRIAL JURORS' FEES AND SELECTION

Sections relating to the fees and mileage allowed for jury service in the trial of criminal cases are not incorporated in this draft. (Cf. Section 9006 of the draft, relating to the fees of grand jurors.) Instead, such sections would be transferred to the appropriate part of the Government Code. Strong public sentiment has been expressed for raising the amount prescribed by Section 1143 of the Penal Code. This position would create a conflict between the amount presently paid to jurors in civil cases and the stipend for those selected to serve on criminal panels. It did not seem appropriate to suggest an across-the-board raise since this approach would substantially affect the cost of a civil jury trial without the benefit of the views of attorneys who engage in civil trial work. There are a number of solutions which will readily occur to the reader, but it is recommended that the ramifications of the problem ought to be separately considered apart from a draft on criminal procedure by a group which includes representation and participation by the civil bar.

In addition, it is suggested that such a group could modernize the law concerning the selection process. For example, Section 198 of the Code of Civil Procedure, which defines competency of a person to serve as a juror uses the term "decrepit."* Such language, while perhaps proper in 1872 when it was adopted, no longer reflects modern usage. Likewise the whole subject of exemptions from jury duty raises questions of public policy which have received attention in recent years and could be re-evaluated.

Mental Health Advisory Board
City & County of San Francisco
101 Grove Street
San Francisco, Ca 94102

Report of the Subcommittee on
HOMOSEXUAL ACTIVITY AND THE LAW
to the San Francisco Mental Health Advisory Board

Dr. Francis J. Rigney
Author

The subcommittee chairperson, Mr. Rosenblat, presented this report to the Mental Health Advisory Board at its meeting of April 10, 1973. The board adopted the report unanimously.

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I. Foreword: Charge to the Committee

Your subcommittee was charged with looking into the role of law enforcem[illegible] San Francisco vis a vis overt, or invited, homosexual acts between any pers[illegible] of any age; to report the obtainable facts, and to make recommendations, if warranted.

To prepare this report, your subcommittee met with representatives of the v[illegible] law enforcement agencies and homophile organizations; before we proceed, we [illegible] like to publicly thank them for their most helpful cooperation.

II. Rationale and Organization of Report

For the purposes of this study sexual acts were classified in five ways: i[illegible] of willingness (vs. force); classes of persons concerned (e.g. adult, sane); of sex acts per se (e.g. fellatio); the role of payment for sex (prostitutio[illegible] the degree of public exposure involved (e.g. nude at beach).

We limited our study of "law enforcement" to the level of initial contact, [illegible] the arresting officer.

III. The Rules of Law

There are a number of California statutes which pertain to sexual activity; classify them for our purposes, as follows:

Class (1): Acts which prohibit any sex act done without the willing consent both of the acting parties (Note: exception: heterosexual intercourse by h[illegible] and wife). The relevant statute is Section 261: "(forcible) rape."

Class (2): Acts which prohibit any sex act between certain classes of pers[illegible] defined by the statute, specifically those classes as between "adults", and a[illegible] "children"; between "sane" and "insane"; "child" and "child", the "married p[illegible] and "unmarried person"; and between certain degrees of kinship ("incest"). relevant statutes are: Section 262: "statutory rape"; 26[illegible]: "seduction of [illegible] ously chaste person"; 26[illegible]a: "living in adultery"; 272: "contributing to the delinquency of a minor"; 285: "incest"; 288: "child molestation."

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, , ...ticals, oral genital

acts ("sodomy"). The laws do not prohibit oral-oral acts ("kissing"). prohibited acts are called "unnatural", "lewd", "lascivious", etc. Asking ("... ting") a person to perform such an act per se is a crime. The relevant statu... are: Sections 288a: oral-genital ("oral copulation"); 286: genital-anal ("... 647a: Mutual masturbation ("lewd act"); 647a: "soliciting for..." Oral-oral although not forbidden, has been harassed (e.g. a white male kissing black mal... arrested for "obstructing the sidewalk"). Sometimes Section 601.w9 is used to interdict "petting"; the term used is "...lead a dissolute life." Sec. 647(d) prohibits "loitering...in public toilets...(in order to solicit/perform)...lew... acts."

Class (4): Acts which, regardless of consent, and regardless of acceptability under Class (3), are done as a commercial service for money, or its equivalent. This is called "prostitution", "whoring." Also prohibited are acts or conduct which aid prostitution, such as "pimping", "operating a bawdy-house" (or "hous... ill repute"), etc. Also, seeking customers per se is a crime ("soliciting"). ...law tries to differentiate between someone who, in "free lance" fashion, trade... dinner, theatre, etc., for intercourse, etc.; and a person who derives his (he... livelihood from selling sexual favors. The relevant statutes are Sec. 647b: f... "soliciting for..." and for doing the act itself; 318: for "pimping", "housin...

Class (5): Acts which relate not to sex acts per se, but to public visibility ... certain parts of the human body, especially the sex organs; these prohibit in varying degrees, when and where and how much can be shown; e.g. nudist beaches, nude shows in night clubs; "exhibitionistic" display by a man of his penis to children in a public park. The relevant statutes are 341.1: "Indecent exposur... 341.2, "persuading (to expose)".

IV. Patterns of Arrest

In this section we tabulate the varieties of reported "offenses" and arrests for "homosexual" activities. Some "heterosexual" offenses are included for comparison. Some of these figures are rounded-off; currently, the San Francisco Police Department keeps various kinds of tabulations for Federal, state, and local purposes; these "headings" did not easily fit our categories. However, by cross-tabulating, certain key patterns were easily evident. (Explanatory comments follow.)

Class (1) Forcible Rape (1972 figures)

567 reported cases (20% classed as "attempted")

Of these:

505 (18% "attempteds") were validly charged, and,
62 were classed as "unfounded."

For the 505 valids, 269 men were arrested (approximately 45%).

Of the 505, those classified as "homosexual": none.

Class (2) Prohibited Pairings (1972 figures)

(1) Cases of "incest": 3 reported occurrences.

(2) Child molestation: 107 offenses (10% "attempts"); fairly consistently, 9-10 cases per month

Classified as "homosexual": none.

One careful study (Oregon) showed over 95% to be heterosexual contacts, mostly within the family unit (especially stepfathers, uncles).

(3) 29 cases of "statutory" rape, 24 arrests; cases classed as homosexual: [illegible]

Class (3) Prohibited Acts (1972)

(1) Sodomy: 12 occurrences reported (average 1/month)

(2) Oral Copulation: 168 arrests

(3) Lewd and lascivious act (soliciting for): 673 arrests. Note that 476 of these were by plainclothesmen ("vice squad"). (See below, "entrapment").

The "lewd' [illegible] solicited was either oral copulation or sodomy; no arrests for meeting, heterosexual requests.

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(4) Prostitution (1972)

Nearly 2,000 female arrests (1500 between ages 18-44), nearly 400 male (320 between ages 18-44). The 400 are probably all homosexual "hustlers"; male customers (of females) (until very recently) are almost never arrested.

Note the great differences in socio-cultural factors. Heterosexual prostitutes commonly are in complicated emotional-financial bondage to their pimps (including drug pushing); today the "quickie" hotel-motel has replaced the "bawdy house."

Homosexual "hustlers" are lone-wolf operators. The main "pimping" outlets have been "modelling agencies" which only kept name-address files.

Note that homosexual prostitutes can be further charged under Class (3) with soliciting an "unnatural" act.

Class (5) Public Display (1972)

Over 300 arrests for indecent exposure. These figures do not make clear what kinds; for example, under the present law, "indecent" covers everything from the exposure of the penis of a man urinating in a dark alley, accidentally discovered by a police officer, to the erection of a psychotic exhibitionist pointed at a group of baby girls.

The distribution over the year is non-illuminating; a "steady" average of 25/ month. (That is, no "summer cluster" for "nude swimming"). Some lawyers feel that these figures hide prohibited acts.

For example, in contrast, there were 75 arrests for obscene shows, 55 occurred in just 2 months (April-May), none at all in the fall (Sept.-Nov.), a pattern typical of "rousting." (The term, "roust", refers to (sudden) increased enforcement of some particular law.)

As an example of overlapping charges (indecent exposure/lewd act (Class 3), consider the case of two males apprehended in the act of fellatio in a public park, or in a public latrine. (The U.S. Supreme Court has recently ruled that, when such statutes apply, the act must be truly "public"; that is, visible to an "innocently accidental" viewer; that is, not someone hidden in the ventilation system, etc.)

There is good psychiatric evidence that some small numbers of such epi- involve homosexuals who have a clear neurotic "need" to exhibit themselves, specifically to perform oral copulation in a public setting; some, furthermore, with a "need" to deliberately risk arrest. On the other hand, the vast majority are those who, driven by loneliness, yet fearful of blackmail, stigma, etc., seek the anonymity which only casual public sex can afford. ("Restrooms" offer safety, plus semi-privacy.)

IV. Civil Rights Aspects (Homosexuals) (Classes (3) (4) above)

In the discussion which follows, keep in mind these factors:

(1) Our society's attitudes to homosexuality, and even sexuality in general, have changed markedly in the past decade. Concurrently reflecting these changes, so have the kinds and degrees of police activity. As one official put it, "Now that the gays also are a pressure group, we can never go back to the old ways."

(7) A basic principle of law is that prohibiting a per

using, or enticing another to commit a crime. If so done by a police
then arrests the very person he/she has enticed, it is called "entrapment."
example, a police officer, disguised as a "civilian", could behave in an art
seductive way which could encourage another to solicit a sex act, free, or p

Discussion:

When a police officer declares in court that a person has solicited him/her for prohibited sex (Classes (3) (4) above), and the other denies it, it is then a ca "one person's word against another." If police officers automatically are believe be the truthtellers, the power of unchecked abuse (especially entrapment) could great. (In one trial for homosexual solicitation, the defense speech was one se long, "Either my client is lying or the policeman is"; the jury, after only 20 mi voted 12-0 to acquit!

In 1970, in response to various complaints, "plain clothesmen" were assigned to Golden Gate Park; and a number of arrests for solicitation were made. The homose concerned complained that certain officers "enticed" them (e.g. the "erection" i officer's tight jeans was his pistol). Also earlier (late '60's) plain clothesm had made arrests in "gay" bars; again the complaint was entrapment (e.g. officer sit at bar with drink, "awaiting" solicitation); also uniformed police would oste ticously demand I.D. cards ("upsetting" customers).

As of 1972, situation is, as we determine it, as follows. Due to increased gener militancy of homophile groups and increasing use of the courts, plus an increasin by police forces that the "cost-energy" efforts are not worth the mini-results, ge police surveillance of homosexuals in San Francisco has markedly decreased. The clothes unit in Golden Gate Park has been disbanded; and no more plain clothesmen assigned to "gay" bars. However, plain clothes officers still cruise the streets arresting prostitutes of either sex.

We have no recommendations about Classes (1): forcible ..., and (4) prostitution; these are contexts outside our assignment. Our recommendations...

For Class (3): "unnatural" acts:

Since modern scientific findings (anthropology, medicine, Kinsey, Masters, et... thoroughly demolished the 1870's definitions of "natural" sex, and since it is obvious that millions of "normal" people practice the so-called "unnatural" act hundreds of millions of times; and

since constant violations of a law on such a massive scale breeds a contempt f... and for law in general; and

since the only function of these laws has been a threat and/or an open invitat... to blackmail; "they all add nothing to the public safety or welfare" (S.C.J. Ro... Conyers)

We recommend the total repeal of all laws which define the "normality" and the "abnormality" of the types of possible sexual actions. (As of 9 March 197... copulation" statute was declared unconstitutional.)

For Class (1): police activity

Pending repeal of laws defining "unnaturalness", we recommend that the law enfc... agencies continue their current enlightened program of not attempting to vigorou... force these "laws", except where the sexual activity is a true public nuisance.

For Class (5):

The law should clearly differentiate between accidental genital exposure, "beac... type nudity, and psychopathic "exhibitionism"; only the last category needs stro... social sanction;

We recommend (1) the creation of a category: "open lewdness", defined as publi... exhibiting the genitals in order to arouse oneself or others; and (2) that we ad... the "Australian" system, whereby "sick" exhibitionists are mandated to outpatien... psychiatric care for a 6-month period, after which they then are reexamined by th... courts, etc.

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For all Classes:

Under Section 290 of the Statutes, any one convicted of any offense under 26, 268, 285, 286, 288, 288a, 314.1,2 and 647 (a)(d) must thereafter register (in prescribed fashion) as a "sex offender." This is a gross lifetime condemnatio of a person; we recommend the total repeal of this Section.

We also recommend instead, that dangerous sexual offenders, or gross "repeate (e.g. certain exhibitionists) be either in therapy, or incarcerated, until tru "cured." (Presently, harmless types are stigmatized for years, while some homicidal rapists have "served their time"; have been released; and have kil again.)

Crim. No. 20198

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

In re

THAD C. ANDERS,

on Habeas Corpus.

pages 11 through 37 of the

BRIEF OF THE PRIDE FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

EXHIBIT C

II.

SECTION 290 DENIES EQUAL PROTECTION TO THOSE COMPELLED BY ITS TERMS TO REGISTER AS SEX OFFENDERS.

Contrary to Real Party's assertion, the registration requirement imposed by Section 290 is by no means a trivial one. (Return, p. 24). Registration makes significant inroads into the individual's liberty, autonomy, and privacy; it affects his freedom to travel; and it provides a continuing source of shame and humiliation by reminding the registrant for the rest of his life of his earlier misadventures.

> Individuals convicted of one of the enumerated crimes have been deemed by the Legislature to have a propensity to commit such anti-social crimes in the future and thus are the subject of continual police surveillance. Whenever any sex crime occurs in his area, the registrant may very well be subjected to investigation. Although the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime.
>
> In re Birch, 10 Cal.3d 314, 321-22 (1973).

Those upon whom the burden of registration falls must expect to find themselves the special targets of police interest. Ibid.; see Barrows v. Municipal Court, 1 Cal.3d 821, 825-26 (1970). They must forever -- unless judicially relieved -- suffer the embarrassment of revealing this aspect of their lives to strangers in the police department -- a duty to be repeated whenever they move to a new town.[5/]

5/ Thus the argument of Real Party that registration information is "maintained confidentially" (Return, p. 24) ignores the

(Footnote continued on page 12)

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The injury thus dealt to the personality of one placed under a duty to register constitutes as tangible a degradation as the pillory. Any law purporting to impose it upon one class of persons, but not on others, should be subjected to the most exacting scrutiny. That was done in Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942), where Oklahoma had imposed sterilization as a penalty for those habitually engaged in larceny, but declined to impose that extreme penalty on one who had repeatedly embezzled property of equal value. The Court held:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.... We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.
>
> 316 U.S. at 541-42.

More recently, in Autry v. Mitchell, 420 F.Supp. 967 (E.D.N.Y. 1976), a three-judge court held invalid a North Carolina "outlawry" statute enabling any citizen without penalty to kill a fleeing accused felon who had been declared an outlaw after failing to surrender. The statute covered all felonies and all felons, but did not apply to anyone unless an accusatory pleading had been filed. Thus, as Judge Craven held for the court:

5/ (Continued)

subjective feelings of degradation which must be suffered by having to provide such information to anyone. The level of confidentiality is in any event a minimal one, since the records are open to any "regularly employed peace or other law enforcement officer." Section 290. Moreover, the court records and transcripts embodying the original order to register are ordinarily open to the public at large.

> The statute makes no distinction with respect to dangerousness. Nor is there any distinction based on the nature of the felony. ....Whether one is outlawed appears to be a matter of caprice.... Some accused murderers who fail to surrender are outlawed, and many others are not.
>
> 420 F.Supp at 970-71, 972.

A similar method of analysis should apply to Section 290. Although its purpose has been held to be the prevention of recidivism (Barrows v. Municipal Court, supra, 1 Cal.3d at 825-26), not all criminal offenses -- indeed, not even all sex offenses -- are included.[6/] The question raised is "whether there is some ground of difference that rationally explains the different treatment...." Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); see In re King, 3 Cal.3d 226 (1970). We submit there is none.

The statutory registration scheme makes no reasonable distinctions in terms of the nature of the victim. Although a concern with children might be a proper basis of differentiation, sex crimes involving children fall on both sides of Section 290's line. One who is convicted of exciting the lust of a child (Section 288) must register; one whose good fortune it is to be convicted instead of lewdness in the presence of a child (Section 273g) need not. Oral copulation with a minor (Section 288a (a-c)) is a registrable offense; other forms of sexual intercourse with minors amounting to statutory rape (Section 261.5)

6/ The contrary statement by Real Party in the Return, p. 26, lines 3-5, is untrue, as shown in Appendix "A" to this brief.

are not.[7] Child molestation (Section 647a) requires registration; child abuse (Sections 273a, 273d) does not.

The seriousness of any of these crimes does not seem to offer any method for divining a rationality on which Section 290 operates. A person who uses a minor under 16 to produce pornographic films (Section 311.4) is guilty of a felony, but need not register; yet for the same act, the same person might be convicted of Section 272 (contributing to the delinquency of a minor) as a lesser-included offense, which, although only a misdemeanor, requires registration if lewdness is involved. One who has had sexual intercourse with an unconscious woman (Section 261(4)), although guilty of rape, need not register; but if the sex act consisted of oral intercourse, the victim being unconscious, the offense (Section 288a(f)) requires registration for life.[8] Sodomy (Section 286) is registrable, but bestiality (Section 285.5) is not; incest (Section 285) is registrable, but bigamy (Section 281, 284) is not.

There is no touchstone based on the presumed degree of recidivism inherent in any of the offenses. Although, as we argue elsewhere in this brief, any conclusive, irrebuttable presumption of future recidivism denies due process, even if it

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7/ Although Section 288a ostensibly includes acts with both male and female "victims", Sections 261 and 261.5 apply only to acts upon women. The exclusion of the latter offenses from Section 290 may indicate a wholly impermissible discrimination based on the sex of the victim and the supposed sexual orientation of the actor, since most arrests under Section 288a involve same-sex acts by males.

8/ *See* footnote 7 above.

were generally supported by empirical data, there is no rational basis for supposing that those who commit the listed offenses are inherently recidivist while other "sex offenders" are not. For example, one who "procures" or "abducts" a minor for prostitution (Sections 266, 267) must register; one who keeps a minor in, or sends a minor to, a house of prostitution (Sections 273f, 309) need not. A rapist whose victim cannot resist because she is drunk (Section 261(3)) is "deemed" a "potential recidivist",[9] but if, instead, the victim is insane (Section 261(1)) the presumption disappears along with the registration requirement. Apparently, we are supposed to believe that those who loiter in toilets for lewd purposes (Section 647(d)) are compelled to commit these acts again and again, but those who loiter about and peep in windows (Section 647(h)) are not; or that soliciting sex for hire (Section 647(b)) is an isolated event in the person's life, but eliminating the consideration of payment turns the person into a compulsive recidivist (Section 647(a)

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[9] Cf. Note, "Criminal Registration Ordinances: Police Control Over Potential Recidivists," 103 U.Pa.L.Rev. 60 (1954). Punishment for the sole "offense" of "potential recidivism" is the result of Section 290 if its purpose is as stated in Barrows. Yet casting the issue in these terms shows that Section 290 is perhaps a crude ancestor of the more recently developed notion of "preventive detention":

> Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers. Our society, however, has made the basic decision not to entrust such sweeping power to the state. We have relied instead upon the moral and deterrent effects of laws which define particular acts as criminal and which punish all who violate their proscriptions.

Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 Va.L.Rev. 371, 376 (1970

It is impossible to conceive any permissible legislative judgment that would lead it to conclude that seduction of a previously chaste, unmarried woman under promise of marriage (Section 268) was a crime so heinous that the perpetrator should be branded a "sex offender" for life; but that persuading a child to perform in a pornographic movie (Section 311.4) was not. Compare In re King, supra, 3 Cal.3d 226 (1970)(nonsupport penalty depended on residence of defendant; held invalid). In fact, the arbitrariness with which similar or equally grave offenses are included within or excluded from the ambit of Section 290 can place the future of a suspect completely in the power of the arresting officer or prosecutor[10/] -- or of a jury which, in convicting of a "lesser" offense, might unknowingly be imposing a much greater, and automatic, penalty.

In Barrows v. Municipal Court, 1 Cal.3d 821, 827-28, (1970), the Court resolved the equal protection problem narrowly, by construing Section 647(a) to exclude theatrical performances covered by the obscenity laws. But the scheme of Section 290

10/

> Often the offense committed is one which could be charged under either the registerable or non-registerable statute. For example, an officer observing two suspects in foreplay preliminary to a felonious homosexual act could arrest for indecent exposure, disorderly conduct, or outraging public decency. Of these, only a conviction for indecent exposure requires registration. Therefore, due to what seems to be the predominant view of police officials that such offenders should be registered, the arrest would be for indecent exposure.
>
> Note, "Compulsory Registration: A Vehicle of Mercy Discarded," 3 Cal.W.L Rev. 195, 199 (1967)(footnote omitted).

See also In re Davis, 242 Cal.App.2d 645 (1966).

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is so broad, and its inequities so pervasive,[11/] that reinterpretation of nearly every sex-related section of the Penal Code would be necessary to give the benefit of the Barrows' reasoning to persons charged with other registrable offenses. Concededly, it is not for this Court to redraft the entire legislative scheme merely to avoid a constitutional ruling. Rather, such a ruling is necessary in order that the Legislature be required to express its policy decisions in a constitutionally permissible way. At a minimum, this requires that the category of offenders upon whom punishments are to be visited be defined with a degree of precision appropriate to the gravity of the harm to be imposed. That degree of precision is absent from Section 290 as it presently exists.

III.

SECTION 290 DENIES DUE PROCESS BY CONFERRING A DISABLING STATUS ON DEFENDANTS WITHOUT A HEARING.

An individual convicted of one of the listed sex crimes

> ha[s] been deemed by the Legislature to have a propensity to commit such anti-social crimes in the future...
>
> In re Birch, 10 Cal.3d 314, 321 (1973).

11/ In Appendix "A" to this brief, we have compared each offense listed under Section 290 with other, non-registrable offenses which are similar in content or equally serious in terms of the presumed concerns of society. The Appendix amply demonstrates that the entire scheme of Section 290 is fraught with inconsistencies and inequities of the types described above.

This "propensity" is not in issue at the trial for the underlying offense which triggers the registration requirement; nor is it an element of the prosecution's case if the defendant is charged with failure to register. The registration requirement is mandatory and is not affected by any mitigating circumstance, such as the nature of the offense or the parties, or the subsequent amendment or repeal of the statute under which defendant was convicted. There is no method by which a defendant may avoid the imposition of the registration requirement by proving that he has no propensity to repeat his offense.[12/]

The effect of this procedure is to use the fact of conviction to place the defendant in a status which penalizes him and from which he cannot escape by proof. Such conclusive presumptions have been declared unconstitutional in numerous civil contexts, [see, e.g., Vlandis v. Kline, 412 U.S. 441, 446 (1973)] and should be striken here as well. The vice of these procedural shortcuts is that they do not permit the defendant an individualized hearing on the very issues which are most crucial to the case. By limiting or eliminating issues, they permit the categorization and punishment of individuals with a degree of imprecision that is intolerable in light of the purpose of the statutes in question. See generally Tribe, "Structural Due Process," 10 Harv.Civ.Rts. - Civ.Lib.L.Rev. 269 (1975).

12/ Compare People v. Jones, 42 Cal.2d 219 (1954), citing Section 290 in support of its holding that one charged with violating Section 288 was entitled to show his mental condition as proof of lack of propensity to commit the charged offense.

In a proceeding for violation of Section 290, the Court is required to assume that anyone convicted of one of the listed offenses is *per se* likely to repeat the conduct -- and *so* likely to do so that society is justified in imposing a registration system that would be intolerable to the general population.[13] Even in the abstract, the required assumption is a strained one:

> In view of the lack of any definite knowledge [on the subject of recidivism]... it is questionable whether there is a sufficient relationship between the registration requirement and the objective of these laws.
>
> Note, "Criminal Registration Ordinances: Police Control Over Potential Recidivists," 103 *U.Pa.L.Rev.* 60, 101 (1954).[14]

13/ Registration requirements are traditionally disfavored. Where imposed in our society, they are usually viewed as administrative measures carrying no social stigma, as in the case of lobbyists or licensees of various types. Other registration requirements are usually justified by some overriding national need of supreme significance, such as the war power or the power over aliens. Even in such cases, courts recognize the "unnecessary and irritating restrictions upon personal liberties" which cause these systems to be "at war with the fundamental principles of our free government...." *Hines v. Davidowitz*, 312 U.S. 52, 71 (1941). The potential for abuse of all registration systems is always present, and brings to mind "the notorious card indices of race polluters and homosexuals, used by the administration of the Third Reich mostly for political frameups." Kempner, "The German National Registration System as Means of Police Control of Population," 36 *J.Crim. L. & Criminology* 362, 382 (1946). The burden placed on those who would impose any system of dossiers must reflect the justifiable fear that such a system will inhibit the exercise of constitutional rights. *See White v. Davis*, 13 Cal.3d 757, 767-68 (1975), and cases cited therein.

14/ Another required assumption is that the punishment inflicted will achieve the stated goal, *i.e.*, that registration will reduce the incidence of recidivism. Although this is next to impossible to prove, the Kinsey studies suggest that no degree of punishment

(Footnote continued on page 20)

In the concrete case, it can become ludicrous if a defendant is presumed, without proof, to be a danger to society for the rest of his life. Such danger is in no way established by the underlying criminal conviction, because the broad issues involved in such a judgment are not, and cannot be litigated in a trial for specific past conduct. For this reason, a teacher's conviction for the identical offense cannot constitute per se proof of his unfitness to teach. Newland v. Board of Governors, 19 Cal.3d 705, 714 n. 11 (1977); Board of Education v. Jack M., 19 Cal.3d 691, 704 (1977). Similarly, an isolated conviction, regardless of the crime, cannot stand alone as sufficient proof that the offender is at all likely to commit the same or a similar offense again. Cf., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 n. 21 (1963).

14/ (Continued)

can eliminate the basic impulses from which the proscribed sex acts arise.

> Data which we have on more than 1200 persons who have been convicted of sex offenses indicate that there are very few who modify their sexual patterns as a result of their contacts with the law, or, indeed, as a result of anything that happens to them after they have passed their middle teens. This is not because convicted sex offenders are peculiarly degenerate or different from the mass of the population. It is simply because all persons have their sexual patterns laid down for them by the custom of the communities in which they are raised.
>
> A.C. Kinsey et al., Sexual Behavior In the Human Male 392 (1948).

The purported availability of proceedings which in the future may negate the duty to register is no answer to the foregoing argument. See Kennedy v. Mendoza-Martinez, supra at 167. First, those proceedings are not available at the time of conviction, but require the defendant to wait until his probation has expired (Section 1203.4), or one year (for misdemeanants not placed on probation under Section 1203.4a), or a variable period not less than three years (for felons under Section 4852.03). Second, all the foregoing statutes not only place the burden of going forward and of persuasion on the defendant, but also require him to satisfy standards such as "the interests of justice" (Section 1203.4(a)) or "has... lived an honest and upright life" (Sections 1203.4a(a) and 4852.05) which in effect leave his fate in the unbridled discretion of the judge who hears the petition. Third, the issues involved in such proceedings do not substitute for a finding explicitly deciding whether or not the defendant's registration with the police would serve the social goals underlying Section 290.

In dealing with registration statutes, in general, it is worth noting that they became common in the 1930's, after previous attempts to deal with the rising crime rate by creating status crimes [see Lanzetta v. New Jersey, 306 U.S. 451 (1939)] or by using "existing vagrancy laws to harass the gangsters and racketeers." Note, supra, 103 U.Pa.L.Rev. at 62 (footnote omitted). After those attempts proved unconstituional or unworkable.

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registration laws were enacted:

> Many felt that these ordinances would be effective because criminals would be harassed by the information requirements and convictions could be obtained merely by showing presence within the jurisdiction, a criminal record and failure to register.
>
> Id. at 62 (footnote omitted).

Because past conduct cannot be changed, basing liability on a "record" amounts to creation of a status crime. See id. at 100. The "social protection" theory does not excuse this; society should be protected enough by the conviction and sentence actually imposed, without the need for creation of a caste of "sex offenders" to which defendants are consigned. Similar "preventive" theories were formerly thought to justify vagrancy laws as well.

> A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life.
>
> District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C.Cir. 1947) (footnote omitted).

Creation of a status crime called "sex offender" is merely the other side of the coin of conclusive presumption. Cf. City of Detroit v. Bowden, 6 Mich.App. 514, 149 N.W.2d 771 (1967) (voiding an ordinance forbidding convicted prostitutes to stop or hail pedestrians or motor vehicles). The vice of Section 290 under either formulation is that it places individuals in categories to which they might not belong, and from which serious disabilities flow, without affording a prior

hearing on the substantive issues which determine whether liability ought to be imposed. Thus, in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court held invalid an Act of Congress which automatically divested any person of United States citizenship who left the country to avoid military service, where no hearing incorporating all the Fifth and Sixth Amendment guarantees was afforded on all the issues relevant to the divestiture. See, 372 U.S. at 167 n. 21. And in Autry v. Mitchell, 420 F.Supp. 867 (E.D.N.C. 1976), the Court considered a North Carolina statute which provided for declaring an accused felon who did not surrender an "outlaw" who could thereafter be killed by any citizen. In addition to the equal protection holding, Judge Craven's opinion held the statute invalid for failing to provide a prior hearing on the issue of whether the accused was so dangerous as to require imposition of such punishment.

Here, too, the statute in question reduces the issues on whose resolution punishment depends to matters which are so far removed from the purpose for which the section was enacted as to deny due process of law. Accordingly, Section 290 should be declared invalid on this ground.

IV.

APPLICATION OF SECTION 290 TO VIOLATIONS OF SECTION 647(a) CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT.

In People v. Anderson,[15] this Court held the death

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[15] 6 Cal.3d 628 (1972), cert.denied, 406 U.S. 958 (1972).

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penalty statute in force at the time violative of the state constitutional proscription against "cruel or unusual" punishment. The Anderson test for determining whether a punishment is cruel or unusual was whether the punishment "affronts contemporary standards of decency", that is, "the evolving standards of decency that marks the progress of a maturing society." (6 Cal.3d at 648, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Although the Court recognized that the Legislature should be accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crimes, it held that "the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function." (6 Cal. 3d at 640). This judicial function is performed by a determination based on society's attitudes and actions toward a particular punishment. The Court stressed the reluctance to put capital punishment into effect as well as "the brutalizing psychological effects of impending execution...." (6 Cal.3d at 651).

The most obvious proof that Section 647(a) registration violates contemporary standards of decency is the new California sex law of 1975.[16] This law removes criminal sanctions for adulterous cohabitation, sodomy, and oral copulation performed by consenting adults in private.[17] This legislative action has

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16/ Stats. 1975, Chapter 71, p. 144.

17/ Id. at 146-147. California Penal Code Sections 269(a), 269(b), 286.1, and 288(b) were repealed. Section 288(a) was substantially amended.

effectively decriminalized private homosexual conduct and has significance as a recognition of the evolving standards of contemporary decency of particular relevance to homosexual behavior.

A second case, In re Lynch,[18] also decided in 1972, created guidelines for determining when a statutory penalty amounts to cruel or unusual punishment. The Court held that "punishment of excessive severity for ordinary offenses might be both cruel and unusual" within the meaning of the California Constitution and under the Eighth Amendment to the United States Constitution. (8 Cal.3d at 420). While the disproportionality concept found in Lynch is not new,[19] it is important because it transforms the vague proscription against cruel or unusual punishment into a more specific mandate. The application of the Lynch analysis has not been limited to the facts of that original case. Since Lynch, California courts have sustained fourteen claims of cruel or unusual punishment utilizing the disproportionality analysis.[20] In the 100 years prior to 1972,

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18/ 8 Cal.3d 410, 217 (1972).

19/ The genesis of the concept may lie in Weems v. United States, 217 U.S. 349 (1910). The Weems court defined three criteria as important for evaluating sentences: (1) punishment should be graduated and proportional to the offense; (2) standards of justice should evolve as public opinion becomes enlightened by justice; and (3) punishment is sufficient if its purposes of deterrence and reformation are fulfilled. (217 U.S. at 367, 378, 381).

20/ Leaming v. Municipal Court, 12 Cal.3d 813 (1974); In re Foss, 10 Cal.3d 910 (1974); In re Walker, 10 Cal.3d 764 (1974); People v. Schueren, 10 Cal.3d 553 (1973); People v. Ruiz, 49 Cal.App.3d 739 (1975); People v. Keogh, 46 Cal.App.3d 919 (1975); People v. Lizarraga, 43 Cal.App.3d 815 (1975); People v. Murphy, 42 Cal.App.

[Footnote continued on page 26]

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only one California case[21] sustained such a claim.

The Lynch court reaffirmed the rationale of Anderson that legislative authority is limited by constitutional safeguards against cruel or unusual punishment, it being the responsibility of the judiciary to guard equally with the Legislature against any violation of those safeguards. Justice Mosk, for the Court, stated:

> The courts can often prevent the will of the majority from unfairly interfering with the rights of individuals who, even when acting as a group, may be unable to protect themselves through the political process....
>
> 8 Cal.3d at 414.

The requirement that all persons convicted of violating Section 647(a)[22] register as sex offenders under Section 290[23]

20/ (Continued)

3d 81 (1974); People v. Thomas, 41 Cal.App.3d 861 (1974); [illegible] v. Malloy, 41 Cal.App.3d 944 (1974).

21/ Ex parte Garner, 179 Cal. 409 (1918).

22/ Section 647(a) provides that every person "[w]ho solicits anyone to engage in 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.

23/ Section 290 requires those convicted of some sex offenses to register within 30 days after sentencing, with the appropriate law enforcement agency having jurisdiction. Any change of residence, permanent or temporary, requires re-registration within 10 days. This requirement to re-register pursues the individual throughout his life unless and until a court relieves him from this disability (see, e.g., Section 1203.4). The required registration documents include a signed informational statement, fingerprints, and photographs, all of which are promptly forwarded to the Department of Justice. Failure to comply with the requirement to register is punishable as a misdemeanor, and may subject defendant to further proceedings as a "mentally disordered" sex offender. See Kelly v. Municipal Court, 160 Cal.App.2d 38 (1958); In re Smith, 7 Cal.3d 362 (1972).

violates the standards set by this Court in Lynch for determining when punishment is cruel or unusual and therefore unconstitutional.

This Court, in Lynch, formulated a three-part test for determining whether the punishment[24] imposed on an individual is disproportionate and therefore cruel or unusual: (1) the nature of the offense; (2) the severity of the punishment as compared to that for more serious crimes; and (3) the disparity of treatment when contrasted with punishment for the same offense in other jurisdictions. The registration requirement under Section 290 is disproportionate under all the tests used in Lynch and should be struck down.

A. The Crime is A Minor One.

Under contemporary standards, petitioner's crime was a minor one. The vagrancy statutes, which encompass lewd or dissolute conduct, have historically been considered minor crimes, punishable by a small fine and/or imprisonment.[25] Section 647(a) retains this characteristic as a minor offense and as such has been under recent scrutiny by those studying and working within the legal community.

24/ Contrary to Real Party's astounding suggestion that registration "is a mere inconvenience" (Return, p. 27), it is clear that punishment is involved even if other purposes are also achieved thereby. See United States v. Brown, 381 U.S. 437, 458 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167-68 (1963).

25/ See Papachristou v. City of Jacksonville, 405 U.S. 156, 158 nn. 1 and 2 (1971).

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A recent law review article found that

> section 647(a) is a victimless crime which produces no real harm to the public. Modern clinical studies typically characterize "lewd or dissolute" conduct as a social nuisance, rather than a criminal activity. Findings substantiate that there is no real "victim", and any harm caused is minimal. Furthermore, it is the consensus of opinion among psychiatrists that sex offenders persist in the same type of behavior; they do not progress to more serious sex crimes. This opinion is confirmed by crime statistics. In short, this type of sex offender usually injures no one by his conduct.
>
> Note, "Sex Offender Registration for Section 647 Disorderly Conduct Convictions Is Cruel and Unusual Punishment," 13 San Diego L.Rev. 391, 400-401 (1976).

Section 647(a) is a minor crime when compared to other sex offenses falling within the registration requirements of Section 290. Additionally, Section 647(a) requires the police officer involved subjectively to decide the intent of an individual, in order to determine whether the conduct observed is or may result in lewd or dissolute behavior. This subjectivity encourages selective and discriminatory enforcement, while doing nothing to develop or maintain support and respect for the criminal justice system. (See Papachristou v. City of Jacksonville, supra). The concern that the Section can be and frequently is selectively enforced is supported by a study reported in the U.C.L.A. Law Review[26/] (hereinafter referred to as Project

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26/ Note, "The Consenting Adult Homosexual and the Law," 13 U.C.L.A.L.Rev. 643 (1966).

which indicates that Section 647(a) is California's homosexual control law.

Project, supra, indicates a statistically and factually insignificant number of private citizen complaints regarding Section 647(a) offenses:

- Out of 434 arrests for violation of 647(a) in 1965, only 10 involved evidence supplied by private citizens as complaining witnesses; only five involved testimony of accomplices. All other complaints were filed by police officers as the only complaining witness.27/

- Statements in arrest reports, as written by arresting officers, are admittedly (by the police) "a matter of form".28/

- The fact that the police use decoys in a majority of their misdemeanor arrests in 647(a) cases is directly related to their inability to generate private citizen complaints.29/

Project, supra, notes the private nature of the encounters:

- Homosexual "contacts" are accomplished most discreetly. The majority are made only if the other individual appears responsive. Such contracts are accomplished by means of quiet contacts and the use of subtle gestures.30/

27/ *Project*, at p. 688, note 17.

28/ *Ibid.*, pp. 689-690.

29/ *Ibid.* at 690.

30/ *Ibid.*, pp. 83-84.

In short, the type of "crime" which often results in registration as a sex offender consists of little more than a gesture; an invitation for sexual favor; or, as in the present case, conduct labeled "lewd" by a snooping vice officer. Almost never is there a victim of these petty crimes. This use of police resources has been criticized by observers of the social and political scene specifically because of the relatively innocuous character of a Section 647(a) offense.[31]

A violation of Section 647(a) is clearly not a major crime, yet the requirement of registration has been recognized by this Court to be extremely onerous.[32] Real Party in Interest attempts to characterize registration under Section 290 as similar to non-penal registration laws such as those requiring registration of automobiles, alien status, or I.R.S. changes of address. Such comparisons are grossly misleading as none of the above-mentioned carry the social stigma this society places on any identifiable sex offender. For a crime which usually involves no public act beyond speech or ambiguous gestures, such registration is disproportionately harsh and severe.

31/ C.H. Ralph, "The Problem for the Police", New Statesman, June 1960; see also Project, supra, at 698-699; Note, "Decoy Enforcement of Homosexual Laws", 112 U.Pa.L.Rev. 259 (1963).

32/ See In re Birch, 10 Cal.3d 314, 321-22 (1973). Real Party argues that registration "is not such an onerous task" and that, in effect, only a long prison term can be considered cruel or unusual. (Return, p. 24). That is completely at odds with the disproportionality concept and with the frequent holding that even a civil disability can constitute "punishment". See cases cited in footnote 23, supra; Robinson v. California, 370 U.S. 660, 666-67 (1962).

B. Violation of Section 647(a) Results in Punishment More Severe than that Inflicted for More Serious Crimes.

The registration requirement applied to Section 647(a) is excessive when compared with punishment for other similar crimes. This is apparent from the fact that not every subdivision of Section 647 imposes the requirement to register, although each crime in that section is part of the same general group and each carries the same possibility of fine or imprisonment. The irrational, disproportionate, discriminatory nature of the registration required by Section 647(a) is even more clearly evident when compared with Section 647(b), which does not subject a person convicted of precisely the same conduct for money or other consideration to the registration provisions of Section 290. The police are allowed wide discretion in deciding under which section of the code to charge a person arrested, thus compounding the potential for arbitrary, capricious, discriminatory use of the Penal Code to punish excessively.

The registration requirement bears no rational relationship to a conviction for crimes relating to sexual misconduct. A comparison of violations requiring registration with those which do not supports this view.[33/]

A careful reading of the Penal Code supports the argument that application of Section 290 to Section 647(a) offenses fails to meet the second requirement of the *Lynch* test. The registration requirement is imposed for such crimes as forcible rape, and is

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33/ See Appendix "A", *infra*.

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not for some sexual crimes involving children (see Sections 261.5, 273f, 273g, 309, 311.4) or crimes of violence (see Section 265).

The requirement of registration is excessive punishment as applied to petitioner when compared with those offenses which have no registration requirement at all. The registration requirement is unnecessary as a means of protecting the public where the offense does not generally affect the public, and in this case, did not affect the public.

Real Party argues that registration of Section 647(a) offenders is necessary because the Legislature felt this would assist the police in preventing such persons from committing similar offenses in the future. As the authorities cited in this brief point out, the majority of victimless sex offenders have a much lower recidivism rate than those more serious crimes which involve a victim. Indeed, it appears that Real Party agrees with this view, since its Return (p. 23) uses rape (rather than a Section 647(a) offense) as the best example sustaining the need for registration. It is apparent by referring to Appendix "A", however, that protection of all rape victims is not guaranteed by the present Penal Code since registration is not required for all rapists. Even more pertinent to petitioner's case is the fact, supported by research (see Project, supra), that Section 647(a) offenders are not rapists. Arguments relying on the problems of identifying rapists are misleading and inapplicable to petitioner's situation.

It should be noted, as well, that only certain narcotics offenses (in addition to those sex offenses listed in Section 290) require registration in California. The absence of additional narcotics convictions within five years of an initial conviction results in an automatic suspension of the duty to register. See Health and Safety Code, Section 11594. Only by operation of Section 1203.4 can one convicted of a sex offense requiring registration be relieved of that obligation. And while such obligation to register may be expunged under Section 1203.4, the record of the requirement to register remains as does the arrest record and original conviction, available to haunt such persons as petitioner indefinitely.[34/]

Further, there is no felony registration law in this state except for sex and narcotics crimes, although the recidivism rates for such violent crimes as robbery, assault, and burglary are higher. While the purpose of Section 290 is to assure that persons convicted of the enumerated crimes will be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future, the available data does not support this legislative presumption. The great majority of sex offenses, with the exception of rape and child molesting, are one-time events.

34/ See Frisbee, "Another Look at Sex Offenders in California", California Mental Health Research Monograph No. 12 (1969); England, "A Study of Post Probation Recidivism", 19 Fed.Prob. 10 (1955); Tappan, "Some Myths About the Sex Offender", 19 Fed.Prob. 1 (1955).

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The San Diego Law Review found that

> the registration of these minor sex offenders serves no legitimate penal purpose. Registration was premised on the belief that sex crimes were highly recidivistic and that it was the best means of protecting society from recurrences. Psychiatric studies reveal, however, that sex offenders have one of the lowest recidivism rates of all criminal types. In addition, an empirical study in the Los Angeles area concluded that the current registration system is not justified as an aid in law enforcement. It was found that the compulsory registration of obscene misdemeanants severely dilutes the effectiveness that registration might otherwise provide in the prevention of child molestation, forcible rape, and other violent sex crimes. Thus, public protection, the very basis upon which sex offender registration is premised, is not effectuated.
>
> Note, supra, 13 San Diego L.Rev. at 401-2.

Many serious crimes involving victims do not require registration, while Section 647(a), which usually has no victim (as in petitioner's case), does require registration. Such disparate, discriminatory and irrational punishment fails to meet the requirements for constitutionality under the second test of Lynch.

C. The Punishment is Disparate When Compared With Punishment for the Same Offense in Other States.

The final criterion for resolving the issue of cruel or unusual punishment under Lynch requires that a comparison be made between the scrutinized law and laws covering the same offense in other jurisdictions.[35] Two studies, made fifteen

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35/ Footnote on following page.

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years apart, of registration statutes offer a perspective under which a rational evaluation of the present California statute can be made. The first, reported in 1954,[36] indicates that out of 220 United States cities with a population over 50,000, only 32 (15%) had a registration ordinance of any kind. Not all of these ordinances were sex-related. Only five states had any type of statewide registration law. In 1969, the Center for the Study of Crime, Delinquency and Corrections at Southern Illinois University surveyed current criminal registration laws in the United States in the same size cities (over 50,000 population).[37] Only four states required registration for serious sex offenses not including disorderly conduct. Ohio, one of the four, required registration only after conviction for two or more sex offenses. Two states had narcotics registration laws; one had a felony control statute.

Only 13 cities (out of 384 surveyed), all located within six states, had sex registration ordinances. Forty-seven

35/ (Continued)

Real Party suggests this last test under Lynch carries the least amount of weight, citing People v. Wingo, 14 Cal.3d 169 (1975). It is difficult to see how this conclusion was reached. This Court clearly recognized in Wingo that disproportionate treatment as compared with that in sister states raises the issue of a potential finding of cruel or unusual punishment. The Wingo case dealt with indeterminate sentencing and the decision held that it was appropriate to give the authorities an opportunity to apply the law constitutionally. In Section 290 registration cases, such discretion is nonexistent once an individual is convicted under Section 647(a).

36/ Note, supra, U.Pa.L.Rev. 60 (1954).

37/ Decker & Kamaler, "Criminal Registration Statutes in the United States", B 9 v. 617, Carbondale, Illinois (1969).

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maintained felony registration laws and 18 required registration for narcotics convictions. There were no sex registration laws at all in 47 states, including the District of Columbia, and 29 of those states had no registration requirement for any criminal offense.

By 1976, only California, Arizona, Nevada, and Ohio required sex offender registration, and only Arizona had a registration requirement comparable to California's. In Nevada, registration is limited to sex offenses classified as felonies. Ohio has a law similar to Nevada's, with the additional requirement that an individual be convicted of two or more sex crimes <u>in separate transactions</u> to come within the purview of registration statutes.

Section 290 constitutes cruel or unusual punishment as it relates to minor sex offenses which involve only speech, the solicitation of lawful sexual conduct, or, as in the present case, conduct which offended no one but, theoretically, the vice officer. More serious crimes are punished less severely while similar crimes go unregistered here and in almost every other jurisdiction in the country. Compared to other jurisdictions having any registration laws for sex offenders, California's statute, attaching registration to convictions under Section 647(a) is harsh, irrational, and excessive.

The requirement to register upon a conviction under Section 647(a) violates the standards of this Court set down in <u>Anderson</u> and refined in <u>Lynch</u>. The requirement amounts to

cruel and unusual punishment and should be abolished.

CONCLUSION

Petitioner's arrest was obtained by means of a search which violates reasonable expectations of privacy. Moreover, the sex offender registration requirement to which he has been subjected is cruel and unusual as applied to the offense for which he was convicted, and violates constitutional due process and equal protection provisions. For all these reasons, petitioner should be discharged from the restraints placed against him.

DATED: March 17, 1978

Respectfully submitted,

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By ______________________
DONALD C. KNUTSON

Attorneys for Amici Curiae*

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* Counsel gratefully acknowledge the assistance of Judith Hedgpeth and of Paul Geller, Esq. in the preparation of this brief.

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APPENDIX "A"

Comparison of Some Offenses Requiring Registration Under Penal Code Section 290 with Other Offenses Not Requiring Registration.

REGISTRATION REQUIRED FOR:	REGISTRATION NOT REQUIRED FOR:
I. Offenses Involving Children	
§266. Procuring female under 18 for prostitution.	§309. Admitting or keeping minor in a house of prostitution.
§267. Abducting a minor for prostitution.	§273f. Sending a minor to saloon, house of prostitution, etc.
§272. Contributing to delinquency of minor [by lewd or lascivious conduct].	§311.4. Child pornography.
	§653g. Loitering about schoolyards.
§288. Exciting lust of child under 14.	§313.1. Distribution of pornography to minors.
§288a (subds. a-c). Oral copulation with minor.	§261.5. Sexual intercourse with minor female (statutory rape).
§647a. Annoying or molesting child.	§273a, 273d. Child abuse.
II. Offenses Involving Adults	
§261(2). Rape--sexual intercourse with female not one's wife, if the victim resists.	§273.5. Willful assault upon one's spouse or cohabitant.
§261(3). Rape--where victim is prevented from resisting by threats or intoxication.	§261(1). Rape--where victim's insanity renders her incapable of consent.
§268. Seduction of previously chaste unmarried female under promise of marriage.	§§266d-266i. Pimping and pandering.
	§§315-316. Keeping house of prostitution.
§285. Incest.	§281, 284. Bigamy.
§286. Sodomy.	§286.5. Bestiality.
§288a (subd. f). Oral copulation upon unconscious victim.	§261(4). Rape--sexual intercourse with unconscious female.

APPENDIX "A" (Cont'd)

Comparison of Some Offenses Requiring Registration Under Penal Code Section 290 with Other Offenses Not Requiring Registration.

REGISTRATION REQUIRED FOR:	REGISTRATION NOT REQUIRED FOR:
III. Offenses Involving the Public	
§220. Assault with intent to commit rape, infamous crime against nature, or sodomy.	§220. Assault with intent to commit mayhem, robbery, or grand larceny.
§314. Indecent exposure.	§273g. Lewdness in presence of child.
§647(a). Soliciting lewd conduct in public.	§647(b). Soliciting or engaging in acts of prostitution.
§647(d). Loitering in toilets for lewd purposes.	§647(h). Peeping in windows at night while loitering, etc.

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MINUTE ORDER and CLERK'S NOTICE PURSUANT TO C.C.P. SECTION 664.5	IN THE MUNICIPAL COURT OF NEWHALL JUDICIAL DISTRICT COUNTY OF LOS ANGELES, STATE OF CALIFORNIA 23747 W. Valencia Blvd., Valencia, CA	Case Number M 9186

PEOPLE OF THE STATE OF CALIFORNIA vs. ALLEN EUGENE REED

Plaintiff(s) Defendant(s)

Court convened at 9:30 A.M. on May 1, 1981; in Division One

Present: Honorable JACK B. CLARK, Judge; Pamela K. Troupe, Deputy Clerk; and the following proceedings were had:

Plaintiff(s) THE PEOPLE OF THE STATE OF CALIFORNIA appearing by Myron Jenkins, D.D.A.

Defendant(s) ALLEN EUGENE REED appearing by Thomas F. Coleman

NATURE OF PROCEEDINGS:

Cause called for hearing re condition of probation to register §290 Penal Code.

Counsel for defendant submits matter to Court for ruling on written offer of proof and waives further evidentuary hearing.

DISPOSITION:

Motion to declare §290 Penal Code unconstitutional as applied to this defendant is denied.
(see Appellate Div. Habeas Corpus ruling 000 095, order dated 4/7/81; Hon. Philip M. Saeta, Judge, and cases cited therein)

The foregoing minutes are correct. Pamela K. Troupe
Pamela K. Troupe, Deputy Clerk

Clerk FREDERICK K. OHLRICH

Entry of order in register of actions compared and dated. Filed on 5/4/81

By Pamela K. Troupe
Pamela K. Troupe, Deputy Clerk

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I am the Clerk of this court, not a party to this cause; that I served a copy of this NOTICE on the below date, by placing a copy thereof in separate sealed envelope(s) addressed to:

Thomas F. Coleman	Myron Jenkins
Attorney at Law	Dep. District Attorney
1800 N. Highland	23747 W. Valencia Blvd.
Los Angeles, CA 90028	Valencia, CA 91355

at the address shown by the records of this Court, and by then sealing said envelope(s) and depositing same, with postage fully prepaid thereon, in the United States mail at Valencia, California.

FREDERICK K. OHLRICH, Clerk

Dated May 4, 1981

By Pamela K. Troupe
Pamela K. Troupe, Deputy

EXHIBIT F

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MINUTE ORDER and CLERK'S NOTICE OF RULING

76M417-C1 20-(6)-REV. 7/78 C.C.P. 664.5, 1013a

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FILED

MAY 14 1981

JOHN L. CORCORAN, COUNTY CLERK

BY Y. S. KIMBROUGH

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALLEN EUGENE REED, Defendant and Appellant.	Superior Court No. CR A 18963 Municipal Court of the Newhall Judicial District No. M9186 STAY ORDER

After this court affirmed defendant's judgment of conviction for a violation of Penal Code section 647, subdivision (a), the trial court, on May 4, 1981, denied defendant's motion to declare Penal Code section 290 unconstitutional. Defendant filed a notice of appeal as to that order on May 11, 1981.

Defendant now seeks a stay of that part of his sentence and of the law requiring him to register pursuant to Penal Code section 290 pending final outcome of his appeal.

IT IS ORDERED that defendant's request for a stay is granted, staying only defendant's obligation to register under Penal Code section 290 pending final determination of his appeal

EXHIBIT G

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1 from the post judgment order of the trial court of May 4, 1981,
2 or until further order of this court. Nothing in this order
3 is intended to or is to be construed as a stay of sentence,
4 except as herein provided.
5 DATED: May 14, 1981.
6
7 [signature]
Presiding Judge
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FEB 19 1982

JOHN J. CORCORAN, COUNTY CLERK

A.B. Hardey

BY A. B. HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALLEN EUGENE REED, Defendant and Appellant.	Superior Court No CR A 18963 Municipal Court of the Newhall Judicial District No. M9186 OPINION AND JUDGMENT

Appeal by defendant from order of the Municipal Court, Jack B. Clark, Judge.

ORDER AFFIRMED.

For Appellant - Thomas F. Coleman

For Respondent - John K. Van De Kamp, District Attorney
Appellate Division
Donald J. Kaplan, Deputy District Attorney
Dirk L. Hudson, Deputy District Attorney

-oOo-

Allen Eugene Reed appeals from a post-judgment order of the Municipal Court denying his motion to declare unconstitutional section 290 of the Penal Code (Registration of Sex Offenders).[1/]

[1/] The parties do not brief the issue of the appealability of this order. We assume, without deciding, that the appeal is taken pursuant to Penal Code section 1466, subdivision 2, subsection (b), as from "any order made after judgment affecting his [defendant's] substantial rights."

EXHIBIT H

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In response, the People assert that Reed is bound to a determination of the constitutionality of section 290, under doctrines of res judicata and the law of the case, by a prior ruling of the Superior Court upon the denial of his petition for habeas corpus. In any event, they contend, its constitutionality has been decided by the Court of Appeal, and we are bound by stare decisis to the ruling of the higher court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) We agree that defendant is now precluded from challenging again the constitutionality of section 290 and affirm the order.

Reed was convicted, after a jury trial, of violating Penal Code, section 647, subdivision (a). On March 14, 1980, he was arraigned for sentencing. Imposition of sentence was suspended and he was placed on two years probation on stated conditions. At that time, he was advised by the court of his obligation to register as a sex offender and subsequently was instructed to do so by the probation officer. Reed appealed from the judgment of conviction (CR A 18087), and execution of the order of probation was stayed pending disposition of the appeal.

While the appeal was pending, Reed on July 25, 1980, filed in the Superior Court a petition for habeas corpus to be freed from the restraint of the requirement of registering as a sex offender. The petition was assigned to the Honorable Philip M. Saeta, sitting in Department 70 of the Superior Court.[2/] Judge Saeta deferred consideration of the petition pending determination of the appeal in CR A 18087.

2/ The People have requested that we take judicial notice of the petition and Judge Saeta's ruling in APHC 000 095, which we do. (Evidence Code, sections 452, subdivision (d), 459.)

1 On October 31, 1980, this court affirmed the judgment
2 of conviction. No point concerning the constitutional validity
3 of section 290 was raised or considered on the appeal.
4 On April 7, 1981, Judge Saeta issued his order denying
5 Reed's petition for habeas corpus. In his memorandum opinion,
6 Judge Saeta stated:
7 "The matters raised by the petition of habeas corpus
8 have been considered and the writ is denied. Most of the
9 arguments raised by the petition should be addressed to
10 the legislature, not the courts. The justiciable argu-
11 ments are met by People vs. Mills (1978) 81 Cal.App.3d
12 171 and People vs. Rodriguez (1976) 63 Cal.App. 3d Supp. 1,
13 Supp.5 (disapproved on other grounds in Pryor v. Municipal
14 Court (1979) 25 C 3d 238, 257, fn 13)."
15 Thereafter, on May 1, 1981, Reed filled in the Municipal
16 Court a document captioned "OBJECTIONS TO REGISTRATION PURSUANT
17 TO SECTION 290 P.C.; MOTION TO DECLARE REGISTRATION UNCONSTITU-
18 TIONAL AS APPLIED: REQUEST FOR EVIDENTIARY HEARING." In the
19 document, defendant recited the history of his conviction and
20 sentencing and advisement of the obligation to register pursuant
21 to section 290, his appeal from the judgment of conviction and
22 subsequent affirmance, that the Clerk of the Municipal Court had
23 sent notice of a hearing on May 1, 1981, concerning his obligation
24 to register pursuant to Penal Code section 290, and that "This
25 hearing on May 1, 1981, will be the first time the defendant has
26 been before a judge of the Municipal Court on the issue of
27 registration."
28 In his points and authorities in support of the motion,

1 Reed raised a number of constitutional objections, bearing
2 upon the question of the statute's application to him.[3/] In
3 support of the motion he further included an "Offer of Proof."[4/]
4 By stipulation between the parties, the motion was submitted
5 on the offer of proof and written memoranda. On May 4, 1981,
6 the motion was denied.

7 On appeal, Reed contends that the validity of section 290
8 is dependent upon the premise that it was created to combat
9 recidivism by subjecting persons convicted of the sex offenses
10 encompassed by it to continual police surveillance. He further

---

11 3/ As will appear, infra, his contentions on the instant appeal are likewise numerous.

12

4/ The offer of proof was as follows:

13 " a) defendant's personal history as stated in the probation report filed in this Court on March 10, 1980;
14 b) defendant has no prior criminal history or record other than for this case;
15 c) defendant has no arrests or criminal record in the past year, i.e., in the year following his conviction;
16 d) judicial notice of the facts underlying this conviction;
17 e) psychiatric testimony that it is unlikely that the defendant would commit another violation of the lewd conduct
18 law in the future;
f) testimony by police and sheriff officials that
19 registration of persons convicted of 647(a) does not assist the police in apprehending violators of the lewd conduct law
20 in that virtually all persons arrested for such an offense are arrested at the scene of the crime by an undercover vice
21 (although registration of persons convicted of indecent exposure, child molestation, and rape usually assist the police in
22 apprehending suspects because the defendant is not arrested at the scene of the crime, the victims of these offenses are
23 private citizens, and that registration photographs can assist the victim in helping the police identify and locate the suspect);
24 g) statistics to show that most persons prosecuted for 647(a) do not repeat that ofense;
25 h) expert testimony to show that most 647(a) cases involve only adults and not children and only a plainclothes
26 vice officer as the sole observer of the lewd conduct;
i) the registration requirement of Section 290, as
27 applied to 647(a) offenses, is being enforced in a manner that violates Article IV, Section 16, in that it is not being
28 uniformly applied by the courts and prosecutors in different judicial districts throughout Los Angeles County."

1 contends that due process requires that, in the individual
2 case, a hearing be conducted to ascertain whether the individual
3 is likely to be a recidivist, if recidivism is likely to be
4 combatted by registration and the resulting police surveillance,
5 and whether registration does, in fact, subject the offender to
6 continual police surveillance. Failing proof of these facts,
7 his argument continues, section 290 and its requirements would
8 be arbitrary and irrational presumptions. Alternatively, he
9 contends that if the requirements of section 290 are imposed
10 as an incident to punishment, it constitutes cruel and unusual
11 punishment. Finally, he argues that the trial court failed to
12 consider a number of his contentions and, if it had done so,
13 it would have been necessary to conclude that the requirements
14 of the section are not applied uniformly, that it is unfair to
15 impose its requirements upon homosexual males in light of
16 evolving public attitudes concerning homosexuality, that equal
17 protection problems arise from the Legislature's failure to
18 include a registration requirement for other sexually related
19 offenses, the section invades defendant's right of privacy,
20 and requiring that he register interferes with his right to
21 travel.

22 Response to defendant's contentions is made difficult by
23 the generally unfocused nature of them. Although he presents
24 a broad range of contentions, he presents little or no supporting
25 argument or citation of authority for most of them.

26 We note initially a fundamental misconception of
27 defendant as to the role of the trial court and this court in
28 inquiring into the basis for the requirements of section 290.

Defendant asserts that a hearing is required "To Show How the Premises Underlying the Legislative Enactment are Faulty" and asks: "How and where does a person convicted of a registerable offense present facts to show the Legislature's basic premises are faulty with regard to automatic registration for himself or all persons convicted of his offense?"

As pointed out in People v. Mills (1978) 81 Cal.App.3d 171, at pp. 176-177:

> "The fundamental legislative purpose underlying section 290 is to assure persons convicted of such a crime as molestation of children shall be readily available for police surveillance at all times. The Legislature has deemed such persons likely to commit similar offenses in the future and upon this basis the registration is required. (Citation.) Mills' charges of unconstitutionality of section 290 face this threshold hurdle: A presumption of constitutionality attends on Penal Code section 290. '[T]he validity of enactments will not be questioned "unless their unconstitutionality clearly, positively, and unmistakably appears."'
>
> "Courts should tread lightly when approaching matters within the unique province of the Legislature. The definition of crime and the determination of punishment are foremost among those matters that fall within the legislative domain. (Citation.)"

It is not the function of the courts, therefore, to conduct hearings concerning the validity of the underlying legislative

findings.[5/] Similarly, section 290 is applicable to "[a]ny person who . . . has been or is hereafter convicted . . . of any offense defined in . . . subdivision 1 of Section 647a . . . ." Accordingly, the trial court quite properly refused to consider whether there was justification for refusing to apply to defendant the requirements of section 290, by which such person "shall" register with the appropriate officials. [Defendant's offers nos. a) through e).]

A prior ruling upon an application for an extraordinary writ constitutes res judicata when there has been an opinion or the circumstances are such that the ruling was of necessity upon the merits. (See People v. Medina (1972) 6 Cal.3d 484, 491, fn. 6.) Judge Saeta's ruling denying Reed's application for habeas corpus was by opinion rejecting Reed's constitutional contentions as without merit. His judgment denying the writ was appealable (Penal Code, section 1506), but no appeal was taken and it is now final.

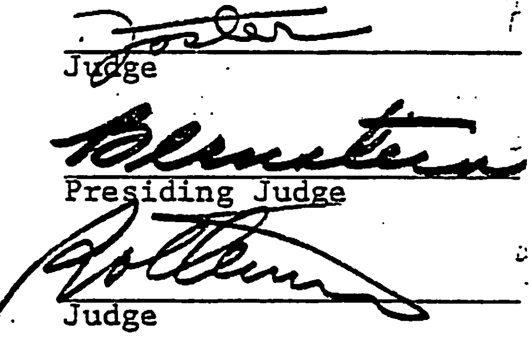
We note in any event that Reed's contentions attacking the constitutionality of section 290 have each been answered in Mills, supra. (81 Cal.App.3d p. 177 [rational relationship between registration and available police surveillance]; p. 178 [the claim of cruel and unusual punishment]; p. 180 [denial of

[5/] For this reason, the trial court quite properly refused to deny application of section 290 on the basis of defendant's offers of proof that registration does not really assist police in apprehending violators of section 647, subdivision (a) [defendant's offer no. f)], that statistics show that such violators are unlikely to repeat that offense [defendant's offer no. g)], and that most victims are adults and usually only a plainclothes vice office [defendant's offer no. h)].

equal protection of the laws]; p. 180 [unequal treatment among various types of sex offenders]; p. 181 [restrictions upon freedom of movement and right to privacy].) And, although his claim that he has been denied equal protection from a lack of uniform application of section 290 was not considered by Mills and apparently was raised for the first time on the motion under review, the trial judge was correct in denying Reed's motion on the basis of the offer of proof. Unequal enforcement of a law is a defense only if the law is applied in an intentional and purposeful discriminatory manner against defendant or a class of which he is a member. (See 1 Witkin, California Crimes (1963) Defenses section 254, p. 235.) Reed's offer of proof presents no facts which would bring his case within that rule.

The order is affirmed.

We concur.



Judge

Presiding Judge

Judge

E-114

LAW OFFICES OF JAY M. KOHORN
1800 North Highland Avenue, Suite 106
Los Angeles, California 90028

(213) 464-6666

Attorneys for Defendant/Appellant

ORIGINAL FILED
MAR 08 1982
COUNTY CLERK

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALLEN EUGENE REED, Defendant and Appellant.	Superior Court No. CR A 18963 Municipal Court of the Newhall Judicial District No. M 9186 PETITION FOR REHEARING

Appellant ALLEN EUGENE REED, by and through his attorney, JAY M. KOHORN, hereby respectfully requests rehearing of the above-entitled action, following filing of this court's opinion on February 19, 1982.

There seem to be two bases for the decision of this court to uphold the trial court's order denying appellant's motion to declare Penal Code section 290 (Sex Offender Registration) unconstitutional as to appellant or as to all defendants convicted of violating Penal Code section 647, subdivision (a) (Lewd Conduct). Each basis will be discussed separately below.

RES JUDICATA

First, Judge Saeta's ruling denying appellant's application for habeas corpus is viewed by this court to be a rejection of "Reed's constitutional contentions as without merit" and constituting res judicata. On page seven of the slip opinion, lines 15-17, the court states that Judge Saeta's "judgment denying the writ was appealable (Penal Code, section 1506), but no appeal was taken and it is now final."

Our reading of Penal Code section 1506 is to the contrary.

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Only the People, if they lose, may appeal; otherwise, a loss by a defendant is a non-appealable order. Since it was a non-appealable order, Judge Saeta's ruling, if seen as res judicata, had the effect of depriving appellant of an evidentiary hearing at the trial court level and, as such, is a deprivation of due process.

This court has addressed the same issue in another case, which case was unpublished, but since that case correctly set forth the constitutional principles in an articulate and convincing manner, and because it seems that granting an evidentiary hearing to one defendant and not to another would create equal protection problems and would not be uniform operation of the law as required by the California constitution, we ask this court to take judicial notice of it under Evidence Code sections 452(d) and 459. The case is People v. Ripley, filed August 20, 1980, CR A 16440. In that case, a copy of which is attached hereto, this court said (at slip opinion page 3):

> The judge's denial of a hearing at which evidence could be received and argument heard regarding the constitutional validity of section 290 as applied to defendant's particular case was error. These issues are best considered in a factual context which should be presented in the trial court. People v. Mills (1978) 81 Cal.App.3d 171. Defendant's request for a hearing was timely, because the question of section 290's constitutional validity is premature if raised by a defendant who has not yet been found guilty of an offense which triggers the section 290 operation. Pryor v. Municipal Court (1979) 25 Cal.3d 238, 257 Fn. 14. Refusal by the trial court to consider the defense based upon constitutional grounds was error (Citations).
>
> Absent a factual record to assist this court in evaluating defendant's contentions regarding the invalidity of the statute, this court is unable to comment intelligently on their merit, beyond stating that these contentions are at least deserving of airing and consideration. (See People v. Mills, supra, at 179, Fn. 1 and 180) In this case failure to consider the issues was not only prejudicial,

1 because defendant has no other defenses, but it was a denial of due process.

2

3 It is of some importance that the Ripley opinion cited Mills twice, and, yet, Mills is the primary reason an evidentiary hearing was denied in the present appeal. As in the present case, the appellant in Ripley had indicated that he wished to attack the constitutionality of the statute on due process, equal protection and cruel and unusual punishment grounds. See slip opinion, page 2, lines 10-13. Also, in that case "[t]he judge indicated that the proper forum for hearing of constitutional defenses is the legislature or Supreme Court . . . ." (Slip opinion, page 2, lines 14-16) This court rejected such a claim, stating at page 2, lines 20-27:

> Because no hearing was held on these defenses, the record on appeal is barren of factual findings essential to determination of defendant's contextual constitutional contentions. "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause . . . A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law . . ." 16A Am.Jur.2d section 843.

In the present case, the "contextual constitutional contentions" were also not before Judge Saeta; there had been at the time of his decision no evidentiary hearing at the trial court and no taking of evidence by the appellate department.

In his memorandum opinion, Judge Saeta also suggested that the questions should be addressed to the legislature and that the "justiciable arguments" had been met by Mills and People v. Rodriguez (1976) 63 Cal.App.3d Supp. 1. This brings us to the second and substantive basis for this court's decision.

PEOPLE v. MILLS

This court's substantive reasoning is based upon Mills. From Mills the court concludes that (a) "[i]t is not the function of the courts . . . to conduct hearings concerning the validity of the underlying legislative findings," and that (b) each of appellant's "contentions attacking the constitutionality of section 290 have . .

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1 . been answered in Mills." It is ironic that the very case which we
2 had thought was forward looking and beneficial turned out to be our
3 nemesis in this situation.
4 The Mills court did, in fact, state that "the validity of
5 enactments will not be questioned 'unless their unconstitutionality
6 clearly, positively, and unmistakably appears.'" It then went on to
7 find that **in the case of child molesters, and specifically felony**
8 **child molestation**, the unconstitutionality is neither clear nor posi-
9 tive. On the face of that type of case, registration is appropriate.
10 However, the Mills court also suggested that the appropriateness of
11 registration for lewd conduct offenders is not so obvious: "The same
12 reluctance that may be contemplated . . . to impose these require-
13 ments in 647(a) type offenses is not present in 288 Penal Code spe-
14 cies of offenses before the court." (Mills, at page 180) "Presented
15 with a rational basis" for the enactment, the court said it would not
16 interfere with the penalty. (See Mills, page 177) Where, then, does
17 a defendant in a non-child molestation, non-violent context -- in a
18 type of case in which the appellate court has suggested the answers
19 are not pre-ordained -- have the opportunity to present information
20 which would prove that, in his case or situation, the law is irra-
21 tional, depriving him of due process? That would be the function of
22 the courts.
23 What the Mills court was saying was that there may be a
24 substantial difference between child molesters and lewd conduct of-
25 fenders and that the obviousness of the rationality behind the appli-
26 cation of the registration law to the former group does not neces-
27 sarily attach to the latter.
28 Then, at page 7 of the present slip opinion, lines 1-8, this
29 court states: "Similarly, section 290 is applicable to '[a]ny person
30 who . . . has been or is hereafter convicted . . . of any offense
31 defined in . . . subdivision 1 of Section 647a . . . .' Accordingly,
32 the trial court quite properly refused to consider whether there was
33 justification for refusing to apply to defendant the requirements of
34 section 290, by which such person 'shall' register with the appro-
35 priate officials. . . ."
36 This quote implies that the trial court was justified in

refusing to consider the constitutional arguments because an appellate court had held 290 appropriate for 647a offenders. Such an implication is very misleading. There is a great difference between penal code section 647a and penal code section 647(a). The former is child molestation, while the latter is lewd conduct. Thus, the "accordingly" in the above quoted passage seems to have little if any pertinence to the present case, except to imply that 647a and 647(a) are the same.

CONCLUSION

The presumption of constitutionality of a legislative enactment is strong. However, if unconstitutionality is alleged, due process requires an airing of the issues. Upon such an airing, the presumption is overcome only is it is "clearly" and "unmistakenly" shown that thee is no rational basis for the enactment or, in the present case, for the specific application of the enactment.

If the appellant had been afforded an evidentiary hearing in which he proved all of the allegations contained in the offer of proof, the irrationality of the registration requirement to him would have been "clear" and "unmistakable".

It was only in the context of felony child molestation that the Mills court held the registration requirement obviously rational.

Finally, appellant requests the name of co-counsel, JAY M. KOHORN, be added to the opinion as attorney for appellant.

For the reasons stated above, appellant respectfully requests this court to grant rehearing of this appeal.

Respectfully submitted,
LAW OFFICES OF JAY M. KOHORN

By________________________
JAY M. KOHORN
Attorneys for Appellant/Defendant

(VERIFICATION — 446, 2015.5 C. C. P.)

1 STATE OF CALIFORNIA, COUNTY OF

2 *I am the* ______

3 ______

4 *in the above entitled action or proceeding; I have read the foregoing* ______

5 ______

6 *and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein*

7 *stated upon my information or belief, and as to those matters I believe it to be true.*

8 ______

9 ______

10 *Executed on* ______ (date) *at* ______ (place) *, California*

11 *I declare, under penalty of perjury, that the foregoing is true and correct.*

12

13 ______ *Signature*

14

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

15 STATE OF CALIFORNIA, COUNTY OF

16 *I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:*

17 1800 N. Highland Ave., Suite 106, Los Angeles, CA 90028

18 *On* March 8 *, 19*82 *, I served the within* PETITION FOR

19 REHEARING

20 *on the* interested parties
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail

21 *at* Los Angeles, California
addressed as follows:

22 Honorable Jack B. Clark
Newhall Municipal Court
23 23747 W. Valencia Blvd.
Valencia, CA 91355

Los Angeles District Attorney
Appellate Section
849 S. Broadway, 11th Floor
Los Angeles, CA 90014

24

25

26

27 *Executed on* March 8, 1982 (date) *at* Los Angeles (place) *, California*

28 *I declare, under penalty of perjury, that the foregoing is true and correct.*

______ *Signature*
Kevin M. Rose

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B:marC

T576T- PS 1-80

FILED

MAR 22 1982

JOHN J. [illegible], COUNTY CLERK
A.B. Hardey
BY A. B. HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALLEN EUGENE REED, Defendant and Appellant.	Superior Court No. CR A 18963 Municipal Court of the Newhall Judicial District No. M-9186 ORDER DENYING REHEARING

THE COURT*

The petition of defendant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

*Before Bernstein, P.J., Foster, J., and Rothman, J.

EXHIBIT J

E-121

NOTICE OF ~~HEARING~~ DUTY TO REGISTER

IN THE MUNICIPAL COURT OF NEWHALL JUDICIAL DISTRICT
County of Los Angeles, State of California
23747 W. Valencia Blvd., Valencia, CA

CASE NUMBER
M 9186

Law offices of Jay M. Kohorn
1800 No. Highland Ave., Ste. 106
Los Angeles, CA 90028

Attorney(s) for Appellant/Defendant

Mr. Allen E. Reed
21438 Briar Way
Saugus, CA 91350

~~Attorney(s) for~~ Defendant

You and each of you will please take notice ~~that the hearing~~ of condition of probation re: duty to register under provisions of Section 290 Penal Code. Defendant ~~is hereby ordered to appear in Court on or before April 2, 1982, Monday~~ through Friday at 9:00 a.m. in Division II re registration. Failure to do so will result in revocation of probation. of this court.

F.K. OHLRICH
Clerk of the Court

Dated March 12, 1982

By *Pamela K. Troupe* Deputy
Pamela K. Troupe

CLERK'S CERTIFICATE OF SERVICE BY MAIL

I certify that I am not a party to this cause; that I served a copy of this Notice on the date shown below upon the person(s) shown above by depositing a true copy thereof in separate sealed envelopes with the postage thereon fully prepaid, in the United States mail at Valencia, California, addressed respectively as shown above, being the addresses of record in this case.

F.K. OHLRICH Clerk

Dated March 15, 1982 By *Pamela K. Troupe* Deputy
Pamela K. Troupe

EXHIBIT K

E-122

NOTICE OF HEARING

from Legal Policies Manual

Section VI.B.2.c.(4)

GORDON JACOBSON
DEPUTY DISTRICT ATTORNEY
ASST. DIRECTOR, BRANCH & AREA OPERATIONS

JOHN K. VAN DE KAMP
DISTRICT ATTORNEY
COUNTY OF LOS ANGELES

18000 CRIMINAL COURTS BLDG.
210 WEST TEMPLE STREET
LOS ANGELES, CALIF. 90012
TEL. 974-3871

3) Driving under the influence of drug deserves special mention:

a) Ordinarily, the accused should be

b) However, when there is evidence ... a plea may be taken to Vehicle Code Section 23102a.

4) Penal Code Section 647(a) filing guidelines:

(This policy has been prepared in light of the *Pryor* decision (*Pryor* v. *Municipal Court*, 25 Cal.3d 236). It is expected that further modifications will be made before September 1, 1980.)

a) A complaint alleging violation of Penal Code Section 647(a) will be filed in cases involving solicitation in a public place to engage in sexual conduct in a public place or a place open to the public or exposed to the public view and the suspect knows or should know that there is (or will be) present a person who may be offended by such conduct. (This represents the CALJIC majority view: See CALJIC 16.400 and Commentary: The language in the brackets represent a minority view which is still being litigated.)

b. A complaint alleging violation of Penal Code Section 647(a) will not be filed in cases involving solicitation in a public place to engage in sexual conduct in a private location.

c. A complaint alleging violation of Penal Code Section 647(a) will be filed in cases involving a touching with sexual connotation whether consensual or non-consensual in a public place or a place open to the public or exposed to public view and the suspect knows or should know that there is (or will be) present a person who may be offended by such conduct. (The language in the brackets reflects the CALJIC minority view still being litigated.)

d. A plea of guilty to Penal Code Section 415, where there has been a solicitation but no touching or a plea of guilty to Penal Code Section 242 where there has been a touching, shall be accepted as a disposition of a case where the complaint alleges a violation of Penal Code Section 647(a), except:

(1) Where the accused has a prior conviction specified in Penal Code Section 290, or where the accused has had 647(a) charges reduced within three (3) years prior to the offense, a plea of guilty to Penal Code Section 415 or a plea of guilty to Penal Code Section 242 shall not be entertained. If the defense can demonstrate that the prior 647(a) or the case reduced from a 647(a) would not have been a valid 647(a) under the *Pryor* decision, then this prohibition shall not apply.

(2) The touching must not be forcible.

(3) The solicitation or touching must not be in the presence of children.

EXHIBIT L

E-123

FILED
Robert D. Zumwalt, Clerk
OCT 8 1980
BY: P. PHELAN, DEPUTY

RECEIVED OCT 10 1980

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED OCT 8 1980

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHN EDWIN WYATT, Defendant and Appellant.	SUPERIOR COURT NO. CR 50555 MUNICIPAL COURT NO. M 316117 (San Diego Judicial District) ORDER

Judgment affirmed. The matter is remanded to the trial court to strike the registration requirements, it being cruel and unusual punishment in this case.

BY THE COURT

______________________ P.J.

______________________ J.

______________________ J.

JRL/rml

EXHIBIT M

E-124

COPY

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/ Respondent, -vs- JOHN EDWIN WYATT, Defendant/ Appellant.	No.: M316117 SETTLED STATEMENT ON APPEAL

On December 3, 1979 in Department Eight, Judge Ernest Borur presiding and jury having been waived, trial proceeded as set forth below. Opening statements were waived.

The prosecution called as its only witness Edward A. MacConaghy, who testified that he has been a San Diego police officer for about one year. He is now a uniformed patrol offic assigned to the State College area of San Diego.

On August 24, 1979 Officer MacConaghy was on a special plainclothes assignment in Balboa Park. It was his first and last such assignment. He did not think much of such duty; it offended him.

EXHIBIT N

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/ / /

/ / /

At approximately 1:00 A.M. on August 24, 1979, he was in the Marston Point area of Balboa Park. He first saw the appellant (whom he identified at trial) inside the men's public restroom by a picnic area at Juniper Street.

Briefly thereafter, while Officer MacConaghy was leaning against a wall outside the bathroom, appellant Wyatt approached him. A short conversation followed and names were exchanged. Wyatt suggested they go for a walk together; MacConaghy agreed. They walked across the grass to the south of the restroom. Then at Wyatt's suggestion, the two sat on a public bench in an area known for homosexual activity. No one was in the immediate vicinity. It was not totally dark as some light from the restroom area reached them. MacConaghy could see Wyatt's face. Wyatt offered MacConaghy a cigarette. After a conversation of two to three minutes Wyatt reached over putting his left hand on MacConaghy's knee and immediately moved it up and gently touched MacConaghy's trousers in the genital area. (The trousers were properly zipped closed.)

MacConaghy stood up and advised Wyatt he was under arrest. Wyatt resisted MacConaghy's attempt to handcuff him. MacConaghy attempted to apply the standard police sleeper hold but failed. Wyatt was eventually subdued on the ground and placed under arrest with the assistance of Officer DeVries.

Appellant's motion for judgment of acquittal (Penal Code §1118) was denied as to both counts.

Appellant Wyatt took the stand as his only witness. He

/ / /

/ / /

testified that on August 24, 1979 at about 1:00 A.M. he was walking past the restroom near Juniper Street but did not go in. He saw a man, identified as Officer MacCongaghy at trial but unknown to appellant when he first saw him. The man was leaning against the west wall at the northwest corner, looking toward Sixth Street, staring around the corner. The man spoke to Wyatt, commenting on what a nice evening it was, and offered him a cigaret They conversed for five to ten minutes. The man (not the appell. then suggested they take a walk.

They proceeded, with appellant in the lead, toward the sout At the park bench the officer (not known to be an officer) said, "Let's sit." They did, with the officer on appellant's left. They were facing north toward the restroom structure. There was very little light. The officer sprawled (sic) his legs apart. Appellant talked about his school, his job, his recent breakup with his male lover, and the end of his two-week vacation. Appellant assumed the officer was also gay. The officer moved closer and touched appellant's knee with his knee. Appellant's legs were crossed.

Appellant believed the officer was gay due to the suggesti to walk away from the light coupled with what appellant recogni as a typical line: "Nice evening, want a cigarette?" "Want to for a walk?"

After talking to the officer for a total of about one half hour, ten minutes at the building and twenty minutes on the benc appellant thought the officer was tired of listening because he

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1 / / /

2 / / /

3 was looking off and not replying. He felt at this point that he
4 knew the officer pretty well and that he (the officer) wanted
5 something besides talk. The officer had said where he lived, gi
6 his first name and had discussed not liking his job. As a gay m
7 with experience in other situations, appellant "could gather wha
8 the man was after" and proceeded to offer it; he reached over an
9 stroked the officer's thigh two or three times, then moved his
10 hand up to the officer's crotch. The officer identified himself
11 as a cop at this point.

12 Appellant felt panicky (sic) and stood up. He was upset.
13 He started to apologize as soon as the officer identified himsel
14 The officer again said to turn around, that he was a police offi
15 The officer struck appellant in the back; he went down with his
16 hands on his knees. The officer struck appellant several times;
17 appellant was crying and asked to be taken to the car and to jai
18 The officer reacted by hitting appellant again and applying the
19 sleeper hold. Further struggling occurred. Appellant was final
20 cuffed by the other officer who had just arrived.

21 Officer MacConaghy again testified in rebuttal. Appellant,
22 not the officer, suggested the walk. The conversation on the
23 park bench lasted five to ten minutes, not twenty. The officer
24 did not move closer to cause knees to touch. Appellant did not
25 stroke the officer's leg before touching his crotch. The offic
26 did not hit appellant in the back; appellant was on the ground
27 due to the sleeper hold. He did not kick appellant nor see his
28 partner knee him in the face.

1 / / /

2 / / /

3 The Judge found appellant not guilty of count two, Penal Co

4 §148, and guilty of count one, Penal Code §647(a).

5

6 Approved as to form and content.

7 DATED: May 13, 1980

8

9 GEORGE HAVERSTICK, Attorney f
Defendant/Appellant.

10 DATED: May , 1980

11

12 FRAN F. McINTYRE, Deputy City
Attorney for Plaintiff/Respon

13

14 The above Statement is hereby settled as setting forth fai

15 and truly the evidence and proceedings in this action, and the

16 same is hereby certified to the Appellate Department, San Diego

17 Superior Court.

18 DATED:

19

20 ERNEST BORUNDA
Judge of the Municipal Court

21

22

23

24

RECEIVED DEC 18 1981

FILED
Robert D. Zumwalt, Clerk
DEC 17 1981
By: P. PHELAN, DEPUTY

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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

8 APPELLATE DEPARTMENT

9 FILED DEC 17 1981

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11 THE PEOPLE OF THE STATE OF CALIFORNIA, 12 13 Plaintiff and Respondent, 14 v. 15 DAVID MILTON LYON, 16 Defendant and 17 Appellant.	SUPERIOR COURT NO. CR 53781 MUNICIPAL COURT NO. M 360453 (San Diego Judicial District) ORDER

18 Judgment affirmed.

19 Masturbation inside defendant's pants in an open peepshow
20 booth was a lewd act in a public place. We are bound by the
21 trial court finding the officer was a person who might be of-
22 fended. The evidence supports the conviction, and we need not
23 review the trial court's other theories. The effect of 290
24 registration is to place in local police records information
25 which these days can be obtained in minutes by computer from
26 ///

the state. It is an anachronistic gratuitous humiliation, but cannot be characterized as cruel or unusual punishment.

BY THE COURT

[signature], P.J.

[signature], J.

[signature], J.

JPL/rml

E-131

RECEIVED JAN 21 1982

FILED
Robert D. Zumwalt, Clerk
JAN 20 1982
BY: P. PHELAN, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED JAN 20 1982

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	SUPERIOR COURT NO. CR 53781
	MUNICIPAL COURT NO. M 360453 (San Diego Judicial District)
v.	
DAVID MILTON LYON, Defendant and Appellant.	ORDER DENYING REHEARING AND GRANTING CERTIFICATION

The petition for rehearing is denied. In view of the language of the Court of Appeal in People v. Mills, 81 Cal.App.3d 171, at 179-180, followed by the Supreme Court disposition of In re Anders, 25 Cal.3d 414, without reaching the Penal Code Section 290 issue, the request for certification to the Court of Appeal on the basis of that issue is granted.

BY THE COURT

[signature] P.J.

William T. Low J.

Elizabeth May Zumwalt J.

JPL/rml

EXHIBIT P

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL · FOURTH DIST
FILED
FEB 25 1982
ROBERT L. FORD, Clerk
DEPUTY CLERK

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

vs.

DAVID MILTON LYON, Appellant

4 CRIM. 13823

RECEIVED FEB 26 1982

San Diego County No. CR 53781
Municipal Court No. M 360453

THE COURT:

The transfer on certification is denied.

Presiding Justice

cc:
County Clerk, San Diego County, 220 West Broadway, San Diego, CA 92101
THOMAS W. BYRON, Deputy City Attorney, 202 "C" St., 3rd Floor, San Diego, CA 92101
THOMAS F. HOMANN, ESQ. of Haverstick and Homann, 1168 Union St., Suite 201, San Diego, CA 92101

EXHIBIT Q

I/r

FILED
AUG 20 1980
JOHN J. CORCORAN, County Clerk
BY E. WALLIN, DEPUTY

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. JAY RIPLEY, Defendant and Appellant	Superior Court No. CR A 1644(Municipal Court of the Los Angeles Judicial District No. 725286 OPINION AND JUDGMENT

Appeal by defendant from judgment and order of the Municipal Court, Richard G. Kolostian, Temporary Judge.

Judgment affirmed. Order reversed. Case remanded with instruction

For Appellant - Thomas F. Coleman

For Respondent - Burt Pines, City Attorney
Jack L. Brown, Deputy City Attorney
Acting Supervisor, Appellate Section
By Peter W. Mason, Deputy City Attorney

-oOo-

Briefing of this case was stayed by our order of July 13, 197 pending the California Supreme Court's decision of Pryor v. Municip Court (1979) 25 Cal.3d 238. Now, following the rendering of the Pryor decision, which we do not believe dispositive of the instant case, we proceed to decide this matter.

We note at the outset that the defendant does not challenge his conviction. We mention also that the defendant has requested

EXHIBIT R

that we take judicial notice of certain material. We decline to do so for the reason that the disposition we make of this appeal will enable the defendant to present to the trial judge all evidence considered by him to be supportive of his contentions.

Subsequent to entry of a nolo contendere plea to violation of Penal Code section 647 subdivision (a) but prior to imposition of sentence and requisite order to register as an habitual sex offender under Penal Code section 290,[1] defendant requested the court to hold a hearing on the constitutional validity of section 290 as applied to section 647 subdivision (a) misdemeanants. He indicated that he wished to attack the constitutionality of the statute on due process, equal protection and cruel and unusual punishment grounds.

The trial judge refused to consider or rule on these issues. The judge indicated that the proper forum for hearing of constitutional defenses is the legislature or Supreme Court, and that "as much as [he] might agree with some of [defense counsel's] suggestions, [he was] bound by the law as it is now . . ., until [he was] ordered by a higher court."

Because no hearing was held on these defenses, the record on appeal is barren of factual findings essential to determination of defendant's contextual constitutional contentions. "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause . . . A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law . . ." 16A Am.Jur. 2d section 843.

---

1. All references to code sections are to the Penal Code unless otherwise indicated.

that we take judicial notice of certain material. We decline to do so for the reason that the disposition we make of this appeal will enable the defendant to present to the trial judge all evidence considered by him to be supportive of his contentions.

Subsequent to entry of a nolo contendere plea to violation of Penal Code section 647 subdivision (a) but prior to imposition of sentence and requisite order to register as an habitual sex offender under Penal Code section 290,[1] defendant requested the court to hold a hearing on the constitutional validity of section 290 as applied to section 647 subdivision (a) misdemeanants. He indicated that he wished to attack the constitutionality of the statute on due process, equal protection and cruel and unusual punishment grounds.

The trial judge refused to consider or rule on these issues. The judge indicated that the proper forum for hearing of constitutional defenses is the legislature or Supreme Court, and that "as much as [he] might agree with some of [defense counsel's] suggestions, [he was] bound by the law as it is now . . ., until [he was] ordered by a higher court."

Because no hearing was held on these defenses, the record on appeal is barren of factual findings essential to determination of defendant's contextual constitutional contentions. "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause . . . A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law . . ." 16A Am.Jur. 2d section 843.

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1. All references to code sections are to the Penal Code unless otherwise indicated.

1 The judge's denial of a hearing at which evidence could be
2 received and argument heard regarding the constitutional validity
3 of section 290 as applied to defendant's particular case was error.
4 These issues are best considered in a factual context which should
5 be presented in the trial court. People v. Mills (1978) 81 Cal.
6 App.3d. 171. Defendant's request for a hearing was timely, because
7 the question of section 290's constitutional validity is premature
8 if raised by a defendant who has not yet been found guilty of an
9 offense which triggers the section 290 operation. Pryor v.
10 Municipal Court (1979) 25 Cal.3d 238, 257 Fn.14. Refusal by the
11 trial court to consider the defense based upon constitutional
12 grounds was error. (See People v. Kiihoa (1960) 53 Cal.2d 748,
13 753; People v. Sarazzawski (1945) 27 Cal.2d 7, 11; Witkin,
14 California Criminal Procedure page 733 et seq.)
15 Absent a factual record to assist this court in evaluating
16 defendant's contentions regarding the invalidity of the statute,
17 this court is unable to comment intelligently on their merit,
18 beyond stating that these contentions are at least deserving of
19 airing and consideration. (See People v. Mills, supra, at 179,
20 Fn.1 and 180.) In this case failure to consider the issues was
21 not only prejudicial, because defendant has no other defenses, but
22 it was a denial of due process.
23 ////
24 ////
25 ////
26 ////
27 ////
28 ////

The judgment of conviction is affirmed. The order to register under section 290 is reversed. The case is remanded for an evidentiary hearing on the constitutional validity of section 290.

Presiding Judge

We concur.

Judge

Judge

E-137

a Paul

FILED
SUPERIOR COURT
FEB - 3 1981
HOWARD C. MENKEL, County Clerk
By [signature]
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PHILLIP B. MENDOZA, Defendant and Appellant.	NO. 132333 ORDER

The judgment of conviction is affirmed. Penal Code Section ~~240~~ 290 registration requirements apply to those convicted of Penal Code Section 647(a) and is constitutional.

[signature]
BRUCE WM. DODDS, Presiding Judge,
Appellate Dept., Superior Court

WE CONCUR:

[signature]
CHARLES S. STEVENS, JR., Judge,
Appellate Dept., Superior Court

L. DONALD BODEN, Judge,
Appellate Dept., Superior Court

EXHIBIT S

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1
2 The conduct for which defendant was convicted involved
3 acts between consenting adults. If defendant could demonstrate,
4 in an evidentiary hearing, that the purpose of Penal Code Section
5 290 registration was not served in this case, under the analysis
6 proposed by the California Supreme Court in In re Lynch, 8 Cal.3d
7 410 (1972), I am of the opinion that the registration requirement
8 would constitute cruel or unusual punishment under the California
9 Constitution because it is grossly disproportionate to the offense.
10 I would accordingly remand the case to the trial court for a
11 further evidentiary hearing on this issue.
12 With this exception, I concur in the Order of the court.
13
14 L. DONALD BODEN, Judge,
15 Appellate Dept., Superior Court
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E-139

FILED
SUPERIOR COURT
FEB 19 1981
HOWARD C. MENZEL, County Clerk
By [signature] Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PHILLIP B. MENDOZA, Defendant and Appellant.	S.C. NO. 132333 M.C. NO. 135101 ORDER DENYING REHEARING AND ORDER CERTIFYING CASE TO THE COURT OF APPEAL [Rule 63(a)]

In this case, appellant was convicted of engaging in lewd and dissolute conduct in a public place and in a place open to the public and exposed to public view [Penal Code § 647(a)]. The evidence indicated that one Baskins was discovered sodomizing Mr. Mendoza at 2:30 p.m. on a Sunday afternoon on the beach south of the intersection of Cabrillo and Santa Barbara Streets. Several persons were on the beach, but only one person said he saw the upper portion of a man in the vicinity of the dredge pipes.

The activity was shielded from view from the north and mostly shielded from view from the east and west. However, the two individuals were exposed to the view of any person on the beach directly south of the pipes, within an arc of some twenty five to

EXHIBIT T

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thirty degrees.

Appellant was admitted to probation on several conditions, including the requirement that he register as a sex offender pursuant to Penal Code § 290. He appealed claiming that the registration requirement was unconstitutional in that 1) the registration requirement as applied to those convicted of violating Penal Code § 647(a) deprived them of equal protection of the law and due process of law, and 2) that it was unconstitutional when applied to defendant and the facts of the case.

On February 3, 1981, this court filed its opinion affirming the conviction. A majority of this court concluded that the Legislature specifically required those convicted of this particular offense to register [Penal Code § 290(a)]. We rejected appellant's due process and equal protection claims.

Judge Boden filed a concurring opinion wherein he tacitly agreed that the requirement did not deny due process of law or equal protection of the laws. However, because the conduct involved consenting adults, he would remand the case for an evidentiary hearing where appellant could attempt to demonstrate that the purpose of the registration requirement was not served in this case under the analysis proposed in In Re Lynch 8 Cal.3d 410 (1972). If appellant met his burden of proof, then he was of the opinion that the registration requirement would constitute cruel and unusual punishment under the California constitution because it would be grossly disproportionate to the offense.

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Judge Dodds and Judge Stevens did not chose to adopt this suggested procedure in light of the nature of the offense and the fact that it was committed on a public beach on a Sunday afternoon. We believed that the registration requirement, as applied to the facts of this case, was manifestly appropriate under the reasoning of People v. Mills 81 Cal.App.3d 171; 146 Cal. Rptr. 411 (1978).

Appellant has filed a petition for rehearing. That petition will be denied.

Appellant has also petitioned us to certify the case to the Court of Appeals, Second Appellate District, for the purpose of securing uniformity of decision among the appellate departments of the Santa Barbara Superior Court, the Los Angeles Superior Court and the San Diego Superior Court.

Technically speaking, we cannot consider the unpublished decisions of the Appellate Department of the Los Angeles Superior Court and the San Diego Superior Court which were attached to the petition (Rule 977). However, we do note, in passing, that the San Diego Court invalidated the registration requirement in People v. Wyatt, San Diego S.C. No. CR 50555(October 10, 1980). In that case, defendant merely moved his hand up to the officer's crotch. In People v. Ripley, Los Angeles S.C. No. CR A 16440 (August 20, 1980), the nature of the offense is not revealed but the appellate department of the Los Angeles Superior Court remanded the case for an evidentiary hearing. However, although we can't take note of those opinions, we do know that the propriety of the registration requirement in a given case has been before us on other occasions

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involving 647(a) offenses and will be before this court again.

In view of the fact that this particular issue is frequently before the appellate department of this superior court and the appellate departments of other superior courts, we urge the court of appeal to accept certification, decide the constitutional issues raised and advise all appellate departments whether an evidentiary hearing is required before a person convicted of Penal Code § 647(a) may be required to register pursuant to Penal Code § 290.

ORDER

1. The petition for rehearing is denied.

2. The case is certified to the Court of Appeal, Second Appellate District, to secure uniformity of decision and settle important questions of law [Rule 63(a)].

3. Copies of this order shall be served upon counsel and upon the Attorney General. A copy of the opinion shall also be forwarded to the Attorney General.

4. The clerk shall forward a copy of this order forthwith to the clerk of the Court of Appeal, Second Appellate District. The clerk shall also forward the record to the Court of Appeal, Second Appellate District, pursuant to Rule 64.

BRUCE WM. DODDS, Acting Presiding Judge, Appellate Dept. Superior Court

WE CONCUR:

CHARLES S. STEVENS, Jr., Judge, Appellate Dept., Superior Court

L. DONALD BODEN, Judge, Appellate Dept., Superior Court

E-143

ASSEMBLY BILL No. 2965

Introduced by Assemblyman Alatorre

March 3, 1982

An act to amend Section 432.7 of the Labor Code and to add Section 851.9 to the Penal Code, relating to criminal records and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2965, as introduced, Alatorre. Criminal records.

Existing law prohibits any employer from asking an applicant for employment to disclose information concerning an arrest or detention which did not result in conviction, except as specified.

This bill would additionally prohibit an employer from asking an employee to disclose information concerning those arrests or detentions which did not result in conviction, except as specified. This bill would also prohibit any employer from asking an employee or an applicant for employment whether any records concerning the employee or the applicant have ever been destroyed, sealed or expunged or whether specified relief has been sought relative to destruction, sealing or expungement. Furthermore, the bill would expand a current exemption from these provisions relative to sex offense information.

Existing law authorizes sealing or destruction of criminal arrest records only as to certain cases involving minors, acquitted adults who are factually innocent, or marijuana.

This bill would provide for the sealing of court records and destruction of other records of an arrest of any person who is not convicted and has no other felony or misdemeanor conviction or pending actions, except as specified. The Department of Justice would initially review the petition of

EXHIBIT U

E-144

the petitioner and if the department finds that the petitioner does not qualify for relief, no further action would be taken, unless the petitioner can demonstrate, to the satisfaction of the court, that the department's finding is inaccurate or incorrect.

This bill would authorize specified fees to be charged and would appropriate receipts therefrom for the support of the Department of Justice without regard to fiscal year.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 432.7 of the Labor Code is
2 amended to read:
3 432.7. (a) No employer whether a public agency or
4 private individual or corporation shall ask an *employee or*
5 applicant for employment to disclose, through any
6 written form or verbally, information concerning ~~an~~ *the*
7 *following: any* arrest or detention which did not result in
8 conviction ~~, or information concerning a~~ *; any* referral to
9 and participation in any pretrial or posttrial diversion
10 program ~~,~~ *; any record concerning the employee or*
11 *applicant for employment which has ever been sealed,*
12 *destroyed or expunged; any action, petition, or*
13 *application of the employee or applicant for employment*
14 *for the sealing, destruction, or expungement of any*
15 *record; nor shall any employer, whether a public agency*
16 *or private individual or corporation, ask an employee or*
17 *applicant for employment to disclose, through any*

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written form or verbally, information concerning whether the employee or applicant for employment has ever sought or received relief under Section 1203.4 or 1203.4a of the Penal Code for a misdemeanor conviction; nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention which did not result in conviction, or any record regarding a referral to and participation in any ~~pretrial or posttrial~~ diversion program. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

(b) In any case where a person violates any provision of this section, or Article 6 (commencing with Section 11140) of Chapter 1 of Title 1 of Part 4 of the Penal Code, the applicant may bring an action to recover from such person actual damages or two hundred dollars ($200), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section shall entitle the applicant to treble actual damages, or five hundred dollars ($500), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(c) The remedies under this section shall be in addition to and not in derogation of all other rights and remedies which an applicant may have under any other law.

(d) Persons seeking employment as peace officers or for positions in the Department of Justice or other criminal justice agencies as defined in Section 13101 of the Penal Code are not covered by this section.

(e) *This section shall not prohibit an employer from*

asking for information concerning any conviction for any offense which is registrable under Section 290 of the Penal code. Nothing in this section shall prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment either of the following:

(1) With regard to an applicant for a position with regular access to patients, to disclose an arrest under any section specified in Section 290 of the Penal Code.

(2) With regard to an applicant for a position with access to drugs and medication, to disclose an arrest under any section specified in Section 11590 of the Health and Safety Code.

(f) (1) No peace officer or employee of a law enforcement agency with access to criminal offender record information maintained by a local law enforcement criminal justice agency shall knowingly disclose, with intent to affect a person's employment, any information contained therein pertaining to an arrest or detention or proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any pretrial or posttrial diversion program, to any person not authorized by law to receive such information.

(2) No other person authorized by law to receive criminal offender record information maintained by a local law enforcement criminal justice agency shall knowingly disclose any information received therefrom pertaining to an arrest or detention or proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any pretrial or posttrial diversion program, to any person not authorized by law to receive such information.

(3) No person, except those specifically referred to in Section 1070 of the Evidence Code, who knowing he or she is not authorized by law to receive or possess criminal justice records information maintained by a local law enforcement criminal justice agency, pertaining to an arrest or other proceeding which did not result in a conviction, including information pertaining to a referral

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1 to and participation in any pretrial or posttrial diversion
2 program, shall receive or possess such information.
3 (g) "A person authorized by law to receive such
4 information", for purposes of this section, means any
5 person or public agency authorized by a court, statute, or
6 decisional law to receive information contained in
7 criminal offender records maintained by a local law
8 enforcement criminal justice agency, and includes, but is
9 not limited to, those persons set forth in Section 11105 of
10 the Penal Code, and any person employed by a law
11 enforcement criminal justice agency who is required by
12 such employment to receive, analyze, or process criminal
13 offender record information.
14 (h) Nothing in this section shall require the
15 Department of Justice to remove entries relating to an
16 arrest or detention not resulting in conviction from
17 summary criminal history records forwarded to an
18 employer pursuant to law.
19 (i) As used in this section, "pretrial or posttrial
20 diversion program" means any program under Chapter
21 2.5 (commencing with Section 1000) or Chapter 2.7
22 (commencing with Section 1001) of Title 6 of Part 2 of the
23 Penal Code, Section ~~13201, 13201.5 or~~ 13352.5 *or Article 2*
24 *(commencing with Section 23151) of Chapter 12 of*
25 *Division 11* of the Vehicle Code, or any other program
26 expressly authorized and described by statute as a
27 diversion program.
28 SEC. 2. Section 851.9 is added to the Penal Code, to
29 read:
30 851.9. (a) Any person who has been arrested may, at
31 any time at least seven years after the date of the arrest,
32 petition the court in which the proceedings occurred, or
33 if there were no court proceedings, the court in whose
34 jurisdiction the arrest occurred, for a sealing of the court
35 records of the case, and the destruction of any other
36 records of the case, including any records of arrest, and
37 detention, if any of the following occurred:
38 (1) He was released pursuant to paragraph (1) of
39 subdivision (b) of Section 849.
40 (2) Proceedings against him were dismissed, or he was

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CALIFORNIA LEGISLATURE—1981–82 REGULAR SESSION

ASSEMBLY BILL No. 2966

Introduced by Assemblyman Alatorre

March 3, 1982

An act to amend Section 432.7 of the Labor Code, and to add Section 851.10 to the Penal Code, relating to criminal records, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2966, as introduced, Alatorre. Criminal records.

Existing law prohibits an employer from asking an applicant for employment to disclose information concerning an arrest or detention which did not result in conviction or information concerning a referral to and participation in any pretrial or posttrial diversion program.

This bill would prohibit an employer from seeking information concerning any record of an employee or applicant which has been sealed, destroyed or expunged, any action or application for the sealing, destruction or expungement of any record, and any application for dismissal of charges and other relief, as specified.

Existing law provides that persons seeking employment as peace officers or for positions in the Department of Justice are not covered by the provisions which prohibit an employer from seeking certain information relating to criminal records, as specified.

This bill would provide that, in addition, persons seeking employment with law enforcement agencies with access to criminal offender record information are not covered by these provisions.

The bill also prohibits an employer from asking for information concerning any conviction for any offense which requires registration as a sex offender, as specified.

EXHIBIT V

Existing law authorizes sealing or destruction of criminal conviction records only as to certain cases involving minors or marijuana.

This bill would provide, with specified exceptions, for the sealing of court records and destruction of other records relating to misdemeanor conviction records of persons generally, after the passage of a specified period of time without subsequent criminal activity or actions.

The bill would authorize specified fees which would be appropriated to the Department of Justice.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 432.7 of the Labor Code is
2 amended to read:
3 432.7. (a) No employer, whether a public agency or
4 private individual or corporation, shall ask an *employee*
5 *or* applicant for employment to disclose, through any
6 written form or verbally, information concerning *the*
7 *following:* ~~an~~ *any* arrest or detention which did not result
8 in conviction ~~; or information concerning a~~ *; any* referral
9 to ~~and~~ *or* participation in any pretrial or posttrial
10 diversion program ~~;~~ *; any record concerning the*
11 *employee or applicant for employment which has ever*
12 *been sealed, destroyed or expunged; any action, petition,*
13 *or application of the employee or applicant for*
14 *employment for the sealing, destruction, or*
15 *expungement of any record;* nor shall any employer

E-150

1 *whether a public agency or private individual or*
2 *corporation ask an employee or applicant for*
3 *employment to disclose through any written form or*
4 *verbally, information concerning whether the employee*
5 *or applicant for employment has ever sought or received*
6 *relief under Section 1203.4, or 1203.4a of the Penal Code*
7 *for a misdemeanor conviction;* nor shall any employer
8 seek from any source whatsoever, or utilize, as a factor in
9 determining any condition of employment including
10 hiring, promotion, termination, or any apprenticeship
11 training program or any other training program leading
12 to employment, any record of arrest or detention which
13 did not result in conviction, or any record regarding a
14 referral to and participation in any pretrial or posttrial
15 diversion program. As used in this section, a conviction
16 shall include a plea, verdict, or finding of guilt regardless
17 of whether sentence is imposed by the court. Nothing in
18 this section shall prevent an employer from asking an
19 employee or applicant for employment about an arrest
20 for which the employee or applicant is out on bail or on
21 his or her own recognizance pending trial.
22 (b) In any case where a person violates any provision
23 of this section, or Article 6 (commencing with Section
24 11140) of Chapter 1 of Title 1 of Part 4 of the Penal Code,
25 the applicant may bring an action to recover from such
26 person actual damages or two hundred dollars ($200),
27 whichever is greater, plus costs, and reasonable
28 attorney's fees. An intentional violation of this section
29 shall entitle the applicant to treble actual damages, or
30 five hundred dollars ($500), whichever is greater, plus
31 costs, and reasonable attorney's fees. An intentional
32 violation of this section is a misdemeanor punishable by
33 a fine not to exceed five hundred dollars ($500).
34 (c) The remedies under this section shall be in
35 addition to and not in derogation of all other rights and
36 remedies which an applicant may have under any other
37 law.
38 (d) Persons seeking employment as peace officers or
39 for positions in ~~the Department of Justice or other~~
40 ~~criminal justice agencies as defined in Section 13101 of~~

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1 ~~the Penal Code are not covered by this section.~~ *law*
2 *enforcement agencies with access to criminal offender*
3 *record information or for positions with the Division of*
4 *Law Enforcement of the Department of Justice are not*
5 *covered by this section.*
6 (e) *This section shall not prohibit an employer from*
7 *asking for information concerning any conviction for any*
8 *offense which is registrable under Section 290 of the*
9 *Penal Code.* Nothing in this section shall prohibit an
10 employer at a health facility, as defined in Section 1250 of
11 the Health and Safety Code, from asking an applicant for
12 employment either of the following:
13 (1) With regard to an applicant for a position with
14 regular access to patients, to disclose an arrest under any
15 section specified in Section 290 of the Penal Code.
16 (2) With regard to an applicant for a position with
17 access to drugs and medication, to disclose an arrest
18 under any section specified in Section 11590 of the Health
19 and Safety Code.
20 (f) (1) No peace officer or employee of a law
21 enforcement agency with access to criminal offender
22 record information maintained by a local law
23 enforcement criminal justice agency shall knowingly
24 disclose, with intent to affect a person's employment, any
25 information contained therein pertaining to an arrest or
26 detention or proceeding which did not result in a
27 conviction, including information pertaining to a referral
28 to and participation in any pretrial or posttrial diversion
29 program, to any person not authorized by law to receive
30 such information.
31 (2) No other person authorized by law to receive
32 criminal offender record information maintained by a
33 local law enforcement criminal justice agency shall
34 knowingly disclose any information received therefrom
35 pertaining to an arrest or detention or proceeding which
36 did not result in a conviction, including information
37 pertaining to a referral to and participation in any
38 pretrial or posttrial diversion program, to any person not
39 authorized by law to receive such information.
40 (3) No person, except those specifically referred to in

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Section 1070 of the Evidence Code, who knowing he or she is not authorized by law to receive or possess criminal justice records information maintained by a local law enforcement criminal justice agency, pertaining to an arrest or other proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any pretrial or posttrial diversion program, shall receive or possess such information.

(g) "A person authorized by law to receive such information", for purposes of this section, means any person or public agency authorized by a court, statute, or decisional law to receive information contained in criminal offender records maintained by a local law enforcement criminal justice agency, and includes, but is not limited to, those persons set forth in Section 11105 of the Penal Code, and any person employed by a law enforcement criminal justice agency who is required by such employment to receive, analyze, or process criminal offender record information.

(h) Nothing in this section shall require the Department of Justice to remove entries relating to an arrest or detention not resulting in conviction from summary criminal history records forwarded to an employer pursuant to law.

(i) As used in this section, "pretrial or posttrial diversion program" means any program under Chapter 2.5 (commencing with Section 1000) or Chapter 2.7 (commencing with Section 1001) of Title 6 of Part 2 of the Penal Code, Section 13201, 13201.5 or 13352.5 of the Vehicle Code, or any other program expressly authorized and described by statute as a diversion program.

SEC. 2. Section 851.10 is added to the Penal Code, to read:

851.10. (a) Any person who has been convicted of a misdemeanor may petition the convicting court for a sealing of the court records of the case and the destruction of any other records of the case, including any records of arrest, conviction, and disposition, including records relative to imprisonment, parole, probation or any other sentence, held by any state or local agency,

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1 except as provided in this section.
2 (b) The relief sought in subdivision (a) shall be
3 granted upon a determination of the following:
4 (1) That at least seven years have passed since the
5 petitioner's court appearance and disposition, including
6 termination of court supervision, probation, parole, or
7 sentence.
8 (2) That the petitioner has not been convicted of or
9 arrested for any felony or misdemeanor in any
10 jurisdiction for the seven years preceding the date on
11 which the petitioner filed his peitition for relief.
12 (3) That no actions for any felony or misdemeanor are
13 pending against the petitioner in any jurisdiction.
14 (c) (1) The Department of Justice shall provide the
15 forms to be used by petitioners under this section, and all
16 petitioners seeking relief under this section shall provide
17 two copies of such forms to the court. The department
18 shall provide these forms to all petitioners upon request.
19 (2) Such forms shall provide for a petitioner to submit
20 two sets of his fingerprints to the court. Upon a
21 petitioner's request, a local law enforcement agency shall
22 affix the petitioner's fingerprints to the forms. A city or
23 county, as applicable, may fix a reasonable fee not to
24 exceed five dollars ($5) for this service to all nonindigent
25 petitioners and shall retain such fee for deposit in its
26 treasury.
27 (3) Such forms shall provide for the petitioner to
28 designate the names and addresses of any agencies or
29 parties, other than the court and department, that the
30 petitioner requests to destroy their records of the
31 petitioner's case.
32 (4) The forms provided by the department shall
33 provide for the petitioner to submit to the court a sworn
34 affidavit specifying that the petitioner satisfies all of the
35 requirements for relief under this section.
36 (5) Any petition for relief submitted to a court by a
37 nonindigent petitioner under this section shall be
38 accompanied by a fee of ten dollars ($10) paid to the
39 court and a fee of ten dollars ($10) to be forwarded by the
40 court to the department. The petition forms shall be

1 signed and dated by a judge or clerk of the court, and one
2 set of petition forms shall be forwarded to the
3 department, along with the fee payable to the
4 department and the two sets of the petitioner's
5 fingerprints.
6 (6) Upon the receipt of the petition forms and
7 fingerprints from the court, the department shall review
8 its state summary criminal history information record, if
9 any, of the petitioner, and the federal summary criminal
10 record, if any, of the petitioner, if such federal record may
11 contain relevant information not contained in the state
12 summary criminal history record. If the department's
13 review does not indicate that the petitioner fails to meet
14 the conditions for relief under this section, then the
15 department shall find the petitioner to be qualified for
16 relief under this section.
17 (7) Notwithstanding any other provision of law, if the
18 department finds the petitioner to be qualified for relief
19 under this section, the department shall forthwith notify
20 any local, state, or federal agency, or party, to which the
21 department has provided a copy of the petitioner's case
22 record, and any agency or party designated by the
23 petitioner, to destroy its record of the petitioner's case.
24 Any state or local agency or party receiving such notice
25 shall request any party or agency to which it has provided
26 a copy of the petitioner's case record, excepting the court
27 and the department, to destroy that record. Any state or
28 local agency or party receiving such notice or request to
29 destroy its record of the petitioner's case shall forthwith
30 destroy both the record and the notice or request to
31 destroy that record. The department shall also destroy its
32 own record, if any exists, of the petitioner's case, and the
33 copy of the petition forms received by the department,
34 after providing the court and the petitioner with written
35 notice of the department's actions and findings under this
36 section. After receiving written notice from the
37 department that the petitioner qualifies for relief under
38 this section, the court shall seal its records of the
39 petitioner's case, including its copy of the petition forms,
40 and other materials, relating to the petitioner's action for

1 relief under this section.
2 (8) Notwithstanding any other provision of law, if the
3 department finds that the petitioner does not qualify for
4 relief under this section, the department shall notify the
5 court and the petitioner in writing of its finding,
6 specifying the reasons thereof. Subsequent to such
7 finding, unless the petitioner can demonstrate to the
8 satisfaction of the court by clear and convincing evidence
9 that the finding of the department is inaccurate or
10 incorrect, no further action shall be taken on the
11 petitioner's petition. If the court is satisfied that the
12 department's finding is incorrect or inaccurate, then the
13 court shall order the department to destroy its record of
14 the petitioner's case, and to provide such relief as is
15 specified in paragraph (7) of this subdivision. In addition,
16 the court shall provide such relief for the petitioner as is
17 specified in paragraph (7) of this subdivision.
18 (9) All fees received by the Department of Justice
19 under this section are hereby appropriated without
20 regard to fiscal years for the support of the Department
21 of Justice in addition to such other funds as may be
22 appropriated therefor by the Legislature. All fees
23 received by the court under this section shall be
24 deposited in the county general fund.
25 (d) This section applies to convictions that occurred
26 before, as well as those that occur after, the effective date
27 of this section.
28 (e) In any judicial action or proceeding, a court, upon
29 a showing of good cause, may order any records sealed
30 under this section to be opened and admitted in
31 evidence. The records shall be confidential and shall be
32 available for inspection only by the court, jury, parties,
33 counsel for the parties, and any other person who is
34 authorized by the court to inspect them. Upon the
35 judgment in the action or proceeding becoming final, the
36 court shall order the records sealed.
37 (f) Any court order issued under this section to seal
38 and destroy the records of a petitioner's case shall not
39 apply to any records held by the Department of Motor
40 Vehicles.

1 (g) Upon the determination by the Department of
2 Justice or a court that the petitioner qualifies for relief
3 under this section, the arrest, conviction, and disposition
4 of the petitioner shall be deemed not to have occurred,
5 and the petitioner may answer accordingly any questions
6 relating to their occurrence, except that the arrest,
7 conviction, and disposition of the petitioner shall be
8 deemed to have occurred in regards to any questions
9 relative to convictions for which records are held by the
10 Department of Motor Vehicles.
11 (h) Destruction of records pursuant to subdivision (a)
12 shall be accomplished by permanent obliteration of all
13 entries or notations upon such records pertaining to the
14 arrest, conviction, and disposition of the petitioner, and
15 the record shall be prepared again so that it appears that
16 the arrest, conviction, and disposition never occurred.
17 However, where (1) the only entries on the record
18 pertain to the arrest, conviction, or disposition of the
19 petitioner and (2) the record can be destroyed without
20 necessarily effecting the destruction of other records,
21 then the document constituting the record shall be
22 physically destroyed.
23 (i) The provisions of this section shall not apply to any
24 misdemeanor conviction which is a registrable offense
25 under Section 290, or to any offense in which the fact of
26 a previous conviction may be charged as an element of
27 any new offense.
28 SEC. 3. No appropriation is made and no
29 reimbursement is required by this act pursuant to Section
30 6 of Article XIII B of the California Constitution or
31 Section 2231 or 2234 of the Revenue and Taxation Code
32 because the local agency or school district has the
33 authority to levy service charges, fees, or assessments
34 sufficient to pay for the program or level of service
35 mandated by this act.

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Los Angeles, Cal. 4-1-82, 19

TITLE In re AllenEugene Reed
~~on habeas corpus~~
vs.
~~Newhall Jud. Dist. # M9186~~

No. 42202

The Court:

The petition for writ of habeas corpus and stay is denied.

CLAY ROBBINS, Clerk

24789-112 2-82 15M CAM ① ✦ OSP

EXHIBIT W

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