

CRIM. 22595

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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

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PETITION FOR WRIT OF HABEAS CORPUS  
AND  
APPLICATION FOR STAY

---

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17 TO: ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE  
18 JUSTICES OF THE CALIFORNIA SUPREME COURT:

19  
20 INTRODUCTION

21  
22 Petitioner ALLEN EUGENE REED is now illegally restrained of  
23 his liberty for the reasons which will be set forth below, and herein  
24 petitions this Court for a Writ of Habeas Corpus.

25  
26 NATURE OF ACTION

27  
28 Petitioner was convicted of violating Penal code Section  
29 647, subdivision (a), the lewd conduct law. He has been ordered by  
30 the trial court to register as a sex offender under Penal Code Sec-  
31 tion 290.

32 Such registration has been seen as having very serious and  
33 significant consequences. Persons convicted of child molestation or  
34 rape must register, and, as a result, they may carry this mark of  
35 Cain with them the rest of their lives, having to appear in line-ups,  
36 limiting their fundamental right of travel, and interferring with

1 their right of privacy. When children or violence is involved, these  
2 consequences may be justifiable for the protection of the state, in  
3 order to reduce recidivism and to assist law enforcement in investi-  
4 gations of these serious types of crimes. People v. Mills (1978) 81  
5 Cal.App.3d 171.

6 However, there is a category of minor offenses which in-  
7 volves no children, no violence, and usually only an undercover vice-  
8 officer and a homosexual in a sexually suggestive atmosphere. These  
9 cases have no citizen complaints; a conviction is predicated on the  
10 jury's believing the uncorroborated testimony of the vice-officer  
11 over that of a defendant. The offense itself often involves only  
12 words or a momentary suggestive gesture. Even if the defendant in  
13 that type of situation has no other criminal record and has no pro-  
14 pensity to engage in any anti-social behavior, he must register along  
15 with child molesters and rapists. With no intent to harm or offend,  
16 and no evidentiary hearing which could show that registration is both  
17 unnecessary and inappropriate in his case, such a defendant is  
18 branded with a status which does not enure even to dangerous felons  
19 in California.

20 When the registration statute was first passed, virtually  
21 all homosexual activity was illegal; some was felonious. All practi-  
22 cing homosexuals were potential criminals. Having a list of homo-  
23 sexual offenders, at that time, could have been rationalized.

24 Homosexuality is no longer a crime. Sexual orientation is a  
25 matter which the public policy of the state has relegated to the  
26 personal privacy of the individual. Yet the registration rolls  
27 persist, and all who have access to criminal information can affect  
28 the registrant's life. Fathers can be kept from participating in  
29 Little League with their sons; employers can exclude applicants for  
30 certain jobs; the list of disabilities is long. The only reason for  
31 the disabilities is a homosexual experience or a suggestive gesture  
32 in the wrong location, involving only a sole observer, a vice offi-  
33 cer.

34 The harshness and irrationality of registration in these  
35 types of cases has been recognized by many judges, prosecutors, and  
36 other members of the legal community. Many courts either do not

1 require registration (contrary to the requirements of the statute) or  
2 find ways to avoid it. As a result, the registration requirement is  
3 not being applied uniformly, and whether one must register is often  
4 based fortuitously on the jurisdiction in which one is arrested.  
5 Appellate Departments as well as trial courts differ as to what  
6 application is appropriate.

7 Further, when the harshness of registration is applied, it  
8 is applied across the board, automatically, as if based upon a legis-  
9 lative conclusive presumption, whether the crime or the defendant  
10 merit it or not, and without the type of evidentiary hearing due  
11 process would normally mandate when a defendant alleges the rule is  
12 unconstitutional as applied to him.

13  
14 PROCEDURAL FACTS  
15

16 1. Petitioner was arrested for and charged with a viola-  
17 tion of subdivision (a) of Penal Code section 647; subsequently, a  
18 jury returned a verdict of guilty, and sentencing was scheduled for  
19 March 14, 1980. (Newhall Judicial District, Municipal Court Case No.  
20 M9186)

21 2. After sentence was pronounced on March 14, 1980, Peti-  
22 tioner was required by the bailiff to read and sign a "Notice of  
23 Registration Requirement Pursuant to Section 290 Penal Code,"  
24 attached as EXHIBIT A.

25 3. On March 27, 1980, the trial court entered an order  
26 staying execution of sentence pending the appeal from the judgment of  
27 conviction. This was done to eliminate the duty to register pending  
28 the appeal, in case Petitioner was successful in overturning his  
29 conviction.

30 4. On October 31, 1980, the Appellate Department of the  
31 Superior Court filed an Opinion and Judgment affirming the convic-  
32 tion. The facts of the case and the reasoning of the court (see  
33 People v. Reed (1980) 114 Cal.App.3d Supp. 1, attached as EXHIBIT B)  
34 are as follows:

- 35 (a) defendant masturbated in a public restroom;
- 36 (b) at issue was the element of the crime which re-

1 quires that the defendant must know or reasonably should know that  
2 another person is present who may be offended by his act (see Pryor  
3 v. Municipal Court (1979) 25 Cal.3d 238);

4 (c) the only observer, an experienced plainclothes  
5 undercover vice-officer, tried to give the appearance that he was not  
6 being offended;

7 (d) defendant started masturbating shortly after the  
8 officer entered, after a salutation, but before any conversation;

9 (e) it could be inferred that the defendant began  
10 acting before he could reasonably have observed that the officer was  
11 not likely to be offended;

12 (f) different reasonable inferences could be drawn  
13 from the evidence; therefore, viewing the record in the light most  
14 favorable to the judgment, the court held that the jury had suffi-  
15 cient evidence from which it could conclude that the defendant was  
16 guilty.

17 5. Concurrent with his appeal, Petitioner filed a Petition  
18 for Writ of Habeas Corpus to the Superior Court (In the matter of the  
19 application of Thomas F. Coleman on behalf of Allen Eugene Reed, Los  
20 Angeles Superior Court case number APHC 000 095), requesting relief  
21 from the registration requirement should Petitioner's conviction be  
22 upheld on appeal.

23 6. On April 7, 1981, the Honorable Philip M. Saeta issued  
24 a minute order denying the petition, holding that Petitioner's "jus-  
25 ticiable arguments are met by People vs. Mills (1978) 81 CA 3d 171  
26 and People vs. Rodriguez (1976) 63 CA 3d Supp. 1, Supp. 5 (disap-  
27 proved on other grounds in Pryor vs. Municipal Court (1979) 25 C 3d  
28 238, 257, fn 31)." (Said minute order is attached as EXHIBIT C.)

29 7. On April 16, 1981, the clerk of the Municipal Court of  
30 the Newhall Judicial District sent notice to Petitioner that there  
31 would be a hearing on "condition of probation re: duty to register  
32 under provisions of Section 290 Penal Code" on May 1, 1981. On May  
33 1, 1981, Petitioner filed "Objections to Registration Pursuant to  
34 Section 290 P.C.; Motion to Declare Registration Unconstitutional as  
35 Applied; Request for Evidentiary Hearing," (attached as EXHIBIT D).  
36 Part of the Motion included an "Offer of Proof" in which he set forth

1 in writing the testimony and facts he would produce at an evidentiary  
2 hearing. Also filed was a "Memorandum of Points and Authorities in  
3 Support of Objection, Motion and Request Re: Registration Under P.C.  
4 §290," (attached as EXHIBIT E).

5 8. On May 1, 1981, Appellant agreed and the trial court  
6 ordered that the motion would stand submitted on the paperwork al-  
7 ready filed on that day. If the court determined that the "Offer of  
8 Proof" was insufficient as a matter of law to declare Section 290  
9 P.C. unconstitutional as applied to Petitioner, then the Court would  
10 summarily deny the Motion without wasting judicial time on a full  
11 evidentiary hearing. If the Court, however, determined that the  
12 "Offer of Proof" would be sufficient to relieve Petitioner from the  
13 duty to register because of the unconstitutionality of the statute as  
14 applied, then the Court would notify the parties of the indicated  
15 ruling and would set a date for an evidentiary hearing on the motion.

16 9. On May 4, 1981, the trial court denied Petitioner's  
17 motion to declare Section 290 unconstitutional as applied to Peti-  
18 tioner, citing "Appellate Div. Habeas Corpus ruling 000 095, order  
19 dated 4/7/81; Hon. Philip M. Saeta, Judge, and cases cited therein)," (attached as EXHIBIT F). On May 11, 1981, Petitioner filed a Notice  
20 of Appeal from the order denying the motion. On May 14, 1981, the  
21 trial court denied Petitioner's application for a stay of registra-  
22 tion pending the appeal; on that same day, after application by Peti-  
23 tioner to the Appellate Department of the Los Angeles Superior Court,  
24 that Court issued an order staying registration pending the outcome  
25 of the appeal (People v. Reed CR A 18963, attached as EXHIBIT G).

26 10. On February 19, 1982, the Appellate Department affirmed  
27 the order of the trial court denying Petitioner's motion to declare  
28 registration unconstitutional as applied to Petitioner. The decision  
29 was based upon two foundations: (1) that the denial of Petitioner's  
30 petition for writ of habeas corpus constituted res judicata in the  
31 case; and (2) ". . . in any event . . . [Petitioner's] contentions  
32 attacking the constitutionality of section 290 have each been an-  
33 swered in Mills, supra [(1978) 81 Cal.App.3d 171]." (See Slip  
34 Opinion, attached as EXHIBIT H, at page 7.)

35 11. Petitioner's Petition for Rehearing (attached as EXHI-  
36

1 BIT I) was denied on March 22, 1982 (attached as EXHIBIT J). Even  
2 before the petition was denied, the trial court issued an order  
3 requiring Petitioner to appear on or before April 2, 1982, to regis-  
4 ter, stating that "[f]ailure to do so will result in revocation of  
5 probation." (Said order is attached as EXHIBIT K.)

6 12. On April 1, 1982, Petitioner filed a Petition for Writ  
7 of Habeas Corpus in the Court of Appeal, Second Appellate District,  
8 Division 5. On that same day, said Petition was denied. (See  
9 EXHIBIT W.)

10 13. On April 2, 1982, the trial court continued Peti-  
11 tioner's appearance re: registration to May 7, 1982.

12 14. Petitioner has no other plain, speedy, or adequate  
13 remedy other than by this petition. No applications, petitions, or  
14 motions have been filed in regard to the issues contained herein  
15 except for those specified herein. Petitioner is presently in the  
16 constructive custody of the Municipal Court of the Newhall Judicial  
17 District by virtue of his being on probation in case number M9186.  
18 The address of said court is 23747 W. Valencia Boulevard, Valencia,  
19 California 91355. Petitioner has not yet registered under the provi-  
20 sions of Section 290 P.C., and unless released from such obligation  
21 by this Court, he may be subjected to criminal penalties for his  
22 failure to register. Petitioner's registration with the sheriff in  
23 Saugus as a sex offender will serve no useful purpose, will not aid  
24 with any rehabilitation, but, instead, will stigmatize him and pos-  
25 sibly subject him to harassment and notoriety within his local com-  
26 munity. After completing probation, the relief promised by Penal  
27 Code section 1203.4 will assist Petitioner only if he moves out of  
28 the area. There is no provision for de-registering him at his cur-  
29 rent address once he has registered. The real parties in interest in  
30 this Petition are the Petitioner, the Municipal Court of the Newhall  
31 Judicial District, and the People of the State of California as  
32 represented by the District Attorney of Los Angeles County whose  
33 address is 849 S. Broadway, 11th Floor, Los Angeles, California  
34 90014.

35 ///

36 ///

1                    UNIFORMITY OF DECISION AND UNIFORM APPLICATION OF LAW

2  
3                    15. This Court is also asked to take judicial notice of  
4 several conflicting appellate department rulings:

5                    A. People v. Wyatt (San Diego Superior Court Appel-  
6 late Department No. CR 50555, filed October 8, 1980)  
7 which held the registration requirement to be cruel and  
8 unusual punishment in that particular case. (EXHIBIT M)  
9 The facts of the case are set forth in the Settled  
10 Statement attached as EXHIBIT N.

11                    B. People v. Lyon (San Diego Superior Court Appellate  
12 Department No. CR 53781, filed December 17, 1981) which  
13 held that registration was not cruel and unusual but  
14 was "an anachronistic gratuitous humiliation." (EXHI-  
15 BIT O) The order denying rehearing and granting certi-  
16 fication with an implied invitation to the Court of  
17 Appeal is attached as EXHIBIT P. The Court of Appeal  
18 denial of transfer is attached as EXHIBIT Q.

19                    C. People v. Ripley (Los Angeles Superior Court  
20 Appellate Department No. CR A 16440, filed August 20,  
21 1980) which held that due process requires the request-  
22 ed evidentiary hearing and which viewed Mills, supra,  
23 as implying that the issues were "at least deserving of  
24 airing and consideration." (Slip Opinion, page 3,  
25 attached as EXHIBIT R)

26                    D. People v. Reed (Los Angeles Superior Court No. CR  
27 A 18963, filed February 19, 1982) which held that all  
28 issues were disposed of by Mills, supra, thus implying  
29 that no evidentiary hearing would be necessary. (See  
30 EXHIBIT H)

31                    E. People v. Mendoza (Santa Barbara Superior Court  
32 Appellate Department No. 132333, filed February 3,  
33 1981) which held in a two to one decision that regis-  
34 tration of 647(a) offenders was constitutional. The  
35 dissent stated that an evidentiary hearing would be  
36 necessary to determine if, as applied to that case, the

1 requirement constituted cruel and unusual punishment  
2 (EXHIBIT S). The Order Denying Rehearing and Ordering  
3 Certification to the Court of Appeal (EXHIBIT T) asked  
4 the Court of Appeal to review the case, stating that  
5 "this particular issue is frequently before the appel-  
6 late department of this superior court and the appel-  
7 late departments of other superior courts."

8 16. EXHIBIT E (at page E-39) indicates, in section X, (page  
9 E-56) the great diversity of ways trial courts treat the registration  
10 requirement, from having a specific policy in the entire judicial  
11 district of refusing to order registration of persons convicted of  
12 647(a) (Long Beach) to automatically reducing charges (in co-ordina-  
13 tion with the prosecutor of the jurisdiction) to a non-registerable  
14 charge on a first offense when no children are involved, to always  
15 requiring registration and no plea bargain for any reason (some parts  
16 of Orange County).

17 17. For the foregoing reasons, the application of the  
18 registration requirement presently violates the state constitutional  
19 provision providing for uniform application of laws of a general  
20 nature.

21 18. In the context of Penal Code Section 647, subdivision  
22 (a), no court has ever ruled on a constitutional challenge to Penal  
23 Code Section 290's automatic requirement to register as a sex-offen-  
24 der. In that context, no state-wide court has yet ruled on (a)  
25 whether such a requirement, given the facts of a specific case and  
26 defendant, constitutes cruel and unusual punishment; (b) whether such  
27 a requirement violates equal protection, the right to travel, and the  
28 right to privacy; (c) whether the diversity of opinions in the var-  
29 ious appellate departments of the state violate both equal protection  
30 and the state constitutional requirement of uniform operation of the  
31 law; (d) whether equal protection and lack of uniform operation of  
32 law are also violated by the great divergance among trial courts in  
33 various jurisdictions in their dealing with the registration require-  
34 ment; (e) whether due process requires that a defendant be entitled  
35 to an evidentiary hearing as to the constitutionality of the provi-  
36 sion as applied specifically to him; (f) whether an offer of proof,



1 combined with the points and authorities filed in the trial court  
2 therewith, would be sufficient to require an evidentiary hearing in  
3 the matter, and (g) whether the provision violates due process in  
4 that it is "irrational" to require Petitioner to register, taking  
5 into account the facts underlying the conviction and the factual  
6 allegations contained in Petitioner's Offer of Proof.

7 19. Petitioner hereby petitions this Court to issue a Writ  
8 of Supersedeas and/or an order staying enforcement of the registra-  
9 tion requirement pending final determination of this petition for  
10 writ of habeas corpus. The previous decisions of the trial court as  
11 well as the Superior Court (in the habeas corpus action and the  
12 appeal) were all based upon only one opinion of a court of state-wide  
13 jurisdiction, namely, People v. Mills (1978) 81 Cal.App.3d 171. A  
14 circumspect reading of Mills leads Petitioner to the conclusion that  
15 much of the rationale of that opinion does not apply to the present  
16 case, and this fact is alluded to within the Mills opinion itself.

17 20. An order of the sort requested is both appropriate and  
18 necessary because without such a stay, Petitioner would be deprived  
19 of the benefit of the granting of the relief requested herein. See  
20 People ex. rel. S. F. Bay, etc., Com. v. Town of Emeryville (1968) 69  
21 Cal.2d 533, 537. The trial court has previously refused to grant a  
22 stay pending appeal of the registration issue, thus necessitating a  
23 stay from the Appellate Department (see EXHIBIT G), and, without a  
24 stay from this court, Petitioner shall have to register by May 3,  
25 1982. If Petitioner does register with the Sheriff's Department, as  
26 he is now under obligation to do, he will be fingerprinted, photo-  
27 graphed, and have vital statistics taken down by the Sheriff's De-  
28 partment and the same will be placed on a list of registered sex  
29 offenders. That information will then be forwarded to the California  
30 Department of Justice. After reviewing the arguments contained in  
31 this Petition, this Court may find that such arguments would support  
32 a finding that section 290 is unconstitutional as applied to this  
33 Petitioner. In such a case, this Court might grant the relief re-  
34 quested. Were Petitioner already registered with the sheriff, this  
35 would be a shallow victory for him. It should be noted that there is  
36 no provision in the Penal Codes or other codes to "de-register"

1 someone once that person has registered. Although Petitioner could  
2 be relieved of the duty to notify the Sheriff's Department of subse-  
3 quent changes in his address (under Kelly v. Municipal Court (1958)  
4 324 P.2d 990), there is no procedure under the registration law or  
5 any other law of California to remove his name from the registration  
6 records of the Sheriff's Department or from the registration records  
7 of the California Department of Justice. Therefore, were Petitioner  
8 to remain living at his present address, the granting of the relief  
9 requested would be no victory at all.

10 21. There would be no prejudice to the People of the State  
11 of California if this Court grants an order staying registration. If  
12 this Petition for Hearing is denied, there is sufficient time for the  
13 Municipal Court to carry out its order to register, since Peti-  
14 tioner's probationary term extends to March, 1983.

15 22. This Court has the power to issue such a stay order or  
16 writ of supersedeas, which is an extraordinary writ issued by an  
17 Appellate court to stay enforcement of an order or judgment of a  
18 trial court where such stay is necessary to protect the respective  
19 rights of litigants. See Sacramento Newspaper Guild v. Sacramento  
20 Board of Supervisors (1967) 255 Cal.App.2d 51. Usually a court will  
21 grant a writ of supersedeas where to deny such a stay would deprive  
22 an appellant of the benefit of a reversal of the judgment against  
23 him. See Emeryville, supra. In addition, California Code of Civil  
24 Procedure Section 923 provides that the Code of Civil Procedure shall  
25 not limit the power of a reviewing court or a judge thereof to stay  
26 proceedings during the pendency of an appeal or to issue a Writ of  
27 Supersedeas or to suspend or modify an injunction during the pendency  
28 of an appeal, or to make any order appropriate to preserve the status  
29 quo, the effectiveness of the judgment subsequently to be entered, or  
30 otherwise in aid of its jurisdiction.

31  
32 ILLEGALITY OF RESTRAINT AND IMPORTANT QUESTIONS OF LAW

33  
34 23. The provisions of Penal Code section 290 are unconsti-  
35 tutional as applied to persons convicted of violating Penal Code  
36 section 647, subd. (a), and also as applied particularly to Peti-

1 tioner for the following reasons:

2 A. Insofar as the section requires automatic regis-  
3 tration for all 647(a) offenders without affording an  
4 evidentiary hearing to determine if there is any legi-  
5 timate purpose for such registration, it creates an  
6 unconstitutional conclusive presumption in violation of  
7 Due Process and Equal Protection under both the State  
8 and Federal Constitutions.

9 B. Given the facts of the case, the actual applica-  
10 tion of section 290 to 647(a) defendants, and the  
11 information contained in the offer of proof, the impo-  
12 sition of the registration requirement on Petitioner  
13 constitutes cruel and unusual punishment under the  
14 State and Federal Constitutions.

15 C. The provision as applied to Petitioner is void of  
16 any sufficient legitimate state interest to intrude as  
17 it does on the fundamental right to travel and the  
18 right to personal privacy, and such intrusion is not  
19 constitutionally justifiable.

20 D. Equal protection and uniform operation of law are  
21 both violated by the application of 290 P.C. to 647(a)  
22 offenders because of the diversity of appellate court  
23 opinions and trial court disposition procedures which  
24 achieve diametrically different results in similar  
25 cases in different jurisdictions.

26 E. The statute as applied in this type of case has no  
27 rational basis and its application is so arbitrary and  
28 shocking to the sense of justice of so many judges and  
29 prosecutors that such application is avoided by a great  
30 number of them.

31 24. Petitioner urges the Court to issue an order to show  
32 cause and to grant a full hearing in this case, perhaps appointing a  
33 master to accept the testimony which would be given in the eviden-  
34 tiary hearing discussed herein, because this case involves an impor-  
35 tant question of law, i.e., the constitutionality of the application  
36 of P.C. 290 in P.C. 647(a) cases. That this issue is one of

1 continuing public interest is evidenced by the continuing appellate  
2 litigation over the issue (although most such appellate department  
3 cases are not certified for publication). This Court has never dealt  
4 with that issue.

5           25. Registration as a sex offender for 647(a) defendants is  
6 of concern to judges, prosecutors, defense attorneys, and defendants.  
7 The requirement to register is a major reason why most defendants in  
8 such cases do not proceed to trial -- they fear the unusually serious  
9 consequences of a guilty verdict. This is also a major reason why  
10 most prosecutors and judges are often willing to dismiss 647(a)  
11 charges if the defendant pleads guilty to disturbing the peace (P.C.  
12 §415) or trespass (P.C. §602L). (See example of prosecutorial guide-  
13 lines from 1980 Legal Policies Manual of the Los Angeles District  
14 Attorney, attached as EXHIBIT L.)

15           26. At an evidentiary hearing in the trial court or before  
16 a special master appointed by the Supreme Court, Petitioner would  
17 offer the following evidence:

- 18           (a) Petitioner's personal history as set forth in the  
19 Probation Report filed with the trial court on March  
20 10, 1980 (attached as part of EXHIBIT D, page E-13 of  
21 Exhibits), including that he is a 54 year old college  
22 graduate with a record of service in the air force and  
23 with a good employment record who was married for over  
24 20 years, has three children, and has been living in a  
25 stable relationship for 10 years with a man after his  
26 divorce;
- 27           (b) Petitioner's criminal record, showing him to be a  
28 law-abiding citizen with no offense whatsoever except  
29 for the one discussed herein;
- 30           (c) the facts of the case, showing no one present  
31 except a plainclothes vice-officer, no children, no  
32 violence, and no aggravating circumstances;
- 33           (d) psychiatric and psychological testimony that it is  
34 extremely unlikely that Petitioner would ever commit  
35 another violation in the future;
- 36           (e) testimony by police and sheriff officials that

1 registration of persons convicted of 647(a) offenses  
2 does not assist the police in apprehending violators of  
3 the lewd conduct law in that virtually all persons  
4 arrested for such an offense are arrested at the scene  
5 of the crime by an undercover vice officer (as opposed  
6 to crimes of indecent exposure, child molestation, and  
7 rape for which registration usually does assist the  
8 police in apprehending suspects);

9 (f) statistics to show that most persons prosecuted  
10 for 647(a) do not repeat the offense;

11 (g) expert testimony to show that most 647(a) cases  
12 involve only adults and only the defendant or defen-  
13 dants and a plainclothes undercover vice-officer as the  
14 sole observer;

15 (h) testimony by prosecutors, judges, and legislators  
16 that they disapprove of and condemn the registration  
17 requirement for 647(a) offenders, that they feel it is  
18 unduly harsh and out of all proportion to the offense  
19 in most situations, that it is arbitrary and shocking  
20 to their sense of justice, and that it so excessive as  
21 to transgress the limits of what is reasonable punish-  
22 ment in that it does not treat society's members with  
23 respect for their intrinsic worth as human beings;

24 (i) the registration requirement as applied to 647(a)  
25 offenders, is being enforced in a manner that violates  
26 Article IV, Section 16 of the state constitution, in  
27 that it is not being uniformly applied by the courts  
28 and prosecutors in the various jurisdictions even  
29 within Los Angeles County; Long Beach prosecutors and  
30 judges, for example, would testify that they have an  
31 agreement not to require registration in 647(a) cases,  
32 while Los Angeles judges and city attorneys would tes-  
33 tify that it is their policy to allow plea bargains to  
34 non-registrable offenses whenever possible, and dis-  
35 trict attorneys in many outlying communities would  
36 testify that judges in those communities often allow no

1 plea bargaining and require registration for first-time  
2 offenders;

3 (j) testimony by prosecutors as well as police inves-  
4 tigators that, while registration is not used to appre-  
5 hend or surveill 647(a) offenders, the very presence of  
6 a very large number of such offenders on the registra-  
7 tion rolls greatly hampers law enforcement in their use  
8 of registration information to apprehend suspects in  
9 cases of sexual violence; for example, the registration  
10 rolls were consulted in order to obtain a pool of  
11 suspects in the Hillside Strangler case; the informa-  
12 tion proved worthless because the list was filled with  
13 thousands of homosexuals convicted only of lewd conduct  
14 in front of a vice-officer, so the very purpose of  
15 registration was foiled; and

16 (k) testimony of the great hardship, degradation, and  
17 humiliation, psychological damage, and actual negative  
18 effects on ability to make a living, suffered by per-  
19 sons convicted of 647(a) offenses and who had to regis-  
20 ter, from excluding fathers from participating with  
21 their sons in Little League to exclusion from the  
22 classroom, to exclusion from working even as a janitor  
23 in a hospital, to the psychological effects of being  
24 branded, of having a "status" for the rest of one's  
25 life.

26 If Petitioner were given the opportunity to present such  
27 information, he could prove that automatic registration for 647(a)  
28 offenders is an irrational and arbitrary collateral disability or a  
29 cruel and unusual punishment, is a deprivation of due process and  
30 equal protection, is not being uniformly applied as required by the  
31 state constitution, and does violate unnecessarily and without suffi-  
32 cient state justification, the fundamental rights to travel and to  
33 personal privacy.

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35 FOR THE FOREGOING REASONS, and for the reasons argued in the  
36 Points and Authorities attached hereto, Petitioner prays that:

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1. This Court issue a Writ of Supersedeas and/or an order staying the Municipal Court's enforcement of the registration requirement against Petitioner pending final determination of this Petition for Writ of Habeas Corpus;

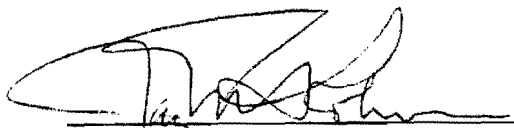
2. This Court issue an order to show cause to the Municipal Court of the Newhall Judicial District ordering that court to refrain from any action against Petitioner by reason of Petitioner's failure to register under Penal Code section 290 or to show cause before this Court why such registration is necessary;

3. This Court grant full hearing in this matter;

4. This Court appoint a special master to take evidence on the issues discussed herein so that this Court will have adequate information in order to rule, and to satisfy the due process requirement of an evidentiary hearing;

5. This Court grant such other and further relief as it may deem appropriate and just.

DATED: APRIL 12, 1982

  
\_\_\_\_\_  
JAY M. KOHORN  
Attorney for Petitioner

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VERIFICATION

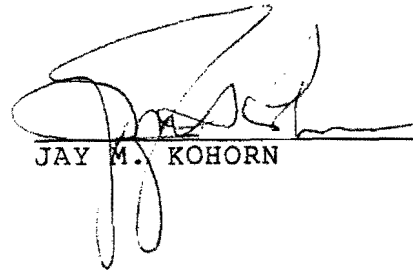
STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) ss

I, the undersigned, state:

I am the attorney for the Petitioner. The above document (Petition for Writ of Habeas Corpus) is true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

Executed at Los Angeles, California, this 7th day of May, 1982.

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



JAY M. KOHORN





1 (k) evidence from the legal community that it feels that  
2 registration for 647(a) offenses should be eliminated, Sec-  
3 tion XII, page E-58 (Conclusion).

4 Attached to that brief are three exhibits of some note. The  
5 first two support the contention that Section 290 may have outlived  
6 its usefulness. One is a recommendation from the Joint Legislative  
7 Committee for Revision of the Penal Code. The second is the San  
8 Francisco Mental Health Advisory Board recommendation. Third is a  
9 part of the brief of the Pride Foundation and the ACLU which was  
10 submitted to the California Supreme Court in n re Anders (1979) 25  
11 Cal.3d 414, on the issue of cruel and unusual punishment. Anders was  
12 ultimately decided on grounds which avoided the registration ques-  
13 tions.

## 14 II. CRUEL AND UNUSUAL

15 Pursuant to Section 290 of the Penal Code, a conviction of  
16 Section 647(a) P.C., for either soliciting or engaging, requires  
17 registration as a sex offender within 30 days after sentencing, with  
18 the appropriate law enforcement agency having jurisdiction. There-  
19 after, any change of residence, including temporary domiciles, must  
20 be accompanied by further registrations within a 10 day period.  
21 These requirements must be fulfilled by a defendant throughout his  
22 life in this state, unless relief is obtained pursuant to Section  
23 1203.4 P.C.

24 Registration involves certain signed informational state-  
25 ments, fingerprints, and photographs, all of which are forwarded to  
26 the State Department of Justice. Failure to comply with any of the  
27 terms of the law is punishable as a misdemeanor and may result in  
28 revocation of probation in many situations. For a lengthy and inci-  
29 sive discussion of judicial opinion relating to the seriousness of  
30 the registration law, see Kelly v. Municipal Court (1958) 160  
31 Cal.App.2d 38, and In re Smith (1972) 7 Cal.3d 362, 366-367.

32 Petitioner contends that requiring a misdemeanant to regis-  
33 ter as a sex offender constitutes cruel and/or unusual punishment as  
34 circumscribed by the California Supreme Court in In re Lynch (1972) 8  
35 Cal.3d 410.

36 Petitioner believes that Section 647(a) is this state's

1 homosexual control law, a belief reinforced by the study, "The Con-  
2 sentsing Adult Homosexual and the Law," 13 U.C.L.A. Law Review 643,  
3 hereinafter referred to as "Project."

4           Because of this belief, Petitioner subscribes ardently to  
5 the words of Justice Mosk in Lynch, supra, that, "[l]egislative  
6 authority remains ultimately circumscribed by the constitutional  
7 provision forbidding the infliction of cruel or unusual punishment.  
8 . . . It is the difficult but imperitive task of the judicial branch,  
9 as co-equal guardian of the Constitution, to condemn any violation of  
10 that prohibition. . . . The courts can often prevent the will of the  
11 majority from unfairly interfering with the rights of individuals  
12 who, even when acting as a group, may be unable to protect themselves  
13 through the political process. . . ." 8 Cal.3d 410, 414.

#### 14                           The Tripartite Analysis

15           The Court in Lynch, supra, held that "a punishment may  
16 violate Article I, Section 6 of the Constitution if, although not  
17 cruel or unusual in its method, it is so disproportionate to the  
18 crime for which it is inflicted that it shocks the conscience and  
19 offends fundamental notions of human dignity." 8 Cal.3d 425. The  
20 Court further developed a three-pronged analysis aimed at focusing an  
21 inquiry upon a particular punishment to detemine if indeed it runs  
22 afoul of Constitutional proscription. One must examine:

- 23                   1. the nature of the offense;
- 24                   2. the punishment vis-a-vis punishments for more  
25                   serious offenses in the same jurisdiction; and
- 26                   3. the punishment vis-a-vis punishments prescribed  
27                   for the same offenses in other jurisdictions.

28           The thrust of this tripartite analysis is to enable a court  
29 to determine the extent to which the punishment is rationally based,  
30 thereby serving a legitimate state objective.

#### 31                           Nature of the Offense

32           As crimes go, 647(a) is conspicuously minor in and of itself  
33 as well as relative to the other "sex offenses" falling within the  
34 ambit of Section 290.

35           Project, supra, indicates a veritable absence of private  
36 citizen complaints regarding 647(a) offenses:

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\* 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. (Page 688, note 17)

\* Statements in arrest reports, as written by the arresting officers, are admittedly (by the police) "a matter of form." (Pages 689-690)

\* 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. (Page 690)

The article notes the private nature of the encounters:

\* Many gay bars, in which a substantial number of arrests for 647(a) occur, are quasi-private in nature, and attempt to discourage attendance by non-homosexuals. (Pages 698-699)

\* Homosexual "contacts" are accomplished most often in rather discreet manner. The majority are made only if the other individual appears responsive. Such contacts are accomplished by means of quiet conversations and the use of subtle gestures. (nn. 83-84)

\* "Homosexual solicitations are so quiet and so barely noticeable that a casual observer could hardly recognize them." 12 U. of Pa. L. Rev. 259 (1963)

In short, this type of "crime" which can and often does terminate in registration for a sex offense, usually consists of little more than a gesture, perhaps an invitation for sexual relief in a quasi-private atmosphere with only the defendant and a plain-clothes undercover vice-officer present.

Punishment for 647(a)

vis-a-vis

Punishments for Other Offenses

The second test advanced in Lynch, involves a reading of the punishments prescribed by law in California for crimes of greater

1 seriousness than 647(a).

2 Because Section 290 itself embraces a multitude of sex  
3 offenses, one need go no further than to look at the statute for a  
4 determination of what offenses are registrable and which are not.

5	<u>REGISTRABLE</u>	<u>NOT REGISTRABLE</u>
6	220 P.C.	261(1) P.C.
7	(assault to rape)	(rape of person incapable of consent)
8	272 P.C.	273 (f) P.C.
9	(contributing to	(sending minor to house
10	delinquency of minor)	of prostitution)
11	266 P.C.	315 P.C.
12	(procuring and	(keeping a house of
	seduction)	prostitution)
13	647(a) P.C.	647(b) P.C.
14	(soliciting or engaging	(soliciting or engaging
15	in lewd conduct without	in lewd conduct with
	consideration)	consideration)

16 Besides the obvious equal protection arguments raised else-  
17 where in this Petition, there seems to be a general anarchy in the  
18 architecture of the registration statute.

19 Beyond the registration statute itself, it may be noteworthy  
20 to point out that only certain narcotics offenses require registra-  
21 tion in California. The absence of any further convictions for  
22 narcotics offenses within five years of an initial conviction gives  
23 rise to an automatic suspension of the duty to register. However,  
24 with respect to 647(a) offenses, only relief under Section 1203.4  
25 P.C. will release a defendant from further obligation to register.  
26 This, however, does not eliminate the registration records which  
27 already exist.

28 Finally, there is no felony registration law in California  
29 beyond those for certain sex and narcotics crimes, despite the fact  
30 that such violent crimes as robbery, assault, and burglary have a  
31 much higher recidivism rate. While many serious crimes involving  
32 victims do not require registration, Section 647(a) which usually has  
33 no victim, does require registration. A person can commit a dan-  
34 gerous, violent felony, pay his debt to society, and be done with it;  
35 yet, a person convicted of the minor offense of lewd conduct, with no  
36 victim other than a vice-officer going out of his way to look for the

1 conduct, has a lifetime status and stigma.

2 Punishment for 647(a)

3 vis-a-vis

4 Punishment in Other Jurisdictions

5 The last basis for analysis includes a comparison of  
6 California's specie of punishment with that metted out in other  
7 jurisdictions for the same offense. To gain perspective on the state  
8 of registration laws in this country, two lengthy studies, made 15  
9 years apart, were utilized. the first, discussed in 103 U. of Pa. L.  
10 Rev. 60, indicates that in cities of over 50,000 population in the  
11 United States (approximately 220 in 1954), 32 (15%) had a registra-  
12 tion statute of one sort or another (not necessarily sex related).  
13 Of the 48 states, only 5 had any statewide registration laws.

14 In 1969, the Center for the Study of Crime, Delinquency and  
15 Corrections at Southern Illinois University surveyed current criminal  
16 registration laws in this country in cities over 50,000 population  
17 (Dreker & Kamler, Criminal Registration Statutes in the United  
18 States, 1969, Carbondale, Ill.). Four states in 1969 required regis-  
19 tration for serious sex offenses (not including disorderly conduct),  
20 one of which, Ohio, required registration only after conviction of  
21 two or more offenses. Two states maintained narcotics registration  
22 laws, while one had a felony control statute.

23 Of the 384 cities surveyed, only 13 (located within 6  
24 states) had local sex registration ordinances. In contrast, 18 had  
25 narcotics registration laws, and 47 maintained felony registration  
26 requirements. **There were 46 jurisdictions, including D.C., without**  
27 **any sex registration laws whatsoever (either statewide or local).**

28 In short, Section 290 constitutes cruel or unusual punish-  
29 ment as it relates to minor sex offenses which can involve nothing  
30 more than speech. Such offenses go unregistered in nearly every  
31 other jurisdiction in the country. And more serious crimes are  
32 punished less severely here.

33 III. EFFECT ON EMPLOYMENT: FURTHER EVIDENCE OF  
34 INVASION OF PRIVACY AND CRUEL AND UNUSUAL PUNISHMENT

35 Labor Code section 432.7 prohibits employers, both public  
36 and private, for any purpose, from inquiring into an employee's or an

1 applicant's record of arrests which did not result in conviction.

2 A specific exception in the statute reads as follows:

3 (e) Nothing in this section shall prohibit an employer  
4 at a health facility, as defined in Section 1250 of the  
5 Health and Safety Code, from asking an applicant for  
6 employment either of the following:

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

10 This is an example of the harms which attend being arrested  
11 for lewd conduct, an offense specified in Section 290. As noted  
12 earlier, this offense is almost exclusively reserved for homosexuals.  
13 Even if there is no conviction, even if a trial results in total  
14 exculpation, a potential hospital worker must reveal the arrest and  
15 risk being branded, humiliated, and stigmatized, first because the  
16 arrest often triggers the common assumption that "where there's  
17 smoke, there's fire," and second because the real world can not yet  
18 fully accept homosexual conduct. This gross and unjustifiable inva-  
19 sion of personal privacy is incurred all because a person is arres-  
20 ted, perhaps wrongly, for an offense which, if he had been found  
21 guilty, would have required registration. How grossly improportion-  
22 ate to the crime can a punishment be?

23 Even more insidious is the restraint subsequently exercised  
24 by a person arrested for lewd conduct. Such a person may purposely  
25 refrain from applying for certain jobs for which he is qualified in  
26 order to save himself embarrassment, humiliation, and to maintain his  
27 sacred privacy.

28 This Labor Code provision is one example. Other examples  
29 are found in the Welfare and Institutions Code (§508, dealing with  
30 state hospitals); the Penal Code (§§11107, 291, 291.1, dealing with  
31 public and private schools); the Business and Professions Code  
32 (§9965.10, dealing with counselor positions); the Education Code  
33 (§§12911, 12912, dealing with schools); and the list goes on.

#### 34 IV. NEW LEGISLATION

35 Attached as EXHIBITS U and V are Assembly Bills ("AB") 2965  
36 and 2966 respectively. Both were introduced by Assemblyman Alatorre

1 on March 3, 1982.

2 Each of these bills contains a slightly different version of  
3 an amendment of Labor Code §432.7. While the present section allows  
4 inquiry into arrests which have not resulted in conviction if the  
5 charge was an offense registrable under P.C. §290, both bills would  
6 add a provision allowing any employer to inquire into a conviction  
7 for any registrable offense under §290 even though that conviction  
8 has been sealed, destroyed, or expunged. Employers are forbidden to  
9 ask about most other sealed offenses.

10 This proposal reflects the general concern about and fear of  
11 child molesters, rapists, and other dangerous sex offenders. For  
12 lewd conduct offenders, however, there is little or no rationale for  
13 the exception, and if passed, the bill promises to be a source of  
14 pain, anxiety, and, perhaps, unemployment, for many homosexual men.


15 AB 2966 would add section 851.10 to the Penal Code. This  
16 provision would provide for sealing and destruction of records of  
17 arrest for misdemeanor violators who have had a perfect clean record  
18 for seven years. However, the proposal adds in its last paragraph:

19 "The provisions of this section shall not apply to any  
20 misdemeanor conviction which is a registrable offense  
21 under Section 290. . . ."

22 The purpose for including these proposed bills in this  
23 Petition is to highlight to the Court the unconscionable harshness in  
24 allowing 647(a) to continue to be tied to 290, especially since there  
25 is no justifiable rationale for the state to intrude to this extent  
26 and for this extended period of time in the life of a member of the  
27 society.

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Respectfully submitted,



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JAY M. KOHORN



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STATE OF CALIFORNIA, COUNTY OF

I am the \_\_\_\_\_

in the above entitled action or proceeding; I have read the foregoing \_\_\_\_\_

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

Executed on \_\_\_\_\_ (date) at \_\_\_\_\_ (place), California

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

\_\_\_\_\_  
Signature

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

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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:

1800 N. Highland Ave., Suite 106, Los Angeles, CA 90028-4596

On May 7, 19 82, I served the within Petition for

Writ of Habeas Corpus

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

at Los Angeles, California  
addressed as follows:

HONORABLE JACK B. CLARK  
Newhall Municipal Court  
23747 W. Valencia Blvd.  
Valencia, CA 91335

Attorney General  
3530 Wilshire Blvd.  
Los Angeles, CA 90010

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

Court of Appeal  
2nd Appellate District  
3580 Wilshire Blvd. Room 301  
Los Angeles, CA 90010

Executed on May 7, 1982 (date) at Los Angeles, (place), California

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

  
\_\_\_\_\_  
Signature

Kevin M. Rose