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TO: CHIEFS OF POLICE
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FROM: JOHN CONLEY, DEPUTY DISTRICT ATTORNEY
HEAD, WRITS AND APPEALS SECTION

DATE: OCTOBER 16, 1979

RE: NEW CALIFORNIA SUPREME COURT DECISION ON 647(a) P.C.,
LEWD ACTS IN PUBLIC, PRYOR V. MUNICIPAL COURT

The California Supreme Court recently handed down a decision which makes significant changes in the elements of 647(a) of the California Penal Code, which forbids the commission of or soliciting of lewd acts in public. The court in effect re-wrote the section, so that cases which traditionally have been clear violations of the law no longer are. The function of this letter is to bring you up to date on this development.

The decision is Pryor v. Municipal Court (1979) 25 Cal.3d, 238. The defendant in Pryor attacked 647(a) as being vague and uncertain in its meaning. The defendant contended that the terms "lewd and dissolute conduct" are so general that citizens were not put on real notice of what conduct the law was forbidding. The defendant also argued that this uncertainty resulted in arbitrary and discriminatory application of the section by police, prosecutors, judges and juries.

The California Supreme Court reviewed the legislative history of 647(a) and reviewed the case decisions which had interpreted (and upheld) the section in the past. The court noted that in January of 1976, California law had been changed to permit sodomy, oral copulation and other sex acts as long as they were performed by consenting adults in private. The court questioned how the law could punish the solicitation of acts which were themselves now legal, i.e. how can you forbid requesting that someone do something that is now completely legal.

Thus the California Supreme Court ruled that 647(a) was indeed vague, uncertain, and thus unconstitutional. Instead of simply erasing the statute from the books, however, the Court in effect rewrote it, so that it would be constitutional. In so doing, the

court disapproved many prior cases which had established the law in this area. The Pryor decision is thus like the Miranda decision: all future cases will be based on it and not on prior law. The decision was made retroactive -- even though it was a substantial departure from prior law.

What then are the elements of the "new" 647(a), as interpreted by the Supreme Court? There are basically four elements. From now on to have a prosecutable case under 647(a), the following must be present:

1. A "solicitation" of [tempting, seeking to induce, or trying to obtain], or commission of,
2. Lewd Criminal Conduct: the touching of the genitals, buttocks, or female breast for the purposes of sexual arousal, gratification, annoyance, or offense,
3. The lewd conduct is to occur or is occurring in a public place, a place open to the public, or exposed to public view,
4. When the suspect knows or should know of the presence of persons who may be offended by the conduct.¹

As you will notice, the most significant changes in the "new" 647(a) deal with the necessity of showing that the conduct is to occur in a public place, place open to the public, or exposed to public view and under conditions where the suspect knows or should know that persons who may be offended by the conduct may be present.²

For example, under the "old" 647(a) it was an offense to solicit an undercover officer to come home and "make love to me". It no longer is illegal. Under the "old" law all lewd acts occurring in a public place (restroom, massage parlor, park) were automatically violations. Now, it must also be shown that there may be other persons present who might be offended by the conduct.³

On the other hand, many of the illegal acts which were prosecuted before can still be prosecuted under this new interpretation. Masturbation in public, groping of genitals, solicitation of acts to occur in public will still be offenses, as long as there are others who could be offended by them. The court also indicates that solicitations to commit lewd acts to occur in private might be still punishable if the solicitation was so phrased as to be "fighting words" under 415 P.C.

Solicitations of lewd acts where the person solicited is a minor, would still be punishable as child annoyance or molesting under 647(a) P.C.

Like Miranda the Pryor decision is a significant departure from prior law and further case decisions will be needed to answer all the questions that may occur. Hopefully, the above will serve as good guidance until those decisions come down in the months and years ahead.

JDC:aw

¹It is unclear from the opinion (p.256) if it must be shown that the act is occurring when someone else is present who may be offended, or simply that there is a possibility that someone else may be present who may be offended. The court expresses the rule both ways on the same page. Until told otherwise by an appellate court, we believe that the "possibility of the presence of someone to be offended by the conduct" is all that need be shown. Solicitations, after all, involve future conduct and it would be impossible in any case to show that in the future observers would certainly be present.

²See note 1.

³See note 1.

PRYOR V. MUNICIPAL COURT

25 Cal.3d 238 (1979)

I. FACTS OF THE CASE

II. LOGIC OF COURT'S DECISION

"Lewd or dissolute conduct", notice to citizens, arbitrariness in application

III. COURT'S HOLDING

". . . we construe that section to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks or female breast, for the purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct."

IV. NEW ELEMENTS OF 647(a) OFFENSE

1. Solicitation of [tempting, seeking to induce, or trying to obtain] or commission of,
2. Lewd criminal conduct,
 - touching of genitals, buttocks or female breast
 - for sexual arousal, gratification, annoyance, or offense
3. The lewd conduct is to occur or is occurring, in a public place, place open to public, or exposed to public view,
4. When the suspect knows or should know of the presence of persons who may be offended by the conduct. "Possible Presence".

V. SAMPLE SITUATIONS

1. Acts in Gay Bar.
2. Acts in Massage Parlor.
3. Acts in Toilet Booth.
4. Acts in Public Park at 0100.
5. Other examples.

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HEAD, WRITS AND APPEALS SECTION

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