June 22, 1976

FOR IMMEDIATE RELEASE:

The Second District Court of Appeal has just issued an opinion which may ultimately lead to the elimination of California's lewd conduct law. Section 647, subdivision (a) is the law which homosexuals claim is used by plain-clothes vice officers to entrap and harass them. In the case of People v. Williams (a copy of which is attached) the Court of Appeal, Second Appellate District, says that the words "lewd or dissolute" are not vague and mean "lustful, lascivious, and unchaste." The court attacks the opinion of the First District Court of Appeal which two years ago held that "lewd or dissolute" meant "obscene." It will now be necessary for the California Supreme Court to take the Williams case to resolve this conflict.

While to the average layperson this case may not seem significant, to gay persons and to sexual civil libertarians, it is quite extraordinary. Although there are over 2,500 prosecutions under Section 647(a) in Los Angeles alone each year (according to police and court stastics), the California Supreme Court has recently refused to hear any of these cases to resolve the disputes between police and homosexuals. In fact, the Supreme Court has only heard three cases involving "lewd or dissolute" conduct. The first such case was decided by the Supreme Court in 1968 which held that prosecutors could use the "lewd conduct" law to prosecute against topless dancers, so long as the trial judge instructed the jury using traditional "obscenity" standards. The second case was decided by the court in 1970, when the court reconsidered its position and held that Section 647(a) could not be used to prosecute stage performances. The third case was decided by the court in 1973 when it held that before a court accepts a guilty plea to Section 647(a), the judge must tell the defendant that he will be required to register as a sex offender.

The issues which will be presented to the Supreme Court in Williams involve the constitutionality of the statute, police discriminatory enforcement practices against gays,

that the requirement of registration as a sex offender is cruel and unusual punishment, as well as numerous trial procedures which would make it easier for a person arrested to defend against such charges.

Also attached is the decision of the Appellate Department of the Los Angeles Superior Court, which was vacated by the Court of Appeal.

Numerous lewd conduct appeals, including that of former Los Angeles Deputy Mayor Maurice Weiner await the outcome of the Williams case.

For further information about this case and its ramifications on lewd conduct trials and on the gay community, CONTACT: Thomas F. Coleman, Attorney at Law, 3701 Wilshire Blvd., Los Angeles, CA 90010. Telephone: (213) 386-7855

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DOUGLAS ROBERT WILLIAMS, Defendant and Appellant.	2D CRIM. NO. 28563 2D EXT.NO. 76-182 L.A.S.C. NO. CR A 13607 MUN. CT. NO. M 118549

APPEAL from a judgment of the Municipal Court of the Long Beach Judicial District. Kenneth E. Sutherland, Judge. Retransferred with directions.

Thomas F. Coleman, Esquire, for Defendant and Appellant.

Robert W. Parkin, City Prosecutor, by William S. Hulsy, Deputy City Prosecutor, for Plaintiff and Respondent.

Douglas Robert Williams was convicted by a municipal court jury of violating Penal Code section 647, subdivision (a), which punishes as a misdemeanor any "lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

We view the evidence, as we must, in the light most favorable to the judgment. Long Beach Police Officer Richard A. Rose observed defendant in a public restroom located on the beach at the foot of Molino Street in Long Beach at about 10:15 p.m. on October 1, 1974. Defendant entered the restroom, stood against one wall for several minutes, and then entered a toilet stall. There was no door on the stall. Defendant lowered his trousers and underpants and commenced to masturbate his penis for a period of several minutes. Another person in the restroom approached, touched defendant's penis and then left the restroom. Defendant then departed the restroom and walked on the beach for a few minutes. Defendant returned to the restroom.

At this time Officer Rose's partner, Officer David John Duran had also entered the restroom. Defendant stood next to Officer Duran for several minutes and massaged his (defendant's) crotch area. He unzipped his pants, reached inside and continued to massage his crotch area. Defendant then entered another open toilet stall and let down his trousers and underpants. At this time Officer Rose placed defendant under arrest.

Defendant testified in his own defense. He indicated that he was an optometrist. His office is in Fullerton and his residence in Huntington Beach. On the date in question he drove from his residence in Huntington Beach to Long Beach to deliver a pair of glasses to an optical laboratory. After arriving in Long Beach he ate dinner at a restaurant and then drove to the optical lab and deposited the glasses through a night drop along with a note indicating the changes in the lenses that he desired. Feeling somewhat full from the dinner he had eaten, he decided to drive to the beach which was only about a mile and one-half away in order to take a walk in the fresh air. After arriving at the beach and walking along the beach for a few minutes he felt the need to relieve himself. He observed a restroom at the edge of the beach and entered the restroom. He stood inside the restroom for a few moments, then entered one of the toilet stalls and both urinated and defecated.

At that time he was approached by one of the police officers and placed under arrest. Defendant denied ever masturbating in the restroom or having his penis touched by any other individual in the restroom. He denied having stood next to anyone while massaging his crotch.

In rebuttal, employees of the optical lab testified that the glasses appellant said he deposited at the lab in the evening were actually delivered to the lab before 5:00 p.m. by someone other than defendant.

The appellate department of the superior court reversed the judgment, citing two grounds for its action. Relying upon Silva v. Municipal Court, 40 Cal.App.3d 733, the appellate department found error in the trial court's instruction to the jury in defining "lewd and dissolute conduct." The appellate department also held that the trial court erred in failing to instruct that "sexual motivation" is an element of the offense in violation of Penal Code section 647, subdivision (a). Other issues raised by defendant on the appeal were not considered in view of the decision that the judgment had to be reversed for the instructional errors.

We ordered transfer of the cause to this court pursuant to Rule 62(a) of the California Rules of Court.

LEWD AND DISSOLUTE CONDUCT

The trial court defined "lewd and dissolute conduct" as provided in the current version of CALJIC (Misdemeanor) 16.402, pertaining to Penal Code section 647, subdivision (a), as follows:

". . . the words 'lewd' and 'dissolute' are synonymous and mean lustful, lascivious, unchaste, wanton, or loose in morals and conduct." The latter instruction has remained unchanged for many years and relies upon People v. Loignon, 160 Cal.App.2d 412, 420, and People v. Babb, 103 Cal.App.2d 326, at 330. In Babb, the court stated, "'Lewd' and "dissolute' are terms often used interchangeably. Each applies to the unlawful indulgence in lust whether in public or private. [Citation.] 'Lewd' is defined to mean: '4. Lustful; libidinous; lascivious; unchaste.' 'Dissolute' is defined

to mean: '2. . . . loose in morals and conduct; wanton; lewd; debauched.' [Citation.]"

Loignon, relying upon the latter definitions in Babb, rejected an argument that the terms "lewd and dissolute" were unconstitutionally vague, indefinite and uncertain. The definitions of "lewd" and "dissolute" set forth in Loignon and Babb have recently been cited with approval. (See In re Smith, 7 Cal.3d 362, 365; In re Steinke, 2 Cal.App.3d 569, 572, fn. 2.)

In the recent case of Silva v. Municipal Court, supra, the Court of Appeal of the First District was confronted with a challenge to a complaint which charged the defendant with soliciting another to engage in lewd and dissolute conduct in violation of Penal Code section 647, subdivision (a).[1]

The case reached the Court of Appeal on a petition for writ of mandate to compel the sustaining of a demurrer to the complaint which was pleaded in the general language of the statute. The context in which the defendant was alleged to have committed the violation is not revealed in the opinion. Defendants there made a two-pronged attack on the statute (1) that solicitation is pure speech and its proscription must be tested against First Amendment principles, and (2) that the term "lewd or dissolute conduct" is unconstitutionally

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1. Penal Code section 647, subdivision (a) condemns both soliciting and engaging in lewd or dissolute conduct in a public place.

vague.

The plain holding of Silva is that Penal Code section 647, subdivision (a) is not vulnerable to either attack. In declaring that the phrase "lewd or dissolute" conduct was not vague or uncertain, the Court of Appeal relied, and we think unnecessarily, on language to be found in In re Giannini, 69 Cal.2d 563, to the effect that the terms "lewd" and "dissolute" are synonymous with "obscene."

Of course Giannini was in turn dealing with a performance by a dancer and the thrust of Giannini was that the performance of a dance before an audience constituted a method of expression which is presumptively protected by the First Amendment and thus must be judged in terms of whether it is "obscene."

This distinction was clarified and emphasized in Barrows v. Municipal Court, 1 Cal.3d 821, where Mr. Justice Mosk traced the history of Penal Code section 647, subdivision (a), from its origin as a vagrancy stature and concluded that the statute was not intended to apply to live performances in a theater before a live audience. In discussing Giannini, the court in Barrows stated at page 828:

"The petitioners in Giannini were convicted of violating section 647, subdivision (a), by performing a dance before an audience in a nightclub. We held that the performance of a dance, whether a ballet or a lesser artistic form, warranted the protection of the First Amendment, absent proof of its obscenity, but that, in determining whether the conduct of the petitioners was lewd or dissolute, the standards to be applied were those relating to obscenity as defined in section 311, subdivision (a)." (Emphasis added.)

Thus we conclude that nothing said in Giannini or Barrows, supra, concerning Penal Code section 647, subdivision (a), was intended to refer to the application of that statute to conduct not involving an expression of ideas such as a theatrical performance. We do not interpret the language from Giannini to which the Silva court referred to require that standards relating to obscenity as defined in Penal Code section 311, subdivision (a), be read into Penal Code section 647, subdivision (a), in a context other than was present in Giannini or Barrows.

Nowhere in Silva v. Municipal Court, supra, is there any mention of Loignon, Babb or CALJIC (Misdemeanor) 16.402. We cannot reasonably conclude that our brethren in the First District intended so unceremoniously to relegate to oblivion those long-standing and respected precedents.

The terms "lewd or dissolute" are susceptible of clear and understandable definition, as demonstrated by Babb and CALJIC (Misdemeanor) 16.402, in describing the type of conduct which the Legislature sought to prohibit. In the final analysis all words are defined by the use of other words. The English language simply does not contain words which can always be characterized as the optimally precise and only term for describing a particular thing or conduct.

Whatever words may be used to define what the statute was intended to cover will necessarily be interpreted by a jury comprised

of individuals from various walks of life, according to prevailing notions of what conduct fits the definition. That is the jury's basic function and it is not necessary to produce expert testimony nor instruct the jury on that concept.

The Silva court in equating "lewd and dissolute" with "obscene" used the phrases "grossly repugnant," "patently offensive," "disgusting," "repulsive," "filthy," "foul," "abominable" or "loathsome." All are good descriptive words of "lewd or dissolute," but no more precise than those used in People v. Babb, supra.

The fundamental test is whether a reasonable person in the position of the defendant would be apprised with reasonable certainty that his conduct is proscribed. We do not think that any reasonable person be he juror or defendant would have any difficulty understanding, even under today's liberal attitudes toward sex, that masturbation in a public place in plain view of anyone who may be on the premises is "lewd and dissolute."

FAILURE TO INSTRUCT THAT "SEXUAL MOTIVATION" IS AN ELEMENT OF THE OFFENSE PROSCRIBED IN PENAL CODE SECTION 647, SUBDIVISION (a)

The appellate department concluded that violation of Penal Code section 647, subdivision (a), requires proof of the defendant's "sexual motivation." The appellate department's opinion relied on In re Birch, 10 Cal.3d 314, fn. 4, at pp. 318-319. Although reversal was ordered in Birch on procedural grounds, the court stated in footnote 4 as follows:

"On this state of the record, which discloses that no testimony has been taken or evidence adduced as to the facts underlying the crime and no stipulation has been entered as to such events, we believe that we should not attempt to determine whether the conduct allegedly resulting in the charges is, as a matter of law, insufficient to support a conviction under section 647, subdivision (a). If, on remand, the state chooses to reprosecute Birch on such charges, defendant will of course remain free to show that his conduct did not exhibit the requisite 'sexual motivation' to bring it within the ambit of 'lewd and dissolute conduct' proscribed by section 647, subdivision (a). [Citations.]" (Emphasis added,)

Without deciding the necessity or propriety, under some special circumstances, of a separate instruction to the effect that "sexual motivation" is an element of the offense herein, it is apparent from the record in this case that the instructions actually given by the trial court were more than adequate. The instruction defining "lewd and dissolute conduct." CALJIC (Misdemeanor) 16.402, plainly informed the jury of the sexual aspects of the offense charged. The instruction defined "lewd and dissolute" as synonymous with "lustful," "lascivious," and "unchaste." The latter terms clearly equate with and connote to any reasonable juror the sexual element of the offense. If the jury here had believed, as testified by defendant, that he was merely attending to matters of personal hygiene when arrested, the latter instruction was sufficient to require them to return a verdict of not guilty.

There is no doubt from the record that once the jury believed the testimony of the arresting officers, as to the nature of defendant's acts in the restroom, the existence of sexual motivation for such acts followed as a necessary inference. Indeed, nothing in appellant's testimony nor in his counsel's argument to the jury suggested that such motivation was lacking if the officers' testimony was credited.

The facts of the present case are quite unlike those in In re Birch, supra, where the defendant was accused of violating section 647, subdivision (a), of the Penal Code by virtue of having urinated next to a wall behind a restaurant. The need for a specific instruction regarding the necessity of sexual motivation for such activity is far more apparent in such a situation than where, as here, if the officers' testimony was believed by the jury, there was no suggestion whatever that defendant's activities were anything other than sexually motivated. We, therefore, conclude that the trial court's instruction defining "lewd and dissolute conduct," adequately informed the jury of the sexual nature of the offense charged. The statute is aimed at prohibiting a type of defined conduct and does not of itself require any special intent or motivation.

As to the above issues, the judgment is affirmed. However, as noted above, defendant raised several other issues on his appeal. The appellate department of the superior court never considered those issues on their merits because of its determination that instructional error existed. Since we have determined that there was no error in the instructions and in order to facilitate the orderly consideration of this misdemeanor appeal, the cause is hereby

retransferred to the appellate department of the superior court for disposition of the remaining issues. (Cf Taylor v. Union Pacific Railroad Corp., Supreme Court No. L.A. 30531, filed May 13, 1976.)

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COMPTON, J.

We concur:

ROTH, P.J.

FLEMING, J.

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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. DOUGLAS ROBERT WILLIAMS, Defendant and Appellant.	Superior Court No. CR A 13607 Municipal Court of the Long Beach Judicial District No. M118549 OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court.

Kenneth E. Sutherland, Judge.

Judgment reversed.

For Appellant - Thomas F. Coleman

For Respondent - Robert W. Parkin, City Prosecutor
by Wm. S. Hulsy, Deputy City Prosecutor

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Defendant was convicted of engaging in "lewd or dissolute conduct" in a public restroom in violation of subdivision (a) of section 647 of the Penal Code.[1/] Two officers testified that defendant "masturbated his erect penis" while standing in one of the

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1/ The statute reads, in pertinent part, as follows:

"§ 647. Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) Who 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."

. . . .

doorless stalls.

We will discuss, first, the failure of the trial judge to instruct on the requisite "sexual motivation" element of a section 647 subdivision (a) violation; and, second, the failure of the trial judge to instruct on the presently accepted definition of "lewd."

I

The failure of the trial judge to instruct on the sexual motivation aspect of violation of subdivision (a) of section 647 of the Penal Code mandates reversal. Appellant argues that the crime of engaging in lewd conduct requires a specific intent.

We need not decide what label to affix to the type of intent required here as in any case the California Supreme Court has indicated that it is a crime requiring proof of "sexual motivation." In the case of In re Birch [1973] 10 Cal.3d 314, the petitioner was arrested for urinating in a public place and was prosecuted for violation of section 647, subdivision (a). Although reversal was ordered on procedural grounds, the court stated at pp.318-319, footnote 4:

> "On this state of the record, which discloses that no testimony has been taken or evidence adduced as to the facts underlying the crime and no stipulation has been entered as to such events, we believe that we should not attempt to determine whether the conduct allegedly resulting in the charges is, as a matter of law, insufficient to support a conviction under section 647, subdivision (a). If, on remand, the state chooses to prosecute Birch on such charges, defendant will of course remain free to show that his conduct did not exhibit the requisite 'sexual motivation' to bring it within the ambit of 'lewd and dissolute conduct' proscribed by section 647, subdivision (a). [Citations omitted.]" [Emphasis supplied.]

The "sexual motivation" referred to by the Birch court is clearly an element of the crime of which defendant was charged and convicted Defense counsel in the case sub judice has argued that, when apprehended by the vice officers, defendant was merely attending to a matter of elimination and personal hygiene and was not compelled by any sexual urge or impulse. The prosecution has insisted that defendant's actions were sexually motivated. Clearly, the issue of "sexual motivation" was crucial to the defense and the court's failure to instruct the jury thereon constituted prejudicial error. "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson [1956] 46 Cal.2d 818, 836. We are of that opinion.

II

Despite defense objections, the judge instructed the jury as to what constitutes a violation of section 647, subdivision (a) by reading CALJIC 16.402. 2/ However, the previously rendered decision in Silva v. Municipal Court [1974] 40 Cal.App.3d 733, had already outmoded the definition of "lewd" contained in CALJIC 16.402 In Silva the Court of Appeal held that "lewd or dissolute"conduct, as used in section 647, subdivision (a), is synonymous with "obscene" conduct, "obscene" being a word often defined, interpreted and limited but never held unconstitutionally vague or uncertain. The court then went on "to determine and state the nature of the obscene conduct proscribed by the statute." (40 Cal.App.3d at p.738 The Silva court ruled that the lewd or dissolute or obscene conduct

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2/ CALJIC 16.402 reads as follows:

"As used in the foregoing instruction, the words 'lewd' and 'dissolute' are synonymous and mean lustful, lascivious, unchaste, wanton, or loose in morals and conduct."

alluded to in section 647, subdivision (a),

> "is that sort of sexual conduct which is 'grossly repugnant' and 'patently offensive' to 'generally accepted notions of what is appropriate' and decent according to statewide contemporary community standards. It will ordinarily include conduct found 'disgusting, repulsive, filthy, foul, abominable [or] loathsome' under those standards." (40 Cal.App.3d at 741.)

Obviously, the Silva [3/] definition varies greatly from the "lustful, lascivious, unchaste" definition of lewd conduct contained in CALJIC 16.402. Where an exhibition of "loose morals and conduct" might once have warranted a conviction under section 647, subdivision (a), the selfsame activity, when measured by today's narrower and more stringent definition of "lewd" might not now fall within the ambit of criminal action. As appellant suggests, it is indeed possible that the jurors in the case sub judice might have believed that defendant did not commit any acts of masturbation but that his mere presence in a restroom reputedly used as a meeting place for deviates was sufficient to support a guilty verdict.

3/ We cannot agree with our dissenting colleague that People v. Loignon [1958] 160 Cal.App.2d 412 is in any way controlling or apposite. The statute there involved was Penal Code section 288, not section 647, subdivision (a); the contention addressed in Loignon was that the words "lewdly," "lewd" and "lascivious" were too vague to meet due process requirements. The court, in Loignon, rejected this contention (110 Cal.App.2d at pp.418-420). In doing so it did not even directly define "lewd," merely equating it with "dissolute" and then defining the latter.

Silva, on the other hand, defined the same word -- "lewd" -- in the same subsection -- subdivision (a) -- of the same statute -- Penal Code section 647 -- with which we are concerned. Surely the word cannot be held to have one meaning if soliciting to engage in conduct is involved and another if it is engaging in conduct which is at issue as here. We cannot attribute to the Legislature any intent to use the identical word in inconsistent or differing senses in the same subsection. Silva v. Municipal Court controls and prescribes our decision. Cf. In re Giannini [1968] 69 Cal. 2d 563, 571, fn. 4.

. . . .

The jurors might have reasoned that defendant's use of a restroom with such a notorious reputation was indicative of "loose morals." This possibility requires reversal.

As we are reversing on the above grounds, we do not reach the other contentions of the defendant.

Judgment is reversed.

Presiding Judge

I concur.

Judge

I concur in the judgment insofar as it mandates reversal for failure to instruct on "sexual motivation." I agree that In re Birch [1973] 10 Cal.3d 314 compels this result.

I am not ready to adopt the definition of the word "lewd" which appears in Silva v. Municipal Court [1974] 40 Cal.App.3d 733 as the preferable or required definition to be given to a jury in a case such as this, involving a charge of engaging in lewd conduct. The definition given to the jury in the instant matter was taken from the decision of the Court of Appeal in People v. Loignon [1958] 160 Cal.App.2d 412. Loignon was neither discussed, distinguished nor disapproved by the court in Silva.[1/] I believe Loignon deserves a more decent burial from a court of at least the same jurisdiction.

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Judge

1/ My esteemed colleagues correctly observe that Loignon "did not even directly define 'lewd,' merely equating it with 'dissolute' and then defining the latter" (footnote 3, ante p. ___ of the majority opinion). In fairness it should be noted that the court in Silva (to paraphrase my colleagues) did not even directly define "lewd," merely equated it with "obscene" and then proceeded to define obscene. (Silva v. Municipal Court, supra, 40 Cal.App.3d at p. 738-742.)