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JUN - 5 1980  
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

In the Matter of the Application of )  
THOMAS F. COLEMAN )  
On Behalf of ROY FITZGERALD STEWART, )  
Petitioner. )

APHC 000 073  
MEMORANDUM OPINION

In Pryor v. Municipal Court [1979] 25 Cal.3d 238, the court held that Penal Code section 647, subdivision (a), as interpreted in prior judicial authorities, was not sufficiently clear or specific to pass constitutional muster. That court then adopted a specific, constitutionally definite test of what conduct does and does not violate that section. Finally, Pryor, supra, held that a person whose conduct had been found criminal under the older vague definition, but would clearly fall beyond the scope of the statute as construed in that case, was entitled to relief from the judgment of conviction and that this rule was to be fully retroactive to cases now pending on appeal. "A defendant whose conviction is now final, however, will be entitled to relief by writ of habeas corpus only if there is no material dispute as to the



1 facts relating to his conviction and if it appears that the statute  
 2 as construed in this opinion did not prohibit his conduct." Pryor,  
 3 supra, at page 258.

4 This court respectfully declines to follow the suggestion  
 5 as to the procedure to be followed, which is contained in the dicta  
 6 quoted above. The trial court which originally rendered the  
 7 judgment of conviction is uniquely possessed of the records of  
 8 those proceedings so as to make the determination that there is  
 9 no material dispute as to the facts and that the statute as con-  
 10 strued in Pryor does not prohibit his conduct. The trial court,  
 11 on defendant's motion, can then set aside the judgment of convic-  
 12 tion and enter a judgment of acquittal of the defendant. Further,  
 13 petitioner here requests this court to order that the trial court  
 14 seal all the records under Penal Code section 851.8. That section  
 15 authorizes the judge presiding at the trial wherein such acquittal  
 16 occurred to make a determination that the defendant was factually  
 17 innocent of the charge and then to exercise his discretion (i.e.,  
 18 "may") to order that the records of the case be sealed.

19 Where a statute is unconstitutionally applied, the trial  
 20 court lacks jurisdiction of the criminal proceedings taken against  
 21 the defendant. Dillon v. Municipal Court [1971] 4 Cal.3d 860,  
 22 872. The resulting judgment of conviction is void and may be set  
 23 aside by the rendering court at any time. "Jurisdictional  
 24 Defenses. A motion to vacate or set aside a judgment may be  
 25 granted on fundamental grounds outside the scope and purpose of  
 26 the common law writ of error coram nobis. These grounds go to  
 27 the jurisdiction of the court to render the criminal judgment,  
 28 and the motion gives the trial court an opportunity to eliminate



1 a void judgment without appellate court intervention by habeas  
2 corpus or prohibition. (See People v. McGee [1934] 1 Cal.2d 611,  
3 613; citations)." Witkin, California Criminal Procedure, section  
4 629 (b). In such a case the defendant is allowed to make a  
5 reviewable record by motion to vacate and appeal from the order  
6 of denial. Witkin, supra, section 654.

7 "Although a writ of mandamus may issue to vacate a judg-  
8 ment entered by a court that lacked jurisdiction, a motion to  
9 vacate such judgment must first be made in the court that entered  
10 the judgment, and a denial of such motion must be appealed in the  
11 regular manner." Neal v. State of California [1960] 55 Cal.2d 11,  
12 at page 16. Before seeking mandate to compel action by a trial  
13 court, a party should first request the lower court to act. If  
14 such a request has not been made, the writ will ordinarily not  
15 issue, unless it appears that the demand would be futile. Fitch v.  
16 Justice Court [1972] 24 Cal.App.3d 492.

17 This court is not unmindful of the severity of the sanction  
18 of registering as a sex offender required by Penal Code section  
19 290 upon a conviction of violation of section 647, subdivision  
20 (a). In re Birch [1973] 10 Cal.3d 314, 321. Further, the pro-  
21 visions of section 290 make failure to so register a misdemeanor  
22 in itself.

23 This court stands ready and available to petitioner to  
24 grant him all the relief he is entitled to under the Pryor deci-  
25 sion. The court is only insisting that petitioner follow what it  
26 deems to be the proper procedure in seeking such relief.

27 Dated: June 5, 1980.

28 M. Rosa Bigelow  
Judge of the Superior Court



NOT FOR PUBLICATION  
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

In re	)	2 Crim. No. 38093
ROY FITZGERALD STEWART	)	(Super. Ct. No. APHC 000073)
on	)	(M. Ross Bigelow, Judge)
Habeas Corpus.	)	OPINION AND ORDER FOR
	)	PEREMPTORY WRIT
	)	OF MANDATE

THE COURT:\*

The petition for writ of habeas corpus, filed June 24, 1980, and treated herein as a petition for writ of mandate (5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 83, p. 3858), has been read and considered. The court has also read and considered the preliminary opposition to issuance of writ of habeas corpus, filed July 16, 1980.

As there is not a plain, speedy and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the full presentation already made, we deem this to be a proper case for

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\*LILLIE, Acting P.J.; HANSON, J.; DUNN, J.\*\*

\*\* Assigned by the Chairperson of the Judicial Council.

the issuance of a peremptory writ of mandate "in the first instance." (Code Civ. Proc., § 1088.)

The sole contention in the within petition is that petitioner's conviction for a violation of subdivision (a) of section 647 of the Penal Code is null and void according to the criteria established by the Supreme Court in Pryor v. Municipal Court, 25 Cal.3d 238. The People on pages two and three of the preliminary opposition state:

"Petitioner's conduct involved the solicitation of a Los Angeles Police Department officer in a public bar to go to petitioner's house to engage in sex. Petitioner's conduct is conceded to be outside the scope of the criminal conduct now proscribed by Penal Code section 647 (a) for the reason that it was intended that such conduct occur at petitioner's house -- a non-public place. As construed in Pryor, Penal Code section 647(a) would not prohibit solicitations to engage in homosexual conduct in a private place."

In view of the People's concession, it is unnecessary to determine if the superior court was correct in concluding that relief should be sought in the trial court which originally rendered the judgment of conviction.



There is no dispute as to the facts and no dispute that the statute as construed by the Supreme Court in Pryor does not prohibit his conduct. Under such circumstances, the Supreme Court has determined that habeas corpus relief is available. (Pryor v. Municipal Court, supra, 25 Cal.3d at p. 258.)

The People's contention that petitioner is not entitled to habeas corpus relief as petitioner is not presently subject to actual or constructive custody is without merit. (In re King, 3 Cal.3d 226, 229, fn. 2; In re William M., 3 Cal.3d 16; see In re Birch, 10 Cal.3d 314.)

IT IS ORDERED that a peremptory writ of mandate issue commanding the superior court to vacate its order of June 5, 1980, in Los Angeles County Superior Court case No. APHC 000075, entitled In re Roy Fitzgerald Stewart, and thereafter conduct further proceedings to determine if petitioner is entitled to an order directing the municipal court to set aside his conviction in Los Angeles Judicial District case No. 316070, entitled The People v. Roy Fitzgerald Stewart, as null and void under the criteria set forth in Pryor v. Municipal Court, 25 Cal.3d 238.

Nothing herein should be construed as requiring reconsideration of the superior court's determination that

2 Crim. No. 38093

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petitioner's request pursuant to Penal Code, section 851.8  
is not properly before the superior court in the habeas  
corpus proceedings.

*[Handwritten signature]*



Date Oct 7, 1980

HONORABLE H. ROSS BIGELOW

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JUDGE  
Deputy Sheriff

E. Wallin  
None

DEPT. 70  
RECEIVED OCT 8 1980

Deputy Clerk  
Reporter

(Parties and counsel checked if present)

PHC 000073

In the matter of the application of:  
THOMAS F. COLEMAN  
On behalf of:  
ROY FITZGERALD STEWARD

Counsel for  
Petitioner. Thomas F. Coleman

Counsel for  
Respondent.

RECEIVED OCT 9 1980

NATURE OF PROCEEDINGS: Petition for Habeas Corpus

The Court of Appeal, Second Appellate District, Division One having filed its decision on a Writ of Mandate or Certiorari on July 24, 1980 and thereafter caused to be issued its Peremptory Writ of Mandate on October 1, 1980, pursuant to said writ of mandate this court now vacates its order of June 5, 1980 in APHC 000 073. [Court of Appeal case number 2 Crim 38093]

Counsel for the people having conceded that defendants conduct does not meet the criteria of Pryor vs Municipal Court, 25 Cal 3d 238, this court now orders the Municipal Court, Los Angeles Judicial District in case No. 316070 entitled People V Roy Fitzgerald Steward, to set aside the conviction as null and void.

The relief requested by Petitioner under § 851.8 Penal Code is not properly before this court in the Habeas Corpus proceeding.

Copies of this minute order sent by Mail addressed as follows:

Thomas F. Coleman  
1600 North Highland Avenue, Suite 106  
Los Angeles, CA 90028

X

Presiding Judge, Municipal Court  
Los Angeles Judicial District  
110 N. Grand Avenue  
Los Angeles, CA 90012

City Attorney  
Appellate Section  
17th Floor City Hall East  
Los Angeles, CA 90012

DEPT. 70

MINUTES ENTERED  
10/7/80  
COUNTY CLERK



2d Crim. No. 38093

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

SUPREME COURT  
FILED

OCT 1 1980

IN RE STEWART ON HABEAS CORPUS. LAURENCE P. GILL, Clerk

Deputy

The request for an order directing publication of the opinion in the above entitled proceeding is denied.

Bird, C.J., is of the opinion that the request should be granted.

*Bird*

Chief Justice