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NATIONAL COMMITTEE FOR SEXUAL CIVIL LIBERTIES

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LEGAL REPORT I

NATIONAL

One of the Committee's most important legal victories during the past year was the California case of In Re Reed, in which the California Supreme Court held that persons convicted under section 647(a) of that state's penal code will henceforth no longer have to register as sex offenders for the remainder of their lives. The story began several years ago, in 1979, when this Committee won the landmark decision of Pryor v. Municipal Court in the same Supreme Court of California. That decision severely reduced the scope of section 647(a). The language of that provision punishes any person "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." After the Pryor decision, the provision was limited to the public solicitation or the public commission of conduct "which involves the touching of the genitals, buttocks, or female breat, for the purpose 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." (Italics added.) The Reed decision, therefore, affects the small number of defendants who continue to be subject to the much reduced ambit of section 647(a), plus those who, until now, have had to register under it.

The Committee's other success story nationally was in New York, where that state's highest court -- the Court of Appeals -- struck down as unconstitutional the penal provision prohibiting loitering "in a public place for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse or other

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sexual behavior of a deviate nature." This case has now been appealed to the U. S. Supreme Court by the prosecutor in Buffalo, where it originated. Because the case, People v. Uplinger, hinges on the decision in People v. Onofre, handed down by the same New York Court of Appeals three years earlier, the latter ruling will also be open to review were the U. S. Supreme Court to accept the Uplinger case. This is the situation even though the Supreme Court refused to accept the Onofre case for review after it was decided. (The Onofre decision -- which was also a Committee case -- struck down New York's voluntary deviate sexual conduct law as unconstitutional.) This could mean the long-expected -- and, by knowledgeable lawyers, the long-avoided -- U. S. Supreme Court test of the constitutionality of state sodomy laws. By October we should know whether or not the S. S. Supreme Court will accept Uplinger. If it does, we will have the fight of our lives on our hands. Not only will a Supreme Court case have to be mounted, with all that that entails by way of sophisticated briefing, but important collateral evidence from different disciplines will have to be gathered, employing the talents of many people, and the groundwork will have to be laid for the entrance of certain selected groups as amici in the litigation. For this purpose the Committee has already retained as its attorney Mr. Melvin Wulf, sometime national legal director of the A.C.L.U., now in private practice in New York City. Mr. Wulf was one of the lawyers in the pivotal Supreme Court case of Dombrowski v. Pfister, which, in 1965, opened the federal judiciary to many of the constitutional challenges to state statutes which are today quite common. He will represent the Committee as amicus curia should the Supreme Court accept the case. The attorney of record for the erstwhile defendant, now the respondent, is William Gardner of Buffalo, who, as a member of the Committtee, won both the Onofre and Uplinger cases.

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LEGAL REPORT - II

NEW JERSEY

Since March of 1982 this Committee has been confronted with an unusual situation in New Jersey. Scores of gay people have been given summonses in various highway rest areas for having their automobiles parked there without lights on. Dozens of others have been arrested for allegedly lewd conduct in those areas or in other locations. In addition to these two types of offences, which constituted the majority of cases, there have been summonses given or arrests made for a wide range of other petty offences, such as having a car in a rest area without its emergency brakes on, for trespassing, for loitering, and for refusing to produce driver's licence, registration, and insurance card to an officer requesting them. About six months ago, while the series of summonses and arrests were at their height, most of the rest areas in New Jersey were closed by the authorities on the ground that they were frequented by "undesirables."

Soon after the first cases arose, this Committee began to select a few of them for the purpose of challenging the indiscriminate issuance of summonses. The twenty defendants on whose behalf it intervened constituted only a small portion of the total number of cases involved. Some of these twenty defendants were faced with multiple charges. What follows is a brief account of the disposition of those cases in which the Committee was involved.

Motor Vehicle Code 39:3-62. Parking on a public highway at night without lights on. A total of 12 tickets were issued for this offence involving 5 different defendants. In

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NEW JERSEY (cont'd)

four of these cases, involving three different persons, the defendants were acquitted at their trials -- that is, by the municipal court -- on the ground that a rest area does not constitute a "highway" within the meaning of the statute. A fourth defendant was convicted at his trial, but the Committee appealed his conviction to the county court, where the case was dismissed before trial on motion of the county prosecutor. The remaining seven cases, involving three of the five defendants, have yet to be decided; the trial judge took them under advisement several months ago, after having requested formal briefing from both the defendants' attorney and the prosecutor.

Lewdness, 2C:14-4. From a substantive standpoint the most important cases have been those having to do with lewdness. All these cases involved conduct occurring at highway rest areas, in parking areas of shopping malls, in mall rest rooms, or in parks. There were twelve such cases involving the same number of defendants, three of whom were co-defendants. The Committee took on these cases because, in its judgment, the defendants involved had not, in the words of the statute under which they were charged, "known" or had not "reasonably expected" that their conduct was "likely to be observed by other non-consenting persons who would be affronted or alarmed." In short, the Committee concluded that, on the basis of the known facts, there was no legitimate case against these defendants. Equally important from the Committee's viewpoint was the fact that these were, to the Committee's knowledge, the first lewdness cases to come to trial anywhere in New Jersey since the enactment of the state's new penal code. Thus they provided the best evidence as to how the local judiciary was interpreting the lewdness provision of the code, section 2C:14-4, in the drafting of which the Committee had been directly involved.

Only two of the twelve defendants charged with lewdness were acquitted at their trial, and these two involved a single case in which they were co-defendants. The four other lewdness acquittals were all the result of reversals at the appellate level, which strongly suggests that, no matter how good a defence someone charged with lewdness may have, trial courts are very unlikely to acquit them. This appears to be due to the unwillingness of local magistrates to antagonize their own local

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police, who appear regularly in their court rooms and with whom they enjoy friendly personal relations. The situation is exacerbated by the fact that the police stations are usually in the same building as the court rooms.

One of the twelve defendants was convicted of lewdness under a local ordinance wider in scope than the state enactment. The Committee appealed his conviction and won an acquittal on the ground that the local ordinance had been pre-empted by the state statute, thus invalidating the ordinance as well as acquitting the defendant. Four others appealed their convictions at the instance of the Committee, and three of them won acquittals from appellate courts. One of the four had a co-defendant who was amongst the five who did not appeal. In overturning this defendant's conviction, the county court stated that, had the co-defendant appealed, he, too, would have been acquitted.

Even the one appeal in which the conviction was sustained did not represent a defeat for the Committee, since it did not appeal the case in the expectation of an acquittal. It appealed -- and stood most of the cost of the appeal -- because the trial judge had rested his decision -- at least in part -- on the fact that one of the two arresting officers had, allegedly, been affronted by defendant's conduct. The Committee could not permit this holding to go unchallenged. On appeal, whilst affirming the conviction, the appellate court specifically reversed that portion of the trial judge's ruling which had rested on the affront and disgust felt by the one arresting officer. The appellate court held that, regardless of any sense of outrage on the part of that arresting officer, unless the defendant knew or reasonably should have expected that the officer was a non-consenting person who would be affronted or alarmed, there could be no offence. Since it was precisely to establish this point that the Committee had instigated the appeal, this case, too, must be considered a Committee victory despite the affirmance of the conviction.

Loitering The loitering case which occurred at a rest area involved a local loitering ordinance. The case was dismissed before trial on motion of the local

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prosecutor in the light of a recent state Supreme Court ruling that all local loitering ordinances had been preëmpted. In this instance the ordinance was preëmpted not because it conflicting with an existing state statute, but because it contravened state policy as manifested by the absence of any state enactment on the subject. (Local ordinances can be preëmpted not only when they contravene existing state laws, but when they are contrary to state policy, which is determinable either by the existence of state statutes inconsistent with the ordinances or by the absence of any state laws on the subject.)

Trespassing This involved a California resident who was arrested, handcuffed, and then jailed for trespassing in a "no trespassing" zone of a rest area. After his release on bail, he left for California and was not present at his trial, at which he was found guilty, as expected. The Committee incurred no expense in this case. (It should be noted that the penalties for trespassing have been drastically increased under the new New Jersey penal code. Whereas under the old trespassing law the maximum penalty for trespassing was a fine of $50.00 -- no imprisonment -- and New Jersey residents arrested for the offence could be released without bond on their own recognizance, the penalty under the present code can run as high as $500.00 and imprisonment for thirty days.)

The remaining case in which the Committee was involved concerned a defendant in a rest area charged with refusing to produce his licence, registration and insurence card on demand of a police officer; also with refusing to sign his name at the request of the officer and with interfering with him. Defendant was acquitted in municipal court of the three charges involving licence, registration, and insurance, but convicted of the last two. These were appealed by the Committee and acquittals obtained from the county court.

As already indicated, the cases instanced above were but a small portion of the total number in which state police harassed or abused persons whom they believed were gay. Not untypical was the case of a college teacher from New

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York who was given a summons for having dirty licence plates while parked at a rest area. Regrettably, he had already pleaded guilty and had paid the fine before his case came to the Committee's attention. The Committee's purpose in entering as many of these cases as it could has been to document the wide-spread harassment and thus to prepare a foundation for an eventual confrontation with the appropriate state authorities, either in court or administratively. In this connection, legal action has already been initiated in the form of a civil action against certain state troopers in state chancery court under section 1983 of the Federal Code. Plaintiffs are several of the twenty defendants whose cases have been discussed. They are suing for damages because of the multiple number of summonses which they have been given without any warrant and because of the physical assault upon one of their number by an officer. The case has already resulted in a request from the state's attorney-general office for a discussion of various problems with the Committee.

A word about the cost of this extensive litigation. Had the Committee not become involved in these cases, most of these defendants would have passively pleaded guilty, and, in the case of the traffic offences, would have paid their small fines without even appearing in court. Faced as they were with fines of no more than $25.00 or $50.00, none of them could have been expected to retain attorneys at a minimum cost of some $250.00 to contest their cases. Hence, if the Committee was to be able to put a stop to the rampant police abuses, it had to shoulder most of the legal expenses of the traffic cases. However, since only one or two offences were involved, the legal work for most of these cases -- which was all handled by the Committee's New Jersey attorney -- was virtually the same and the costs were commensurately low. This was not entirely true of the lewdness cases, although there, too, the legal preparation for one served as the basis for most of the others. However, several of the defendants charged with lewdness had been prepared to hire attorneys of their own, or were encouraged to fight their cases by the Committee. The result was that, in most of the lewdness cases, the Committee arranged to have the defendants share the attorney's fees with the Committee. The most expensive litigation will be the one which the Committee itself has mounted against the state police.

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There, however, the $1,500 cost will be shared equally with the state chapter of the A.C.L.U.