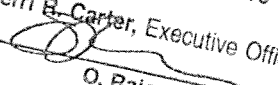


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Superior Court of California
County of Los Angeles

APR 29 2016

Sherri B. Carter, Executive Officer/Clerk
By:  Deputy
O. Raigoza

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff,)
)
v.)
)
RORY MORONEY,)
)
Defendant.)
)

Case No. 4LG03026
Statement of Decision on Defense Motion to Dismiss for Discriminatory Prosecution

I. Introduction

The defendant has moved this court to dismiss the charges against him, alleging that the Long Beach Police Department has engaged in an unlawful practice of discriminatory prosecution against men who engage in homosexual sex,¹ and that he would not have otherwise faced criminal charges but for this practice.

A. Case History

The evidentiary hearing on the motion was conducted over a six day period, where the court heard testimony from eight witnesses and received 35 exhibits. Members of the Long

¹ The court has chosen to characterize the cognizable group in question as “men who engage in homosexual sex,” as opposed to “homosexuals,” in order to include all men who seek out and participate in sex acts with other men, regardless of how they identify themselves to others.

1 Beach Police Department testified to the department's policies and procedures governing the
2 investigation of lewd conduct and the circumstances surrounding several specific investigations
3 conducted in the two years leading up to and including the defendant's arrest. An expert witness
4 provided insights into aspects of gay culture and common methods employed in the social
5 practice of cruising.² The court also took testimony from a defense attorney who practiced in the
6 jurisdiction and a defense investigator. Lastly, the court heard from the defendant himself.

7 The exhibits reviewed by the court included the police reports detailing the lewd conduct
8 investigations discussed in testimony, diagrams and photos of the location where the
9 investigations took place, a written guide to cruising, Long Beach Police Department training
10 materials and policies, and official department complaint logs and records.

11 Upon the close of evidence, the hearing was recessed for one day for counsel to prepare
12 final arguments on the motion. The court has taken the matter under submission for 14 days,
13 considering the evidence and arguments presented, as well as the points and authorities,
14 declarations, attachments, and exhibits contained in the moving papers and responses.³ The
15 court is now prepared to deliver its decision.

16 B. Procedural History

17 The defendant was arrested by the Long Beach Police Department on October 15, 2014
18 for an incident that occurred in a public restroom at Recreation Park in the City of Long Beach,
19 California. He posted a \$10,000 bond and was arraigned on a criminal complaint alleging one
20 count of indecent exposure in violation of Penal Code section 314.1 and one count of lewd
21 conduct in violation of Penal Code section 647(a). On November 5, 2015, his attorney entered
22 pleas of not guilty on his behalf and the matter was set for pretrial. On December 4, 2014, the
23

24 ² The term "cruising" is a term of art discussed in the testimony. It applies to the behaviors associated with men
25 who seek out, identify, and initiate anonymous sexual interaction with other men in a public setting.

26 ³ The defense filed a written request to have the court consider the reasoning of the Court of Appeal in the
27 unpublished case of *Baluyut v. Superior Court*, 37 Cal.Rptr.2d 741. The court declined the request and did not read
28 or consider any portion of the decision in the case.

1 defense received all requested discovery and a settlement offer from the People and the matter
2 was continued for further pretrial. On January 15, 2015, the defense formally rejected the
3 People's settlement offer and the matter was set for jury trial.

4 On February 9, 2015, Bruce Nickerson substituted in as the attorney of record for the
5 defense, filing an informal request for discovery of Long Beach Police Department records and
6 policies pertaining to lewd conduct complaints, investigations, and arrests. The People objected
7 to the request on relevance grounds and the matter was set for a formal discovery hearing on
8 March 12, 2015. At the hearing, the court granted the defense request in part, ordering the
9 People to provide all Long Beach Police Department arrest reports, citizen complaints, policies,
10 and training records related to lewd conduct investigations from January 1, 2013 to October 15,
11 2014. Discovery was provided on July 27, 2015. On September 1, 2015, the defense filed a
12 motion for further discovery and dismissal due to extensive redactions to the original discovery
13 provided by the People. On October 2, 2015, the court ordered the People to provide the
14 discovery without redaction and continued the motion to dismiss. After several more
15 continuances of the motion to dismiss and supplemental filings by the parties, the court
16 conducted an evidentiary hearing from April 8, 2016 through April 14, 2016, hearing final
17 arguments on the motion on April 15, 2016.

18 II. Factual Background

19 A. Summary of Evidence

20 1. Defense witnesses

21 Sergeant Eric Hooker

22 Sergeant Hooker spent six of his 22 years with the Long Beach Police Department as a
23 supervisor for the Vice detail, conducting investigations for lewd conduct and prostitution. In
24 the past two years, he made 20 arrests for lewd conduct. Although the department received
25 complaints about lewd conduct involving men and women at various parks and beaches within
26 the city, none of the undercover investigations conducted by his detail occurred in those
27 locations. Instead, Vice focused all of its undercover investigations on the public men's
28 restrooms located at Recreation Park, Junipero Beach Park, and Hartwell Park. All undercover

1 investigations involved male officers targeting suspected lewd conduct between men. All
2 arrestees in those investigations were men seeking sex with other men. None of the undercover
3 investigations targeted women or men seeking sexual interaction with women. While Sergeant
4 Hooker was not personally aware of any specific citizen complaints about lewd conduct in the
5 men's restroom at Recreation Park,⁴ he believed that the location had a reputation for lewd
6 conduct activity. As a matter of department policy, none of the undercover investigations
7 involved police officer decoys⁵ nor could they be characterized as sting operations.⁶
8 Additionally, the Vice detail chose not to use recording devices during these investigations,
9 asserting privacy concerns.

10 Officer Raymond Arcala

11 Officer Arcala arrested the defendant for indecent exposure and lewd conduct allegedly
12 occurring in the men's restroom at Recreation Park on October 15, 2014. He arrived at the park
13 in plain clothes, parking his car on the street in front of the restroom. After sitting in the car for a
14 few minutes, he observed the defendant enter the restroom. Approximately one minute later, he
15 entered the restroom and observed the defendant washing his hands at the sink. He went into the
16 fourth stall and stood facing the toilet, holding his hands near his belt buckle, under his shirt, as if
17

18 ⁴ Sergeant Hooker testified that the Vice detail received its citizen complaint information from calls to their
19 secretary, emails from the public, calls for service, and from other divisions within the department. While the
20 complaint log admitted into evidence as Defense Exhibit I contained no complaints of lewd conduct in the men's
21 restroom at Recreation Park, the calls for service log attached to the defense declaration filed on September 1, 2015
22 listed four complaints of indecent exposure at Recreation Park between the dates of January 1, 2013 and October 15,
23 2014. However, it is unknown whether any of the calls related to conduct by men in the men's restroom area of the
24 park or whether any suspects were identified.

25 ⁵ As defined by Sergeant Hooker, an undercover officer is only a decoy when he is an active participant in the
26 interaction with a suspect, rather than solely an observer.

27 ⁶ As defined by Sergeant Hooker, a sting operation involves pre-planning and organization on the part of the
28 undercover officer and his team.

1 he were urinating. He observed the defendant walk to the second stall, retrieve toilet paper from
2 the dispenser, dry his hands, and walk toward the exit. He heard the defendant approach, and
3 turned to face him. He saw the defendant looking at him from three to four feet away, then he
4 turned back toward the toilet that he was pretending to use. He saw the defendant walk toward
5 the exit then turn around and return to his location. As Officer Arcala turned around, he saw the
6 defendant put his hand down his pants for three to five seconds, smile at him, and pull his penis
7 out of his shorts, masturbating for six to seven seconds. He then walked away from the
8 defendant and gave his team a signal to arrest him. He testified that the entire interaction
9 between himself and the defendant took no more than 30 to 60 seconds. Officer Arcala also
10 testified that the defendant was not in an area of the restroom that would have been visible from
11 the outside during the incident due to a vestibule located at the entry of the restroom. Of the
12 estimated 12 lewd conduct investigations in which he participated over approximately one and
13 one half years, all occurred in the men's restrooms at Recreation Park and Hartwell Park.

14 Officer Eduardo De la Torre

15 Officer De la Torre spent five of his 16 years with the Long Beach Police Department on
16 the Vice detail. Each of the approximately 30 lewd conduct arrests he made in the past five
17 years while working undercover were of men in the men's restrooms located at Recreation Park,
18 Hartwell Park, Junipero Beach and Granada Beach. He never arrested a woman for lewd
19 conduct. He was not aware of any specific complaints for lewd conduct in any public restroom.
20 Officer De la Torre testified about four separate undercover investigations in the men's restroom
21 at Recreation Park. In one incident involving two suspects, Officer De la Torre was greeted by
22 the first suspect in a stall next to the one he was pretending to use. The suspect pointed to an
23 adjoining stall and raised his eyebrows in an up and down motion. Officer De la Torre nodded
24 his head in return. The suspect then began to masturbate in front of his stall while a second
25 suspect also began to masturbate. The second suspect reached for Officer De la Torre's penis,
26 asking to see it. Both suspects were arrested. In another incident, Officer De la Torre observed
27 the suspect using the toilet in a stall adjacent to the one he was pretending to use. The suspect
28 smiled at him, attempted to look over a dividing wall that separated the two stalls, and started

1 masturbating before being arrested. In the third incident, Officer De la Torre saw the suspect
2 pretending to use the toilet in his stall as he did the same. The suspect raised his eyebrows at
3 him and started to masturbate under his pants. Officer De la Torre watched the suspect
4 masturbate for approximately 45 seconds, waiting to see if he would expose his penis, making
5 him liable for indecent exposure. When the suspect did not, he was arrested for lewd conduct.
6 In the last incident, Officer De la Torre entered the restroom with Officer Kevin Ong. The facts
7 of this incident will be discussed below.

8 John Duran

9 As a criminal defense attorney, John Duran represented over 1,000 clients accused of
10 lewd conduct in Los Angeles and Orange counties. Some of the cases involved investigations by
11 the Long Beach Police Department. Of the cases involving undercover investigations, all of the
12 suspects and undercover officers were men.

13 Detective Kevin Ong

14 Detective Ong spent one and one half of his 26 years with the Long Beach Police
15 Department working on the Vice detail. None of the five to six arrests he made for lewd conduct
16 involved female suspects. Detective Ong testified about three undercover investigations in the
17 men's restroom at Recreation Park. In the first incident, Detective Ong entered the men's
18 restroom with Officer De la Torre, each taking a position in a toilet stall, simulating urination.
19 Detective Ong glanced over at the suspect in an adjacent stall. The suspect then approached
20 Detective Ong's stall. Detective Ong turned around to face the suspect. The suspect began to
21 masturbate before being arrested. In the next incident, Detective Ong watched a male enter and
22 exit the restroom multiple times from his position in his parked car. He entered the restroom and
23 took a position in a vacant stall, pretending to urinate. He stood in this position for five minutes
24 as several people entered and exited the restroom. Eventually, another male individual entered
25 the restroom and stood in an adjacent stall. The suspect did not appear to use the toilet.
26 Detective Ong and the suspect looked at each other and Detective Ong nodded at him. Detective
27 Ong backed out of his stall and peered into the suspect's stall. The suspect stood with his hands
28 in his pockets. Detective Ong left the restroom, returning five minutes later. He looked into

1 each of the stalls and observed two suspects engaged in oral sex. He watched the suspects for
2 approximately 30 seconds before arresting them. In the last incident, Detective Ong parked
3 outside the restroom for five minutes before entering. He and the suspect stood in adjacent stalls
4 for approximately two minutes, neither using the toilet. Detective Ong observed the suspect to
5 be moving his shoulders and making a spitting sound. The suspect looked over at Detective Ong
6 who nodded back at him. The suspect backed out of his stall, stepped to the side, and
7 masturbated in front of Detective Ong for approximately five seconds before being arrested.

8 Michael Buitron

9 AIDS educator Michael Buitron testified as an expert in the cruising phenomenon within
10 gay culture. His research and community work in five cities, including the City of Long Beach,
11 gave him firsthand knowledge of the behaviors exhibited by men in public sex environments. He
12 described these environments as being divided into three zones: the safety zone, where
13 individuals can watch cruising activity from a safe vantage point in order to distinguish potential
14 players⁷ from non-players; the posturing zone, where players engage in various forms of
15 signaling activity⁸ in order to safely determine whether other players are open to sexual
16 interaction; and the activity zone, where players engage in mutually desired sexual conduct free
17 from the view of non-players. The boundaries of each of these zones is contextual, depending on
18 the layout of the specific location, time of day, and the potential vantage points of others in the
19
20
21
22

23 ⁷ Mr. Buitron used the term "player" to describe a male individual who actively seeks out other men for anonymous
24 sex within the context of cruising.

25 ⁸ As described in the testimony, this signaling activity is akin to a form of flirting. It is usually non-verbal,
26 involving gestures that would only carry meaning to other players who would respond in kind, such as loitering,
27 head nods, smiles, prolonged eye contact, and other behaviors that would be highly unusual to be exhibited by
28 people present at the location for its intended use.

1 area. The primary goal of these general cruising protocols is to facilitate consensual sexual
2 interaction among players in a safe, pseudo private,⁹ anonymous way.

3 Mr. Buitron reviewed all of the arrest reports in evidence and commented on the
4 investigative practices of the undercover officers that mimicked cruising behaviors. The
5 undercover officers were all men. All went to the men's restroom at Recreation Park in order to
6 investigate lewd conduct, citing complaints of lewd conduct activity at the location. The officers
7 made their initial observations from parked cars, close to the entrance of the restroom, in full
8 view of others in the area. Upon entry into the restroom, the officers took a position within one
9 of four stalls, placing their hands in front of their waist, pretending to urinate. The officers held
10 this position anywhere from a few seconds to as long as five minutes. Officers exchanged head
11 nods, glances, and eye contact with potential suspects. One actually moved from his initial
12 position in order to look into the stall occupied by the suspect. Mr. Buitron posited that the
13 officers engaged in these behaviors, universally recognized within the cruising world, in order to
14 signal consent to potential suspects. All of these behaviors were present in varying degrees prior
15 to the occurrence of alleged criminal conduct on the part of the suspects.

16 Mr. Buitron also testified to a personal experience he had in this area, being arrested for
17 masturbating in front of an undercover Long Beach Police officer while cruising in an adult
18 bookstore theater. In that case, the undercover officer made eye contact with Mr. Buitron, sat
19 next to him, and simulated masturbation under his clothes. When Mr. Buitron began to
20 masturbate, he was arrested, charged with lewd conduct, and tried but not convicted.

21 Rebekah Moore

22 Rebekah Moore was a private investigator employed by the defense. She measured the
23 distance between the Recreation Park restroom and the closest part of the Wilson High School
24 campus, the baseball field, to be 77 yards. The baseball field had no lights. The closest lit field
25 on the Wilson High School campus, the football field, was one block farther than the baseball
26

27 ⁹ While cruising activity, by definition, takes place in spaces open to the public, a certain degree of isolation is
28 required to promote the safety and anonymity of the players who participate.

1 field. She also testified to several anecdotes in which she observed lewd conduct between
2 heterosexual couples in public spaces in the City of Long Beach, sometimes reporting it to the
3 police but never seeing a police response.

4 Rory Moroney

5 Rory Moroney testified to the circumstances surrounding his arrest for indecent exposure
6 and lewd conduct on October 15, 2014. He went to Recreation Park that day to do office work at
7 a park bench near the men's restroom. He entered the restroom, urinated, and washed his hands.
8 He saw Officer Arcala walk into the restroom. They made eye contact as they passed each other.
9 Officer Arcala stood in the fourth stall, known by Mr. Moroney to be a popular stall for cruising
10 due to its larger size and greater privacy. Officer Arcala did not make sounds associated with
11 urination, also a significant sign to Mr. Moroney indicating a potential cruising opportunity. Mr.
12 Moroney lingered in the restroom and dried his hands for an excessive period of time in order to
13 see how Officer Arcala would respond. Officer Arcala made eye contact with him again. Mr.
14 Moroney and Officer Arcala exchanged smiles. Mr. Moroney took these signals and the fact that
15 Officer Arcala had still not urinated to mean that Officer Arcala was also cruising. Mr. Moroney
16 continued posturing by returning to the sink area and then the third stall. Officer Arcala looked
17 at Mr. Moroney before the two exchanged smiles again. Mr. Moroney backed out of his stall so
18 he could see into Officer Arcala's stall. He noticed that Officer Arcala had his hands in front of
19 his waist leading him to believe that he might have his penis exposed. Officer Arcala turned and
20 looked at him. Mr. Moroney touched the crotch area of his shorts with his hand. Officer Arcala
21 continued to look at him in a friendly way. Mr. Moroney put his hand down his pants as Officer
22 Arcala made eye contact with him, smiled, and looked at his crotch. Mr. Moroney pulled down
23 the waistband of his shorts with his free hand, exposing his penis as he smiled at Officer Arcala.
24 Officer Arcala turned away and left, leaving Mr. Moroney feeling rejected and confused.
25 According to Mr. Moroney, the entire incident in the restroom lasted between two and three
26 minutes.

1 B. Prosecution Position

2 1. Factual Position

3 The People deny that the Long Beach Police Department intentionally targets men who
4 engage in homosexual sex for lewd conduct investigations. The department's undercover
5 operations are conducted in public men's restrooms in the City of Long Beach as a direct
6 response to citizen complaints. Arrests made during these investigations are of male suspects
7 because women are never present in those locations. At no time do the investigators engage in
8 any behaviors that are intended to encourage the commission of lewd conduct in their presence.

9 2. Legal Position

10 According to the prosecution, the evidence does not establish the intentional
11 discriminatory prosecution of men who engage in homosexual sex by the Long Beach Police
12 Department. As such, the defendant's equal protection rights have not been violated. In the
13 alternative, the People argue that any discriminatory prosecution of men who engage in
14 homosexual sex for lewd conduct is justified by the compelling interest in responding to citizen
15 complaints.

16 IV. Applicable Law

17 All citizens are guaranteed the right of equal protection under the law pursuant to the
18 Fourteenth Amendment of the United States Constitution and Article I, section 7, subdivision (a)
19 of the Constitution of the State of California. This right is violated when the government
20 prosecutes an individual based on an unjustifiable, arbitrary classification. *Oyler v. Boles*, 368
21 U.S. 448, 456; *Wayte v. United States*, 470 U.S. 598, 608. If the defendant can establish by a
22 preponderance of the evidence that: (1) he has been deliberately singled out for prosecution on
23 the basis of some invidious criterion; and (2) that the prosecution would not have been pursued
24 except for the discriminatory design of the prosecuting authorities, then the prosecution must
25 "collapse upon the sands of prejudice" and the defendant may successfully move the court to
26 dismiss the charges against him at a pretrial hearing before the court. *Murgia v. Municipal*
27 *Court*, 15 Cal. 3d 286, 293, fn. 4; *People v. Gray*, 254 Cal. App. 2d 256, 267. If not, then the
28 presumption that the government has exercised reasonable selectivity in enforcement as part of

1 its broad discretion as to when and how to initiate a prosecution will be upheld. *Oyler, supra*,
2 368 U.S. 448 at p. 456; *Wayte, supra*, 470 U.S. 598 at p. 607 citing *United States v. Goodwin*,
3 457 U.S. 368, 380. The prosecution may also defeat the motion by showing that any
4 discrimination in prosecution is narrowly tailored to achieving a compelling state interest in the
5 selective enforcement practiced by the authorities. *McLaughlin v. Florida*, 379 U.S. 184, 196;
6 *Murgia, supra*, 15 Cal. 3d 286 at p. 303, fn. 14.

7 V. Discussion and Analysis

8 A. Factual Findings

9 The Long Beach Police Department enforces lewd conduct¹⁰ differently depending on
10 whether the suspects are men who engage in homosexual sex. According to the official policy of
11 the department, the Vice detail is given the primary responsibility for the abatement of lewd
12 conduct. Investigators are directed to concentrate their activities in locations that have been the
13 source of citizen complaints. Despite the department's acknowledgement that lewd conduct
14 involves both heterosexual¹¹ and homosexual activity, the Vice detail conducts all of its
15 undercover investigations with male officers in locations where only male suspects seeking
16 sexual encounters with other men would be found, explaining why all of the arrests for lewd
17 conduct made by the Vice detail during its undercover investigations were of men who engage in
18 homosexual sex.

19 The claim that this investigative focus is driven by complaints is unsupported by the
20 evidence, especially as it relates to Recreation Park, where the defendant was arrested. A review
21 of the Vice Section Complaint Log admitted into evidence reveals only three complaints of lewd
22

23 ¹⁰ While lewd conduct, as described in Penal Code section 647(a) and indecent exposure, as described in Penal Code
24 section 314.1, are distinct crimes, their enforcement has the same primary purpose of protecting onlookers who
25 might be offended by the proscribed conduct. *Pryor v. Municipal Court*, 25 Cal. 3d 238, 255-256. As such, the two
26 crimes are joined together under the label of "lewd conduct" for the purposes of this discussion.

27 ¹¹ According to Sergeant Hooker, lewd conduct complaints involving heterosexual couples are handled individually
28 as calls for service by patrol officers, rather than by undercover investigations.

1 conduct in a public restroom, the one located at Junipero Beach, between December 11, 2012
2 and August 6, 2014. Only one of these complaints specified that the activity was occurring in
3 the men's restroom. There is no evidence of any citizen complaints of lewd conduct in any other
4 men's restroom in the City of Long Beach. Additionally, none of the witnesses who testified
5 were aware of any citizen complaints of lewd conduct alleged to have occurred in the men's
6 restroom at Recreation Park, notwithstanding the fact that every police report discussed in
7 evidence cited complaints of lewd conduct as a basis for conducting undercover investigations at
8 that location.

9 The way in which the Long Beach Police Department conducted lewd conduct
10 investigations demonstrated that it intentionally targeted men who engage in homosexual sex.
11 Although the officers who testified made a point of stating in their testimony and in their reports
12 that they only acted as neutral observers while undercover, the facts suggest otherwise. Using
13 the definitions provided by Sergeant Hooker, it is evident that each undercover officer acted as a
14 decoy as part of a sting operation designed to specifically target the defendant and other men like
15 him who engage in homosexual sex. Each of the undercover officers intentionally engaged in
16 conduct designed to communicate receptiveness to the sexual advances of their targets. They
17 made their initial observations while parked in a car in front of the restroom entrance inasmuch
18 of an effort to see as to be seen. Upon entering the restroom, they assumed the same stance in
19 front of the toilet for an extended period of time, pretending to urinate, thereby communicating
20 to their targets that they were there for a purpose other than to use the restroom. They engaged
21 in repeated non-verbal communication with their targets, including head nodding, smiling,
22 exchanging glances, and prolonged eye contact, all of which would be highly unusual for a
23 person intending to use the restroom for normal purposes.¹² This behavior, akin to flirting in the
24 cruising world, was intentionally utilized by the officers in order to gain the confidence of their
25 targets. Predictably, this interaction immediately preceded the activity leading to the suspects'
26 arrests.

27
28 ¹² Officer Ong went so far as to step away from his stall and to peer into the adjacent stall of a potential target.

1 These types of exchanges were also present in the events that led up to the defendant's
2 arrest. To the extent that the defendant's testimony and Officer Arcala's version are at odds, the
3 court finds the defendant to be more credible. The defendant and Officer Arcala both engaged in
4 the type of incremental gesturing typical of cruising behavior. Officer Arcala was so convincing
5 in conveying his interest that the defendant's initial reaction to Officer Arcala walking away
6 from him after he exposed his penis was the feeling of rejection and confusion. The defendant,
7 like others who engage in cruising, went to great lengths to send and to read the signals being
8 exchanged with the undercover officer. Such is not just a matter of sexual satisfaction, but
9 primarily of safety. Men who engage in cruising risk serious physical harm if they make overt
10 sexual advances to other men who are not open to receiving them. This is why the subtle cues
11 that are the hallmark of cruising are of the kind that would be reciprocated by other players but
12 ignored by non-players, ensuring that the only people present to witness any sexual behavior
13 associated with cruising would be willing participants and observers--or undercover officers. It
14 is, therefore, no surprise that there have been so many arrests for lewd conduct by undercover
15 officers, and so few complaints of citizens witnessing lewd activity unwillingly. In the case of
16 the men's restroom at Recreation Park, there have been no complaints at all.

17 Finally, the court finds that the conduct of the Long Beach Police Department is
18 indicative of animus toward homosexuals.¹³ In addition to the targeting of men who engage in
19 homosexual sex, the undercover officers who participated in the lewd conduct investigations at
20 Recreation Park all included the same misleading information in their reports. Each of the
21 reports began with the same boilerplate recitation of inaccurate information. Specifically, each
22 report contained the claim of citizen complaints of lewd conduct despite the fact that none of the
23 officers were aware of any such complaints, nor did departmental records substantiate this claim

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25
26 ¹³ While specific intent to punish is not required to establish a claim of discriminatory prosecution, animus toward a
27 group singled out for selective enforcement bolsters the position that the discrimination in question was intentional.
28 *Baluyut v. Superior Court*, 12 Cal. 4th 826, 829-830.

1 as it related to Recreation Park.¹⁴ In addition, each report made mention of the alleged proximity
2 of Recreation Park to Wilson High School, despite the fact that the school was nearly a football
3 field away from the Recreation Park men's restroom and that none of the reports contained any
4 reference to students from that school being present anywhere near the public restroom at the
5 time of the investigations. In fact, even the reports for investigations occurring at night, after
6 school hours, included the same language about Wilson High School. The court sees no
7 legitimate reason to include this reference to the school other than to inflame the passions of the
8 reader of the reports. Indeed, Officer Ong testified that the language regarding Wilson High
9 School was included in his reports per his training. Lastly, in each of the reports, the undercover
10 officer asserted that he made no suggestive movements. However, as previously discussed, the
11 evidence suggests otherwise. The conduct of the undercover officers was intentionally and
12 consistently suggestive, ensuring that suspects seeking cruising opportunities would identify the
13 officers as potential sexual partners. On one such occasion, Officer De la Torre even watched
14 his target masturbate for 45 seconds before arresting him.¹⁵ The evidence gives rise to a strong
15 inference that the Long Beach Police Department harbored animus toward homosexuals in its
16 undercover investigations of lewd conduct.

17 B. Legal Findings

18 The government may not pursue the discriminatory prosecution of men who engage in
19 homosexual sex without running afoul of the equal protection clauses of the United States and
20

21 ¹⁴ Sergeant Hooker testified that he believed the men's restroom at Recreation Park to have a reputation for lewd
22 conduct, though he provided no information regarding the source of the reputation or how he became aware of it.

23 ¹⁵ Officer De la Torre testified that he allowed the suspect to masturbate under his clothes for such a prolonged
24 period of time because he wanted to see if he would expose his penis, making him liable for the more serious charge
25 of indecent exposure--a charge carrying the requirement of registering as a sex offender for life. It is difficult to
26 imagine another circumstance in which an officer would allow a crime in progress to continue with the hope of a
27 more serious crime being committed. It would be like an officer watching a battery in progress and allowing it to
28 continue so that he might be able to make an arrest for homicide.

1 California Constitutions. *Baluyut, supra*, 12 Cal. 4th at p. 831. In the instant case, the defendant
2 has established by a preponderance of the evidence that: (1) he has been deliberately singled out
3 for prosecution on the basis of his sexuality; and (2) that the prosecution would not have been
4 pursued except for the discriminatory design of the prosecuting authorities. By utilizing
5 undercover officer decoys in a pre-planned, lewd conduct sting operation designed to ensnare
6 men who engage in homosexual sex without any relationship to citizen complaints of lewd
7 conduct at Recreation Park, the Long Beach Police Department has demonstrated its intent to
8 discriminate against the defendant and other members of this group. The defendant would not
9 have been prosecuted except for this invidious discrimination.

10 The prosecution's position that the discriminatory practices of the Long Beach Police
11 Department are narrowly tailored to addressing a compelling interest in the abatement of lewd
12 conduct is without merit. There has been no evidence presented of any citizen complaints of
13 lewd conduct in the men's restroom at Recreation Park. In fact, given that the crime of lewd
14 conduct requires the presence of another person who may reasonably be offended by the
15 conduct, it appears that the presence and tactics of the decoy officers actually caused the crimes
16 to occur, since the only people who witnessed any lewd conduct on the part of the defendant or
17 other targeted individuals were either willing participants or the officers themselves. As stated by
18 the California Supreme Court, "even if conduct occurs in a location that is technically a public
19 place, a place open to the public, or one exposed to public view, the state has little interest in
20 prohibiting that conduct if there are no persons present who may be offended." *Pryor, supra*, 25
21 Cal. 3d 238 at p. 256. The notion of the undercover officers being offended by the conduct that
22 they encouraged and explicitly sought to observe is bizarre.

23 The only other way the prosecution could justify the discriminatory prosecution in this
24 case would be to show that the singled out group, men who engage in homosexual sex, constitute
25 a "criminal organization" or "gang of lawbreakers" with certain "criminal proclivities." *Murgia,*
26 *supra*, 15 Cal. 3d 286 at 303, fn. 14. This position only finds support in the rhetoric of
27 homophobia that seeks to portray homosexual men as sexual deviants and pedophiles. To the
28 extent that the Long Beach Police Department has tried to appeal to this view by gratuitously

1 referencing school children in the reports of their lewd conduct investigations, the court rejects it
2 wholeheartedly.

3 VI. Conclusion

4 This court takes no position on how the Long Beach Police Department allocates its
5 resources in the service of public safety. If the abatement of lewd conduct is made a priority,
6 then the court has no issue with that decision. As stated by the California Supreme Court in the
7 *Murgia* case, "the doctrine [of discriminatory prosecution] imposes absolutely no impediment to
8 legitimate law enforcement operations, for it does not insulate particular lawbreakers from
9 prosecution, but simply requires that the authorities enforce the laws evenhandedly." It is this
10 principle of equal treatment that is the cornerstone of our Constitutional democracy, the glue that
11 binds the disparate components of society together. Our commitment to it is a necessary
12 precondition to achieving a fair and pluralistic society. Too often in our history has an unpopular
13 group been made to bear the brunt of discriminatory tactics by law enforcement. The fact that
14 members of these groups might be vulnerable to abuse requires the law to be a shield rather than
15 a bludgeon. The arbitrary enforcement of the law as seen in this case undermines the credibility
16 of our legal system, eroding public confidence in our ability to achieve just results. This court is
17 determined to do its part to prevent this from occurring. In recognition of the well-established
18 legal principles discussed herein, the court is compelled to grant the defense motion to dismiss
19 for discriminatory prosecution.

20
21 DATED: April 29, 2016



22 HALIM DHANIDINA
23 Judge of the Superior Court

24 **THE DOCUMENT TO WHICH THIS CERTIFICATE IS**
25 **ATTACHED IS A FULL, TRUE, AND CORRECT COPY**
26 **OF THE ORIGINAL ON FILE AND OF RECORD IN**
27 **MY OFFICE.**

28 ATTEST 04/29/16

SHERRI R. CARTER

Executiva Officer/Clerk of the Superior
Court of California, County of Los Angeles.

BY  DEPUTY

