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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CRUZ

(Appellate Division)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,/Respondents,

vs.

GARY ALLEN JOHNSON,

Defendant/Appellant.

Case No.AP 001625
(Trial Court No. M 54857)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs/Respondents,

vs.

EDWIN AUGUSTUS FREY,

Defendant/Appellant.

Case No. AP 001626
(Trial Court No.M55606)

APPELLANTS' JOINT OPENING BRIEF

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I. INTRODUCTION

During a period of several weeks in the Summer of 2010 Appellants Gary Johnson and Ed Frey, along with many others, engaged in the most peaceful form of protest possible, sleeping, on the threshold of government power, during night-time traditional sleeping hours only. There was no evidence that Appellants victimized anyone, that they obstructed anyone's free passage or that they caused any property damage. They provided their own outhouse.

They carried out these activities on property which the trial court judicially noticed as being areas traditionally used as public forums and protest sites. CT 37, 66. For the first 33 days at the County Courthouse the Sheriffs and the Police left all the protesters alone, sleepers and non-sleepers alike.

Their cause for protest was the Government's treatment of homeless people: Sending out peace officers in the middle of the night to breach the peace by waking up sleeping people who are not bothering anyone, threatening them with jail, citing them for criminal violations of law and ordering them to move along and take their worldly possessions with them, all at a time when there is no shelter space for 90% of homeless people locally and the law insists that there is not one square inch in the entire State of California where a person without a roof over her head can sleep and be legal. Having to hide to sleep is dangerous.

Prior police testimony is that the interests of finance and commerce drive this policy. There are constant reports that many peace officers have a severe distaste for this duty assignment.

This is elevating the value of property rights over the whole panoply of other rights, indeed, over the right to life itself. As we can say about many of the policy arrangements in our political economy, this harassment is a slow-motion death sentence.

Despite the harmlessness of Appellants' activities, they

were accused and convicted of "unlawful lodging" under Penal Code sec. 647(e). In an over-reaction to Appellants' protest activities the trial court judge (1) summarily rejected all Appellants' constitutional challenges, (2) guided the jury to guilty verdicts, especially by providing an arbitrary definition of "Unlawful Lodging", thereby contradicting his earlier ruling denying the obvious vagueness of the statute, and (3) sentenced The Appellants to six months jail each, setting the bail at $50,000.00 each in case they appealed their convictions.

This comprehensive violation of constitutional sensibilities came to pass as the judge faithfully adhered to the current practice of excluding basic considerations of human decency and ethics from the judicial process, a practice that continues to render the process more dysfunctional and illegitimate, particularly in the realm of victimless crime. Ignoring his earlier pronouncement as to the utmost importance of showing respect to all people, he overthrew all sane and humane values, as demonstrated in the argument and evidence below. RT 1780:4-9.

II. LEGAL DISCUSSION

A. De Novo Review Required

The standard on appeal of a constitutional challenge is *de novo* review.

B. The Ninth Amendment to the United States Constitution and Its California Analogue Provision Protect the Right to Sleep Even If The Sleeper Has No Traditional Cognizable Property Right In His Sleep Site

The Drafters of the Bill of Rights had the wisdom to foresee that their express listing of certain rights might cause future readers to argue that, "Well, if it's not in the Bill of Rights, then it doesn't exist." See generally, RETAINED BY THE PEOPLE: The Silent Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (Basic Books, 2007) by Daniel A. Farber, a copy of which will be lodged with the Clerk.

Doubtless the Drafters felt it would be foolish and undignified to list the right to breathe in the Bill of Rights, or the right to blow one's nose, or the right to defecate, or the right to sleep. For these reasons they inserted the following words:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Ninth Amendment, U.S. Constitution.

In the course of debate on the Ninth Amendment, Congressman Theodore Sedgwick said: "If the committee were governed by that general principle (that all rights had to be enumerated), they might have gone into a very lengthy enumeration of rights; they might have declared that a man shoud have a right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper." THE BILL OF RIGHTS IN MODERN AMERICA: After 200 Years, by David J. Bodenhamer and James W. Ely (Indiana University Press, 1993), p. 182.

Courts are not free to ignore this pre-eminently authoritative and transparent legislative history supporting the proposition that Government has no power to interfere with a person's need and right to sleep, so long as the sleeper is not interfering with the rights of others. This is particularly so for courts in California, where (1) we have our own version of the Ninth Amendment at Article I, sec. 24 of the California Constitution, and (2) We have the explicit judicial recognition of the fact that "Sleep is a physiological need, not an option for humans. It is common knowledge that loss of sleep produces a host of physical and mental problems ..."

Nor are the courts free to disregard the principle of unenumerated rights merely because appellate court judges have generally failed to apply it. What counts are the words of the Constitution, not the silence or the pronouncements of appellate judges. Interpreting and applying the text of the Constitution is "the very essence of judicial power." Marbury v. Madison (1803) 5 U.S. (i Cranch) 137, 176.

In light of the trial judge's (1) protective treatment of the

"unlawful lodging" statute, and (2) wholesale rejection of Appellants' constitutional claims, the simple proposition bears repeating, that "A statute does not trump the Constitution." Peo. v. Ortiz (1995) 32 Cal App.4th 286, 292. Another way to put it is that fundamental rights can not be legislated away.

The present appellate court is obligated to explicitly decide, Yes, the Ninth Amendment protects sleep, or No, it does not, and forthrightly state its reasoning in writing for all to see and evaluate. The Constitutions belong to everyone, after all.

The Deputy District Attorney, adopting the trial court's earlier erroneous statement, argued to the jury that the Appellants were seeking the right to "sleep wherever they want ..." RT 1385:15.

Appellants contend that, since the Ninth Amendment and its California analogue provision protect their right to sleep outside, the State must either designate a reasonable location on public property, or accept the sleeper's choice of public property, so long as it does not interfere with anyone else's rights. Professor Jeremy Waldron said it well: "No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location." 39 U.C.L.A. L.Rev. 295, 296 (1991).

A homeless person's choice to designate a public park as his residence for voter-registration purposes was upheld in Walters v Weed (1988) 45 Cal.3d 1. As the court there said, "Everybody belongs somewhere." Id., at p. 7. The opinion cites Government Code sec. 243, which states that "Every person has, in law, a residence." (Emphasis added), and sec. 244 (the place of residence for a person who lacks a physical abode "is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.").

Rights protected by the Ninth Amendment can not be made to depend upon the popular will, and for good reason; Professor Waldron captures the prevailing public attitude: "Now one question we face as a society -- a broad question of justice and social policy -- is whether we are willing to tolerate an economic system in which large numbers of people are homeless. Since the answer is evidently, 'Yes,' the question that remains is whether we are willing to allow those

who are in this predicament to act as free agents, looking after their own needs in public places -- the only space available to them. It is a deeply frightening fact about the modern United States that those who HAVE homes and jobs are willing to answer'Yes" to the first question and 'No' to the second." Waldron, supra, p. 304. (Capitalized emphasis in original).

The evidence indicates that there is only one shelter space in Santa Cruz County for every ten or twenty homeless residents. (RT 1099 - 1102; 1269 - 1270). Further, even if there were a space available for every homeless person, the Government has no power to (1) force people to gather inside together and be involuntarily exposed to disease and undesirable company, or (2) force people to sleep only during the shelter's designated hours. These types of restrictions violate our freedom of association and ignore Congressman Sedgwick's warning against Government telling us when we can go to bed and when we must wake up.

The trial court expressed its opinion (at the unrecorded hearing on Appellants' motion to dismiss) that the Ninth Amendment protects only political rights, not personal or private rights. This is erroneous. As Justice Goldberg said in affirming the right to use contraceptive devices: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our peiple' to determine whether a principle is 'so rooted there ... as to be ranked as fundamental.' The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'..." This is a rare and ringing judicial endorsement of the Ninth Amendment's sweeping reservation of rights in the people. Griswold v. Connecticut (1965) 381 U.S. 479, 493, 496, 14 L.Ed.2d 510, 520 (emphasis added).

Further, as stated in Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 65 L.Ed.2d 973, 991, "Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns

expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." (Emphasis added).

The Ninth Amendment clearly defeats the notion that the Government has the power to forbid a person from sleeping merely because she lacks a pre-existing property right in her sleeping-site. The authors of the Bill of Rights would be outraged by the degradation of the law that this foolishly-applied lodging statute has wrought. To hold that an innate human, physiological and psychological need can be smothered in order to honor this notion of property rights would rankle the conscience of nearly every person who has access to a physical abode and thus takes her right to sleep for granted. And tipping this hateful Government policy over into the realm of the cruelly psychotic is the (quite common) use of a blanket or sleeping bag as an element and evidence of the crime.

C. The Enumerated Rights of the California Constitution Protect the Appellants' Right to Sleep on Public Property When it Does Not Interfere With Anyone else

The enumerated federal Bill of Rights pales in comparison with Article I, section 1 of the California Constitution. This broad declaration of rights expressly includes (1) the right to enjoy life, (2) the right to defend life, (3) the right to pursue liberty, (4) the right to defend liberty, (5) the right to pursue safety, (6) the right to obtain safety, (7) the right to pursue happiness, (8) the right to obtain happiness, (9) the right to pursue privacy, and (10) the right to obtain privacy.

Further, Article I, sec. 24 states the obvious: "Rights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution."No court has ever tested Penal Code sec. 647(e) against these broad and generous protections. In view of the absolutely crucial role that sleeping plays in allowing a person to live, thrive and survive, however, it is beyond debate that every one of these enumerated protections renders

invalid the police power to wake up and punish innocent sleepers on public property.

The express rights in Article I, sec. 1 are more than a set of noble sentiments: They are binding upon every court in the State. They require the court to examine the bedrock principles on which our Governments are founded, and invoke the spirit expressed by Mr. Justice Harlan in I.C.C. v. Brimson (1894) 143 U.S. 447, 479, 38 L.Ed. 1047, 1058: "The principles that embody the essence of constitutional liberty and security forbid all invasions on the part of government and its employees of the sanctity of a man's home and the privacies of his life."

Sleeping is the activity that not only restores a person physiologically, it also provides the crucial activity of dreaming and all the psychological and spiritual processes that accompany our sleeping and dreaming. It is wholly inappropriate for the State to destroy these eminently private and personal phenomena. As Mr. Justice Brandeis said in Olmstead v. United States (1928) 277 U.S. 438, 478, 72 L.Ed. 944, 956: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." As is clear from this passage, the right to privacy is supported by the right to be free from unreasonable search and seizure. Is it not tyrannical for the State to crush all these express rights where, as here, there is no countervailing compelling state interest to serve?

It would be intolerable for this appellate court to disregard these explicit protections, sweep them under the rug, without explaining how it is that our noble system of laws can provide the express inalienable right to "pursue and obtain" safety, happiness

and privacy as it blithely approves the rousting of the untouchables among us. The citizens of this State deserve such an explanation. Justice cries out to hear the rationale. This court must not ignore its responsibility to provide it.

D. APPELLANTS' FREEDOM OF SPEECH AND FREEDOM OF ASSEMBLY ARE VIOLATED BY THIS PROSECUTION

Appellants clear and singular intention was to gather together and publicly protest the ban against sleeping outdoors. (RT 1079, 1084-1089, 1282-1284).

Both sites of their protest, the County Courthouse and City Hall, are traditionally devoted to political speech, demonstrations and protest. The trial court took judicial notice of that fact. CT 37, 66 (all references to the Clerk's Transcript are to that prepared for Appellant Frey). When the protests began at each site, no signs were posted prohibiting entry or usage of the grounds at any time of the day or night. (RT 539:11-14; 1050:6-11).

The content of their speech was expressed by their conduct, which consisted mainly of sleeping. As stated in Clark v. Community For Creative Non-Violence (1984) 468 U.S. 288, 293, 82 L.Ed.2d 221, 226-227: "Overnight sleeping in connection with the demonstration is expressive conduct ..." (Emphasis added).

The power of Government to limit access to government land for people seeking to engage in expressive activity depends upon the nature of the forum. Cornelius v. N.A.A.C.P.L.D.E.F. (1986) 473 U.S. 788, 800. Four categories of forum are recognized: (1) a traditional public forum -- government property which by long tradition or government fiat has been devoted to assembly and debate; (2) A designated public forum; (3) A limited public forum; and (4) A non-public forum.

Government restrictions on expressive activities taking place in either of the first two categories of forum are subject to strict scrutiny. Pleasant Grove City v. Summum (2009) 555 U.S. 460, 469-470. "The proper analysis for a challenge to an ordinance that

restricts speech is whether the restriction is a valid time, place and manner restriction on speech." Klein v. San Diego County (9th Cir., 2006) 463 Fed.3d 1029, 1034.

The evidence shows that the Appellants' protest sleeping activity took place only during the hours of 8:00 P.M. to 8:00 A.M. the next morning, and did not disrupt any person or public business access or activity. (RT 1293). The Sheriff's deputies admitted that non-sleepers on the scene were left alone because, according to the deputies' understanding, the non-sleepers had every right to be there. (RT 777-778; 815). The County agent in charge of the grounds admitted that "This is a public place and that people have a right to protest here and that's what they were doing and that was certainly appropriate." (RT 901:6-8; 902:3-9).

The central restriction placed on the Appellants' activities was against the act of sleeping, i.e., a restriction upon the "manner" of protesting. The other protesters who were merely sitting, standing or holding a sign were not cited or arrested. Thus one form of protesting is allowed, but another is prohibited. This constitutes an impermissible content-based exclusion, a clear violation of the First Amendment. Perry Educ. Assn. v. Perry Local Educ. Council, etc. (1983) 460 U.S. 37, 45.

Further, the sleepers, by being arrested, were prohibited from joining with their fellow protesters (who were not sleeping). Thus the Appellants' freedom of assembly was also violated.

The First Amendment permits none of this Government trampling upon these most basic of rights.

E. The Anti-Lodging Statute is Void for Vagueness

The "Unlawful Lodging" statute criminalizes the act of anyone who "lodges" without permission in any "place", whether "public or private" anywhere in the State of California. This all-inclusive prohibition is vague, particularly so because the verb "lodge" is not defined or explained in the statute. No reading of the actual terms of the statute provides the reader with any guidepost by which to avoid criminal behavior.

Further, as a result of the vagueness the police are free to engage in arbitrary and discriminatory enforcement activities. The statute is therefore void for vagueness, on its face. Papachristou v. City of Jacksonville (1972) 405 U.S. 156, 31 L.Ed.2d 110; People v. Heitzman (1994) 9 Cal.4th 189, 199. See, generally, Vol 1, WITKIN & EPSTEIN: CALIFORNIA CRIMINAL LAW: Introduction to Crimes, sections 40 ff.

The lodging statute is part of the pattern of broad historical prohibitions against "vagrancy", "loitering", and poor people generally. The purpose of these "Poor Laws" has always been to keep social and economic control over the lives and movements of the poor and laboring classes. Papachristou, at 161-162. The need to avoid arbitrary police action is particularly acute where, as here, their target is a demonized class: Poor people who have no physical abode.

The void-for-vagueness doctrine seeks to avoid two evils, generally (a third is also identified below): First, the challenged statute must give fair notice of the act to be avoided -- it obviously violates due process to impose criminal liability if the defendant cannot understand by a fair reading of the statute what is and what is not prohibited. Secondly, the statute must provide reasonably adequate standards to guide law enforcement officers in order to avoid abusive and arbitrary practices. Kolender v. Lawson (19830 461 U.S. 352, 357, 75 L.Ed.2d 903, 909. There the court struck down former Penal Code sec. 647(e) (loitering). The present statute fails both tests.

How can a person know if she is "lodging"? The term implies the existence of a contract or lease or other arrangement with a landlord or innkeeper. As the court states in Roberts v. Casey (1939) 36 Cal.App.2d Supp. 767, 774, if one is a lodger, then she has "a personal contract".

Under CCP sec. 1959, a "lodger" is a person who "hires real property." Under Civil Code sec. 1940(a) a "lodger" is someone who "hires" a "dwelling unit", and under sec. 1940(c) a "dwelling unit" is a "structure or the part of the structure that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household."

A lodger is a "mere licensee". Edwards v. City of Los Angeles (1941) 48 Cal.App.2d 62, 67. In Stowe v. Fritzie Hotels, Inc. (1954) 44 Cal.2d 416, 421, the court distinguished between a "tenant" and a "lodger", stating that a tenant has exclusive legal possession of real property and is responsible for its care, whereas a lodger has merely the right to use the property.

Under Civil Code sections 1946 and 1946.5 a lodger is a person "hiring a room ... on a periodic basis within a dwelling unit occupied by the owner ..." and can only be summarily removed following a minimum of seven days' written notice. Thus all these California authorities give the impression that one is only a lodger, lawful or unlawful, if she has previously entered into some contractual arrangement with the owner, usually to occupy a physical structure.

Further, the notice requirements set out above are merely part of a whole panoply of statutory due process protections afforded to occupants (including "lodgers") of real property, which provide minimal assurance that they will not be charged or ousted by the police before they have their day in court. It is unlikely the Legislature intended to overthrow such protections for large numbers of real property occupants by employing the kind of meat-ax approach used by the police enforcing Penal Code sec.647(e). In the instant case neither the statute nor the accusatory pleading makes any reference to a contract, a hiring, a license, a notice to vacate (the police-drafted notice delivered an hour prior to arrest does not qualify as any valid notice), or any other indices of "lodging" as defined under express California law.

It follows that a person reading all the available law on the subject of lodging in California would not be reasonably informed by the text of the "Unlawful Lodging" statute that she was prohibited from sleeping on the courthouse grounds.

Prior to trial Appellants made their Motion to Dismiss the Penal Code sec.647(e)charges, based in part on this vagueness. (CT 19-22). The trial court rejected this argument without comment. Before turning the case over to the jury, however, the court came to the conclusion that the jury would not know what the term "lodging" means, and, over Appellants' strong objections, gave a definition-

instruction that dovetailed perfectly with the standard used against the Appellants by the police and sheriffs: Lodging means sleeping. (RT 1379:9-10).

If the Legislature had intended to prohibit the act of sleeping, they could have used the word "sleep" in the statute. This is particularly relevant here, because the California statutes and cases, as demonstrated above, are replete with the verb "lodge", but none of these authorities equate "lodge" with "sleep".

Uncertainty in the law is particularly objectionable where, as here, the defendant's act is not improper or immoral. Bouie v. City of Columbia (1964) 378 U.S. 347, 362, 122 L.Ed.2d 894 (sit-down protests at lunch counters). Further, the standards for certainty in a criminal statute are more exacting than for a civil statute. Bd. of Equalization v. Wirick (2001) 93 Cal.App.4th 411, 420. And why did the authorities not choose to charge Appellants with trespassing if that's what they thought was going on? Perhaps the decision had to do with the lack of any signs keeping people off the grounds, and perhaps it had to do with the express statutory protections in the trespass statute for First Amendment activity?

Finally, a third factor to consider in vagueness claims: Over-breadth. As the court states in Snatchko v. Westfield, LLC (2010) 187 Cal.App.4th 469, 494, "a vague law may have a chilling effect causing people to steer a wider course than necessary in order to avoid the strictures of the law." The overbreadth consideration is particularly important where, as here, as in Snatchko, First Amendment rights are threatened by the challenged statute or rule.

The statute challenged in the instant case is so dangerously vague that it is void on its face.

F. The International Covenant on Civil and Political Rights Grants the Appellants the Right to Sleep on Public Property So Long As They Do Not Interfere With the Rights Of Others

The United States Supreme Court insists that the opinions

of humankind generally must be respected in our courts, especially as those views are expressed in international treaties or covenants, whether those treaties and covenants are ratified by the United States Senate or not. Graham v. Florida (2010) 560 U.S. ___, 176 L.Ed. 2d 825; Roper v. Simmons (2005) 543 U.S. 551, 575.

Thus where a Covenant has been ratified, as with the International Covenant On Civil and Political Rights, (Ratified April 2, 1992), it becomes part of the "Supreme law of the land" and has the force and effect of law in our country.

Appellants will lodge a copy of the ICCPR with the Clerk. It protects the right to life (Art. 6.4), the right to be free from degrading, inhuman and cruel treatment by Government (Art. 7), the freedom to choose one's residence (Art. 12), the right to privacy (Art. 17), the right of peaceful assembly (Art. 21). freedom of association (Art. 22), and freedom from discrimination based on one's status (Art. 26).

These carry the force of law and must be enforced by all courts in the United States. Each of these provisions invalidates the Appellants' convictions in this case.

G. The Six-Month Sentences Are Cruel and Unusual Punishment

The inference seems inescapable that the trial court felt mortally threatened by what it must have perceived as inexcusable temerity on the part of Appellants in daring to bring their protest against the glaring injustice of a complete Government ban on sleeping to the very doorstep of the justice system.

Regardless of the thoughts and emotions of the trial judge, however, the six-month sentences are cruel and unusual, and must be stricken.

III. CONCLUSION

For all the reasons set out above, the Unlawful Lodging statute is void on its face and must be declared so, and the

Appellants' convictions must be set aside.

Dated: Feb. 2, 2012
Respectfully submitted,

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