

Documents:  
Condoms as Evidence  
San Francisco Task Force  
on Prostitution

from  
Final Report March 1996

[Condoms As Evidence of Prostitution]

1 URGING THE MAYOR TO URGE THE DISTRICT ATTORNEY AND THE POLICE  
2 COMMISSION TO NO LONGER CONFISCATE AND/OR ALTER OR USE THE FACT  
3 OF CONDOM POSSESSION FOR INVESTIGATIVE OR COURT EVIDENCE IN  
4 PROSTITUTION-RELATED OFFENSES.  
5

6 WHEREAS, The California Health and Safety Code, Section 24800 states that  
7 every person charged with the performance of any duty under the laws of this state  
8 relating to the preservation of the public health, must perform the same; and

9 WHEREAS, pursuant to this law and in response to the AIDS pandemic, the City  
10 and County of San Francisco has declared a State of Emergency in San Francisco;  
11 and

12 WHEREAS, The State of Emergency calls for an agreement with the District  
13 Attorney to allow for the clean distribution of needles in an effort to end the further  
14 transmission of HIV and other diseases; and

15 WHEREAS, Simultaneously, a strong public health campaign has been waged  
16 to encourage all sexually active individuals, especially those with multiple partners, to  
17 always use condoms; and

18 WHEREAS, The transmission of AIDS through prostitution is apparently being  
19 contained by the conscientious use of condoms; and

20 WHEREAS, The District Attorney's practice of using possession of condoms as  
21 evidence in prostitution-related crimes discourages condom use; and

22 WHEREAS, Discouraging the use of condoms undermines the City's current  
23 policy and the labors of health practitioners, and counters the efforts behind the  
24 enactment of San Francisco's "State of Emergency"; and

25 HALLINAN, ALIOTO

1           WHEREAS, by the District Attorney's own admission, other evidence is readily  
2 available in seeking convictions in prostitution-related crimes; and

3           WHEREAS, The law enforcement value of condoms as indirect evidence of  
4 prostitution-related crime is exceeded by the AIDS prevention value of condoms; now,  
5 therefore, be it

6           RESOLVED, That the Board of Supervisors of the City and County of San  
7 Francisco hereby urges the Mayor to urge the District Attorney and the Police  
8 Commission to no longer confiscate and/or alter or use the fact of condom possession  
9 for investigative or court-evidence in prostitution-related offenses.

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REPLY TO

- SACRAMENTO ADDRESS  
ROOM 5035  
STATE CAPITOL  
95814  
PHONE (916) 445 1412  
FAX (916) 327 7229
- SAN FRANCISCO ADDRESS  
711 VAN NESS AVENUE  
SUITE 310  
94102  
PHONE (415) 474 0308  
FAX (415) 346 4009
- MARIN / SONOMA ADDRESS  
30 N SAN PEDRO ROAD  
SUITE 160  
SAN RAFAEL CA 94903  
PHONE (415) 479 6612  
FAX (415) 479 1146



# SENATOR MILTON MARKS

THIRD SENATORIAL DISTRICT

REPRESENTING  
SAN FRANCISCO · MARIN · SONOMA

## S e n a t e

CHAIR

Senate Majority Caucus

and

Senate Committee on Elections and Reapportionment

9 March 1994

- STANDING COMMITTEES  
ELECTIONS AND REAPPORTIONMENT (CHAIR)  
BUSINESS AND PROFESSIONS  
HOUSING AND URBAN AFFAIRS  
JUDICIARY  
NATURAL RESOURCES AND WILDLIFE
- SUBCOMMITTEES  
RIGHTS OF THE DISABLED (CHAIR)  
ADMINISTRATION OF JUSTICE  
OFFSHORE OIL AND GAS DEVELOPMENT
- SELECT COMMITTEES  
MARITIME INDUSTRY (CHAIR)  
VOTING PRACTICES AND PROCEDURES  
CALIFORNIA'S WINE INDUSTRY  
CITIZEN PARTICIPATION IN GOVERNMENT  
PACIFIC RIM  
DEFENSE BASE CLOSURES
- JOINT COMMITTEES  
ARTS  
FISHERIES AND AQUACULTURE  
LEGISLATIVE BUDGET COMMITTEE
- COMMISSIONS  
CALIFORNIA STATE GOVERNMENT  
ORGANIZATION AND ECONOMY  
STATUS OF WOMEN
- SPECIAL COMMITTEE  
DEVELOPMENTAL DISABILITIES AND  
MENTAL HEALTH

Arlo Smith, San Francisco District Attorney  
850 Bryant, Third Floor  
San Francisco, CA 94103

Dear Arlo:

I understand that the use, or the suggestion of the use, of a condom has become an excellent way of proving 'furtherance' of a crime of prostitution.

I also understand that the result of this has been a fear among street prostitutes of using condoms altogether. This is alarming to me, and should be alarming to all public health officials, as it runs directly counter to the work which we have achieved in the past 12 years of the AIDS pandemic.

I am therefore writing to urge that a new mechanism be developed in obtaining convictions.

Certainly there are other ways of proving illegal solicitation, as for example, open admission of engaging in an illegal commercial transaction.

Anything which discourages condom use ought not to be public policy, particularly in San Francisco. In fact, I encourage increased condom distribution. I am told that in the past there was a city-wide agreement between health workers and law enforcement that provided for uninhibited condom and bleach distribution. Since your office has begun using the presence of a condom as evidence for a conviction, prostitutes have become reluctant to take them from outreach workers. I encourage you, Chief Ribera and Dr. Hernandez to reinstate this agreement. Clearly, this is in the interest of all San Franciscans.

With best wishes,

Cordially,

MILTON MARKS

MM:cs  
cc:Dr. Sandra Hernandez  
cc:Chief Tony Ribera

## San Francisco Task Force on Prostitution

### RESOLUTION TO STOP THE CONFISCATION AND USE OF CONDOMS OR CONDOM POSSESSION AS COURT EVIDENCE IN PROSTITUTION RELATED OFFENSES

Passed May 10, 1994

"In response to the concerns of the Law and Fiscal Impact Committee, Health Committee and other health practitioners in California, in order to prevent the transmission of sexually transmitted diseases including HIV infection and unplanned pregnancies, the San Francisco Police department and the District attorney's Office shall no longer confiscate and/or alter or use the fact of condom possession for investigative or court evidence in prostitution-related offenses.

Condoms are recognized as effective against the spread of HIV. Health and safety education programs and materials are effective in encouraging condom use, and are available to the public at hospitals and health clinics, substance detoxification centers, AIDS treatment programs, community based organizations and on the streets. Various government funded agencies and other organizations hand out free condoms to encourage safe sex practices.

The use of condoms as a prevention measure to reduce the risk for HIV transmission is critically important. Use of condoms as evidence of prostitution-related crimes discourages safe sex practices and undermines the labors of other prevention efforts. The value of condoms in preventing sexually transmitted diseases including HIV, and unwanted pregnancy far outweighs their value as indirect evidence in prostitution related crimes."

March 31, 1994

Teri Goodson/SF NOW  
Laws and Local Enforcement/Fiscal Impact Committee Report

### Condoms as Court Evidence

Senator Marks' aide Carol Stewart has informed me that the Senator is concerned about the use of condoms as court evidence and he has contacted the AIDS office about this matter. Carol Stewart says the AIDS office (Dr. Swartz and Dr. Katz, Director), is interested in working on a memo of understanding between the AIDS office and the police department and/or on other local policy issues. Marsha Herring who represents the AIDS office on the Health, Safety and Services Committee has been told of the use of condoms as evidence, the alledged confiscations of them and harrassment for their possession as well as the unfinished memo of understanding. She said she would consult with Dr. Hernandez and report back to the Health Committee. I've also been in contact with the policy director at the SF AIDS Foundation and the Women's Caucus about these matters and they seem interested in helping.

### Mandatory Testing/AIDS Services in Prison

I left a message for Teri Jackson Asst. DA to verify and update stats on the number of 647f arrests and convictions. I have listed that in 1993 there were 17 cases of which over half were male, but no customers. I called the Offender Information Service with the Department of Corrections and left a message for Penny O'Daniel to determine the percentage of inmates incarcerated for 647f as well as demographic information such as race, age, sex. I would also like to know what percentage are serving time for pandering or pimping and what the circumstances were.

Dr. Kramer with the City Jail says that HIV results from tests requested by inmates are completely confidential and kept sepearate from court mandated tests, but at the Santa Rita jail, prostitutes are being discouraged from voluntary HIV testing by some health care providers for fear the results will be used against them later.

I spoke with Kevin May, AIDS Advisory Committee, Dept. of Corrections about the level of services available to inmates. He said that by June 1 a Peer Education Program would be in all the prisons. He said voluntary testing was available and pre/post test counseling. Kevin said HIV awareness is offered as part of the Life Skills Cirriculum in prison classes and that a pre-release class discusses HIV. He also said there were far fewer women with AIDS than men and that is why there is no hospice for women as there is for men at the Vacaville facility. No AIDS deaths in prison has been reported as far as he knows. I have left 2 messages for Crystal Mason of the SF AIDS Foundation for her input as she has done extenstive work in the prisons but have not heard from her. I am trying to find other contacts, because I have heard the level of services is very inadequate.

# DISTRICT ATTORNEY

ARLO SMITH  
DISTRICT ATTORNEY



ROBERT M. PODESTA  
CHIEF ASSISTANT  
DISTRICT ATTORNEY

## SAN FRANCISCO

880 BRYANT STREET, SAN FRANCISCO 94103 TEL. (415) 553-1752

September 6, 1994

The Honorable Sandra Hernandez  
Director of Public Health  
Department of Public Health  
City and County of San Francisco  
101 Grove Street  
San Francisco, CA 94102

Dear Ms. Hernandez:

We have reconsidered our utilization of condom evidence as the result of the public health concerns which have been expressed.

This policy has been under review for several months. We have sought information and statistics from other agencies to assist us in this policy review.

In the interest of public health in San Francisco, the District Attorney's Office will undertake -on a trial basis- to prove our 647(b) cases (prostitution cases) without producing condom evidence in those cases.

The San Francisco District Attorney's office has always been responsive to the health concerns of San Franciscans. Six years ago, the office initiated a policy of requesting that all condoms submitted as evidence in prostitution related offenses be photographed and returned to the arrested suspect rather than being confiscated.

For a conviction of Penal Code Section 647(b), the District Attorney's Office must prove the following: specific intent to engage in prostitution; soliciting a customer or agreeing to perform a sex act or lewd conduct with another and there must be an act of furtherance.

In some of our cases currently, condoms are needed as an element to prove the "act of furtherance" in order to prove the case.

Honorable Sandra Hernandez  
Director of Public Health

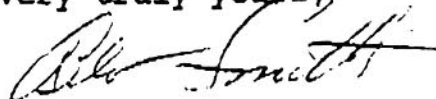
September 6, 1994  
Page Two

We will be working with the Police Department to develop other evidence to prove the "act of furtherance."

Prostitution is a serious public health issue and we intend to vigorously enforce the State laws. Prostitution not only affects the health of our community but is a serious quality of life issue in some of our neighborhoods.

With this new policy we are trying to balance public safety and public health.

Very truly yours,



ARLO SMITH  
District Attorney

AS/mc

cc: Honorable Frank Jordan, Mayor  
Board of Supervisors, John Taylor, Clerk



Condoms: Not Admissible to Prove Prostitution-Related Crimes

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add to Evidence Code.

- 1 §1108
- 2 Condom use, condom possession, displaying a condom or
- 3 referring to a condom is not admissible as evidence in
- 4 prosecutions of persons pursuant to Penal Code sections
- 5 647(b), 315, or 318.

PROPOSER: Criminal Justice Section of the San Francisco Bar Association

STATEMENT OF REASONS

Existing Law: Permits condom use, possession, referring to or displaying a condom to be used to prove the overt act element in prosecutions pursuant to Penal Code section 647(b) (solicitation), and as relevant evidence in prosecutions pursuant to Penal Code sections 315 (keeping or residing in house of ill fame) and 318 (prevailing upon person to visit place of prostitution).

This Resolution: Would prohibit prosecutors from using the fact of condom possession, use, referring to or displaying a condom to prove the overt act element in prosecutions pursuant to Penal Code section 647(b), and as relevant evidence in prosecutions pursuant to Penal Code sections 315 and 318.

The Problem: The Center for Disease Control and the World Health Organization have recognized that condoms are the most effective barrier against the spread of AIDS. Health and safety educational programs and materials are effective in encouraging condom use, and are available to the public at hospitals and health clinics, substance detoxification centers, AIDS treatment programs and foundations. The federal government, state and local health departments distribute funds to educate the public and encourage condom use. Certain local governments fund programs that distribute condoms directly to the public.

While the transmission of AIDS through prostitution is apparently being contained by the conscientious use of condoms, use of condoms as evidence of prostitution-related crimes discourages safe sex practices and undermines the labors of other agencies. The law enforcement value of condoms as indirect evidence of prostitution-related crimes is exceeded by their AIDS prevention value.

IMPACT STATEMENT

This proposed resolution affects Penal Code sections 647(b), 315, and 318. by prohibiting the fact of condom use or possession as evidence of the prostitution-related crimes contained within those statutes.

AUTHOR AND/OR PERMANENT CONTACT: Erin Crane, 819 Eddy Street, San Francisco, CA. 94109, 415/771-6174

RESPONSIBLE FLOOR DELEGATE: Criminal Justice Section Representative