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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL AGUAYO SANCHEZ, Defendant and Appellant.	H022692 (Santa Clara County Super. Ct. No. FF093025)

Defendant Michael Aguayo Sanchez raises a number of constitutional challenges to the condition of his probation requiring him to register with law enforcement pursuant to Penal Code sections 186.30 and 186.32,[1] the "gang registration" law. We find that the registration requirement is constitutional.

BACKGROUND

On October 27, 2000, Gilroy Police officers responded to a report of a fight in progress and found a victim bleeding from facial injuries. The victim's left eye was swollen shut and he had deep lacerations on his lips. The victim reported that defendant had approached him, yelled "Norte puto," and began punching him. Two witnesses corroborated the victim's account of the beating.

Defendant pled no contest to one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) and admitted that the assault was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

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[1] Further statutory references are to the Penal Code unless otherwise stated.

Defendant was granted probation upon certain terms and conditions, one of which was that he register with law enforcement pursuant to sections 186.30 and 186.32.

ISSUES ON APPEAL

Defendant contends that the gang registration provisions of sections 186.30 and 186.32, enacted following the passage of the Gang Violence and Juvenile Justice Initiative (Proposition 21), offend both the state and federal constitutions. Defendant argues that the registration requirements are (1) vague; (2) overbroad; (3) violate his right to privacy; (4) constitute unreasonable search and seizure; (5) violate his right to remain silent and the privilege against self-incrimination; (6) violate his right to counsel; and (7) constitute cruel and unusual punishment. Defendant also contends (8) that Proposition 21 violated the California Constitutional requirement of a single subject for initiatives.

In his supplemental briefing, defendant asks this court to correct a clerical error in the clerk's minutes relating to the conditions of probation.[2] The People concede the error. We shall order the superior court to make the correction.

DISCUSSION

Section 186.30 provides that any person convicted of participating in a criminal street gang (§ 186.22, subd. (a)), convicted of a crime that the court finds is gang related, or as to whom the gang enhancement of section 186.22 subdivision (b) has been found to be true, shall register with the local law enforcement agency. (§ 186.30, subd. (a).) Section 186.32 describes what the registration entails:

". . . (2) Adult registration shall include the following:[3]

"(A) The adult shall appear at the law enforcement agency.

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[2] The clerk's minutes reflect the condition that defendant not drive without a valid license and insurance. According to the transcript of the sentencing hearing, the trial court did not include such a restriction among the conditions of defendant's probation.

[3] The requirements for juveniles are identical except that the juvenile is to be accompanied by an adult when registering. (§ 186.32, subd. (a)(1).)

"(B) The law enforcement agency shall serve the adult with a California Street Terrorism Enforcement and Prevention Act notification which shall include, where applicable, that the adult belongs to a gang whose members engage in or have engaged in a pattern of criminal gang activity as described in subdivision (e) of Section 186.22.

"(C) A written statement, signed by the adult, giving *any information* that may be required by the law enforcement agency, shall be submitted to the law enforcement agency.

"(D) The fingerprints and current photograph of the adult shall be submitted to the law enforcement agency.

"(b) Within 10 days of changing his or her residence address, any person subject to Section 186.30 shall inform, in writing, the law enforcement agency with whom he or she last registered of his or her new address. . . .

"(c) All registration requirements set forth in this article shall terminate five years after the last imposition of a registration requirement pursuant to Section 186.30. . . ." (§ 186.32, subd. (a)(2), (b) & (c), italics added.)

1. Vagueness

Defendant contends that the written statement provision of section 186.32 subdivision (a)(2)(C) is impermissibly vague and thus violates his right to due process under the Fifth and 14th Amendments of the federal Constitution and article I, section 7, of the California Constitution. Defendant's challenge focuses on the requirement that he give *any information* that the law enforcement agency demands.

A penal statute is unconstitutionally vague if it does not define its requirements with sufficient precision that ordinary people can understand what those requirements are, or if it is expressed in a way that encourages arbitrary and discriminatory enforcement. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107.) However, we begin with the assumption that the statute is constitutional. (*Id.* at p. 1106.) If possible, we construe a statute in a manner that upholds its validity. (*In re Cregler* (1961)

56 Cal.2d 308, 312.) "A statute 'will not be given an interpretation in conflict with its clear purpose, and . . . general words used therein will be given a restricted meaning when reason and justice require it, rather than a literal meaning which would lead to an unjust and absurd consequence.' [Citations.]" (*Ibid*.) Thus, it is sometimes necessary to construe a statute more narrowly than its literal meaning in order to render it constitutional. (See *Boos v. Barry* (1988) 485 U.S. 312, 330.)

In construing a statue that has been challenged for uncertainty we first look to the purpose of the enactment. This is because unqualified terms or clauses, such as "any information," may acquire sufficient certainty when read in that context. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1107; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 569.) Second, we give the statute's language any reasonable and practical construction it can be given or refer to other definable sources to give its language reasonable certainty. (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1117.)

Proposition 21 was directed to the specific goal of minimizing the "significant threat to public safety and health" posed by criminal street gangs. (Voter Information Guide Primary Elec. (Mar. 7, 2000) Text of Prop. 21, § 2, subd. (b), p. 119.) Public safety issues have also been at the core of other registration statutes. In connection with those statutes it has been stated: "Registration requirements generally are based on the assumption that persons convicted of certain offenses are more likely to repeat the crimes and that law enforcement's ability to prevent certain crimes and its ability to apprehend certain types of criminals will be improved if these repeat offenders' whereabouts are known. (3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1416, p. 1678.) Accordingly, the Legislature has determined that sex offenders (Pen. Code, § 290), narcotics offenders (Health & Saf. Code, § 11590) and arsonists (Pen. Code, § 457.1) are likely to repeat their offenses and therefore are subject to registration requirements." (*People v. Adams* (1990) 224 Cal.App.3d 705, 710.) In connection with the sex offender

registration requirement the Supreme Court has consistently reiterated: " 'The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future.' " (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Without the ability to keep track of the whereabouts of convicted sex offenders, law enforcement would be frustrated and the statutory purpose of enhancing public safety would be thwarted. (*Ibid*.)

These other registration statutes contain language similar to the written statement requirement of section 186.32, subdivision (a)(2)(C). Section 290, subdivision (e)(2)(A) provides that a person required to register as a sex offender must make a signed statement "giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address." Health and Safety Code section 11594 states that a person who is required to register as a narcotics offender must provide a signed written statement "giving such information as may be required by the Department of Justice." Section 457.1, subdivision (f) provides that a person required to register as an arsonist must make a signed written statement "giving the information as may be required by the Department of Justice."

In light of the stated public safety purpose of Proposition 21, and consistent with the purpose of the other registration statutes found in the Penal and Health and Safety Codes, it is reasonable to presume that the written statement required by section 186.32 is intended to improve law enforcement's ability to prevent gang related crimes by keeping the agency informed of the registrants' whereabouts. The requirement may be upheld by limiting its construction in a way that achieves this public safety purpose. Accordingly, we read the requirement that the registrant give "any information" (§ 186.32, subd. (a)(1)(C) & (a)(2)(C)) to mean that the registrant must provide information from which the law enforcement agency can locate him or her. Such information would include the

person's full name, any aliases or gang monikers or change of name, the person's date of birth, residence address, description and license plate number of any vehicle the person owns or drives, and information regarding the person's employment or school. With this limiting construction the written statement requirement is not unconstitutionally vague because it provides sufficiently certain notice to the registrant of what information will be required. The limitation also limits law enforcement discretion and consequently defeats the argument that the requirement is subject to arbitrary or discriminatory enforcement.

2. Overbreadth

Defendant complains that the requirement that he give "any" information is overbroad because it invades his First Amendment rights to freedom of speech and association, presumably because it requires that he register his associations. He also argues that the five-year registration requirement of section 186.32, subdivision (c) is overbroad because the registration period extends beyond his three-year probation.

"The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' (*NAACP v. Alabama* (1964) 377 U.S. 288, 307.)" (*Williams v. Garcetti*, *supra,* 5 Cal.4th at p. 577.)

The written statement requirement of section 186.32 does not implicate defendant's freedom to associate. Given our construction of the statute, there is no requirement that defendant list his associates. Moreover, the right to associate is not an absolute right. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623.) "[O]ur cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious

activities." (*Bd. of Dirs. of Rotary Int'l v. Rotary Club* (1987) 481 U.S. 537, 544.) But freedom of association " 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights,' " such as associating with criminal street gangs. (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1112.) Criminal street gangs are not associations of persons formed for the purpose of engaging in protected speech or religious activity. Nor do they constitute the type of intimate or familial associations that have been accorded constitutional protection. Therefore, to the extent defendant's claim concerns his association with criminal street gang members, there is no basis for the claim. (*Id*. at p. 1111.)

Defendant's freedom of speech contention is that under the statute he is required to go to the police station and, once there, "he is obligated to answer *all* questions put forth by the law enforcement agency." Given our construction of the statute, the information defendant will be required to provide is only that which will help law enforcement keep track of his whereabouts. The statute, as so construed, is not unnecessarily broad.

3. Privacy[4]

Defendant also claims that the gang registration requirement violates his right to privacy guaranteed by the California Constitution, article I, section 1. Once again, he bases his argument on law enforcement's "wholesale collection of information." Since we have construed the statute to require only identifying and locating information, we need not discuss this contention.

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[4] Defendant's counsel did not object to the gang registration order on either privacy or unreasonable search and seizure grounds. "[T]he objection/waiver rule is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below. [Citation.]" (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.) As our review of these issues is such a pure question of law, we consider the merits of the arguments.

4. Unreasonable Searches and Seizures

Next, defendant states that the registration requirements of sections 186.30 and 186.32 violate his right to be free of unreasonable searches and seizures pursuant to the Fourth Amendment of the United States Constitution and article I, section 13 of the California Constitution. According to defendant, the registration requirement compels him "to proceed to the law enforcement agency and subject himself to fingerprinting, photographing (not unlike the booking process), and undetermined and unlimited questioning by law enforcement in a custodial setting. He is not free to leave and he is not free to refuse to answer questions. He has effectively been seized without a warrant and without probable cause."

The core issue in any Fourth Amendment analysis is the reasonableness of the search or seizure under the circumstances of the governmental intrusion upon the citizen's personal security. (*Maryland v. Wilson* (1997) 519 U.S. 408, 411.) Disabilities experienced by convicted felons under California law, such as the registration requirement imposed here, serve vital public interests. (*People v. Ansell* (2001) 25 Cal.4th 868, 888.) The United States Supreme Court has upheld the reasonableness of such laws even where they implicate the fundamental rights and conduct of convicted felons. (See *Richardson v. Ramirez* (1974) 418 U.S. 24, 41-56 [upholding state laws permanently depriving convicted felons of the right to vote]; *De Veau v. Braisted* (1960) 363 U.S. 144, 151-160, [enforcing a state statute prohibiting convicted felons from holding office in labor organizations]; *Hawker v. New York* (1898) 170 U.S. 189, 192-200 [applying a state statute barring convicted felons from practicing medicine].) Our state Supreme Court has emphasized that the restrictions are imposed, not as punishment for past crimes, but as a " 'relevant incident' " to some other present regulatory purpose. (*People v. Ansell, supra,* 25 Cal.4th at p. 888.)

The gang registration requirement is similar to other types of restrictions imposed for the purpose of protecting the public. Defendant must register with law enforcement

once and report again only if he changes his residence. The procedure is not custodial because the registrant chooses when to come to the police station and is free to leave at any time. The requirement expires altogether after five years. The registration requirement was only imposed following defendant's conviction for assault and his admission that he committed the offense for the benefit of a criminal street gang. And, as construed herein, the statute seeks no more from the defendant than that which is necessary to achieve its public safety purpose. Weighed against the governmental interest in protecting the public, the requirements of sections 186.30 and 186.32 do not constitute unreasonable search or seizure.

5. Right to Remain Silent

Next, defendant contends that the gang registration requirement violates his right to remain silent under the Fifth Amendment of the United States Constitution and article I, section 24, of the California Constitution. He claims gang registrants "find themselves firmly impaled upon the horns of a dilemma. To force an individual to choose one of any number of unpalatable alternatives (such as between one's Fifth Amendment right to remain silent, or becoming an informant against one's will, or being subject to retaliation, to name just three) runs counter to our historic aversion to cruelty reflected in the privilege against self-incrimination."

The Fifth Amendment privilege against self-incrimination protects an accused from being forced to reveal his knowledge of facts relating him to a criminal offense. (*Doe v. United States* (1988) 487 U.S. 201, 213.) But defendant may only invoke the privilege if he is confronted by a substantial and " 'real' " hazard of incrimination. (*Marchetti v. United States* (1968) 390 U.S. 39, 53.) If section 186.32, subdivision (a)(1)(C) is construed as we have discussed, i.e., to permit only solicitation of information that will assist law enforcement in identifying and locating the registrant, a law enforcement officer taking the registration would not expect to elicit an incriminating response. (*People v. Hall* (1988) 199 Cal.App.3d 914, 921.) Any hazard of

incrimination is speculative, at best, and insufficient to implicate defendant's right to remain silent. (See *Marchetti v. United States*, *supra*, 390 U.S. at p. 53.)

6. Right to Counsel

Defendant asserts that he is entitled to the assistance of counsel during the registration procedure. The purpose of the Sixth Amendment right to counsel is to " 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177-178.) The right also attaches at critical pretrial phases of a criminal proceeding. (*Massiah v. United States* (1964) 377 U.S. 201, 204-206 [pre-indictment lineup].) Until the right to counsel attaches, there can be no violation. (*People v. Wader* (1993) 5 Cal.4th 610, 636.) Since the registration procedure of section 186.32 does not contemplate that on the day it occurs criminal proceedings will have commenced against the registrant in an identifiable prosecution, or that he will be subject to a pre-indictment lineup, there is no prospective right to counsel.

7. Cruel and Unusual Punishment

Next, defendant declares that the registration requirement of sections 186.30 and 186.32 violates the Eighth Amendment to the United States Constitution and article I, section 17, of the California Constitution, both of which prohibit the imposition of cruel and unusual punishment. The threshold determination in either case is whether the government action constitutes "punishment." Relying upon *In re Reed* (1983) 33 Cal.3d 914 (*Reed*), defendant presumes that it does.[5]

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[5] We note that the California Supreme Court has granted review in two cases involving the issue of whether a registration requirement constitutes "punishment" for purposes of the California Constitution. (*In re Walter S.* (S099120) [§ 186.30-gang offender registration] and *Alva on Habeas Corpus* (S098928) [§ 290-sex offender registration].) Review was granted in both cases on September 19, 2001.

There is presently some confusion as to the proper test to apply in determining whether a statute constitutes "punishment" within the meaning of the cruel and unusual punishment prohibitions of the state and federal constitutions. In *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 (*Mendoza-Martinez*), the United States Supreme Court used the following factors to decide whether a civil penalty (denationalization for draft evasion) was actually punishment for purposes of the Fifth and Sixth Amendments: "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment--retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." (*Id* at pp. 168-169, footnotes omitted.) *Reed, supra,* applied these factors in concluding that the lifetime sex offender registration required by section 290 was a form of punishment within the meaning of article I, section 17, of the California Constitution. (*Reed*, *supra*, 33 Cal.3d at pp. 920-922.)

In *Austin v. United States* (1993) 509 U.S. 602 (*Austin*) the Court concluded that civil forfeiture penalties could be a form of punishment within the meaning of the excessive fines clause of the Eighth Amendment. *Austin* pointed out that the concept of punishment under the Eighth Amendment was broader than that encompassed by the *Mendoza-Martinez* analysis. (*Id*. at p. 610, fn. 6.) *Austin* took a categorical approach to the question and held that the proper test for Eighth Amendment "excessive fines" claims was to determine whether the law "can only be explained as serving in part to punish." (*Id*. at p. 610.) If the law was entirely remedial it would not be considered punishment. (*Ibid*.)

People v. Castellanos (1999) 21 Cal.4th 785 (*Castellanos*), upon which the People herein rely, held more recently that for purposes of ex post facto analysis, the sex

offender registration requirement of section 290 was not "punishment." The court was evenly divided on the appropriate analysis (with Justice Mosk dissenting). The lead opinion conceded that the United States Supreme Court analyzed the issue differently depending upon the context in which the question arose but that two factors were common to all cases: "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*Castellanos*, *supra*, 21 Cal.4th at p. 795.) The lead opinion chose to analyze the issue based upon these two factors.

We need not settle upon any one analysis because whether we apply the fact-based test that *Reed* used, the "intent and effect" test adopted by *Castellanos*, or the broad categorical approach of *Austin*, the gang registration requirement does not reveal itself as a form of punishment.

Historically, registration statutes were not regarded as punishment. (*Reed*, *supra*, 33 Cal.3d at p. 921; *Wright v. Superior Court*, *supra*, 15 Cal.4th at p. 527 [sex offender registration is "regulatory in nature"]; *Castellanos*, *supra*, 21 Cal.4th at p. 804 [opn. of Kennard, J., conc. & diss.] [government registration, at least in the abstract and apart from public shaming, has not been regarded as a punishment].) An examination of the intent of Proposition 21 leads to the conclusion that the registration requirement enacted pursuant to that initiative was likewise not intended to punish the registrant. Sections 1 and 2 of Proposition 21, provide in pertinent part:

"SECTION 1. SHORT TITLE.

"This act shall be known, and may be cited, as the Gang Violence and Juvenile Crime Prevention Act of 1998.

"SEC. 2. FINDINGS AND DECLARATIONS.

"The people find and declare each of the following: [¶] . . . [¶]

“(b) Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized . . . .

“(c) Vigorous enforcement and the adoption of more meaningful criminal sanctions, including the voter-approved ‘Three Strikes’ law, Proposition 184, has resulted in a substantial and consistent four year decline in overall crime. Violent juvenile crime has proven most resistant to this positive trend. [¶] . . . [¶]

“(h) Gang-related crimes pose a unique threat to the public because of gang members’ organization and solidarity. [This finding declares life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity] . . . . [¶] . . . [¶]

“(k) Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence. . . . This act addresses each of these issues with the goal of creating a safer California . . . .” (Voter Information Guide Primary Elec., *supra*, Text of Prop. 21, §§ 1, 2, subds. (b)-(k), p. 119.)

Thus, the goal of the initiative that the registration requirement addresses is the need for vigorous law enforcement directed toward the acts of organized criminal street gangs. In particular, since one of the hallmarks of gang-related crime is the organization and solidarity of the gang-members, registration of convicted gang associates may reasonably be expected to assist law enforcement efforts in curbing gang related crime. This is an entirely regulatory, non-punitive, purpose.

We further find that the effect of the requirement is not punitive. Registration imposes some inconvenience to the extent that the registrant is expected to present him or herself at the local law enforcement agency for fingerprinting, etc. But the only time the registrant has to re-register is if and when he or she changes residence. And the requirement expires after five years. Registration is a minimal burden, and is no more

onerous than necessary to achieve the crime prevention purpose of the statute. (See *Castellanos*, *supra*, 21 Cal.4th at p. 796.) We find that the statute is entirely remedial or preventative in nature and effect and, therefore, is not punishment for purposes of the Eighth Amendment.

The multifactor analysis used in *Reed* necessarily yields the same result. Any affirmative disability the requirement imposes is minor. Unlike sex offender registration, which imposes a lifetime annual re-registration requirement, registration here is limited in extent and duration. Registration requirements in general are not historically imposed as punishment. Although the requirement will often come into play upon a finding of scienter, such as when the registrant has been convicted of participating in a criminal street gang with knowledge that the members engage in a pattern of criminal gang activity, the law also applies whenever the trial court determines the registrant's offense was gang related. The operation of the law is expected to promote deterrence, generally, but the law simply does not have a retributive purpose. The behavior for which it is imposed is a crime, unquestionably. But the primary purpose of the law is not punitive. Moreover, the punitive aspect of the registration requirement, to the extent there is any at all, is not excessive compared to its non-punitive goal of deterring gang-related crime.

In sum, there is no argument that registration requirements in general are a "widely accepted means of aiding law enforcement authorities in preventing and investigating . . . crimes." (*People v. Fioretti* (1997) 54 Cal.App.4th 1209, 1216.) The instant requirement is non-punitive in intent and effect and its non-punitive aspects substantially outweigh any arguably punitive effect of the law. Therefore, regardless of the analysis we apply, the gang registration requirement does not constitute cruel or unusual punishment under either the state or federal constitutions because it is not "punishment."

8. Violation of the Single-Subject Rule

Proposition 21 contains three distinct subjects, gang violence, juvenile crime prevention, and changes to "Three Strikes" and other sentencing laws. Defendant asserts that by incorporating these three subjects Proposition 21 violates the California Constitutional requirement that initiatives pertain to a single subject. This contention has been set to rest by the California Supreme Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 573-582. The Court held that the initiative's parts are reasonably germane to each other and to the general purpose or object of the initiative.

DISPOSITION

The Santa Clara County Superior Court is directed to correct the clerk's minutes of the proceedings of February 20, 2001 in *People v. Sanchez* (case No. FF093025) to delete the condition that defendant "Not drive w/o valid lic & ins."

As modified, the judgment is affirmed.

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Wunderlich, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. FF093025
Trial Judge:	Hon. Daniel E. Creed & Edwin B. Pearce
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