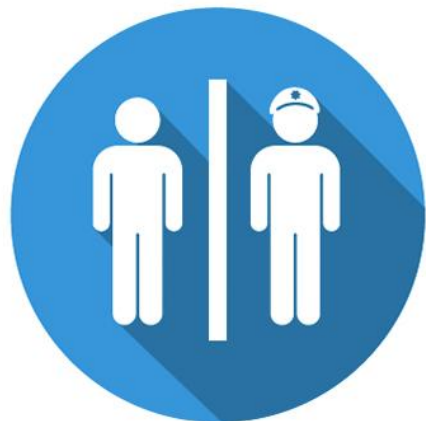


INVESTIGATIVE REPORTS

San Jose Police Honey-Trap Gay Men, Sparking Civil Rights Fight

By Jennifer Wadsworth@jennwadsworth / July 28, 201626

LGBT advocates say SJPD wasted precious resources honey-trapping gay men in public bathroom stings. (Graphic by Kara Brown)

At Columbus Park, where San Jose decades ago cleared hundreds of homes beneath the municipal [airport's flight path](http://www.sanjoseinside.com/tag/minetasanjoseinternationalairport/) (<http://www.sanjoseinside.com/tag/minetasanjoseinternationalairport/>), jets wing in low enough to rattle the signposts. By day, the poorly kempt 10-acre tract bustles with softball teams. Weekends bring beach volleyball players and horseshoe pitchers. Mostly, it's left to the tent-dwellers who live among clustered trees and along the adjacent Guadalupe River.

The park's dusk-through-dawn desertion gave rise to its reputation as a cruising spot. A bathroom on the western edge of the baseball diamond becomes, on occasion, a byplace for men who want to have sex with other men.

John Ferguson, a South County native in his mid-50s who knew of the park's repute, says it seemed empty as usual when he stopped by one evening in May last year. But minutes after he latched the toilet stall, a man clad in shorts and a T-shirt ambled in to use the urinal. Ferguson spied a round cutout in the mottled black partition—a gloryhole, meant for soliciting sex—and, impulsively, slipped his forefinger through as an invitation.

The man on the other side stepped back, paused and then walked outside. Ferguson shrugged it off as polite rejection and got up to leave. But the stranger, idling by the door, struck up a conversation.

“How often do you come here?” the man asked, a coy smile parting his lips while telegraphing what Ferguson took for meaningful eye contact.

Ferguson puzzled over the mixed signals from this cute, much-younger stranger, but lingered to chat. Maybe they could exchange numbers or continue the repartee elsewhere, he recalls thinking, indulging a whit of naïve optimism.

A third man appeared minutes into the exchange. The sexual tension must have been palpable, Ferguson figured, because the newcomer stepped into the bathroom, dropped trou and began to masturbate.

Just then a fourth person arrived, brusquely introducing himself as Officer Adam Jenkins of the San Jose Police Department's Downtown Services Unit. Ferguson's breath quickened in

panic. The guy he'd been flirting with—Officer Samuel Marquardt, as it turned out—whipped a badge out from under his shirt and broke the bad news.

The man who exposed himself was caught in the act and charged accordingly. But Ferguson's alleged violation was one of intent.

Stunned, he agonized over how the ill-fated encounter would affect his career as a federal agricultural biologist. He'd taken an extended sabbatical to write a book—would the government hire him back with this kind of black mark on his record? Would he pass a background check for new work or housing? Would he have to register as a sex offender? How would he tell his family?

Shock turned to shame. Ferguson had spent decades coming to terms with his sexuality, which he considered a symptom of being molested as a child. For years, he endured evangelical Christian pray-the-gay-away therapy to cure his same-sex attraction. When that failed, he turned to drugs to suppress it.

Not until his early 40s—after sobriety untangled his innate self from trauma and addiction—did he finally come out of the closet. But on his half-hour drive home, that lifetime of hurt crashed back to the present.

Making a Case

Officer Marquardt cited Ferguson for a petty crime, but one freighted with controversy and historical import. Section 647(d) of the California penal code outlaws loitering in or around a public restroom for the purpose of engaging in a lewd or lascivious act. Police often couple it with 647(a), which makes it illegal to solicit or engage in lewd conduct in public. Because they're classified as sex crimes, the punishments for code 647 arrests often go far beyond plea-bargained misdemeanor settlements of \$1,000 fines or community service; they may require giving up Fourth Amendment rights or registering as a sex offender.

Although people of all orientations have sex in public in parked cars on lovers' lanes and on streets, in parking lots or at the beach, 647 citations disproportionately upend the lives of men who seek out homosexual companionship. That SJPD apparently applied the former charge solely to gay men using male decoys to feign interest evokes a not-so-distant past of sanctioned oppression against anyone other than straight. It also puts the city at risk of federal litigation.

Bruce Nickerson, a 75-year-old attorney who spent half his life defending men against such allegations, plans to take the city of San Jose to task in a case that could culminate his storied career.

"A lot of gay rights attorneys turn up their noses at what I do," says Nickerson, known by detractors and allies alike as the state's pre-eminent "toilet lawyer." "But there's a reason I do these kinds of cases. Because worse than being fired because you're gay is to be arrested for being gay. The most fundamental right is to be free of imprisonment."



Famed “toilet lawyer” Bruce Nickerson has made a career out of defending gay men against charges of lewd conduct. (Photo by Greg Ramar)

Gay rights advocates, who certainly don’t excuse public sex or boorish behavior, deride the stings as a form of entrapment. They object to the way police seem to unfairly fixate on gay men and go out of their way to elicit sexual interest by conveying spoken and nonverbal cues such as below-the-stall foot tapping or outright propositions. After decades of denouncing gay cruising stings, critics have made some headway in recent years as the public grows more supportive of LGBT rights.

Police in Mountain View and San Leandro stopped undercover 647 crackdowns after a series of lawsuits over the years pegged them as unconstitutional. So did Palo Alto and Sunnyvale. “We do not conduct these stings, nor, to my knowledge, have we ever in my 18-year career,” Palo Alto police spokesman Lt. Zach Perron tells *Metro*. The Santa Clara County District Attorney’s Office rarely sees the charge, having prosecuted only 33 cases for 647(d) in the past decade—24 of them, however, since SJPD doubled down on the toilet busts in 2013.

In April, a Los Angeles County judge [chucked identical charges](http://www.latimes.com/local/lanow/la-me-ln-gay-sex-stings-police-discriminatory-20160429-story.html) (<http://www.latimes.com/local/lanow/la-me-ln-gay-sex-stings-police-discriminatory-20160429-story.html>) in a closely watched case against one of Nickerson’s clients from Long Beach. Not two months later, he heard about a similar dismissal in San Jose, where he defended his first client against the same allegations 35 years ago. Since his inaugural case, cities throughout the nation have all but ended gay cruising stings after so many acquittals, big-money lawsuits and the resulting public backlash. To hear that the 10th largest American city revived the practice as recently as 2015 came as a shock.

“Outrageous,” Nickerson says. “There was a general understanding that they wouldn’t continue this.”

San Jose police and prosecutors that argued the cases deny claims of prejudice. SJPD spokesman Sgt. Enrique Garcia objects to even calling the operations “stings” because no overtime was used and the officers work their shifts in plainclothes anyway. Each one, he says, came in response to complaints from the public. SJPD has since suspended the practice, though Garcia says it may resume if the need arises.

“We had a judge render a decision that the arrests were invalid, but that’s not unusual,” Garcia says. “We have cases heard in court every day—some get adjudicated, others get thrown out. This wasn’t what we call a case law or precedent. We are still going to respond to criminal activity as best we can. We are obligated to respond.”

To LGBT advocates, however, the tactics bear troubling traces of recent history, when police

raided gay bars and private bedrooms and publicly circulated mugshots of people arrested for the “perversion” of homosexuality. All too often, the accused would lose their jobs, homes, families and their will to live.

Historic persecution and the stigma associated with gay bars or bathhouses rendered public park cruising into a something of a subculture, says Attila Szatmari, spokesman for a gay male hookup app called Squirt. Men who cruise at public parks tend to lead double lives. They’re often older men unfamiliar with mobile apps, or they came out later in life and feel out of place in the younger gay dating scene.

Divorced from cultural context, a misdemeanor seems trifling. But it shows how enforcing laws without a nuanced understanding of why they were created and how case law subsequently reshaped them can erode trust between police and marginalized communities. For example, [U.S. Justice Department statistics \(http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html\)](http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html) show that police disproportionately target African-American men for driving infractions. A petty crime, but one that inspires a very real fear because of a mounting number of high-profile cases in which police shoot unarmed black men during routine traffic stops.

Gay, lesbian, transgender and otherwise queer people have their own strained relationship with law enforcement. Queer youth remain some of the most vulnerable, according to a 2015 survey by the [Urban Research Institute \(http://www.urban.org/research/publication/homeless-lgbtq-youth\)](http://www.urban.org/research/publication/homeless-lgbtq-youth), which found that 70 percent of LGBT runaways had been arrested at least once. Generations of gay Americans grew up viewing police as a source of fear, not protection, according to [Brian Sharp \(http://www.newsweek.com/police-officer-improve-cop-lgbt-relations-380468\)](http://www.newsweek.com/police-officer-improve-cop-lgbt-relations-380468), an openly gay veteran cop who consults with police agencies on how sexual orientation figures into criminal justice reform. California’s 647 violations resemble a charge that galvanized one of the most important figures in American LGBT history 60 years ago.

The late [Franklin Kameny \(https://newrepublic.com/article/96118/frank-kameny-gay-rights\)](https://newrepublic.com/article/96118/frank-kameny-gay-rights), a WWII veteran with a doctorate from Harvard University, may well have served a distinguished career as an astronomer in the Army Map Service had his sexual orientation remained secret. But this was during the “[Lavender Scare \(http://www.thelavenderscare.com/\)](http://www.thelavenderscare.com/),” the mass firings of gay and lesbian federal employees by an executive order of President Dwight D. Eisenhower. Kameny lasted five months. The government canned him once it found out that the “morals squad” arrested him as a “sexual pervert” across from the White House in Lafayette Park, a gay cruising ground.

More than a decade before the [Stonewall riots \(http://www.pbs.org/wgbh/americanexperience/features/introduction/stonewall-intro/\)](http://www.pbs.org/wgbh/americanexperience/features/introduction/stonewall-intro/) in New York, Kameny turned his 1957 arrest into the spark that ignited the nation’s gay civil rights movement. By litigating against his termination, he became a powerful force in confuting the notion of homosexuality as a perversion and the laws based on that premise.

The generations to follow saw state after state decriminalize sodomy. Meanwhile, beginning in the 1960s, the United States Supreme Court repeatedly affirmed a right to privacy that prevents the government from meddling with people’s consensual sex lives. Only in the past few years has the nation legalized same-sex marriage, lifted a ban on openly gay military members and made greater efforts to dismantle lingering dregs of systemic bigotry.

Now, just as the Orlando massacre intensifies national concern over gay rights, San Jose stands to become an example of how institutional discrimination persists in picayune laws and oblivious bias.

War for the Soul

Nickerson turned the old saw about a man’s home being his castle into reality. When he bought his San Carlos abode in the 1970s, he added a third story, poured his own concrete

balusters, installed a faux-stone facade and narrow stained-glass windows to model it after a castle in Germany.

“My poor man’s Hearst Castle,” he says, allowing a moment’s pause to admire his handiwork before heading inside.



Most
days

Bruce Nickerson outside his San Carlos home. (Photo by Jennifer Wadsworth)

Nickerson and his room-renting tenants use the kitchen door, but first-time visitors get escorted through the front entrance to witness the spectacle of the main room. Every nook in the cathedral-ceilinged lobby has been lovingly filled with mementos of his travels, hobbies and life’s work. A model train track winds its way around the perimeter of the room and a bridge connects two landings overhead. Photos of his journeys to Nordic glaciers and Gothic castles represent checks on his 200-point bucket list, which he’s 10 away from completing. The most beautiful view on the planet, he says, lies only a few hours away in Yosemite.

One wall is taken up by a two-story pipe organ, which plays his impassioned melodies in mighty bursts through speakers inlaid in the ceiling. On Sundays, he plays a much smaller organ at the local Episcopalian church, his shelter dog Sheba frequently flopped beside him on the floor. Every so often, he invites his two ex-wives, ex-boyfriends, their partners and other friends and family to his castle’s front room for a classical recital. Second to law, he calls music his greatest passion.

Before he summoned the strength to live on his own terms, Nickerson channeled his energies into conforming to the heteronormative expectations of the people around him. His father was a former Golden Gloves boxer and atheist who distrusted anything unseen, and his mother a Pentecostal minister with unwavering spirituality.

“Together,” he says with his signature aplomb, “they warred for my soul.”

When Nickerson reached the age of 5, they somehow began to intuit homosexual tendencies. His father determined to beat it out of him for a host of trivial reasons, he says. His mother, on her part, prayed the blood of Jesus over him to protect him from menaces outside, but offered no defense against “the monster down the hall.” Nickerson tried to live as a straight man at community college and Stanford University. In his twenties, he married a woman who had his son and another who became his second wife.

“I gave it a valiant effort,” he says from his second-story home law office, where heaps of binders, court records and books fill virtually every square inch. “I was fortunate enough that the woman I married was one for the ages. Together, we set about raising our son, who’s the son of any man’s dreams.”

After his second divorce, and in the throes of depression, he says he had an epiphany. With two failed marriages, a defunct business, a conflicted identity and having done little with his Stanford degree, he realized that God loved all of him anyway.

“I had been living life with wings strapped to my sides, and suddenly I could use them,” Nickerson says. “We’re in 1975 now, in the midst of the gay rights movement, and I’m finally an openly proud gay man who starts thinking, ‘How do I make this into a career?’ Well, if you really want to affect change, I realized, you should become a lawyer.”

At 39 years old, he took his first case, representing a man who had been arrested in San Jose at an adult bookstore called Circus. An undercover officer peered into a porn booth at the private business, saw the man masturbating and arrested him for lewd conduct. When Nickerson cited the 1979 case law about intent to offend, the prosecutor scoffed at the defense as pointless because these cases inevitably get settled anyway. This time, however, the trial ended with a hung jury—short of a triumph, but heartening to civil rights attorneys watching the case.

“We realized that we could actually start winning these,” Nickerson says. “So I focused on this type of case because these people were innocent. They weren’t a menace ... so acquitting them wouldn’t cause damage to the public. Plus, I thought these stings were a waste of resources.”

Only one of the 10,000 police reports he says he’s read on lewd conduct arrests of gay men involved a child wandering into a bathroom and witnessing an erotic dalliance. That, Nickerson agrees, was a valid arrest. He says the rest almost invariably involved mere verbal intent, sex in enclosed spaces, or performed without intent to offend.

Over the course of three-and-a-half decades, Nickerson has made new case law five times. He has brought juries to the scenes of so-called crimes in public bathrooms in some cases and brought replica porn booths to the courtroom in others to illustrate how arresting officers would have to go out of their way to see anyone wanking off. He has cleared the records of gay men who lost their jobs, families and friends over lewd conduct arrests. He has defended his practice before the powers that be in the California State Bar, which suspended his law license in the 1990s, and against the cultural establishment by way of a sputtering Bill O’Reilly (<https://www.youtube.com/watch?v=HzXjKHD4Qsw>), who cut his mic on national TV.

“Here I am, 75 years old,” he says. “I have congestive heart failure, so I have to sit down in front of the judge. They’re quite gracious to let me do that. I thought about retiring, but ... there’s more work cut out for me.”

‘Something Bigger’

Without any direct involvement in Ferguson’s case, Nickerson helped clear his name and that of many others with a courtroom victory decades ago. In 1996, he landed a six-figure judgment with a unanimous decision from the California Supreme Court that Mountain View police unlawfully singled out gay men in lewd conduct arrests.

Over two years in the early 1990s, undercover Mountain View cops flirtatiously lured gay men to a car. Once in the open, the officers would cite the men for soliciting a lewd act in public. Nickerson defended 10 men who fell for the honeytrap. His *Baluyut v. Superior Court* (<http://law.justia.com/cases/california/supreme-court/4th/12/826.html>) win established discriminatory prosecution as a defense to exactly the type of operation that ensnared Ferguson.

A state Supreme Court case 17 years before *Baluyut* set the foundation for Nickerson’s victory. In *Pryor v. Municipal Court* (<http://scocal.stanford.edu/opinion/pryor-v-municipal-court-28116>), jury instructions held that lewd conduct only rises to the level of a crime if performed with the intent to offend.

“That’s been the law since 1979,” he says. “Police don’t know or don’t want to hear that, but by their very nature these stings are invalid. A required element of conviction is that the guy must know, or should reasonably know, that someone would be offended. Second, they would have to enforce the law equally to men and women. Only using a male decoy, that’s strike one. Strike number two is that they’re only pursuing men. They’re double-damned.”

Most of the Columbus Park arrests involved no exposure at all. Ferguson was one of 19 gay men SJPd cited for the same lewd conduct misdemeanor over a 17-month period from 2014 to the end of last year.

In 18 of those cases, Officer Marquardt made the arrest. By his own accounts, he almost always made the first move.

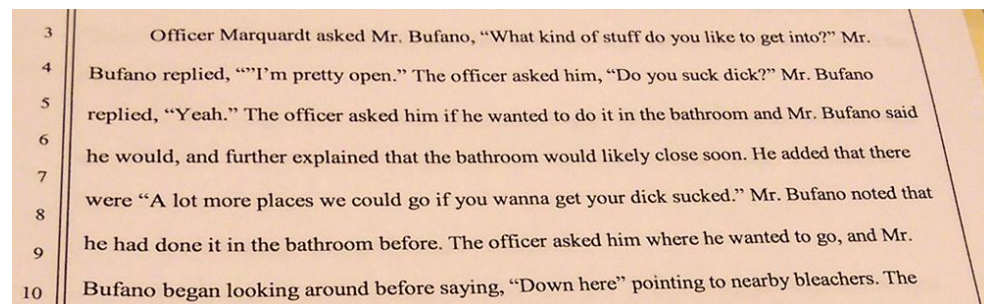
A few months after Ferguson’s arrest, Daniel Bufano says he rushed into the Columbus Park bathroom to blow his nose. Like Ferguson, he knew of the park’s reputation.

But no one was there that night of Aug. 8, 2015, he says. On his way out, Bufano says, a handsome sandy blond stranger—Officer Marquardt, he later learned—approached him.

“What kind of stuff do you get into?” the cop asked, in his report of the incident.

“I’m pretty open,” Bufano replied, according to the same report.

Officer Marquardt asked if he wanted to perform oral sex in the bathroom. Bufano replied that there are “a lot more places we could go if you wanna get your dick sucked,” according to police, who say he then suggested hooking up by the nearby bleachers. As he walked in that direction, police say they called their bluff and wrote him a ticket.



Officer Marquardt’s account of Daniel Bufano’s arrest. Source: Santa Clara County Superior Court

In Bufano’s telling, he was much less receptive to the cop’s advances. And after the citation, he says, they illegally searched him and left him physically bruised and emotionally shaken. His friend, a closeted gay man who witnessed the ordeal from the parked car, was terrified.

“I didn’t approach him, I never said hello to him or nothing,” says Bufano, 51, an East Coast transplant who says he moved to the Bay Area more than two decades ago after being hit with similar citations in his hometown of Richmond, Virginia. “The officer, he’s the one who came up to me and all these other men, saying hi and flirting. Isn’t that entrapment? How is that not entrapment?”

Seeing the resulting charge leveled against him raised many more questions. How could a conversation rise to the level of criminal conduct? And if it does, why do straight people get a pass? Would police send an attractive female decoy to offer free consensual sex to straight men? Why send decoys at all instead of a uniformed cop?

After months of arrests by the same officer at the same squalid bathroom, lawyers in the Public Defender’s Office began asking some of the same questions. Andrea Randisi, an attorney assigned to research duty, spotted a pattern in the accused: all were gay men.

“Once we connected the dots, we went around the office asking if anyone else had a loitering case like this,” says deputy public defender Carlie Ware, who ran with Randisi’s insight to combine and reframe the cases as a civil rights issue. “What we noticed was that these cases

in the year-and-a-half period we looked at were nearly identical. At that point, we knew this was something bigger.”

Thirteen of those defendants took a plea deal to put the embarrassment behind them, agreeing to perform 40 hours of community service, submit to HIV tests and stay away from Columbus Park for six months. The remaining six, including Ferguson, emboldened by Ware’s belief in their innocence, went to trial.

16 arrest people like me in a sting operation
 17 14. Its not illegal to be gay. Its not illegal to use the restroom and be gay. Before I
 18 learned that the handsome man was really an undercover officer targeting me for a sting
 19 operation, I thought that he was a consenting adult interested in me as a sexual partner
 20 feel that there is nothing illegal about two consenting adults expressing their sexual
 21 interest to each other in a public place.
 22 ... of things I said to another consenting adult in

In an affidavit, Clay Morgan Parks recounts his arrest.

Ware cited the *Baluyut* ruling to argue that police violated the constitutional right to equal protection because the arrests exclusively targeted gay men. It took nearly a year—an extraordinary amount of time for a misdemeanor case—before a judge tossed the charges last month.

“For me, this case touched on issues of discrimination based on identity,” Ware says. “If a person is singled out by virtue of who they are, whether they’re a black man or a gay man or something else, that’s unconstitutional.”

With a shortage of officers and increasing crime, SJPD should focus its resources on more pressing problems like violent crimes, says Clay Parks, a 58-year-old hairstylist Marquardt arrested in January of 2015. Three police were involved, and for what?

“I was accused of a crime because of things I said to another consenting adult in a public place,” Parks wrote in an affidavit for Ware’s motion to dismiss the charges. “This accusation makes me feel less comfortable now expressing myself in public, especially about my sexual preference. I feel silenced.”

Cruise Control

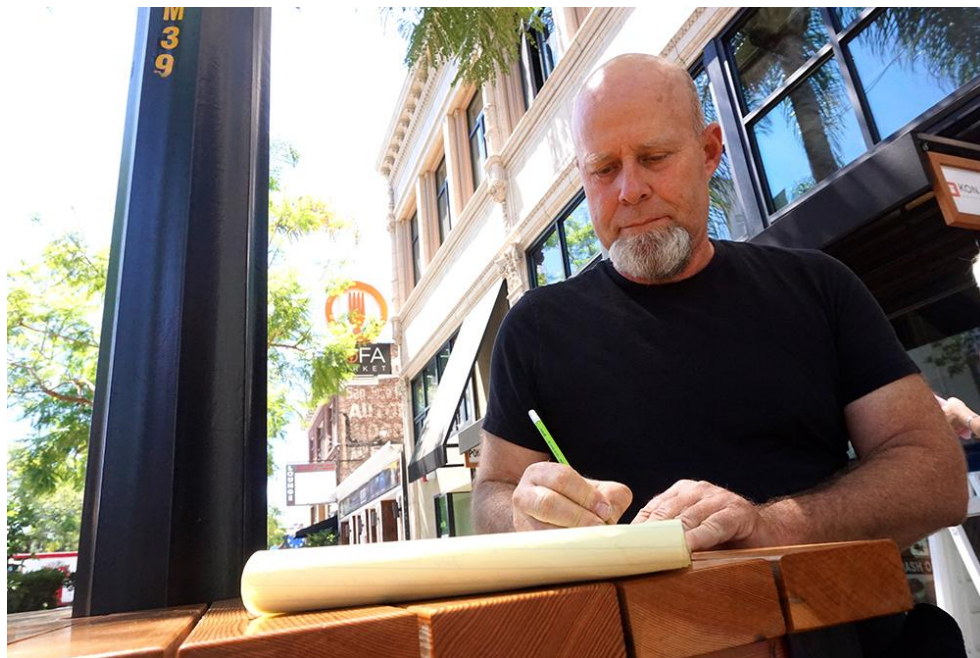
In a June 17 ruling, Santa Clara County Superior Court Judge Jose S. Franco slammed the SJPD’s singular focus on gay men at Columbus Park. Prosecutor Judith Sklar insisted that the operations stemmed from complaints about men loitering around the bathrooms with lustful intent. But the judge pointed out that a review of citizen calls turned up scant mention of public sex and that 13 of the 19 arrests happened after 8pm, when no families would be at the park.

“By conducting themselves in a way that mimics ‘cruising’ behavior of the suspects targeted, the undercover officers demonstrated the intent to target this group to the exclusion of other perpetrators of lewd conduct,” the judge wrote. Later, he added: “Unpopular groups have too often been made to bear the brunt of discriminatory prosecution or selective enforcement. The unconstitutional selective enforcement of the law as seen in the cases before this court undermine the credibility of our legal system and risks eroding public confidence in our ability to achieve just results.”

The following week, Nickerson called Ware to congratulate her on the win. Hearing from the man behind the *Baluyut* decision, which she relied on to clinch the case, brought her to tears. “He laid the path for me,” says Ware, 37, whose biracial parents raised her as a child of the civil rights movement. “To learn from him without even meeting in person speaks to the importance of his work. It felt good to carry on that legacy.”

Prosecutors had until July 17 to appeal Judge Franco's decision, but let it pass. The next order of business for Nickerson is to secure findings of factual innocence for each of the men acquitted, which will wipe the arrests from the record as though they never happened. Then, as in Long Beach, he says he will file a class-action lawsuit against San Jose police to vindicate Ferguson, Bufano and the others.

Though Nickerson's heart condition may force him to physically sit through the planned proceedings, it would mark his final stand in the same city where it all started.



John Ferguson, one of several gay men acquitted in June, plans to sue SJPD for discriminatory enforcement. (Photo by Jennifer Wadsworth)

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