

Internet sex case dispute

Constitutionality of law used in arrest faces a court challenge

By Kelly Whalen

The case of a San Ramon man arrested last summer by Piedmont Police after having sexual conversations on the Internet with a supposed teenage girl is being challenged in the Contra Costa County courts.

A three-judge panel will hear arguments March 3 on the constitutionality of a state law used in the arrest of John Joseph Costello, Jr., 48.

Piedmont Police arrested Costello using Section 288.2 (b) of the California Penal Code. It prohibits knowingly sending harmful matter to a mi-

nor by e-mail, Internet or online services. Detectives Steve DeWarns and Curtis Selseth have investigated Internet chat rooms, posing as a teenage girl.

Costello was arrested after he drove to Piedmont last July thinking he was going to meet "Maggie," a cover name for DeWarns, who indicated in a chat room he was 13 years old.

Costello talked online about things of a sexual nature with "Maggie," according to DeWarns.

The Alameda County District Attorney's Office dismissed the

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case against Costello last fall, however, dropping all charges against him including the felony charge of attempting to molest a minor. District Attorney Brook Bennigson would not comment on why the case was dismissed because of a pending Contra Costa County case against Costello.

After the dismissal in Alameda County, DeWarns pursued charges against Costello in Contra Costa, the other county with legal jurisdiction over Costello's alleged crimes.

Costello now faces a misdemeanor for being in possession of child pornography on his computer and three felony counts for attempting to send harmful material to a minor. He pled not guilty to all charges in December.

Defense Attorney John D. Forsyth of the Walnut Creek-based Patrick E. Clancy Law Firm is representing Costello. He has filed a writ to the Appellate Division of the Contra Costa Superior Court challenging the legality of Section 288.2. According to Forsyth, the section limits freedom of speech and vio-

lates the Commerce Clause, a federal law which gives Congress the power to regulate commerce among the states.

"You can't burn the house down to roast the pig," said Forsyth. "Is it in the state's interest to protect children [from child molesters]? Yes. Are they going about it the right way? No. You can't crush the first amendment."

According to Forsyth, state law similar to California's Section 288.2 have been overturned in New York, Michigan and New Mexico. He added that the U.S. Congress' efforts to regulate the Internet have been challenged.

The U. S. Supreme Court struck down in 1996 the Communications Decency Act, which Congress passed to prohibit distribution of indecent or offensive materials to minors over computer networks.

Costello's case also follows a decision two weeks ago by Contra Costa Superior Court Judge John Minney, in which he ruled Section 288.2 violated free speech and due process provisions of both the 1st

and 14th amendments of the U.S. Constitution. That case is on appeal.

"We don't agree with his decision," said Contra Costa County District Attorney Julie Hast.

"We may be slower to charge this crime, but we are going to continue prosecuting cases and oppose the constitutionality argument. This puts a damper on our work, but someone has to stop [these violations] on the Internet."

Detective DeWarns said the law on the Internet is so new that he expected case law to clearly spell it out. Meanwhile, he said he will continue to investigate online in chat rooms. "I am not discouraged one bit," he said.

Last summer, Piedmont Police also arrested Jason Astoria, 25, who pled guilty to one felony count of sending harmful matter to a child online. Astoria is to appear for sentencing in Superior Court Jan. 21.

Other Bay Area police departments investigate crimes against children online, including San Jose which has several officers assigned full-time to the Internet.