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No. _____
B214707

SUPREME COURT
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Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re C. H., A person coming under the Juvenile Court Law	
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. C. H., Defendant-Minor and Appellant.	CASE NO.: B214707 Superior Court Case Number 2005040811

APPEAL FROM THE SUPERIOR COURT

OF VENTURA COUNTY

HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Cases

Statutes

No. _____
B214707

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STATE OF CALIFORNIA

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

C.H., defendant/appellant, hereby petitions this Honorable Court for review in the above-entitled matter after decision rendered by the Court of Appeal of the State of California, Second Appellate District, Division Six, on May 18, 2010, affirming the judgment. A copy of the opinion of the Court of Appeal is attached hereto as Exhibit A. This petition is based upon the incorrect decision of important questions of law, to secure uniformity of decision, and/or to transfer to the Court of Appeal for further proceedings.

QUESTIONS PRESENTED FOR REVIEW

1. May a ward be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) without any offense which falls within Welfare and Institutions Code section 707(b)?

2. May a ward be committed DJJ without any offense which falls within Welfare and Institutions Code section 707(b), if his only offense is a registrable sex offense?

3. Is it error to commit appellant to DJJ without evidence demonstrating probable benefit from his commitment there?

4. Is it error to commit appellant to DJJ when the evidence submitted to the juvenile court was overwhelming that appellant would not receive probable benefit from his commitment there?

5. Is it error to commit appellant to DJJ without adequately considering alternative placements, and was it improper to reject the ones offered?

6. Is it a violation of appellant's 5th and 14th Amendment due process rights to commit him to DJJ when the evidence was overwhelming that there was virtually no chance the commitment would provide benefit to him and/or without adequately considering alternative placements?

STATEMENT OF THE CASE

November 22, 2005, Original Petition.

On November 22, 2005, an original petition was filed against appellant, **age 13**, pursuant to Welfare and Institutions Code section 602 (I[1] CT 1-2). The petition alleged a violation of Penal Code section 288(a), lewd act upon S.H., a child under the age of 14, a felony (I CT 1).

On December 20, 2005, appellant admitted the charge (I CT 6, RT 3). The court found that appellant came within the provisions of Welfare and Institutions Code section 602 (I CT 6, RT 4). The court released appellant to his aunt, Joanne Kennerley pursuant to a Community Confinement Contract which included electronic monitoring (I CT 5, 7, 56, RT 6).

On December 28, 2005, a probation memorandum was filed (I CT 9), alleging that, on December 23, 2005, appellant violated term 8 of the Contract by conversing with an older female on an unapproved sexual website (I CT 9). Appellant was arrested and transferred to the juvenile justice facility (JJF) (I CT 9). On December 28, 2005, the court found that appellant had violated the Contract, revoked its prior electronic monitoring order and the Contract, and ordered appellant detained in JJF (I CT 10, RT 10).

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1 I CT refers to volume I of the Clerk's Transcript. II CT will refer to volume II.

On January 5, 2006, disposition on the original petition took place (I CT 51-55, RT 12-16B). After reading the court file, the probation report (I CT 12-46), Dr. Martin's report (II SCT[2] 14-20), Dr. Singer's report (II SCT 2-13), and a letter from appellant's family members (I CT 46, 47), the court declared appellant a ward pursuant to Welfare and Institutions Code section 602, and committed appellant to the care of the probation officer for placement in suitable open placement (I CT 51, 52, RT 12-16B).

Appellant was placed at Starshine in San Bernardino County on January 13, 2006 (I CT 57, 60, RT 17).

February 7, 2007, Notice of Charged Violations.

On February 7, 2007, a Notice of Charged Violations was filed (I CT 18-23), alleging appellant's failure to comply with program/placement rules by failing to complete therapy assignments and unsatisfactory participation in group therapy; appellant's failure to attend school by failing to complete assignments and failing several classes; and appellant's failure to complete other assignments (I CT 118-119).

On February 8, 2007, appellant admitted allegations I.C (failure to complete therapy assignments (I CT 118)) and I.D (failure to participate in group therapy (I CT 119)) (I CT 139, RT 25, 26). The court ordered appellant detained and

2 II SCT refers to the larger volume of the Clerk's Transcript prepared pursuant to appellant's Rule 8.340(b) request, marked "confidential" on the cover.

directed probation to look into the Rancho San Antonio as a possible placement (I CT 139, RT 35). Probation was later authorized to place appellant at Rancho San Antonio if the possibility arose (RT 40). Appellant was placed at Rancho San Antonio shortly thereafter (RT 44).

May 30, 2007, Notice of Charged Violations.

On May 30, 2007, a Notice of Charged Violations was filed (I CT 157-163). It was alleged that, on May 18, 2007, appellant told a social worker that, in April of 2007, he and another resident had twice engaged in mutually consensual sex acts (I CT 158).

On May 31, 2007, appellant admitted the violation (I CT 178, RT 51). At that time, the court also had the probation department's detention hearing report (I CT 164-169), and the report of neuropsychologist Dr. Karen Schiltz (I ACT[3] 1-57), but had not yet read Dr. Schiltz's report (RT 49, 50). Appellant was continued a ward in the custody of probation for suitable placement (I CT 262, RT 53). After some gender identity issues surfaced, appellant was placed at Gay and Lesbian Adolescent Social Services (GLASS) in Los Angeles on June 20, 2007 (I CT 182, 185, RT 54, 55, 60).

May 1, 2008, Notice of Charged Violations.

On May 1, 2008, a Notice of Charged Violations was filed (I CT 252-258),

3 I ACT refers to the augmented clerk's transcript prepared pursuant to appellant's motion to augment the record.

alleging that appellant failed to comply with residential program rules by failing to complete assignments (I CT 252).

On May 2, 2008, appellant admitted the allegations (I CT 262, RT 68, 69, 70). Appellant was continued a ward, placed at GLASS, and was given 90 days in JJF stayed to July 18, 2008 in order to see if appellant's performance improves (I CT 262, 263, RT 73, 74, 75, 76, 78). The court stated that, if appellant did not do well in the interim, the court would impose the stayed 90 days (I CT 263, RT 75). Appellant was returned to GLASS (I CT 263, RT 76).

On July 18, 2008, probation reported that appellant had not changed his behavior and that he consistently failed to do his work (II CT 305, 306, RT 83). The court continued appellant as a Welfare and Institutions Code section 602 ward and imposed the previously-stayed 90 days at JJF (II CT 309, RT 85).

On August 29, 2008, a probation memorandum reported appellant doing better and recommended early release from JJF back to placement (II CT 318-321). The court granted that request (II CT 322, RT 91, 92). Appellant was placed at GLASS on September 11, 2008 (II CT 324, RT 93).

A supplemental probation memorandum filed January 2, 2009 (II CT 334-354) reported appellant's behavior deteriorating in the form of a negative attitude and failure to work on assignments (II CT 335, 336). On that date, the court continued appellant in suitable placement (II CT 356, RT 98, 99), but directed

probation to look into the likelihood of appellant getting into a sex offender program at CDCR/DJJ (II CT 357, RT 96, 97, 99).

January 5, 2009, Notice of Charged Violations.

On January 5, 2009, a Notice of Charged Violations was filed (II CT 358-362), alleging that appellant failed to complete assignments for his sex offender program, that he made no progress, and that he failed to complete school assignments (II CT 358, 359).

On January 6, 2009, appellant admitted the allegations (II CT 376, RT 101). On February 11, 2009, the disposition began (RT 109-128). The court announced (RT 109, 110) that it had a supplemental report from the probation department (CT 391-399, also available on February 4, 2009 (RT 106)), an updated report by Ventura County Behavioral Health by Dr. Yoshimura (II SCT 23-29, and an earlier memorandum from Dr. Yoshimura available on February 4, 2009 (II SCT 21-22, RT 106)), a report from Dani Levine of S.T.E.P. Group Corp. (I ACT 58-74, also available on February 4, 2009 (RT 107)). The court also heard testimony by Dr. Levine (RT 115-119).

On February 18, 2009, the disposition concluded (RT 129-144). The court heard from appellant's mother, who had located potential alternative placements (RT 130-131). The court committed appellant to DJJ on count 1, the violation of Penal Code section 288(a) sustained December 20, 2005, with the maximum term

of confinement set as the upper term of 8 years, and with credits for 204 days (II CT 402, 406, 407, RT 139-143).

The court found that the offense did not fall within Welfare and Institutions Code section 707(b) (II CT 402, 406, RT 140, 141). The court stated that appellant was committed to DJJ because the court believed that appellant would be able to participate in the adolescent sex offender program there, and requested notification if such would not occur (II CT 403, RT 142, 143).

Appellant filed a timely notice of appeal on March 16, 2009 (II CT 412, 413).

Appellant was delivered to DJJ on April 6, 2009 (I[4] SCT 1).

On May 18, 2010, the Court of Appeal issued its opinion affirming the judgment[5]. Appellant filed a timely Petition for Rehearing on May 28, 2010, requesting that the Court of Appeal consider certain of appellant's contentions omitted from or inaccurately stated in the opinion, and to modify the opinion to reflect certain omitted or inaccurately stated evidence. The Court of Appeal denied the Petition for Rehearing on June 15, 2010.

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4 I SCT refers to the brief volume I of the Supplemental Clerk's Transcript prepared pursuant to appellant's Rule 8.340(b) request.

5 On that same date, as reflected in the Court of Appeal's Opinion, the Court of Appeal issued an Order denying appellant's related petition for writ of habeas corpus (B219096) without issuance of an order to show cause. Appellant is filing a separate Petition for Review from that order.

STATEMENT OF FACTS

Since this offense was adjudicated by an admission, the facts are as expressed in probation reports.

On October 17, 2005, appellant, age 13, was with his 3-year-old sister, S.H., in the family's vehicle parked outside a grocery store, while his father and 8-year-old sister M.H. were inside the store (I CT 14, 16). Appellant was observed by a 15-year-old witness in another vehicle (I CT 14). Appellant licked S.H.'s vagina and had her suck his penis (I CT 14, 15, 16).

Although not part of the instant charges, appellant had been in counseling for touching his sister M.H.'s vagina and touching her twin brother B.H. approximately a year earlier (I CT 15, 16). Neither M.H. nor B.H. had been touched by appellant since (I CT 15).

ARGUMENT

I
REVIEW SHOULD BE GRANTED TO SETTLE THE IMPORTANT AND RECURRING QUESTION OF WHETHER A WARD CAN BE ELIGIBLE FOR COMMITMENT TO DJJ EVEN THOUGH HE HAS NOT BEEN FOUND TO HAVE COMMITTED A WELFARE AND INSTITUTIONS CODE SECTION 707(b) OFFENSE

It is submitted that appellant is not eligible for commitment to DJJ because the threshold requirement of a Welfare and Institutions Code[6] section 707(b)

6 All further statutory references will refer to the Welfare and Institutions Code unless otherwise stated.

offense has not been met, regardless of the fact that appellant's offense was a sex offense described in Penal Code section 290.008(c).

A. Appellant May Not Be Committed To DJJ Unless He Has Committed A Section 707(b) Offense.

In order to be eligible for commitment to DJJ, appellant must have, at least at some point, committed an offense described by section 707(b). (Section 731(a)(4).) Section 731(a) provides in pertinent part:

> "(a) If a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may order any of the types of treatment referred to in Sections 727 and 730 and, in addition, may do any of the following:
>
> ***
>
> (4) Commit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, if the ward has committed an offense described in subdivision (b) of Section 707 **and** is not otherwise ineligible for commitment to the division under Section 733." (Emphasis added.)

By the plain meaning of section 731(a)(4), in order to be committed to DJJ, appellant must have committed a section 707(b) offense. By the terms of section 731(a)(4), even with a section 707(b) offense, a ward could still be ineligible under section 733, but section 733 does not come into play unless the threshold requirement of a section 707(b) offense is met.

Appellant was adjudicated to have committed only a violation of Penal Code section 288(a), a lewd act upon his sister. While this offense brought

appellant within the provisions of section 602, it was not an offense listed in section 707(b). (Section 707(b); II CT 402, 406, RT 140, 141.)

A section 707(b) violation is, for dispositions occurring after the effective date of the applicable statutes, the sine qua non for a commitment to DJJ.

B. The Provisions Of Section 733 Do Not Provide An Exception To Section 731(a)(4)'s Requirement Of An Underlying Section 707(b) Offense.

It is submitted that the plain language of section 731(a)(4) requires the existence of two things: (1) a section 707(b) offense and (2) that there is no further ineligibility pursuant to section 733.

Section 733 provides in pertinent part:

> "A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities:
>
> ***
>
> (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code." (Emphasis added.)

It can be seen that the mention of a sex offense in this context cannot be used to counteract the clear base requirement of section 731(a)(4) that there be a section 707(b) offense at some point. Section 731(a)(4) provides the minimum requirement for commitment to DJJ. It is the eligibility statute. Section 733 then

provides circumstances for ineligibility even if the minimum requirement is met, but then says that that ineligibility (i.e., the fact that the petition be the most recent) does not render an otherwise eligible ward ineligible just because the most recent offense is not a section 707(b) offense if that most recent offense is an enumerated sex offense.

In other words, section 733 provides further additional limitations on eligibility for DJJ commitment. It declares conditions of ineligibility, which would logically only apply or even be a consideration if and only if the threshold eligibility requirements were met.

As set forth, section 733 provides that **an otherwise eligible ward** would nevertheless be ineligible unless the most recent offense was a section 707(b) offense. It then goes on to provide that **an otherwise eligible ward** would not be made ineligible just because the most recent offense was not a section 707(b) offense, if that most recent offense were an enumerated sex offense.

This provision does not negate section 731(a)(4), but rather just limits the application of an ineligibility principle.

C. The Principles Of Statutory Interpretation Require The Threshold Of A Section 707(b) Offense Even If The Most Current Offense Is An Enumerated Sex Offense.

The fundamental principles of statutory interpretation or construction have been frequently stated. As set forth in *V.C. v Superior Court* (2009) 173 Cal.App.4th 1455, 1467:

> """As in any case involving statutory interpretation, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy (2001) 25 Cal.4th 136, 142 [105 Cal. Rptr. 2d 387, 19 P.3d 1129].*)' (*People v. Cole (2006) 38 Cal.4th 964, 974 [44 Cal. Rptr. 3d 261, 135 P.3d 669].*) Statutory interpretation begins with an analysis of the statutory language. (*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal.4th 503, 507 [66 Cal. Rptr. 3d 52, 167 P.3d 666].*) 'If the statute's text evinces an unmistakable plain meaning, we need go no further.' (*Id. at p. 508.*) If the statute's language is ambiguous, we examine additional sources of information to determine the Legislature's intent in drafting the statute. (*Ibid.*; *People v. Cole, supra, 38 Cal.4th at p. 975.*)" (*Olson v. Automobile Club of Southern California (2008) 42 Cal.4th 1142, 1147 [74 Cal. Rptr. 3d 81, 179 P.3d 882].*)"

See also, *In re J.L.* (2008) 108 Cal.App.4th 32, 55, wherein the court stated:

> "In construing whether *section 733, subdivision (c)*, precludes the minor's commitment to Juvenile Justice, we apply the well-settled rules governing statutory construction. "We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of the statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative

> construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Flores (2003) 30 Cal.4th 1059, 1063 [135 Cal. Rptr. 2d 63, 69 P.3d 979].*)" (Underline emphasis added.)

See also, *People v Woodhead* (1987) 43 Cal.3d 1002, 1010, where it is stated:

> "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided."

Parts of a statute should be harmonized by consideration of the questioned clause in statutory context. (See *Valov v Tank* (1985) 168 Cal.App.3d 867, 874.) Statutes should generally not be interpreted in a manner which renders portions thereof mere surplusage. (*People v Craft* (1986) 41 Cal.3d 554, 560; *People v Smith* (2000) 81 Cal.App.4th 630, 641, quoting *Dyna-Med, Inc. v Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; see also *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.)

Finally, there is the "rule of lenity." Where a penal statute is susceptible of two or more interpretations, courts should generally construe the statute "as favorably to the defendant as its language and the circumstances of its application may reasonable permit." (*Keeler v Superior Court* (1970) 2 Cal.3d 619, 631; *People v Overstreet* (1986) 42 Cal.3d 891, 896 ["The defendant is entitled to every reasonable doubt as to the true interpretation of words or the construction of a

statute. [Citations.]"]; *Bradwell v Superior Court* (*People*) (2007) 156 Cal.App.4th 265, 270.)

It is submitted that the language of sections 731(a)(4) and 733 is unambiguous and thus the plain meaning controls. If the legislature had meant not to require a section 707(b) offense ever if the offense were a sex offense, it could have said so in the language of section 731(a)(4). Yet it did not. Instead, it required a section 707(b) offense and then, even in the face of that, found a ward ineligible if the most recent offense was a non-707(b) offense which was not also an enumerated sex offense.

However, the result should be the same even if we consider the legislative intent behind the 2007 modifications to the statutes. *V.C., supra*, notes that the legislative purpose for these revisions was that the legislature intended only currently violent or serious juvenile offenders to be sent to DJJ starting on September 1, 2007. (*V.C., supra*, 173 Cal.App.4th at pp. 1468, 1469.) *V.C., supra* at p. 1469, cites *In re N.D.* (2008) 167 Cal.App.4th 885, 891, where that court recognized this, stating:

> " Like the court in *In re N.D. (2008) 167 Cal.App.4th 885, 891-892 [84 Cal. Rptr. 3d 517]*, we also find it helpful background to realize *section 733(c)* was enacted as part of chapter 175 of the Statutes of 2007 in order to make "necessary statutory changes to implement the Budget Act of 2007 ... ." (Stats. 2007, ch. 175, § 38.) According to the court in *In re N.D.*, "[a] report of the California Little Hoover Commission explains the budget impact. To settle a lawsuit brought on behalf of inmates of state juvenile facilities, the state entered into

> a consent decree in November of 2004. The cost of compliance with the consent decree proved to be high: 'Realizing the state could not afford to comply with the ... consent decree, in 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. ...' [Citation.]" (*In re N.D., supra, at pp. 891-892.*)"
>
> (Underline emphasis added.)

Because the legislative goal of the modifications to sections 731 and 733 was to reduce the population at DJJ by placing there only the most continually criminal and most violent and those whose criminal conduct is escalating and to place the others under the responsibility of the counties, it is contrary to this legislative intent to commit appellant, a ward whose only offense is a non section 707(b) offense and whose probation violations consisted only of failing to do his assignments.

No case known to appellant has construed these two statutes when there has been no section 707(b) offense at all. However, to interpret sections 731(a)(4) and 733 to require at the very least a section 707(b) offense before a ward can be committed to DJJ matches both the plain meaning of the statutes in question, harmonizes them in a way that makes sense, renders their words effective and not surplusage, and matches the legislative intent. Since appellant's offense was not such an offense, he is not eligible for commitment to DJJ.

D. Section 731(a)(4) Requires A Section 707(b) Offense; The Court Of Appeal Is Not Tasked To Determine Whether An Offense Not Listed In Section 707(b) Is One, When The Juvenile Court Made An Affirmative Finding That Appellant's Only Offense Is Not A Section 707(b) Offense.

The Opinion in this case states that it was determining whether the offense was a section 707(b) offense (Opinion at p. 10). It is submitted that this is not permitted in this case.

The juvenile court made an affirmative factual finding that the offense was not a section 707(b) offense, and this factual finding cannot be attacked by the prosecution under a theory of insufficiency of the evidence to support the finding.

While the Opinion concedes the language of section 731(a)(4), it then converts its analysis to an improper legislative intent analysis of section 731.1. The issue of the applicability of 731.1 will be discussed in Section I.E. herein.

As set forth, section 731(a) requires both a section 707(b) offense **and** that the ward is not otherwise ineligible under section 733.

By its terms, section 731(a)(4) requires a section 707(b) offense. There is no confusion, uncertainty, or ambiguity as to the meaning of this statute. "And" means "and." Both conditions are required. (*Amerigraphics, Inc. v Mercury Casualty Co.* (2010) 182 Cal.App. 4th 1538, 1551 [the word "and" used in its ordinary and popular sense, is a conjunction used to indicate an additional thing, situation, or fact]; *Ratzlaf v United States* (1994) 510 U.S. 135, 114 S.Ct. 655, 662

126 L.Ed.2d 615, 626 [the court does not resort to a legislative history to cloud a statutory text that is clear].) A section 707(b) offense is absolutely necessary. Once it is shown that a ward's offense is an enumerated 707(b) offense and the juvenile court so finds, then and only then does the analysis of the ineligibility by virtue of section 733 occur. Until there is a 707(b) offense, it is not necessary to determine if appellant would then be ineligible under section 733 because appellant is already ineligible.

E. Section 731.1 Is Not Relevant To The Appropriate Analysis.

The Opinion relies heavily on section 731.1's recall provisions (Opinion at pages 10, 11), even though neither appellant nor respondent provided any analysis of section 731.1 to the court. While section 731.1 was part of the statutory scheme that made the cited modification to section 731(a)(4) and created sections 731.1 and 733, there is no need to construe them together because the plain meaning of section 731(a)(4) is unambiguous and does not conflict with section 731.1.

As set forth, the purpose of these sections was to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. (*V.C. v Superior Court, supra*; *In re N.D., supra.*)

Accordingly, the new section 731(a)(4) now requires at the bare minimum a section 707(b) offense. Section 733 requires also that the 707(b) offense must be

the most recent offense, not just any of the ward's offenses, unless the most recent offense was a registrable sex offense. These sections became operative in September of 2007.

Section 731.1 was enacted to decide the question of what to do with the wards who were already at DJJ in September of 2007. Could the existing DJJ population be culled further, in order to effectuate the purpose of the statutes? Accordingly, 731.1 created a recall provision, whereby the probation departments could, if they so chose, look at each ward already at DJJ and decide whether to ask the juvenile court if it wanted to reconsider an option other than DJJ. This recall scheme was a two part procedure, and a ward already at DJJ on the effective date of the statute had no automatic right to have his commitment re-examined. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 438.) *Carl N., supra* at p. 436, 437, 438. held that sections 731 and 733 were not retroactive to wards already committed to DJJ at the time of the effective date of the statutes, but rather the recall provision was created for that purpose.

We do not know why the "registrable offense" language was included in section 731.1. Perhaps it was placed there in order to secure legislative votes from legislators who did not want the statutes to look like they were unleashing all previously committed wards who would not now be eligible, when those wards might have become hardened and/or gang-entrenched from their time at DJJ.

Instead section 731.1 created a two-step process, first under the complete discretion of the probation officer and then under the complete discretion of the juvenile court. (*Carl N., supra.*)

The language in section 731.1 does not contradict that in section 731(a)(4), and it is not necessary to change the meaning of "and" in section 731(a)(4) to harmonize the statutes.

II
REVIEW SHOULD BE GRANTED TO SETTLE THE IMPORTANT AND RECURRING QUESTION AS TO WHETHER IT IS IMPROPER TO COMMIT APPELLANT TO DJJ WHEN THE REQUIREMENT OF PROBABLE BENEFIT TO APPELLANT FROM THAT COMMITMENT IS NOT MET

Appellant was committed to DJJ for a single violation of Penal Code section 288(a), committed when he was 13 years old, and for probation violations involving his failure to do some of the work assigned in his placements and failure to do some of his school work as well.

It is submitted that the Court abused its discretion in committing appellant to DJJ for several reasons, including:

1. There was insufficient evidence to support the court's finding of probable benefit from the commitment to DJJ; and

2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered.

A. Authority Controlling DJJ Commitments; Standard Of Review.

A commitment to DJJ is a two step process, involving both fact-finding and the exercise of discretion.

i. Probable Benefit.

An order committing appellant to DJJ will be considered improper unless the evidence before the court "demonstrates probable benefit to the minor from commitment to DJJ **and** that less restrictive alternatives would be ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, *In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556; *In re George M.* (1993) 14 Cal.App.4th 376, 379.)

Because the finding of probable benefit is evidentiary based, it is reviewed under sufficiency of the evidence standards. As set forth, in California, sections 202 and 734 require that, to support a DJJ commitment, there must be *substantial evidence* in the record (1) supporting the court's disposition order committing a juvenile to DJJ, (2) which demonstrates probable benefit to the minor, and (3) supports a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A., supra*; *In re Pedro M., supra*; *In re George M., supra.*) Substantial evidence is defined as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v Virginia* (1979) 443 U.S. 307, 318.)

Johnson, 26 Cal.3d at 578, summarizes the proper standard, which should be applied to the evidentiary finding of probable benefit by the juvenile court:

> "We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the court must review the **whole record** in the light most favorable to the judgment below to determine whether it discloses **substantial** evidence – that is, evidence which is **reasonable, credible**, and of **solid value** – such that a **reasonable** trier of fact could find the defendant guilty beyond a reasonable doubt." (Emphasis added.)

ii. Discretion To Order The Commitment.

After the court makes the finding of probable benefit based on the evidence, then and only then does the court have the discretion as to whether or not to send appellant to DJJ. A finding of probable benefit does not mandate a commitment, though it is a necessary prerequisite. Other factors may be considered.

The statutory scheme of the Welfare & Institutions Code contemplates a progressively restrictive and punitive series of disposition orders, such as home placement under supervision, foster home placement, placement in treatment facilities, and, as a last resort, Youth Authority (DJJ) placement. (*In re Aline D.* (1975) 14 Cal.3d 557, 564.) The *Aline D.* court went on to note that commitments to DJJ are made only in the most serious cases and only after all else has failed, and that commitment to the Youth Authority is generally viewed as the final treatment resource available to the juvenile court. Of course, the circumstances of

a particular case may well suggest the desirability of a commitment despite the availability of such alternative dispositions as placement in a county camp or ranch. (*In re Anthony M.* (1981) 116 Cal.App.3d 491, 502; *In re John H.* (1978) 21 Cal.3d 18, 27.) However, first, there is no showing that this is such a case, and, second, even *John H.* mandates that there at least be substantial evidence of probable benefit to the minor before a DJJ commitment can be upheld. See also, *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53; *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258. Further, the courts have consistently indicated that a DJJ commitment is usually not justified by the seriousness of a current offense alone. (*In re Anthony M., supra; In re Teofilio A., supra.*)

It is well settled that, when a public offense is committed by a juvenile, certification of the juvenile to DJJ is within the sound discretion of the Court. (section 731; *In re Michael R.* (1977) 73 Cal.App.3d 327, 332.) This decision may be reversed on appeal only upon a showing that the court abused its discretion in committing the minor to DJJ. (*In re Michael R., supra*, 73 Cal.App.3d at p. 333; *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Teofilio A., supra.*) A reviewing court must indulge all reasonable inferences to support the findings of the juvenile court and such findings will not be disturbed on appeal when there is substantial evidence to support them. (*In re Michael R., supra*, 73 Cal.App.3d at p. 333.)

Whether a commitment in a particular case conforms to the general purpose of the juvenile court law is necessarily included when determining whether a commitment constitutes an abuse of discretion. (*In re Michael R., supra*, 73 Cal.App.3d at pp.333-335; *In re Teofilio A., supra*, 210 Cal.App.3d at p. 579.)

Teofilio A., supra, at p. 576, describes the purposes of the juvenile court law in this context. It takes note of the 1984 change in section 202, recognizing punishment as a rehabilitative tool, and shifting its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the protection and safety of the public, where care, treatment and guidance shall conform to the interests of public safety and protection.

Teofilio A., supra, citing *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396, goes on to explain:

> "Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety. This interpretation by no means loses sight of the 'rehabilitative objectives' of the Juvenile Court Law. (§202, subd. (b).) Because commitment to CYA cannot be based solely on retribution grounds (§202, subd. (e)(5)), there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate." (Emphasis added.)

The *Teofilio A.* court goes on to conclude:

> "Thus, while there has been a slight shift in emphasis, rehabilitation continues to be an important objective of the juvenile court law. To support a CYA commitment, it is required that there be evidence in

the record demonstrating probable benefit to the minor, and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate." (Emphasis added.)

See also, *In re Pedro M., supra*; *In re George M., supra.*

It is submitted that, under the circumstances, there was insufficient **evidence** to support the Court's decision to commit appellant to DJJ and that therefore it was an abuse of discretion for the Juvenile Court to so decide. (*People v Jacobs* (2007) 156 Cal.App.4th 728, 737; *City of Sacramento v Drew* (1989) 207 Cal.App.3d 1287, 1297; *United States v Taylor* (1988) 487 U.S. 326, 336 [101 L.Ed.2d 297, 108 S.Ct. 2413]; *People v Penoli* (1996) 46 Cal.App.4th 298, 306-307; *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1091.)

B. DJJ Is Inappropriate For Appellant Because It Provides No Probable Benefit To Him.

Any assumption that there would be services and programs available to help appellant at DJJ is unsupported by the facts.

As set forth, the juvenile court read the statutory language and made the unsupported finding of probable benefit without evidentiary support. Instead, the court relied on its own outdated experience with DJJ, which had no evidentiary support whatsoever. The court also relied on the probation report which had been prepared for the February 4, 2009, hearing (II CT 391-399). With regard to DJJ, that report provided that DJJ's screening stated that appellant would participate in

the sex behavior treatment programs there. However, the probation report did not evidence any personal familiarity with the sexual behavior treatment programs at DJJ, and, as set forth in appellant's companion Petition for Writ of Habeas Corpus to the Court of Appeal (B219096), DJJ does not in fact have such programs, and the court's recollections of DJJ's resources were grossly outdated and presently inaccurate.

The court also had evidence in the form of appellant's mother's testimony concerning other placements (RT 130-131), psychological evaluations by Dr. Reanne Singer (II SCT 2-13), Dr. Karen Schiltz (I ACT 1-57), Dr. Paul Martin (II SCT 14-20), Dr. Ellen Yoshimura (II SCT 23-29), and Dr. Dani Levine (I ACT 58-74), and also heard testimony from Dr. Levine (RT 115-119).

The court stated that appellant was committed to DJJ because the court believed that appellant would be able to participate in the adolescent sex offender program there, and requested notification if such would not occur (II CT 403, RT 142, 143). It was clear that the juvenile court committed appellant to DJJ because it felt that DJJ had an excellent sex offender program and that appellant would be able to participate in it. On numerous occasions the court stated its outdated and inaccurate view of the sex offender treatment programs at DJJ, stating that DJJ was the model for other facilities in the country with regard to its sex offender programs, that DJJ had the best sex offender program in the country, and that the

court knew this from its 17 years of being a prosecutor (RT 98, 111, 112, 113, 120, 121, 123, 124). While this may arguably have been true when the judge was a prosecutor[7], it was no longer true at the time of the disposition in this case.

In making the commitment, the judge emphasized the need to get appellant the sex offender treatment he needed (RT 98). The court was specific in stating that it was sending appellant to DJJ specifically in order to have appellant participate in sex offender treatment (RT 121, 123, 142-143), stating that, if appellant were unable to do so, the court might consider other alternatives (RT 142-143).

Yet, as set forth, the juvenile court read the statutory language and made the unsupported finding of probable benefit without evidentiary support.

The doctors who evaluated appellant agreed that it would be inappropriate to send appellant to DJJ, and that he would not receive probable benefit there, would not be rehabilitated there, and in fact instead would be damaged by such a commitment.

At both sessions of the disposition hearing, appellant argued that DJJ would not be appropriate for appellant. He explained that a necessary issue in the determination was whether appellant was resistant to treatment or whether he had a disorder causing him not to be able to internalize and respond to the treatment (RT

7 Judge Coleman came on the bench in 1996.

113). This was the thrust of the medical evaluation reports as well.

Appellant pointed out that Dr. Yoshimura indicated that appellant has features of pervasive developmental disorder, and that Dr. Levine was concerned with the fact that appellant was not a violent offender and therefore would be inappropriate for DJJ (RT 113).

Appellant requested that appellant not be sent to DJJ, that DJJ was inappropriate for him, that appellant's parents were very involved, that appellant was not a violent offender, that appellant had no history of escape or flight from placement, that **Dr. Yoshimura indicated that appellant needed intensive individual treatment which was not provided at DJJ**, and that appellant has learning disabilities which needed to be addressed in order that he benefit from treatment (RT 120). Appellant's counsel pointed out that appellant was not re-offending, and argued that laziness was not a reason to send appellant to DJJ (RT 121, 133, 137, 138). Dr. Martin noted that appellant was not predatory by nature, and the court agreed (II SCT 17, RT 137).

The live testimony from Dr. Levine, in addition to her report, was telling. She testified to grave concerns with DJJ and the programs appellant has previously been in (RT 115). She testified that the population in DJJ was quite different from appellant, and that many of them had conduct disorder, behavioral problems, and other problems appellant does not have (RT 115, 116, 117, 118). She emphasized

that appellant was not successful before because prior treatments were not the right treatment for him, and that he needed placement which would address his complex profile, and that DJJ would not be good for appellant and in fact would exacerbate appellant's problems (RT 115, 116).

Dr. Levine testified that she did not believe that the sex offender programs at DJJ can treat appellant effectively (RT 118). She said that DJJ was not safe, and that appellant would not be amenable to treatment where he would not feel safe (RT 118).

She also pointed out that appellant had significant learning issues getting in the way of his being able to process a program (RT 119). She pointed out the great amount of testing material showing that appellant has significant executive functioning difficulties and critical reasoning difficulties (RT 119). She emphasized that appellant would not "get it" without a program specifically designed for children who learn and process differently (RT 119).

Dr. Levine's report stated that DJJ would be bad for appellant because he had no history of aggressive, violent, or delinquent behavior, and that he should be with non-violent offenders (I ACT 59). She pointed out that appellant would be at risk in the presence of highly delinquent or gang or assaultive offenders (I ACT 59). This is exactly what DJJ is. The other evaluation reports agreed with Dr. Levine in terms of the diagnoses and needs. Appellant cannot be said to receive

probable benefit from a commitment at DJJ.

It was an abuse of discretion to commit appellant to DJJ (*Jacobs, supra; City of Sacramento, supra; U.S. v Taylor, supra; Penoli, supra; Ronnie P., supra.*)

III
REVIEW SHOULD BE GRANTED TO SETTLE THE IMPORTANT AND RECURRING QUESTION AS TO WHETHER IT IS IMPROPER TO COMMIT APPELLANT TO DJJ WHEN ALTERNATIVE PLACEMENTS ARE NOT SUFFICIENTLY CONSIDERED

As set forth, an order committing appellant to DJJ will be considered an abuse of discretion unless the evidence before the court "demonstrates probable benefit to the minor from commitment to DJJ **and** that less restrictive alternatives would be ineffective or inappropriate." (*In re Teofilio A., supra*; *In re Pedro M., supra*; *In re George M., supra.*)

As set forth, the statutory scheme of the Welfare & Institutions Code contemplates a progressively restrictive and punitive series of disposition orders, such as home placement under supervision, foster home placement, placement in treatment facilities, and, as a last resort, Youth Authority (DJJ) placement. (*In re Aline D.* (1975) 14 Cal.3d 557, 564.) The *Aline D.* court went on to note that commitments to DJJ are made only in the most serious cases and only after all else has failed, and that commitment to the Youth Authority is generally viewed as the final treatment resource available to the juvenile court.

It is submitted that alternative placements were not sufficiently considered for appellant. While appellant had been tried at three prior placements, as set forth in the evaluation reports, those placements were not proper for appellant. There were several other prospective placements suggested to the court which would have addressed appellant's needs and would have resulted in the great likelihood of success for appellant's rehabilitation to enable him to return to the community as a productive member of society.

The reports indicate that appellant has specific learning disabilities which impact his ability to process the programs and learn and benefit from the therapy (I ACT 7, 10, 11 [Dr. Schiltz], I ACT 58 [Dr. Levine], II SCT 6, 11, 12 [Dr. Singer], II SCT 16, 17, 18 [Dr. Martin], II SCT 25, 26, 28, 29 [Dr. Yoshimura]).

The reports indicate that appellant has executive functioning deficits which explain why he has been unable to progress (I ACT 11, II SCT 25, 26).

The reports suggest specialized methodologies to enable appellant to benefit from therapy and programs (I ACT 21-57 [Dr. Schiltz, with detailed suggestions for methodologies], I ACT 59 [Dr. Levine], II SCT 18, 19 [Dr. Martin], II SCT 29 [Dr. Yoshimura]).

Alternative placements were suggested, which would provide the necessary environment and therapies which would have the highest likelihood of success. One of these, a program specifically designed to deal with appellant's problems,

was the Ryder program at the Stetson School, suggested by Dr. Levine (RT 115). Dr. Levine testified that appellant had a complex profile and it was necessary to find a program which would address that (RT 115). Dr. Levine's report stated that appellant would benefit from a residential facility with a therapeutic milieu, with clinicians with masters level or higher and with specialized training, such as the Ryder program (I ACT 58). She recommended a holistic approach, which treated the whole child, and explained in detail why the Stetson School would be appropriate, stating that that program offered treatment for boys with sexual concerns, learning concerns, and underlying emotional concerns, and explaining the various treatments and treatment goals there (I ACT 58, 59, 60).

Dr. Levine explained that appellant had been accepted at another excellent and appropriate placement, Oxbow Academy (I ACT 66-67). She also included with her report, information on several programs.

Dr. Yoshimura was in agreement about the type of programs appellant needs, as were the other evaluators.

Appellant's mother offered for potential consideration the Woodward Academy, which would also be available and appropriate for appellant, and which is certified by the State of California (RT 130, 131).

The court refused to consider Ryder House, refused to explore their willingness to contract with the County and with California, and refused to allow

Woodward Academy to interview appellant (RT 114, 115, 124, 125, 132, 134, 135, 139), instead sticking with its opinion that DJJ was the only answer.

Appellant pointed out to the court that, because of appellant's youth, DJJ would be available for appellant for a long time, and that, if a more appropriate program did not work, the court could consider DJJ then (RT 123). The court did not agree.

It is submitted that the necessary alternative placements were not sufficiently considered by the juvenile court in this case. It was an abuse of discretion to commit appellant to DJJ (*Jacobs, supra; City of Sacramento, supra; U.S. v Taylor, supra; Penoli, supra; Ronnie P., supra.*)

IV
REVIEW SHOULD BE GRANTED TO SETTLE THE IMPORTANT AND RECURRING QUESTION AS TO WHETHER APPELLANT'S 5TH AND 14TH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT COMMITTED HIM TO DJJ.

The due process clause of the 5th and 14th amendments to the United States Constitution require substantial and fundamental fairness in State proceedings which deprive a person of liberty. (*Hicks v Oklahoma* (1980) 447 U.S. 343.) In the case at bar, it was fundamentally unfair, and a violation of appellant's right to due process, when the court deprived him of his liberty by committing him to DJJ

without evidence of probable benefit and when the weight of the evidence was overwhelming that alternative placements would be by far the best choice.

In *Hicks, supra*, the United States Supreme Court held that the failure of a state to observe its own statutory procedural law in criminal sentencing violates the federal due process rights of a criminal defendant by depriving him of a liberty interest. (*Hicks, supra,* at pp. 346-347.) See also, *Vansickel v White* (9th Cir. 1999) 166 F.3d 953, 957 [the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the 14th amendment.]. Therefore, when a state has provided a specific method of determining whether a commitment which results in a loss of liberty shall be imposed, "'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.'" (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.).

The United States Supreme Court "repeatedly has recognized that ... commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425, italics added.) Such protections are equally available in juvenile delinquency proceedings. (*Addington, supra*, at p. 428; *In re Winship* (1970) 397 U.S. 358, 365-366; *Schall v Martin* (1984) 467 U.S. 253.) See also, *Parham v. J. R.* (1979) 442 U.S. 584, 600 [liberty interest in avoiding involuntary confinement].

As set forth, certain due process protections are applicable in juvenile

proceedings, including the right to have the state meet its statutorily defined burden of proof before the juvenile loses his liberty. (*Alfredo A. v. Superior Court* (1994) 6 Cal. 4th 1212, 1225, citing *Schall v. Martin* (1984) 467 U.S. 253, 263.) The standard of proof which is required to be applied to the facts in reaching a judgment implicates federal due process rights.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Addington v. Texas*, *supra*, 441 U.S. at p. 423.)

In California, the statutes that govern the commitment of juvenile wards to DJJ have resulted in the creation of a protected liberty interest. As set forth, in California, sections 202 and 734 require that, to support a DJJ commitment, there must be *substantial evidence* in the record (1) supporting the court's disposition order committing a juvenile to DJJ, (2) which demonstrates probable benefit to the minor, and (3) supports a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.*, *supra*; *In re Pedro M.*, *supra*; *In re George M.*, *supra.*) Substantial evidence is defined as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v Virginia* (1979) 443 U.S. 307, 318.)

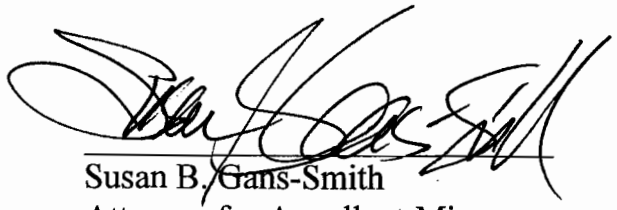
Therefore, to satisfy the requirements of due process, there had to be **substantial evidence** in the record that there be probable benefit to appellant from the availability of effective treatment and rehabilitation programs and appropriate consideration of alternative placements before he could lawfully be committed to DJJ.

In the case at bench, the State violated appellant's right to due process of law when it committed appellant to DJJ without any evidence of probable benefit to him from that commitment and without consideration of the suggested and far superior alternative placements.

For all the foregoing argument and authority, it is respectfully submitted that review should be granted in this case.

Respectfully submitted,

Dated: June 17, 2010



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CERTIFICATE OF WORD COUNT
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DATED: June 17, 2010

Susan B. Gans-Smith
Attorney for Appellant
C.H.

EXHIBIT A

Court of Appeal Opinion

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C. H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B214707 (Super. Ct. No. 2005040811) (Santa Barbara County)
THE PEOPLE, Plaintiff and Respondent, v. C. H., Defendant and Appellant.	COURT OF APPEAL - SECOND DIST. FILED MAY 18 2010 JOSEPH A. LANE, Clerk Deputy Clerk

Christopher H. appeals from a juvenile court dispositional order committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ),[1] for a maximum term of confinement of eight years. Appellant contends that the court abused its discretion because "1. There was insufficient

[1] "The California Youth Authority (CYA) was renamed California Department of Corrections and Rehabilitation, Juvenile Justice, effective July 1, 2005. The Division of Juvenile Facilities (DJF) is part of the Division of Juvenile Justice. (Gov.Code, §§ 12838, 12838.3, 12838.5, 12838.13.) DJF is referenced in statutes, such as [Welfare and Institutions Code] sections 731 and 733, that formerly referred to CYA." (*In re M.B.* (2009) 174 Cal.App.4th 1472, 1475, fn.2.) In this opinion, we use the term "DJJ" whenever reference to the DJJ or DJF is appropriate.

evidence to support the court's finding of probable benefit from the commitment to DJJ; and [¶] 2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered [by appellant]." Appellant also contends that the commitment offense - lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)) - does not qualify as an offense for which he can be committed to the DJJ. We affirm.[2]

Factual and Procedural Background

Appellant was born in August 1992 and was adopted three days later. In October 2005, when appellant was 13 years old, he licked the vagina of his three-year-old sister and put his penis inside her mouth. This incident constitutes the commitment offense. Appellant admitted to the police that a similar incident had "happened another time with the victim at their house about a year prior and that his father caught him." Appellant also admitted that, about a year earlier, he had "put[] his mouth" on his then seven-year-old sister's vagina and had sexually molested his then seven-year-old brother.

Appellant's parents said that they "first became aware of [appellant] sexually acting out when he was seven years old." Appellant's mother caught him and another boy with their pants down. The other boy "said that [appellant] told him 'If you suck my penis, I'll suck yours.' " Appellant's mother "heard from neighbors and a family friend that [appellant] asked a neighbor boy (age 8) and a girl (age 11) to have sex about two years ago" when appellant was 11 years old.

In October 2005 when appellant sexually molested his three-year-old sister, he was in counseling for his prior sexual misconduct. His therapist said that appellant "is unable to control his impulses to sexually acting out" and that he had not improved after almost one year of treatment.

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[2] Appellant's petition for writ of habeas corpus is denied by separate order.

In November 2005 a petition was filed pursuant to section 602 of the Welfare and Institutions Code.[3] The petition alleged that, in violation of Penal Code section 288, subdivision (a), appellant had committed a lewd act upon his three-year-old sister in October 2005. In December 2005 appellant admitted the petition's allegations, and the juvenile court found that he came within the provisions of section 602. The court released appellant to the custody of his aunt after he had signed a contract forbidding him from contacting anyone not approved by his aunt. Three days later, appellant violated the contract "by conversing with an 'older' female on a 'sexual website.' " Appellant was detained and transported to a juvenile facility.

On January 5, 2006, appellant was declared a ward of the juvenile court and placed on probation. He was removed from the custody of his parents and "committed to the care of the probation officer for placement in a suitable open placement."

On January 12, 2006, appellant was placed at Starshine Treatment Center. In a supplemental report filed in July 2006, appellant's probation officer characterized his "performance in the overall program at Starshine . . . as lethargic." The probation officer noted that appellant had "just recently had an incident with another minor involving inappropriate sexual conduct."

In a supplemental report filed in January 2007, the probation officer wrote that appellant had "made little improvement" at Starshine. Appellant's therapist said that "he continues to be at a high risk to re-offend."

In February 2007 the probation officer filed a notice of charged violations of probation. The violations included a failure to complete therapy assignments and to participate in group therapy. The probation officer declared: "When asked why he doesn't do what he needs to do, [appellant] has nothing to say aside from, 'I don't know.' [Appellant's] therapist . . . has tried several different therapeutic approaches . . . to try to gain his participation, and still [appellant] does not respond."

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[3] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Appellant admitted that he had violated his probation by failing to complete therapy assignments and participate in group therapy. Pursuant to the juvenile court's recommendation, appellant was removed from Starshine and placed at Rancho San Antonio.

On May 30, 2007, the probation officer filed a second notice of charged violations of probation. Appellant was charged with engaging in two consensual sex acts with another resident at Rancho San Antonio. The sex acts involved oral copulation and anal penetration. Because of these incidents, Rancho San Antonio terminated appellant's participation in its treatment program. Appellant told the probation officer that, when he becomes an adult, he would like to have an operation to change his sex from male to female. The probation officer declared: "This 14 year old minor failed his first treatment program after 13 months of substandard progress before entering Rancho San Antonio in February '07. Unfortunately, [appellant] demonstrated the same lackluster effort while at Rancho San Antonio. More concerning to Rancho San Antonio treatment team was [appellant's] gender identity issue . . . ."

Appellant admitted the charged violations of probation. On June 20, 2007, appellant was placed at Gay and Lesbian Adolescent Social Services (GLASS) in Los Angeles. In a supplemental report filed on July 5, 2007, appellant's probation officer noted that at GLASS appellant was "receiving sex offender therapy, as well as therapy that addresses his gender identity issues."

On May 1, 2008, the probation officer filed a third notice of charged violations of probation. Appellant was charged with failing to complete assignments for his sex offender therapy at GLASS. The manager of GLASS reported that appellant had completed only one of twelve assignments. His therapist at GLASS stated: " '[Appellant] has shown myself and other staff that he is an intelligent and caring young man who can be manipulative and very lazy. He has shared how he has learned over time that if he plays "dumb" or incompetent, less is expected of him and in his mind means more TV and game time. He has also stated that he enjoys "getting one over"

on adults by not doing his work, or pretending that he doesn't understand it. This learned helplessness has been going on for many years before he arrived at GLASS according to [appellant].' "

On May 2, 2008, appellant admitted the charged violations of probation. The juvenile court ordered that he serve 90 days in the "Juvenile Justice Facilities." But it stayed execution of the 90-day commitment until July 18, 2008. The court said that on that date it would vacate the commitment if appellant had made a genuine effort to participate in the treatment program at GLASS.

On July 18, 2008, the probation officer filed a memorandum concerning appellant's behavior at GLASS. The probation officer reported: "On 7/10/08, Probation met with GLASS staff to review [appellant's] progress. Staff reported no improvements with his attitude and behavior. [Appellant] still failed to complete his assignments for his JSO [Juvenile Sex Offender] group." When a therapist asked him why he did not complete his assignments, appellant replied: " 'I won't lie, I just didn't feel like doing it.' " A GLASS progress report noted that appellant " 'prefers to watch TV, play Playstation games, or just lie around and do nothing.' " The progress report further observed: " 'For four weeks straight [appellant] was not prepared with his issues for the advanced JSO group. He was voted by his peers and staff to start back over in the entry level JSO group.' " The progress report opined that " '[a]t this time [appellant] is at a high risk of re-offending.' " On July 18, 2008, the juvenile court ordered appellant to serve the previously stayed 90-day commitment at the Juvenile Justice Facilities.

In a memorandum filed on August 29, 2008, the probation officer reported that appellant's performance at the Juvenile Justice Facilities "has been satisfactory." On that same date, the juvenile court granted appellant an early release and ordered that he be returned to GLASS.

On January 2, 2009, the probation officer filed a supplemental report on appellant's progress at GLASS. The probation officer concluded that appellant had failed "to make any progress in his JSO program." A GLASS progress report

observed: " 'Since [appellant] returned from juvenile hall his attitude has been more negative. He is defiant with staff. He often refuses to do what is asked of him or if he does it, he makes very little effort to do it correctly. He has lied to staff and cursed at them. He is doing very little Juvenile Sex Offender (JSO) work and school work. His school grades are very poor. . . . Even if told to sit a[t] the kitchen table to do his work, if left alone, he will put his head down and sleep.' " The progress report noted that, on a PlayStation Portable device, appellant had accessed "several pornographic sites including one of beastiality [*sic*]."

On January 5, 2009, the probation officer filed a fourth notice of charged violations of probation. The notice alleged that appellant "fails to follow the [GLASS] program rules, is not completing assignments for his sex offender therapy, and is making no progress." The probation officer declared that, during an interview on December 31, 2008, appellant had "admitted that the reason he did not complete his assignments was due to laziness not because he did not understand the assignments/material." Appellant "stated that if he had chosen to complete the assignments, he would not have had any difficulty in doing so."

On January 6, 2009, appellant admitted the probation violations. The juvenile court asked the probation officer "to contact the [DJJ] to see if a commitment there would ensure [appellant] participate in their sexual offender therapy program."

On February 18, 2009, the probation officer filed a supplemental report. The probation officer said that appellant had been "screened for a commitment" to the DJJ. If so committed, appellant "will participate in the sex behavior treatment program[]." The probation officer concluded: "[Appellant's] continued defiance and resistance to treatment justify his need for a structured program that is able to provide aggressive treatment. Due to his high risk to re-offend, it is recommended that [appellant] be provided a higher level of supervision, with no immediate access to the community. A commitment to the [DJJ] would enable [appellant] to receive the appropriate level of treatment and supervision."

On February 11 and 18, 2009, the juvenile court conducted a disposition hearing on appellant's probation violations. Appellant's counsel asked the court "for one last placement" before sending him to the DJJ. Counsel recommended that appellant be placed at the Stetson School in Massachusetts. A psychologist, Dr. Dani Levine, appeared in court and opined that the DJJ cannot effectively treat appellant and is "not a safe environment" for him. In a letter filed with the court, Dr. Levine also recommended the Stetson School for appellant because it "offers a unique program specifically designed to treat children with sexual behavioral problems." Dr. Levine wrote that the Stetson School "has earned a reputation of expertise in the juvenile sex offender field."

Appellant's mother spoke and requested that the court consider placing him at the Woodward Academy in Iowa. Mother stated that the academy is "100-percent certified by the State of California" and currently has two California children in its sex offender program. Mother said that appellant would have to be interviewed by the academy's director of admissions before he could be accepted into the program. Mother believed that appellant's commitment to the DJJ "would be destructive to [appellant] more than helpful." Appellant's counsel said that, if the court did not want an out-of-state placement for appellant, she would try to find a suitable local placement for him.

The juvenile court decided to commit appellant to the DJJ so that he could participate in its sex offender program: "I think the best chance for [appellant] is at the . . . [DJJ], Sexual Offender Program. . . . [¶] I just think that's the place where he can receive the appropriate level of treatment and supervision . . . . [¶] I think the longer we wait, the longer we run the risk of not helping this young man." "It's not like we're putting him in a cell, locking it up and walking away. We're not doing that. [¶] I don't know of any better program, quite frankly." The court noted that "he's had three opportunities in three very fine programs. Rancho San Antonio is top notch, and he hasn't made it. And he doesn't make it because he hasn't wanted to." The court was "fully satisfied that the mental and physical condition and qualifications of [appellant]

are such as to render it probable that [he] will be benefited by the reformatory, educational discipline, and other treatment provided by the [DJJ]." The court also concluded that appellant "poses a significant risk to the safety of children in our community" and needs to be "in a place where he cannot have access to other potential victims. And that comes down to the [DJJ]."

The Juvenile Court Did Not Abuse Its
Discretion by Committing Appellant to the DJJ

"The decision of the juvenile court to commit a juvenile offender to [the DJJ] may be reversed on appeal only by a showing that the court abused its discretion. [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*In re Carl N.* (2008) 160 Cal.App.4th 423, 431-432.) "A decision by the juvenile court to commit a minor to the [DJJ] will not be deemed to constitute an abuse of discretion where the evidence 'demonstrate[s] probable benefit to the minor from commitment to the [DJJ] and that less restrictive alternatives would be ineffective or inappropriate. [Citation.]' [Citation.]" (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556.)

Appellant contends that the juvenile court abused its discretion because "1. There was insufficient evidence to support the court's finding of probable benefit from the commitment to DJJ; and [¶] 2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered [by appellant]."

We disagree. The juvenile court's finding of probable benefit is amply supported by the probation officer's description of the DJJ sex offender treatment program. In the supplemental report filed on February 18, 2009, the probation officer explained that the program, which usually requires 24 months to complete, "is divided into four phases as follows: The Orientation Phase is approximately 28 weeks long. In this stage, youth gain an understanding of treatment concepts, rules of group therapy, psychological testing, and overall rules/expectations, including the expectation of full disclosure. The Core Program Phase[] is approximately 40 weeks. In this phase, youth go through an intense exploration of their sexual offender behavior patterns,

identifying triggers, antecedents, perceptions, cognitions and emotions. They learn their assault cycle and how to interrupt it. The Relapse Phase is approximately 20 weeks. This [involves] the development of a detailed plan on how to interrupt the sexual offending cycle and prevent or eliminate criminal behaviors. [Appellant] will also participate in the following groups: victim awareness, anger management, and family dynamics counseling."

The record demonstrates that the juvenile court considered less restrictive placements and did not abuse its discretion in rejecting them as ineffective or inappropriate. Appellant had dismally failed at three prior less restrictive placements. In view of these failures, the juvenile court reasonably concluded that appellant's best chance at rehabilitation was the DJJ sex offender treatment program. That program would provide him with extensive, long-term sex offender counseling in a highly structured, disciplined, and closely supervised environment. Such a restrictive environment was necessary to ensure appellant's participation in the treatment program.

Moreover, since appellant had been assessed as posing a high risk of reoffending, his commitment to the DJJ would ensure the safety of the community. "The purposes of juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct. [Citations.] The preservation of the safety and welfare of a state's citizenry is foremost among its government's interests . . . ." (*In re Jose C.* (2009) 45 Cal.4th 534, 555.)

Because the juvenile court did not abuse its discretion by committing appellant to the DJJ, we reject appellant's contention that the commitment violated his constitutional right to due process.

Appellant's Offense Renders Him Eligible for Commitment to the DJJ

Appellant contends that the commitment offense - lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)) - does not qualify as an offense for which a ward may be committed to the DJJ because it is not listed in section 707, subdivision (b). Section 731, subdivision (a)(4), provides that the juvenile court may commit a

ward to the DJJ "if the ward has committed an offense described in subdivision (b) of Section 707 . . . ."

In determining whether a violation of Penal Code section 288, subdivision (a), qualifies as an offense for which a ward may be committed to the DJJ, "[o]ur task is to ascertain legislative intent so we can 'effectuate the purpose of the law.' [Citations.] We begin with the statutory language, which is usually the most reliable indicator of legislative intent. [Citations.] Ordinarily, if that language is susceptible of only one meaning, ' "we presume the Legislature meant what it said, and the plain meaning of the statute controls." ' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1045-1046.)

The relevant statutory language clearly manifests the Legislature's intent that a violation of Penal Code section 288, subdivision (a), shall qualify as an offense for which a ward may be committed to the DJJ. Section 733, subdivision (c), provides that a ward shall not be committed to the DJJ if "the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, *unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code.*" (Italics added.) A violation of Penal Code section 288 is one of the sex offenses set forth in Penal Code section 290.008, subdivision (c)(2).

Section 733 was added to the Welfare and Institutions Code in 2007 and became operative on September 1, 2007. (Stats.2007, c. 175, §§ 22, 37.) Section 731.1, also added in 2007, (Stats.2007, c. 175, § 20) provides that "the court committing a ward to the [DJJ], upon the recommendation of the chief probation officer of the county, may recall that commitment in the case of any ward whose commitment offense was not an offense listed in subdivision (b) of Section 707, *unless the offense was a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code*, and who remains confined in an institution operated by the [DJJ] on or after September 1, 2007." (Italics added.) Thus, a court that committed a ward to the DJJ for a violation of Penal Code section 288, subdivision (a), cannot recall the

commitment even though that offense is not listed in subdivision (b) of section 707. If the legislature had intended that only offenses listed in subdivision (b) of section 707 shall qualify for commitment to the DJJ, it would have permitted recall for an unlisted commitment offense irrespective of whether that offense was set forth in subdivision (c) of Penal Code section 290.008.

Disposition

The dispositional order of the juvenile court committing appellant to the DJJ is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Donald D. Coleman, Judge

Superior Court County of Ventura

Susan B. Gans-Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

PROOF OF SERVICE BY MAIL
[C.C.P. §1013A(3)]

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is PMB #237, 1130 East Clark Ave., Suite 150, Santa Maria, California 93455-5123.

On June 18, 2010, I served the foregoing document described as APPELLANT'S PETITION FOR REVIEW on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

*** See attached service list ***

I deposited such envelope in the mail at Santa Maria, California. Each envelope was mailed with postage thereon fully prepaid.

Executed on June 18, 2010, at Santa Maria California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Susan B. Gans-Smith

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