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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
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JAMES RICHARD JOHNSON Petitioner and Appellant, *v.* ***THE SUPERIOR COURT OF SAN BERNARDINO COUNTY*** Respondent; ***THE PEOPLE OF THE STATE OF CALIFORNIA*** Real Party in Interest and Respondent.	**Case No.** Court of Appeal Case No. E055194 San Bernardino County Superior Court Case No. CIVDS1105422

PETITION FOR REVIEW

Of the decision of the Fourth District Court of Appeal, Division Two

After Appeal from the Superior Court of San Bernardino County,
The Honorable David Cohn, Judge, Presiding

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JAMES RICHARD JOHNSON v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY	Court of Appeal Case No. E055194
(THE PEOPLE OF THE STATE OF CALIFORNIA)	San Bernardino County Superior Court Case No. CIVDS1105422

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The People respectfully petition this court for review, following issuance of the Court of Appeal's opinion on January 31, 2013. (Cal. Rules of Court, rule 8.500.)

The People respectfully request that the Court grant review, to secure uniformity of decision and settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

This case concerns sex offender registration, and the equal protection analysis mandated by *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). The question is whether the age of the defendant at the time of the offense should be considered. There is a split of authority in the Court of Appeal.

ISSUE PRESENTED FOR REVIEW

1. When evaluating whether sex offender registration stemming from an offense against a minor violates equal protection, is the age of the defendant at the time of the offense considered?

BRIEF PROCEDURAL BACKGROUND

Appellant James Richard Johnson brought a petition for writ of mandate in the trial court, asking to be relieved of the duty to register as a sex offender, stemming from his conviction for violating Penal Code[1] section 288a, subdivision (b)(2) (oral copulation of a person under 16 by a person over 21). Petitioner was 27 years old at the time of the offense.

The trial court denied the petition, following *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*). The Court of Appeal reversed, electing instead to follow *People v. Ranscht* (2009) 173 Cal.App.4th 1369 (*Ranscht*) and *People v. Luansing* (2009) 176 Cal.App.4th 676 (*Luansing*).

No petition for rehearing was filed in the Court of Appeal.

GROUNDS FOR REVIEW

Review is appropriate to secure uniformity of decision and to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

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1 Further statutory references are to the Penal Code, unless otherwise designated.

There is a split of authority in the Court of Appeal, concerning how to treat violations of section 288a, subdivision (b)(2), in situations where the defendant was at least 10 years older than the victim. (See *People v. Tuck* (2012) 204 Cal.App.4th 724, 736-737 [describing split].)

Under *Manchel, supra,* 163 Cal.App.4th 1108, sex offender registration is still required, because section 288, subdivision (c)(1) is a mandatory-registration comparison offense.

Under *Ranscht, supra,* 173 Cal.App.4th 1369 and *Luansing, supra,* 176 Cal.App.4th 676, registration is discretionary only, because section 288, subdivision (c)(1) is not a valid comparison offense, and because section 261.5 does not require mandatory registration.

REVIEW IS APPROPRIATE

Two considerations support review in this case. First, the split of authority in the Court of Appeal merits resolution. Second, review would provide an opportunity to clarify this aspect of the equal protection analysis, which is applicable to a large number of offenses.

Review would provide guidance to the lower courts: how to handle this and similar offenses, and how to properly perform the equal protection analysis of *Hofsheier, supra,* 37 Cal.4th 1185. Without review, trial courts will continue to face conflicting appellate decisions. Current criminal cases face uncertainty regarding whether registration is required. Post-conviction petitions for habeas corpus or mandate can

have different results, depending on which line of authority persuades the reviewing court. Clear law would conserve judicial resources at the trial and appellate level.

Adoption of the reasoning of *Manchel, supra,* 163 Cal.App.4th 1108 would preserve more of the Legislature's intent in enacting section 290.

MEMORANDUM

I.

UNDERLYING FACTS AND PROCEDURE

In 1990, appellant was convicted of oral copulation on a person under 16 by a person over 21. (§ 288a, subd. (c)(1).) (Slip Opn., p. 2.) At the time of the offense, he was 27 years old, and thus more than 10 years older than the victim. (Slip Opn., p. 2, fn. 2.)

In 2011, appellant filed a petition for writ of mandate in the trial court, pursuant to *Hofsheier*, *supra*, 37 Cal.4th 1185, the procedure approved of in *People v. Picklesimer* (2010) 48 Cal.4th 330. (Slip Opn., p. 2.)

The trial court noted the conflict in the Court of Appeal decisions governing petitioner's offense, and chose to follow *Manchel*, *supra*, 163 Cal.App.4th 1108. (Slip Opn., pp. 2-3.) The petition was denied on legal grounds.

Appellant appealed, and the Court of Appeal reversed, repeating the criticism of *Manchel* made by *Ranscht*, *supra*, 173 Cal.App.4th 1369. (Slip Opn., pp. 4-5.)

II.

LEGAL BACKGROUND

Appellant's offense is listed in section 290, subdivision (c), as subject to mandatory registration under subdivision (b). Under *Hofsheier*, *supra*, 37 Cal.4th 1185, requiring mandatory registration for certain offenses violates equal protection, if the sexual act committed is the only reason for

requiring registration—situations where, had the same victim and defendant engaged in intercourse, registration would not have been mandatory.

In appellant's case, the sexual act was not the only reason for requiring registration. Based on the ages of petitioner and the victim, the offense could also have been prosecuted as a lewd or lascivious act on a child aged 14 or 15 by a person at least 10 years older (§ 288, subd. (c)(1)). Under *Manchel, supra,* 163 Cal.App.4th 1108, this is the proper way to conduct the equal protection analysis.

Ranscht, supra, 173 Cal.App.4th 1369, and the cases following it, including the Court of Appeal here, decline to use section 288 as a comparison offense, reasoning that the focus should be on the offense of conviction, rather than what offenses could have been supported by the underlying conduct. (Slip Opn., p. 5, quoting *Ranscht, supra,* 173 Cal.App.4th at pp. 1374-1375.)

The People believe that the Court of Appeal in this case erred, as did *Ranscht.* The pertinent question is what *intercourse* could have been prosecuted as; in this case, it would have violated both section 261.5, subdivision (d), *and* section 288, subdivision (c)(1). The trial court was correct in finding no equal protection violation.

III.

THE *HOFSHEIER* EQUAL PROTECTION ANALYSIS

This Court's decision in *Hofsheier, supra*, 37 Cal.4th 1185 originated the equal protection analysis applicable to sex offender registration.

In *Hofsheier*, appellant was a 22-year-old man, convicted of violating section 288a, subdivision (b)(1), for engaging in voluntary[2] oral copulation with a 16-year-old girl. The Court held that it was a violation of equal protection to subject Hofsheier to mandatory sex offender registration, because registration would not have been mandatory had he engaged in intercourse with the victim. *Hofsheier* remanded the case back to the trial court to consider whether to nonetheless impose the discretionary sex offender registration requirement of former section 290, subdivision (a)(2)(E) (now section 290.006).

In its analysis, *Hofsheier* compared section 288a, subdivision (b)(1) with section 261.5. The Court reasoned that "[t]he only difference between the two offenses is the nature of the sexual act." (*Id.* at p. 1200.) The difference in sexual acts was not sufficient to justify requiring mandatory sex offender registration for oral copulation but only discretionary sex offender registration for sexual intercourse. (*Id.* at pp. 1206-1207.)

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[2] A minor, of course, cannot consent to sexual activity in the State of California. *Hofsheier* used the term "voluntary" to indicate that the minor willingly participated in the sexual act, and that there was no force, violence, duress, et cetera. (*Supra*, 37 Cal.4th 1185, 1193, fn. 2.)

Hofsheier explicitly stated that it was *not* considering crimes involving forcible sexual acts or victims under the age of fourteen, "because all such persons must register as sex offenders irrespective of whether they engaged in oral copulation or sexual intercourse." (*Id.* at p. 1198.) The Court then cited sections 264 (rape), 288 (lewd or lascivious acts with a victim under the age of fourteen), 288a(c)(1) (oral copulation with a minor under the age of fourteen), and 288a(c)(2) (forcible oral copulation).

Cases since *Hofsheier* have relied upon the above-quoted explanation of the equal protection analysis, holding that sex offender registration for certain crimes does not violate equal protection. (See *People v. Alvarado* (2010) 187 Cal.App.4th 72 [attempted lewd act on a child under 14 (§§ 288, subd. (a); 664)]; *People v. Anderson* (2008) 168 Cal.App.4th 135 [lewd act on a child under 16 (§ 288, subd. (c)(1))].) On the other hand, *Ranscht* (*supra*, 173 Cal.App.4th 1369, 1374) treats the Court's explanation of its analysis as mere dicta.

IV.

APPLICATION OF *HOFSHEIER* TO VIOLATIONS OF SECTION 288A, SUBDIVISION (B)(2)

A. Application of *Hofsheier* to Appellant's Case

To determine whether a state-adopted classification (here, sex offender registration) violates equal protection, the courts must consider whether there are two similarly situated groups, whether they are treated unequally, and if so,

whether there is nonetheless a plausible, rational relationship to a legitimate state interest. (*Hofsheier, supra*, 37 Cal.4th 1185, 1198-1207.)

1. Similarly Situated Groups

First, there must be

> a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.

(*Hofsheier, supra*, 37 Cal.4th 1185, 1199 [italics in original]; quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.)

In this case, the two similarly situated groups are: (1) persons convicted of a crime based on voluntary oral copulation of a person under sixteen, and (2) persons convicted of a crime based on voluntary sexual intercourse with a person under sixteen. Like in *Hofsheier*, the only difference between the two groups is the sexual act engaged in. Unlike in *Hofsheier*, however, had appellant engaged in intercourse with the victim, he could have been charged with two different offenses: either as unlawful sexual intercourse with a person under sixteen by someone 21 or older (§ 261.5, subd. (d)), or with lewd act[3] on a person under sixteen by someone at least ten years older (§ 288, subd. (c)(1).)

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[3] Intercourse can constitute the lewd act for purposes of a violation of section 288. (See *People v. Fox* (2001) 93 Cal.App.4th 394, 399; *People v. Ward* (1986) 188 Cal.App.3d 459, 470 ["lewd act of sexual intercourse"]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 475, fn. 13.) Section 288, subdivision (a) notes that a lewd and lascivious act can include "any of the acts constituting other crimes provided for in Part 1 [of the Penal Code.]"

The two offenses are not perfect analogs for each other, as each contains an additional age element that was not addressed in *Hofsheier*: violations of section 261.5, subdivision (d) require that the defendant be at least 21 years old, while violations of section 288, subdivision (c)(1) require that the defendant be at least ten years older than the victim. Appellant was both at least 21 and more than ten years older than the victim. Appellant could have been charged with either offense, had the sexual act been intercourse, rather than oral copulation.

Thus, although defendants who have committed oral copulation on children under the age of sixteen are similarly situated to defendants who have engaged in unlawful sexual intercourse with children under the age of sixteen, the two groups are *not* necessarily treated in an unequal manner. If the defendant is at least ten years older than the victim, as appellant was, intercourse can be prosecuted under section 288, subdivision (c)(1). A conviction for that offense requires sex offender registration. (§ 290, subd. (c).)

2. *Consideration of Defendant's Age Is Appropriate*

When determining comparison offenses *Hofsheier* considered the ages of the defendant and victim:

> If defendant here, a 22–year–old man, had engaged in voluntary sexual intercourse with a 16–year–old girl, instead of oral copulation, he would have been guilty of violating section 261.5, subdivision (c)...

(*Supra*, 37 Cal.4th 1185, 1195.)

Notably, although Hofsheier's offense of conviction, a violation of section 228a, subdivision (b)(1), makes absolutely no reference to the age of the perpetrator at all, the Court nonetheless used Hofsheier's true age to determine that the equivalent sexual intercourse offense was a violation of section 261.5, subdivision (c) [unlawful sexual intercourse with a minor who is three years younger]. *Hofsheier* was eminently logical in this respect; had it instead considered section 261.5 as a generic whole, it would by implication have removed the mandatory registration obligation from all persons convicted of all sexual offenses against a person under the age of 18. This was clearly not the Court's intent. (See *id.*, at p. 1198.)

Moreover, the structure of section 261.5 *requires* consideration of the defendant's age. Subdivision (a) contains the generic definition of unlawful sexual intercourse, but no penalty; that is left for subdivisions (b) through (d). Subdivision (b) addresses a three-year age difference between the perpetrator and victim. Subdivision (c) applies where the victim is more than three years younger than the perpetrator. Subdivision (d), relevant here, applies to perpetrators over 21 and victims under 16. There is no generic unlawful sexual intercourse crime; all versions of the offense depend on the ages of the victim and perpetrator. For the purposes of section 261.5, the ages are impossible to ignore.

In appellant's case, had his sexual act on the victim been intercourse, rather than oral copulation, he could have been charged either with an offense that required registration

(§ 288, subd. (c)(1)), or one that did not (§ 261.5, subd. (d)).[4] Because intercourse could have still subjected appellant to sex offender registration, there is no unequal treatment, and thus no equal protection violation. There is no need to consider whether there are rational reasons for unequal treatment, because no inequality is present; in appellant's case, either sex act could have been charged as a registerable offense.

B. *Manchel* Correctly Held that There Was No Equal Protection Violation

Manchel followed the equal protection analysis laid out in *Hofsheier*. In *Manchel*, the defendant was 29 years old, and engaged in intercourse and oral copulation with a 15 year-old victim. (*Supra*, 163 Cal.App.4th 1108, 1110.) Defendant pled no contest to a violation of section 288a, subdivision (b)(2). (*Ibid.*) The underlying facts of *Manchel* match appellant's case very closely; the only difference is that appellant was two years younger than Manchel.

The court in *Manchel* observed that the defendant could have been subject to not one but two different criminal offenses, had the sexual act been intercourse, rather than oral copulation: a violation of section 261.5, subdivision (d), or of section 288, subdivision (c)(1). (At pp. 1112-1114.) The court explained that because he fell "within statutes that provide for mandatory registration regardless of whether he engaged in

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4 That the same act can be charged in different ways does not create an equal protection problem. (*People v. Gonzales* (2012) 211 Cal.App.4th 132, 137-138, citing *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 115-117.)

intercourse or oral copulation" Manchel could not establish that he was similarly situated to a group of offenders who were not subject to registration. (*Id.*, at p. 1115.) He was therefore unable to show an equal protection violation. (*Ibid.*)

In arriving at its ruling, *Manchel* simply followed the analysis laid out in *Hofsheier*. Both looked at the sexual act engaged in (oral copulation) and determined what the equivalent intercourse offense would be, based on the ages of the defendant and victim. In *Hofsheier*, the sole equivalent offense did not require registration. In *Manchel*, there was an equivalent offense that did require registration, and therefore defendant was not treated unequally.

Although some cases have explicitly disagreed with *Manchel*, as discussed below, others have found its reasoning and logic helpful, even if they were addressing other offenses, and thus did not reach a conclusion about violations of section 288a, subdivision (b)(2). (See *People v. Cavallaro*, *supra*, 178 Cal.App.4th 103, 112-113; *People v. Anderson*, *supra*, 168 Cal.App.4th 135, 143-144; *People v. Alvarado*, *supra*, 187 Cal.App.4th 72, 77-78.)

C. The Reasoning of *Ranscht*[5] and *Luansing* Is Flawed, and Should Not Be Followed

The Court of Appeal rejected *Manchel*, and chose instead to follow *Ranscht*, *supra*, 173 Cal.App.4th 1369, and *Luansing*, *supra*, 176 Cal.App.4th 676. *Luansing* held that violations of section 288a, subdivision (b)(2) are not

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5 *Ranscht* was not unanimous; Associate Justice Benke dissented.

mandatory registration offenses under *Hofsheier*, following the criticism of *Manchel* made by *Ranscht*. (*Supra*, 176 Cal.App.4th at pp. 684-685.)

1. Ranscht *Misunderstood the Equal Protection Analysis*

Ranscht criticized *Manchel* for

> completely [ignoring] the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant *could have* been convicted based on his conduct.

(*Ranscht*, *supra*, 173 Cal.App.4th 1369, 1374, italics in original.) *Ranscht* further claimed that *Manchel* thus ignored the plain language of *Hofsheier* focusing on convictions. (*Ibid.*)

This criticism misrepresents *Manchel*. *Manchel* considered what offenses defendant could have been convicted of, had he engaged in intercourse with the victim, rather than oral copulation; the same matter taken up in *Hofsheier*. (*Manchel*, *supra*, 163 Cal.App.4th 1108, 1114.) *Ranscht* assumes that section 261.5 is the only viable comparison offense; *Hofsheier* did not so hold. Rather, *Hofsheier* identified a single subdivision of section 261.5 as the only intercourse offense that Hofsheier could have been convicted of, based on the ages of defendant and victim. (*Hofsheier*, *supra*, 37 Cal.4th 1185, 1195.)

Clearly *Hofsheier* looked past "convictions." (*Supra*, 37 Cal.4th 1185, 1199-1200.) The Court looked beyond the offense of conviction to what Hofsheier *could have been* convicted of, had his conduct been different; i.e., intercourse. (*Ibid.*, ["The only difference between the two offenses is the

nature of the sexual act."]) Indeed, the equal protection analysis *requires* the court to consider what a particular defendant could have been convicted of, had his or her conduct been a different sexual act.

2. Ranscht *Wrongly Dismissed* Hofsheier's *Reasoning As Dicta*

Hofsheier introduced its equal protection analysis in part by explaining that is was not addressing forcible sex crimes or crimes against children under 14. (*Supra*, 37 Cal.4th 1185, 1198.)

Manchel quoted and interpreted this language as:

> The Supreme Court implicitly recognized that the equal protection analysis enunciated in the *Hofsheier* decision would not extend to situations in which the sexual conduct required mandatory registration regardless of whether it was sexual intercourse or oral copulation.

(*Supra*, 163 Cal.App.4th 1108, 1115.)

Ranscht dismisses the Court's words in *Hofsheier* as dicta, contending that it addresses facts not before the Court and "appears little more than" unnecessary, general observation. (*Ranscht, supra*, 173 Cal.App.4th 1369, 1374.)

The passage from *Hofsheier* served an important function, limiting the holding of the case, and more importantly, explaining *why* that limit existed. Contrary to *Ranscht's* assertion, the passage does not "rise to the level of a statement of law capable of contradicting *Hofsheier's* central holding." (*Ibid.*) Rather, the passage simply explains what *Hofsheier's* holding *did not include* and *why not.* The Court

reinforced the point in *Hofsheier* when it discussed whether the statutory distinction was rational; the Court signaled its agreement with *People v. Mills* (1978) 81 Cal.App.3d 171, as there is no equal protection problem with requiring registration for violations of section 288, "because all adults convicted of crimes requiring sexual acts with minors of that age were required to register." (*Hofsheier, supra,* 37 Cal.4th 1185, 1202.)

3. Luansing *Erroneously Relied on* Ranscht

Facing similar facts as in *Manchel*, the *Luansing* court ultimately chose not to follow that case, extensively quoting the criticism from *Ranscht.* (*Luansing, supra,* 176 Cal.App.4th 676, 684-685.) It quoted *Ranscht's* charge that the proper analysis was to focus on the offense of conviction, rather than possible offenses supported by the conduct underlying the charge. (*Luansing, supra,* 176 Cal.App.4th at p. 685.)

Yet *Manchel* did not rely on "the conduct underlying the charge" (oral copulation); it considered what charges could have been brought, *had defendant engaged in intercourse with the victim.* (*Manchel, supra,* 163 Cal.App.4th 1108, 1113-1115.) By failing to recognize this critical difference, *Luansing* adopted *Ranscht's* erroneous critique.

V.

THE AGE OF DEFENDANT AND VICTIM IS AN APPROPRIATE BASIS FOR REQUIRING REGISTRATION

California law recognizes that not all sex offenses on minors are the same. Regardless of the sex act involved however, voluntary sex offenses against minors impose greater punishment as the victim becomes younger. (Cf. §§ 261.5, 286, 288, 288.7, 288a.)

Even if a victim under the age of 14 agrees to engage in sexual activity, it is no defense to a charge of violating section 288, as "consent [is] immaterial *as a matter of law*...." (*People v. Soto* (2011) 51 Cal.4th 229, 238, original italics.) The purpose of section 288 is to provide children with special protection from sexual exploitation. (*Id.*, at p. 243, quoting *People v. Olsen* (1984) 36 Cal.3d 638, 647-648.) Built into the statute is the assumption that "young victims suffer profound harm whenever they are perceived and used as objects of sexual desire." (*Ibid.*, quoting *People v. Martinez* (1995) 11 Cal.4th 434, 443-444.)

This case concerns the next category of child victims, those who are 14 or 15 years old. Clearly, a legislative determination has been made that such children are in need of extra protection when the perpetrator of a sex act on them is significantly older. (§ 288, subdivision (c)(1).) Just as reasonable mistake of age is not a defense to a violation of section 288, subdivision (a) (*People v. Olsen, supra*, 36 Cal.3d 638), it is also not a defense to a violation of section 288, subdivision (c)(1) (*People v. Paz* (2000) 80 Cal.App.4th 293).

The legislative intent of subdivision (c)(1) is to protect 14 and 15 year-olds from predatory adults. (*Id.*, at p. 297.) The mandatory age gap of ten or more years recognizes that a sexually naïve 14 or 15 year-old is vulnerable to exploitation by an adult. (*Ibid.*)

It is reasonable for the Legislature to determine that a person who engages in sexual relations with a 14 or 15 year-old, being ten years older than the child, should register as a sex offender. (See *People v. Cavallaro, supra*, 178 Cal.App.4th 103.) Such a person has shown a willingness to exploit a vulnerable youth for his or her own sexual gratification.

CONCLUSION

The People respectfully request that the Court grant review, to resolve the conflict of appellate authority and to provide guidance to the lower courts regarding the equal protection analysis to be employed when faced with sex offender registration questions.

Sex offender registration always begins with the list of offenses in section 290, followed by the analysis as laid out in *Hofsheier* to determine whether that defendant would have to register as a sex offender, had the sex act been intercourse instead.

Appellant was convicted of an offense that requires mandatory sex offender registration. Had he engaged in sexual intercourse with the victim, he could have been charged with two different offenses, including one that mandates registration. Because the ages of appellant and his

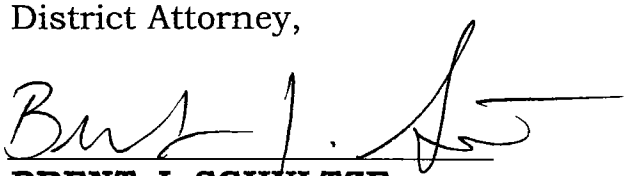
victim are the determining factor, rather than the sex act engaged in, mandatory sex offender registration does not offend equal protection.

Review will enable the Court to finally resolve the split of authority in the Court of Appeal, and to give guidance to the Court of Appeal and the Superior Courts. Clear law will promote legal certainty when sex crimes are being prosecuted, when they are reviewed on appeal, and when post-conviction writs are considered.

Done this 8th day of March, 2013, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,



BRENT J. SCHULTZE,
Deputy District Attorney,
Appellate Services Unit.

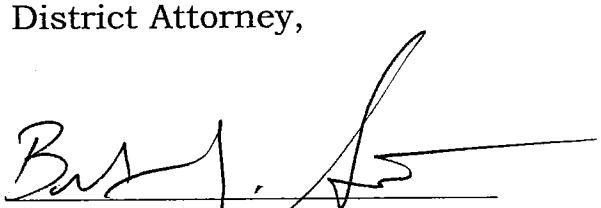
CERTIFICATE OF COMPLIANCE

I certify that the attached **Petition For Review** uses a 13-point Bookman Old Style font and contains **3,869** words.

Done this 8th day of March, 2013, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,



BRENT J. SCHULTZE,
Deputy District Attorney,
Appellate Services Unit.

Filed 1/31/13 Johnson v. Super. Ct. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES RICHARD JOHNSON, Petitioner and Appellant, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest and Respondent.	E055194 (Super.Ct.No. CIVDS1105422) OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Reversed with directions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael A. Ramos, District Attorney, and Brent J. Schultze, Deputy District Attorney, for Real Party in Interest and Respondents.

I

INTRODUCTION

Petitioner James Richard Johnson seeks to be relieved of the requirement to register as a sex offender under Penal Code section 290 et seq.[1] We agree that the trial court erred in denying his petition for writ of mandate. Accordingly, we reverse the judgment and direct the trial court to conduct a new hearing to determine whether the discretionary registration requirement should be applied to him.

II

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Johnson pleaded guilty to a violation of section 288a, subdivision (b)(2), oral copulation of a person under 16 years of age by a person over the age of 21.[2]

In 2011, Johnson filed a petition for writ of mandate based on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), contending that the mandatory registration requirement for the section 288a, subdivision (b)(2), conviction violates equal protection. He further argued that the court should not require discretionary registration in his case. He asserted that he "has not, in the twenty years since his conviction in 1990, committed any offenses that would otherwise require him to register as a sex offender."

The trial court noted a conflict in the Courts of Appeal about whether *Hofsheier* applies to section 288a, subdivision (b)(2), convictions. The trial court believed the

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

[2] The offense was committed between September and December 1988. Defendant was born in April 1961, making him 27 years old when the crime occurred.

decision in *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*) was controlling and denied the petition for mandate.

III

DISCUSSION

In *Hofsheier, supra*, 37 Cal.4th 1185, the California Supreme Court held that imposition of mandatory lifetime sex registration on a defendant convicted of a violation of section 288a, subdivision (b)(1), for voluntary oral copulation with a 16- or 17-year-old minor violated equal protection because a defendant convicted of engaging in sexual intercourse with such a minor under section 261.5 was not subject to the mandatory requirement. (*Hofsheier*, at pp. 1206-1207.) The Supreme Court explained that persons convicted of the two offenses were similarly situated, and there were no rational grounds for treating them differently. (See *People v. Garcia* (2008) 161 Cal.App.4th 475, 481 (*Garcia*), overruled on another ground by *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4 (*Picklesimer*).) In determining the appropriate remedy, the court rejected the option of declaring the mandatory lifetime registration provisions invalid. It also refused the other option of extending the mandatory requirement to persons convicted of unlawful intercourse under section 261.5. The *Garcia* court concluded that "where mandatory registration violates the equal protection clause, the proper remedy is to hold a hearing to determine whether the defendant should be subject to discretionary registration as a sex offender under former subdivision (a)(2)(E) of section 290. [Citation.]" (*Garcia*, at pp. 478-479; see also *Hofsheier*, at pp. 1208-1209.)

Hofsheier has been applied to convictions for other crimes subject to mandatory registration, including convictions under section 288a, subdivision (b)(2). (*Garcia, supra*, 161 Cal.App.4th 475.) The court in *Manchel, supra*, 163 Cal.App.4th 1108, came to a contrary result where, as here, the defendant was 10 years older than the victim who was under age 16. The court noted that the defendant could have been prosecuted under section 288, subdivision (c), and, therefore, subject to mandatory registration whether he engaged in oral copulation or sexual intercourse with the victim. The court reasoned that because the defendant's sexual conduct fell within statutes that provide for mandatory registration, he could not establish that he was similarly situated to another group of offenders who were not subject to mandatory sex offender registration. (*Manchel*, at p. 1115.) Thus, the order requiring him to register as a sex offender did not violate the equal protection clause. (*Ibid.*)

Subsequent case law criticizes *Manchel* for improperly basing its decision on the fact that the defendant could have been convicted of a section 288, subdivision (c)(1), crime (lewd acts involving a child 14 or 15 years old), when the defendant actually pled guilty to violating section 288a, subdivision (b)(2). (*People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Ranscht* (2009) 173 Cal.App.4th 1369.) We agree with that criticism. *Manchel* "would have us completely ignore the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant *could have* been convicted based on his conduct. This holding overlooks *Hofsheier*'s plain language, which focused on 'persons who are *convicted* of voluntary oral copulation . . . , as opposed to those who are *convicted* of voluntary intercourse with adolescents in [the]

same age group.' [Citation.] [¶] Consistent with *Hofsheier*, we think the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of which the defendant *could have* been convicted based on the conduct underlying the charge. 'This approach jibes with the mandatory registration statutes themselves, which are triggered by certain convictions . . . , and not by the underlying conduct of those offenses per se.' [Citations.]" (*Ranscht*, at pp. 1374-1375.)

For these reasons, we reject the reasoning of *Manchel* and conclude that subjecting defendant to mandatory sex offender registration violated his equal protection rights. This court's opinion in *People v. Alvarado* (2010) 187 Cal.App.4th 72, 76-79 [Fourth Dist., Div. Two], is distinguishable because it involves a conviction under section 288, not section 288a, a distinction other courts have recognized. (See *People v. Tuck* (2012) 204 Cal.App.4th 724, 738-739.)

While petitioner is not subject to the mandatory registration requirement, he has not established a right to relief from registration as a matter of law because he may be subject to discretionary registration under section 290.006. The trial court must reconsider this matter and conduct a new hearing to determine whether the defendant must continue to register as a sex offender. (*Picklesimer*, *supra*, 48 Cal.4th at pp. 336-341, 343; see also *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 77-78.) To require registration under this statute, "the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it

must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) In exercising its discretion, the trial court's focus is to determine based on all relevant information whether petitioner is likely to commit such offenses in the future. (*Lewis v. Superior Court, supra*, 169 Cal.App.4th at pp. 78-79.)

III

DISPOSITION

We reverse the judgment of the superior court denying defendant's petition for writ of mandate and we remand for the court to conduct a new hearing to determine whether petitioner is subject to the registration requirement under section 290.006.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE BY UNITED STATES MAIL

STATE OF CALIFORNIA
ss
COUNTY OF SAN BERNARDINO

James Richard Johnson v. Superior Court (People)
E055194

Brent J. Schultze says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on March 8, 2013, I served the within:

PETITION FOR REVIEW

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at 412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on March 8, 2013.

Brent J. Schultze