In the Supreme Court of the State of California

In re C.H., **a Person Coming Under the Juvenile Court,**	Case No. S183737
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **C.H.,** **Defendant and Appellant.**	

Second Appellate District, Division Six Case No. B214707
Ventura County Superior Court, Case No. 2005040811
The Honorable Donald D. Coleman, Judge

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

ISSUES PRESENTED

1. Whether appellant was eligible for commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice ("DJJ"), where he committed a sex offense enumerated in Penal Code section 290.008, subdivision (c), but not in Welfare and Institutions Code section 707, subdivision (b), where the Legislature intended that such offenses make a ward eligible.

2. Whether the juvenile court abused its discretion in committing appellant to DJJ where he failed at three prior placements over three years and would receive structured sex offender treatment at DJJ.

INTRODUCTION

Appellant sexually molested his younger sister. At 13 years old, he already had a sordid history of sexual misconduct. Therapy had been unsuccessful. Appellant was made a ward of the juvenile court and was placed in three different programs, each of which provided him sex-offender treatment. Over the course of three years, appellant failed miserably at each placement. He continued to engage in sexual misconduct, failed to participate in sex-offender therapy or complete his therapy assignments, and did not show any progress in therapy.

Based on his misconduct and failures, appellant violated probation numerous times, and each time the juvenile court tried to motivate appellant and find effective treatment. After three years, three programs, and a stint in DJJ, it became apparent that no program, short of the structured sex offender treatment provided by DJJ, would provide appellant the help he

needed. If appellant had any chance at rehabilitation, more drastic measures had to be attempted. The court accordingly, after receiving assurances that appellant would participate in the sex offender treatment offered by DJJ, committed him.

In the meantime, in 2007, the Legislature made comprehensive changes to the Welfare and Institutions Code, limiting which minors would remain eligible for DJJ commitment. The Legislature expressly stated that enumerated sex offenses[1] would not be affected by the legislation. In other words, the Legislature intended enumerated sex offenses to continue to make a ward eligible for DJJ commitment. This conclusion is apparent from the statutory language of the amended statutes, as well as the statutory history, scheme, and public policy.

Because appellant committed an enumerated sex offense, and because the juvenile court acted within its discretion in committing him, appellant was properly committed to the DJJ.

STATEMENT OF THE CASE

A. Charged Offense, Original Petition, and Background

Appellant was born in August 1992. (1CT 13.) On October 17, 2005, when appellant was 13 years old, he licked the vagina of his three-year-old sister and put his penis in her mouth. (1CT 14-16.) That incident formed the basis of the charged offense. Appellant admitted that, about a year

[1] When the statutes at issue here were first amended in 2007, they referenced sex offenses listed in Penal Code section 290, subdivision (d)(3). The following year, the statutes were amended to refer to Penal Code section 290.008, subdivision (c). (See stats. 2008, ch. 699, §§ 27-31.) Appellant's offense of violating Penal Code section 288, subdivision (a), is listed in both sections, so those amendments do not affect appellant or the issues raised herein. For clarity and ease of reference, respondent will describe generically the crimes listed in these sections as "enumerated sex offenses," unless a particular statute is referenced in quoted language.

prior, he had put his mouth on his seven-year-old sister's vagina, and molested his seven-year-old brother. (1CT 15-16.)

Appellant's parents first became aware of appellant's sexual misconduct when he was seven. His mother caught him and a neighbor boy with their pants down. The neighbor boy said appellant told him, "If you suck my penis, I'll suck yours." Appellant began counseling. (1CT 18.) Appellant's mother reported several other incidents over the years. (1CT 18-19.) Appellant's therapist, who was treating him at the time of the charged offense, reported that appellant was "unable to control his impulses to sexually acting out," and had not improved after almost a year in treatment. (1CT 23.)

On November 22, 2005, the Ventura County District Attorney's Office filed an original petition pursuant to Welfare and Institutions Code section 602.[2] It alleged appellant committed a lewd act on a child under 14 years old in violation of Penal Code section 288, subdivision (a). (1CT 1-2.) On December 20, 2005, appellant admitted the violation, and the juvenile court found he came within the provisions of section 602. (1CT 6-7.) Appellant was released on home supervision/electronic monitoring to the custody of his aunt after signing a contract agreeing not to contact anyone not approved by his aunt. (1CT 9.)

Three days later, on December 23, 2005, appellant violated the contract by "conversing with an 'older' female on a 'sexual website.'" When confronted about his behavior, appellant said he "would 'rather die' than stop going on the sites." (1CT 9.) Appellant was detained pending disposition of the original petition. (1CT 9-10.)

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise designated.

On January 5, 2006, the juvenile court declared appellant a ward with a maximum term of confinement of eight years. (1RT 12-13.) Appellant was "committed to the care of the probation officer for placement in a suitable open placement which is not to include the [DJJ]."[3] (1RT 13-14.)

B. First Placement – Starshine

On January 13, 2006, appellant was placed at Starshine in San Bernardino County. (1CT 57; 1RT 17.) On July 6, 2006, the probation officer filed a supplemental report, which characterized appellant's "performance in the overall program at Starshine . . . as lethargic." The report noted appellant had "just recently had an incident with another minor involving inappropriate sexual conduct," but it did not describe that conduct. (1CT 69.)

On January 5, 2007, the probation officer filed a supplemental report indicating that after a year at Starshine, appellant had "made little improvement." His therapist reported that he "continues to be at a high risk to re-offend." (1CT 98.)

On February 7, 2007, the probation officer filed a notice of charged violations. (1CT 118.) The violations, which appellant admitted on February 8, 2007, included failing to complete therapy and school assignments, and little to no participation in group therapy. (1CT 118-119, 139; 1RT 25-26.)

The report noted appellant's "lack of motivation has caused him to remain on one of the lowest levels in the program." "When asked why he

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[3] The California Youth Authority, or CYA, was renamed the Department of Corrections and Rehabilitation, Juvenile Justice ("DJJ"), effective July 1, 2005. The Division of Juvenile Facilities is part of the DJJ. (See § 1000; Gov. Code, §§ 12838, 12838.3, 12838.5, 12838.13; see also *In re N.D.* (2008) 167 Cal.App.4th 885, 889-890, fn. 2.) At times, the courts, parties and statutes refer to all three names. For clarity, respondent will use the term DJJ uniformly, even if the referenced material uses a different name.

doesn't do what he needs to, [appellant] has nothing to say aside from, 'I don't know.'" The report found appellant "lacks empathy for others and is unaffected by his past actions. This is something his therapist has addressed with him, but again to no avail." (1CT 119.)

C. Second Placement – Rancho San Antonio

Appellant served 12 days in the DJJ, and was placed at Rancho San Antonio on about February 20, 2007. (1CT 146-147; 1RT 44-46.)

On May 30, 2007, the probation officer filed a second notice of charged violations. (1CT 157.) Appellant admitted engaging in two consensual sex acts with another resident at Rancho San Antonio. Appellant schemed with the other resident to have short sexual visits in the shower. Appellant orally copulated the other resident and was anally penetrated by him. Appellant revealed to the probation officer that he wanted a sex-change operation when he became an adult. (1CT 158.)

The probation officer found appellant "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." (1CT 159.)

Appellant admitted the violation on May 31, 2007. (1CT 178.)

D. Third Placement – GLASS

Appellant served seven days in the DJJ and was placed at Gay and Lesbian Adolescent Social Services ("GLASS") in Los Angeles. (1CT 178, 182.) There he received therapy to address his gender identity issues as well as sex offender therapy. (1CT 185.)

On July 5, 2007, the probation officer filed a supplemental report. (1CT 184.) Appellant's progress was characterized as "below average," making "little to no progress." (1CT 185.)

On January 4, 2008, the probation officer filed another supplemental report. (1CT 212.) Appellant had been attending therapy and made "some progress," but he was doing only the minimal amount of work. The report noted appellant "still needs extensive therapy." (1CT 213.)

On May 1, 2008, the probation officer filed a third notice of charged violations for failing to complete sex therapy assignments, which appellant admitted. (1CT 252, 262.) Appellant admitted to his therapist that he had often "play[ed] 'dumb,'" so that less was expected of him, and he could have more time for television and playing games. He also admitted deliberately not doing his best on psychological tests. The therapist believed appellant was capable of much more and had seen him complete well-thought-out assignments on time when he had an upcoming court date. (1CT 253-254.) The therapist described appellant as "an intelligent and caring young man who can be manipulative and very lazy." (1CT 253.) He had told her he "enjoys 'getting one over' on adults by not doing his work or pretending that he doesn't understand it." (1CT 254.)

The therapist reported, "Over the past month [appellant] has been doing less and less work. . . . He was told a few weeks ago that [the staff would stop working harder than him] and he would be given the chance to 'sink or swim'. [Sic.] He chose to stop working completely and watch TV for hours on end." (1CT 254.)

The probation officer concluded appellant's "lack of progress is jeopardizing his current placement. This is [appellant]'s third placement. Since [appellant] was placed at [GLASS] in June 2007, Probation has been working very closely with staff to address the [appellant]'s lack of progress. All efforts have been futile." (1CT 254.)

The juvenile court ordered appellant to serve 90 days in DJJ, but that order was stayed until July 18, 2008, to give appellant another chance to

participate in treatment at GLASS. (1CT 262-263; 1RT 74-76.) The court impressed upon appellant that his fate was in his own hands. (1RT 75-76.)

On July 3, 2008, the probation officer filed a supplemental report. (1CT 264.) GLASS reported that appellant "still struggles with being able to identify how his actions affect his victims or develop victim empathy." He continued not to do his assignments. He did his Juvenile Sex Offender ("JSO") work "only with constant pushing of staff," and was dropped a level. (1CT 265.) "For four weeks straight he 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," after being at GLASS for over a year. (1CT 265-266.) When confronted by staff about his behavior, appellant "becomes disrespectful towards staff and curses at them." (1CT 265.)

The report concluded, appellant "continues to display the same lack of motivation and laziness reported previously. Numerous efforts have been made by GLASS staff, Probation and his parents to impress upon [appellant] the seriousness of this matter. However, all efforts have been futile." (1CT 265.)

On July 18, 2008, the probation officer filed a memorandum to assist the court in determining whether to impose the previously-stayed, 90-day DJJ sentence. (2CT 305-306.) The probation officer stated, "nothing has changed since the last time [appellant] was before the Court." (1CT 305.) The GLASS staff reported no improvements in appellant's attitude and behavior, and he still failed to complete his minimal sex offender group assignments. (1CT 305-306.) He admitted the reason he did not do his assignments was because he "just didn't feel like doing it." He preferred "to watch TV, play Playstation games, or just lie around and do nothing." (1CT 305.)

Appellant's therapist observed that appellant had briefly motivated himself before his previous court date. "Then the day after he came back from the Court he reverted right back to his old behavior and stopped doing his work. He admitted that he did what he needed to do just to not go to jail." (2CT 306.)

The juvenile court ordered appellant to serve 90 days at DJJ. (1CT 308-309; 1RT 84-85.) The court set a hearing for August 29, 2008, to consider an early release if appellant did well. (1RT 86.)

On August 29, 2008, the probation officer filed a memorandum regarding appellant's progress at the DJJ. Appellant's performance was reported as "satisfactory." Appellant did the minimum required in school and participated in sex offender counseling. (2RT 318-319.) The juvenile court granted appellant an early release back to GLASS as soon as a bed was available. (1RT 91-92.)

On January 2, 2009, the probation officer filed a supplemental report. (2CT 334.) The report stated that upon his return to GLASS, appellant had become more negative and defiant, lying to and cursing at staff. He did "very little Juvenile Sex Offender (JSO) work and school work. His school grades are very poor. . . . If left alone, [appellant] will play games and TV and never do any school work or JSO work. 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." A portable game device was found in appellant's room, and he had used it to access "several pornographic sites including one of beastiality [*sic*]." The GLASS house manager stated appellant "was not in compliance due to failing school grades, not following the group home rules, and showing no effort in his JSO group." (2CT 335.)

The report concluded, appellant "continues to display the same lack of motivation and laziness reported previously. Probation and GLASS staff have tried every conceivable intervention, including incentives, rewards,

and meaningful consequences; however, he has failed to make any progress in his JSO program." (2CT 335.)

E. Final Disposition – DJJ

The juvenile court directed the probation officer to contact DJJ and see if appellant could attend the sex offender program there. (1RT 97.) The court noted, "that's one of the better sex offender programs in the country, if not the state." The court found, "we should do everything we can to get [appellant] the treatment that he needs. Right now I think we're just moving him from one program to another and we're not getting success in any of them." The court further found, appellant had "been molesting children since he was seven years old. He's now 16 years old, and he's not getting any benefit of treatment, and he continues to look at pornographic material on the internet." (1RT 98.)

On January 5, 2009, the probation officer filed a fourth notice of charged violations. (2CT 358.) It alleged, and appellant admitted, that he failed to follow program rules, failed to complete assignments for sex offender therapy, and was making no progress. (2CT 358; 1RT 100-101.) Appellant told the probation officer "the reason he did not complete his [sex offender] assignments was due to laziness not because he did not understand the assignments/material. He stated that if he had chosen to complete the assignments, he would not have had any difficulty doing so." (2CT 359.)

The juvenile court again asked the probation officer to ensure appellant would participate in the sex offender program in DJJ. (1RT 102.)

On February 11, 2009, at the urging of defense counsel, the juvenile court considered a letter from, and heard testimony by, Dr. Dani Levine regarding placement in a Massachusetts program. (1RT 109-119.) The court expressed concern that it lacked authority to send appellant to an out-

of-state program and gave defense counsel a week to research that issue. (1RT 114-115, 124-127.)

The court found appellant had failed at his previous placements, which specialized in sex offender treatment, and found the reason he failed was because he did not want to do the work. The court was hopeful that appellant would benefit from the right program, and found "the sexual offender program at [DJJ], is topnotch, one of the best programs around, from their years of experience in dealing with adolescents and, of course, adults on the adult side." (1RT 110-111.) The court expressed hope that if appellant was in the sex offender treatment program at DJJ, he would "choose to begin to participate and learn from it and improve." (1RT 112.) The court wanted to "help [appellant] while we can before he becomes an adult, because if he continues this behavior when he's an adult, then forget about treatment; it's lock him up. And I don't want to see [appellant] in that position." (1RT 126.)

Appellant's counsel sought placement in one more non-DJJ program. (1RT 119-123.) The court found, "the best chance for [appellant] is at the [DJJ], Sexual Offender Program. And they say he'll be placed in that program, which is segregated from the rest of the population. . . . [¶] I just think that's the place where he can receive the appropriate level of treatment and supervision and we can do what we can to not cure, but do what we can to help him control whatever those feelings were that caused him to molest children. [¶] I think the longer we wait, the longer we run the risk of not helping this young man." (1RT 123.)

On February 18, 2009, the probation officer filed a supplemental report. (2CT 391.) It noted appellant had been screened for commitment to DJJ and would participate in the "sex behavior treatment program[]" there, which was detailed in the report. (2CT 393-394.) The report concluded, appellant "has been in placement for over three years. His lack of

motivation and commitment to treatment has caused him to fail three very reputable programs. The various placements have tried different therapeutic approaches with the minor to try to gain his participation. However, [appellant] has failed to respond. [Appellant] has refused to take advantage of the treatment opportunities that were provided for him. In fact, the minor readily admits he did not complete his assignments due to laziness." (2CT 394.) The report recommended commitment to DJJ "[d]ue to [appellant's] high risk to re-offend." (2CT 394.)

The juvenile court heard from appellant's mother, who urged the court to send appellant to a placement in Iowa. (1RT 129-132.) Defense counsel argued for another placement short of DJJ. (1RT 132-135.) The prosecution explained that after three failed attempts at treatment at reputable programs, which appellant had admitted was due to his own laziness, appellant needed a more intensive, structured program, which DJJ offered. (1RT 135-136.)

The court noted the importance of having appellant "confront these issues. [¶] And, quite frankly, I think 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." (1RT 136.) The court found appellant failing to do the therapeutic work required of him posed a "significant risk to the safety of children in our community." (1RT 136-137.)

The juvenile court committed appellant to the DJJ for eight years, with 204 days credit. (1RT 140.) The court found the Penal Code section 288, subdivision (a) offense, for which appellant was committed, was not listed in section 707, subdivision (b). (1RT 140-141.) The court noted it was committing appellant with the understanding that he would be able to participate in the sex offender program at DJJ, and if he could not, he was

to be returned to court for consideration of other alternatives. (1RT 142-143.)

F. Post-Commitment Proceedings

Appellant filed a notice of appeal on March 16, 2009. (2CT 412.) On May 18, 2010, the Court of Appeal affirmed appellant's commitment order.[4] Appellant filed a petition for rehearing in the Court of Appeal, which was denied on June 15, 2010. Appellant filed a petition for review in this Court, which was granted on September 1, 2010.

SUMMARY OF ARGUMENT

The Legislature made a comprehensive change to the Welfare and Institutions Code in 2007. To save money, the Legislature limited the minors who could be sent to DJJ to only serious, violent or sexual offenders. Viewing the language of these amended statutes, particularly in the context of the changes that were made, together with the legislative history and purpose of the amendments, leaves no doubt that the Legislature intended to preserve DJJ commitment for minors committing enumerated sex offenses. Because appellant's offense of committing a lewd act on a child under 14 years old was an enumerated sex offense, he was eligible for DJJ commitment.

The juvenile court reviewed evidence of appellant's dismal failure at three different non-DJJ programs over three years. Of particular concern to the court was appellant's lack of motivation and failure to participate or show any progress in therapy. After three years, appellant did not

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[4] The same day, the Court of Appeal denied appellant's petition for writ of habeas corpus (case no. B219096). Appellant filed a petition for review from that order, which this Court denied on September 1, 2010 (case no. S183723). Appellant's references to evidence allegedly presented in those petitions, but not in the record below (AOB 28-30), is improper and should not be considered here. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 413.)

appreciate the harm of his actions and remained at high risk to reoffend. The court considered various alternatives and reasonably found that the only program that would likely benefit appellant at that point was the more structured and regimented sex offender program at DJJ. The court was singularly concerned with successfully treating appellant, if possible, and was assured appellant would receive sex offender treatment at DJJ. There was substantial evidence that a DJJ commitment would be a probable benefit to appellant and that less restrictive alternatives would be ineffective or inappropriate. The court was well within its discretion in committing appellant to DJJ.

ARGUMENT

I. APPELLANT WAS ELIGIBLE FOR COMMITMENT TO DJJ BECAUSE HIS OFFENSE WAS AN ENUMERATED SEX OFFENSE

Appellant first claims he was ineligible for commitment to DJJ because the offense he committed, lewd act on a child under 14 in violation of Penal Code section 288, subdivision (a), is not listed in section 707, subdivision (b). (AOB 10-21.) However, considering the relevant statutory language, as well as the statutory scheme as a whole, the legislative history of the amended statutes at issue, and public policy, it is clear the Legislature intended to retain a juvenile court's discretion to commit a minor who violated an enumerated sex offense, even if it is not listed in section 707, subdivision (b). Because appellant committed an enumerated sex offense, he was eligible for DJJ and was properly committed there.

A. Background of Relevant Statutes and Amendments

There are multiple statutes that govern placement of a minor who has been adjudged a ward of the court pursuant to section 602, including sections 727, 730, 731, 733, 734, 736, 740.1, and 1731.5. In 2005, when appellant committed his offense and was adjudicated a ward of the juvenile court (1CT 1, 6-7), the Welfare and Institutions Code permitted a juvenile

court to commit a ward to the DJJ without restriction based on the offense committed. (See former § 731, subd. (a), as amended by stats. 2003, ch. 4, § 1; former § 1731.5, amended by stats. 1996, ch. 195, § 1.)

In 2007, the Legislature enacted and amended several statutes related to juvenile justice as part of the Budget Act. (Stats. 2007, ch. 175, §§ 18-31, 38; Stats. 2007, ch. 257, §§ 2-13; see also *In re N.D.*, *supra*, 167 Cal.App.4th at p. 891; MJN 22-35, 37, 77-84.)[5] As a way to save the state money, the Legislature determined that non-serious, non-violent, non-sex-offender wards should not be sent to DJJ. (*In re N.D.*, at pp. 890-892; Sen. Repub. Fiscal Off., analysis of Sen. Bill No. 81, pp. 1-2, 4-5; MJN 53-54, 56-57.) Instead, they would be housed at county facilities. (*In re N.D.*, at pp. 891-892; Sen. Repub. Fiscal Off., analysis of Sen. Bill No. 81, pp. 4-5; MJN 56-57.) The state would save over $100,000 for each ward housed at a county facility instead of DJJ. (*In re N.D.*, at pp. 891-892; Sen. Repub. Fiscal Off., analysis of Sen. Bill No. 81, pp. 4-5; MJN 56-57.)

It appears the first set of legislation (SB 81) was rushed through, and a second bill (AB 191) was enacted shortly thereafter to help "clean up" and "clarify" some of the changes. (Concur. in Sen. Amendments, Budget Com., analysis of Assem. Bill No. 191, as amended September 7, 2007; Sen. Repub. Fiscal Off., analysis of Assem. Bill No. 191, pp. 1-2; MJN 145-148.)

1. Senate Bill 81 (Stats. 2007, Ch. 175)

Senate Bill 81 ("SB 81"), passed on August 24, 2007, was intended to reduce the amount of money spent on housing juvenile offenders in the DJJ by transferring responsibility for offenders committing non-serious, non-

[5] For the Court's convenience, legislative documents attached to Respondent's Motion for Judicial Notice, filed concurrently herewith, are cited herein as "MJN."

violent, and non-sex-offense crimes to the counties. (Legis. Counsel's Dig., Sen. Bill No. 81, stats. 2007, ch. 175, pp. 3-4; Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 81, as amended July 19, 2007, pp. 2-3; MJN 4-5, 41-42.) To carry out this purpose, the Legislature, *inter alia*, amended sections 731, 736, 1731.5, and 1766, added sections 731.1 and 1767.35, and replaced section 733.

Specifically, section 731, subdivision (a)(4), was amended to state that the juvenile court could commit a minor to the DJJ "if the ward has committed an offense described in subdivision (b) of Section 707." (§ 731, subd. (a)(4), as amended by stats. 2007, ch. 175, § 19.) That section had previously permitted the juvenile court to commit a ward to the DJJ without restriction. (See former § 731, as amended by stats. 2003, ch. 4, § 1.)

Section 731.1 was added and provided a procedure to recall the commitment of a 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 paragraph (3) of subdivision (d) of section 290 of the Penal Code."[6] (§ 731.1, as added by stats. 2007, ch. 175, § 20.) No such recall procedure previously existed.

Section 733 was repealed and restructured, adding subdivision (c) to prohibit commitment to the DJJ if "the most recent offense alleged in any petition and admitted or found true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code."[7] (§ 733, subd. (c), as added by stats. 2007, ch. 175, § 22.)

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[6] See *ante* fn. 1 regarding references to enumerated sex offenses and Penal Code section 290.

[7] Section 733 stated in full: "A ward of the juvenile court who meets any condition described below shall not be committed to the [DJJ]: [¶] (a) The ward is under 11 years of age. [¶] (b) The ward is suffering from any contagious,

(continued...)

Section 736 was amended to read, "*Except as provided in Section 733*, the [DJJ] shall accept a ward committed to it pursuant to this article if the Chief Deputy Secretary for the [DJJ] believes that the ward can be materially benefitted by the division's reformatory and educational discipline, and if the division has adequate facilities, staff, and programs to provide that care."[8] (§ 736, as amended by stats. 2007, ch. 175, § 23.) That section had previously not included the exception of section 733. (Former § 736, as amended by stats. 2006, ch. 257, § 1.)

Section 1731.5 was amended to state that "a court may commit to the [DJJ] any person who meets all of the following: [¶] (1) *Is convicted of an offense described in subdivision (b) of Section 707 or paragraph (3) of subdivision (d) of Section 290 of the Penal Code.*"[9] (§ 1731.5, subd. (a), as amended by stats. 2007, ch. 175, § 24.) That section did not previously

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(...continued)
infectious, or other disease that would probably endanger the lives or health of the other inmates of any facility. [¶] (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 paragraph (3) of subdivision (d) of Section 290 of the Penal Code. This subdivision shall be effective on and after September 1, 2007."

[8] Where helpful, language that was added to an existing statute is italicized.

[9] Section 1731.5, subdivision (a) read in full: "(a) After certification to the Governor as provided in this article, a court may commit to the [DJJ] any person who meets all of the following: [¶] (1) Is convicted of an offense described in subdivision (b) of Section 707 or paragraph (3) of subdivision (d) of Section 290 of the Penal Code. [¶] (2) Is found to be less than 21 years of age at the time of apprehension. [¶] (3) Is not sentenced to death, imprisonment for life, with or without the possibility of parole, whether or not pursuant to Section 190 of the Penal Code, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment. [¶] (4) Is not granted probation, or was granted probation and that probation is revoked and terminated."

include any offense-specific requirement. (Former § 1731.5, as amended by stats. 1996, ch. 195, § 1.)

Section 1766, subdivision (a), was amended to read, "*Subject to Sections 733 and 1767.35, and subdivision (b) of this section*, if a person has been committed to the [DJJ], the Juvenile Parole Board, according to standardized review and appeal procedures established by the board in policy and regulation and subject to the powers and duties enumerated in subdivision (a) of Section 1719, may . . . ." Subdivision (b) was added to state, in part, "The county of commitment shall supervise the parole of any ward released on parole on or after September 1, 2007, who was committed to the custody of the division for committing an offense other than those described in subdivision (b) of Section 707." (§ 1766, subds. (a) & (b), as amended by stats. 2007, ch. 175, § 25.) Previously, section 1766 made no mention of sections 733, 1767.35, or 707, subdivision (b). (Former § 1766, as amended by stats. 2005, ch. 10, § 88.)

Finally, section 1767.35 was added, dividing responsibility for juvenile parolees between the state and counties: "Commencing on September 1, 2007, any parolee under the jurisdiction of the Division of Juvenile Parole Operations shall be returned to custody upon the suspension, cancellation, or revocation of parole as follows: [¶] (a) To the custody of the [DJJ] if the parolee is under the jurisdiction of the division for the commission of an offense described in subdivision (b) of Section 707. [¶] (b) To the county of commitment if the parolee is under the jurisdiction of the division for the commission of an offense not described in subdivision (b) of Section 707." (§ 1767.35, as added by stats. 2007, ch. 175, § 27.)

Explanations in the legislative history reflect the intent that the limitations on DJJ commitment in this package of legislation would have no impact on juvenile sex offenders. (Sen. Rules Com., Off. of Sen. Floor

Analyses, analysis of Sen. Bill No. 81, as amended July 19, 2007, p. 2; MJN 41.)

2. Assembly Bill 191 (Stats. 2007, Ch. 257)

Shortly after enactment of SB 81, the Legislature passed a "cleanup" bill, Assembly Bill 191 ("AB 191"), which was enacted on September 29, 2007. (Concur. in Sen. Amendments, Budget Com., analysis of Assem. Bill No. 191, as amended September 7, 2007; Sen. Repub. Fiscal Off., analysis of Assem. Bill No. 191; MJN 145-149, 162-163.) The goal of AB 191 was, in part, "to ensure that none of the juvenile justice reforms contained in SB 81 affect juveniles adjudicated of a sex offense as set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Assem. Bill No. 191, as amended September 7, 2007, p. 1; MJN 164.) To that end, AB 191 amended almost every relevant section affected by SB 81, including sections 731, 731.1, 1731.5, 1766, and 1767.35.

Specifically, section 731, subdivision (a)(4), was amended to permit a juvenile court to commit a ward to the DJJ "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.*"[10] (§ 731,

[10] Section 731, subdivision (a) read in full: "(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: [¶] (1) Order the ward to make restitution, to pay a fine up to two hundred fifty dollars ($250) for deposit in the county treasury if the court finds that the minor has the financial ability to pay the fine, or to participate in uncompensated work programs. [¶] (2) Commit the ward to a sheltered-care facility. [¶] (3) Order that the ward and his or her family or guardian participate in a program of professional counseling as arranged and directed by the probation officer as a condition of continued custody of the ward. [¶] (4) Commit the ward to the [DJJ], 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."

subd. (a)(4), as amended by stats. 2007, ch. 257, § 2.) Previously, there was no reference to section 733. (§ 731, subd. (a)(4), as amended by stats. 2007, ch. 175, § 19.)

Sections 731.1 and 1731.5 were amended in minor respects irrelevant to the issues here.

Section 1766, subdivision (b), which addressed the responsibility for wards paroled from DJJ, was amended to read: "The following provisions shall apply to any ward eligible for release on parole on or after September 1, 2007, who was committed to the custody of the [DJJ] for an offense other than one described in subdivision (b) of Section 707 or paragraph (3) of subdivision (d) of Section 290 of the Penal Code: [¶] (1) The county of commitment shall supervise the reentry of any ward released on parole on or after September 1, 2007, who was committed to the custody of the division for committing an offense other than those described in subdivision (b) of Section 707 *or paragraph (3) of subdivision (d) of Section 290 of the Penal Code.*" (§ 1766, subd. (b), as amended by stats. 2007, ch. 257, § 5.)

Likewise, section 1767.35 was amended to state that DJJ parolees "shall be returned to custody upon the suspension, cancellation, or revocation of parole as follows: [¶] (a) To the custody of the [DJJ] if the parolee is under the jurisdiction of the division for the commission of an offense described in subdivision (b) of Section 707 *or an offense described in paragraph (3) of subdivision (d) of Section 290 of the Penal Code.* [¶] (b) To the county of commitment if the parolee is under the jurisdiction of the division for the commission of an offense not described in subdivision (b) of Section 707 *or paragraph (3) of subdivision (d) of Section 290 of the Penal Code.*" (§ 1767.35, as amended by stats. 2007, ch. 257, § 6.)

The Legislature's express intent in enacting these changes was, in part, to "clarif[y] that sex offenders are still eligible for commitment to

DJJ." (Sen. Repub. Fiscal Off., analysis of Assem. Bill No. 191, p. 2; MJN 148.)

B. Applicable Law: Statutes Should Be Construed to Effectuate Legislative Intent

Courts "apply well-established principles of statutory construction in seeking to determine the Legislature's intent in enacting the statute so that we may adopt the construction that best effectuates the purpose of the law." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214, citations and quotation marks omitted.)

> We begin with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]" [Citation.] But if the statutory language may reasonably be given more than one interpretation, courts may employ various extrinsic aids, including a consideration of the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.

(*Ibid.*; accord, *In re Derrick B.* (2006) 39 Cal.4th 535, 539.)

> [T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not

> prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

"'[S]tatutory ambiguities may often be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes.'" (*People v. Arias* (2008) 45 Cal.4th 169, 177, quoting *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) Moreover, "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*People v. King* (1993) 5 Cal.4th 59, 69, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899, internal quotation marks omitted; accord, *People v. Arias*, *supra*, 45 Cal.4th at p. 177.)

"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. King*, *supra*, 5 Cal.4th at p. 69, quoting *People v. Pieters*, *supra*, 52 Cal.3d at pp. 898-899; accord, *People v. Arias*, *supra*, 45 Cal.4th at p. 177.)

C. Based on the Relevant Statutory Language and History, the Legislature Intended to Preserve a Juvenile Court's Discretion to Commit a Sex Offender to DJJ

There is no dispute that the comprehensive changes made to the Welfare and Institutions Code in 2007 reflected the Legislature's intent to

limit the juveniles who could be sent to DJJ. (AOB 16-17.) The question here is whether such limitation extends to enumerated sex offenses. The legislative intent, as reflected in the statutory language and history, the statutory scheme as a whole, and public policy, leave no doubt that enumerated sex offenses continue to qualify a ward for DJJ commitment.

1. Statutory Language

The language of the relevant statutes demonstrates the legislative intent that enumerated sex offenses be excepted from the limitation on DJJ placement, i.e., that such sex offenses still qualify a ward for DJJ.

Section 731, subdivision (a), as currently amended, states, "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 . . .: [¶] . . . [¶] (4) Commit the ward to the [DJJ], 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." This statute thus explicitly refers the reader to section 733.

Section 733 lists bases for disqualifying a ward from commitment to DJJ. One such basis is 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." (§ 733, subd. (c).) Reading these statutes together indicates that enumerated sex offenses were intended to be excepted from disqualification. In other words, committing an enumerated sex offense continues to qualify a ward for commitment to DJJ.

Notably, the language in section 731 referring to section 733 was added by the second round of legislation in 2007, AB 191. (§ 731, subd. (a)(4), as amended by stats. 2007, ch. 175, § 19.) Section 733 always provided bases to exclude a ward from DJJ commitment, and section 731

did not previously reference that statute. (See § 731, as amended by stats. 2003, ch. 4, § 1.) There would be no reason for the Legislature to add language referencing section 733 (which excludes enumerated sex offenses from its restriction) if its intent was not to include enumerated sex offenses as a basis for DJJ commitment. Reading the statutes in this way prevents section 731's added reference to section 733 from becoming nugatory. (See *Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735 ["An interpretation that renders related provisions nugatory must be avoided."].)

The Fifth District Court of Appeal recently addressed this issue and determined the statutory language of section 731, when read together with section 733, could only be read to permit a sex offender to be committed to DJJ. (*In re Robert M.* (Jan. 28, 2011, F060094) __ Cal.App.4th __ [2011 WL 255803, *3].) The court found, "[t]he language of each statute when read separately appears clear and unambiguous. But, when read together they are inconsistent." (*Ibid.*) The court found that the defendant's interpretation, which would permit only minors who commit section 707, subdivision (b) offenses to be committed to DJJ, would render meaningless section 733, subdivision (c)'s exception for enumerated sex offenses. (*Ibid.*)

To find for the defendant, the court found it would have to ignore the language of section 733, subdivision (c), including an exception for enumerated sex offenses, which it could not do. (*In re Robert M., supra,* 2011 WL 255803, *3.) "'When two seemingly inconsistent statutes apply, we harmonize the competing statutes and "avoid an interpretation that requires one statute to be ignored."'" (*Ibid.*, citation omitted.) The court concluded that the language excepting enumerated sex offenses in section 733, subdivision (c) "was added for a purpose. That purpose is to allow the court to commit a minor to the [DJJ] when the minor has committed an offense listed in Penal Code section 290.008." (*Ibid.*)

It thus appears that the Legislature's reference to section 733 was intended to except enumerated sex offenses from any limitation made by the referencing statute. This interpretation is emboldened by examining other related statutes with similar language.

Section 736 was also amended in 2007 to add an exception for section 733. (§ 736, as amended by stats. 2007, ch. 175, § 23.) That statute requires the DJJ to accept a ward committed to it if the ward will benefit from the commitment. The statute states, "Except as provided in Section 733, the [DJJ] shall accept a ward . . . ." (§ 736.) The reference to section 733, which explicitly excepts enumerated sex offenders from disqualification, again indicates an intent by the Legislature to permit such offenders to be committed to DJJ.

Section 1766, subdivision (a), likewise states that it is "[s]ubject to Sections 733 and 1767.35." That section deals with paroling a ward who has been committed to the DJJ. The reference to sections 733 and 1767.35, both of which permit a sex offender to be committed to DJJ, again indicates the Legislature's intent to continue committing sex offenders to DJJ without restriction.

If the Legislature's intent is somewhat ambiguous from the language in those sections, section 1731.5 is clearer. Section 1731.5, which was also amended in 2007, states that "a court may commit to the [DJJ] any person who meets all of the following: [¶] (1) Is convicted of an offense described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code." This statute could not more clearly express the intent that enumerated sex offenders are eligible for commitment to DJJ.

Appellant claims the limitation on offenders sent to DJJ was intended to permit only juveniles who had committed an offense listed in section 707, subdivision (b). Appellant further argues that sex offenses not listed in

section 707, subdivision (b), like that committed by appellant, do not qualify for DJJ commitment. Appellant relies almost exclusively on a narrow construction of the language in sections 731 and 733. (AOB 10-19.) However, section 731 is not the sole authorizing statute regarding placement of a ward at DJJ. As discussed above, when section 731 is read in conjunction with the other relevant amended statutes, including section 733, the clear intent is that enumerated sex offenses may continue to qualify a ward for commitment to DJJ. Statutes should be read in context to help ascertain their meaning. (See *People v. Arias*, *supra*, 45 Cal.4th at p. 177 [statutes should be examined in context and harmonized internally and with related statutes]; *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735 ["The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."].)

Appellant claims that section 733's limitation to "the most recent offense" permits a juvenile court to commit a minor who had previously committed a section 707, subdivision (b) offense when his or her most recent offense is an enumerated sex offense. In other words, minors who could be committed include only those whose current offense is listed in section 707, subdivision (b), or who had a previous offense listed in section 707, subdivision (b), but whose most recent offense is an enumerated sex offense. (AOB 12-13, 16.) Such a narrow interpretation ignores the intent of the 2007 amendments and likewise requires this Court to ignore every other relevant amended statute. (See *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735 [courts must determine whether the literal meaning of a statute, considered in context, comports with its purpose and is consistent with other provisions].) Such an interpretation would also lead to

unintended and absurd results.[11] (See *People v. King*, *supra*, 5 Cal.4th at p. 69 ["language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend"]; accord, *People v. Arias*, *supra*, 45 Cal.4th at p. 177.)

It is more likely the Legislature's use of "the most recent offense" language simply intended to exclude from commitment those minors who had a previous offense listed in section 707, subdivision (b) or an enumerated sex offense, but whose most recent offense was neither. Such an interpretation harmonizes the language of sections 731 and 733, as well as the other related statutes that were amended at the same time. (See *People v. Arias*, *supra*, 45 Cal.4th at p. 177.)

Appellant asserts that section 731.1 is irrelevant to the question posed here (AOB 19-21), and would likely find consideration of other statutes discussed herein equally irrelevant. However, that statute, as well as the many others amended at the same time as part of a comprehensive change in the law, is relevant to help determine legislative intent. (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735 [language "must be read not in isolation but in light of the statutory scheme"].) Viewing the amendments and statutes in context helps shed light on the legislative intent, which is the key determination here. (See *ibid.* [legislative "intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act"]; see also *People v. King*, *supra*, 5 Cal.4th at p. 69 ["fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law"].)

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[11] For example, minors who commit only an enumerated sex offense would not be permitted to be committed to DJJ, but they could be "returned" to DJJ upon violation of parole. (See § 1767.35.)

Appellant also invokes the "rule of lenity." (AOB 15.) As the United States Supreme Court has held, however, "The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. Cf. *Smith* [*v. United States* (1993)] 508 U.S. [223,] 239 ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable"). '"The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what [the Legislature] intended.'"' [Citations.]" (*Muscarello v. United States* (1998) 524 U.S. 125, 138; see also *People v. Oates* (2004) 32 C.4th 1048, 1068 [rule of lenity does not apply where defendant's construction is not as reasonable as alternative construction].) Because deduction of the Legislature's intent here is much more than a "guess," and because appellant's interpretation is the less reasonable one, relying on the rule of lenity would be improper.

Reviewing the statutory language of relevant sections of the Welfare and Institutions Code, as amended in 2007, demonstrates the Legislature's intent that enumerated sex offenses continue to make a juvenile offender, like appellant, eligible for commitment to DJJ. To the extent the legislative intent is ambiguous from the language alone, the statutory history and scheme, as well as public policy, leave no doubt.

2. Statutory History, Scheme, and Public Policy

The statutory history, as demonstrated by various amendments to relevant sections of the Welfare and Institutions Code, as well as a variety of legislative documents analyzing the pertinent amendments, demonstrates a clear intent to continue permitting DJJ commitment for juvenile sex offenders.

As discussed above, the statutes at issue here were amended in 2007 as part of a package to reduce the state's costs of housing juvenile

offenders. The history of those amendments indicates a clear and explicit intent of the Legislature to limit commitment to DJJ of only serious or violent offenders, as listed in section 707, subdivision (b), and sex offenders, as listed in Penal Code section 290, subdivision (d)(3) (or later, Penal Code section 290.008, subdivision (c)).

First, as discussed above, all of the amended statutes designated offenses listed in section 707, subdivision (b) and enumerated sex offenses as those continuing to justify commitment to DJJ. They did this either directly (see § 731.1, as added by stats. 2007, ch. 175, § 20; § 733, as added by stats. 2007, ch. 175, § 22; § 1731.5, as amended by stats. 2007, ch. 175, § 24; § 1766, subd. (b), as amended by stats. 2007, ch. 257, § 5; § 1767.35, as amended by stats. 2007, ch. 257, § 6.), or indirectly by reference to section 733 and/or section 1767.35. (See § 731, as amended by stats. 2007, ch. 257, § 2; § 736, as amended by stats. 2007, ch. 175, § 23; § 1766, subd. (a), as amended by stats. 2007, ch. 175, § 25.)

The amendments that failed to include such language in the initial round of legislation (SB 81), did so in the "cleanup" bill (AB 191). (See § 731, as amended by stats. 2007, ch. 257, § 2; § 1766, subd. (b), as amended by stats. 2007, ch. 257, § 5; § 1767.35, as amended by stats. 2007, ch. 257, § 6.) The addition of enumerated sex offenses as an exception to the restrictions of DJJ commitments, especially in the second round of legislation, shows the Legislature's intent to continue permitting DJJ commitments for such offenses.

Second, some of the amended and added statutes do not speak directly to placement of a ward at DJJ, but they were enacted as part of the same statutory scheme and provide context to the authorizing statutes. For example, section 731.1, which was added in 2007, created a recall procedure for wards who had been committed for crimes other than those listed in section 707, subdivision (b) or an enumerated sex offense. It

permitted the juvenile court to recall any ward committed to DJJ prior to September 1, 2007, unless the ward had committed an offense listed in section 707, subdivision (b) or an enumerated sex offense. (§ 731.1.) The explicit exclusion from this procedure of enumerated sex offenses, as well as serious and violent offenses listed in section 707, subdivision (b), shows the Legislature's intent to keep sex offenders committed at DJJ. It would be illogical for such a recall procedure to exclude sex offenders if the Legislature intended that sex offenders not be committed to DJJ after September 1, 2007.

Moreover, sections 1766 and 1767.35, both of which were amended in the 2007 legislation, govern wards who are paroled from DJJ. Section 1766 designated whether the state or county would have responsibility for a ward paroled from DJJ after September 1, 2007. It specified that a ward paroled from DJJ who had not committed an enumerated sex offense or an offense listed in section 707, subdivision (b), would be the responsibility of the county. (§ 1766, subd. (b).) This reflects the Legislature's intent to shift costs and responsibility to the counties for wards who had not committed a serious or violent offense or an enumerated sex offense. Paroled minors who had committed an enumerated sex offense or an offense listed in section 707, subdivision (b), would remain the responsibility of the state. (§ 1766, subd. (a).) The Legislature's division of responsibility with respect to paroled minors is a strong indication of its overall intent as to which entity (state or county) would have responsibility for which minors. This distinction further reinforces the intent that sex offenders remain the responsibility of the state, and thus remain eligible for DJJ.

Even more telling is section 1767.35, which governs the return of a parolee to custody and continues the county versus state distinction. It states that after September 1, 2007, any parolee "returned to custody upon the suspension, cancellation, or revocation of parole" shall be returned to

DJJ "if the parolee is under the jurisdiction of the division for the commission of an offense described in" section 707, subdivision (b) or an enumerated sex offense. (§ 1767.35, subd. (a).) Those parolees who had not committed an offense listed in section 707, subdivision (b) or an enumerated sex offense were to be returned to the county. (§ 1767.35, subd. (b).) It would be illogical for the Legislature to require sex offenders to be "returned" to DJJ upon violation of parole if they could not be committed there initially. This statute further supports a legislative intent to continue to permit DJJ commitment for sex offenders.

Finally, a variety of legislative documents analyzing the 2007 legislation explicitly state the intent that sex offenders would remain eligible for DJJ commitment under the amendments. The Senate Rules Committee, Office of Senate Floor Analyses, prepared an analysis regarding SB 81. Its analysis of the "Juvenile Justice Reform" contained in the bill stated:

> This bill will stop the intake of youthful offenders adjudicated for non-violent, non-serious offenses (non-707b offenses) to the state Division of Juvenile Facilities within the CDCR on September 1, 2007. These youth will remain in county care and custody. *Juvenile sex offenders are excluded from this change and will not be impacted by this bill.*

(Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 81, as amended July 19, 2007, p. 2, italics added; MJN 41.)

The Senate Third Reading of SB 81 contained a similar description of the bill's limitation on juvenile offenders eligible for DJJ. It also stated, "Juvenile sex offenders are excluded from this change and will not be impacted by this bill." (Sen. Third Reading, analysis of Sen. Bill No. 81, as amended July 19, 2007, p. 1, par. 1; MJN 50; accord, *In re Robert M.*,

supra, 2011 WL 255803, *4, quoting Assem. Com. on Budget & Fiscal Review, Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 1.)

An analysis prepared by the Senate Republican Fiscal Office reflects a similar understanding of SB 81. In a "Quick Summary" section, the analysis explained, "This bill stops intake of non-serious, non-violent, *non-sex offender* juvenile wards from counties." (Sen. Repub. Fiscal Off., analysis of Sen. Bill No. 81, p. 1, italics added; MJN 53.) In its analysis, under a section entitled, "Sections 18-27, 30-31, 37. Department of Corrections and Rehabilitation, Division of Juvenile Justice Population Shift," the report stated, "This bill would restrict the offenders that could be sent to the [DJJ] to those offenders who commit offenses listed in Welfare and Institutions Code 707(b), *or sex offenses*." (*Id.* at p. 4, italics added; MJN 56.) Further in the same section, the report again explains, "This bill would stop intake of all non-serious, non-violent, *non-sex offender* commitments, and instead these offenders would stay at a local level." (*Id.* at p. 5, italics added; MJN 57.)

Regarding AB 191, a report by the Senate Rules Committee, Office of Senate Floor Analyses, analyzed the "Juvenile Justice Reform Modifications." It stated, "This bill makes various modifications to the juvenile justice reform contained in SB 81 . . . . Specifically, this bill: [¶] 1. *Makes conforming changes to ensure that none of the juvenile justice reforms contained in the SB 81 affect juveniles adjudicated of a sex offense* as set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Assem. Bill No. 191, as amended Sept. 7, 2007, p. 1, italics added; MJN 105.) Similar language appears in the analysis of the Concurrence in Senate Amendments. (Concurr. in Sen. Amendments, analysis of Assem. Bill No. 191, as amended Sept. 7, 2007, p. 1; MJN 145.) This clearly states the

Legislature's intent that SB 81 was meant to exclude sex offenders from its limitations on DJJ commitment, and to the extent it did not, AB 191 would ensure that intent was carried out.

Again, an analysis by the Senate Republican Fiscal Office reflects the same understanding and intent. Under the "Analysis, Arguments in Support" section, the report states: "The changes in this bill related to the placement of juvenile offenders clarifies that rejecting non 707B commitments at the [DJJ] *does not apply to sex offenders*, which was not uniformly state[d] in SB 81." (Sen. Repub. Fiscal Off., analysis of Assem. Bill No. 191, p. 1, italics added; MJN 147.) Moreover, under the "Digest" section, it states, "This bill clarifies which juvenile wards will not be eligible for commitment to DJJ under the policy change reflected in SB 81 which will result in the rejection of non-serious, non-violent offenders. *It also clarifies that sex offenders are still eligible for commitment to DJJ.*" (*Id.* at p. 2, italics added; MJN 148.) Under the "Background" section, the report states, "SB 81 stopped intake of all non-serious, non-violent, *non-sex offender* commitments, and instead diverted these offenders to local options." (*Ibid.*, italics added.)

There is no question, based on the legislative history, that sex offenders were intended to remain eligible for DJJ commitment. The discussion of this issue in the legislative reports also helps explain the somewhat awkward wording of some of the amendments. Instead of simply excepting section 707, subdivision (b) offenses as well as enumerated sex offenses with the same words, several amended statutes use different language and clauses for section 707, subdivision (b) offenses and enumerated sex offenses. For example, sections 731.1 and 733 both except offenses described in section 707, subdivision (b), and then add the clause, "unless the offense was a sex offense set forth in paragraph (3) of subdivision (d) of section 290 of the Penal Code." (§ 731.1, as added by

stats. 2007, ch. 175, § 20; § 733, subd. (c), as added by stats. 2007, ch. 175, § 22.) Such phrasing likely reflected the Legislature's intent that juvenile sex offenders be "excluded from this change and will not be impacted by this bill." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 81, as amended July 19, 2007, p. 2; Sen. Third Reading, analysis of Sen. Bill No. 81, as amended July 19, 2007, p. 1, par. 1; MJN 41, 50.)

Finally, public policy strongly supports the continued discretion of juvenile courts to commit sex offenders to DJJ. The public has determined that sex offenders pose a substantial threat to society, and many laws have been passed to address that threat. (See, e.g., § 6600 et seq. [addressing sexually violent predators]; Pen. Code, §§ 290 et seq. [requiring lifetime registration of sex offenders], & 667.51 et seq. [enhanced sentencing for sex offenders]; see also *People v. Sorden* (2005) 36 Cal.4th 65, 72-73 [discussing policy of registration requirement].) Continuing to permit juvenile courts the vast array of options available to them, including DJJ commitment, when dealing with juvenile sex offenders best gives effect to this public policy.

In sum, the statutory language, statutory history, statutory scheme and public policy all strongly support the conclusion that juveniles who commit enumerated sex offenses are eligible for commitment to DJJ. Because appellant committed such an offense, he was properly committed to DJJ.

II. THE JUVENILE COURT ACTED WITHIN ITS DISCRETION BY COMMITTING APPELLANT TO DJJ BECAUSE IT REASONABLY FOUND APPELLANT WOULD BENEFIT FROM SUCH COMMITMENT AND ADEQUATELY CONSIDERED ALTERNATIVE PLACEMENTS

The second and final issue is whether the trial court abused its discretion by committing appellant to DJJ. (AOB 21-42.)[12] Because there

[12] Appellant breaks up this issue into several headings, but it is addressed under a single heading here.

was substantial evidence supporting the juvenile court's reasonable decision to commit appellant to DJJ after three failed placements over three years, the court's decision should be upheld.

A. Applicable Law: Juvenile Court's Decision Can Be Reversed Only for Abuse of Discretion

Section 202 sets forth the goals of juvenile court dispositions. It identifies as appropriate considerations: "the protection and safety of the public and each minor," "to preserve and strengthen the minor's family ties whenever possible," that the minor, "in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances," and punishment that is consistent with rehabilitation. (§ 202, subds. (a), (b).)

Section 202 was revamped in 1984, to shift "'its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express "protection and safety of the public" [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection.'" (*In re Carl N.* (2008) 160 Cal.App.4th 423, 432-433, quoting *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.) Section 202 for the first time permitted a juvenile court to consider "punishment as a rehabilitative tool." (*Id.* at p. 432.) "'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.'" (*Id.* at p. 433, quoting *In re Michael D.*, at p. 1396.) "It is also clear . . . that a commitment to [DJJ] 'may be made in the first instance without previous resort to less restrictive placements.'" (*Ibid.*, quoting *In re Asean D.* (1993) 14 Cal.App.4th 467, 473; see also *In re Robert M.*, *supra*, 2011 WL 255803, *4 [minor who committed violation of Penal

Code section 288, subdivision (a), was sent to DJJ without any attempt at other options].)

A juvenile court's commitment to DJJ may be reversed "'only upon a showing the court abused its discretion.'" (*In re Robert M.*, *supra*, 2011 WL 255803, *4, quoting *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330; accord, *In re Carl N.*, *supra*, 160 Cal.App.4th at pp. 431-432.) "'Discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.'" (*In re Carl N.*, at p. 432, quoting *People v. Giminez* (1975) 14 Cal.3d 68, 72; accord, *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

> An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citation.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in the light of the purposes of the Juvenile Court Law.

(*In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1395, quoted in *In re Carl N.*, *supra*, 160 Cal.App.4th at p. 432.) The evidence is viewed "in the light most favorable to the judgment which is required by the familiar rules governing appellate review." (*People v. Sons* (2008) 164 Cal.App.4th 90, 93, fn. 3, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1212 and *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"'A DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate.'" (*In re Robert M.*, *supra*, 2011 WL 255803, *4, quoting *In re M.S.* (2009) 174

Cal.App.4th 1241, 1250; see also § 734; *In re Carl N.*, *supra*, 160 Cal.App.4th at p. 433; *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.)

B. The Juvenile Court Was Well within Its Discretion in Committing Appellant to DJJ after He Failed at Three Other Programs

The juvenile court here committed appellant to DJJ only after his failed placement at three previous programs as well as a relative's home. Appellant's behavior over three years as a ward of the court demonstrated a complete lack of motivation, lack of remorse for, or acknowledgement of, his offenses, and a continued threat to the children of the community if he did not show he was amenable to the treatment he received. The evidence before the court demonstrated that commitment to DJJ would likely benefit appellant and that less restrictive alternatives would be ineffective and inappropriate. The juvenile court therefore did not abuse its discretion by committing appellant to DJJ.

First, the seriousness of appellant's offense cannot be overstated. He molested his three-year-old sister in public, licking her vagina and putting his penis in her mouth. (1CT 14-16.) The nature of his actions in committing that offense, as well as his years of previous sexual misconduct with his two other siblings and friends (1CT 15-16, 18-19), showed appellant to be a clear danger to the community. His sexual misconduct continued while in placement. (1CT 9, 69, 157-158; 2CT 335.) In the final probation report, the officer recounted appellant's history and recommended DJJ commitment "[d]ue to his high risk to re-offend." (2CT 394.)

Second, numerous programs, therapeutic models, and therapists had been attempted, and appellant failed with every one. Even before his appearance in juvenile court, appellant's parents sought treatment for him because of his sexual misconduct. He first went to counseling for about a

year when he was caught with a neighbor boy at seven years old. (1CT 18.) His mother later switched therapists, and appellant had been in therapy with his then-therapist for almost a year when he committed the underlying offense here. (1CT 23.) His therapist reported that appellant had not improved, and continued to be a danger to the community. (1CT 23.)

About six months after being placed at his first placement facility, Starshine, appellant "had an incident with another minor involving inappropriate sexual conduct." (1CT 69.) After a year at Starshine, he had "made little improvement," and his therapist reported he "continue[d] to be at a high risk to re-offend." (1CT 98.) Appellant admitted violating probation by failing to complete therapy and school assignments, and having little to no participation in group therapy. (1CT 118-119, 139.) His therapist reported he had tried "several different therapeutic approaches" to try to gain appellant's participation, but to no avail. (1CT 119.)

Appellant was sent to another placement, Rancho San Antonio, and within about three months, appellant engaged in two consensual sex acts with another resident. (1CT 157-158, 178.) He admitted planning the sexual encounters to avoid detection. (1CT 158.) It was reported that appellant "failed his first treatment program after 13 months of substandard progress," and he "demonstrated the same lackluster effort while at Rancho San Antonio." (1CT 159.)

Appellant was terminated from that program and was sent to a third placement for treatment, GLASS, which was selected specifically to address appellant's recently discovered gender identity issues, as well as for sex offender treatment. (1CT 158-159, 178, 182.) Appellant at first appeared to adjust to the program there, but his laziness and lack of motivation was a perpetual problem. (1CT 213.) After almost a year at GLASS, appellant admitted violating probation by failing to complete his sex therapy assignments. (1CT 252, 262.) The probation officer noted, "Of

great concern is his lack of progress in the sex offender program." (1CT 266.)

It became clear that appellant's lack of motivation and failure to do what was required of him, was not due to some learning disability or neuropsychological problem, as had been previously surmised. Appellant admitted to his therapist and mother that for years he had deliberately "played dumb" and pretended not to understand so that less would be expected of him. (1CT 253-254.) He admitted deliberately not doing his best on psychological exams he had taken. (1CT 254.) These admissions were borne out when appellant was made aware of an upcoming court date and worked steadily to complete his assignments on time and in a thoughtful manner. (1CT 254.) These admissions and observations supported the therapist's characterization of appellant as intelligent but manipulative and lazy. (1CT 253.) They also severely undermined any claim that appellant had learning disabilities.

In an attempt to help motivate appellant, the juvenile court ordered that he serve 90 days in DJJ, which was stayed to allow appellant the opportunity to participate in his sex offender therapy at GLASS. (1CT 262-263; 1RT 74-76.) Appellant still did not participate, failing to complete even simple sex offender group assignments. (1CT 305-306.) Appellant admitted he did not do the assignments because he "just didn't feel like . . . it." (1CT 305.)

The court imposed the previously-stayed 90 days at DJJ. (1CT 308-309.) Appellant's progress at DJJ was reported as "satisfactory," and he participated in sex offender counseling there. (1CT 318-319.) Based on appellant's positive report, the juvenile court granted an early release. (1RT 91-92.)

A few months later, appellant again admitted violating probation by failing to follow program rules, failing to complete sex offender therapy

assignments, and making no progress. (2CT 358, 376.) Appellant told the probation officer he did not do the work because he did not want to do it. He said he could have easily done it if he so desired. (2CT 359.) The report stated, "Probation and GLASS staff have tried every conceivable intervention, including incentives, rewards, and meaningful consequences; however, he has failed to make any progress in his [sex offender] program." (2CT 335.)

A probation report filed with the court evaluated appellant's history of failed treatment and noted, "[t]he various placements have tried different therapeutic approaches, . . . [h]owever, the minor has failed to respond." (2CT 394.) After this long history of three failed placements, each of which was chosen because of its sex offender treatment program and potential to help appellant, appellant was finally committed to DJJ.

Third, appellant showed absolutely no progress throughout his three years in placement. Appellant repeatedly engaged in inappropriate sexual conduct. (1CT 9, 69, 157-158; 2CT 335.) He consistently failed to participate in therapy and sex offender treatment. His participation was so dismal that he was voted by his peers to return to the entry level sex offender group after over a year at GLASS. (1CT 265-266.) Both at the beginning of placement and the end, it was reported that appellant did not show any empathy for his victims or understand the affects of his actions. (1CT 119, 265.) After three years and three programs, he remained at "high risk to re-offend." (2CT 294.) In short, every therapeutic program attempted had been completely ineffective, and there was no reason to believe that yet another program would be any different.

Finally, the juvenile court was singularly focused on the goal of successfully treating appellant, if possible. The court found, "we should do everything we can to get [appellant] the treatment that he needs. Right now I think we're just moving him from one program to another and we're not

getting success in any of them." (1RT 98.) The court further found, appellant had "been molesting children since he was seven years old. He's now 16 years old, and he's not getting any benefit of treatment." (1RT 98.) The court also found the DJJ program was "the place where he can receive the appropriate level of treatment and supervision and we can do what we can to not cure, but do what we can to help him control whatever those feelings were that caused him to molest children. [¶] I think the longer we wait, the longer we run the risk of not helping this young man." (1RT 123.)

The court asked probation to ensure appellant would be able to participate in the sex offender program, and if not, ordered that he be returned to the court for consideration of other alternatives. (1RT 97, 102, 142-143.) The court had previously attempted to motivate appellant with a short stay at DJJ. (1RT 74-76, 84-85.) Notably, appellant received a positive report during his stay, and did so well that his term was cut short and he was returned to GLASS. (1CT 318-319; 1RT 91-92.) This provided substantial evidence of a probable benefit to appellant from commitment.

Appellant inappropriately relies on information beyond the scope of the record in this case and claims the juvenile court based its assessment of the DJJ program on its own "grossly outdated" experience, as opposed to any evidence before it. (AOB 28-30.) It is true that the trial court expressed its strong belief that the DJJ sex offender treatment program was "topnotch" (1RT 110-111), however, the probation report filed with the court provided evidence detailing the program. The report stated appellant had been screened for commitment and would participate in the "sex behavior treatment programs." (2CT 393.)

The report described the program in detail: it took an average of 24 months to complete and was broken down into three phases; the Orientation Phase was about 28 weeks long and provided the minor with "an

understanding of treatment concepts, rules of group therapy, psychological testing, and overall rules/expectations"; The Core Program Phase was about 40 weeks, and included "an intense exploration of their sexual offender behavior patterns, identifying triggers, antecedents, perceptions, cognitions and emotions"; and the Relapse Phase was 20 weeks wherein the minor would develop "a detailed plan on how to interrupt the sexual offending cycle and prevent or eliminate criminal behaviors." (2CT 393-394.)

The report stated appellant would also participate in groups on victim awareness, anger management, and family dynamics. Mental health services would also be available to appellant. (2CT 394.)

The probation report reviewed appellant's failed history in placement at "three very reputable programs." Despite the best efforts of the therapists, staff and probation, "appellant continued to reject these efforts and has instead chosen to waste time and has displayed a serious lack of commitment to his treatment. The minor's continued defiance and resistance to treatment justify his need for a structured program that is able to provide aggressive treatment." (2CT 394.) There was thus substantial evidence presented to the court of a probable benefit to appellant from DJJ commitment.

Appellant claims the juvenile court abused its discretion because it did not agree with doctors' reports that DJJ would not be a good fit for appellant and did not send appellant to yet another placement. (AOB 28-36.) Appellant presented additional out-of-state placements to the juvenile court as alternatives to DJJ. Although the court listened to the claimed merits of these programs, the court was under no obligation to send appellant to them. (*In re Carl N.*, *supra*, 160 Cal.App.4th at p. 433 ["commitment to [DJJ] 'may be made in the first instance without previous resort to less restrictive placements'"]; see also *In re Robert M.*, *supra*, 2011 WL 255803, *4.) The court considered placement at the programs but

expressed concern about its authority to send appellant out of state and provided appellant a week to determine if such placement could be authorized. (1RT 109-119, 124-127, 129-132.) In the end, the court determined commitment to DJJ was the best alternative for appellant and for the public's protection. (1RT 123, 136-137.)

In sum, appellant already had a long and disturbing history of sexual misconduct by the time he became a ward of the court at 13 years old. He failed to respond to therapy, despite numerous and varied opportunities and programs. He continued to engage in sexual misconduct while in placement. Finally, a more structured and aggressive program was available to appellant at DJJ. This substantial evidence supported the juvenile court's findings that a DJJ commitment would be a probable benefit to appellant, and that less restrictive alternatives would be ineffective or inappropriate. The trial court's decision to commit appellant to DJJ after three years of failure at three programs did not "exceed the bounds of reason," and was therefore not an abuse of discretion.[13] (See *In re Robert M.*, *supra*, 2011 WL 255803, *4; *In re Carl N.*, *supra*, 160 Cal.App.4th at p. 432.)

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[13] As appellant acknowledges (AOB 39, fn. 8), he did not object on constitutional grounds in the juvenile court. To the extent his constitutional claim requires analysis that could have been but was not addressed in the juvenile court, it is forfeited. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.) If it is not forfeited, appellant's claim of constitutional violation based on his commitment (AOB 39-42), should be rejected for the same reasons discussed in the text above. (See e.g., *People v. Davis* (1995) 10 Cal.4th 463, 506, fn. 7 [a defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation].)

CONCLUSION

For all these reasons, the Court of Appeal's decision affirming appellant's commitment to DJJ should be upheld.

Dated: February 25, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 12,328 words.

Dated: February 25, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re C.H., a Minor***
No.: **S183737**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **February 25, 2011**, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 25, 2011**, at Los Angeles, California.

Marianne A. Siacunco
Declarant

Signature

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