IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN LLOYD MOSLEY, Defendant and Appellant.	)	No. S187965

APPELLANT'S ANSWER BRIEF ON THE MERITS

Fourth Appellate District, Division Three, No. G038379
Orange County Superior Court No. 05NF4105
Honorable David Hoffer, Judge

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STATEMENT OF THE CASE

On June 6, 2006, the District Attorney of Orange County filed an information charging appellant with committing a lewd act on a child under the age of 14, in violation of Penal Code[1] §288, subdivision (a) (count 1) and having sexual intercourse with a minor who was more than three years younger than appellant, in violation of §261.5, subdivision (c) (count 2). The information further alleged that appellant suffered a prior conviction for robbery, and charged this conviction as both a strike and a prior serious felony conviction. (CT 47-49.) On June 7, 2006, appellant pleaded not guilty to both counts and denied the prior conviction/strike allegations. (CT 50.)

On October 12, 2006, appellant filed a demurrer challenging the prior conviction/strike allegations on the ground that the prior robbery conviction occurred after the commission of the offenses charged in the information. (CT 64-68.) The People filed a concession to the demurrer (CT 69-70), and on October 20, 2006, the court granted the demurrer and dismissed the strike and serious prior felony conviction allegations. (CT 71.)

Trial was by jury and began on January 22, 2007, with hearings on in limine motions. (CT 81-83.) The next day, the court granted the People's motion to dismiss count 2. (CT 84.) On January 29, the jury returned their verdicts, finding appellant not guilty of lewd conduct, but guilty of the lesser included offense of misdemeanor simple assault. (CT 94-95.)

On March 16, 2007, the court ordered appellant to serve six months in county jail, awarded credit for 180 days of time served, and ordered appellant to register as a sex offender pursuant to Penal Code §290, but stayed the registration requirement. (CT 169.)

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

On the same day the court pronounced judgment, appellant filed a notice of appeal. (CT 171-172.)

On appeal, appellant challenged the order requiring him to register as a sex offender. On September 29, 2010, the Court of Appeal, Fourth Appellate District, Division Three, filed a published opinion, originally reported as *People v. Mosley* (2010) 188 Cal.App.4th 1090, finding merit in appellant's contention. The Court of Appeal ruled that where, as here, a trial court imposes discretionary sex offender registration, the residency restrictions that accompany registration increase the penalty for the offense beyond the statutory minimum, and the facts supporting the imposition of the residency requirement must be found true by a jury beyond a reasonable doubt, which did not occur here.

On November 8, 2010, the Attorney General filed a petition for review. On January 26, 2011, the Court granted the petition. In an order filed on March 2, 2011, the Court directed the parties to brief two questions in addition to the question the Attorney General presented in the petition for review.

STATEMENT OF FACTS

When describing the evidence presented at trial, an appellate court views the evidence in the light most favorable to the judgment. (See, e.g., *People v. Ramirez* (2010) 184 Cal.App.4th 1233, 1236; *People v. Haddad* (2009) 176 Cal.App.4th 270, 272.) The basis for the judgment in this case was verdicts finding appellant not guilty of the charged offense of committing a lewd act, but guilty of the lesser included offense of misdemeanor simple assault. (CT 94-95.) The instruction describing simple assault stated that the People were not required to prove that appellant actually touched someone, but that a touching, even if slight and done through the victim's clothing, was

sufficient if done in a rude or angry way. (CT 131-132.) The instruction describing the offense of committing a lewd act on a child stated that a touching was required and could consist of touching the victim's clothing, but it had to be accompanied by the intent of arousing, appealing to or gratifying the lust, passions, or sexual desires of the defendant or the child. (CT 133.) The only sensible explanation for the verdicts is that the jury thought appellant touched the victim in a rude or angry manner, and therefore committed a simple assault, but that appellant did not harbor a lewd intent when doing so, and therefore did not commit a lewd act.

In view of the nature of the verdicts and the factual findings by the jury on which it had to have been based under the instructions, it is a bit of a challenge to state the facts in the light most favorable to the judgment. At pages 2-3 of the Opening Brief on the Merits, respondent summarizes testimony supporting the conclusion that appellant touched Lori in various ways when they were in the carport. But it is hard to conceive how most of the acts of touching respondent describes – especially touching Lori's breasts and buttocks, rubbing between her legs, and the act of intercourse – could be done without the intent of arousing, appealing to or gratifying the lust, passions, or sexual desires of appellant or Lori.

Respondent's statement of facts is, for the most part, accurate insofar as it summarizes some of the testimony the jury heard. But it is hard to reconcile the testimony respondent describes with the jury's verdicts finding appellant not guilty of lewd conduct but guilty of simple assault. It appears that the facts that best reflect the verdicts are in the testimony of Lori's grandmother, Virginia Robles, who testified she saw appellant and Lori struggling as appellant tried to kiss Lori and she backed away from him, but she did not see appellant actually kiss Lori. (2RT 247, 280, 283.)

Fortunately, we need not deal with the thorny question of how to state the facts of this case in the light most favorable to the judgment. This is because the issues before this Court are pure issues of law relating to the application of constitutional protections and the interpretation of statutory provisions. The facts of the offense are not germane to these issues.

ARGUMENT

I

BECAUSE RESIDENCY RESTRICTIONS INCREASE THE PENALTY FOR A SEX OFFENSE THAT IS SUBJECT TO DISCRETIONARY REGISTRATION, A JURY MUST FIND BEYOND A REASONABLE DOUBT THE FACTS THAT PROVIDE THE BASIS FOR THE RESIDENCY RESTRICTIONS

A. Factual and Procedural Background

The information charged appellant with committing a lewd act on a child under the age of 14, in violation of Penal Code §288, subdivision (a). (CT 47-49.) The jury found appellant not guilty of this offense, but guilty of the lesser included offense of misdemeanor simple assault in violation of §240. (CT 94-95.) Registration as a sex offender is mandatory for a person who has been convicted of violating section 288. (§290, subdivision (c).)[2] Registration as a sex offender is discretionary for a person who has been convicted of

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[2]Section 290, subdivision (c) provides, in relevant part: "The following person shall be required to register [as a sex offender]: Any person who, since July 1, 1994, has been or is hereafter convicted in any court of this state ... of a violation of ... Section ... 288...."

violating section 240. (§290.006.)[3]

Section 290.006, which is the statutory provision governing discretionary registration, provides:

> "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

As this Court has explained, this statutory language requires trial courts to "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." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.) The latter requirement gives the trial court the discretion to weigh the reasons for and against registration in each particular case rather than requiring registration simply because the court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification. (*Ibid.*) Section 290.006 applies even if the defendant was not convicted of a sexual offense. (*Id.* at pp. 1197-1198.) This is clear from its language stating that it can apply to "any offense" not listed in section 290.

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[3]At the time of the proceedings in the superior court in appellant's case, the discretionary registration provision was in section 290, subdivision (a)(2)(E). Section 290.006 was added, and section 290 was rewritten to remove subdivision (a)(2)(E), effective October 13, 2007. (Stats. 2007, ch. 579, §§8 and 14.)

On January 29, 2007, shortly after the jury returned their verdicts, the prosecutor asked the court to consider ordering appellant to register as a sex offender. (2RT 428-429.) The court continued the case to March 16 for sentencing and invited counsel to file briefs on the issue of registration. (2RT 430-431.) On March 15, 2007, the People filed a brief asking the trial court to order appellant to register as a sex offender. (CT 156-160.) The next day, appellant filed points and authorities opposing the People's request. (CT 161-168.)

At the hearing on March 16, 2007, the court stated it was inclined to order appellant to register as a sex offender and invited the parties to address the issue. (2RT 432-433.) After counsel for both parties concluded their arguments, the court found beyond a reasonable doubt that the assault was committed as a result of sexual compulsion or for the purposes of sexual gratification. (2RT 438-439.) The court stated the following reasons for its conclusion: (1) the evidence showed appellant assaulted Lori; (2) the assault was sexual based on Lori's testimony that appellant, despite her objections, grabbed her, kissed her, fondled her breasts, buttocks and the area between her legs, and had intercourse with her, and based on corroborative testimony from Lori's brothers and grandmother; (3) the sexual assault was especially serious and flagrant because it involved all the elements of rape and was not an isolated incident because appellant kissed Lori a few days before the incident. (2RT 439-441.) The court acknowledged that the jury acquitted appellant of the lewd conduct charge, but concluded it was not bound by this verdict because the discretionary registration statute authorizes a court to make the requisite findings for registration. (2RT 441.)

The court further made the following findings supporting registration: (1) appellant is physically dangerous to the public; (2) appellant's conduct

demonstrates he was driven by sexual compulsion over which he had little control, creating a serious and well-founded risk he will re-offend; (3) appellant is currently receiving no treatment for his sexual compulsion and has not admitted committing the offense; and (4) appellant will not be on probation and as an untreated sex offender he presents an especially serious risk to the community. (2RT 441-442.)

B. Because the Residency Restrictions in Jessica's Law Are Punitive, Appellant Was Entitled to a Jury Trial on the Factual Predicate that Made Him Subject to these Restrictions

1. Introduction

The trial court ordered appellant to register as a sex offender after making findings required for discretionary registration. (CT 438-441.) Under Jessica's Law any defendant who must register as a sex offender is automatically subject to residency restrictions that preclude him from residing within 2000 yards of a school, or a park where children regularly gather. (§3003.5, subd. (b).)[4]

The trial court's finding that appellant had to register thus had two consequences: (1) registration and (2) residency restriction. Although registration is not punitive, it is appellant's position that residency restrictions are. And because residency restrictions are punitive, under binding United States Supreme Court case law, appellant was entitled to a jury trial on the findings related to discretionary registration that generate the residency restrictions.

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[4]Section 3003.5, subdivision (b) provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

2. California Law Governing Registration for Sex Offenders

"California has had some form of sex offender registration requirement since 1947." (*In re Alva* (2004) 33 Cal.4th 254, 264; Stats. 1947, ch. 1124, §1.) The basis for the registration requirement is the state interest in controlling crime and preventing recidivism in sex offenders. (*People v. Monroe* (1985) 168 Cal.App.3d 1205, 1215.) The purpose of the registration requirement is to assure that people subject to the requirement are readily available for police surveillance at all times because the Legislature deems them likely to commit similar offenses in the future. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) More recently, "registration has acquired a second purpose: to notify members of the public of the existence and location of sex offenders so they can take protective measures." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1196.)

In 1994, the Legislature extended the scope of sex offender registration to allow trial courts, in certain specified circumstances, to require registration for defendants who were not convicted of offenses expressly listed in section 290. (Stats. 1994, ch. 867, §2.7.) This provision originally appeared in subdivision (a)(2)(E) of section 290. In 2007, the Legislature moved it to section 290.006. (Stats. 2007, ch. 579, §14.) In the second paragraph of subsection A of this argument, appellant summarized this Court's discussion in *Hofsheier* concerning how a trial court should determine whether to require discretionary registration for offenses not enumerated in section 290. The apparent purpose and basis for the discretionary registration requirement appear to be the same as those for the mandatory registration requirement. (See *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 78.)

Registration is "regulatory in nature, intended to accomplish the government's objective by mandating certain affirmative acts." (*Wright v.*

Superior Court, *supra*, 15 Cal.4th at p. 527.) However, it imposes a "substantial" and "onerous" burden on the defendant. (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1197; *People v. Castellanos* (1999) 21 Cal.4th 785, 796; see also *In re Birch* (1973) 10 Cal.3d 314, 322, characterizing registration as being a "grave" consequence of conviction of an offense requiring such registration.) Also: "When it becomes publicly known that a person is a registered sex offender, the person may be at risk of losing employment, and may have difficulty finding a place to live." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1197.) Nevertheless, this burden is viewed as being no more onerous than necessary to achieve the purpose of the registration requirement. (*People v. Castellanos*, *supra*, 21 Cal.4th at p. 796.) Registration is not considered to be a form of punishment under the state or federal constitution. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 343-344; *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1197.)

3. California Law Governing Residency Restrictions for Sex Offenders

In 2006, the voters adopted an initiative that added residency restrictions for all people subject to sex offender registration. This Court succinctly described the origins and nature of this residency restriction as follows:

> On November 7, 2006, the voters enacted Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006); hereafter Proposition 83 or Jessica's Law). Proposition 83 was a wide-ranging initiative intended to "help Californians better protect themselves, their children, and their communities" (*id.*, §2, subd. (f)) from problems posed by sex offenders by "strengthen[ing] and improv[ing] the

> laws that punish and control sexual offenders" (*id.*, § 31).
>
> Among other revisions to the Penal Code, Proposition 83 amended section 3003.5, a statute setting forth restrictions on where certain sex offenders subject to the lifetime registration requirement of section 290 may reside. New subdivision (b), added to section 3003.5, provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b) (section 3003.5(b)).) The new residency restrictions took effect on November 8, 2006, the effective date of Proposition 83.

(*In re E. J.* (2010) 47 Cal.4th 1258, 1263, footnotes omitted.)

Jessica's Law also authorizes residency restrictions beyond the 2000-foot restriction mentioned in Penal Code §3003.5, subdivision (b). Subdivision (c) of section 3003.5 provides: "Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290."

The intent behind Jessica's Law is to strengthen and improve laws that punish and control sex offenders. (Proposition 83, §31.) The intent behind the residency restriction is to create a predator-free zone around schools and parks to prevent sex offenders from living near where children learn and play. (*In re E. J.*, *supra*, 47 Cal.4th at p. 1271.)

4. The Right to a Jury Trial for Penalty Provisions

Appellant contends the residency restriction constitutes a penalty provision that can be imposed only if a jury finds true beyond a reasonable

doubt the facts which trigger its application. In cases, like appellant's, involving discretionary registration, the facts which trigger application of the residency restrictions are the registration triggering facts set forth in section 290.006 and *Hofsheier*. The problem in this case is that the judge, rather than a jury, found these triggering facts. This violated appellant's Sixth Amendment right to a jury trial.

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." The Fourteenth Amendment to the United States Constitution provides, in relevant part "nor shall any State deprive any person of life, liberty, or property, without due process of law...." These constitutional protections are "of surpassing importance" and, taken together, they "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477 [120 S.Ct. 2348, 147 L.Ed.2d 435], internal quotation marks and citation omitted.) These protections apply not only to the elements of an offense, but also to factual predicates that result in increased penalty or punishment. As the Supreme Court explained in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

In *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the Supreme Court described what it meant by the "prescribed statutory maximum" penalty. As the Court put it:

> the "statutory maximum" for *Apprendi* purposes

> is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

(*Id.* at pp. 303-304, citations omitted, italics in original.) "As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Id.* at p. 313.)

In *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], the Court reaffirmed *Apprendi* and *Blakely*. As the Court stated in *Cunningham*:

> As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."

(*Id.* at pp. 274-275, citations omitted.) The Supreme Court reaffirmed that *Apprendi* contains the following bright-line rule for the findings of fact that increase a penalty: "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at pp. 288-289, citation omitted.)

In the next section of this brief, appellant will show that the residency restrictions in Jessica's Law constitute a penalty for purposes of *Apprendi* and its progeny. It is clear the residency restrictions add to the maximum penalty that is authorized by the facts the jury found. The jury found appellant guilty of misdemeanor simple assault. The maximum penalty for the factual findings inherent in that verdict (i.e., the elements of the crime) is imprisonment in county jail for six months and a fine of $1000. (Penal Code §241, subd. (a).) The factual findings that triggered the residency restrictions under Jessica's Law were those that triggered the discretionary registration requirement. In violation of *Apprendi* and its progeny, it was the judge, not the jury, who found these facts to be true.

5. The Residency Restrictions in Jessica's Law Are Penalty Provisions

a. Introduction

Registration as a sex offender and the residency restrictions go hand-in-hand when viewed from the perspective of the findings needed to trigger both. If a defendant is convicted of an offense listed in section 290, subdivision (c) that carries mandatory registration, the jury's verdict means that the defendant is required to register as a sex offender, and the fact that he is required to register as a sex offender means he is automatically subject to the residency restrictions of Jessica's Law. (Penal Code §3003.5, subd. (b).) If a defendant is convicted of an offense not listed in section 290, subdivision (c), then the jury's verdict does not mean that the defendant has to register. Instead, the defendant must register only if there are further factual findings – those in section 290.006 as explained in *Hofsheier*. And once these facts are found

true, the fact that the defendant is required to register as a sex offender automatically subjects him to the residency restrictions of Jessica's Law.

As appellant has noted above, case law holds that registration as a sex offender is not punitive, and instead is regulatory. Accordingly, if registration were the only thing that flowed from a finding under section 290.006, there would be no constitutional provision prohibiting judge from deciding the issue. But under Jessica's Law the fact that the defendant must register as a sex offender also subjects him to the residency restrictions of Jessica's Law. Under *Apprendi* and its progeny, if the residency restrictions of Jessica's Law are punitive, then the facts triggering the application of those restrictions must be found by a jury. Accordingly, a jury must find beyond a reasonable doubts the facts that trigger application of registration requirement, for without such a finding, there can be no residency restrictions.

There is case law holding that the requirement of registering as a sex offender is not a penalty within the meaning of *Apprendi*. (*People v. Picklesimer*, *supra*, 48 Cal.4th at pp. 343-344; *People v. Garcia* (2008) 161 Cal.App.4th 475, 485-486, overruled on another point in *People v. Picklesimer*, *supra*, 48 Cal.4th at p. 338, fn. 4; *People v. Presley* (2007) 156 Cal.App.4th 1027, 1031-1035.) Appellant's case raises a different question. The question here is whether the residency restrictions in Jessica's Law constitute penalty provisions for purposes of *Apprendi* and its progeny. The United States Supreme Court has not decided this issue. Neither has this Court.

It is clear from *Apprendi*, *Blakely* and *Cunningham* that a provision which increases a defendant's prison sentence constitutes a penalty provision, as this is the sort of provision the defendants in those cases challenged. But none of these cases expressly limits its holding to provisions that increase a

defendant's prison sentence. *Apprendi* could have said that a provision that increases the defendant's prison sentence required a jury finding. Instead, it used a broader term, saying: "any fact that increases the *penalty* for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, italics added.) And in *Apprendi*, the Supreme Court, when discussing the procedural protections a defendant enjoys under the United States Constitution, recognized that the penalty for a conviction could be something other than the sentence. As the Court put it: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that *both the loss of liberty and the stigma attaching to the offense are heightened*; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." (*Id.* at p. 484, italics added.) Restrictions on residency are certainly a stigma. They prevent a person from enjoying the right to live where he or she chooses, and they may require him to move out of or sell his home. And, as noted above, they can preclude a person from residing in vast stretches of urban areas.

When determining whether a requirement constitutes punishment, courts determine whether the intent of the legislation enacting the provision is punitive and whether the purpose or effect of the requirement is punitive. (*Smith v. Doe* (2003) 538 U.S. 84, 92 [123 S.Ct. 1140, 155 L.Ed.2d 164]; *People v. Castellanos*, *supra*, 21 Cal.4th at p. 795.) If the intent of the Legislature was to impose punishment, this ends the inquiry and renders the requirement punitive. (*Smith v. Doe*, *supra*, 538 U.S. at p. 92.) Because courts ordinarily defer to the legislature's stated intent, only the clearest proof will

suffice to override the legislative intent and transform what has been labeled a civil remedy into a criminal penalty. (*Ibid.*)

If the legislative intent is not punitive, the Court must examine whether the statute is so punitive either in its purpose or effect as to negate the intent to deem it merely regulatory and nonpunitive. (*Ibid.*) When analyzing the effect of the legislation, courts apply the "factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963), as a useful framework." (*Id.* at p. 97.) Although *Kennedy* lists seven such factors, as appellant will show only five apply to whether a statute is punitive.

b. Analysis of the Legislative Intent of Jessica's Law

Appellant submits that the legislative intent of the residency restrictions in Jessica's Law is punitive. The question of legislative intent is one of statutory construction. (*Smith v. Doe*, *supra*, 538 U.S. at p. 92.) Courts "consider the statute's text and its structure to determine the legislative objective." (*Ibid.*) Courts must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for punishing or regulating. (*Id.* at p. 93.) The intent can sometimes appear in the words of the statute. (*Ibid.*)

The intent behind the adoption of Proposition 83, the initiative that adopted Jessica's Law, appears in the words of the initiative. Proposition 83 contains two provisions that explain the intent behind the measure. Section 2(f) states: "It is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses." Section 31 states, in relevant part: "It is the intent of the People of the State of California in enacting this measure to strengthen and improve

the laws that punish and control sexual offenders."[5]

These expressions of intent are very different from the expression of intent in the 1996 amendment to the registration requirement which authorized limited public release of information about registered offenders whom law enforcement officials consider a threat to the public. (*Hatton v. Bonner* (9th Cir. 2003) 356 F.3d 955, 959.) The latter provision expressly states that in making information available about certain sex offenders to the public, the Legislature "[did] does not intend that the information be used to inflict retribution or additional punishment." (*Id.* at p. 962; Stats. 1996, ch. 908, §1(g).) The Ninth Circuit concluded that the Legislature did not intend the information-release provision to be punitive. (*Hatton v. Bonner*, *supra*, 356 F.3d at pp. 961-963.)

Taken together, the language in the intent provisions of Jessica's Law shows that the intent behind the law is punitive. Indeed, section 31 expressly uses the term punish. It is true that section 31 also uses the term "control," and that section 2(f) says the intent is to protect people and communities. But statutes which punish invariably control offenders and protect people and communities by subjecting those who are incarcerated to restrictions on their freedom. Incarceration, for example, is clearly punishment. But it also controls the person who is incarcerated by restricting his movement and activities, and it protects people and communities from the incarcerated offender. The incarcerated person is required to reside in a location that is not of his own choosing. This also can be the case with defendants who are

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[5]The text of Proposition 83, as it appeared in the Official Voter Information Guide for the General Election of November 7, 2006, may be found at http://vote2006.sos.ca.gov/voterguide/pdf/English.pdf. Section 2 is on page 127 of the Guide. Section 31 is on page 138.

subject to Jessica's Law. It is true that their residency options are not confined to the area within the walls of a prison, but they are required to reside in areas that are not within 2000 feet of a school or park.

Also relevant to the intent of a provision is the manner of its codification. (*Smith v. Doe*, *supra*, 538 U.S. at p. 94.) Jessica's Law appears in the Penal Code. This code is devoted to punitive statutory provisions. The fact the section containing the residency restrictions appears in the Penal Code indicates the intent of the Legislature was that the restrictions were punitive.

In addition, Jessica's Law allows municipalities to enact ordinances that further restrict the residency of registered sex offenders. (Section 3003.5, subd. (c).) This allows for restrictions that confine the residency of registrants to a much greater degree than the 2000-foot area. Indeed, under the language of subdivision (c), a municipality can require registrants to reside in a specific area within the municipality or even a specific building or set of buildings. This is not the same as a prison because the registrants only need to reside in the narrow area and are free to leave it. But restrictions on residency, like incarceration, are punitive.

c. Analysis of the Effect of Jessica's Law

Not only is the intent behind the residency restrictions in Jessica's Law punitive, the effect of those restrictions is punitive under the factors in *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. 144. Although *Kennedy* lists seven factors, the Supreme Court has stated that five are most relevant to the analysis of punitive effect: "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." (*Smith v. Doe*, *supra*, 538 U.S.

at p. 97.)

i. History and Tradition as Punishment

The residency restrictions in Jessica's Law are similar to several things that historically or traditionally constitute punishment. These include banishment, homelessness, the denial of the full use of one's property, uncompensated taking of property, and parole.

Historically, banishment is a form of punishment. (*Smith v. Doe, supra*, 538 U.S. at p. 98.) It is one of the sanctions imposed for the commission of the oldest recorded transgression. (Genesis 3:23, King James Version ["Therefore the Lord God sent [Adam] forth from the garden of Eden...."].) Banishment was even an ancient punishment for a sex offense. Under the Laws of Hammurabi, dating from about 1750 B.C., a man having incest with his daughter was banished from the city. (Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law* (1996) 76 Boston U. L. Rev. 29, 48.) In England, banishment can be traced back to the twelfth century. (Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders* (2007) 85 Wash. U. L. Rev. 101, 108, hereafter referred to as *Banishment by a Thousand Laws*.)

"Banishment has been defined as punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life." (*Commonwealth v. Baker* (Ky. 2009) 295 S.W.3d 437, 444, internal quotation marks and citation omitted.) Appellant submits that residency restrictions are a form of banishment and that the residency restrictions of Jessica's Law can result in actual banishment in some cases and in all cases fits a functional definition of banishment.

The Supreme Court of Kentucky has viewed residency requirements as having the effect of being punitive banishment. In *Commonwealth v. Baker*,

supra, 295 S.W.3d 437, the Court reviewed a state law (Ky. Rev. Stat. Ann. (KRS) §17.545) that restricted where registered sex offenders could reside. (*Id.* at p. 439.) Under the restriction, the registrant could not live within 1000 feet of a school, preschool, publicly owned playground or licensed daycare facility. (*Id.* at p. 440.) The Court concluded that the residency restriction amounted to banishment and therefore punishment, stating: "While KRS 17.545 is not identical to traditional banishment, it does prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes, even if their residency predated the statute or arrival of the school, daycare, or playground. Such restrictions strike this Court as decidedly similar to banishment. We therefore conclude that the residency restrictions in KRS 17.545 have been regarded in our history and traditions as punishment." (*Id.* at p. 444.) The residency restrictions in section 3003.5, subdivision (b) is twice as restrictive as the one the Kentucky Supreme Court found in *Baker* to constitute punishment, and subdivision (c) allows municipalities to enact even greater restrictions.

There are, however, cases which have concluded that residency restrictions do not constitute banishment. In *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700, the court reviewed an Iowa statute that prohibited people convicted of committing certain sex offenses against minors from residing within 2000 feet of a school or a registered child care facility. (*Id.* at p. 704.) The court noted that banishment is punishment and "involves an extreme form of residency restriction." (*Id.* at p. 719.) It pointed out, however, that the Iowa law does not expel the offenders from the community, but only restricts where they reside. (*Ibid.*) The court observed that residency restrictions are relatively new, which suggests they are not meant to be punitive or at least do not involve traditional means of punishment. (*Id.* at p. 720.) Finding that the

residency restriction is different than banishment in important respects, the court concluded it was not something that is traditionally punitive. (*Ibid.*)

One judge dissented on this point, concluding that although a residency restriction is not the same as banishment, "it sufficiently resembles banishment to make this factor weigh towards finding the law punitive." (*Id.* at p. 724.) The dissenting judge noted that the law prevents offenders from living in certain small communities and, in Des Moines, which is a large community, restricts residency to industrial areas and some of the cities newest and most expensive areas. (*Ibid.*) The dissenting judge found: "This effectively results in banishment from virtually all of Iowa's cities and larger towns." (*Ibid.*) The dissenting judge concluded:

> Of course, the residency restriction does not prevent offenders from living in every community, nor from visiting communities in which they are not allowed to live. In this way, the law differs from complete banishment. However, preventing offenders from making a home in many Iowa communities after they have served their sentence does have substantial similarity to banishment. To the extent that offenders are effectively banished from their desired places of residence, I would find this factor weighs in favor of finding section 692A.2A punitive.

(*Id.* at p. 725.)

Other courts come to the same conclusion as the majority in *Doe*. They conclude that residency restrictions on sex offenders do not amount to banishment, and therefore are not a traditional means of punishment, because they do not expel the offender from the entire community. (*In re Pham* (2011) 195 Cal.App.4th 681, 687-688; *Coston v. Petro* (S.D. Ohio 2005) 398

F.Supp.2d 878, 885; *State v. Seering* (Iowa 2005) 701 N.W.2d 665, 667.)[6] Similarly, in another case, the court ruled that residency restrictions are not banishment because during colonial times, banishment meant defendants could not return to their communities, and, because their reputations were tarnished, could not easily be admitted into a new community. The residency restriction, however, did not prevent the defendant from residing in his own community or in a new one and therefore did not resemble historical banishment. (*People v. Leroy* (2005) 357 Ill.App.3d 530 [828 N.E.2d 769, 780-781].)

In a recent article, Professor Yung questioned the rigid and narrow definition of banishment used in these cases. He identified banishment as having three core elements: (1) expulsion of a person from a community, (2) relocation in a non-institutional setting, and (3) severance of ties to a community. (*Banishment by a Thousand Laws, supra*, 85 Wash. U. L. Rev. at p. 134.) He concluded that residency restrictions satisfy each element by banning offenders from large areas of a state, putting offenders in a non-institutional setting, and severing ties between the offender and the community. (*Id.* at pp. 135-136.)

Even if a residency restriction is not identical to banishment, it is sufficiently similar in its effect to be viewed as constituting banishment. It operates to bar the defendant from living in portions of a community. Jessica's

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[6]Two justices in *Seering* dissented, stating: "The residency restriction imposes an onerous and intrusive obligation on a convicted sex offender, results in community ostracism, and marks the offender as a person who should be shunned by society. Accordingly, I would hold section 692A.2A effectively banishes an offender from a community. Therefore, this factor weighs in favor of finding section 692A.2A as being punitive." (*Id.* at pp. 671-672.)

Law can in fact result in a defendant not being able to reside in an entire community. This depends on how close the schools and parks in the community are from each other. It also depends on whether the municipality has decided to enact additional restrictions as section 3003.5, subdivision (c) permits them to do.

There has been some analysis of the scope of the residency restrictions which Jessica's Law allows. The effects are particularly wide-ranging in urban areas. By enacting Jessica's Law, "California voters effectively banned registered sex offenders from residing in half of the Sacramento urban area, nearly seventy percent of the San Francisco Bay area, and about seventy-five percent of the Los Angeles metro area." (Note, *When Hysteria and Good Intentions Collide: Constitutional Considerations of California's Sexual Predator Punishment and Control Act* (2008) 29 Whittier L. Rev. 679, 687, footnote omitted, hereafter referred to as *When Hysteria and Good Intentions Collide*.) A more recent study estimated that residency restrictions covered between 50% and 99% of all urban areas in California and that in San Francisco nearly all possible residential locations are within 2000 feet of a school or park. (California Sex Offender Management Board, *Recommendations Report* (2010) at p. 42, hereafter referred to as *Recommendations Report*.)[7]

Also, under section 3003.5, subdivision (c) municipalities may enact additional residency restrictions, thereby banning registered sex offenders from residing in areas that are more than 2000 feet from schools and parks. The residency restrictions are theoretically without limit and could result in total

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[7]This document may be found online at http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf.

banishment. About 50 cities and six counties have enacted such ordinances. Among other things, they have expanded the distance of the residency restriction, have added additional restricted locations, or have created areas in which sex offenders may not enter or loiter. (*Recommendations Report, supra,* at p. 46.) "In other jurisdictions, similar language has justified the almost complete prohibition of 'offenders from working or even being in the restricted areas - a modern-day sentence of exile.'" (*When Hysteria and Good Intentions Collide, supra,* 29 Whittier L. Rev. at p. 688, footnote omitted.) Under subdivision (c), it is possible to banish a defendant from entire communities even if there are residential areas in which subdivision (b) allows him to live.

Jessica's Law has another punitive effect aside from acting similarly to banishment – rendering registrants homeless. Because the residency restriction narrows the number of compliant residences, the number of registrants who are transients has increased since the adoption of Jessica's Law. "Since the implementation of Proposition 83, there has been a surge in the number of sex offenders who register as transients." (California Sex Offender Management Board (December 2008) *Homelessness Among Registered Sex Offenders in California: The Numbers, the Risks and the Response* at p. 7, hereafter referred to as *Homelessness.*)[8] This increase was 60% from June 2007 to August 2008 among all registered sex offenders and 800% from November 2006 to June 29, 2008, among registrants who are parolees. (*Id.* at p. 1.) In 2007, 88 parolees for sex offenses were homeless. In two years, that number rose to 2,088. The total number of homeless sex

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[8]This publication is available online at http://www.casomb.org/docs/Housing%202008%20Rev%201%205%20FINAL.pdf.

offenders in 2009 was over 5000. (*Recommendations Report, supra*, at p. 12.) By March 2011, the number rose to 5960. (Respondent's Opening Brief on the Merits (ROBOM) at pp. 23-24, fn. 11.)

The home is a central feature of Anglo-American law. As this Court has stated: "The sanctity of a private home is not only guaranteed by the Constitutions of the United States and of our own state, but it is traditional in our Anglo-Saxon heritage." (*People v. Privett* (1961) 55 Cal.2d 698, 703.) The constitutional and traditional guarantee of the sanctity of the home, and even the comforts and security of a home, are nonexistent when the law restricts someone's residency options to an extent that results in his being homeless. A provision that forces people from their homes or has the effect of rendering them homeless is a particularly cruel form of punishment in view of the importance of the home in Anglo-American history and tradition.

Property deprivation is another traditional punishment and dates back to the time of the Revolutionary War. (*Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 474 and fn. 38 [97 S.Ct. 2777, 53 L.Ed.2d 867].) Although the residency requirement does not mean that a registrant will lose ownership of his property, it can result in the registrant losing the full use and enjoyment of property he owns if it is within 2000 feet of a school or park. This "affect[s] one's freedom to live on one's own property." (*State v. Pollard* (Ind. 2009) 908 N.E.2d 1145, 1150.) Indeed, it constitutes an uncompensated taking of the property. (*Mann v. Georgia Department of Corrections* (2007) 282 Ga. 754 [653 S.E.2d 740, 745].)

Parole is another traditional form of punishment – "an established variation on imprisonment." (*Morrisey v. Brewer* (1972) 408 U.S. 471, 477 [92 S.Ct. 2593, 33 L.E.2d 484].) Probation is similar. "[R]estrictions on living in certain areas is not an uncommon condition of probation or parole."

(*State v. Pollard, supra*, 908 N.E.2d at 1151.) The Supreme Court of Indiana also has viewed residency restrictions on sex offenders as being punitive when viewed from an historical perspective because the reporting requirements for sex offenders are comparable to supervised probation or parole. (*Id.* at pp. 1150-1151.)

Similarly, the court in *Mikaloff v. Walsh* (N.D. Ohio 2007), Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076, held that residency restrictions in Ohio state law constituted punishment when viewed from an historical perspective because they are analogous to residency restrictions for parole and probation, both of which are historically viewed as punitive. (*Id.* at *26-*28.) The court also noted that "subjecting a sex offender to constant ouster from his or her home seems a significant deprivation of liberty and property interests. It sentences them to a life of transience, forcing them to become nomads." (*Id.* at *28.) Indeed, residency restrictions not only are analogous to parole, but are "even more onerous." (*Id.* at *23, *27.)

Although, as noted above, there are cases that view residency restrictions as nonpunitive when viewed from an historical or traditional perspective because they are not identical to banishment, these cases do not analyze the other historically punitive sanctions that residency restrictions resemble. The case law discussing these other punitive sanctions all conclude that residency restrictions are punitive.

In summary, viewed from an historical and traditional perspective, the residency restrictions in Jessica's Law are punitive in several different ways. They resemble banishment, can result in actual banishment, have resulted in an enormous increase in sex offenders who are homeless and transient, can result in a registrant being denied full use of his property, can constitute an uncompensated taking of property, and are analogous to a feature of parole and

probation. The historical/traditional factor weighs in favor of finding that the residency restrictions in Jessica's Law have a punitive effect.

ii. Affirmative Disability or Restraint

The second factor is affirmative disability or restraint. This involves an inquiry into "how the effects of the [provision] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." (*Smith v. Doe*, *supra*, 538 U.S. 99-100.) The provision the Supreme Court reviewed in *Smith* required registration and community notification for people convicted of sex offenses against children. (*Id.* at pp. 90-91.) The Supreme Court found the disability was not punitive. (*Id.* at pp. 100-102.) The Court based its conclusion in large part on the fact the disability did not restrict where an offender could reside. Indeed, the Court mentioned this several times. "The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." (*Id.* at p. 100.) "[O]ffenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." (*Id.* at p. 101.)

Jessica's Law is markedly different. Under it, registrants are not free to change residences unless the new residence is 2000 feet from a school or park. Registrants thus are not free to move where they wish or to live as other citizens. A central feature whose absence caused the Supreme Court to conclude the disability or restraint in *Smith* was nonpunitive is present here. This restraint is direct – it affects where every sex offender may live. And because of this, it is not a minor restraint, but one that goes to the heart of an important value – the ability to live where one chooses. People subject to the residency requirements in Jessica's Law would strongly feel its effects.

The Kentucky Supreme Court has held that a residency restriction

"clearly imposes affirmative disabilities and restraints upon registrants." (*Commonwealth v. Baker*, *supra*, 295 S.W.3d at p. 445.) This is because it places "significant limitations on where a registrant may live." (*Ibid.*) In addition, there are "significant collateral consequences" because the residency restriction could affect where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender. (*Ibid.*) Also, the registrant faces a constant threat of eviction because there is no way for him or her to find a permanent home in that there are no guarantees a school or other facility will not open within the residency restriction limit of any given location. (*Ibid.*)

The Indiana Supreme Court has also concluded that residency restrictions impose affirmative punitive disabilities and restraints. The court stated: "The disability or restraint imposed by the residency restriction statute is neither minor nor indirect." (*State v. Pollard*, *supra*, 908 N.E.2d at p. 1150.) The effects of residency restrictions can include eviction, the cost of moving from a residence that does not comply with the residency restriction, and preventing the registrant from living in his own home. (*Ibid.*)

The court in *Mikaloff v. Walsh*, *supra*, 2007 U.S. Dist. LEXIS 65076 likewise concluded that residency restrictions impose affirmative punitive disabilities and restraints. These include disadvantages in housing. (*Id.* at *24.) "A sex offender is subject to constant eviction, and there is no way for him or her to find a permanent home. For, there are no guarantees a school or daycare will not open up within 1,000 feet of anywhere." (*Id.* at *24-*25.) In addition, the residency restrictions can affect where an offender's children attend school, access to public transportation for employment purposes, access

to employment opportunities, access to residential alcohol and drug abuse rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender. (*Id.* at *25.)

If a registrant owns a home in an excluded area, he must leave it. If he has a family living there, he must either live separately from them or uproot them and relocate. The number of sex offenders who must relocate can be significant. In one county in Georgia, 64 out of 68 registered sex offenders would have to move under the state's residency restriction law. In another county, all 466 registered sex offenders would have to move. (Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions* (2007) 40 Akron L. Rev. 339, 356, hereafter *Off to Elba.*) Such relocation may be difficult in view of the large areas that are within 2000 feet of schools and parks.

Not only must the registrant move if a new park opens within 2000 feet of his residence, he faces the possibility that a community group will deliberately open a school or park within 2000 feet of his residence in order to force him out of the community. (*Mann v. Georgia Department of Corrections*, *supra*, 653 S.E.2d at pp. 742-743.) Indeed, in Georgia, supporters of the residency restriction law, including a legislator, said the law could be used to force offenders into leaving the state. (Article, *Crimes and Offenses* (2006) Ga. S. U. L. Rev. 11, 19.)

Even courts which have found residency restrictions not to be punitive under the history and traditions factor agree that such restrictions constitute an affirmative disability or restraint. (*Doe v. Miller*, *supra*, 405 F.3d at pp. 720-721; *State v. Seering*, *supra*, 701 N.W.2d at p. 668 [residency restrictions "clearly impose a form of disability"]; *People v. Leroy*, *supra*, 828 N.E.2d at p. 781 [residency restriction is not minor or indirect]; but see *Coston v. Petro*,

supra, 398 F.Supp.2d at pp. 885-886 [finding that the residency restriction imposed an affirmative disability or restraint, but also finding the disability or restraint to be "relatively limited" and therefore not to constitute punishment].)

The residency restrictions in Jessica's Law imposes an affirmative disability or restraint. This factor weighs heavily in favor of finding that residency restrictions are punitive in effect.

iii. Traditional Aims of Punishment

The traditional aims of punishment are deterrence and retribution. (*Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at p. 168.) "Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing 'justice.' Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior." (*Artway v. Attorney General of New Jersey* (3d Cir. 1996) 81 F.3d 1235, 1255.) These are the aims of the residency restrictions in Jessica's Law.

Jessica's Law seeks to deter a registrant from committing sex offenses against children by making it unlawful for him to reside fewer than 2000 feet from schools and parks, which are places where children congregate. As one court put it, when concluding that the aim of the state residency restriction is punitive: "By prohibiting sex offenders from living in certain proscribed areas the residency restriction statute is apparently designed to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes." (*State v. Pollard*, *supra*, 908 N.E.2d at p. 1152.)

The residency restriction results in retribution because it causes significant and lasting adverse consequences on the registrant. It reduces the areas in which the registrant may live, results in large numbers of registrants being homeless, requires the registrant in some cases to reside away from his family or to uproot his family, and removes the security of the home by

requiring the registrant to move if a new school or park is opened within 2000 feet of his residence. As the Kentucky Supreme Court observed, a residency restriction like the one in Jessica's Law "makes no individualized determination of the dangerousness of a particular registrant. Even those registrants whose victims were adults are prohibited from living near an area where children gather. When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones." (*Commonwealth v. Baker*, *supra*, 295 S.W.2d at p. 444.) The court went on to conclude that the residency restriction did in fact promote and further punishment on the registrant for his past crime and promotes the traditional aim of punishment. (*Id.* at p. 445.)

The court in *Mikaloff v. Walsh*, *supra*, 2007 U.S. Dist. LEXIS 65076 concluded that the residency restriction in that case "serves an obvious deterrent purpose." (*Id.* at *29.) The court noted that retribution is vengeance for its own sake. It ruled that the residency restriction fits this definition, stating: "The residency restriction applies regardless of the type of offense committed, the offender's classification level, and his or her risk of re-offense. A feeble, aging paraplegic must leave his home just as a younger one. This lack of any case-by-case determination demonstrates that the restriction is 'vengeance for its own sake.'" (*Id.* at *30.)

Even courts which have found residency restrictions not to be punitive under the history and traditions factor agree that such restrictions promote the traditional aims of punishment, although they give little or no weight to this because they view the punitive aims of deterrence and/or retribution as being consistent with nonpunitive statutes. (*Doe v. Miller*, *supra*, 405 F.3d at p. 720;

State v. Seering, *supra*, 701 N.W.2d at p. 668; *People v. Leroy*, *supra*, 828 N.E.2d at p. 781.) This reasoning is circular and fallacious. The factor we are discussing is whether the measure under discussion promotes the traditional aims of punishment, which are deterrence and retribution. If it does, this factor weighs in favor of a conclusion that the measure is punitive. It does not matter that there are nonpunitive measures which might promote deterrence and retribution. This only means that the other factors pointing to the measure being nonpunitive outweigh the factor that the measure promotes the traditional aims of punishment.

An analogy may help to illustrate the fallacy in the reasoning of these cases. Assume there are five factors which relate to whether a bear is a polar bear. One of those factors is whether the bear is white. If one sees a white bear, this factor weighs in favor of it being a polar bear. It does not matter for purposes of the presence of this factor that there are bears other than polar bears, such as albino black bears, that are white. In such cases the other factors – for example that the bear does not live in the arctic and is much smaller than a polar bear – outweigh the fact the bear is white.

Because residency restrictions promote the traditional aims of punishment this factor weighs in favor of the conclusion that these restrictions have a punitive effect.

iv. Rational Connection to a Nonpunitive Purpose

The Supreme Court has said that an act's "rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." (*Smith v. Doe*, *supra*, 538 U.S. at p. 102.) The act is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. (*Id.* at p. 103.)

The residency restrictions are connected to the nonpunitive purpose of

protecting children in schools and parks. But the connection is not rational if we view Jessica's Law in terms of its application and effects. So viewed, the nonpunitive purpose drowns in a sea of consequences that not only fails to protect children, but actually puts them at greater risk. In addition, the residency restrictions are so broad as to sever any rational connection to a nonpunitive purpose.

Under Jessica's Law, all people who must register as a sex offender are subject to the residency restrictions. (Section 3003.5, subd. (b).) Those who must register are not just people who have committed sexual offenses against children, but also people who have committed sex offenses against adults and who have no sexual interest in children. There is no rational connection between the protection of children and a rule that requires people who have no sexual interest in children not to live near schools or parks where children congregate. In addition, Jessica's Law imposes the residency restriction across the board without any determination about whether the registrant might re-offend. The Indiana Supreme Court concluded that these two features of the state's residency restriction made the statute's effect punitive and severed any rational connection between the restriction and a protective purpose. As the court put it: "Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes." (*State v. Pollard, supra*, 908 N.E.2d at p. 1153.)

Also, as the Kentucky Supreme Court noted, although the residency restriction prevents sex offenders from residing near areas where children congregate, it does not prevent them from spending all day near a school or park. Nor does it prevent them from living with potential victims as long as

they live outside the prohibited areas. (*Commonwealth v. Baker*, *supra*, 295 S.W.3d at p. 445.) As the court further noted: "It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present." (*Ibid.*) The court concluded that although the residency restrictions in the statute were connected to public safety, "the statute's inherent flaws prevent that connection from being 'rational.' Therefore, we conclude that KRS 17.545 does not have a rational connection to a nonpunitive purpose." (*Id.* at pp. 445-446.)

If the offender is a person who has committed sexual offenses against children, Jessica's Law does not prevent him from actually living with children who are related to him – such as his own children or step-children – as long as they all reside in a residence that is more than 2000 feet from a school or park. "More than ninety percent of sex crimes against children are committed by fathers, stepfathers, relatives, and acquaintances, rather than by the strangers. In fact, the percentage of nonstranger molestations may be even higher as the majority of this type of sexual abuse is not reported and/or prosecuted." (Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives* (2009) 86 Wash. U. L. Rev. 1397, 1403, footnotes omitted, hereafter referred to as *Banishment of Sexual Offenders*.) Under the residency restriction of Jessica's Law, the vast majority of people who have been convicted of a sex offense against children – those who have molested family members – are permitted to reside with potential victims as long as their residence is more than 2000 feet from a school or park. This has no rational connection to the law's protective purpose.

In addition, as noted above, Jessica's Law has resulted in an enormous number of registered sex offenders becoming homeless. (*Homelessness*, *supra*,

at p. 1, 7.) Because these people have no residence, they may sleep near schools and parks. Also, because they are homeless, they are more difficult to track and monitor. (*Id.* at p. 17.) In Iowa, for example, the number of missing sex offenders have more than doubled since the residency restriction statute went into effect, and in North Carolina, sex offenders now are missing in record numbers. (*Off to Elba*, *supra*, 40 Akron L. Rev. at pp. 360-361.) This, too, severs the rational connection between the residency requirement and the nonpunitive purpose of protecting children. There is less protection and greater danger if the offenders are more difficult to locate and monitor. (*Banishment of Sexual Offenders*, *supra*, 86 Wash. U. L. Rev. at p. 1452.)

Also, Jessica's Law has the anomalous effect of only applying to registrants with a residence. If the registrant is homeless, Jessica's Law does not prevent him from sleeping, eating, loitering or doing other similar activities near a school or park.

Finally, although advocates of residency restrictions argue that limiting offenders' access to children will reduce the temptation and ability to re-offend, there is no empirical evidence correlating recidivism and residency, and studies instead show no such correlation. (Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond* (2009) 41 Tex. Tech L. Rev. 1235, 1245-1246.) As Professor Saxer observed: "There is not yet sufficient evidence showing that residency restrictions are effective at preventing or reducing sex offender recidivism. In fact, there are grave concerns that these restrictions are forcing sex offenders into homelessness, hopelessness, and transience, making them even more dangerous to our communities because the tasks of accurate registration and subsequent monitoring become much too difficult and expensive." (*Banishment of Sex Offenders*, *supra*, 86 Wash. U. L. Rev. at p. 1452.)

It is true that an act is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. (*Smith v. Doe*, *supra*, 538 U.S. at p. 103.) But here, there is much more than the lack of a close or perfect fit. The law tries to put a size 14 foot in a size 5 shoe, splitting the shoe's seam in the process. The residency restriction in Jessica's Law lacks a rational connection to its nonpunitive purpose of protecting children. It applies to registrants who have no sexual interest in children. It applies to a registrant without any consideration of whether he might re-offend. It allows a registrant to spend his entire day near a school or park – a time children are present – as long he does not spend his nights, when children are not present, at a residence within 2000 feet of the school or park. Even though more than 90% of sex offenses against children are committed by relatives, Jessica's Law allows registered sex offenders to live with children as long as the residence is farther than 2000 feet from a home or park. Also Jessica's Law has caused a large increase in homeless registrants, resulting in these people being more difficult to locate and monitor. Finally, there is no empirical evidence correlating recidivism and residency, and studies instead show no such correlation. (Comment, *supra*, 41 Tex. Tech L. Rev. at pp. 1245-1246.) There is, on balance, no rational connection between the residency requirement in Jessica's Law and its protective purpose.

v. Excessiveness with Respect to the Nonpunitive Purpose

The excessiveness inquiry " is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." (*Smith v. Doe*. *supra*, 538

U.S. at p. 105.) Legislation is excessive if "the extent and duration of [its] requirements are greater than necessary to meet the legislature's purpose." (*State v. White* (2004) 162 N.C.App. 183, 197 [590 S.E.2d 448, 457].) A number of courts have given the greatest weight to this factor. (*Wallace v. State* (Ind. 2009) 905 N.E.2d 371, 383.) When a court reaches a conclusion on factor 4 (presence or absence of a rational connection to a nonpunitive purpose), it will decline to reach a different conclusion on the "excessiveness" factor. (See *People v. Leroy*, *supra*, 828 N.E.2d at p. 782.)

In *Doe v. State* (Alaska 2008) 189 P.3d 999, the Alaska Supreme Court applied the excessiveness factor to an Alaska statute that required sex offenders to register with law enforcement and to disclose personal information, some of which was not otherwise public and most of which was publicly disseminated. (*Id.* at p. 1000.) The nonpunitive purpose of the statute was to protect the public from sex offenders. (*Id.* at p. 1016.) The court began by noting that the statute was broad in that it encompassed a wide array of crimes that vary greatly in severity. (*Id.* at p. 1017.) In addition, offenders could not shorten their registration and notification periods, even on the clearest showing of rehabilitation or conclusive proof of physical incapacitation. (*Ibid.*) The court further concluded that the statute's chosen methods are excessive in relation to its purpose because it is underinclusive – it applies only to those convicted of specific offenses and excludes those who have committed the same acts but who avoid conviction by pleading guilty to a lesser charge or whose conviction was overturned. (*Ibid.*) Moreover, the registration requirements are excessive in relation to the state's legitimate interest in public safety because the registration requirements are demanding, intrusive and of long duration. (*Ibid.*) Finally, the provisions relating to dissemination of information are sweeping and broad, and not restricted even

if a court were to find dissemination is not required for public safety. (*Ibid.*) The court held: "Although the non-punitive aims are undeniably legitimate and important, [the statute's] registration and dissemination provisions have consequences to sex offenders that go beyond the state's interest in public safety; we must therefore conclude that the Alaska statute is excessive in relation to the state's interest in public safety." (*Id.* at p. 1018.)

The Indiana Supreme Court, also in a case involving sex offender registration and notification, has noted that there is an implication that a statute is excessive if its requirement is not tied to a finding that the safety of the public is threatened, such as where a statute's measures are not limited to those necessary for public safety and when no individualized finding of future dangerousness is made. (*Wallace v. State, supra*, 905 N.E.2d at p. 383; accord *People v. Dipiazza* (2009) 286 Mich.App. 137, 155-156 [778 N.W.2d 264, 274].)

Here we deal with a residency restriction rather than registration and notification requirements. Nevertheless, the observations and analytical frameworks in *Doe* and *Wallace* are applicable. (*Commonwealth v. Baker, supra*, 295 S.W.3d at p. 446 [concluding the residency restriction was excessive because of its consequences and because there is no individual determination of the threat a particular registrant poses to public safety]; *Matter of Berlin v. Evans* (2011) 31 Misc.3d 919, 929 [923 N.Y.S.2d 828, 836] [same]; *Pollard v. State, supra*, 908 N.E.2d at p. 1153 ["Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes."].)

The residency restrictions in Jessica's Law are underinclusive. They do

not apply to defendants who have committed the same acts as a registrants but who avoid conviction by pleading guilty to a lesser charge or who have their convictions reversed. Also, they do not apply to homeless offenders, they permit registrants to remain near schools and in parks as long as they do not reside within 2000 feet of a school or park, and they allow registrants to live with children as long as the residence is 2000 feet from school or a park.

Moreover, they are overinclusive. Although their purpose is to protect children, they apply to all convicted sex offenders, even those whose crimes show no sexual interest in children. Jessica's Law does not consider whether a particular offender is a danger to children. In addition, the law has consequences unrelated to its interest in protecting children. It has caused a huge increase in homelessness among registrants, which has a punitive effect on these registrants. And because homeless people are harder to monitor, locate and supervise, Jessica's Law actually results in a substantial decrease in the protective purpose of the statute.

The residency restriction in Jessica's Law is excessive with respect to its nonpunitive purpose and therefore this factor weighs in favor of finding the law punitive.

vi. Summary

Several cases hold residency restrictions to be punitive. (*State v. Pollard*, *supra*, 908 N.E.2d at p. 1154; *Commonwealth v. State*, *supra*, 295 S.W.3d at p. 447; *Matter of Berlin v. Evans*, *supra* 923 N.Y.S.2d at p. 836; *Mikaloff v. Walsh*, *supra*, 2007 U.S. Dist. LEXIS 65076.) Even in the cases holding residency restrictions nonpunitive, judges dissented from the holdings. (*Doe v. Miller*, *supra*, 405 F.3d at pp. 723-726; *State v. Seering*, *supra*, 701 N.W.2d at pp. 671-672; *People v. Leroy*, *supra*, 828 N.E.2d at pp. 784-793.) All five factors weigh in favor of concluding that the effect of the residency

restrictions in Jessica's Law are punitive.

Aeschylus writes in *Agamemnon*: "Exiles feed on empty dreams of hope." (Line 1668, Richmond Lattimore's translation.) The Sixth Amendment accords a defendant a jury trial on the facts authorizing the residency restrictions that empty his dreams of hope. Here, the Sixth Amendment requires that the discretionary findings under section 290.006 triggering the application of the residency restrictions be made by a jury, not a judge.

6. *E.J.* and *Picklesimer*

This Court has not decided whether the residency restrictions in Jessica's Law are punitive. However, it has commented in passing on the point in *In re E.J.*, *supra*, 47 Cal.4th 1258 and *People v. Picklesimer*, *supra*, 48 Cal.4th 330. The Court's comments do not undermine the above analysis because it did not analyze or apply the five factors that relate to punitiveness.

E.J. involved registered sex offenders who were convicted before, and paroled after, the enactment of Jessica's Law. (*Id.* at p. 1264.) They argued that the residency restriction in Jessica's Law did not apply to them for various reasons, including that such application would violate the ex post facto clauses of the state and federal constitutions. The Court rejected the latter contention. (*Ibid.*)

The Court resolved the issue by relying on the rationale of the ex post facto prohibition, which is to assure that a legislative act gives fair warning of its effect so that people can rely on the statute's meaning until it is changed. (*Id.* at 1279.) The Court noted that to be ex post facto, two elements both must be present: the law must be retroactive (i.e., it must apply to events occurring before its enactment) and it must disadvantage the offender affected by it. (*Ibid.*) The focus is on the last act or event necessary to trigger application of

the statute. (*Id.* at 1273.) The court held that the residency restriction was not ex post facto because it applied to an event occurring after its adoption – the petitioners' taking up residency in noncompliant housing. (*Id.* at 1280.) The petitioners were not punished for their original offenses, but rather for conduct occurring after the adoption of Jessica's Law.

Thus, when resolving the ex post facto issue, the court did not analyze whether the residence restriction in Jessica's Law was punitive. Unlike *E.J.*, appellant's case requires that the Court resolve this issue. Because *E.J.* does not address the issue, it has no precedential value. "[C]ases, of course, are not authority for propositions not there considered." (*People v. Ceballos* (1974) 12 Cal.3d 470, 481.)

In *Picklesimer*, the Court addressed a procedural issue of how defendants who are not in custody and whose appeals are over, but who may have a basis for challenging, on equal protection grounds, the mandatory requirement for sex offender registration, can challenge that requirement. The Court concluded that the appropriate procedural vehicle is a petition for writ of mandate in the trial court, not a postjudgment motion for relief. (*People v. Picklesimer*, *supra*, 48 Cal.4th at p. 335.) The Court also discussed the discretionary registration requirement now found in section 290.006. The discussion was premised on the assumption the mandatory registration requirement did not apply. (*Id.* at p. 342.)

The defendant in *Picklesimer* was convicted of sex offenses in 1993. (*Id.* at p. 336.) The discretionary registration requirement was enacted in 1994, after the defendant's conviction. (*Id.* at p. 342.) The Court addressed whether the discretionary registration requirement applied even though it was not in place at the time of the conviction. (*Ibid.*) The Court concluded that the Legislature intended that the discretionary registration requirement apply to

crimes committed before its enactment, and noted that it had held in *Castellanos*, *supra*, 21 Cal.4th 785 that such retroactive application of the requirement was constitutional. (*Id.* at p. 343.) Picklesimer argued that application of section 290.006 violates *Apprendi* because it imposes heightened punishment in the form of a residency restriction based on a finding by a court rather than a jury. (*Id.* at pp. 343-344.) The Court did not decide whether the residency restriction was punishment for purposes of *Apprendi*. Instead, it focused on the registration requirement alone and said it did not matter for purposes of this requirement whether or not the residency restriction was punitive. As the Court put it:

> If Proposition 83's restrictions do not amount to punishment for his original crimes, there is no *Apprendi* problem and no right to a jury trial. Conversely, if Proposition 83's restrictions were to be considered punishment for his original offenses, they could not under the state and federal ex post facto clauses be constitutionally applied to Picklesimer, whose crimes all long predate the approval of Proposition 83. In either event, there is no constitutional bar to having a judge exercise his or her discretion to determine whether Picklesimer should continue to be subject to registration.

(*Id.* at p. 344, citations omitted.)

As in *E.J.*, the Court in *Picklesimer* did not address the question of whether the residency requirement is punitive and did not apply the five-factor test for making this determination. As with *E.J.*, *Picklesimer* is not authority for the proposition that the residency restriction in Jessica's Law is not punitive.

7. Response to the Attorney General's Argument

The Attorney General argues that sex offender registration does not implicate the right to a jury trial under *Apprendi*. (ROBOM 7.) Under this Court's precedent, this is correct. But it is not the issue. The issue instead is whether the residency restriction in Jessica's Law is punitive. If it is, appellant is entitled to a jury trial of the facts which permit this punitive requirement. Those facts happen to be the facts that trigger registration. But this is incidental – it is how Jessica's Law was written. For *Apprendi* purposes, the focus is not on the nature of the facts that lead to the sanction but rather the punitive nature of the sanction. And if the same facts lead to two sanctions, one of which is punitive and one of which is not, a jury must find those facts.

Respondent argues that the residency requirement is not punitive because it was not intended to be punitive, because it is not the kind of sanction that historically was entrusted to a jury, and because the five-factor test does not apply. (ROBOM 8-10.) Appellant disagrees.

The intent behind Jessica's Law is punitive, as explained in subsection B5b above.

The *Ice* case on which respondent relies is inapposite. It does not deal with whether the sanction (consecutive sentences) is punitive, which is the issue here. Instead, it finds that consecutive sentences did not have to be decided by the jury because traditionally and historically the judge, not the jury, made this determination, and because *Apprendi* is based on long-standing common law practice. (*Oregon v. Ice* (2009) 555 U.S. 160, 164, 167-169, 172 [129 S.Ct. 711, 172 L.Ed.2d 517].) The Court made clear in *Ice* that the decision in that case applied to "multiple offenses different in character or committed at different times" but that *Apprendi* applied to punishment "for a discreet crime." (*Id.* at p. 167.) The sanction of residency restriction is recent

and has no historical tradition comparable to the one for consecutive sentences. Also, it is a punishment provision that applies to a discreet crime as opposed to applying to the interrelationship of multiple crimes. Residency restrictions are thus analogous to an enhancement – an additional punishment for a single crime – and identical in principle to the "offense-specific" (*id.* at p. 163) penalty provision in *Apprendi*.

As for respondent's suggestion that the five-factor test, derived from *Mendoza-Martinez*, does not apply, it is sufficient to say that this position is at odds with all residency-restriction cases – both those finding that restrictions punitive and those finding them nonpunitive – cited and discussed in subsection B5c above. Respondent relies entirely on *Ice*. None of the relevant case law relies on *Ice*, and respondent cites no case that does.

Respondent argues that the residency restriction applies only to parolees, not to appellant, who is a probationer. (ROBOM 11-12.) Appellant disagrees for the reasons set forth in argument II, below.

Respondent argues that if the residency restriction applies to appellant, the registration requirement remains. (ROBOM 12-13.) Appellant disagrees.

Respondent argues that this Court's decision in *Picklesimer* supports his position by holding that a registration requirement remained valid even if *Apprendi* requires a jury trial to support a residency restriction. (ROBOM 12-13.) There is no such holding in *Picklesimer*. Instead, as explained in subsection B6, above, the discussion on which respondent focuses relates entirely to the registration requirement. The Court held the trial court could determine whether the defendant should be subject to discretionary registration. (*People v. Picklesimer*, *supra*, 48 Cal.4th at p. 344.) But it did not hold or even suggest that the residency restriction could be severed from the registration requirement and did not purport to rewrite section 3003.5,

subdivision (b) to allow this.

Respondent argues that any *Apprendi* error was harmless because the trial court found beyond a reasonable doubt that the offense was committed as a result of sexual compulsion or for sexual gratification, the Court of Appeal rejected the argument that registration was factually unsupported, and there was overwhelming evidence the assault was the result of sexual compulsion or for purposes of sexual gratification. (ROBOM 13-14.) Appellant disagrees with respondent's analysis.

Respondent is correct in stating that the test for reversal is the one in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], under which respondent has the burden of establishing beyond a reasonable doubt that the error was harmless. An appellate court applies this test by evaluating the record and asking whether respondent has shown beyond a reasonable doubt that the jury that tried this case would have found that the crime was the result of sexual compulsion or for purposes of sexual gratification. The question is "whether the jury would have returned the same verdict absent the error." (*Washington v. Recuenco* (2006) 548 U.S. 212, 221 [126 S.Ct. 2546, 165 L.Ed.2d 466].) The focus is on the whether the error did or did not "contribute to the verdict obtained." (*Neder v. United States* (1999) 527 U.S. 1, 17 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Respondent's discussion of harmless error fails to consider the essential issues of whether the jury in this case would have made the necessary findings and the relationship of error to the verdict the jury returned.

The basis for the judgment in this case was verdicts finding appellant not guilty of the charged offense of committing a lewd act, but guilty of the lesser included offense of misdemeanor simple assault. (CT 94-95.) The

instruction describing simple assault stated that the People were not required to prove that appellant actually touched someone, but that a touching, even if slight and done through the victim's clothing, was sufficient if done in a rude or angry way. (CT 131-132.) The instruction describing the offense of committing a lewd act on a child stated that a touching was required and could consist of touching the victim's clothing, but it had to be accompanied by the intent of arousing, appealing to or gratifying the lust, passions, or sexual desires of the defendant or the child. (CT 133.) The only sensible explanation for the verdicts is that the jury thought appellant touched the victim in a rude or angry manner, and therefore committed a simple assault, but that appellant did not harbor a lewd intent when doing so, and therefore did not commit a lewd act.

In light of the jury's verdict and the factual findings on which it was based, it is not clear by any standard, let alone beyond a reasonable doubt, that the jury would have found that the offense involved sexual compulsion or sexual motivation. Respondent's claim that the evidence of sexual compulsion and motivation is overwhelming does not comport with the jury's evaluation of the evidence.

Nor does the Court of Appeal's finding in footnote 3 of the slip opinion aid respondent. There, the court simply rejected an insufficiency of evidence argument because it had to defer to the trial court's evaluation of Lori's credibility. Review of insufficiency of evidence arguments are highly deferential to the trier of fact, which, with respect to the facts related to registration, was the trial court. For purposes of such review, the evidence is viewed in the light most favorable to respondent. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Analysis of whether an error is harmless is different and involves independent appellate review. A finding of harmlessness for the error

in this case relates to what the jury that tried the case would have concluded, not to what the trial court concluded.

When the test for harmless error is properly applied, it is clear the error was not harmless.

II

THE RESIDENCY RESTRICTIONS APPLY REGARDLESS OF THE REGISTRANT'S PAROLE STATUS

Respondent argues that the residency restrictions in Jessica's Law apply only to parolees. (ROBOM 15-23.) Appellant disagrees.

Preliminarily, appellant wishes to commend respondent's counsel for acknowledging how tenuous her argument is. But the argument is more than tenuous. It is completely without merit because it simply cannot be squared with the plain words of the applicable statute.

The residency requirement is in section 3003.5, subdivision (b), which states: "Notwithstanding any other provision of law, it is unlawful for *any person for whom registration is required* pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (Italics added.) This Court has correctly characterized this language as being "plain." (*In re E.J.*, *supra*, 47 Cal4th at p. 1272.) Under its plain language, the residency restriction applies to all registrants. If those restrictions applied only to parolees, the words "on parole" would appear after the word "person" or the word "parolee" would appear instead of the word "person." Where, as here, statutory language is clear and unambiguous, there is no need for construction. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.) "Clear statutory language no more needs to be interpreted than pure water

needs to be strained." (*Holder v. Superior Court* (1969) 269 Cal.App.2d 314, 317.)

Respondent's argument rewrites the statute's language. Under the statutes, appellant must register if there is a finding pursuant to section 290.006. Under section 3003.5, subdivision (b), "any person for whom registration is required" is subject to the residency restriction. The section 290.006 finding thus triggers two statutory requirements – registration and residency restriction. Respondent's argument rewrites subdivision (b) to add after the word "required" the phrase "except persons subject to discretionary registration when a judge, rather than a jury, decides discretionary registration is appropriate." What the electorate hath joined, no court should put asunder, absent a constitutional imperative. If respondent wants subdivision (b) rewritten, she should ask the Legislature or the electorate, not this Court, to rewrite it.

Respondent says that a violation of the residency restriction is not a misdemeanor. (ROBOM 19-23.) Appellant disagrees.

Section 3003.5, subdivision (b) states it is "unlawful" for a registrant to reside within 2000 feet of a school or park. The Legislative Analyst's description of the residency restriction in Proposition 83 stated that a violation of the restriction "would be a misdemeanor offense, as well as a parole violation for parolees." (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) analysis of Prop. 83 by Legis. Analyst, p. 44.) This characterization of the sanctions for violating the residency restriction in Jessica's Law comes from an objective, nonpartisan source. The electorate having been informed of these sanctions, reasonably would conclude that a violation of the restriction would be a misdemeanor.

When a statute declares an act to be a public offense, but prescribes no

penalty, the act is punishable as a misdemeanor. (Section 19.4.) Respondent argues that section 19.4 does not apply because section 3003.5, subdivision (b) uses the term unlawful instead of the term public offense. (ROBOM 19-21.)

The term unlawful has been construed as constituting a public offense punishable as a misdemeanor. Health and Safety Code section 11364, subdivision (a), for example, makes it "unlawful" to possess various items of drug paraphernalia. The section does not say that such possession is a public offense. Yet the offense is a misdemeanor. (*People v. Sullivan* (1965) 234 Cal.App.2d 562, 565; *People v. Chambers* (1989) 209 Cal.App.3dSupp. 1, 3 [defendant convicted of violating the section].)

Respondent's reliance on 53 Ops.Cal.Atty.Gen. 309 (1970) is misplaced. (ROBOM 19-21.) The statute there under review provided that a minor "may not possess a concealable firearm" except under certain circumstances. (*Id.* at p. 310.) It did not say that such possession was unlawful. Respondent's reliance on early cases from this Court (ROBOM 19) likewise is misplaced, because the unlawful act described by section 3003.5, subdivision (b) is punishable as a misdemeanor by virtue of section 19.4.

Also misplaced is respondent's reliance on *People v. Ranney* (1931) 213 Cal. 70. (ROBOM 21.) The part of *Ranney* upon which respondent relies dealt with instructional error. Ranney had been charged with 21 counts of grand theft. (*Id.* at p. 72.) The trial court instructed the jury that they should convict the defendant if they found he "unlawfully" took the property. The instruction did not tell the jury they had to find that the taking was felonious and it made no reference to any distinction between what was criminally unlawful and was civilly unlawful. Under the instruction, they were to convict in either case. (*Id.* at p. 76.) This Court found the instruction erroneous, noting that there are many acts of taking that are unlawful but not criminal,

such as the violation of a contract or the acts of a corporation that are *ultra vires*. (*Id.* at pp. 76-77.) The Court noted that "an act may be unlawful and not be penal." (*Id.* at p. 77.) The Court did not hold that acts that are unlawful under the Penal Code are not penal.

The act of living within 2000 feet of a school or park is not similar to violations of a contract or acts that are *ultra vires*. The act has been committed by someone who has been convicted of a crime. The act is prescribed by the Penal Code. The act is therefore both unlawful and penal. "When [a] statute makes an act unlawful or imposes a punishment for its commission, this is sufficient to constitute the act a crime without any express declaration to that effect." (*People v. Kennedy* (1937) 21 Cal.App.2d 185, 193.)

III

SECTION 3003.5, SUBDIVISION (B) DOES NOT OPERATE TO ESTABLISH RESIDENCY RESTRICTIONS AS A VALID CONDITION OF SEX OFFENDER REGISTRATION

Respondent argues that the residency restrictions are not a condition of sex offender registration and a violation of those restrictions therefore does not amount to a criminal violation of the sex offender registration act. (ROBOM 23-27.) Appellant agrees.

Under the statutory scheme, registration is one thing and residency restrictions are another. The first relates to reporting to law enforcement officials and has nothing to do with where the registrant lives. The second relates to where the registrant resides and does not require the registrant to report where he is residing. It is true that all who must register as a sex offender are subject to the residency restrictions in section 3003.5, subdivision

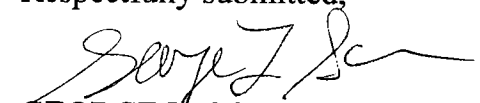
(b). But nothing in the sex offender registration statute says that residency restrictions are a condition of registration and nothing in that statute or in section 3003.5, subdivision (b) says that a violation of the residency restriction amounts to a violation of the registration requirement or is punishable as if it were.

CONCLUSION

The judgment of the Court of Appeal striking the discretionary sex offender registration requirement should be affirmed.

DATED: October 11, 2011

Respectfully submitted,



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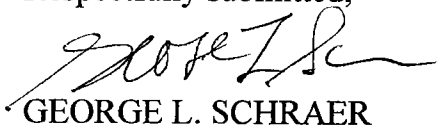
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this brief contains 14,941 words, based on the word-count feature of my word-processing program.

DATED: October 11, 2011

Respectfully submitted,



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PROOF OF SERVICE

I, George L. Schraer, declare under penalty of perjury that I am a member of the State Bar of California and not a party to this cause. My business address is 5173 Waring Road, #247, San Diego, California 92120. On October 11, 2011, I served the attached APPELLANT'S ANSWER BRIEF ON THE MERITS by placing true and correct copies in envelopes addressed to

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