In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL D. CORNETT,

Defendant and Appellant.

Case No. S189733

First Appellate District, Division Two, Case No. A123957
Sonoma County Superior Court, Case No. SCR504048
The Honorable Rene A. Chouteau, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does the phrase "10 years of age or younger" in Penal Code section 288.7, subdivision (b) include a person who has passed her 10th birthday, but who has not yet reached her 11th birthday?

STATEMENT OF THE CASE AND FACTS

On January 9, 2007, appellant was discovered molesting his stepdaughter, Jane Doe 1, who was 10 years 11 months old. Investigation revealed that appellant had molested a younger stepdaughter, Jane Doe 2, the same day and three days before. Appellant had been convicted of molesting another stepdaughter from a prior marriage 11 years earlier.

Following a jury trial, appellant was convicted of seven felonies, including count 6, the oral copulation of Jane Doe 1, a child 10 years of age or younger. (Pen. Code, § 288.7, subd. (b), further citations to statute are to this code.) The jury also found true allegations that appellant was a habitual sexual offender (§ 667.71), that multiple victims made him subject to a One Strike law sentence (§ 667.61, subd. (b)), and that he had a prior serious felony and strike (§ 667, subd. (a)(1), 1170.12). (2 CT 354-369, 371-377, 382-384, 399.) The court sentenced appellant to 150 years to life plus 10 years in state prison, including a concurrent term of 50 years to life on count 6. (2 CT 376-377, 382-384, 399.)

A divided panel of the Court of Appeal for the First Appellate District, Division Two, held, in the published portion of the opinion, that Jane Doe 1 was not "10 years of age or younger" at the time of the offense, as required by section 288.7, subdivision (b), based on a conclusion that the statute "excludes children who have passed the 10th anniversary of their birth." (Typed opn. at p. 2 (Maj. opn of Kline, P.J.); *id.* at p. 40.) The court found no California decisions had interpreted the statutory phrase "10 years of age or younger," despite a longstanding division among courts

interpreting similar statutory language in other jurisdictions, and it found the legislative history shed no light on the issue. (*Id.* at pp. 26-28.) The court discerned two commonsense interpretations of the statutory phrase that each led to reasonable consequences and deemed it improper to judge between the two by considering "common parlance." (*Id.* at pp. 28-31.) The court ventured a "guess" that the drafter who chose the phrase "erroneously assumed it was no different from the phrase 'younger than 10 years of age.'" (*Id.* at pp. 36-37.) Nevertheless, the court said that it did not "presume to know precisely what the Legislature intended by the words," nor did the court "claim that phrase can have but one meaning, or that the meaning attributed to it by the Attorney General is unreasonable or would have absurd consequences." (*Id.* at p. 39.)

The Court of Appeal found the rule of lenity required strict construction of the statutory phrase. (Typed opn. at pp. 28-29, 32-38 (Maj. opn. of Kline, P.J.).) Application of the rule, it held, compelled its view that 10 years of age "is an exact and definite period of time," which "does not mean or include ten years and two or six or eleven months" (*id.* at p. 38), given that the phrase "10 years of age or younger" is "manifestly ambiguous" (*id.* at p. 39). The court reversed count 6 for insufficient evidence and invited the Legislature to amend the statute "if the intention was to include as victims children under the age of 11 . . . ." (*Id.* at pp. 40, 45.)[1]

Justice Richman rejected the court's interpretation of 288.7, subdivision (b). (Typed opn. at pp. 1-6 (conc. & dis. opn. of Richman, J.).) Reasoning that a child is considered "10 years of age or younger" until the

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[1] The court was unanimous in reversing, on an unrelated ground, a conviction of lewd act on Jane Doe 1 in count 7. (Typed opn. at pp. 1, 12, 45 (Maj. opn. of Kline, P.J.); *id.* at p. 1 (conc. & dis. opn. of Richman, J.).)

11th birthday in common parlance, the dissent found illogical a construction of the statutory phrase that excludes as victims all 10-year-olds, save children on the day of their 10th birthday. (*Id.* at p. 4.) The dissent perceived that the Legislature would use different language in the statute had its intent been to protect only children under 10 years old. (*Id.* at p. 5.) Justice Richman concluded that the rule of lenity is inapplicable, because the court's interpretation of the phrase was not equally reasonable with its commonsense meaning and because in terms of fair warning, appellant doubtless "knew [Jane Doe 1] was '10 years of age.' What else could he have thought? She had not reached her eleventh birthday." (*Id.* at p. 6.)

SUMMARY OF THE ARGUMENT

The plain meaning rule resolves the issue in the present case of what the Legislature meant by "10 years of age or younger" in section 288.7, subdivision (b). In this country, age is stated in one-year increments. (Black's Law Dict. (8th ed. 2004) p. 66.)

Accordingly, the plain and commonsense meaning of "10 years of age or younger," as including children before their 11th birthday, is unambiguously contrary to appellant's understanding. That meaning is presumed to be what the Legislature intended in section 288.7, subdivision (b). (See *People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 709.)

Even if interpretation of the statute beyond its plain language were needed, the same conclusion would follow. The statute's use of the disjunctive indicates the Legislature was concerned with the protection of two groups of children: a child "who is 10 years of age" (not a child *on* the 10th birthday) and those less than 10 years of age. This statute was enacted after the "birthday rule" had been adopted by this court and presumably drafted in light of its anticipated application to the law. The import of the birthday rule is that a person reaches a given age on the anniversary of his

or her birth and remains that age until the next anniversary. Had the drafter of section 288.7, subdivision (b) intended that a child of 10 be deemed to have that age only on the 10th birthday, and not a single day longer, the law presumably would expressly so provide. The trend of decisions from other jurisdictions also supports the conclusion that language like that appearing in the statute is read in the ordinary, commonsense manner consistent with the birthday rule. Appellant's contrary interpretation unacceptably shrinks the class of victims protected by the statute on the basis of a strained claim of ambiguity and undercuts the Legislature's comprehensive effort to protect children in this state from sexual offenses.

The Court of Appeal erred by rejecting the plain meaning rule, as well as by failing to apply the appropriate principles of construction to resolve the issue. Resort to the rule of lenity, otherwise known as strict construction, a residual principle applicable only when plain meaning and construction fail to make legislative intent clear, is inappropriate and unnecessary in this case.

ARGUMENT

Section 288.7, subdivision (b) provides that "[a]ny person 18 years of age or older who engages in oral copulation or sexual penetration . . . with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." The phrase "10 years of age" encompasses any child who has not yet reached her 11th birthday, and thus applied to Jane Doe 1, who was 10 years 11 months old when appellant sexually assaulted her. This interpretation is supported by the plain words of the statute, the purpose of the statute, and case law.

A. Rules Governing Statutory Interpretation

The court's primary duty when interpreting a statute is to """determinate and effectuate""" the intent of the Legislature. (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 326.) It looks first to the words of the statute, """giving them their 'usual and ordinary meanings' and construing them in context [citation]." (*People v. Allegheny Casualty Co.*, *supra*, 41 Cal.4th at p. 709.) If the language contains no ambiguity, the court "'presume[s] the Legislature meant what it said, and the plain meaning of the statute governs.'" (*Ibid.*) "A court in interpreting a statute should employ the common usage and understanding of the statute's words." (*Yassin v. Solis* (2010) 184 Cal.App.4th 524.) "'[W]here a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is enlarged or restricted and especially in order to avoid absurdity or to prevent injustice."'" (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 260.)

Where the statutory language leaves uncertainty, the court should consider the consequences that will flow from a given interpretation. It may also consider the legislative history of the statute and the wider historical circumstances of its enactment. (*Dyna-Med v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) An ambiguity will not be interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent. (*People v. Cruz* (1996) 13 Cal.4th 764, 782-783.) "The intent prevails over the letter, and the letter will, if possible, be read so as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

B. The Plain Language of the Statute and Case Law Support Interpreting the Statute to Apply to Victims Molested Before Their 11th Birthdays

Contrary to the view of the Court of Appeal, the words "10 years of age or younger" in the statute are not ambiguous. Penal Code section 7, subdivision (16) provides in pertinent part that "[w]ords and phrases must be construed according to the context and approved usage of the language . . . ." "In American usage, age is stated in full years completed (so that someone *15 years of age* might actually be 15 years and several months old)." (Black's Law Dict. (8th ed. 2004) p. 66.) Generally, in all but the most formal documentary contexts, the age of a child who has passed the 10th birthday and not yet reached the 11th birthday routinely appears, both in writing and in speech, as "10 years old," not 10 years plus months and days. Accordingly, at the time of the offense in count six, Jane Doe 1 was, quite literally, "10 years of age."

That she otherwise might be described at the time as a child "over 10 years of age" or "10 years 11 months" or "under 11 years of age" is no demonstration of statutory ambiguity. Parents, babysitters, pedants, virtually everyone who would come into contact with a child of that age, would be expected to operate on the principle that "10 years of age" encompassed a child who had passed her 10th birthday but not reached her 11th birthday.

This is more than a commonsense observation about what it means to be 10 years old. It is revelatory of ordinary usage—not just in language, but in terms of the behavior of persons over 18 who interact with younger children. Given that it is adults who constitute the audience to whom the Legislature has addressed the prohibition in section 288.7 subdivision (b), it would seem to throw real light on the issue. The conventional and common

usage of terms reflects the absence of ambiguity, rather than the presence of ambiguity in the present case. It is a sufficient answer to appellant's claim.

Recognizing the convention of measuring age in one-year increments, numerous courts construing similar statutory language in other states hold that a person remains a given age until he or she reaches his or her subsequent birthday. For example, in *State v. Carlson* (1986) 223 Neb. 874 [394 N.W.2d 669], the Supreme Court of Nevada concluded: "[T]o the ordinary person 'fourteen years of age' means that one has passed the 14th birthday but has not reached the 15th birthday. Thus, 'fourteen years of age' is a temporal condition existing on the 14th birthday and continuing until the 15th birthday. Any other construction of 'fourteen years of age' would be a perversion of popular parlance." (*Id.* at p. 674.)

Consistent with *Carlson* is *State v. Shabazz* (App. Div. 1993) 263 N.J.Super. 246 [622 A.2d 914]: "In common parlance, a juvenile becomes 17 years of age upon reaching his 17th birthday, and remains 17 years of age until he reaches his 18th birthday. The simple and overriding fact is that most people state their ages in yearly intervals. Although such expressions are perhaps linguistically flawed, we doubt that the Legislature intended to depart from the common, everyday meaning of the words used and engage in a metaphysical analysis of the aging process. Instead, we believe that the Legislature, in drafting the statute, intended to "talk the way regular folks do." [Citation.]" (*Id.* at p. 916.)

More recently, the Utah Supreme Court came to a similar conclusion in *State v. Christensen* (Utah 2001) 20 P.3d 329: "It is significant that it is almost a universal practice in our society to state our age (except possibly for infants) by the number of full years we have lived, without adding or recognizing that we have also lived some additional months beyond those full years. We do not ordinarily recognize increase in our age until we have lived another full year. Thus we conclude that the usual and accepted

meaning that the person is seventeen years old is that the person has not reached his or her eighteenth birthday." (*Id.* at p. 330 ; see also *Covell v. State* (1921) 143 Tenn. 571 [227 S.W.41] ["It is technically true that one reaches a particular age at a fixed or certain point of time, but, having attained the designated birthday, one's age, as ordinarily alluded to, continues as of the latter birthday until the succeeding one is reached. . . . in common acceptation one's age is spoken of as 21 until the arrival of the twenty-second birthday—the year, and not the day, being the unit of measurement."].)

Numerous decisions are supportive of this reasoning. (E.g., *State v. Demby* (Del. 1996) 672 A.2d 59, 61 [statutory aggravating factor as to victims "14 years of age or younger" so construed as common and approved usage]; *State ex rel. Morgan v. Trent* (1995) 195 W.Va. 257 [465 S.E.2d 257, 264-265] [holding it "illogical" to construe amendment of sex offense to apply to victim "who is eleven years old or less" as intended only to add 11th birthday; court follows *Carlson*]; *State v. Joshua* (1991) 307 Ark. 79 [818 S.W.2d 249, 251] ["Twelve years of age or younger" in battery statute applies to victim who has not yet reached the 13th birthday]; *State v. Rusin* (1989) 153 Vt. 36, 568 A.2d 403, 404 [construing hearsay exception to victim "ten years of age or under" to apply to a child of ten until the 11th birthday as "common sense and common usage']; *State ex rel. Juv. Dept. v. White* (1986) 83 Or.App. 225 [730 P.2d 1279, 1280] [penalty applicable to defendants who are "17 years of age or younger" applies to person who has not reached 18th birthday]; *Phillips v. State* (Tex. Crim. App. 1979) 588 S.W.2d 378 [statutory language, "a child who is 14 years of age or younger," included all children who had not attained the 15th birthday].)

The dissent below had it right. Justice Richman correctly relied upon this "universal practice" in concluding Jane Doe 1 was 10 years old at the

time of the offense. "[T]he People's interpretation is consistent with the manner in which people commonly state their age." (Typed opn. at p. 3 (conc. & dis. opn. of Richman, J.).)

C. Statutory Construction Also Reflects that the Statute Encompasses Children Who Have Not Reached the 11th Birthday

The statute under review uses the disjunctive—"10 years of age *or* younger" (§ 288.7, subd. (b), italics added). Analysis demonstrates that the Legislature must have intended to protect children throughout the 10th year of life. Specifically, the language indicates that the statute was intended to protect two groups of children: those who are 10 years old and those who are younger than 10 years old.

First, no reasonable basis can be offered for the proposition that the first group represents a focus of legislative concern as regards molestation that occurs on a child's 10th birthday, but legislative indifference to such acts on days following that birthday.

Second, it would make little sense, as a practical matter, for the Legislature to create a separate category to encompass only one additional day. (*Phillips*, *supra*, 588 S.W.2d at p. 380 [appellant's interpretation of "14 years of age or younger" to include only children who have not passed their fourteenth birthdays "limits the duration of the protection afforded to fourteen year olds to a period of one day or less"]; *Shabazz*, *supra*, 622 A.2d at p. 252.) As the dissenting justice below explained, under such an interpretation, "section 288.7, subdivision (b) would apply to all children from birth through the day of their tenth birthday—but to no other ten year olds. Common sense suggests that the statute would apply to all ten-year-old children. There is no rationale for the position that the Legislature chose the line of demarcation to be a child on his or her tenth birthday." (Typed opn. at p. 4 (conc. & dis. opn. of Richman, J.).)

It is certainly true that the Legislature could have used the words "under 11 years of age." Indeed, there might be several ways of indicating a preference to include children who have not yet reached the 11th birthday. However, to say that the Legislature used the phraseology it did "to include a class of people who were injured only on their birthdate does not make sense." (*Phillips v. State*, *supra*, 588 S.W.2d at p. 380; cf. *State ex. rel. Morgan v. Trent*, *supra*, 465 S.E.2d at p. 264 [where legislature amended statute protecting those "less than eleven years old" to those who were "eleven years old or less," intent could not have been only to add on a day to the age of the protected class, i.e., the 11th birthday].)

Respondent's view is supported by *In re Harris* (1993) 5 Cal.4th 813. In that decision, this court adopted the so-called "birthday rule." At common law, a person's age was computed by including the day of birth, with the result that "one reache[d] a given age at the earliest moment of the day *before* their anniversary of birth." (*Id.* at p. 844.) In California, however, the Legislature abandoned the common law rule in favor of "the common, everyday method of age calculation," which holds that "a person attains a given age on his or her corresponding birthday." (*Ibid.*) Jane Doe 1 thus reached the age of 10 on her birthday, and by extension, did not reach the age of 11 until her next birthday, which occurred after the crime inflicted upon her. (Accord, *State v. Moore* (2004) 167 N.C.App. 495, 606 S.E.2d 127, 133 ["Under the 'birthday rule,' a person reaches a certain age on her birthday and remains that age until her next birthday."].)

As the Court of Appeal observed, some state courts construing similar statutory language adopt the interpretation used by the majority below. (See, e.g., *State v. Jordan* (R.I. 1987) 528 A.2d 731, 734; *State v. McGaha* (1982) 306 N.C. 699 [295 S.E.2d 449, 450]; *Knott v. Rawlings* (1959) 250 Iowa 892 [96 N.W.2d 900, 901-902]; *People v. O'Neill* (N.Y. Sup. Ct. 1945) 208 Misc. 24 [53 N.Y.S.2d 945, 947]; *Gibson v. People* (Colo. 1908)

44 Colo. 600 [99 P. 333, 334-335].) But the modern trend, reflected in the cases cited *ante*, is otherwise.

Moreover, some contrary decisions rely on the rule that criminal statutes are to be construed strictly against the state and liberally in favor of the defendant. (See, e.g., *State v. Jordan*, *supra*, 528 A.2d at p. 735; *State v. McGaha*, *supra*, 295 S.E.2d at p. 451.) As discussed in Argument I.D., that rule does not apply in California.

D. The History and Purpose of Penal Code section 288.7 Support the View That Subdivision (b) Was Intended to Apply to Offenses Before the Victim Reaches the 11th Birthday

Assuming the statutory language permits more than one reasonable interpretation, the court may consider the legislative history of the statute and the wider historical circumstances of its enactment. (*Dyna-Med v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at pp. 1386-1387.) Consideration of these factors also support a conclusion that section 288.7 applies to all victims molested before their 11th birthdays.

Penal Code section 288.7 was enacted in 2006 as part of Senate Bill 1128, an omnibus bill entitled the "Sex Offender Punishment, Control, and Containment Act of 2006." (Stats. 2006, ch. 337 (S.B. 1128), § 1.) The purpose of the law was "to provide a comprehensive, proactive approach to preventing the victimization of Californians by sex offenders." (Sen. Rules Com., Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended Aug. 22, 2006, p. 7; see also Stats. 2006, ch. 337, § 2.) The bill made "dozens of changes to the body of law relating to sex offenders." (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended June 22, 2006, p. 1.) A number of the provisions created new crimes or increased penalties for offenses against children. These included creation of new crimes for child luring (§ 288.3), sexual intercourse, sodomy, or oral copulation against a child 10 years of age or

younger (§ 288.7), and annoying or molesting an adult whom the person believes to be a minor (§ 647.6, subd. (a)(2)); increased penalties for child pornography (§§ 311.2, 311.4, 311.9, 311.11), and annoying or molesting a minor (§ 647.6, subd. (a)(1)); and expanding the coverage of the crime of aggravated sexual assault of a child (§ 269, subd. (a) [requiring the perpetrator to be 7 or more years older than the victim instead of 10 or more years older]). Other amendments made major changes to the Sexually Violent Predator program. These included increasing the commitment term from two years to an indeterminate term (Welf. & Inst. Code, § 6604) and tolling parole while the person is an SVP (§ 3000, subd. (a)(4)), extending parole periods for violent sex offenders (§ 3000, subd. (b)), and creating a state and local scheme for assessing the risk posed by such offenders (§§ 290.03-290.08).

Section 288.7, then, was not enacted as a standalone statute. Nor was it intended to address a single, narrow issue. It was part of a broad plan to better protect Californians from sexual offenses. The Legislature implemented that intent in large part by creating new crimes, and expanding and increasing punishment for old crimes, paying particular attention to sexual crimes against children. In light of these surrounding circumstances, the language of section 288.7 must be read broadly, that is, to protect more victims, and thereby """best attain the purposes of the statute."""" (*Friends of Mammoth v. Board of Supervisors*, *supra*, 8 Cal.3d at p. 260.)

E. The Rule of Lenity Does Not Apply

The rule of lenity, the "principle at the heart of the majority's conclusion" below (Typed opn. at p. 5 (conc. & dis. opn. of Richman, J.)), does not dictate a different result. Under that doctrine, "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*People v. Avery* (2002) 27 Cal.4th 49, 57.) However, the rule "does not

automatically grant a defendant 'the benefit of the most restrictive interpretation given any statute by any court' when there is a split of authority." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023.)

As this court explained in *People v. Avery*, *supra*, 27 Cal.4th at p. 57, "[t]wo separate strands of . . . guidelines coexist" with respect to resolving competing statutory interpretations. "On the one hand, we have repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. [Citations.] . . . On the other hand, section 4 provides: 'The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All of its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.' Appellate courts have often invoked section 4 as a reason *not* to interpret a statute strictly in favor of a criminal defendant. [Citations.]" (*Id.* at p. 58.)

This court reconciled the two lines of authority by explaining that only in cases of true interpretive deadlock does the rule of lenity apply. That is, "'[t]he rule [of lenity] applies only if the court can *do no more than guess* what the legislative body intended; there must be an *egregious ambiguity and uncertainty* to justify invoking the rule.'" (*Ibid.*, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53, italics added.) The principle is inapplicable "'unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.'" (*Avery*, *supra*, at p. 58.) "[A]n appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Ibid.*)

As explained above, a contrary legislative intent can be discerned with respect to section 288.7, subdivision (b). That intent is based upon: (1)

ordinary, American usage, whereby age is referred to in one-year increments; (2) the statute's use of the disjunctive; (3) this Court's adoption of the "birthday rule" in a case predating the enactment of section 288.7, and of which the Legislature was presumably aware; (4) modern case law from foreign jurisdictions; and (5) the inclusion of the statute in a comprehensive bill whose stated purpose was to protect the public from sex offenders—a purpose the bill sought to achieve in large part by creating new crimes for sex offenses against children and increasing the punishment for, and expanding the scope of, crimes already in existence. Combining all these considerations, it is apparent that appellant's proposed interpretation of the statute is not "at least as plausible as that of the People." (*People v. Hammer* (2003) 30 Cal.4th 756, 771, fn. 13.) It follows the rule of lenity does not apply.

The rationale for the rule of lenity is not applicable either. Application of the rule of lenity "'ensures that criminal statutes will provide fair warning concerning conduct rendered illegal . . . .'" (*People ex rel. Lungren* (1996) 14 Cal.4th 294, 313.) As demonstrated in Part I.A., to the average person of ordinary understanding and intelligence, "a child who is 10 years of age" refers to a person has passed the 10th birthday, but has not yet reached the 11th birthday.[2] "The legislature intends that its statutes be understandable by the general public as well as English scholars." (*State v. McGaha*, *supra*, 295 S.E.2d at p. 453 (dis. opn. of Martin, J.); see *Branson v. State* (Mo. Ct. App. 2004) 145 S.W.3d 57, 61 (conc. opn. of Prewitt, J.) ["When reference is made to a person being 'seventeen years of age,' everyone that I know except a few highly-technical jurists would believe

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[2] Moreover, as the court below acknowledged, "the need to provide fair warning would seem unnecessary with respect to crimes, such as the one that here concerns us, that are malum in se rather than malum prohibitum." (Typed opn. at p. 36 (Maj. opn. of Kline, P.J.).)

that it is someone who has had the seventeenth anniversary of their birth, but not the eighteenth anniversary of their birth."].)

With this background, the dissenting justice below was clearly correct in concluding that the majority's reliance on the rule of lenity was unwarranted. "[T]he United States Supreme Court's 'explanation' for the rule of lenity is to '"ensure[] that criminal statutes will provide fair warning."' . . . I have absolutely no doubt that when defendant committed the heinous crime on Jane Doe I, he knew that she was '10 years of age.' What else could he have thought? She had not reached her eleventh birthday." (Typed opn. at p. 6 (conc. & dis. opn. of Richman, J.); see also *Abbott v. United States* (2010) 131 S.Ct. 18, 31, fn. 9 [the "'grammatical possibility' of a defendant's interpretation does not command a resort to the rule of lenity if the interpretation proffered by the defendant reflects 'an implausible reading of the [legislative] purpose,'" citation omitted].)

In finding the rule of lenity was dispositive of this case, the Court of Appeal essentially dismissed Penal Code section 4 as a law existing in name only: "[T]he California Legislature *nominally abrogated* the rule of lenity in 1872 by enacting section 4 . . . . The rule of strict construction or, as it is also called, the rule of lenity, has, however, survived the statute." (Typed opn. at p. 34, italics added (Maj. opn. of Kline, P.J.).) Having jettisoned section 4, the Court of Appeal distinguished, as inconsistent with the required strict construction rule, most decisions from other jurisdictions that have interpreted statutory language similar to section 288.7, subdivision (b) in a manner different from the court below: "Most of the other cases supporting the interpretation urged on us by the Attorney General *do not follow or ignore the rule of strict construction applicable in California*. For example, in *State v. Christensen*, *supra*, 20 P.3d 329, the defendant had argued that the victim, who was between her 17th and 18th birthdays, was 'older than 17' and therefore not protected by the statute.

The Supreme Court of Utah rejected the cases the defendant relied upon because most of them 'relied in part on the rule that criminal statutes are to be construed strictly against the state and liberally in favor of the defendant' (*id.* at p. 330), a rule which 'does not obtain in Utah.' (*Ibid.*)" (Typed opn. at pp. 32-33, italics added (Maj. opn. of Kline, P.J.).)

The purported distinction fails to withstand analysis. In fact, Utah's anti-lenity statute is virtually identical to Penal Code section 4. As the court in *Christensen* itself noted: "Section 76-1-106 expressly prohibits its application to our criminal code and substitutes instead the rule that 'all . . . offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law.' Utah Code Ann. § 76-1-106 (Supp. 1998)." (*Christensen*, *supra*, 20 P.3d at p. 330.)

In short, the Court of Appeal had it backward. *People v. Avery*, *supra*, 27 Cal.4th 49, confirms section 4's continuing vitality. Like Utah, California does not require penal statutes to be strictly construed. Therefore, the distinguishable cases are those that interpret the language of penal statutes similar to section 288.7, subdivision (b) under a rule of strict construction like that urged by appellant. The "usual, ordinary import" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743) of the term "10 years of age or under" includes anyone who has not yet celebrated their 11th birthday.

CONCLUSION

Accordingly, respondent respectfully requests the reinstatement of the judgment of conviction in count six.

Dated: May 23, 2011

Respectfully submitted,

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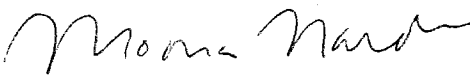

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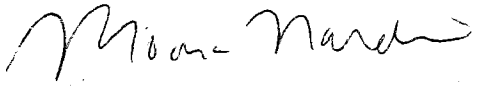
CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5256 words.

Dated: May 23, 2011

KAMALA D. HARRIS
Attorney General of California



MOONA NANDI
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael D. Cornett**

No.: **S189733**

I declare:

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

On May 23, 2011, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Ozro William Childs
Attorney at Law
1622 Fourth Street
Santa Rosa, CA 95404

County of Sonoma
Hall of Justice
Superior Court of California
600 Administration Drive, #107-J
Santa Rosa, CA 95403-2818

The Honorable Jill Ravitch
District Attorney
Sonoma County District Attorney's Office
Hall of Justice
600 Administration Drive, Room 212J
Santa Rosa, CA 95403

First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

First Appellate District
Division Two
Court of Appeal of the State of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 23, 2011, at San Francisco, California.

D. Desuyo
Declarant

R. Deny
Signature