No. S183737
B214707

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re C. H., A person coming under the Juvenile Court Law	
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. C. H., Defendant-Minor and Appellant.	CASE NO.: S183737 Court of Appeal: B214707 Superior Court Case Number 2005040811

APPEAL FROM THE SUPERIOR COURT

OF VENTURA COUNTY

HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant's Reply Brief on the Merits is limited to the rebuttal of certain points in Respondent's Answering Brief on the Merits. This limitation does not constitute a waiver of any issues raised in Appellant's Opening Brief on the Merits. Appellant submits that the points in Respondent's Answering Brief to which partial or no reply has been made herein have been fully covered in Appellant's Opening Brief on the Merits and that only those points requiring additional comment will be addressed herein.

ARGUMENT

I
CORRECTION OF MISSTATEMENTS OF FACT AND PROCEEDINGS IN RESPONDENT'S ANSWERING BRIEF ON THE MERITS

There are several misstatements of fact and proceedings in respondent's answering brief on the merits. Appellant will correct the important ones here.

First, in numerous places in respondent's brief (RBM[1] 5, 6, 7, 8, 38, 40), respondent states that, prior to appellant's commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) on February 18, 2009, appellant had spent time at DJJ previously. Respondent is incorrect.

As described in appellant's opening brief on the merits at page 4, the placements referred to by respondent as DJJ were in fact to JJF, which is the Juvenile Justice Facility, **Ventura County's Juvenile Hall**. Appellant had never before been placed at DJJ.

Second, respondent paints appellant as a continuous sex offender. Respondent's characterization is contrary to the facts.

Respondent claims that appellant admitted touching his other sister and brother a year prior. However, that "admission" was not pursuant to any juvenile

1 Particular pages of respondent's answering brief on the merits are referred to as RBM.

delinquency petition or accusation. Appellant had started going to counseling and got his own room, and the contact stopped (I CT 15). That matter was handled through Ventura County Child and Family Services, by their giving the parents a list of therapists and encouraging them to have appellant sleep in a separate bedroom; the case was closed as "medium risk" (I CT 15, 21). No delinquency petition was filed.

There was a second referral to Child and Family Services arising out of appellant's alleged activities with his brother and other sister (CT 21). Since appellant was in counseling, that case was closed (CT 21). No delinquency petition was filed.

There was an earlier referral to Child and Family Services when appellant was age 7, and it was reported that appellant had sexually acted out with a friend of the same age (CT 20). That referral was closed as unfounded (CT 20). No delinquency petition was filed.

Appellant's first and only delinquency petition was the November 22, 2005, original petition, the instant case, for conduct occurring when appellant was 13 years of age, and for which appellant was improperly committed to DJJ.

The only subsequent sexual conduct that was charged in any way was the probation department's notice of charged violations, dated May 30, 2007, two years prior to his commitment to DJJ, when appellant was 14 years of age and in

placement (I CT 157-163). It was framed as a failure to comply with residential program/placement rules, and alleged that appellant had told a social worker that he and another resident had twice engaged in mutually consensual sex acts (I CT 158). No other sexual conduct was alleged in any petition or notice of charged violations.

II
APPELLANT IS NOT ELIGIBLE FOR COMMITMENT TO DJJ BECAUSE HE HAS NOT BEEN FOUND TO HAVE COMMITTED A WELFARE AND INSTITUTIONS CODE SECTION 707(b) OFFENSE

As set forth in appellant's opening brief on the merits, it is submitted that appellant is not eligible for commitment to DJJ because the threshold requirement of a Welfare and Institutions Code[2] section 707(b) offense has not been met, regardless of the fact that appellant's offense was a sex offense described in Penal Code section 290.008(c).

Pursuant to the plain meaning of sections 731 and 733, appellant may be committed to DJJ only if he has a section 707(b) offense and the most recent offense is either a section 707(b) offense or a sex offense described in Penal Code section 290.008(c). **The existence of a section 707(b) offense is an essential prerequisite to a commitment to DJJ.**

---

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

Respondent's challenges to this reasoning are incorrect:

1. Respondent misinterprets the relevant statutes, to wit, sections 731, 731.1, and 733;

2. Respondent incorrectly concludes that there is an ambiguity in the relevant statutes;

3. Respondent incorrectly concludes that an analysis of legislative history is necessary;

4. Respondent incorrectly concludes that the purported legislative history documents submitted with its answering brief on the merits compel rejection of appellant's argument that a section 707(b) offense is an absolute prerequisite to an initial commitment to DJJ;

5. Respondent incorrectly relies on other Welfare and Institutions Code sections enacted or modified in the same lengthy bill as the relevant sections, even though they refer to a different class of individuals and even though it is logical to treat those individuals differently; and

6. Respondent's reliance on *In re Robert M.* (January 28, 2011) 192 Cal.App.4th 329 (petition for review filed March 9, 2011, pending, S191261) is misplaced as the reasoning in that case is flawed.

A. There Is No Ambiguity Or Inconsistency
In Sections 731, 731.1, And 733.

Respondent claims that the meaning of these statutes is ambiguous and the statutes are inconsistent. Respondent is incorrect.

As set forth at length in appellant's opening brief on the merits, sections 731(a)(4), 733, and 731.1 are completely consistent. By the terms of section 731(a)(4), even with a section 707(b) offense, a ward could still be ineligible under section 733, but section 733 does not come into play unless the threshold requirement of a section 707(b) offense is met.

In other words, once appellant qualifies initially under section 731(a)(4), he might still be ineligible, and thus section 733 then provides circumstances for ineligibility even if the minimum requirement is met, but then says that that ineligibility (i.e., the fact that the petition be the most recent) does not render an otherwise eligible ward ineligible just because the most recent offense is not a section 707(b) offense if that most recent offense is an enumerated sex offense.

Furthermore, the provisions of section 731.1 do not contradict the interplay between sections 731(a)(4) and 733, providing only a scheme to deal with wards already at DJJ, and leaving the implementation of that scheme to the discretion, first, of the probation department, and then, if and only if the probation department decides to suggest recall of the ward, to the court. (*In re Carl N.* (2008) 160

Cal.App.4th 423, 438). The language in section 731.1 does not contradict the language in section 731(a)(4), and "and" still means "and."

Respondent attempts to describe an inconsistency that does not exist, by virtue of a superficial and illogical interpretation of the statutes, and the bare assumption that section 733 provides that an enumerated sex offense qualifies any ward for commitment to DJJ (RBM 22). Saying that section 733 provides that does not make it so. The language of the statutes is clear.

Respondent assumes that there would be no reason to add the language in section 731(a)(4) referencing section 733, if the intent was not to include enumerated sex offenses as a basis for DJJ commitment (RBM 23). This is incorrect because section 731(a)(4)'s reference to section 733(c) states an ineligibility provision even with the required section 707(b) offense, and the reference to section 733(c) specifically, by its express terms, refers to the most current offense. Appellant's reasoning is set forth more fully in section II.E, herein, discussing *In re Robert M., supra*, which came to the same incorrect conclusion as respondent.

Respondent also refers (RBM 24) to language in section 736, which states that "except as provided in section 733, [DJJ] shall accept a ward committed to it pursuant to this article," if the ward can be materially benefited by DJJ's programs and DJJ has adequate staff, facilities, and programs to provide that care. The

"article" referred to includes section 731(a)(4), which includes the absolute prerequisite of a section 707(b) offense at some point, and that a ward not be otherwise ineligible pursuant to section 733. Again, section 733 by its express terms, is a way for an otherwise eligible ward to become ineligible. A ward must still be properly committed to DJJ before DJJ may legally accept him. Appellant was not properly committed.

Respondent's references to other, irrelevant, statutes (RBM 24) is discussed in section II.D herein. Those statutes do not create an ambiguity where none exists in the plain words of the statutes.

Respondent claims that appellant's interpretation of sections 731(a)(4) and 733 is a "narrow interpretation" (RBM 25), but in fact appellant's interpretation is the only interpretation that gives meaning to the language actually used in the statutes. If the legislature had chosen to make any enumerated sex offense an exception to the existence (at any time) of a section 707(b) offense, it could easily have said so in section 731(a)(4), yet it did not.

B. There Is No Need To Resort To An Analysis Of Legislative History Materials.

Because the statutes are neither ambiguous nor inconsistent, there is no need to resort to an analysis of the documents submitted by respondent in order to

discern a legislative intent different from what is obvious from the express language of the relevant statutes.

As set forth more fully in appellant's opening brief on the merits, statutory interpretation begins with an analysis of the language of the governing statute (*Beal Bank, SSB v Arter & Hadden , LLP* (2007) 42 Cal.4th 503, 507). See also, *People v Woodhead* (1987) 43 Cal.3d 1002, 1007. Words are afforded their ordinary and usual meaning, as the words the Legislature chose to enact are the most reliable indicator of its intent. (*Vasquez v California* (2008) 45 Cal.4th 243, 251.)

If the text evinces an unmistakable plain meaning, we need go no further. (*Beal Bank, supra*, at p. 508; *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758.) See also, *V.C. v Superior Court* (2009) 173 Cal.App.4th 1455, 1467; *In re J.L.* (2008) 108 Cal.App.4th 32, 55; *People v. Traylor* (2009) 46 Cal.4th 1205, 1212.

As stated recently by this court in *People v Albillar* (2010) 51 Cal.4th 47, 55, citing *Traylor, supra*:

> "We first examine the words of the statute, 'giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.' " (Ibid.) " 'If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.' "

The absence of an ambiguity dispenses with the need to review the legislative history. (*Albillar, supra*, at pp. 56, 67.) Where there is no ambiguity in the statutory text, the legislature is presumed to have meant what it said, and the plain meaning of the language governs. (*Albillar, supra*, at p. 55; *Lennane v Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.)

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

C. Appellant's Interpretation Of The Statutes In Question Is Consistent With The Legislative Intent Behind Their Enactment.

Respondent's conclusion that the legislative intent of sections 731 and 733 does not require a section 707(b) offense if appellant's only offense is a listed sex offense is incorrect.

As already set forth in section II.A *supra*, the language of the relevant statutes is consistent and unambiguous. It is undisputed that the legislative intent behind the statutes is as set forth in *V.C., supra*, 173 Cal.App.4th at p. 1469, citing *In re N.D.* (2008) 167 Cal.App.4th 885, 891, stating that the goal of the modifications to the statutes was to reduce the population at DJJ by placing there

only the most continually criminal and most violent and those whose criminal conduct is escalating and to place the others under the responsibility of the counties. It would be contrary to this legislative intent to commit appellant, a ward whose only offense is a non section 707(b) offense and whose probation violations consisted only of failing to do his assignments.

1. Respondent's Documents Are Improper For Judicial Notice.

Respondent filed a motion for judicial notice purportedly pursuant to Evidence Code sections 452, 453, and 459, and Rule 8.252(a) of the California Rules of Court, and attached numerous unindexed, unlisted, and frequently illegible documents. Pursuant to Evidence Code section 453, respondent is required to give appellant sufficient notice of the request to enable him to meet the request, and to furnish the court with sufficient information to enable it to take judicial notice of the matter. (*People v Terry* (1974) 38 Cal.App.3d 432, 439.) The materials must also be authenticated. (*East Bay Asian Local Dev. Corp. v California* (2000) 24 Cal.4th 693, 736, fn 5.). The materials submitted were not authenticated. There is merely a declaration by counsel for respondent that she asked two librarians for legislative history documents, was given some documents, and is attaching what counsel refers to as relevant ones. Counsel did not obtain the documents and does not say what they are.

It is not entirely clear what the documents are, partly because many of them are illegible, and partly because they are not listed or indexed. Without knowing who prepared the documents and for what purpose, and without evidence of which legislators, if any, read it, it is inappropriate to take judicial notice of these documents. (*Jones v The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172; *State Compensation Ins. Fund v Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10.)

Even if this court decides to take judicial notice of the documents submitted, this does not establish the truth of all recitals in the documents nor does it render inadmissible matters admissible. (*Mangini v R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063; *Marocco v Ford Motor Co.* (1970) 7 Cal.App.3d 84, 88; *Aquila Inc. v Superior Court* (2007) 148 Cal.App.4th 556, 569.) Additionally, this court may take judicial notice in whatever tenor it chooses and thus may determine what significance or interpretation to give the matters. (Evidence Code section 459(a); 1 Civil Appellate Practice 3d, §11.86; *StorMedia Inc. v Superior Court* (1999) 20 Cal.4th 449, 457, fn 9.) Although the reviewing court may take judicial notice of matters not before the trial court, it "need not give effect to such evidence." (*People v Hamilton* (1986) 191 Cal.App.3d Supp. 13, 21.)

Judicial notice may not be taken of any matter that is irrelevant; any matter to be judicially noticed must be relevant to a material issue. (*People v Rowland*

(1992) 4 Cal.4th 238, 268, fn 6; *People ex rel. Lockyer v Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn 2; *Mangini, supra.*)

As set forth, respondent requests judicial notice of what it claims to be various budget committee, rules committee, and Republican party fiscal office staff analyses. These materials are neither probative nor persuasive. Further they are not relevant because the statutes in question are unambiguous and consistent. It is urged that this court not give significance or effect to the selected recitals in the documents.

2. Respondent's Documents Are Neither Probative Nor Persuasive.

It is inappropriate and unnecessary to delve into a few sentences in the midst of the vast amount of purported legislative materials submitted by respondent.

First, as set forth, the language of the statutes is clear, unambiguous, and logically consistent, both among the statutes and with the legislative intent described in *V.C., supra*, and *N.D., supra.*

Second, respondent's citations to the purported legislative intent documents refer only to brief statements that the changes made by the bills (S.B. 81 and A.B. 191) would not impact juvenile sex offenders. Such statements are buried in documents concerning lengthy bills involving a very large number of statutes which were created or modified to implement the provisions of the budget (S.B. 81

implicates approximately 43 different statutes and A.B. 191 implicates approximately 13 statutes). In fact some of respondent's references are to statements made by legislative staff of the Republican caucus, a minority view. The remaining references are to notes made by other legislative staff, again to provisions which were a small part of the overall bills.

The unambiguous language of the statutes should control, and statements made by legislative staff should be given no weight under these circumstances. As set forth in *Halbert's Lumber, Inc. v Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238 (cited with approval by *California School Employees Assn. v Governing Board* (1994) 16 Cal.4th 1210, 1215):

> "[i]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.'"

In the instant case, it is the language of the sections 731(a)(4) and 733 that have survived the legislative gauntlet, and it was the language that was chosen after lobbying, study, drafting, amendment, analysis, and the votes of the houses of the legislature. This language of these sections should not be ignored in favor of any statements to the contrary buried in lengthy materials.

3. The Added Language In Section 731(a)(4) Does Not Support An Intent To Allow Any Ward With An Enumerated Sex Offense To Be Committed To DJJ Without Any Section 707(b) Offense.

Respondent claims that the addition of the A.B. 191 language of 731(a)(4) requiring, in addition to the S.B. 81 language requiring a section 707(b) offense, that the ward is not otherwise ineligible for commitment under section 733, evidences an intent to allow a ward with an enumerated sex offense but no section 707(b) offense to be committed to DJJ. Respondent is incorrect. The addition of that language does not increase the types of wards committable to DJJ, but rather narrows that class of wards, to further exclude wards described by section 733(c) from commitment.

Furthermore, it is inappropriate to utilize statutory language designed to lessen eligibility to DJJ to instead increase eligibility. (*In re Greg F.* (2011) 192 Cal.App.4th 1253, 1258; *V.C. supra*, 173 Cal.App.4th at p. 1455, fn 9.)

D. The Additional Code Sections Cited By Respondent Refer To A Different Class Of Individuals; It Is Logical To Treat Those Individuals Differently.

Respondent cites to several other statutes, to wit sections 1731.5, 1766, and 1767.35. However those statutes refer to a class of offenders completely different from appellant, to wit, those who had previously been committed to DJJ such as parolees, and those convicted in adult court after a criminal trial. It is completely

logical to treat those offenders differently, and in fact it is logical to treat those who are potentially the subject to the recall provisions of section 731.1 with this group rather than with the group of initial committees such as appellant.

Furthermore, since the legislature had no trouble using different language in those sections, the fact that they did not use that language in section 731(a)(4) further supports the conclusion that a section 707(b) offense is an essential prerequisite to a commitment to DJJ, as section 731(a)(4) specifically states. Similarly, in *Albillar, supra*, 51 Cal.4th at p. 56, the court noted that the legislature in that case clearly knew how to draft language to effectuate the urged purpose had it desired to, and indeed did so in other sections, yet it did not.

Section 1731.5 states, in pertinent part:

> "(a) After certification to the Governor as provided in this article, a court may commit to the Division of Juvenile Facilities any person who meets all of the following:
> (1) Is convicted of an offense described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code.
> ...."

That section applies to individuals who were convicted in a regular criminal adult proceeding. (Section 1731(a).) Section 1731(a), which is entitled "determination of age; commitment of adult to Youth Authority," provides:

> "When in any criminal proceeding in a court of this State a person has been convicted of a public offense and the person was a minor when he or she committed the offense, the court shall determine whether the person was less than 21 years of age at the time of the apprehension from which the criminal proceeding resulted.

> Proceedings in a juvenile court in respect to a juvenile are not criminal proceedings as that phrase is used in this chapter." (Emphasis added.)

Thus, it can be seen that that section applies only to those convicted in adult court in a criminal proceeding, not to those proceeding in juvenile court. This section gives a lesser alternative to state prison by allowing certain individuals convicted in adult court to go to DJJ instead. DJJ is a less serious alternative to those affected by this section, not a more serious one as it would be for appellant herein.

Section 1766(a) talks about what the juvenile parole board may do after a parolee from DJJ re-offends or violates parole. This section by definition applies to those who have already been committed to DJJ, have spent time there, and have been paroled. Section 1766(b) also contains specific language requiring county supervision of a violator except if the ward was originally committed for a section 707(b) offense or an enumerated sex offense.

Section 1767.35 also deals with parolees from DJJ, and specifically allows the ward to be returned to DJJ if the ward had committed a section 707(b) offense or an enumerated sex offense.

These sections have a few important things in common. First, they contain specific unambiguous language quite different from the language of sections 733(c) and 731(a)(4). While, as set forth, section 731(a)(4) requires a section

707(b) offense and that the ward not be otherwise ineligible pursuant to section 733(c), which in turn contains language requiring the most current offense be a section 707(b) offense unless it is an enumerated sex offense, which respondent incorrectly calls ambiguous or inconsistent, sections 1731.5, 1766, and 1767.35 are quite clear in saying that an individual subject to those sections can be committed to DJJ with either a section 707(b) offense or an enumerated sex offense.

The different choice of language is significant. If the legislature had wanted to authorize an initial commitment to DJJ without any section 707(b) offense whatsoever at any time, it could easily have said so in section 731(a)(4). That it was capable of creating language to say just that is obvious because of the language in sections 1731.5, 1766, and 1767.35.

The second common ground among sections 1731.5, 1766, and 1767.35, and for that matter 731.1, is that they all involve either a youth convicted after an adult criminal trial, or wards who had already spent time at DJJ. Such wards might have become hardened and/or gang-entrenched from their time at DJJ. They had been subject to the DJJ culture and, quite possibly, might be difficult to rehabilitate locally. It is perfectly logical to treat those wards differently from those who have never been at DJJ.

E. Respondent's Reliance On *In Re Robert M.* Is Misplaced; The Reasoning In *Robert M.* Is Flawed.

Respondent relies on the only published case on the ineligibility issue. That case is, as set forth *infra*, *In re Robert M.* (issued January 28, 2011) 192 Cal.App.4th 329 (petition for review filed March 9, 2011, pending, S191261). It is submitted that the reasoning in that case is seriously flawed and it should not be followed.

Robert M. concluded that sections 731(a)(4) and 733 were inconsistent, and further found that, if a 707(b) offense were absolutely necessary, the court would have to ignore the language in section 733(c) regarding penal code section 290.008 (*Robert M., supra*, 102 Cal.App.4th at p. 334). The court in *Robert M.* is wrong.

As set forth, Section 731(a)(4) requires both that a ward has committed a section 707(b) offense **and** that the ward is not otherwise ineligible under section 733. Section 733(c) provides that, in order to be committed to DJJ, the ward's **most recent offense** must be a 707(b) offense unless that most recent offense is an enumerated sex offense. The "unless" part of section 733(c) functions as an exception to the requirement that the **most recent** offense be a section 707(b) offense. Contrary to the reasoning in *Robert M.*, the section 707(b) requirement does not require the court to ignore this portion of section 733(c).

The "unless" language is only an exception to the "most recent" requirement. It is written that way, it is consistent with section 731(a)(4), and it does not require a strained or overly narrow interpretation to interpret it that way. Under appellant's reasoning and appellant's logical interpretation of the interplay between sections 731(a)(4) and 733, a hypothetical ward could have an older section 707(b) offense, with his most recent offense not a section 707(b) offense. Section 733 would allow such a ward to be committed to DJJ if that most recent non-section-707(b) offense were an enumerated sex offense. This is because this hypothetical ward had a past section 707(b) offense to meet the essential prerequisite in section 731(a)(4).

Far from requiring the court to ignore the section 733(c) "unless" language, this interpretation, which follows the rules of logic, is perfectly consistent with both statutes, and does not render any language surplusage.

III
IT IS IMPROPER TO COMMIT APPELLANT TO DJJ WHEN THE REQUIREMENT OF PROBABLE BENEFIT TO APPELLANT FROM THAT COMMITMENT IS NOT MET, WHEN ALTERNATIVE PLACEMENTS ARE NOT SUFFICIENTLY CONSIDERED, AND WHEN IT IS THEREFORE AN ABUSE OF DISCRETION TO COMMIT APPELLANT TO DJJ

As set forth in appellant's opening brief on the merits, an order committing appellant to DJJ will be considered improper unless the evidence before the court "demonstrates probable benefit to the minor from commitment to DJJ **and** that less

restrictive alternatives would be ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, *In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556; *In re George M.* (1993) 14 Cal.App.4th 376, 379; sections 202, 734.) Appellant was committed to DJJ for a single violation of Penal Code section 288(a), committed when he was 13 years old, and for probation violations involving his failure to do some of the work assigned in his placements and failure to do some of his school work as well.

A. Respondent's Claim That Punishment Alone Meets The Rehabilitative Purpose Is Incorrect.

First, respondent argues that one of the purposes of the juvenile court law recognizes punishment as a rehabilitative tool and as a means to protect public safety, apparently arguing that the goal of punishment by itself is enough. This is not the law. Contrary to respondent's position, punishment is not the **only** factor to be considered[3].

Respondent quotes portions of Welfare and Institutions Code section 202. Portions of the very sections cited by respondent, as well as other parts of section 202, demonstrate that punishment is not the only goal.

3 Respondent cites, both for this point and for other points regarding the probable benefit and abuse of discretion issues, *In re Robert M., supra.* However this is improper as those cites are to the unpublished portion of the *Robert M.* opinion. (Rules 8.1110(c) and 8.1115(a) of the California Rules of Court.)

Welfare and Institutions Code section 202 provides in pertinent part:

> "(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court....
> (b) .... Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest... This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter.
> ***
> (d) Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor in all deliberations pursuant to this chapter.
> ***
> 'Punishment,' for the purposes of this chapter, does not include retribution." (Emphasis added.)

It can be seen that, in addition to the protection of the public, an important goal of the commitment must be to benefit the minor, to provide him care, treatment, guidance, and services consistent with his best interests, and must be for rehabilitative purposes and not for retribution.

While it is true that, if a commitment conforms to the general purposes of the juvenile court law, the disposition will be deemed to fall within the sound discretion of the juvenile court. The key word here is "if." This commitment does not conform to those purposes.

Furthermore, the juvenile court's stated and sole reason for the commitment

was that appellant would receive benefit from DJJ's supposed sexual offender treatment programs (RT 98, 111-113, 120-124, 142-143). The problem was that there was no evidence that DJJ had any such programs. The juvenile court stated that this was its view, but this view was based on its 17 years as a prosecutor, which ended at the latest in 1996. The fact is that this was no longer the case, if it ever was, at the time of the disposition.

As set forth in appellant's opening brief on the merits, all of the doctors who evaluated appellant agreed that it would be inappropriate to send appellant to DJJ, and that he would not receive probable benefit there, he would not be rehabilitated there, and he would be damaged by such a commitment.

This was the only real evidence before the court at the disposition. The probation report did not evidence any personal familiarity with the actual sexual behavior treatment programs at DJJ, whereas the doctors who evaluated appellant opined that he would not receive the appropriate treatment there.

Because the court's reason for commitment was to get appellant the appropriate sexual behavioral treatment, and not to merely lock him up, the rehabilitative objective to which respondent refers is not part of the probable benefit found by the juvenile court and was not the basis for its decision.

B. Respondent's Argument That Appellant's Failure At Prior Placements Is Sufficient For Commitment To DJJ Is Incorrect.

Respondent argues that, because appellant has been tried at prior placements, there is no further requirement that appropriate alternative placements be considered at his dispositional hearing when he is committed to DJJ. Respondent is wrong.

While it is admitted that prior placements had been tried, this was not sufficient consideration of alternative placements. As set forth more fully in appellant's opening brief on the merits, it was agreed by the doctors who evaluated appellant that the prior placements were the wrong placements for him. Therefore, new and more appropriate placements were suggested and extensive reasons were given for them. It is those newly suggested placements which the juvenile court did not sufficiently consider but instead improperly rejected outright, even though it was demonstrated that they would provide the necessary environment and therapies which would have the highest likelihood of success, the stated goal of the juvenile court.

Respondent argues that appellant did not have a learning disability and cites as proof of that appellant's statement that sometimes he plays dumb and tries to do less than expected. However, respondent ignores two things: (1) numerous qualified doctors testified to appellant's learning disability, and to the fact that, in the proper program, with proper techniques utilized to address appellant's learning

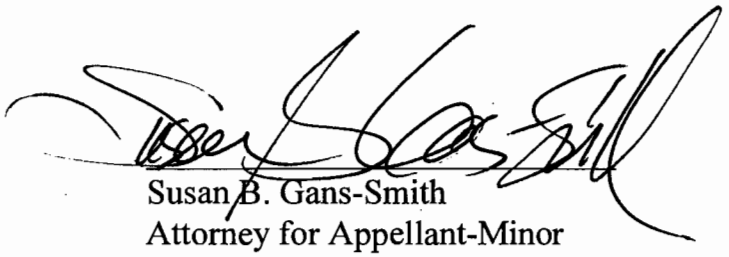
disability, appellant would do much better; and (2) appellant was a child, and a child would naturally try to protect himself against admitting he couldn't do something and instead say that he just didn't want to.

Respondent also argues that there was no reason to believe that another program would be different, but in fact the doctors testified that other programs with certain important attributes would indeed be different, and would have the best chance to help appellant, to rehabilitate him.

For all the foregoing argument and authority, it is respectfully submitted that this judgment should be reversed.

Respectfully submitted,

Dated: April 8, 2011



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CERTIFICATE OF WORD COUNT
(Ca. Rules of Court, rule 8.520(c))

The text of this brief consists of 5596 words as counted by the Microsoft Word 2000 word-processing program used to generate the brief.

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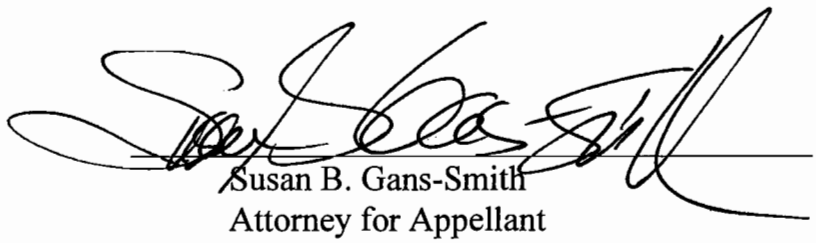

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PROOF OF SERVICE BY MAIL
[C.C.P. §1013a(1)]

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

On April 12, 2011, I served the foregoing document described as APPELLANT'S REPLY BRIEF ON THE MERITS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

*** See attached service list ***

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

Executed on April 12, 2011, at Santa Maria California.

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

Susan B. Gans-Smith

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