S189733

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-v-

MICHAEL DAVID CORNETT,

Defendant and Appellant.

ANSWER BRIEF ON THE MERITS

First Appellate District, Division Two, Case No. A123958
Sonoma County Superior Court, Case No. SCR 504048
The Hon. Rene Auguste Chouteau, Judge

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independent case system)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

QUESTION PRESENTED

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

STATEMENT OF THE CASE AND FACTS

As noted by the Attorney General, appellant was discovered committing an act of oral copulation on Jane Doe 1, who was 10 years 11 months old at the time. Later investigation revealed that he had also engaged in lewd acts with Doe 1's younger sister (Doe 2). Following a jury trial, he was convicted of seven felonies, including count 6, a violation of Penal Code section 288.7.[1] It also developed that he had a prior conviction for lewd acts with a stepdaughter from a previous marriage. As a result, appellant was sentenced under various applicable enhancements to a term of 150 years to life plus 10 years in state prison, including a term of 50 years to life on Count 6, stayed pursuant to section 654.

The Court of Appeal upheld the principal counts of conviction, but reversed the conviction on Count 6, because Jane Doe 1 was not "10 years of age or younger" as required by the statute. It also reversed the conviction on Count 7, involving Jane Doe 2.[2]

Appellant's Petition for Review to preserve state remedies was denied; Respondent's petition for review of the published portion of the opinion below was granted.

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

[2] The Attorney General did not petition for review of that reversal.

ARGUMENT

I.

INTRODUCTION

In this case, the Legislature created a new crime with imprisonment from 15 years to life, oral copulation with a child "ten years old or younger" that seems understandable on the six o'clock news, but is hopelessly ambiguous, because unlike almost every other penal statute punishing sexual contact with minors, it does not penalize sexual conduct with a person under a given age, but uses a new and unnecessary formulation that has only caused trouble in those states whose laws use similar language. Does the new law cover all children under the age of 11, all children under the age of 10, or perhaps all children up to and including their 10th birthday? As we shall see, even the Legislature did not know exactly what it meant.

In 2006, the Legislature enacted the "Sex Offender Punishment, Control, and Containment Act" (Stats 2006, ch. 337 [SB 1128].) Its stated goals were to manage sex offenders in the community so as to prevent future victimization, to create a "cohesive and comprehensive system" for monitoring the conduct of released sex offenders, and to "retool" the collection and dissemination of information about registered sex offenders (*Id.*, §2). The statute had 62 separate sections, and the bulk of its provisions dealt with sex offender registration, treatment of sex offenders, and

restriction of child pornography. In some cases, penalties were increased for sex offenses or probation was subjected to revised eligibility requirements, but for the most part, the law hewed close to its stated goals.

But the Legislature also added a new crime, providing for a term of up to life in prison for adults who engage in substantial sexual activities with very young children. The newly enacted section 288.7 (Stats 2006, ch. 337, §9) imposed a term of 25 years to life for any adult 18 or older who has sexual intercourse or sodomy "with a child who is 10 years of age or younger" (subd. (a)), and a term of 15 years to life for oral copulation or sexual penetration "with a child who is 10 years of age or younger" (subd. (b).) Appellant was sentenced under the latter provision, though the term was stayed pursuant to section 654.

The phrase, "10 years of age or younger" is inherently ambiguous. As we shall see, the courts of several states have held that similarly phrased penal statutes have held that children who have reached the age stated in the statute as so many "years and under" (or "less") are not under the stated age, they are over that age, therefore crimes involving them are not punishable under a statute with similar wording to section 288.7 (see, e.g., *State v. McGaha* (1982) 306 N.C. 699 [295 S.E.2d 449]; *Knott v. Rawlings* (1959) 250 Iowa 892, 894-895, [96 N.W.2d 900].) On the other hand, the courts of some states have come to the opposite conclusion (see, e.g., *State*

v. Christensen (Utah 2001) 20 P.3d 329; *State v. Carlson*, (1986) 223 Neb. 874 [394 N.W.2d 669].

This case is governed by the "rule of lenity" which requires that ambiguous penal statutes be interpreted in the manner most favorable to the defendant, or as stated in *People v. Avery* (2002) 27 Cal.4th 49, 58, "true ambiguities are resolved in a defendant's favor" although "an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." As we shall also show, the legislative history does not support the proposition that the Legislature intended section 288.7 to apply to persons who commit a specified crime against a child who is almost 11; instead, the intent was to punish crimes against children younger than ten.

The question to be decided by this Court, therefore, is, does "10 years of age or younger" mean all children under the age of 11, or all children under the age of 10, plus, possibly, a child who has just reached his or her 10th birthday? A majority of the Court of Appeal panel believed the law did not apply to appellant, because his victim was well over the age of 10, and the law was so ambiguous that under California's well established "rule of lenity" the statute must be interpreted as applying only to acts involving children under ten. We believe the Court of Appeal majority had it right.

II.

ALTHOUGH THE LEGISLATIVE HISTORY IS SCANT, THE LIMITED HISTORY AVAILABLE SUGGESTS THAT THE LEGISLATURE INTENDED TO PUNISH CRIMES AGAINST YOUNG CHILDREN, BY WHICH WAS MEANT CHILDREN UNDER THE AGE OF TEN

As noted, section 288.7 was a small part of a major piece of legislation enacted in 2006, SB 1128. In enacting the statute, the Legislature used the unusual language, "10 years or younger", and one question, therefore, is, what did the Legislature intend? As we shall see in part IV, *infra*, the meaning of the words "10 years or younger" is susceptible of two reasonable interpretations, and the courts of several other states have come to contradictory conclusions as to the meaning of similar statutes. Where the intended meaning of a statute is ambiguous, it is the duty of this Court to ascertain, if it can, the legislative intent and construe the statute in accordance therewith (*People v. Jones* (1988) 46 Cal.3d 585, 599). In ascertaining the meaning of an ambiguous statute, it is proper to consider legislative history (*People v. Arias* (2008) 45 Cal.4th 169, 182).

Almost all other statutes punishing sexual contact with persons under a certain age draw a clear and certain line: A crime is committed if the contact is with a child "under" a certain age – age 18 for unlawful sexual intercourse and similar offenses (§261.5) and age 14 for the lewd acts (the

crime commonly known as child molestation) (§288).[3] It goes without saying that under these laws, a person is not guilty of unlawful intercourse if his sexual partner has celebrated her 18th birthday, and is not guilty of child molestation under section 288, subdivisions (a) or (b) if he has sexual contact with a child who has reached his or her 14th birthday (see, e.g., *People v. Cantrell* (1992) 7 Cal.App.4th 523, 536-539).

It is therefore hard to fathom why the author of SB 1128 departed from normal practice and defined the new crime under section 288.7 as sexual intercourse, sodomy, or oral copulation "with a child who is 10 years of age or younger." However, such legislative history as we have shows that "10 years of age or younger" was intended to mean a child under the age of 10 years.

As introduced in the State Senate in the fall of 2003, the bill was a placeholder for a contemplated revision of several laws dealing with sexual offenders, most significantly, the Sexually Violent Predators law. On February 9, 2006, the bill was amended in the Senate to add substantive content; among the amendments was a proposed Section 5, that punished sexual intercourse and sodomy with children "10 years of age or younger" in

[3] The principal exception is section 288, subdivision (c), punishing lewd contact with "a child of 14 or 15 years" if the perpetrator is at least 10 years older than the child. But this section builds on the previous subsections punishing lewd acts with children "under the age of 14 years." The remaining examples, cited in the typed opinion of the Court of Appeal (p. 26) are either not penal in nature or involve seldom-prosecuted misdemeanors.

the exact language of what is now section (a) of section 288.7. The report of the Senate Committee on Public Safety described the bill as one enacting a new crime for intercourse or sodomy with a person 10 years of age or younger, merely quoting the bill's language with no further explanation (Sen. Com. On Public Safety, report [3/14/06] on SB 1128, p. K). The Senate Floor Analysis for Third Reading described this part of the bill as follows: "2. Creates a new crime for sex offenses against *very young children* with a punishment of 25 years to life." (Sen. Rules Com., Floor Analysis [5/30/06] for SB 1128, [2005-2006 Reg. Sess.], p. 1 [emphasis added].) The bill passed the Senate and went to the Assembly.

There, it was referred to the Assembly Committee on Public Safety, which analyzed the new crime as follows: "Punishes any adult who engages in sexual intercourse or sodomy with a child *under the age of ten years or younger* by sentencing the offender to a term of 25-years-to-life." (Assem. Com. On Public Safety, report [6/26/06] on SB 1128, p. 2 [emphasis added].) While in the Assembly, the bill was amended to also punish oral copulation with a person 10 years of age or younger with a term of 15 years to life (§288.7, subd. (b), the crime of which appellant was convicted.) The Assembly Floor Analysis as of August 22, 2006 used the same language with respect to the described sexual acts: "with a child under the age of ten years or younger" (Assem. Floor Analysis for SB 1128, [2005-2006 Reg. Sess.], p. 2). As amended the bill passed the Assembly, and was returned to

the Senate, which concurred in the amendments and sent the bill to the Governor.

Thus, the only explanation we have from the Assembly is that the bill was intended to apply to crimes against children "under the age of ten years" and the only explanation we have from the Senate, other than the text of the bill itself, is that it severely punished crimes "against very young children". We submit that 10-year-olds are not *very* young children and no doubt both houses felt they were providing extra punishment for the commission of crimes against children under the age of ten, despite the sloppy language.

III.

IF "TEN YEARS OLD OR YOUNGER" INCLUDES ALL PERSONS COMMONLY CALLED TEN-YEAR-OLDS, WOULD "OVER THE AGE OF 21 YEARS" THEN EXCLUDE ALL 21-YEAR—OLDS?

The Attorney General insists that "10 years of age or younger" must include all persons under 11, because in common parlance, all children are "ten years old" in the year before their 11th birthday. This proposition would lead to an illogical result, for using the same interpretive method, any law that imposes a penalty on persons "over the age of 21 years" would not apply to anyone not yet 22, because, in common parlance, a person remains a 21-year-old for the entire year after his 21st birthday, and only becomes over that age when he becomes 22.

California in fact has several penal laws dealing with sexual contact with minors that apply only to persons "over the age of 21 years". Section 288a, subdivision (b)(2) defines a felony of oral copulation of a victim "under 16 years of age" by a defendant "over the age of 21 years." Similar phrasing is used with regard to other offenses (§261.5 subd. (d) [sexual intercourse with child under 16]; §289, subd. (i) [sexual penetration]; §286, subd. (b)(2) [sodomy].) This is, we agree, not what the Legislature probably meant; indeed the relevant CALCRIM instructions for the above offenses specify that a person is liable if he is "at least 21 years old" (CALCRIM [Lexis-Nexis Ed. 2011] Nos. 1070, 1081, 1091, 1101). But surely if a law

applicable to a victim "10 years of age or younger" is to apply to all victims who are under the age of 11, based solely on the common understanding of "10 years of age", a limitation of liability to persons "over the age of 21 years" must exclude all those who are in common parlance still "21 years old".

We are not the first to notice this anomaly. In *Knott v. Rawlings*, (1959) 250 Iowa 892, 895, [96 N.W.2d 900], the Iowa Supreme Court rejected the identical argument the Attorney General makes here, asking rhetorically, "[s]uppose a man twenty-five years and six months of age were charged under this statute with an attack upon a female under the age of seventeen, would the state excuse him on the ground that he is only twenty-five years of age until the day he becomes twenty-six?"

Although we can find no published case that has considered an argument by a 21-year-old that he is not guilty of an automatic felony if he has sexual contact with a person under 16, because he is not "over the age of 21 years", we are confident that few appellate courts would accept such an argument. Once a person reaches is 21st birthday, he is "over the age of 21 years" even if he is not older than 21 in some senses of the word. Similarly, a person who is in common parlance "10 years old" is not "10 years of age or younger" after her birthday, she is 10 years of age or older. The decision of the Court of Appeal should be affirmed.

IV.

BECAUSE SECTION 288.7 IS AMBIGUOUS AND REASONABLY SUSCEPTIBLE TO TWO CONTRARY INTERPRETATIONS, THE RULE OF LENITY APPLIES IN THIS CASE

We quote the opinion of the Court of Appeal on this point:[4]

In California a criminal defendant "is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute..'" (*People v. Gutierrez* (1982) 132 Cal.App.3d 281, 284, quoting *Ex parte Rosenheim* (1890) 83 Cal.388, 391; *People v. Davis* (1981) 29 Cal.3d 814, 828; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631; *People v. Forbes* (1996) 42 Cal.App.4th 599, 603-604.) Thus, "when language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*In re Tartar* (1959) 52 Cal.2d 250, 256; accord, *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 487-488.) The foregoing principles reflect "the policy of this state to construe a penal statue as favorably to the defendant as its language and the circumstances of its application may reasonably permit...." (*Keeler v. Superior Court,* at p. 631; *People v.*

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[4] Respondent often quotes the dissent below. We quote liberally and at some length from the majority opinion below, because it is well researched and well written, and went far beyond the briefing.

Garcia (1999) 21 Cal.4th 1, 10; *People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427.) This principle is often referred to as the rule of strict construction but it is also know as the "rule of 'lenity.'" (*People ex rel. Lungren v. Superior Court,* at p. 312).

[Court of Appeal opinion, typed pp. 28-29]

The Court of Appeal went on to explain that although the rule of lenity was nominally abrogated in 1872 by the enactment of section 4, which stated that the common-law rule of strict construction no longer applied, numerous subsequent cases showed that the rule survived the statute. "The reason a higher degree of certainty is still required of a penal than a civil statute (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 60) is that the rule of strict construction possesses a constitutional dimension. As Professor Packer said, the rule of strict construction and the constitutional vagueness doctrine 'have an intimate connection and may most usefully be thought of as contiguous segments of the same spectrum' (Packer, *The Limits of the Criminal Sanction* (1968) 79, 93; see also Jeffries, *Legality, Vagueness, and the Construction of Penal Statues* (1985) 71 Va. L.Rev. 189, 198-201 (1985).) In effect, the rule of strict construction may be seen "as something of a junior version of the vagueness doctrine." (Packer, *supra, The Limits of the Criminal Sanction,* at p. 95.)"

[typed opinion of Court of Appeal, p. 34]

Noting the need for "clear directives" in penal legislation, the Court of Appeal quoted the following passage from a law review article: "Lenity is an appropriate background principle in the penal context.... When the legislature fails to speak clearly, considerations of lenity avoid the dilemma of how to derive a legitimate interpretation without 'legislating' by choosing *a priori* the stance the court will take. Considerations of lenity therefore create a presumption against criminal liability by assuming that the legislature only intended what was readily apparent." (Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity, supra,* 29 Harv. C.R. & C.L. L.Rev. 197, 206-207, fns. omitted)."

[Court of Appeal typed opinion, p. 35).

In *United States v. Bass* (1971) 404 US. 336, 338, the Supreme Court explained the reasons for the rule: "a fair warning should be given to the world in a language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

The Court of Appeal summarized the law stated in *Bass*, *supra* and other cases: "As stated in *Bass* and reiterated in *Liparota v. United States, supra,* 471 U.S. 419 at page 427, and *People ex rel. Lungren v. Superior Court, supra,* 14 Cal.4th 294 at page 313, 'because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should

define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. [Citation.]' *United States v. Bass, supra,* 404 U.S. at p. 348). Our own Supreme Court's opinion more than a century ago in *Ex parte Rosenheim, supra,* 83 Cal. 388, 391 also recognized that 'criminal penalties, because they are serious and opprobrious, merit heightened due process protection for those in jeopardy of being subject to them, including the strict construction of criminal statutes.' (*People ex rel. Lungren v. Superior Court, supra,* 14 Cal.4th at p. 313.)"

[Court of Appeal opinion, typed p. 36].

Moreover, the opinion in *People v. Gutierrez, supra*, is very much on all fours with the instant case. There, a penal law precluded a grant of probation to a defendant possessing more than one-half ounce of heroin. The term "ounce" could reasonably refer to either an avoirdupois ounce or an apothecaries' ounce, both of which are in common use, though most people think of the former when they see or hear the word. Because there is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment" the rule remains that if a legislative body "does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved...[against the government.]" (*Id.* at p. 285, quoting *Bell v. United States* (1955) 349 U.S. 81, 83-84.)

Respondent primarily relies on *People v. Avery* (2002) 27 Cal.4th 49, 57-58 for the proposition that the "rule of lenity" does not apply, despite the contrary example found in *People v. Gutierrez, supra*. What respondent overlooks is that *Avery* was not based on the interpretation of a modern penal statute, but instead required an interpretation or explanation of the common law. California law has always held that an intent to commit theft means an intent to *permanently* deprive the owner of his property. The question was, did a conviction in Texas of "burglary of a habitation" with the intent to commit theft qualify as a prior serious felony analogous to California's burglary statute defining first-degree burglary as entering an "inhabited dwelling house" (§§459, 460)?[5] The applicable Texas law defined the intent to commit theft required for burglary as an "intent to deprive the owner of property", and "deprive" was defined as "withholding property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." (*People v. Avery, supra.* at p. 54) Would a similar intent to deprive for an extended period of time qualify as an intent to steal under California law as embodied in sections 484 et. seq.?

This Court noted that the statutes defining theft do not use the word "permanently". The requirement of an intent to permanently deprive is based on common law, which distinguishes between theft and mere

[5] First degree burglary is a serious felony (§1192.7, subd. (c)(18)).

borrowing without permission. Exercising its power to interpret the common law, this Court determined that the Texas requirement should be *judicially* adopted in California (27 Cal.4th at pp. 54-55).

It is in that context that the *Avery* opinion's discussion of the rule of lenity must be considered. The actual statute at issue was the theft statute, section 484, which punishes as larceny instances where a person "shall feloniously steal" property. It can hardly be denied that the statute itself calls upon the courts to use the common law to determine when a taking is "felonious". At various times, courts have used various language to explain what sort of intent to deprive an owner of property qualifies as "felonious". In deciding the *Avery* case, this Court was not called upon to determine what the Legislature meant by "felonious" because the Legislature was simply enacting the common law into statute, and the common law is susceptible to change and interpretation, for as Oliver Wendell Holmes said, "The life of the law is not logic: it is experience."[6]

The *Avery* opinion summed up its discussion in this manner: "Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent" (27 Cal.4th at p. 58). In the subsequent case of *People v. Montes* (2003) 31 Cal.4th 350, this Court

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[6] Holmes, Oliver Wendell, Jr., *The Common Law*, p. 1 (1881), often summarized as "experience is the life of the law."

described the *Avery* decision as one that "limited the applicability of the rule of lenity as a means of resolving a perceived ambiguity in a penal statute" (*Id.* at p. 355, fn. 4). However, *Avery* did not substantially change the law in this regard. The rule had previously been explained as follows: "The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants 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." (*People v. Jones*, *supra*, 46 Cal.3d at p. 599).[7]

Here, the competing interpretations of the statute stand in relative equipoise, though the interpretation favorable to the defendant is somewhat better supported. As noted, the legislative history suggests an intention to punish crimes against "very young children", and the Assembly, at least, was told that this meant "children under the age of ten years or younger." And as we shall discuss in the next section, the better-reasoned decisions from other states support appellant's position, while most of the out-of-state decisions that favor respondent's position are based on a clear finding as to legislative intent, which cannot be made here. Therefore the rule of lenity applies, and appellant's conviction must be reversed.

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[7] In *People v. Hernandez* (2003) 30 Cal.4th 835, 869, this Court quoted the above language from *Jones*, *supra* and also cited the *Avery* decision.

V.

THE BETTER REASONED OPINIONS FROM THE COURTS OF OTHER STATES SUPPORT APPELLANT'S POSITION, AND MANY OF THE CONTRARY OPINIONS CAN BE DISTINGUISHED BASED ON LEGISLATIVE HISTORY OR CONTEXT NOT PRESENT HERE.

The Court of Appeal majority properly relied on opinions from the highest courts in other states that have interpreted language of the "n years or less" variety to cover only children just at or under the age stated in the statute. Contrary opinions from courts that have reached the opposite conclusion are in many cases based on context or legislative history not present here. Those few opinions that contain a reasoned discussion of the contradictory authorities are, we submit, not so well reasoned and often have relied on authority that should easily have been distinguished.

Although there are many court opinions that stand for the proposition we present in this case (collected at 73 A.L.R.2d 874), we will concentrate on the two that have been most quoted in subsequent decisions.

In *Knott v. Rawlings*, *supra*, 250 Iowa 892, 894-895, [96 N.W.2d 900], the charge was lewd conduct with a "child of the age of sixteen years or under." The defendant demurred and moved to dismiss on the ground that the child's birthday, stated in the indictment, showed he was 16 years six months old, and the Iowa Supreme Court granted certiorari to review the legal question presented. In holding that the statute only applied to crimes against children who had not passed their 16th birthday the Iowa

Supreme Court wrote,

> This calls for an answer to the following question: Is one who is sixteen years, six months and three days old "a child of the age of sixteen years, or under," within the contemplation of section 725.2 of the 1958 Code? We have no hesitancy in answering this question in the negative.... We ... follow the majority rule which seems to us to be supported not only by the better authority but also by the better reasoning.
>
> A child is one year old on the first anniversary of his birth and is sixteen years old on the sixteenth anniversary. Before the sixteenth anniversary he is under the age of sixteen years and after that anniversary he is over the age of sixteen. Sixteen years is an exact and definite period of time. It does not mean or include sixteen years and six months. We should be realistic and not read something into the statute which is not there and which clearly was not intended to be there. This is a criminal statute and cannot be added to by strained construction.
>
> "Of the age of sixteen years" must be construed to mean just what it says, i.e., sixteen years and not sixteen years, six months and three days.... It has been suggested that when one is asked to state his age he gives only the age at the latest anniversary of his birth and does not add the additional months and days which a completely correct statement would require, and this is cited as indicating it is commonly accepted that one is sixteen until his seventeenth birthday anniversary. All such arguments are unsound.... It is contended that when the legislature used the words "a child of the age of sixteen years, or under" it intended such words to mean "a child under seventeen years of age." That contention is answered by the fact that it chose the words "sixteen years, or under" in preference to the words "under seventeen years" which it would have used had it intended what the State maintains it intended.

In *State v. McGaha* (1982) 306 N.C. 699 [295 S.E.2d 449], the North Carolina Supreme Court explained its position more pithily. A statute

punishing sexual contact with a child "twelve years or less" did not apply where the alleged victim was twelve years and four months old. The court rejected an argument identical to that of the Attorney General in this case:

> The State also contends that "common practice" supports its position. That is, most people will state their age by giving the number of birthdays celebrated. Hence, one is still twelve until the thirteenth birthday. We agree that most adults state their ages in this manner. This "common practice," however, is based on the fiction that we grow older only at yearly intervals. The truth, of course, is that we grow older a day (or less) at a time. After a child celebrates his twelfth birthday, he is no longer "12 years or less," he is 12 and more.

(*Id.* at p. 701).

Many of the cases cited by respondent deal with laws that may be distinguished because the relevant context or statutory history made it clear that "n years or less" was intended to include all persons n years of age. For instance, in *State ex rel. Morgan v. Trent* (1995) 195 W.Va. 257 [465 S.E.2d 257], the law had previously punished sexual assaults against children "less than 11 years of age". When the law was amended to cover children "11 years old or less", it was clear that the legislature had intended to change the law by expanding its coverage by an additional year. In *State v. Christensen* (Utah 2001) 20 P.3d 329, the law presumed that intercourse with a female "over the age of 14, but not older than 17" was without consent, and the question was whether 17-year-old females were covered. A parallel law made sexual contact with a child under 18 by a parent or

caregiver punishable as incest. The Utah Supreme Court observed, "We can perceive no reason why the legislature would protect a minor seventeen years old in subsection 10 against sexual conduct by a parent, stepparent, adoptive parent, or legal guardian, but in subsection 11 would not protect the same seventeen-year-old minor against the enticing or coercion of an adult predator ...." Moreover, the legislative history of the statute strongly supported the State's position (20 P.2d at pp. 320, 331).[8] *State v. Shabazz* (N.J. App. Div. 1993) 263 N.J. Super. 246 [622 A.2d 403]) involved penalties for using persons "17 years of age or younger" in drug transactions. In context, the statute clearly was intended to apply to all juveniles, which means all persons under the age of 18. This conclusion was reinforced by a provision that said it was no defense to a prosecution that the defendant mistakenly believed that the person was 18 years of age or older (263 N.J. Super. at p. 253). *State ex rel. Juv. Dept. v. White* (1986) 83 Or.App.225 [730 P.2d 1279] required persons "17 years of age or younger" to have their drivers' licenses suspended if convicted of an alcohol-related offense. That this applied to all persons under 18 seemed obvious to the appellate court, and this conclusion was supported by legislative history; even so, a dissenting justice was of the opinion that *Knott v. Rawlings*, *supra*, compelled the interpretation that only persons

[8] Additionally, as the Court of Appeal observed (Opinion, pp. 32-33), Utah refuses to follow the standard rule that ambiguous states are to be strictly construed against the state and liberally construed in favor of the defendant.

exactly 17 or younger were covered.

Many of the other cases respondent cites are no more than an "ipse dixit", deciding the issue without a reasoned discussion of contrary authority. This is preeminently true of *Phillips v. State* (Tex. Crim.App. 1979) 588 S.W.2d 378, which decided that if the Legislature had meant "under the age of n years" it would have said so, ignoring contrary authority including the proposition stated in *State v. McGaha, supra*, that "[a]fter a child celebrates his twelfth birthday, he is no longer '12 years or less,' he is 12 and more" (306 N.C. at p. 701). Similarly, in *State v. Joshua* (1991) 307 Ark. 79 [818 S.W.2d 249] and *State v. Demby* (Del.1966) 672 A.2d 59 the opinions are devoid of reasoned discussion.

That leaves, among the longer opinions to take respondent's view, *State v. Carlson*, (1986) 223 Neb. 874 [394 N.W.2d 669]. The Supreme Court of Nebraska did discuss contrary authority, but failed to notice that much of the authority it relied on was inapposite. As a result, the *Carlson* opinion does not adequately explain why the long-settled law as set forth in *Knott v. Rawlings, supra* and *State v. McGaha, supra*, should be overturned. The case the *Carlson* court primarily relied on, *People ex rel Makin v. Wilkins* (1965) 22 A.D.2d 497 [257 N.Y.S.2d 288] was grounded on clearly indicated legislative intent. New York law had formerly provided that a sexual assault on a child under the age of 10 years could be a felony, while an assault on a child "over ten years of age and less than sixteen" was

a misdemeanor. At least one state-court decision had held that the 10th birthday was the intended dividing line and a felony could not be charged in a case where the alleged victim was over ten but under eleven (*People v. O'Neil* (1945) 208 Misc. 24, [53 N.Y.S.2d 945]). Years later, the statute was amended for the express purpose of including as felonies assaults on 10-year-olds. Inartfully, the legislature chose to modify the misdemeanor portion of the statute and not the felony portion, but the intent to cover sexual contact with all ten-year-olds was clear. Thus, the *Carlson* court mistakenly extracted a general principle from a special amendment to the statutes of another state. Since Nebraska had no similar legislative history, the *Carlson* court could reasonably have interpreted the statute in the same way the courts of Iowa and North Carolina did, recognized the ambiguity, and construed the statute favorably to the defendant.[9]

[9] No useful purpose would be served by discussing the "birthday rule". If a child becomes ten only on his or her birthday, and not the day before, the statute clearly applies before the birthday, and no longer applies on or after that date.

CONCLUSION

Section 288.7 represents one short portion of a large bill that mostly dealt with other subjects. The wording, "10 years of age or younger" is unlike the wording used in any similar penal statute, and is inherently ambiguous. As is apparent from both the legislative history and the decisions of the courts in other states, the provision at issue could reasonably have been intended to exclude from the coverage of the statute children who have passed their 10th birthday. Under the "rule of lenity" as formulated by this Court, the competing interpretations of the statute are at least in relative equipoise, and therefore the interpretation most favorable to the defendant must be adopted.

Dated: July 18, 2011

Respectfully submitted,

OZRO WILLIAM CHILDS
Attorney for appellant

CERTIFICATE OF WORD COUNT

I am counsel for appellant herein, and hereby certify that there are 5901 words in the brief to which this certificate is attached, excluding tables, this certificate, and any attachments authorized by Rule 8.360(b), California Rules of Court.

This certification is based on the word count feature of Office X for Macintosh, used to prepare the final version of this brief.

Dated: July 18, 2011

OZRO WILLIAM CHILDS

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1622 Fourth Street, Santa Rosa, California 95404.

On the date set forth below, I served the attached ANSWER BRIEF ON THE MERITS in said cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in a box designated for collection of mail, following ordinary business practices, at my business address. I am familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service and that this correspondence will be deposited with the United States Postal Service on the date set forth below in the ordinary course of business.

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Copy sent to or on behalf of Appellant pursuant to his instructions

O W CHILDS

I, Sharon Ricks, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed at Santa Rosa, California this 19th day of July 2011.

SHARON RICKS