# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**MICHAEL D. CORNETT,**<br>**Defendant and Appellant.** | No. S189733 |



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

## REPLY BRIEF ON THE MERITS

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## ARGUMENT

### I. APPELLANT'S POSITION IS NOT SUPPORTED BY LEGISLATIVE HISTORY

Penal Code section 288.7, subdivision (b) makes it a felony for an adult to engage in oral copulation or sexual penetration with a child who is "10 years of age or younger." Although in ordinary American usage, age is routinely stated in full years completed (Black's Law Dict. (8th ed. 2004), p. 66), appellant insists that the statute is ambiguous, and that Jane Doe I, who had not yet reached her 11th birthday, could reasonably be considered more than "10 years of age." To resolve the alleged ambiguity, appellant turns to legislative history, which he contends supports his view that the statute was not intended to protect children between their 10th and 11th birthdays. His "evidence" does not withstand analysis.

Appellant first points to a bill analysis describing the proposed legislation as creating a new crime "for sex offenses against very young children . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended May 30, 2006, p. 1.) According to him, "10-year-olds are not *very* young children." (ABOM 9, original italics.) He does not explain how he divines the line between children, young children, and very young children, and not surprisingly provides no citation therefore. In our view, the quoted language, itself ambiguous, provides no aid whatsoever in interpreting the statutory language. Moreover, another bill analysis describes the proposed legislation as creating a new crime for specified sex crimes "against young children," as opposed to "very young children," demonstrating that the adverb is not meaningful. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended March 7, 2006, p. B.)

Appellant's other legislative history argument rests on an assembly committee analysis describing the proposed legislation as punishing any

adult who engages in specified sexual activity "with a child under the age of 10 years of age or younger . . . ." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended June 22, 2006, p. 2; see also Assem. Floor Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended Aug. 22, 2006, p. 2 [repeating the quoted phrase].) The quoted phrase makes no sense. A child can be (1) under the age of 10 years, or (2) 10 years of age or younger, but what does it mean to be "under the age of 10 years of age or younger"? Any child who has not reached the 10th birthday is under the age of 10 years. To whom does "or younger" refer? It is a redundancy. The only reasonable conclusion is that the author made an error while attempting to copy the statutory language.[1] Indeed, construed as appellant would have it, the quoted language *contradicts* the statutory language. According to appellant, the legislative history shows the statute was intended to protect a child under the age of 10 years. (ABOM 7.) The plain language of the statute, however, states that it applies to a child "10 years of age or younger," which at the very least would cover the child molested on her 10th birthday.

In short, neither of the two thin strands upon which appellant relies point to the conclusion he advocates. The first quoted excerpt from the legislative history is more general than the statutory language itself. The second is plainly a typo.

## II. APPELLANT'S POSITION IS NOT COMPELLED BY LOGIC

Appellant's next appeal is to logic: if "10 years of age or younger" includes a person who has not yet reached her 11th birthday, "over the age of 21 years" must exclude a person who has not yet reached her 22nd

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[1] The nonsensical quote appears in two bill analyses prepared by the same author, suggesting the latter was the product of a careless "cut and paste."

birthday. (ABOM 10, citing Penal Code, §§ 261.5, subd. (d),[2] 286, subd. (b)(2), 288a, subd. (b)(2), 289, subd. (i).) That is, statutes requiring a person to be "over 21" must be interpreted to refer to persons who are 22 years of age or older—a result appellant agrees would not be correct.

We, too, agree that "over the age of 21 years" in the cited statutes refers to persons who have passed their 21st birthday—that is, persons 21 years of age or older. Indeed, one of the statutes appellant cites, Penal Code section 261.5, subdivision (d), which originally employed this language, was amended in 1998 to read "21 years of age or older." (Stats. 1998, ch. 925 (A.B. 1290), § 1.) According to the legislative history, the change was prompted by the misinterpretation of the phrase to mean persons 22 years of age or older.

> As currently drafted any person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years. *This portion of the statutory rape statute has been held to apply to persons who are 22 years of age or older.*
>
> *As such, adults who are 21 but are not yet 22 are not subject to these penalty provisions. Staff is advised that this resulted from a drafting error in the 1993 statutory rape revision.*

(Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1290 (1997-1998 Reg. Sess.) as amended June 24, 1998, § 7 ("Age Clarification Issue in Statutory Rape Cases"), italics added.)

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[2] Penal Code section 261.5, subdivision (d) actually uses the phrase "21 years of age or older." However, subdivision (e)(1)(D) of the same section uses the phrase "over the age of 21 years."

Certainly "over the age of 21 years," as used in the statutes appellant cites, refers to persons who have reached their 21st birthdays. That is not inconsistent with respondent's argument here, which is based on different language in a different statute that seeks to accomplish a different purpose. No anomalous legal result appears as the court explained in *People v. Mendoza* (2003) 342 Ill.App.3d 195 [795 N.E.2d 316]. The defendant there made the opposite argument as appellant here, arguing that a recidivist statute for defendants "over the age of 21 years" did not apply to him because he was not yet 22 years old. The court explained that the defendant's interpretation was "contrary to what 'over 21' is commonly understood to mean." (795 N.E.2d at p. 319.) "Becoming 21 years old is a significant milestone in our society, and Illinois's legislative scheme reflects this" by banning the consumption of alcohol by persons "under 21" years old, and defining juveniles and adults by reference to whether they are "under the age of 21 years" or "21 years or older." (*Ibid.*) "To adopt defendant's reasoning would 'repeal long standing custom and usage.'" (*Id.* at p. 320.)

The court dismissed the defendant's argument that interpreting "over 21" to include those between their 21st and 22nd birthdays would be inconsistent with cases like *State v. Carlson* (1986) 223 Neb. 874 [394 N.W.2d 669] and others relied upon by respondent here (RBOM 7-8) whereby "21 years old or younger" would include anyone under 22.

> [Such cases address] entirely different language that has no bearing on the analysis here. Under the type of statutory language at issue in the decisions just cited, defendant here could be considered "21 years old or younger," but that is not the question before us. Our decision is based on the common understanding of what it means to be "over 21." It would not be inconsistent to conclude that defendant was "21 years old or younger" under a statute like the ones in the cases cited above and "over 21" under the statute at issue here.

(795 N.E.2d at p. 320.)

California, too, treats 21 as a milestone birthday, establishing it in its Constitution as the age of majority for purposes of the sale or furnishing of alcoholic beverages (Cal. Const., Art. XX, § 22 [prohibiting the sale or furnishing of alcohol to any person "under the age of 21 years"]), and in statute as the age of majority for purposes of gaming (Bus. & Prof. Code, § 19921 [prohibiting any person "under 21 years of age" from entering a gaming establishment]) and juvenile court jurisdiction (Welf. & Inst. Code, § 607, subd. (a) [providing that juvenile court may retain jurisdiction over a ward or dependent until the child "attains the age of 21 years"]). For this reason, the "usual, ordinary import" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743) of the phrase "over 21" means past the 21st birthday, just as the usual, ordinary import of "10 years of age is younger" means before the 11th birthday. Philosophers may decry the logical inconsistency of this result, but it is entirely in keeping with the rules governing statutory interpretation, which seek to ascertain and effectuate the intent of the Legislature by interpreting its words in accordance with common usage and understanding. (*Yassin v. Solis* (2010) 184 Cal.App.4th 524, 531.)

## III. RESPONDENT'S VIEW IS SUPPORTED BY CASE LAW FROM OTHER STATES

Appellant argues that the out-of-state case law supporting respondent's position is distinguishable for a variety of reasons. "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." (ABOM 21.)

The same was true in *State v. McGaha* (N.C. 1982) 306 N.C. 699 [295 S.E.2d 449], a 4-3 opinion upon which appellant places great reliance. Nevertheless, the majority, ignoring the statutory history, held that "a child of the age of 12 years or less" as used in North Carolina's rape statute referred to a child who had not yet passed her 12th birthday. It was the three dissenting justices who pointed out that the predecessor statute to the one at issue read "any female child under the age of twelve years." They asked, "Why did the legislature change the wording of the statute in 1979 and 1981? . . . The logical inference is that the legislature wanted to extend the protection of the statute to children who had not attained their thirteenth birthdays. Otherwise, there is no reasonable basis for the deletion of 'under' and the use of the phrase 'of the age of 12 years.'" (*State v. McGaha*, *supra*, 295 S.E.2d at p. 452 (dis. opn. of Martin, J.).) To accept the reasoning of *Trent*, then, as appellant apparently does, one must reject the reasoning of the majority in *McGaha*. Yet that is the opinion appellant would have this Court follow.

The statutory language at issue here cannot be resolved based on statutory history. However, the dissenting opinion in *McGaha*—which, as we have shown, is better reasoned than the majority opinion—also noted that the phrase "of the age of 12 years" "means 'while a child is 12 years old,' or 'during the period that a child is 12 years of age.'" (*State v. McGaha*, *supra*, 295 S.E.2d at p. 452 (dis. opn. of Martin, J.).)

> If the legislature intended the protection of the statute to terminate at the instant of a child's twelfth birthday, it would have used language such as "a victim who has attained his 12th birthday or less." The words "of the age of 12 years" denote a continuing condition until the child's thirteenth birthday. The use of the verb "is" with the phrase "of the age," rather than "has attained" or similar language, denotes a continuing or existing condition.

(*Ibid.*)

Likewise here, if the Legislature intended the protection of Penal Code section 288.7 to end on the child's 10th birthday, it would have had the statute apply to a child "who has attained 10 years of age or less" rather than to a child "who is 10 years of age or younger." (See, e.g., Pen. Code, § 457.1, subd. (b)(3); Health & Saf. Code, § 11361.5, subd. (a); Welf. & Inst. Code, § 607, subds. (a), (b) [all making statutory cutoff by reference to date person attains specified age].)

Appellant's attempt to distinguish the other cases in respondent's favor is equally unavailing. *People v. Christensen* (Utah 2001) 20 P.3d 329 and *State v. Shabazz* (App. Div. 1993) 263 N.J.Super. 246 [622 A.2d 944], and for that matter *State ex rel. Morgan v. Trent*, *supra*, may have had more than one basis for concluding that statutory language similar to that here should be read to encompass the entire year the person is the age named in the statute. A primary basis in all three, however, was that in ordinary usage, age is counted in yearly intervals. The same is true of the other decisions cited in respondent's opening brief. Although the case law on this subject is not uniform, we believe respondent's view represents the modern trend and the one contemplated by the Legislature for the reasons expressed in our opening brief.

## IV. THE RULE OF LENITY DOES NOT APPLY

Appellant seeks to distinguish *People v. Avery* (2002) 27 Cal.4th 49, 58, cited in respondent's brief for the principle that the rule of lenity applies only in cases of true interpretive deadlock, where there is egregious ambiguity such that the court can do no more than guess at what the legislature intended. (RBOM 13.) To this end, he points out that *Avery* "was not based on the interpretation of a modern penal statute, but instead required an interpretation or explanation of the common law." (ABOM 16.) The precise factual context of *Avery* itself is immaterial, however. In

discussing the rule of lenity, this Court did not distinguish between cases calling for linguistic interpretation versus those calling for interpretation by reference to common law. The point, rather, was that penal statutes are not to be construed strictly, but rather to the fair import of their terms, and that the rule of lenity is to be used only as a last resort in resolving an ambiguity. (*Avery, supra*, 27 Cal.4th at pp. 57-58.) This Court has, in fact, reaffirmed this principle in a number of cases since the decision in *Avery* in situations that did not involve interpretations based on common law. (*People v. Zambia* (2001) 51 Cal.4th 965 [2011 WL 2150236, *9, fn. 7]; *People v. Medina* (2007) 41 Cal.4th 685, 699; *People v. Montes* (2003) 31 Cal.4th 350, 355, fn. 4; *People v. Hammer* (2003) 30 Cal.4th 756, 771, fn. 13.) This case does not call for the use of a tie-breaker like the rule of lenity because there is no tie. The Legislature's intent in criminalizing oral copulation with a child "10 years of age or younger" can be discerned based upon ordinary American usage whereby age is stated in full years completed, modern case law from foreign jurisdictions, and the other considerations discussed in respondent's opening brief on the merits. (See RBOM 14.)

Appellant resists the notion that ordinary usage or "common parlance" may be used as an interpretive tool in resolving the meaning of the statute, and insists that resort to the rule of lenity is required. Like the Court of Appeal below, he places great reliance on a single case, *People v. Gutierrez* (1982) 132 Cal.App.3d 281. As the court below explained, "*Gutierrez* involved a statute precluding a grant of probation to a defendant possessing more than one-half ounce of heroin. The term 'ounce' could refer to either an avoirdupois ounce or an apothecaries' ounce . . . . Even though the average person would understand the word 'ounce' to refer only to an avoirdupois ounce, and few would even be aware another type of ounce existed, the court rejected the idea that the meaning of the word 'ounce' in a

penal statute could be made certain by its common usage." (Typed opn. at p. 30 (maj. opn. of Kline, P.J.).) Instead, relying on the rule of lenity, the *Gutierrez* court adopted "the uncommon use of an apothecaries' ounce as the weight standard." (*Ibid.*)

Neither appellant nor the court below mention what happened next: the very next term, the Legislature amended Penal Code section 1203.07, the statute at issue in *Gutierrez*, and four other statutes (Pen. Code, §1203.04, Health & Saf. Code, §§ 11352.5, 11357, 11360) to eliminate the words "ounce" and "one-half ounce" and replace them with the gram equivalent of an avoirdupois ounce or half ounce. (Stats. 1983, ch. 222, §§ 1-5, pp. 690-693.) The legislative history indicates the purpose of the bill was to overrule *People v. Gutierrez*. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1242 (1983-1984 Reg. Sess.) as amended April 18, 1984, p. 2.) "In effect, the bill would adopt the avoirdupois ounce as the standard of measurement instead of the apothecary ounce measure adopted by the court, but would state it in its rough equivalent in grams." (*Id.* at p. 3.)

The lesson to be learned from *Gutierrez* is that ordinary usage can and should be used in determining legislative intent. Absent evidence of contrary intent, this Court should assume that "in drafting the statute, [the legislators] intended to 'talk the way regular folks do.' [Citation.]" (*State v. Shabazz*, *supra*, 622 A.2d at p. 916.) Applying the rule of lenity to adopt a meaning at odds with common parlance would disserve the public, whom statutes are intended to inform. (*People v. McGaha*, *supra*, 295 S.E.2d at p. 453 (dis. opn. of Martin, J.) ["The aim of the criminal statute is to notify a person of ordinary understanding and intelligence of the conduct that is prohibited."].)

## CONCLUSION

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

Dated: August 8, 2011

Respectfully submitted,

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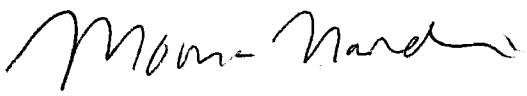

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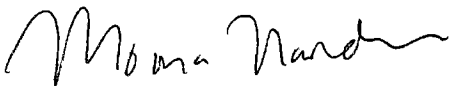
## CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,002 words.

Dated: August 8, 2011

KAMALA D. HARRIS
Attorney General of California



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