IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAMES RICHARD JOHNSON
Petitioner and Appellant,

v.

CALIFORNIA DEPARTMENT OF JUSTICE
Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA
Real Party in Interest and Respondent.

Case No. S209167

Court of Appeal Case No. E055194 (4th Dist., Div. 2)

San Bernardino County Superior Court Case No. CIVDS1105422

SUPPLEMENTAL LETTER REPLY BRIEF

After decision of the Fourth District Court of Appeal, Division Two

After Appeal from the Superior Court of San Bernardino County,
The Honorable David Cohn, Judge, Presiding

MICHAEL A. RAMOS
District Attorney
BRENT J. SCHULTZE
SBN 230837
Deputy District Attorney
Appellate Services Unit
412 W. Hospitality Lane,
First Floor
San Bernardino, CA,
92415-0042
Telephone: (909) 891-3302
Fax: (909) 891-3303
bschultze@sbcda.org
Attorneys for Respondent and
Real Party in Interest, the
People of the State of California

COUNTY OF SAN BERNARDINO
Office of the District Attorney
Appellate Services Unit
MICHAEL A. RAMOS
DISTRICT ATTORNEY

January 16, 2014

Honorable Tani Gorre Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California, 94102-4797

Re: Supplemental Letter Reply Brief
James Richard Johnson, Petitioner and Appellant v. California Department of Justice, Respondent; The People of the State of California, Real Party in Interest and Respondent.
S209167; E055194; CIVDS1105422

Dear Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to the Court's order of December 18, 2013, the People reply to appellant Johnson's supplemental letter brief. In that brief, appellant minimizes the problematic aspects of *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*) and the damage that case has the potential to cause, if this Court does not clarify or overrule it. The People believe the Court should give serious consideration to overruling *Hofsheier*, or at the very least should clarify and limit it.

412 W. Hospitality Lane, First Floor, San Bernardino, CA 92415-0042 Phone: (909) 891-3302
E-mail address: bschultze@sbcda.org Web site: www.sbcountyda.org Fax (909) 891-3303

I. Area of Agreement: Rational-Basis Review

The parties agree with the determination in *Hofsheier* that rational-basis review should be used. The sex offender registration laws do not involve any interests that would merit a higher level of scrutiny.

II. Areas of Disagreement: The Past and Future Effects of *Hofsheier*

Essentially, the parties disagree about the effects that *Hofsheier* has had on California jurisprudence, and the potential effects that it may have in the future. Appellant cites its useful and uncontroversial aspects, while the People's letter brief noted the problems it has caused and could cause.

The People agree that *Hofsheier* has often been cited for basic equal protection principles, which generally originated elsewhere and were cited and relied upon in *Hofsheier*. Such citations are fairly uncontroversial. It is the *Hofsheier* case itself that has caused problems.

A. The Lower Courts Do Not Agree on What *Hofsheier* Itself Means

When the lower courts try to apply *Hofsheier*, problems sometimes arise. The problem is illustrated by this case, and by the split of authority between *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*) and *People v. Ranscht* (2009) 173 Cal.App.4th 1369 (*Ranscht*). The split between these cases arises out of a difference of opinion as to the very holding of *Hofsheier* itself.

Hofsheier explained that it was not concerned with cases involving a forcible sexual act, or with victims under age fourteen. (*Supra*, 37 Cal.4th 1185, 1198.) *Ranscht* considered this language to be dicta, while *Manchel* considered it to be an important to key to understanding *Hofsheier's* holding. Both views cannot be correct.

To support its ruling that requiring registration of a defendant convicted of sexually penetrating a thirteen-year-old victim violated equal protection, *Ranscht* added a level of analysis not found in *Hofsheier*, concerning specific versus general intent. (*Supra*, 173 Cal.App.4th 1369, 1373-1374.) This specific-intent analysis has not always been persuasive in *Ranscht's* sister courts. (See *People v. Gonzalez* (2012) 211 Cal.App.4th 132, 137, fn. 2 [noting that intercourse without specific sexual intent would be "freakishly rare" and that the Legislature could therefore disregard such exceptional and unlikely scenarios].)

B. The Lower Courts Have Extended *Hofsheier* in Unexpected Ways

Some cases have taken *Hofsheier's* basic issue, whether a defendant can be required to register as a sex offender, and have extrapolated it to eligibility for relief from the registration obligation via a certificate of rehabilitation. (See *People v. Schoop* (2012) 212 Cal.App.4th 457 [ten-year rehabilitation period held to violate equal protection]; *People v. Tuck* (2012) 204 Cal.App.4th 724, 739-742 [in concurrence,[1] noting possibility that all violations of Pen. Code, § 288, subd. (a) may be eligible for relief, based on legislative oversight in failing to exclude violations of Pen. Code, § 288.7].)

Hofsheier's reach has not been limited to sex offender registration. By comparing people convicted of different offenses (in circumstances that do not implicate fundamental interests that would invite strict scrutiny) *Hofsheier* perhaps unwittingly invited the lower courts to do the same with other offenses.

---

[1] Although clearly dicta in this case, this concurrence was likely the inspiration for the issue under consideration in *People v. Tirey* (Court of Appeal case number G048369).

As discussed in the People's Supplemental Letter Brief, this Court has already faced such a situation in *People v. Turnage* (2012) 55 Cal.4th 62. In that case, the very elements of an offense were challenged based on *Hofsheier*—a challenge that proved successful in the Court of Appeal.

III. In this Case, the People Do Not Join the Attorney General's Past Concessions

Appellant refers to two unpublished Court of Appeal cases where the Attorney General conceded that *People v. Manchel* (2008) 163 Cal.App.4th 1108 was wrongly decided. (Appellant's Supplemental Letter Brief, p. 7, citing *People v. Porter* (Oct. 24, 2011, B22831) and *People v. Wagner* (Oct. 4, 2010, E049563).)

The People, here represented by the District Attorney of San Bernardino County, do not make a similar concession. If anything, the Attorney General's past concessions highlight the problems that have arisen in *Hofsheier's* wake.

In *People v. Artz* (Feb. 13, 2013, C068429),[2] the Attorney General conceded the defense's *Hofsheier*-based arguments, which went far beyond sex offender registration. The Attorney General conceded that defendant could not be convicted of violating Penal Code section 288.3, because although it applied to communicating with a minor to violate Penal Code section 288a, it did not include communicating with a minor to violate section 261.5. (Slip opn., pp. 4-6.) Effectively, the defense's *Hofsheier*-based

---

2 This unpublished case is not cited as authority, given the constraints of California Rules of Court, rule 8.1115, but rather for illustrative purposes and in response to appellant's argument in his letter brief.

argument, the Attorney General's concession thereto, and the Court of Appeal's acceptance of both un-wrote part of a criminal statute.

People v. Artz went further. Defendant argued that he should not be convicted of a felony for violating Penal Code section 288a, subdivision (b)(1), because intercourse could only have resulted in a conviction of section 261.5, subdivision (b). (Slip opn, p. 8.) Again the Attorney General conceded, and again the argument and concession were accepted by the Court of Appeal; defendant's conviction was reduced to a misdemeanor. (Slip opn., pp. 8-9.)

People v. Artz shows the degree to which *Hofsheier* has undermined traditional equal protection principles. By reducing a felony to a misdemeanor, the Court of Appeal invalidated the Legislature's[3] prerogative to recognize degrees of culpability. (*Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 613.) By invalidating defendant's conviction for violating Penal Code section 288.3, the Court of Appeal decided that the section should be partially invalidated for underinclusiveness, contrary to *People v. Ward* (2005) 36 Cal.4th 186, 217. By holding that defendant could only receive a misdemeanor sentence, the Court of Appeal invaded the Legislature's power to set punishments for crimes. (See *People v. Wingo* (1975) 14 Cal.3d 169, 174 [definition of crime and determination of punishment are uniquely in domain of Legislature]; see also *People v. Knowles* (1950) 35 Cal.2d 175, 181.)

---

[3] Penal Code section 288.3 was added by an initiative, Proposition 83, in 2006. However, the fact that it was the People of California who exercised the legislative function does not alter the constitutional analysis. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208.)

People v. Artz illustrates the problems that *Hofsheier* has created. By supplanting traditional equal protection principles, *Hofsheier* opens the door to judicial reordering of California criminal law. Not only does this endanger the principle of separation of powers that underlies California's constitutional order, it also contains the seeds of legal chaos: the potential for increased litigation over whether or not criminal statutes violate equal protection, and the eminently-foreseeable divergence of opinion as different judges look at the same statutes from different perspectives in different cases.

IV. If *Hofsheier* Is Overruled, It Should Be Retroactive

In their Supplemental Letter Brief, the People argued for retroactive application if *Hofsheier* is overruled. In his, appellant argues for prospective application only.

Retroactive application is supported by case law specific to sex offender registration. (*People v. Castellanos* (1999) 21 Cal.4th 785.) Additionally, in *Doe v. Harris* (2013) 57 Cal.4th 64, the Court held that plea agreements include the reserve power of the state to amend the law or enact different ones.

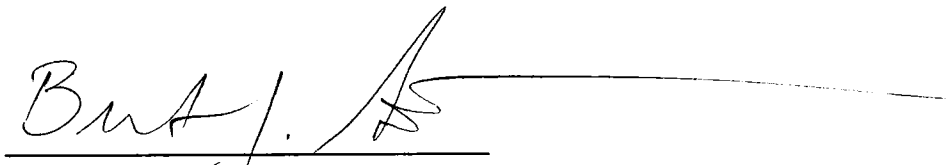
Appellant suggests that large numbers of settled criminal cases will need to be reopened if *Hofsheier* is retroactively overruled. Yet given the time limits of Penal Code section 1018, it is unlikely that many pleas would be withdrawn. It is also speculative how many defendants would have any interest in withdrawing a plea and electing trial, surrendering the benefits of their bargains to gamble that they might be acquitted of all registerable offenses charged.

Conclusion

The Court should give serious thought to overruling *Hofsheier*. It is not an equal protection violation for the *same* criminal conduct to be covered by more than one statute, with different punishments and consequences. (*United States v. Batchelder* (1979) 442 U.S. 114, 123-125; *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) For a variance in the collateral consequences of *similar yet different* criminal conduct to constitute an equal protection violation is incongruous.

If the Court is not inclined to overrule *Hofsheier*, it should clarify its limits. Otherwise, the lower courts will be forever comparing statutes, puzzling over which statutory quirks and inconsistencies rise to the level of an equal protection violation, and what remedy should apply.

Sincerely,



BRENT J. SCHULTZE
Deputy District Attorney
Appellate Services Unit

CERTIFICATE OF WORD COUNT

I certify that this **SUPPLEMENTAL LETTER REPLY BRIEF** uses a Bookman Old Style typeface and 13-point font and contains **1,377**words.

Done this 16th day of January, 2014, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,

BRENT J. SCHULTZE,
Deputy District Attorney,
Appellate Services Unit.

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE BY UNITED STATES MAIL

STATE OF CALIFORNIA	ss.	***JOHNSON v. CALIFORNIA DEPT. OF JUSTICE (PEOPLE)***
COUNTY OF SAN BERNARDINO		S209167

Brent J. Schultze says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on January 16, 2014, I served the within:

SUPPLEMENTAL LETTER REPLY BRIEF

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at 412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042, addressed as follows:

Marilee Marshall
523 W. Sixth Street,
Ste. 1109
Los Angeles, CA, 90014
(2 copies)

Andrew J. Moll
Deputy Public Defender
364 N Mountain View Ave
San Bernardino, CA, 92415

Attorney General
P.O. Box 85266-5299
San Diego, CA, 92186-5266

Appellate Defenders, Inc.
555 W. Beech Street,
Ste. 300
San Diego, CA, 92101

Clerk of the Court
San Bernardino
Superior Court
For: Hon. David Cohn
303 W. Third Street
San Bernardino, CA, 92415

Clerk of the Court
Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA, 92501

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on January 16, 2014.

Brent J. Schultze

PROOF OF SERVICE BY UNITED STATES MAIL