SUPREME COURT COPY

No. S183737
B214707

SUPREME COURT
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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 OPENING BRIEF ON THE MERITS

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APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTIONS PRESENTED FOR REVIEW

1. May a ward be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) without any offense which falls within Welfare and Institutions Code section 707(b)?

2. May a ward be committed DJJ without any offense which falls within Welfare and Institutions Code section 707(b), if his only offense is a registrable sex offense?

3. Is it error to commit appellant to DJJ without evidence demonstrating probable benefit from his commitment there?

4. Is it error to commit appellant to DJJ when the evidence submitted to the juvenile court was overwhelming that appellant would not receive probable benefit from his commitment there?

5. Is it error to commit appellant to DJJ without adequately considering alternative placements, and was it improper to reject the ones offered?

6. Is it a violation of appellant's 5th and 14th Amendment due process rights to commit him to DJJ when the evidence was overwhelming that there was virtually no chance the commitment would provide benefit to him and/or without adequately considering alternative placements?

STATEMENT OF THE CASE

November 22, 2005, Original Petition.

On November 22, 2005, an original petition was filed against appellant, **age 13**, pursuant to Welfare and Institutions Code section 602 (I[1] CT 1-2). The petition alleged a violation of Penal Code section 288(a), lewd act upon S.H., a child under the age of 14, a felony (I CT 1).

On December 20, 2005, appellant admitted the charge (I CT 6, RT 3). The

1 I CT refers to volume I of the Clerk's Transcript. II CT will refer to volume II.

court found that appellant came within the provisions of Welfare and Institutions Code section 602 (I CT 6, RT 4). The court released appellant to his aunt pursuant to a Community Confinement Contract which included electronic monitoring (I CT 5, 7, 56, RT 6).

On December 28, 2005, a probation memorandum was filed (I CT 9), alleging that, on December 23, 2005, appellant violated term 8 of the Contract by conversing with an older female on an unapproved sexual website (I CT 9). Appellant was arrested and transferred to the juvenile justice facility (JJF), Ventura County's juvenile hall (I CT 9). On December 28, 2005, the court found that appellant had violated the Contract, revoked its prior electronic monitoring order and the Contract, and ordered appellant detained in JJF (I CT 10, RT 10).

On January 5, 2006, disposition on the original petition took place (I CT 51-55, RT 12-16B). After reading the court file, the probation report (I CT 12-46), Dr. Martin's report (II SCT[2] 14-20), Dr. Singer's report (II SCT 2-13), and a letter from appellant's family members (I CT 46, 47), the court declared appellant a ward pursuant to Welfare and Institutions Code section 602, and committed appellant to the care of the probation officer for placement in suitable open placement (I CT 51, 52, RT 12-16B).

Appellant was placed at Starshine in San Bernardino County on January 13,

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2 II SCT refers to the larger volume of the Clerk's Transcript prepared pursuant to appellant's Rule 8.340(b) request, marked "confidential" on the cover.

2006 (I CT 57, 60, RT 17).

Subsequent Probation Violations and Placements.

Over the course of three more years, appellant was found to be in violation of probation for failing to complete his school assignments and therapy assignments, resulting in different placements, and ultimately resulting in the commitment to DJJ on February 18, 2009. These subsequent probation violations are described below.

February 7, 2007, Notice of Charged Violations.

On February 7, 2007, a Notice of Charged Violations was filed (I CT 18-23), alleging appellant's failure to comply with program/placement rules by failing to complete therapy assignments and unsatisfactory participation in group therapy; appellant's failure to attend school by failing to complete assignments and failing several classes; and appellant's failure to complete other assignments (I CT 118-119).

On February 8, 2007, appellant admitted the allegations for failure to complete therapy assignments (I CT 118) and for failure to participate in group therapy (I CT 119) (I CT 139, RT 25, 26). Appellant was later placed at Rancho San Antonio (RT 44).

May 30, 2007, Notice of Charged Violations.

On May 30, 2007, a Notice of Charged Violations was filed (I CT 157-163).

It was alleged that, on May 18, 2007, appellant told a social worker that, in April of 2007, he and another resident had twice engaged in mutually consensual sex acts (I CT 158).

On May 31, 2007, appellant admitted the violation (I CT 178, RT 51). At that time, the court also had the probation department's detention hearing report (I CT 164-169), and the report of neuropsychologist Dr. Karen Schiltz (I ACT[3] 1-57), but had not yet read Dr. Schiltz's report (RT 49, 50). Appellant was continued a ward in the custody of probation for suitable placement (I CT 262, RT 53). After some gender identity issues surfaced, appellant was placed at Gay and Lesbian Adolescent Social Services (GLASS) in Los Angeles on June 20, 2007 (I CT 182, 185, RT 54, 55, 60).

May 1, 2008, Notice of Charged Violations.

On May 1, 2008, a Notice of Charged Violations was filed (I CT 252-258), alleging that appellant failed to comply with residential program rules by failing to complete assignments (I CT 252).

On May 2, 2008, appellant admitted the allegations (I CT 262, RT 68, 69, 70). Appellant was continued a ward, placed at GLASS, and was given 90 days in JJF stayed to July 18, 2008 in order to see if appellant's performance would improve (I CT 262, 263, RT 73, 74, 75, 76, 78). The court stated that, if appellant

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3 I ACT refers to the augmented clerk's transcript prepared pursuant to appellant's motion to augment the record.

did not do well in the interim, the court would impose the stayed 90 days (I CT 263, RT 75). Appellant was returned to GLASS (I CT 263, RT 76).

On July 18, 2008, probation reported that appellant had not changed his behavior and that he consistently failed to do his work (II CT 305, 306, RT 83). The court continued appellant as a Welfare and Institutions Code section 602 ward and imposed the previously-stayed 90 days at JJF (II CT 309, RT 85).

On August 29, 2008, a probation memorandum reported appellant doing better and recommended early release from JJF back to placement (II CT 318-321). The court granted that request (II CT 322, RT 91, 92). Appellant was placed at GLASS on September 11, 2008 (II CT 324, RT 93).

A supplemental probation memorandum filed January 2, 2009 (II CT 334-354) reported appellant's behavior deteriorating in the form of a negative attitude and failure to work on assignments (II CT 335, 336). On that date, the court continued appellant in suitable placement (II CT 356, RT 98, 99), but directed probation to look into the likelihood of appellant getting into a sex offender program at CDCR/DJJ (II CT 357, RT 96, 97, 99).

January 5, 2009, Notice of Charged Violations; DJJ Disposition.

On January 5, 2009, a Notice of Charged Violations was filed (II CT 358-362), alleging that appellant failed to complete assignments for his sex offender program, that he made no progress, and that he failed to complete school

assignments (II CT 358, 359).

On January 6, 2009, appellant admitted the allegations (II CT 376, RT 101). On February 11, 2009, the disposition began (RT 109-128). The court announced (RT 109, 110) that it had a supplemental report from the probation department (CT 391-399, also available on February 4, 2009 (RT 106)), an updated report by Ventura County Behavioral Health by Dr. Yoshimura (II SCT 23-29, and an earlier memorandum from Dr. Yoshimura available on February 4, 2009 (II SCT 21-22, RT 106)), a report from Dani Levine of S.T.E.P. Group Corp. (I ACT 58-74, also available on February 4, 2009 (RT 107)). The court also heard testimony by Dr. Levine (RT 115-119).

On February 18, 2009, the disposition concluded (RT 129-144). The court heard from appellant's mother, who had located potential alternative placements (RT 130-131). The court committed appellant to DJJ on count 1, the violation of Penal Code section 288(a) sustained December 20, 2005, with the maximum term of confinement set as the upper term of 8 years, and with credits for 204 days (II CT 402, 406, 407, RT 139-143).

The court found that the offense did not fall within Welfare and Institutions Code section 707(b) (II CT 402, 406, RT 140, 141). The court stated that appellant was committed to DJJ because the court believed that appellant would be able to participate in the adolescent sex offender program there, and requested

notification if such would not occur (II CT 403, RT 142, 143).

Post-DJJ-Disposition Proceedings.

Appellant filed a timely notice of appeal on March 16, 2009 (II CT 412, 413).

Appellant was delivered to DJJ on April 6, 2009 (I[4] SCT 1).

On May 18, 2010, the Court of Appeal issued its opinion affirming the judgment. Appellant filed a timely Petition for Rehearing on May 28, 2010, requesting that the Court of Appeal consider certain of appellant's contentions omitted from or inaccurately stated in the opinion, and to modify the opinion to reflect certain omitted or inaccurately stated evidence. The Court of Appeal denied the Petition for Rehearing on June 15, 2010.

On June 21, 2010, appellant filed a Petition for Review in this Court. On September 1, 2010, this Court granted the petition for review[5].

STATEMENT OF FACTS

Since this offense was adjudicated by an admission, the facts are as expressed in probation reports.

On October 17, 2005, appellant, age 13, was with his 3-year-old sister, S.H.,

4 I SCT refers to the brief volume I of the Supplemental Clerk's Transcript prepared pursuant to appellant's Rule 8.340(b) request.

5 On the same date the Court of Appeal's Opinion was issued, the Court of Appeal issued an Order denying appellant's related petition for writ of habeas corpus (B219096) without issuance of an order to show cause (as reflected in the Court of Appeal's Opinion). Appellant filed a separate Petition for Review from that order. That petition for review was denied by this Court on September 1, 2010.

in the family's vehicle parked outside a grocery store, while his father and 8-year-old sister M.H. were inside the store (I CT 14, 16). Appellant was observed by a 15-year-old witness in another vehicle (I CT 14). Appellant licked S.H.'s vagina and had her suck his penis (I CT 14, 15, 16).

Although not part of the instant charges, appellant had been in counseling for touching his sister M.H.'s vagina and touching her twin brother B.H. approximately a year earlier (I CT 15, 16). Neither M.H. nor B.H. had been touched by appellant since (I CT 15).

ARGUMENT

I
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

It is submitted that appellant is not eligible for commitment to DJJ because the threshold requirement of a Welfare and Institutions Code[6] 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 <u>only</u> if he has a section 707(b) offense <u>and</u> the most recent

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

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.

A. Appellant May Not Be Committed To DJJ Unless He Has Committed A Section 707(b) Offense.

In order to be eligible for commitment to DJJ, appellant must have, at least at some point, committed an offense described by section 707(b). (Section 731(a)(4).) Section 731(a) provides in pertinent part:

> "(a) If a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may order any of the types of treatment referred to in Sections 727 and 730 and, in addition, may do any of the following:
> ***
> (4) Commit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, if the ward has committed an offense described in subdivision (b) of Section 707 **and** is not otherwise ineligible for commitment to the division under Section 733." (Emphasis added.)

By the plain meaning of section 731(a)(4), in order to be committed to DJJ, appellant must have committed a section 707(b) offense. 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.

Appellant was adjudicated to have committed only a violation of Penal Code section 288(a), a lewd act upon his sister. While this offense brought

appellant within the provisions of section 602, it was not an offense listed in section 707(b), and the juvenile court so found. (Section 707(b); II CT 402, 406, RT 140, 141.)

A section 707(b) violation is, for dispositions occurring after the effective date of the applicable statutes, the sine qua non for a commitment to DJJ.

B. The Provisions Of Section 733 Do Not Provide An Exception To Section 731(a)(4)'s Requirement Of An Underlying Section 707(b) Offense.

It is submitted that the plain language of section 731(a)(4) requires the existence of two things: (1) a section 707(b) offense and (2) that there is no further ineligibility pursuant to section 733.

Section 733 provides in pertinent part:

> "A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities:
> ***
> (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code." (Emphasis added.)

It can be seen that the mention of a sex offense in this context cannot be used to counteract the clear base requirement of section 731(a)(4) that there be a section 707(b) offense at some point. Section 731(a)(4) provides the minimum

requirement for commitment to DJJ. It is the eligibility statute. Section 733 then provides circumstances for ineligibility <u>even if the minimum requirement is met</u>, 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.

In other words, <u>section 733 provides further **additional** limitations on eligibility for DJJ commitment</u>. It declares conditions of ineligibility, which would logically only apply or even be a consideration if and only if the threshold eligibility requirements were met.

As set forth, section 733 provides that **an otherwise eligible ward** would nevertheless be ineligible unless the most recent offense was a section 707(b) offense. It then goes on to provide that **an otherwise eligible ward** would not be made ineligible just because the most recent offense was not a section 707(b) offense, <u>if</u> that most recent offense were an enumerated sex offense.

This provision does not negate section 731(a)(4), but rather just limits the application of an ineligibility principle.

By the plain, clear, and unambiguous terms of section 731(a)(4) he may not be committed to DJJ.

C. The Principles Of Statutory Interpretation Require The Threshold Of A Section 707(b) Offense Even If The Most Current Offense Is An Enumerated Sex Offense.

The fundamental principles of statutory interpretation or construction have been frequently stated. As set forth in *Beal Bank, SSB v Arter & Hadden , LLP* (2007) 42 Cal.4th 503, 507, statutory interpretation begins with an analysis of the language of the governing statute. 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; and *In re J.L.* (2008) 108 Cal.App.4th 32, 55.

As set forth in *Woodhead, supra*, 43 Cal.3d at pp. 1007, 1008:

> "When the language is clear and unambiguous, there is no need for construction."

*Woodhead, supr*a at p. 1010, goes on to state:

> "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided."

Parts of a statute should be harmonized by consideration of the questioned clause in statutory context. (See *Valov v Tank* (1985) 168 Cal.App.3d 867, 874.) Statutes should generally not be interpreted in a manner which renders portions thereof mere surplusage. (*People v Craft* (1986) 41 Cal.3d 554, 560; *People v Smith* (2000) 81 Cal.App.4th 630, 641, quoting *Dyna-Med, Inc. v Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; see also *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) It is inappropriate to read into a statute language it does not contain or elements that do not appear on its face. (*Vasquez, supra*, 45 Cal.4th at p. 253.)

Finally, there is the "rule of lenity." Where a penal statute is susceptible of two or more interpretations, courts should generally construe the statute "as favorably to the defendant as its language and the circumstances of its application may reasonable permit." (*Keeler v Superior Court* (1970) 2 Cal.3d 619, 631; *People v Overstreet* (1986) 42 Cal.3d 891, 896 ["The defendant is entitled to every reasonable doubt as to the true interpretation of words or the construction of a statute. [Citations.]"]; *Bradwell v Superior Court* (*People*) (2007) 156 Cal.App.4th 265, 270.)

Section 731 was modified and sections 731.1 and 733 were added by SB 81 (c. 175, operative September 1, 2007), and sections 731 and 731.1 were modified by AB 191 (c. 257, operative September 29, 2007).

It is submitted that the language of sections 731(a)(4) and 733 is unambiguous and thus the plain meaning controls. If the legislature had meant not to require a section 707(b) offense ever if the offense were a sex offense, it could and should 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.

However, the result should be the same even if we consider the legislative intent behind the 2007 modifications to the statutes. *V.C., supra*, notes that the legislative purpose for these revisions was that the legislature intended only currently violent or serious juvenile offenders, and those whose behavior was escalating, to be sent to DJJ starting on September 1, 2007. (*V.C., supra*, 173 Cal.App.4th at pp. 1468, 1469.) *V.C., supra* at p. 1469, cites *In re N.D.* (2008) 167 Cal.App.4th 885, 891, where that court recognized this, stating:

> " Like the court in *In re N.D. (2008) 167 Cal.App.4th 885, 891-892 [84 Cal. Rptr. 3d 517]*, we also find it helpful background to realize *section 733(c)* was enacted as part of chapter 175 of the Statutes of 2007 in order to make "necessary statutory changes to implement the Budget Act of 2007 ... ." (Stats. 2007, ch. 175, § 38.) According to the court in *In re N.D.*, "[a] report of the California Little Hoover Commission explains the budget impact. To settle a lawsuit brought on behalf of inmates of state juvenile facilities, the state entered into a consent decree in November of 2004. The cost of compliance with the consent decree proved to be high: 'Realizing the state could not afford to comply with the ... consent decree, in 2007, policy-makers acted to reduce the number of youth offenders housed in state

facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. ...' [Citation.]" (*In re N.D., supra, at pp. 891-892.*)" (Underline emphasis added.)

Because the legislative goal of the modifications to sections 731 and 733 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 is 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.

No published case known to appellant has construed these two statutes when there has been no section 707(b) offense at all. However, to interpret sections 731(a)(4) and 733 to require at the very least a section 707(b) offense before a ward can be committed to DJJ matches both the plain meaning of the statutes in question, harmonizes them in a way that makes sense, renders their words effective and not surplusage, and matches the legislative intent. Since appellant's offense was not such an offense, he is not eligible for commitment to DJJ.

D. Appellant's Offense Is Not Listed In Section 707(b).

Welfare and Institutions Code section 707(b) contains a lengthy list of

offenses. The only sex offenses listed are as follows:

> "(4) Rape with force, violence, or threat of great bodily harm.
> (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.
> (6) A lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.
> (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
> (8) An offense specified in subdivision (a) of Section 289 of the Penal Code."

Appellant's offense was a violation of Penal Code section 288(a), lewd act upon S.H., a child under the age of 14. This offense is not enumerated in Section 707(b). Thus the essential prerequisite for a commitment to DJJ is not met.

As set forth, section 731(a) requires both a section 707(b) offense **and** that the ward is not otherwise ineligible under section 733.

As discussed herein, by its terms, section 731(a)(4) requires a section 707(b) offense. There is no confusion, uncertainty, or ambiguity as to the meaning of this statute. "And" means "and." Both conditions are required. (*Amerigraphics, Inc. v Mercury Casualty Co.* (2010) 182 Cal.App. 4th 1538, 1551 [the word "and" used in its ordinary and popular sense, is a conjunction used to indicate an additional thing, situation, or fact]; *Ratzlaf v United States* (1994) 510 U.S. 135, 114 S.Ct. 655, 662 126 L.Ed.2d 615, 626 [the court does not resort to a legislative history to cloud a statutory text that is clear].) A section 707(b) offense is absolutely necessary. Once it is shown that a ward's offense is an enumerated

707(b) offense and the juvenile court so finds, then and only then does the analysis of the ineligibility by virtue of section 733 occur. Until there is a 707(b) offense, it is not necessary to determine if appellant would then be ineligible under section 733 because appellant is already ineligible.

E. Section 731.1 Is Not Relevant To The Appropriate Analysis.

While section 731.1 was part of the statutory scheme that made the cited modifications to section 731(a)(4) and created sections 731.1 and 733, there is no need to evaluate the legislative intent and to construe them together because the plain meaning of section 731(a)(4) is unambiguous and does not conflict with section 731.1, and the two statutes are designed to address different situations.

As set forth, the purpose of these sections was to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. (*V.C. v Superior Court*, *supra*; *In re N.D.*, *supra*.)

Accordingly, the new section 731(a)(4) now requires at the bare minimum a section 707(b) offense. Section 733 requires also that the 707(b) offense must be the most recent offense, not just any of the ward's offenses, unless the most recent offense was a registrable sex offense. These sections became operative in September of 2007.

The court of appeal's opinion acknowledged the language of section 731(a)(4), but then, without further analyzing it, went on to rely heavily on section 731.1's recall provisions. It is submitted that this was improper and unnecessary. As set forth, the statutes do not contradict each other, address different situations, and can easily be harmonized.

Section 731.1 provides, in pertinent part:

> " Notwithstanding any other law, the court committing a ward to [DJJ], upon the recommendation of the chief probation officer of the county, <u>may recall that commitment</u> in the case of any ward whose commitment offense was not an offense listed in subdivision (b) of Section 707, unless the offense was a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code, <u>and who remains confined in an institution operated by [DJJ]</u> on or after September 1, 2007. Upon recall of the ward, the court shall set and convene a recall disposition hearing for the purpose of ordering an alternative disposition for the ward that is appropriate under all of the circumstances prevailing in the case." (Emphasis added.)

It can be seen that, while section 731(a)(4) concerns <u>new</u> commitments when a ward is not yet at DJJ, section 731.1 was enacted to decide the question of what to do with the wards who were <u>already</u> at DJJ in September of 2007. Could the <u>existing</u> DJJ population be culled further? Accordingly, 731.1 created a <u>recall provision</u>, whereby the probation departments could, if they so chose, look at each ward already at DJJ and decide whether to ask the juvenile court if it wanted to reconsider an option other than DJJ. This recall scheme was a two part procedure, and a ward already at DJJ on the effective date of the statute had no automatic

right to have his commitment re-examined. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 438.) *Carl N., supra* at p. 436, 437, 438, held that sections 731 and 733 were not retroactive to wards already committed to DJJ at the time of the effective date of the statutes, but rather the recall provision was created for that purpose.

Section 731.1 created a two-step process, first under the complete discretion of the probation officer and then under the complete discretion of the juvenile court. (*Carl N., supra.*)

The language in section 731.1 does not contradict that in section 731(a)(4), and it is not necessary to change the meaning of "and" in section 731(a)(4) to harmonize the statutes.

II
IT IS IMPROPER TO COMMIT APPELLANT TO DJJ WHEN THE REQUIREMENT OF PROBABLE BENEFIT TO APPELLANT FROM THAT COMMITMENT IS NOT MET

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.

It is submitted that the Court abused its discretion in committing appellant to DJJ for several reasons, including:

1. There was insufficient evidence to support the court's finding of

probable benefit from the commitment to DJJ; and

2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered.

A. Authority Controlling DJJ Commitments;
Standard Of Review.

A commitment to DJJ is a two step process, involving both fact-finding and the exercise of discretion.

i. Probable Benefit.

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.)

While section 734 directly requires probable benefit from the commitment, section 202 contains the general goals of juvenile court dispositions, stating 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, contemplate reunification with his family, and must be for rehabilitative purposes and not for retribution. Thus, as set forth, reading these statutes together with a long line of case law, it is apparent that, in

order to commit a minor to DJJ, the evidence must demonstrate probable benefit to the minor and that less restrictive alternatives would be ineffective or inappropriate.

Section 734 provides:

> "No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."

Section 202 provides, in pertinent part:

> "(a) The purpose of this chapter is to provide for <u>the protection and safety of the public and each minor</u> under the jurisdiction of the juvenile court and to <u>preserve and strengthen the minor's family ties</u> whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. If removal of a minor is determined by the juvenile court to be necessary, <u>reunification of the minor with his or her family shall be a primary objective</u>. If the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents. This chapter shall be liberally construed to carry out these purposes.
> (b) Minors under the jurisdiction of the juvenile court who are in need of protective services <u>shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public</u>. 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, <u>receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances</u>. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. If a

> minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct when those goals are consistent with his or her best interests and the best interests of the public. When the minor is no longer a ward of the juvenile court, the guidance he or she received should enable him or her to be a law-abiding and productive member of his or her family and the community.
> ***
> (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.
> ***
> (e) As used in this chapter, "punishment" means the imposition of sanctions. It does not include retribution...." (Emphasis added.)

Because the finding of probable benefit is evidentiary based, it is reviewed under sufficiency of the evidence standards. As set forth, in California, sections 202 and 734 require that, to support a DJJ commitment, there must be *substantial evidence* in the record (1) supporting the court's disposition order committing a juvenile to DJJ, (2) which demonstrates probable benefit to the minor, and (3) supports a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A., supra*; *In re Pedro M., supra*; *In re George M., supra.*) Substantial evidence is defined as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v Virginia* (1979) 443 U.S. 307, 318.)

Johnson, 26 Cal.3d at 578, summarizes the proper standard, which should be applied to the evidentiary finding of probable benefit by the juvenile court:

> "We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the court must review the **whole record** in the light most favorable to the judgment below to determine whether it discloses **substantial** evidence – that is, evidence which is **reasonable**, **credible**, and of **solid value** – such that a **reasonable** trier of fact could find the defendant guilty beyond a reasonable doubt." (Emphasis added.)

ii. Discretion To Order The Commitment.

After the court makes the finding of probable benefit based on the evidence, then and only then does the court have the discretion as to whether or not to send appellant to DJJ. A finding of probable benefit does not mandate a commitment, though it is a necessary prerequisite. Other factors may be considered.

The statutory scheme of the Welfare & Institutions Code contemplates, as a general goal, a progressively restrictive and punitive series of disposition orders, such as home placement under supervision, foster home placement, placement in treatment facilities, and, as a last resort, Youth Authority (DJJ) placement. (*In re Aline D.* (1975) 14 Cal.3d 557, 564.) The *Aline D.* court went on to note that commitments to DJJ are made only in the most serious cases and only after all else has failed, and that commitment to the Youth Authority is generally viewed as the final treatment resource available to the juvenile court. Of course, the

circumstances of a particular case may well suggest the desirability of a commitment despite the availability of such alternative dispositions as placement in a county camp or ranch, and thus intermediate placements can under certain circumstances be skipped. (*In re Anthony M.* (1981) 116 Cal.App.3d 491, 502; *In re John H.* (1978) 21 Cal.3d 18, 27.) However, first, there is no showing that this is such a case, and, second, even *John H.* mandates that there at least be substantial evidence of probable benefit to the minor before a DJJ commitment can be upheld. See also, *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53; *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258. Further, the courts have consistently indicated that a DJJ commitment is usually not justified by the seriousness of a current offense alone. (*In re Anthony M., supra; In re Teofilio A., supra.*)

It is well settled that, when a public offense is committed by a juvenile, certification of the juvenile to DJJ is within the sound discretion of the Court. (section 731; *In re Michael R.* (1977) 73 Cal.App.3d 327, 332.) This decision may be reversed on appeal only upon a showing that the court abused its discretion in committing the minor to DJJ. (*In re Michael R., supra*, 73 Cal.App.3d at p. 333; *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Teofilio A., supra.*) A reviewing court must indulge all reasonable inferences to support the findings of the juvenile court and such findings will not be disturbed on appeal when there is

substantial evidence to support them. (*In re Michael R., supra*, 73 Cal.App.3d at p. 333.)

Whether a commitment in a particular case conforms to the general purpose of the juvenile court law is necessarily included when determining whether a commitment constitutes an abuse of discretion. (*In re Michael R., supra*, 73 Cal.App.3d at pp.333-335; *In re Teofilio A., supra*, 210 Cal.App.3d at p. 579.)

Teofilio A., supra, at p. 576, describes the purposes of the juvenile court law in this context. It takes note of the 1984 change in section 202, recognizing punishment as a rehabilitative tool, and shifting its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the protection and safety of the public, where care, treatment and guidance shall conform to the interests of public safety and protection.

Teofilio A., supra, citing *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396, goes on to explain:

> "Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety. This interpretation by no means loses sight of the 'rehabilitative objectives' of the Juvenile Court Law. (§202, subd. (b).) Because commitment to CYA cannot be based solely on retribution grounds (§202, subd. (e)(5)), there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate." (Emphasis added.)

The *Teofilio A.* court goes on to conclude:

> "Thus, while there has been a slight shift in emphasis, rehabilitation continues to be an important objective of the juvenile court law. To support a CYA commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate." (Emphasis added.)

See also, *In re Pedro M., supra*; *In re George M., supra.*

It is submitted that, under the circumstances, there was insufficient **evidence** to support the Court's decision to commit appellant to DJJ and that therefore it was an abuse of discretion for the Juvenile Court to so decide. (*People v Jacobs* (2007) 156 Cal.App.4th 728, 737; *City of Sacramento v Drew* (1989) 207 Cal.App.3d 1287, 1297; *United States v Taylor* (1988) 487 U.S. 326, 336 [101 L.Ed.2d 297, 108 S.Ct. 2413]; *People v Penoli* (1996) 46 Cal.App.4th 298, 306-307; *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1091.)

B. DJJ Is Inappropriate For Appellant Because It Provides No Probable Benefit To Him.

Any assumption that there would be services and programs available to help appellant at DJJ is unsupported by the facts.

As set forth, the juvenile court read the statutory language and made the unsupported finding of probable benefit without evidentiary support. Instead, the court relied on its own outdated experience with DJJ, which had no evidentiary support whatsoever. The court also relied on the probation report which had been

prepared for the February 4, 2009, hearing (II CT 391-399). With regard to DJJ, that report provided that DJJ's screening stated that appellant would participate in the sex behavior treatment programs there. However, the probation report did not evidence any personal familiarity with the sexual behavior treatment programs at DJJ, and, as set forth in appellant's companion Petition for Writ of Habeas Corpus to the Court of Appeal (B219096), DJJ does not in fact have such programs, and the court's recollections of DJJ's resources were grossly outdated and presently inaccurate.

The court also had evidence in the form of appellant's mother's testimony concerning other placements (RT 130-131), psychological evaluations by Dr. Reanne Singer (II SCT 2-13), Dr. Karen Schiltz (I ACT 1-57), Dr. Paul Martin (II SCT 14-20), Dr. Ellen Yoshimura (II SCT 23-29), and Dr. Dani Levine (I ACT 58-74), and also heard testimony from Dr. Levine (RT 115-119).

The court stated that appellant was committed to DJJ because the court believed that appellant would be able to participate in the adolescent sex offender program there, and requested notification if such would not occur (II CT 403, RT 142, 143). It was clear that the juvenile court committed appellant to DJJ because it felt that DJJ had an excellent sex offender program and that appellant would be able to participate in it. On numerous occasions the court stated its outdated and inaccurate view of the sex offender treatment programs at DJJ, stating that DJJ

was the model for other facilities in the country with regard to its sex offender programs, that DJJ had the best sex offender program in the country, and that the court knew this from its 17 years of being a prosecutor (RT 98, 111, 112, 113, 120, 121, 123, 124). While this may arguably have been true when the judge was a prosecutor[7], it was no longer true at the time of the disposition in this case.

In making the commitment, the judge emphasized the need to get appellant the sex offender treatment he needed (RT 98). The court was specific in stating that it was sending appellant to DJJ specifically in order to have appellant participate in sex offender treatment (RT 121, 123, 142-143), stating that, if appellant were unable to do so, the court might consider other alternatives (RT 142-143).

Yet, as set forth, the juvenile court read the statutory language and made the unsupported finding of probable benefit without evidentiary support.

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, would not be rehabilitated there, and in fact instead would be damaged by such a commitment. This was the only real evidence concerning the issue of probable benefit before the juvenile court.

At both sessions of the disposition hearing, appellant argued that DJJ would

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7 Judge Coleman came on the bench in 1996.

not be appropriate for appellant. He explained that a necessary issue in the determination was whether appellant was resistant to treatment or whether he had a disorder causing him not to be able to internalize and respond to the treatment (RT 113). This was the thrust of the medical evaluation reports as well.

Appellant pointed out that Dr. Yoshimura indicated that appellant has features of pervasive developmental disorder, and that Dr. Levine was concerned with the fact that appellant was not a violent offender and therefore would be inappropriate for DJJ (RT 113).

Appellant requested that appellant not be sent to DJJ, that DJJ was inappropriate for him, that appellant's parents were very involved, that appellant was not a violent offender, that appellant had no history of escape or flight from placement, that **Dr. Yoshimura indicated that appellant needed intensive individual treatment which was not provided at DJJ**, and that appellant has learning disabilities which needed to be addressed in order that he benefit from treatment (RT 120). Appellant's counsel pointed out that appellant was not re-offending, and argued that laziness was not a reason to send appellant to DJJ (RT 121, 133, 137, 138). Dr. Martin noted that appellant was not predatory by nature, and the court agreed (II SCT 17, RT 137).

The live testimony from Dr. Levine, in addition to her report, was telling. She testified to grave concerns with DJJ and the programs appellant has previously

been in (RT 115). She testified that the population in DJJ was quite different from appellant, and that many of them had conduct disorder, behavioral problems, and other problems appellant does not have (RT 115, 116, 117, 118). She emphasized that appellant was not successful before because prior treatments were not the right treatment for him, and that he needed placement which would address his complex profile, and that DJJ would not be good for appellant and in fact would exacerbate appellant's problems (RT 115, 116).

Dr. Levine testified that she did not believe that the sex offender programs at DJJ can treat appellant effectively (RT 118). She said that DJJ was not safe, and that appellant would not be amenable to treatment where he would not feel safe (RT 118).

She also pointed out that appellant had significant learning issues getting in the way of his being able to process a program (RT 119). She pointed out the great amount of testing material showing that appellant has significant executive functioning difficulties and critical reasoning difficulties (RT 119). She emphasized that appellant would not "get it" without a program specifically designed for children who learn and process differently (RT 119).

Dr. Levine's report stated that DJJ would be bad for appellant because he had no history of aggressive, violent, or delinquent behavior, and that he should be with non-violent offenders (I ACT 59). She pointed out that appellant would be at

risk in the presence of highly delinquent or gang or assaultive offenders (I ACT 59). This is exactly what DJJ is. The other evaluation reports agreed with Dr. Levine in terms of the diagnoses and needs. Appellant cannot be said to receive probable benefit from a commitment at DJJ.

It was an abuse of discretion to commit appellant to DJJ (*Jacobs, supra; City of Sacramento, supra; U.S. v Taylor, supra; Penoli, supra; Ronnie P., supra.*)

III
IT IS IMPROPER TO COMMIT APPELLANT TO DJJ WITHOUT SUFFICIENT CONSIDERATION OF ALTERNATIVE PLACEMENTS

As set forth, an order committing appellant to DJJ will be considered an abuse of discretion 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., supra*; *In re Pedro M., supra*; *In re George M., supra.*)

As set forth, the statutory scheme of the Welfare & Institutions Code contemplates a progressively restrictive and punitive series of disposition orders, such as home placement under supervision, foster home placement, placement in treatment facilities, and, as a last resort, Youth Authority (DJJ) placement. (*In re Aline D.* (1975) 14 Cal.3d 557, 564.) The *Aline D.* court went on to note that commitments to DJJ are made only in the most serious cases and only after all else

has failed, and that commitment to the Youth Authority is generally viewed as the final treatment resource available to the juvenile court.

It is submitted that alternative placements were not sufficiently considered for appellant. While appellant had been tried at three prior placements, as set forth in the evaluation reports, those placements were not proper for appellant. There were several other prospective placements suggested to the court which would have addressed appellant's needs and would have resulted in the great likelihood of success for appellant's rehabilitation to enable him to return to the community as a productive member of society.

The reports indicate that appellant has specific learning disabilities which impact his ability to process the programs and learn and benefit from the therapy (I ACT 7, 10, 11 [Dr. Schiltz], I ACT 58 [Dr. Levine], II SCT 6, 11, 12 [Dr. Singer], II SCT 16, 17, 18 [Dr. Martin], II SCT 25, 26, 28, 29 [Dr. Yoshimura]).

The reports indicate that appellant has executive functioning deficits which explain why he has been unable to progress (I ACT 11, II SCT 25, 26).

The reports suggest specialized methodologies to enable appellant to benefit from therapy and programs (I ACT 21-57 [Dr. Schiltz, with detailed suggestions for methodologies], I ACT 59 [Dr. Levine], II SCT 18, 19 [Dr. Martin], II SCT 29 [Dr. Yoshimura]).

Specific alternative placements were suggested, which would provide the necessary environment and therapies which would have the highest likelihood of success. One of these, a program specifically designed to deal with appellant's problems, was the Ryder program at the Stetson School, suggested by Dr. Levine (RT 115). Dr. Levine testified that appellant had a complex profile and it was necessary to find a program which would address that (RT 115). Dr. Levine's report stated that appellant would benefit from a residential facility with a therapeutic milieu, with clinicians with masters level or higher and with specialized training, such as the Ryder program (I ACT 58). She recommended a holistic approach, which treated the whole child, and explained in detail why the Stetson School would be appropriate, stating that that program offered treatment for boys with sexual concerns, learning concerns, and underlying emotional concerns, and explaining the various treatments and treatment goals there (I ACT 58, 59, 60).

Dr. Levine explained that appellant had been accepted at another excellent and appropriate placement, Oxbow Academy (I ACT 66-67). She also included with her report, information on several programs.

Dr. Yoshimura was in agreement about the type of programs appellant needs, as were the other evaluators.

Appellant's mother offered for potential consideration the Woodward Academy, which would also be available and appropriate for appellant, and which is certified by the State of California (RT 130, 131).

The court refused to consider Ryder House, refused to explore their willingness to contract with the County and with California, and refused to allow Woodward Academy to interview appellant (RT 114, 115, 124, 125, 132, 134, 135, 139), instead sticking with its opinion that DJJ was the only answer.

Appellant pointed out to the court that, because of appellant's youth, DJJ would be available for appellant for a long time, and that, if a more appropriate program did not work, the court could consider DJJ then (RT 123). The court did not agree.

It is submitted that the necessary alternative placements were not sufficiently considered by the juvenile court in this case. It was an abuse of discretion to commit appellant to DJJ (*Jacobs, supra; City of Sacramento, supra; U.S. v Taylor, supra; Penoli, supra; Ronnie P., supra.*)

IV

IT WAS AN ABUSE OF DISCRETION TO COMMIT APPELLANT TO DJJ WITHOUT EVIDENCE OF PROBABLE BENEFIT TO HIM FROM THE COMMITMENT AND WITHOUT APPROPRIATE CONSIDERATION OF ALTERNATIVE PLACEMENTS

As set forth, the decision to commit a ward to DJJ rests within the sound discretion of the court, once the required and evidentiary supported findings are made. However, this discretion is not unfettered.

As described in *People v Jacobs* (2007) 156 Cal.App.4th 728, 737, citing *City of Sacramento v Drew* (1989) 207 Cal.App.3d 1287, 1297:

> "Elaborating, the Court of Appeal further explained: "Very little of general significance can be said about discretion. ' "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" ' (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355, citing to 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 244.) The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.]" (*Drew, supra,* 207 Cal.App.3d at p. 1297.) Finally, as *Drew* noted, the "legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred." (*Id.,* at p. 1298.)" (Emphasis added.)

Jacobs went on to note:

> "Various other cases are to the same effect, including: *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831, fn. 3 [" '[a]lthough an act exceeding the bounds of reason manifestly constitutes an abuse of discretion, abuse is not limited to such an extreme case' "]; *County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1778 ["range of judicial discretion is determined by analogy to the rules contained in the general law and in the specific body or system of law in which the discretionary authority is granted"]; see generally *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1021-1026, overruled on other grounds in *Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 479." (Emphasis added.)

As set forth by the United States Supreme Court (*United States v Taylor* (1988) 487 U.S. 326, 336 [101 L.Ed.2d 297, 108 S.Ct. 2413]):

> "Discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles. Thus a decision calling for the exercise of judicial discretion hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.
> Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." (Citations and internal quotation marks omitted)

In the instant case, the juvenile court improperly committed appellant to DJJ without evidence of probable benefit to appellant from the commitment and disregarding important evidence to the contrary, and without considering appropriate and superior alternative placements.

The failure to exercise the discretion conferred upon the court is a fundamental procedural due process deprivation (under the 5th and 14th

amendments to the United States Constitution and Article I section 7 of the California Constitution) and requires reversal to consider the appropriate factors and to exercise that discretion. (*People v Penoli* (1996) 46 Cal.App.4th 298, 306-307; *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1091.)

In *Ronnie P.*, the court stated:

> "By failing to consider any of the prescribed dispositional factors the court...failed to exercise a discretion conferred and compelled by law. Such error constituted the denial of a fair hearing and deprivation of fundamental procedural rights compelling reversal. (See *In re Geronimo M.* (1985) 166 Cal.App.3d 573, 587-588 [212 Cal.Rptr.532.)

It is submitted that the commitment to DJJ must be reversed.

V
APPELLANT'S 5TH AND 14TH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT COMMITTED HIM TO DJJ.

The due process clause of the 5th and 14th amendments to the United States Constitution require substantial and fundamental fairness in State proceedings which deprive a person of liberty[8]. (*Hicks v Oklahoma* (1980) 447 U.S. 343.) In the case at bar, it was fundamentally unfair, and a violation of appellant's right to

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8 Appellant recognizes that the constitutional objection was not raised below. However it is still a valid and arguable issue, based on *People v Partida* (2005) 37 Cal.4th 428, 433-439, where the court held that new constitutional arguments are not forfeited on appeal when the new arguments did not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely asserted that the trial court's act or omission, insofar as possibly wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution.

due process, when the court deprived him of his liberty by committing him to DJJ without evidence of probable benefit and when the weight of the evidence was overwhelming that alternative placements would be by far the best choice.

In *Hicks, supra*, the United States Supreme Court held that the failure of a state to observe its own statutory procedural law in criminal sentencing violates the federal due process rights of a criminal defendant by depriving him of a liberty interest. (*Hicks, supra,* at pp. 346-347.) See also, *Vansickel v White* (9th Cir. 1999) 166 F.3d 953, 957 [the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the 14th amendment.]. Therefore, when a state has provided a specific method of determining whether a commitment which results in a loss of liberty shall be imposed, "'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.'" (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.).

The United States Supreme Court "repeatedly has recognized that ... commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425, italics added.) Such protections are equally available in juvenile delinquency proceedings. (*Addington, supra*, at p. 428; *In re Winship* (1970) 397 U.S. 358, 365-366; *Schall v Martin* (1984) 467 U.S. 253.) See also, *Parham v. J. R.* (1979) 442 U.S. 584, 600 [liberty interest in avoiding involuntary confinement].

As set forth, certain due process protections are applicable in juvenile proceedings, including the right to have the state meet its statutorily defined burden of proof before the juvenile loses his liberty. (*Alfredo A. v. Superior Court* (1994) 6 Cal. 4th 1212, 1225, citing *Schall v. Martin* (1984) 467 U.S. 253, 263.) The standard of proof which is required to be applied to the facts in reaching a judgment implicates federal due process rights.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Addington v. Texas, supra*, 441 U.S. at p. 423.)

In California, the statutes that govern the commitment of juvenile wards to DJJ have resulted in the creation of a protected liberty interest. As set forth, in California, sections 202 and 734 require that, to support a DJJ commitment, there must be *substantial evidence* in the record (1) supporting the court's disposition order committing a juvenile to DJJ, (2) <u>which demonstrates probable benefit to the minor</u>, and (3) <u>supports a determination that less restrictive alternatives are ineffective or inappropriate</u>. (*In re Teofilio A., supra*; *In re Pedro M., supra*; *In re George M., supra.*) Substantial evidence is defined as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v*

Johnson (1980) 26 Cal.3d 557, 576; *Jackson v Virginia* (1979) 443 U.S. 307, 318.)

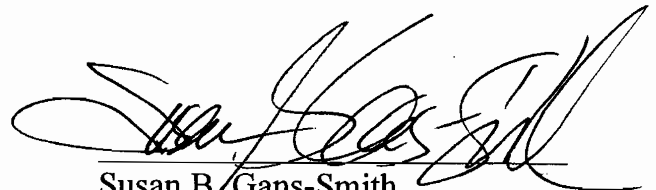
Therefore, to satisfy the requirements of due process, there had to be **substantial evidence** in the record that there be probable benefit to appellant from the availability of effective treatment and rehabilitation programs and appropriate consideration of alternative placements before he could lawfully be committed to DJJ.

In the case at bench, the State violated appellant's right to due process of law when it committed appellant to DJJ without any evidence of probable benefit to him from that commitment, without consideration of the suggested and far superior alternative placements, and contrary to the California statutory scheme.

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

Respectfully submitted,

Dated: November 19, 2010



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CERTIFICATE OF WORD COUNT
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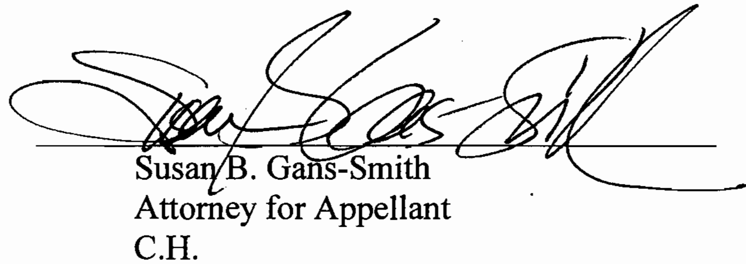

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PROOF OF SERVICE BY MAIL
[C.C.P. §1013a(1)]

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.

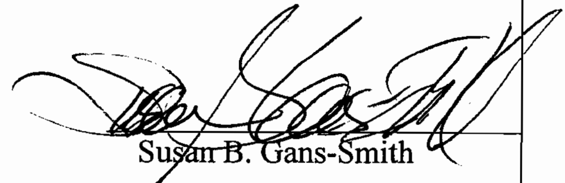
On November 23, 2010, I served the foregoing document described as APPELLANT'S OPENING BRIEF ON THE MERITS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

*** 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 November 23, 2010, 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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<u>Service List</u>
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