In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STEVEN LLOYD MOSLEY,

Defendant and Appellant.

Case No. S187965

Fourth Appellate District, Division Three, Case No. G038379
Orange County Superior Court, Case No. 05NF4105
The Honorable David Hoffer, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does Jessica's Law's residency restriction (see Pen. Code, § 3003.5, subd. (b))[1] render discretionarily imposed sex offender registration pursuant to Penal Code section 290.006[2] unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, in the absence of a jury trial on the facts required to support the registration order?

2. Does section 3003.5(b), validly create a misdemeanor offense subject to violation by all persons required to register for life pursuant to Penal Code section 290, et seq., regardless of their parole status?

3. If section 3003.5(b) is not separately enforceable as a misdemeanor offense, does that section nevertheless operate to establish the residency restrictions contained therein as a valid condition of sex offender registration pursuant to section 290, et seq.?

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[1]Penal Code section 3003.5, subdivision (b), hereinafter 3003.5(b), enacted as part of the Sexual Predator Punishment and Control Act: Jessica's Law (Pen. Code, § 3003.5(b) (approved by the public as Proposition 83 in the General Election in November 2006 provides::

Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.

[2]Penal Code section 290.006 provides as follows:

> Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.

STATEMENT OF THE CASE

One day in 2003, while she was staying at her grandmother's apartment in Anaheim, Lori C. met appellant Steven Mosley. (1 RT 41-42; 2 RT 242-243.) She mentioned to him that she was 12 years old. (1 RT 43.)[3] That evening, Lori went to the laundry room to open the door for a neighbor. Mosley walked up behind her, and when she turned, he kissed her on the lips. (1 RT 44; 2 RT 331.)

About three days later, Lori was in the carport. (1 RT 45-46.) Mosley approached her and kissed her on the neck, telling her to just relax and not say anything. (1 RT 51-52.) Lori tried to move away, but Mosley held her wrists and pinned her to the wall with the weight of his body so she could not move. (1 RT 51-52, 62.) He tried to stick his tongue in her mouth. Then he put his hand up her shirt and down her pants, grabbing her breasts and buttocks and rubbing her between the legs. (1 RT 62-63.) Pulling down his own shorts and pulling Lori's "skort" to one side, Mosley put his penis in Lori's vagina for about two minutes. (1 RT 52, 54, 134.)

Lori's older brother Robert saw Mosley standing in front of Lori with his pants hanging down to his knees.[4] (1 RT 158, 161-164.) Her eleven-year-old brother Daniel also saw Mosley with his pants down and with his arms around Lori. (1 RT 186, 192.) Soon, Lori's grandmother came outside to check on Lori and saw her struggling with Mosley as he tried to kiss her. (2 RT 246-247.) She called out Lori's name, and yelled to Mosley, "What are you doing? She's only twelve." (1 RT 57.) Mosley turned, saw the grandmother, and fled by jumping over a wall. (1 RT 168, 194; 2 RT 247.)

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[3]Mosley was 18 years old at the time of the assault. (1 CT 11, 47.)

[4]Robert was 17 years old at the time of trial. (1 RT 158.)

Scared, confused, and embarrassed, Lori did not tell anyone about the rape until months later when she confided in her father; he called the police. (1 RT 64-65, 70.) Lori's parents took her to a doctor for an examination to determine whether she had contracted any diseases as a result of the rape. (2 RT 293-294.)

An Orange County Sheriff's Department investigator interviewed Lori in August 2003 and again in September 2005. (2 RT 310, 315.) During the interviews, Lori related substantially the same account of events to which she would later testify at trial. (2 RT 316-319, 326-327.) The Sheriff's department did not request a sexual assault exam, as the offense had occurred too far in the past to yield useful results. (2 RT 330-331.)

An Orange County jury found Mosley guilty of simple assault (Pen. Code, § 240), a lesser offense included within the charged crime of committing a lewd act upon a child under 14 (Pen. Code, § 288(a)). (1 CT 94-95, 97.) The trial court sentenced Mosley to six months in the county jail. (1 CT 169; 2 RT 445.) In addition, upon finding that Mosley's assault had been sexually motivated, the court ordered him to register as sex offender under (former) Penal Code section 290, but stayed the registration order pending appeal. (1 CT 169; 2 RT 445.)

On appeal, Mosley challenged the registration order. In its first published opinion in this case,[5] the Court of Appeal opined that the section 3003.5(b) residency restriction, triggered by the trial court's registration order, amounted to added "punishment" exceeding the maximum statutory penalty available under the jury's misdemeanor assault verdict alone. The Court of Appeal concluded that, under *Apprendi v. New Jersey*, Mosley should have been afforded a jury trial on the predicate facts, that is, the

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[5]Previously published at: 168 Cal.App.4th 512, hereinafter First Slip Opinion.

crime was committed out of sexual compulsion or for sexual gratification, that were required to support the discretionary section 290 registration obligation that triggered the residency restriction. Because Mosley had not been afforded such a jury trial, the Court of Appeal struck the registration order. (First Slip. Opn. at p. 2.)

This Court granted review and deferred briefing pending the disposition of *In re E.J. on Habeas Corpus*, S156933. In February 2010, this Court issued its decision in *In re E.J.* (2010) 47 Cal.4th 1258. In April, this Court directed the Court of Appeal to vacate its decision in this case and to reconsider the cause in light of *E.J.*

After supplemental briefing, the Court of Appeal issued a second published opinion.[6] It again concluded that the Jessica's Law's residency restriction constituted additional punishment so that Mosley was entitled to a jury trial on the factual predicate for the registration obligation that had triggered the residency restriction; and it again struck the triggering registration order. (Second Slip Opn. at p. 3, 26-27.)

The People filed a petition for review on the question of whether enforcement of Mosley's sex offender registration obligation required an *Apprendi* jury trial on the predicate fact that the offense had been sexually motivated. This Court granted the petition and identified further specific questions for briefing.

SUMMARY OF ARGUMENT

1. The Court of Appeal erred in invalidating the trial court's discretionary order requiring Mosley to register as a sex offender. Such registration does not implicate any *Apprendi* right to a jury trial. Indeed, this Court already held that in *People v. Picklesimer* (2010) 48 Cal.4th 330.

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[6]Previously published at: 188 Cal.App.4th 1090, hereinafter Second Slip Opn.

Nor does the statutory imposition of the Jessica's Law residency restriction in section 3003.5(b), which follows from the defendant's status as a sex offender registrant, require a jury trial to determine the facts requisite to the registration obligation. Like registration itself, the residency restriction is regulatory, involves no incarceration, and does not implicate matters traditionally entrusted to the jury at common law so as to trigger any *Apprendi* jury-trial right.

Even if the residency restriction somehow required *Apprendi* jury findings of the facts giving rise to the underlying registration obligation, Mosley's registration obligation still would remain intact. The Jessica's Law residency restriction applies only to sex offender parolees and only as a statutory condition of their parole from prison; violation of the restriction, where it applies, is not a crime but only a violation of parole. As a mere misdemeanor probationer, rather than a felony parolee, Mosley is not subject to the Jessica's Law residency restriction as a result of his crime at all. So the *Apprendi* jury trial required by the Court of Appeal is unnecessary and could serve no purpose.

Further, even if Mosley were subject to the residence restriction, his separate registration obligation would be severable and therefore would still remain in effect. This Court already decided as much in *Picklesimer*. And, in any event, the alleged *Apprendi* jury-trial error in Mosley's case proves harmless. For it may be said beyond a reasonable doubt that, given the overwhelming evidence that the crime was sexually motivated, a jury would have found the factual predicate for section 290 registration.

2. In response to the Court's questions, as implicit in the argument that Mosley is not subject to the residency restriction, it is respondent's view, as previously expressed in other state and federal courts, that the section 3003.5(b) residency restriction operates, not as a basis for criminal liability, but only as a condition of parole for sex offender parolees.

Similarly, the residency restriction does not operate as part of the section 290 registration obligation so as to permit prosecution under the registration-enforcement provision of section 290 for violation of the residency restriction itself.

Though adhering here to those previously expressed views, respondent notes that a case might be made for the proposition that the voters may have intended that section 3003.5(b) would operate so that a violation of the residency restriction by any sex offender registrant would be punishable as a misdemeanor. To aid the Court, respondent discusses that counter argument in some detail below.

ARGUMENT

I. A DEFENDANT IS NOT ENTITLED TO A JURY TRIAL ON THE FACTUAL PREDICATE THAT SUPPORTS HIS OBLIGATION TO REGISTER AS A SEX OFFENDER

Introduction

The Court of Appeal held that the Jessica's Law residency restriction, imposed by statute on sex offender registrants, constituted a penalty beyond the maximum punishment available simply for Mosley's conviction for assault. Therefore, the Court of Appeal ruled, Mosley was entitled under *Apprendi* to a jury trial on the facts necessary to support the discretionary registration obligation that triggered the residency restriction. Because Mosley was not afforded that jury trial, the appellate court concluded that the registration order itself must be struck.

The Court of Appeal, however, erred in invalidating Mosley's registration requirement. Sex offender registration does not implicate any *Apprendi* right to a jury trial and nor does the Jessica's Law residency restriction.

Even if the residency restriction somehow required *Apprendi* jury findings to support the underlying registration obligation, Mosley's

registration obligation would remain intact. Because he is not a sex offender parolee, Mosley is not subject to the Jessica's Law residency restriction at all. Further, Mosley's separate registration obligation is separately enforceable without regard to the residency restriction. In any event, an *Apprendi* jury-trial error in Mosley's case proves harmless.

A. The Sex Offender Registration Requirement Does Not Implicate the *Apprendi* Right to a Jury Trial.

Regardless of whether the Court of Appeal was right about the nature of the Jessica's Law residency restriction in section 3003.5(b), it erred in its holding that invalidated the trial court's section 290 registration order on *Apprendi* jury-trial grounds. As this Court recently held, sex offender registration does not trigger any *Apprendi* jury-trial right. (*People v. Picklesimer*, *supra*, 48 Cal.4th at pp. 343-344.)

Registration falls outside the *Apprendi* jury-trial rule because it is not the kind of consequence that traditionally has been entrusted to a criminal case jury. (See *Oregon v. Ice* (2010) 555 U.S. 160 [129 S.Ct. 711, 713, 172 L.Ed.2d 517].) Most obviously, it is not incarceration. It is, instead, a regulatory measure for the protection of society. As this Court has repeatedly recognized, it does not even amount to punishment for the defendant's crime. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197 (citing *In re Alva* (2004) 33 Cal.4th 254, 268; *People v. Castellanos* (1999) 21 Cal.4th 785, 796.) Thus, even to the extent that it was based on the trial judge's own finding that Mosley's assault against Lori C. had been sexually motivated, the discretionary order requiring Mosley to register as a sex offender under section 290 was valid notwithstanding *Apprendi*.

B. The Jessica's Law Residency Restriction Does Not Affect the Continuing Validity under *Apprendi* of Sex Offender Registration Based on Findings Made by a Judge

To be sure, the Court of Appeal never directly questioned *Picklesimer's* holding that sex offender registration implicates no *Apprendi* right to a jury trial. Instead, it invalidated Mosley's registration obligation on a roundabout theory: that, under section 3003.5(b) as enacted in Jessica's Law, section 290 registration now carries with it an onerous new residency restriction that separately entitled the defendant to an *Apprendi* jury trial on the factual allegations supporting the underlying registration obligation. The Court of Appeal's theory was wrong in a number of ways.

1. The Jessica's Law residency restriction does not implicate *Apprendi*.

First, the Jessica's Law residency restriction does not implicate any constitutional right to a jury trial on the factual predicate, that is, the crime for which the jury convicted the defendant had been sexually motivated, which supports a registration order. As with registration itself, the Jessica's Law residency restriction does not amount to incarceration. As with registration, it is regulatory, and as the Court of Appeal recognized (Slip Opn at p. 19), was not intended to be punitive. In sum, with registration, the residency restriction falls outside the *Apprendi* rule because it is not the kind of consequence of a conviction that historically was entrusted to control by the jury.

a. *Oregon v. Ice*, *supra*, 555 U.S. 160, is instructive. In *Ice*, Oregon law required concurrent sentences unless a judge found certain facts that then permitted consecutive sentences. (*Id.* at p. 715.) Finding such facts, the judge sentenced Ice to consecutive terms totaling 340 months for multiple sex offenses, rather than to concurrent terms that would have expired after only 90 months. (*Id.* at p. 716, fn. 5.) Ice contended that,

under *Apprendi*, the Sixth Amendment guaranteed him a right to jury findings on the facts that alone authorized the consecutive sentences. (*Ibid.*)

But the United States Supreme Court rejected Ice's contention. It explained that application of the *Apprendi* rule must honor the longstanding common-law practice in which the rule is rooted. (*Oregon v. Ice*, *supra*, 555 U.S. at p. 717.) The "animating principle" of the *Apprendi* rule, the Court further observed, was preservation of the jury's historic role as a bulwark between the state and the accused at trial for an alleged offense. (*Ibid.*) Historically, however, that role did not extend to the decision to impose sentences consecutively or concurrently. That choice, instead, historically "rested exclusively with the judge." (*Id.* at pp. 717-718.)

Also significant here, *Ice cautioned* against over-expansion of *Apprendi* "beyond its necessary boundaries" to invalidate or jeopardize modern state initiatives. As *Ice* noted, states permit judges to make a wide variety of sentencing determinations beyond that of setting the length of incarceration. (*Oregon v. Ice*, *supra*, 555 U.S. at p. 719.) Judges often find facts, about the nature of an offense or the character of the defendant, in determining the length of supervised release following a prison sentence, attendance at drug rehabilitation programs, terms of community service, fines, and orders for restitution. (*Ibid.*) "Intruding" *Apprendi's* rule into these sentencing choices or "accoutrements" would cut the rule "loose from its moorings." (*Id.*) Finally, *Ice* explained that sentencing-choices findings about the nature of the offense and the character of the defendant have been historically entrusted to the sentencing judge rather than to the jury. (*Oregon v. Ice*, *supra*, 555 U.S. at p. 719.)

Application of *Ice* to the Jessica's Law residency restriction dictates rejection of Mosley's jury-trial claim. The section 3003.5(b) residency restriction does not involve added incarceration at all, as did the extended-

term sentencing consequences at issue in the Supreme Court's *Apprendi* line of cases. Nor can Mosley point to historical common-law practice entrusting the basis for any residency restriction to the jury's determination.

Instead, the residency restriction and the underlying registration obligation are modern regulatory imperatives unknown at common law. If anything, the registration obligation and the residency restriction are akin to other modern programs, such as supervised release following a prison sentence, attendance at drug rehabilitation programs, terms of community service, and orders for restitution, programs that *Ice* made clear were unaffected by *Apprendi*. To invalidate them under *Apprendi* would also jeopardize other similar modern programs. Finally their operation depends upon evaluation of the nature of the offense and of the offender.

Just as the common law discloses no jury-trial pedigree for consecutive sentencing, it discloses no such pedigree for the Jessica's Law residency restriction or its underlying registration obligation. Neither, then, is subject to any constitutional requirement for a jury trial under *Apprendi*.

b. The Court of Appeal begged the *Apprendi* question when it considered only whether the residency restriction might be considered "punishment" so as to trigger other general constitutional guarantees. It relied heavily on *Mendoza-Martinez* (1963) 372 U.S. 144 [83 S.Ct. 554, 9 L.Ed.2d 644], where the Supreme Court held that the government could not divest an American of citizenship without affording him the protections of the Fifth and Sixth Amendments. But the further question of whether the Constitution entitles a defendant to the specific right to a jury trial, however, depends upon "the longstanding common-law practice" in which the jury-trial rule is rooted. (*Oregon v. Ice*, *supra*, 555 U.S. at p. 712.) Under the Court of Appeal's truncated analysis, due process somehow would guarantee a jury trial even to a defendant charged with a misdemeanor for which he might be "punished" by imprisonment for less

than six months in jail, contrary to the settled understanding of the constitutional provision specifically governing jury trials. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 159-160 [88 S.Ct. 1444, 1453, 20 L.Ed.2d 491].)

The issue here, more narrowly confined, is whether the defendant has a right to jury trial for a residency-restriction "accoutrement" of sentencing. *Ice*, not *Mendoza-Martinez*, controls that question. Under *Ice*, the answer is "no."

C. Even if enforcement of the residency restriction requires jury findings on the underlying registration facts, the registration obligation in this case remains valid.

Besides its error in deducing a jury-trial right from the residency restriction, the Court of Appeal's order striking Mosley's registration obligation was wrong for three further reasons. First, the residency-restriction statute does not govern non-parolees such as Mosley. Second, even if it did, Mosley's underlying registration obligation would remain separately enforceable. Third, any error was harmless.

1. The residency restriction applies only to parolees.

Jessica's Law imposes its residency restriction only on parolees and only as a statutory condition of their parole from prison. As merely a misdemeanor probationer, rather than a felony parolee, Mosley is not subject to the Jessica's Law residency restriction at all.

The conclusion that the residency restriction is only a statutory parole condition, and not a more broadly enforceable obligation, is part and parcel of the analysis offered by respondent in Argument II at pages 15-22, *post*, on the question of whether a violation of the restriction constitutes a crime. Although one could make a plausible argument that the Jessica's Law residency restriction applies to all sex offender registrants and that violation

of the restriction is a crime, which might have been the intent of the voters in passing Proposition 83, the better view, to which respondent adheres, is that the residency restriction operates only as a condition of parole.

Accordingly, for the reasons given in Argument II, *post*, Mosley's misdemeanor conviction and resultant obligation to register as a sex offender do not subject him to the Jessica's Law residency restriction.

In the Court of Appeal's view, and apparently in Mosley's own view, it is the "punitive" effect of the residency restriction that mandates an *Apprendi* jury-trial on the facts supporting the registration order from which the residency restriction follows. But, as the residency restriction is not applicable to Mosley as a result of his crime, that rationale for imposing an *Apprendi* requirement vanishes.

2. Even if the residency restriction applies to non-parolee sex offenders and requires an *Apprendi* jury trial, the registration obligation remains separately enforceable.

Even if the residency restriction applied to Mosley and even if enforcement of the restriction required a jury trial on the facts supporting the registration obligation, the Court of Appeal nevertheless erred in striking the registration order. For, as this Court held in *People v. Picklesimer*, *supra*, 48 Cal.4th 330, the registration order itself would remain separately enforceable.

Like Mosley, Picklesimer argued that his sex offender-registration order was unlawful under *Apprendi* because it triggered heightened residency-restriction punishment under Jessica's Law based on factual findings made by a judge rather than a jury. (*People v. Picklesimer*, *supra,* 48 Cal.4th at p. 343.) As noted above, this Court correctly held that *Apprendi* required no such jury findings. (*Id.* at p. 344.) But this Court further ruled that, even if Jessica's Law required an *Apprendi* trial and even if the state and federal ex post facto clauses prohibited enforcement of the

residency restriction against Picklesimer because he had committed his crime prior to Proposition 83, there still would be no constitutional bar to a judge exercising discretion to determine whether Picklesimer nevertheless should remain subject to sex offender registration. (*Ibid.*) That is, the sex offender registration obligation, which requires no *Apprendi* jury trial, would remain separately enforceable. (See *id.*) It therefore remains separately enforceable here.

The Court of Appeal wrongly interpreted *Picklesimer* to do no more than recognize "the limited reach of *E.J.* by phrasing its citation to *E.J.* to leave unaddressed those situations in which imposing the residency restriction would punish the original offense." (Second Slip Opn. at p. 33.) But *Picklesimer* did more than that. It held that registration would remain valid even if *Apprendi* required a jury trial to support the additional residency restriction.

3. Any *Apprendi* error was harmless.

In *Washington v. Recuenco* (2006) 548 U.S. 212, 222 [126 S. Ct. 2546, 165 L. Ed.2d 466], the United States Supreme Court held that *Apprendi* error is not structural but is instead subject to a harmless-error review. (*Id.* at p. 222.) And, under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], before a federal constitutional error can be held harmless, a reviewing court must conclude, beyond a reasonable doubt, that the error was harmless. (*Id.* at p. 24.) Here, even if the judge's discretionary registration order violated *Apprendi*, the trial court judgment still should be affirmed because the alleged error proves harmless beyond a reasonable doubt.

As the Court of Appeal observed, the trial court in this case found, "beyond a reasonable doubt," that Mosley had "sexually assaulted the victim" and that "the assault in this case was committed as a result of sexual compulsion or for purposes of sexual gratification." (Second Slip

Opn. at p. 7.) The trial court considered Lori C.'s "'truthful and sincere'" testimony that defendant had "'grabbed her, kissed her, fondled her breasts, buttocks and the area between her legs, dropped his pants and inserted his penis into her vagina.'" The trial court also noted that Lori's grandmother had testified to seeing defendant struggle with the girl, and that her brothers had testified that Mosley's pants were down around his ankles. The court found that Mosley was "'even more likely'" driven by sexual compulsion because he had assaulted Lori in an open carport, and that the assault was "'not an isolated incident'" because he had kissed her once before. In addition, the trial court found registration appropriate because Mosley was physically dangerous to the public. (Second Slip Opn. at p. 7.)

Moreover, the Court of Appeal rejected Mosley's argument that sex offender registration was unwarranted on the facts of this case. It concluded that Lori's testimony supported both the trial court's finding that Mosley's assault was sexually motivated and its reasons for imposing registration. Had the facts been found by a jury, the appellate court agreed, the trial court would have been justified in exercising discretion to order registration. (Second Slip Opn. at p. 8, fn. 3.)

The evidence overwhelmingly shows that Mosley's assault on Lori was committed as a result of sexual compulsion or for purposes of sexual gratification. (See Pen. Code, § 290.006.) Indeed, there was no evidence of any other motive for Mosley's attack on his 12-year-old victim. It therefore can be said beyond a reasonable doubt that, had the question been presented to the jury, it would have found that the assault in fact had been sexually motivated. Any *Apprendi* error, therefore, was harmless under *Chapman*. Therefore, the registration order here must be upheld.

II. THE RESIDENCY RESTRICTION GOVERNS ONLY PAROLEES RATHER THAN ALL SEX OFFENDER REGISTRANTS AND OPERATES ONLY AS A CONDITION OF PAROLE RATHER THAN AS A PENAL PROVISION

In the previous *E.J.* cases, this Court did not decide whether section 3003.5(b) governed only parolees or created a separate new misdemeanor offense applicable to all sex offenders subject to registration regardless of their parole status because the Department of Corrections and Rehabilitation in that case was seeking only to enforce section 3003.5(b) as a statutory parole condition; and, as this Court further noted, there was no indication that any other registered sex offenders, on parole or otherwise, had ever been charged with a criminal offense based on this provision. (*In re E.J., supra*, 47 Cal.4th at p. 1271, fn 5.)[7] Now, however, this Court has requested briefing on the question left unanswered in *E.J.*

As explained below, it may reasonably be argued that the electorate, in voting for Proposition 83, intended that the residency restriction would govern all sex offenders subjected to a lifetime registration obligation and that violation of its terms would constitute a misdemeanor. Nevertheless, the Attorney General, on behalf of the People, has consistently taken the position, in state and federal courts, that section 3003.5(b) did not successfully carry out any such alleged intent. Instead, the better reading of section 3003.5(b) is that it applies only to parolees as a statutory condition of parole and that its sanction extends only to holding the parolee in violation of parole rather than to holding him culpable for a new crime. Although the matter is not free from doubt, respondent adheres to that position here.

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[7]Like the situation in *E.J.*, there is no evidence that any sex offender registrant has been prosecuted for a criminal violation under this section.

1. Section 3003.5(b) governs only sex offender parolees.

The drafters of Proposition 83, and the voters who approved it, may have intended that the section 3003.5(b) residency restriction would govern all sex offender registrants. But the more reasonable view is that section 3003.5(b) as adopted applies only to parolees.

a. When interpreting a voter initiative, a reviewing court applies the same principles that govern the construction of a statute. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276; *People v. Rizo* (2000) 22 Cal.4th 681, 685.) The meaning of a statute is not determined from a single word or sentence. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Rather, the words are construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Ibid.*)

Here, the Jessica's Law residency restriction provides that,

> "[n]otwithstanding any other provision of law, it is unlawful for *any person* for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

(Pen. Code, § 3003.5, subd. (b) [emphasis added].) And it is true that use of the phrase "any person" (required to register), without limitation, reasonably may be said to evince an intent on the part of the electorate that the residency restriction would apply to sex offender registrants regardless of parole status.

Indeed, this inference of intent might appear somewhat stronger in light of the fact that, in contrast, section 3003.5, subdivision (a), hereinafter 3003.5(a), defines a narrower class of persons subject to a special additional dwelling restriction. It reads,

> (a) Notwithstanding any other provision of law, when *a person is released on parole* after having served a term of imprisonment in state prison for any offense for which

> registration is required pursuant to Section 290, that person may not, *during the period of parole*, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption..

(Pen. Code, § 3003.5, subd. (a) [italics added].)

Section 3003.5, that is, employs different phrases to identify different classes of persons for whom these different residency restrictions apply. Subsection (a) subjects a class of "persons released on parole" to a restriction on cohabiting with other registrants; subsection (b) subjects a broader "any person" class to a restriction on living within 2000 feet of any public or private school, or park where children regularly gather.

The different descriptions might suggest an intent that the residency restriction contained in subsection (b) should apply to a different set of persons than the parolees subject to subsection (a). "Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117; *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.)

But that inference would be more cogent if the different words were used in adjoining subdivisions of a statute that were contemporaneously enacted. (See *People v. Jones* (1988) 46 Cal.3d 585, 596). Here, however, subdivisions (a) and (b) were not contemporaneously enacted.

Further, the Proposition 83 drafters added the section 3003.5(b) residency restriction provision to the existing section 3003.5, which already contained a residency restriction and was aimed peculiarly at parolees. Section 3003.5(a) (formerly section 3003.5) limits its application to persons released on parole after having served a term of imprisonment in state prison for an offense that requires sex offender registration, and only to the period of parole. The placement of Jessica's Law's residency restrictions

within the same section as a prior-enacted residency restriction on parolees evinces an intent on the part of the drafters that "any person" in section 3003.5(b) refers to the same persons identified in § 3003.5(a), that is, parolees. Thus, the language of section 3003 as a whole indicates that the section 3003.5(b) residency restriction applies, as does section 3003.5(a), only to parolees for the term of their parole.

Indeed, although Jessica's Law amended several sections of the Penal Code, its drafters placed the section 3003.5(b) residency restrictions within the parole section of the Penal Code (chapter 8, commencing with section 3000). This choice further suggests an intent that the provisions of that section be enforced by the authority with jurisdiction over parolees, rather than the public prosecutor with authority to enforce the criminal law.

b. Certain statements in the Voter Information Pamphlet do provide some support for a different and broader interpretation of section 3003.5(b) as applying to sex offender registrants and not just to parolees. Most particularly, the proponents stated in the pamphlet that "Proposition 83 means dangerous child molesters will be kept away from our children and monitored *for life*." (Voter Information Pamp. Gen. Elec. (Nov. 7, 2006), argument in favor of Prop. 83 at p. 46 [italics added].) The proponents' assertion that dangerous child molesters would be "kept away from our children . . . "for life" might be interpreted as indicating that, like sex offender registration, the residency restriction would be enforced for life and not merely for the term of parole. Thus, it may be argued, the section 3003.5(b) residency restrictions were intended to apply to "any" sex offender registrant, regardless of parole status, for life.

But the ballot argument, which is no part of the initiative measure itself, cannot support the novel proposition that the Authority is now

charged with responsibility for *non-parolees* -- and for life. (Cf., Pen. Code, § 3000.)[8] Accordingly, although voter's pamphlets may serve as an indicator of the electorate's intent, the argument here is not sufficient to overcome the textual statutory argument that section 3003.5(b), placed as it is in the pre-existing parole statute, operates instead as a *parole* provision subject to the enforcement powers of the Authority. Statutes should be construed to avoid absurd consequences. (See *People v. Pieters* (1991) 52 Cal.3d 894, 898 quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113

2. A section 3003.5(b) transgression is a parole violation but not a crime.

The more reasonable inference that section 3003.5(b) applies only to parolees subject to the enforcement powers of the Authority, and not to sex offender registrants generally, is reinforced by the apparent fact that the drafters did not provide for enforcement of the residency restriction as a criminal matter.

a. It has long been the rule in this state that "[a] description of acts necessary to constitute a crime does not make the commission of such acts a crime; punishment is as necessary to constitute a crime as definition." (*People v. McNulty* (1892) 93 Cal. 427, 439 (*McNulty*), citing to Pen. Code, § 15; see also, *Ex parte Ellsworth* (1913) 165 Cal. 677, 681(*Ellsworth*) ["A description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime, unless a punishment be annexed, for punishment is as necessary to constitute a crime as its exact definition."]; 53 Ops.Cal.Atty.Gen. 309, 310-311 (1970).)

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[8]As is discussed immediately *post*, violation of the residency restriction would not be enforceable as a crime against non-parolees by district attorneys.

Penal Code section 15 reads:

> A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, *and to which is annexed*, upon conviction, either of the following punishments: (1) Death; (2) Imprisonment; (3) Fine; (4) Removal from office; or (5) Disqualification to hold and enjoy any office of honor, trust, or profit in this state.

(Emphasis added.)

Section 3003.5(b), which sets forth the residency restriction, does not contain a provision for punishment. It nowhere states that failure to comply with this residency restriction constitutes a felony, misdemeanor, crime, or public offense. Nor does any it identify any punishment for such a violation. Further, no general provision in the same chapter, title, or part of the Penal Code provides that a violation of any section of that chapter, title, or part is a misdemeanor or other crime.

Penal Code section 19.4 does not clearly fill in the gap. Section 19.4 states that "[w]hen an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor." By its plain language, the statute applies only when the act or omission "is declared by a statute to be a public offense." (See 53 Ops.Cal.Atty.Gen., *supra*, at p.311 (1970).)

The Attorney General, in a formal opinion, has addressed the question of whether and when the violation of a statute constitutes a crime or public offense:

> A crime or public offense is defined in section 15 of the Penal Code as 'an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed' any of certain enumerated punishments (death, imprisonment, fine, or removal from or disqualification to hold public office). A statute requiring or prohibiting an act makes violation of the statute a crime or public offense only if there is some means of determining the punishment to be imposed for the violation.

> [Citations.] The statute may itself expressly designate the punishment for its violation, or it may do so indirectly by designating the violation as a felony or misdemeanor, enabling the punishment to be ascertained by reference to other statutes []. A statute may merely declare the violation to be a public offense, in which case it is punishable as a misdemeanor under [Penal Code] Section 177. Moreover, a statute merely prohibiting or commanding an act may be a valid penal provision if it can be read together with a general provision making all violations of provisions of the same or a different code, or part thereof, misdemeanors (or felonies or public offenses). [Citation.]

(53 Ops.Cal.Atty.Gen., *supra*, at pp. 310-311.) None of these circumstances, however, seem present here. When construing a statute, a reviewing court may presume that the Legislature, or in this case the electorate, acted with knowledge of Attorney General opinions affecting the subject matter of proposed legislation. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 564.)

b. Nor does the fact that section 3003.5(b) explicitly states that it is "unlawful" for sex offenders to live near schools and parks suggest that failure to comply is a crime. As this Court has noted—albeit in the different context of interpreting jury instructions rather than interpreting statutes—"unlawful" is not synonymous with "criminal."

> To speak of an act as unlawful is not equivalent to saying it has been denounced as a crime. Every criminal act is illegal or unlawful, but illegal or unlawful acts may not be criminal. [Citation.]

(*People v. Ranney* (1931) 213 Cal. 70, 77; but see *People v. Kennedy* (1937) 21 Cal.App.2d 185, 193 ["[w]hen the statute makes an act unlawful *or* imposes a punishment for its commission, this is sufficient to constitute the act a crime without any express declaration to that effect." (italics added)].)

c. As with the earlier discussion about whether section 3003.5(b) applies to sex offender registrants generally rather than just to a smaller included class of parolees, of course, there are arguments on either side. Here, it might be argued that, on the question of whether a violation of section 3003.5(b) amounts to a misdemeanor offense, there is a lacuna—the statute does not declare a violation of its provisions a "crime" or "public offense" or provide for a penalty—that a court might seek to fill by resort to sources extrinsic to the statute's text. (See *People v. Elliot* (2005) 37 Cal.4th 453, 478; ITT *World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 868 [where language of voter initiative is ambiguous, reviewing court considers extrinsic aids, such as the ballot materials on the proposition]; see also *People v. Prather* (1990) 50 Cal.3d 428, 431, 436, fn. 7; *People v. Elliot*, *supra*, 37 Cal.4th 453, 478. Indeed, the Legislative Analyst did state in the ballot pamphlet that violation of the provision would be a misdemeanor. (Voter Information Pamp., Gen. Elec., *supra*, Analysis by the Legislative Analyst of Prop. 83, pages 43-44 [italics added].)[9]

Nevertheless, respondent is of the view that adherence to the very workable, "bright line" standard found in Penal Code section 15 and confirmed by this Court in *McNulty* and *Ellsworth*, *supra*, is the better approach and provides guidance and certainty for courts in the future. Moreover, a court ordinarily should not in effect create an offense by enlarging a statute or by inserting words. (*People v. Baker* (1968) 69 Cal.2d 44, 50.)

In sum, it is the Attorney General's position that section 3003.5(b) does not mandate that a violation of its terms is a criminal offense. Failure

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[9]The legal basis for Legislative Analyst's statement is not known.

to comply with the residency restriction provision, therefore, does not give rise to a misdemeanor.

III. THE SECTION 3003.5(B) RESIDENCY RESTRICTION IS NOT A CONDITION OF SEX OFFENDER REGISTRATION, SO VIOLATION OF SECTION 3003.5(B) DOES NOT AMOUNT TO A CRIMINAL VIOLATION OF THE SEX OFFENDER REGISTRATION ACT[10]

In response to this Court's final question: Nothing in section 3003.5(b) suggests that violation of the residency restriction may be prosecuted as a criminal violation of the sex offender registration statute itself.

As this Court observed in *In re Alva* (2004) 33 Cal.4th 254, California has had some form of sex offender registration requirement since 1947. (*Id.* at p. 264 citing former § 290, as enacted by Stats. 1947, ch. 1124, § 1, p. 2562.) As further stated by this Court, the purpose of the Sex Offender Registration Act (SORA) is to ensure that persons convicted of sex offenses "shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citations]." (*In re Alva*, *supra*, 33 Cal.4th at p. 264; Pen. Code, §§ 290.-290.023.)[11] As this Court also has concluded, the statute was regulatory in

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[10]The Sex Offender Registration Act comprises Penal Code sections 290-290.023.

[11]A perhaps unintended impact of the residence restriction has been to make registrants less readily available for police surveillance, because it has resulted in a dramatic increase in the number of sex offenders registering as transient (having no residence address—see Penal Code section 290.011, subdivision (g).) A 2010 report to the Legislature by the California Sex Offender Management Board (CASOMB) shows that prior to enforcement of the residence restriction, 88 sex offender parolees were transient, but as of January 2010, 2,088 sex offender parolees were homeless. (CASOMB Recommendations Report, Jan. 2010, at www.casomb.org/reports, at p. 44.) The total number of registered sex

(continued...)

nature and was "intended to accomplish the government's objective by mandating certain affirmative acts." (*Ibid.*)

Section 290 imposes a lifetime sex offender registration obligation for persons convicted of enumerated offenses, persons convicted of non-enumerated offenses that a trial court finds were committed as a result of sexual compulsion or for purposes of sexual gratification, and persons adjudicated as sexually violent predators or determined to be mentally disordered sex offenders. (Pen. Code, §§ 290, subds. (b), (c), 290.006.) Section 290 expressly defines a willful failure to register as a criminal offense and expressly provides for penalties. The failure to register is a misdemeanor or felony, depending on whether the registrant's underlying conviction was a misdemeanor or felony. (Pen. Code, § 290.018, subds. (a) & (b).)

In addition, registrants must update their registration annually, when they change addresses, sexually violent predators must verify their addresses every 90 days, and transients must reregister every 30 days. (Pen. Code, §§ 290.011, 290.012, 290.013.) A willful failure to reregister or provide proof of residence is a misdemeanor. (Pen. Code, § 290.018,

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(...continued)
offender transients in California had surpassed 5,000 as of the 2010 CASOMB report, up from 2,049 in 2007. (*Ibid.*; see also Homelessness among Registered Sex Offenders in California: The Numbers, the Risks and the Response, November 2008, www.casomb.org/reports.htm; hereinafter "Homelessness report".) As of March 2, 2011, the number of sex offenders in California registering as transient was approaching 6,000 (5,960). (DOJ statistics for California Sex and Arson Registry, March 2, 2011.) The anomalous effect, discussed at length by CASOMB in its 2008 and 2010 reports, has been to make California communities less safe, because stable housing is an important factor in preventing future sexual offending, and homelessness is associated with risk of future reoffense. (CASOMB Recommendations Report, at pp. 41-46; see also CASOMB Homelessness report.)

subds. (f), (g), (h).) These criminal penalties apply to violations of the Sex Offender Registration Act itself.

There are myriad other statutes that impose added duties on persons required to register sex offenders. Notably, when those statutes seek to make it a crime to violate such duties, they specifically state the penalty. For example, Penal Code section 290.95 requires registered sex offenders working as employees or volunteers with children under certain circumstances to disclose their status, and prohibits designated registered sex offenders from working with children in those circumstances. Violation of this statute is punishable as a misdemeanor, as specifically stated in section 290.95, subdivision (e).

Similarly, section 626.81 prohibits registered sex offenders from being on school campuses without having both lawful business there and the permission of the chief administrative officer of the school. The statute expressly makes violation of the statute a misdemeanor. (Pen. Code, § 626.81, subd. (b).) As another example, section 290.01 applies to registered sex offenders who attend or are employed by an institution of higher education. Again, the section creates its own penalty for registrants who violate its provisions, making the first two violations a misdemeanor punishable only by a fine, and the third violation a misdemeanor punishable by imprisonment up to a year in county jail, or by a fine, or both. (Pen. Code, § 290.01, subd. (c).)

Loitering around schools or places where children normally congregate, and remaining after being asked to leave, is prohibited by section 653b. And that statute specifies a criminal penalty for those who violate it, and it specifies an additional, more onerous penalty for its violation when committed by a registered sex offender. (Pen. Code, § 653b, subd. (b).) Health and Safety Code section 1564 is similar. It prohibits specified registered sex offenders from residing in community

care facilities located within one mile of an elementary school. And then it expressly makes violation of the statute a misdemeanor. (Health & Saf. Code, § 1564, subd. (e).) Also, a registered sex offender must disclose his status as a registrant before becoming a client of a community care facility. (Health & Saf. Code, § 1522.01.) The statute makes it a misdemeanor pursuant to Health and Safety Code section 1540, subdivision (a), for a registrant to fail to disclose his or her status. (Health & Saf. Code, § 1522.01, subd. (a).)

Other provisions pertaining to registered sex offenders exist in the parole section of the Penal Code, and these have never been construed to create a separate criminal offense, or to create an unwritten criminal penalty under the Sex Offender Registration Act for violations. Instead, these sections have historically been enforced only by a parole revocation. They include section 3003(g), prohibiting designated registered sex offenders from living within a half mile of a school on parole; and section 3003.5(a), prohibiting registered sex offenders on parole from living in a single family dwelling with other registrants, unless legally related by blood, marriage or adoption.

Jessica's Law did not amend any provision of the SORA.[12] Section 3003.5(b)'s purpose, in referring to section 290, is only to identify those persons to whom the section 3003.5(b) residency restriction applies. If the drafters had intended violation of section 3003.5(b) to result in a section 290 criminal penalty, they would have known how to do it. (*People v. Murphy* (2001) 25 Cal.4th 136, 159 [Legislature knows how to use language clearly expressing intent].) The Legislature has amended the

[12]Jessica's Law did amend Penal Code section 290.03, a provision assessing fines pertaining to registrants, which is outside the SORA. (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, sec. 7, at p. 128.)

SORA repeatedly since 1995, and any new registration requirements are all contained within the SORA, and all are made punishable as provided in Penal Code section 290.018.[13]

The public prosecutor is vested with the power to conduct prosecutions for the failure to register or reregister. (*People v. Eubanks* (1996) 14 Cal.4th 580, 588 [prosecution of criminal offenses is the sole responsibility of the public prosecutor]; Gov. Code, §100, subd. (b).) The only other sanction for a failure to register provided for in section 290 is the revocation of parole or probation by the appropriate authority. (Pen. Code, § 290.018, subd. (k) [if a person required to register is on parole or probation, and fails to do so, the Authority or the court must revoke the person's parole or probation].) As section 290.018 acknowledges, the power to revoke parole is vested exclusively in the Authority. (Pen. Code, §§ 3000, subds. (b)(8)(9), 3060.)

In short, even if violation of section 3003.5(b) were construed to be a condition of registration subject to enforcement pursuant to section 290, that latter statute would provide no penalty for transgressing the residency restriction itself. Instead, it treats failure to register as a felony or misdemeanor depending on the defendant's underlying crime. (Cf., *Ellsworth*, *supra*, 165 Cal. at p. 680 [an "effort to transport the penal provisions" of one ordinance into a later -enacted initiative that provided for no penalty itself, "cannot be sustained."].)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

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[13]A 2009 expansion of the scope of Penal Code section 290.95, prohibiting designated registrants from providing goods or services to minors, was made an offense in that code section—not as a part of the SORA. (Pen. Code, § 290.95, subd. (d).) In contrast, Jessica's Law did not amend the SORA to add additional conditions.

Dated: April 8, 2011

Respectfully submitted,

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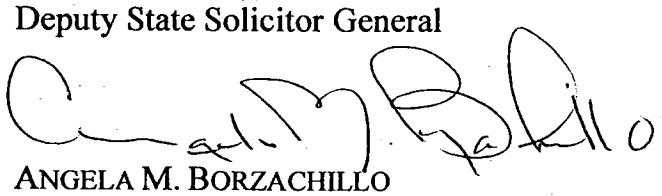

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Opening Brief on the Merits uses a 13 point Times New Roman font and contains 7,246 words.

Dated: April 8, 2011

KAMALA D. HARRIS
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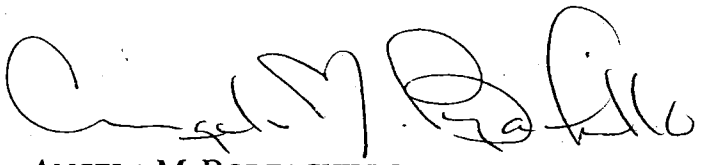

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Mosley**
No.: **S187965**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 8, 2011, I served the attached **Respondent's Opening Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on April 8, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 8, 2011, at San Diego, California.

Kimberly Wickenhagen
Declarant

Kimberly Wickenhagen
Signature

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