S189733

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-v-

MICHAEL DAVID CORNETT,

Defendant and Appellant.

SUPREME COURT
FILED

JAN 27 2011

Frederick K. Ohlrich Clerk

Deputy

ANSWER TO PETITION FOR REVIEW

Appeal from the Judgment of the Superior
Court of the State of California for the
County of Sonoma No. SCR 504048

THE HON. RENE AUGUSTE CHOUTEAU, JUDGE

OZRO WILLIAM CHILDS
SBN 46364
1622 Fourth Street
Santa Rosa, CA 95404
Telephone (707) 527-9911

Attorney for appellant
(by appointment -- First
District Appellate Project--
independent case system)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ANSWER TO PETITION FOR REVIEW 1

STATEMENT OF THE CASE 1

ARGUMENT AGAINST REVIEW 2

I. IT IS NOT TRUE THAT CHILDREN BETWEEN THE AGES OF TEN AND ELEVEN ARE A SPECIAL SUBJECT OF ANTI-MOLESTATION LAWS 4

II. THE STATUTES CITED BY THE PEOPLE AS BEING AFFECTED BY THE INTERPRETATION OF SECTION 288.7 IN THIS CASE ARE OF LITTLE IMPORTANCE TO THE LAW AND IN SOME INSTANCES ARE BEST INTERPRETED IN THE MANNER SET FORTH BY THE COURT OF APPEAL IN ITS PUBLISHED OPINION. SECTION 288.7 IS THE *ONLY* FELONY STATUTE THAT APPLIES TO CHILDREN "____ YEARS OF AGE OR YOUNGER" RATHER THAN TO CHILDREN UNDER A STATED AGE. 5

III. THE PUBLIC INTEREST WOULD BE SERVED BY A DENIAL OF REVIEW 7

CONCLUSION 9

CERTIFICATE OF WORD COUNT 10

TABLE OF AUTHORITIES

CASES

Keeler v. Superior Court (1970) 2 Cal.3d 619 3
People v. Gutierrez (1982) 132 Cal.App.3d 281 3

STATUTES

Penal Code §269 1
Penal Code §273i 5
Penal Code §286 subd. (b)(2) 4
Penal Code §286 subd. (c)(1) 4
Penal Code §288 .... 4, 5
Penal Code §288.5 4
Penal Code §288.7 .... 1, 2, 3, 5, 7, 8
Penal Code §288.7 subd. (b) 8
Penal Code §288a subd. (b)(2) 4
Penal Code §288a subd. (c)(1) 4
Penal Code §417.27 5
Penal Code §654 .... 1, 2
Penal Code §701.5 subd. (a) 5
Penal Code §861.5 6
Penal Code §1127f 6
Penal Code §1170 6
Penal Code §1170.72 6
Penal Code §1347 6
Penal Code §12088.2 6
Penal Code §12088.5 6

RULES

California Rules of Court, Rule 8.360 subd. (b) 10
California Rules of Court, Rule 8.500, subd. (b)(1) 3

ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, Chief Justice, and to the honorable associate justices of the California Supreme Court:

COMES NOW MICHAEL DAVID CORNETT, appellant herein, and hereby answers the petition for review filed by respondent on January 18, 2011, and requests that review not be granted on the issue raised by the Attorney General.

STATEMENT OF THE CASE

Appellant was tried for and convicted of seven felonies involving the molestation of his two stepdaughters. Because he was a prior offender, he qualified for sentencing under "Jessica's Law" (Pen. Code §269) and also as a second-striker; he was therefore sentenced to 150 years to life on three counts, plus two five-year enhancements for his prior prison term. Sentences on the remaining four counts were either made concurrent or stayed pursuant to Penal Code section 654.

The Court of Appeal upheld the convictions on five of the seven counts and upheld the 160-years-to-life sentence. One of the counts (Count 7) as to which sentence was concurrent was reversed on grounds not relevant here; the other, a conviction for oral copulation under Penal Code section 288.7 (Count 6) as to which sentence was stayed under Penal Code

section 654, was reversed on the ground that Jane Doe 1 was 10 years 11 months old at the time of the offense, and therefore was not "ten years of age or younger" as required by the statute.

Appellant filed a timely petition for review to exhaust state remedies on January 13, 2011, as to those counts sustained on appeal. Respondent filed a Petition for Review on January 18, 2011, seeking to set aside the reversal of Count 6.

ARGUMENT AGAINST REVIEW

As a rule, statutes designed to punish crimes against minors either apply to all minors or to minors under a certain age (e.g., a "child who is under the age of 14 years" [Pen.Code §288].) Penal Code section 288.7 uniquely punishes certain sexual acts against a "child who is 10 years of age or younger." This phrase has never been interpreted in California. Turning to interpretations of similarly worded statutes in other states, the Court of Appeal found that about half the states that have considered the issue have concluded that a phrase such as "10 years of age or younger" means a child who is exactly ten years of age on the day of the offense, or a child under the age of 10; to interpret the statute as applying to all children in their eleventh year of life would change the plain meaning of the statute to "ten years of age or *older*" (but not yet eleven). The remaining states interpret similar laws to apply to all children who would in common

parlance be called "ten-year-olds". Noting that it is "the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit" (Opinion, p. 29, citing *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631), and further noting that in *People v. Gutierrez* (1982) 132 Cal.App.3d 281, 283-284, the reviewing court adopted the "rule of lenity" by construing an ambiguous statute literally, the Court of Appeal reversed appellant's conviction on Count 6.

The basis for the review sought by the People is their belief (though unsupported by legislative history) that the Legislature intended section 288.7 to apply to crimes against all children under 11. We believe that prosecutors and judges can live with either interpretation of the statute, which is relatively new, and has evidently seldom been used in cases where the victim is over 10, but under 11. Certainly appellant can live with either version since whether his conviction on the relevant count stands or falls, he is still serving a 160-to-life sentence.

We write this Answer because the People's stated reason for review, that review is "necessary to secure uniformity of decision or to settle an important question of law" (Calif. Rules of Court, Rule 8.500, subd. (b)(1)) is not supported by a review of the reasons given in the Petition for Review. Moreover, the public interest would best be served by a denial of review.

I.

IT IS NOT TRUE THAT CHILDREN BETWEEN THE AGES OF TEN AND ELEVEN ARE A SPECIAL SUBJECT OF ANTI-MOLESTATION LAWS

The Attorney General urges that the "statute's application is now precluded as respects child victims in an age cohort commonly the subject of anti-molestation laws – those children past their 10th birthday who have not yet celebrated their 11th birthday." (Petition, p. 2). This is simply not the case. Children between their 10th and 11th birthday are not singled out for special treatment, but instead are protected by laws that apply with equal force to older children.

The most commonly used law, Penal Code section 288, applies unambiguously to "a child who is under the age of 14 years". The same is true of similar statutes, all of which apply to persons "under the age of 14 years", e.g., Pen. Code §§288.5 [resident child molesters]; 288a, subd. (c)(1) [oral copulation with child under 14 by adult more than 10 years older]; and 286, subd. (c)(1) [sodomy with child under 14 by adult more than 10 years older]. Similar statutes are clearly worded to refer to victims who are "under" a specified, but older, age (e.g., Pen Code §§286, subd. (b)(2); 288a, subd. (b)(2). No other child-molestation statute applies particularly to children under 11.

II.

THE STATUTES CITED BY THE PEOPLE AS BEING AFFECTED BY THE INTERPRETATION OF SECTION 288.7 IN THIS CASE ARE OF LITTLE IMPORTANCE TO THE LAW AND IN SOME INSTANCES ARE BEST INTERPRETED IN THE MANNER SET FORTH BY THE COURT OF APPEAL IN ITS PUBLISHED OPINION. SECTION 288.7 IS THE *ONLY* FELONY STATUTE THAT APPLIES TO CHILDREN "____ YEARS OF AGE OR YOUNGER" RATHER THAN TO CHILDREN UNDER A STATED AGE.

Respondent lists a number of Penal Code sections that, he argues, are affected by this decision (Petition, p. 2). Few are of any substantial importance. The listed statutes are:

Section 273i. This misdemeanor statute punishes publication of information about a child, defined as a "person who is 14 years of age or younger" with intent that another person commit a crime against that child. This rarely used statute almost certainly was not intended to apply to potential crimes against teenagers between their 14th and 15th birthdays, but was instead intended to track Penal Code section 288, which applies only to potential crimes against children under the age of 14.

Section 417.27. Prohibits selling a laser pointer to a person "17 years of age or younger." Punishable as an infraction, with a fine of $50 for a first offense and $100 for a subsequent offense.

Section 701.5, subd. (a). Prohibits police officers from using a "person 12 years of age or younger as a minor informant". No criminal

penalty is provided for an officer who violates this subdivision.

Section 861.5. Provides for a one-day continuance of a preliminary examination to accommodate the special needs of a child witness "who is 10 years of age or younger or a dependent person." This procedural provision does not appear to have ever been the subject of a published opinion.

Section 1127f. Specifies a jury instruction to be used when a child "10 years of age or younger" testifies as a witness in a criminal case.

Section 1170.72. Specifies that where specified drug offenses involve a "minor … 11 years of age or younger", this is a circumstance in aggravation when a felony prison term is imposed under section 1170.

Section 1347. Permits the use of closed-circuit television when a witness "13 years of age or younger" testifies in certain crimes including sexual offenses and violent felonies if the minor would otherwise be "unavailable as a witness."

Section 12088.2. Attorney General is to develop regulations for firearms safety and storage to prevent "injuries to children 17 years of age and younger".

Section 12088.5. Law enforcement agencies to report to State Department of Health when a "child 18 years of age or younger" suffers serious injury or death as a result of an "unintentional or self-inflicted gunshot wound." [Note that a person over the age of 18, but not yet 19, is

not a "child". We assume the intent of the statute was to tabulate injuries to minors; the Legislature therefore probably intended this reporting statute to apply only to minors under the age of 18].

In other words, every single statute allegedly affected by the decision in this case, other than section 288.7 itself, is regulatory or procedural in nature, or imposes no criminal penalty other than a fine. In some of the cited instances, the words "___ years of age or younger" were almost certainly intended to apply only to persons under the stated age. In every case imposing criminal penalties, where the age of a minor victim is relevant, the statute specifies that the penalty applies where the victim is "under the age of 14" or some other specified age. There is in all such criminal statutes no room for disagreement as to what the statute means. Thus, allowing the published opinion to stand will not adversely effect any criminal laws and will have no substantial effect on court procedures or policies.

III.

THE PUBLIC INTEREST WOULD BE SERVED BY A DENIAL OF REVIEW

As the Court of Appeal pointed out in the published portion of its opinion, it is *important* that criminal statutes be written clearly, so there is no doubt about the circumstances under which they apply. Where, as here, the Legislature has consistently used the phrase "under the age of ____" in

punishing crimes against children of a defined age, it is equally important that the use of unnecessarily ambiguous language should be discouraged. We think the public interest is best served when criminal statutes are clearly written and understandable to all, and where a statute is sloppily drafted and ambiguous, the public is best served if the Legislature is given the opportunity to re-examine the wording of the statute and determine for itself what it intended. This can only happen if the ambiguity of the statute is pointed out in a published appellate opinion.

A grant of review in this case will have the undesirable effect of postponing any resolution by the Legislature of what it intends to punish. If review is denied, the published opinion may prompt the Legislature to amend the statute to include only crimes against children under 11 (or under 10, depending on which age the Legislature thinks is appropriate). As the Court of Appeal said, "The Legislature should take another look at section 288.7 and amend it if the intention was to include as victims children under the age of 11 in subdivision (b)." (Opinion, p. 40).

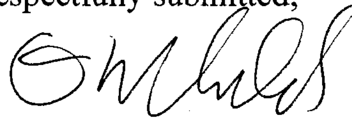
But if review is granted, there will be a strong temptation to *not* decide whether to amend the statute, because the Opinion in this case will be depublished, and it may take some time for this Court to reach a decision. In the meantime, the proper interpretation of the statute will remain in limbo. A denial of review will, either through legislative action or inaction, make the interpretation of the law certain.

CONCLUSION

For the foregoing reasons, review should be denied on the issue raised by respondent.

Dated: January 26, 2011

Respectfully submitted,



OZRO WILLIAM CHILDS
Attorney for appellant

CERTIFICATE OF WORD COUNT

I am counsel for appellant herein, and hereby certify that there are 1891 words in the brief to which this certificate is attached, excluding tables, this certificate, and any attachments authorized by Rule 8.360(b), California Rules of Court.

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

Dated: January 26, 2011

OZRO WILLIAM CHILDS

PROOF OF SERVICE BY MAIL

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

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

Said envelopes are addressed as follows

Court of Appeal
First Appellate District
350 McAllister St.
San Francisco CA 94102
Attn: Division Two

First District Appellate Project
730 Harrison St.
San Francisco CA 94107

Attorney General of the State of California
455 Golden Gate Ave. #1100
San Francisco CA 94102

The Hon. Rene Auguste Chouteau
Judge of Superior Court
Sonoma County
600 Administration Drive
Santa Rosa CA 95403

Charles Ogulnik
Deputy Public Defender
Sonoma County
600 Administration Drive
Santa Rosa CA 95402

Juliette Olson
Deputy District Attorney
Sonoma County
600 Administration Drive
Santa Rosa CA 95402

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

O W CHILDS

I, Sharon Ricks, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed at Santa Rosa, California this 26th day of January 2011.

SHARON RICKS