

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

JAMES RICHARD JOHNSON
Petitioner and Appellant,

v.

**THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY**
Respondent;

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

Case No. S209167

SUPREME COURT
FILED

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Deputy

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

San Bernardino County
Superior Court Case No.
CIVDS1105422

REPLY BRIEF ON THE MERITS

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

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

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INTRODUCTION

Respondent, the People, reply to appellant's Answering Brief on the Merits (ABM). Rather than repeat the Opening Brief on the Merits, the People focus their reply on appellant's arguments in his Answer.

The parties agree that "age is a consideration that must be taken into account when analyzing whether an equal protection violation has occurred" under *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). (ABM 7.) The parties disagree as to which line of cases should be applied in appellant's case. The trial court followed *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*) and the People urge this Court to approve of the trial court's choice. Appellant instead asks the Court to disapprove *Manchel* and follow *People v. Ranscht* (2009) 173 Cal.App.4th 1369 and the cases that flow from it. The People believe that the reasoning in *Ranscht* is unsound. (Although *Ranscht* did not address the

violation of Penal Code¹ section 288a, subdivision (b)(2) at issue here, the language and reasoning of that case were adopted by the Court of Appeal in this case, among others, and thus *Ranscht* is addressed directly.)

In particular, appellant urges adoption of *Ranscht*'s intent analysis. (ABM 19-26.) This analysis was *Ranscht*'s invention, and is not found anywhere in *Hofsheier, supra*, 37 Cal.4th 1185. The intent analysis is flawed, because section 290 makes no distinction between general and specific intent offenses and in fact mandates registration for both general and specific intent offenses, and for specific intent attempt and conspiracy counterparts. *Ranscht* was only able to maintain its intent analysis by erroneously deeming parts of *Hofsheier* to be dicta. *Manchel*, in contrast, considered those same words key to understanding *Hofsheier*'s holding, and appropriately conducted the equal protection analysis as a result.

Appellant brings a new argument to this Court, arguing that because subdivision (c)(1) had not yet been added to section 288 at the time of his offense in 1988, it should not be used as a comparison offense.² (ABM 27-28.) Yet the Court has already rejected a similar argument in *People v. Picklesimer* (2010) 48 Cal.4th 330. Under section 290.023, the

¹ Further statutory references are to the Penal Code.

² Although the Court generally does not consider issues that were not raised in the Court of Appeal, the People reply to it nonetheless, should the Court determine that it is within the scope of its grant of review or otherwise wish to consider it. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 5-6.)

registration provisions of the Sex Offender Registration Act apply regardless of when the crime was committed or when the duty to register arose.

MEMORANDUM

I.

THE DISTINCTION BETWEEN SPECIFIC AND GENERAL INTENT HAS NO PLACE IN HOFSCHEIER'S EQUAL PROTECTION ANALYSIS

Appellant urges the Court to adopt *Ranscht's* analysis concerning specific and general intent. Appellant argues that section 288, subdivision (c)(1) [lewd act on a child aged 14 or 15 by someone at least 10 years older] should not be considered a valid comparison offense for the purposes of the equal protection analysis, because it is a specific intent offense, and he pled guilty to a general intent offense.

The Court should reject *Ranscht's* specific versus general intent analysis. It formed no part of the Court's decision in *Hofscheier*, and it makes no sense in light of the structure of the Sex Offender Registration Act.

A. The Sex Offender Registration Act Requires Registration for Specific and General Intent Crimes

Subdivision (c) of section 290 makes no mention of specific or general intent. It lists a wide variety of crimes that lead to a duty to register as a sex offender, including rape (section 261, general intent) and sexual battery (section 243.4, specific intent). (See *In re Alberto S.* (1991) 226

Cal.App.3d 1459 [rape is general intent, sexual battery is specific intent].)

More to the point, subdivision (c) also requires registration for all *attempts* to commit listed crimes, and all *conspiracies* to commit listed crimes.

Thus, the statute not only requires registration for violations of section 288a, it also requires registration for attempts or conspiracies to violate section 288a.

Attempted crimes require specific intent. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549; citing *People v. Mize* (1889) 80 Cal. 41 [attempted murder].) Conspiracy is likewise a specific intent offense. (*People v. Morante* (1999) 20 Cal.4th 403, 416.)

Under appellant's proposed rule, would attempted oral copulation of a person under age 18 (sections 288a, subd. (b)(1); 664) be immune from the rule announced in *Hofsheier*? Would those who attempt to commit certain sex crimes be required to register, while those who complete the act are not? Of course not. *Hofsheier* made no such distinctions between intents. Moreover, attempted unlawful sexual intercourse (sections 261.5, 664) would be a specific intent crime as well.

B. *Ranscht* Misapplied *Hofsheier* and Erroneously Deemed Parts to be Dicta

Ranscht focused on the distinction between specific and general intent as part of an implicit lesser included offense analysis. It reasoned that because a violation of section 288 was not a lesser included offense of section 289, subdivision

(h) (sexual penetration of a person under 18), section 288 was therefore not a valid comparison offense for purposes of the equal protection analysis. (*Ranscht, supra*, 173 Cal.App.4th 1369, 1373-1374.)

Hofsheier's logic was not based on lesser included offenses. It was based on a comparison of whether registration was required for different sex acts committed by like-aged defendants on like-aged victims. The Court explained,

We are not here concerned with persons convicted of a crime involving a forcible sexual act, or one involving a victim under the age of 14, because all such persons must register as sex offenders irrespective of whether they engaged in oral copulation or sexual intercourse. (See §§ 264 [rape], 288 [lewd or lascivious acts with victim under the age of 14], 288a, subd. (c)(1) [oral copulation with a minor under 14 years of age], 288a, subd. (c)(2) [forcible oral copulation], 290, subd. (a)(2) [convictions requiring registration].)

(*Hofsheier, supra*, 37 Cal.4th 1185, 1198.)

Had intent been the unspoken reasoning behind *Hofsheier*, the Court would not have mentioned violations of section 288a, subdivision (c)(1). Oral copulation on a victim under the age of 14 has no specific intent element. (§ 288a, subd. (c)(1); see *People v. Thornton* (1974) 11 Cal.3d 738, 765 [disapproved of on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12].) Yet the Court excluded it from the reach of *Hofsheier's* holding because the victim is under

age 14, and all sex acts against victims of that age must register as sex offenders, because intercourse can be prosecuted as a registerable offense: section 288.

Ranscht avoided the implications of the above-quoted passage by deeming it dicta. (*Supra*, 173 Cal.App.4th 1369, 1374.) *Ranscht* erred. By explaining the limits of its holding in *Hofsheier*, the Court reinforced that holding: comparison of the sex act with equivalent-aged parties is the core of the analysis. Specific intent, general intent, and lesser included offenses have no part in it.

C. *Manchel* Correctly Applied *Hofsheier*

In this case, the Court of Appeal echoed *Ranscht*'s criticism of *Manchel*. (*Johnson v. Superior Court* (Jan. 31, 2013, E055194) [nonpub. opn.], pp. 4-5³ (*Johnson*).) According to *Ranscht*, *Manchel* erred by ignoring the crime of conviction and instead focusing on what crimes the defendant could have been convicted of, based on his conduct. (*Ranscht, supra*, 173 Cal.App.4th 1369, 1374-1375.) *Ranscht* and *Johnson* misstate *Manchel*.

Manchel emphasized that registration was required of the perpetrator "irrespective of whether he engaged in oral copulation or sexual intercourse" due to his age and that of the victim. (*Supra*, 163 Cal.App.4th 1108, 1115.) *Manchel* explicitly took guidance from the Court's explanation of what its holding in *Hofsheier* did not apply to. (*Manchel, supra*, at pp. 1114-1115; quoting *Hofsheier, supra*, 37 Cal.4th 1185,

³ Citations to *Johnson* are to the pagination of the slip opinion.

1198.) Following the Court's example in *Hofsheier, Manchel* correctly determined that section 288 provided a comparable mandatory registration offense, had the sex act been intercourse.

II.

THE DATE OF APPELLANT'S CRIME IS IMMATERIAL

Appellant raises a new argument in his answer: because subdivision (c)(1) was not added to section 288 until after he committed his crimes, he claims it cannot be used as a comparison offense.⁴ (ABM, 27-28.)

The Court rejected a similar argument in *People v. Picklesimer, supra*, 48 Cal.4th 330 (*Picklesimer*). There, defendant argued that because he committed his offense before discretionary registration was enacted by the Legislature in 1994, he should not be subject to possible discretionary registration, as provided for in *Hofsheier*. (*Picklesimer, supra*, 48 Cal.4th at p. 342.) The Court rejected his argument, because all provisions of the Sex Offender Registration Act apply regardless of when the crime was

⁴ Appellant also characterizes the complaint as contradictory, regarding the victim's age. (ABM, 27, fn. 2.) Counts 1 and 2 allege violations of section 288 subdivision (a), lewd act on a child under age 14, occurring on June 1 and September 24, 1988, respectively. (1 CT 8-9.) Counts 3, 4, and 5 allege sodomy and oral copulation on a person under age 16 between September 1 and December 31, 1988. (1 CT 9-11.) It can reasonably be inferred that the victim turned 14 years old after September 24 but before January 31, 1988.

committed or when the duty to register arose. (*Id.*, at p. 343, citing section 290.023.)

Moreover, although appellant committed his crimes in 1988, he was prosecuted for them in 1990 (1 CT 20-25, 74-75.) At that time, section 288, subdivision (c)(1) existed, and could have been considered as a comparison offense, had the *Hofsheier* rule already been in place.⁵ (§ 290.023.) Even if appellant had been prosecuted in 1988, a duty to register would have arisen in 1989, when section 288, subdivision (c)(1) came into force. (§ 290.023; *Picklesimer, supra*, 48 Cal.4th at p. 343; see also *People v. Castellanos* (1999) 21 Cal.4th 785.)

CONCLUSION

Hofsheier made it clear that the focus of its analysis was disparate treatment of similarly situated individuals, where the only difference was the sex act engaged in. Appellant and respondent agree that age must be taken into account. (ABM, 7.) Appellant nonetheless contends that he should not be required to register as a sex offender; even though his age and the age of the victim could result in prosecution under section 288, subdivision (c)(1), he argues that the difference in intent between that offense and section 288a makes them unsuitable for comparison for equal protection purposes. In *Hofsheier*, however, the Court made no mention of specific or

⁵ *Hofsheier* was decided in March of 2006, approximately seventeen and a half years after appellant's crimes and approximately sixteen years after appellant's 1990 conviction.

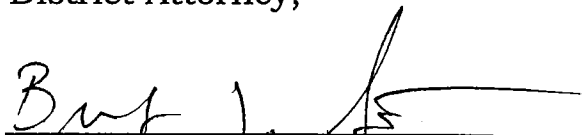
general intent or of lesser included offenses, instead giving examples of offenses that its holding did not reach, such as section 288a, subdivision (c)(1). That offense, a general intent oral copulation offense, subjects a perpetrator to mandatory sex offender registration because the victim is under 14; intent plays no part in it.

For the reasons stated above and in the Opening Brief on the Merits, the People respectfully request that the Court of Appeal be reversed.

Done this 15th day of July, 2013, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,

A handwritten signature in black ink, appearing to read "Brent J. Schultze", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

BRENT J. SCHULTZE,
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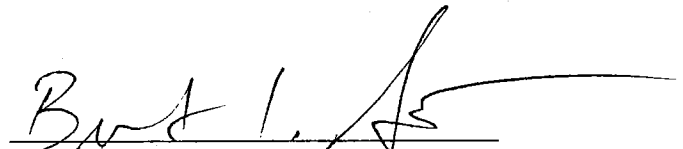
CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13-point Bookman Old Style font and contains **1,907** words.

Done this 15th day of July, 2013, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,


BRENT J. SCHULTZE,
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**SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE BY UNITED STATES MAIL**

STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

} ss **James Richard Johnson v.
Superior Court (People)
S209167**

Brent J. Schultze says:

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

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

That on July 15, 2013, I served the within:

REPLY BRIEF ON THE MERITS

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

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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on July 15, 2013.


Brent J. Schultze