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EXPANDING APPLICATION OF HOFSCHEIER

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I. INTRODUCTION

In the Summer 2007 issue of the California Defender Magazine, Garrick Byers wrote an informative article about the Megan's Law Web Site that both clarified the complicated statutory scheme for the statewide web site and offered various strategies that criminal defense attorneys can employ to help their clients "avoid the 'Net.'" Mr. Byers described several methods that practitioners can use to obtain better results for their clients by, for example, "pleading up," seeking a misdemeanor reduction at sentencing and setting up the ability to seek an exclusion.

This article continues in that vein by describing the California Supreme Court's 2006 decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185, and illustrates how the *Hofsheier* analysis has been extended to other circumstances. Specifically, in the cases described herein, the reasoning in *Hofsheier* has been applied to violations of Penal Code section 289(h) and subsequently to violations of Penal Code section 288a(b) (2). In these cases, some California appellate courts have held that mandatory sex offender registration is a violation of equal protection.

II. BACKGROUND: *People v. Hofsheier*

In *People v. Hofsheier*, *supra*, 37 Cal.4th 1185, the California Supreme Court held that mandatory sex offender registration for violations of Penal Code section 288a(b)(1), oral copulation with a minor, was a violation of equal protection, because individuals convicted of Penal Code section 261.5, unlawful sexual intercourse with a minor, were subject to registration only in the court's discretion.^{1/} The court noted that the crimes of oral copulation with a minor and



statutory rape were punishable in varying degrees, depending on the ages of the offender and the victim.^{2/} In *Hofsheier*, the defendant was 22 years old and the victim was 16; oral copulation and statutory rape between individuals of those ages were punishable as wobblers under both statutes.^{3/} Thus, because both statutory provisions concerned sexual conduct with minors and the only difference was the nature of the sexual act, *Hofsheier* held that equal protection framework applied. (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1199.) Using the rational relationship test, the California Supreme Court determined there was no rational basis for treating offenders of sections 288a(b)(1) and 261.5 differently for three main reasons.

First, although the primary purpose of Penal Code section 290^{4/} was to prevent recidivism, there was no evidence in the record or the legislative history of section 290 regarding the relative rates of recidivism for any types of sex offenders. (*People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1202-1207.) *Hofsheier* noted:

No doubt there are some persons convicted of oral copulation with 16- or 17-year-old minors for whom lifetime registration is appropriate,

because their conduct and criminal history suggest a high risk of recidivism, but the same can be said of some individuals convicted of unlawful intercourse with minors in that same age group. The existence of such potential recidivists under both statutes argues for discretionary registration depending on the facts of the case, rather than mandatory registration for all persons convicted under section 288a(b)(1). (*Id.* at p. 1204.)

The court found no reason to presume that the recidivism rate for oral copulation with a minor was higher than that for statutory rape.

Second, the court also recognized that "[o]n three occasions in the last 10 years the Legislature considered and rejected proposals that would require registration for sexual intercourse with a minor in violation of section 261.5." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1206.) The Legislature had expressed policy reasons for not requiring mandatory registration for statutory rape, including a concern that the victim of the crime might bear a child that is the product of the rape. (*Id.* at pp. 1204-1205.) Under such circumstances, the mother and child might be stigmatized by the defendant's registration requirement, and the father's ability to support his child might be impaired. (*Id.* at p. 1205.) The court noted however, that many offenders who commit oral copulation with a minor also engage in intercourse. In such cases, the offender would be required to register and any protection for the victim and the child would be obviated. (*Id.* at p. 1205.)

Finally, the court noted that any act of oral copulation, even between consenting adults, was criminalized in California until 1947, while the similar act of voluntary adult intercourse has never

been unlawful. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1205-1206.) As a result, the court found that the mandatory registration requirement for oral copulation with a minor was "a historical atavism dating back to a law repealed over 30 years ago that treated oral copulation as a crime, regardless of age or consent." (*Id.* at p. 1206.) *Hofsheier* concluded:

[T]he statutory distinction in section 290 requiring mandatory lifetime registration of all persons who, like defendant here, were convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not of someone convicted of voluntary sexual intercourse with a minor of the same age, violates the equal protection clauses of the federal and state Constitutions. (*Id.* at p. 1207.)

This holding does not preclude the court from exercising its discretionary registration power under section 290(a)(2)(E)⁵/ in appropriate cases. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1208.) Only the mandatory registration for a violation of section 288a(b)(1) is eliminated. (*Ibid.*) The remedy the Supreme Court crafted in *Hofsheier* was to remand the case to the trial court to determine whether the defendant's conduct was within the discretionary registration category of Penal Code section 290(a)(2)(E)⁶/, and if so, whether to require registration under the circumstances. (*Ibid.*)

III. APPLYING THE HOFSCHEIER ANALYSIS

Since the *Hofsheier* decision, there have been several attempts to apply the Supreme Court's reasoning in a variety of contexts. Courts have declined to find equal protection violations in some instances,⁷/ but for other offenses, the *Hofsheier* analysis has been relied upon to find equal protection violations. This article reviews both published and unpublished cases where appellate courts have analyzed Penal Code sections 289(h) and 288a(b)(2) and have determined that mandatory sex offender registration for these offenses violates equal protection; these cases may be used as guides for framing an equal protection argument that sex offender registration should not be mandatory.

A. Penal Code section 289(h)

In *People v. Wilson* (August 18, 2006, A112196) 2006 WL 2383397, an unpublished opinion, the Court of Appeal, First District, held that mandatory sex offender registration for violations of Penal Code section 289(h), sexual penetration of a minor, violated equal protection, because there was no such mandatory registration pursuant to Penal Code section 261.5. The court first reviewed the two statutes and noted that Penal Code sections 289(h) and 261.5 are both structured with a graduated pattern of punishment, so that depending on the ages of the victim and the perpetrator, the punishment and sentences imposed at each age level fluctuate. (*People v. Wilson, supra*, 2006 WL 2383397 *4.) *Wilson* noted that "apart from the mandatory lifetime registration requirement, voluntary sexual acts between an adult and a 17-year-old – whether sexual penetration or sexual intercourse – are treated identically; both can be punished as either a felony or a misdemeanor." (*Id.* at *4; citing *People v. Hofsheier, supra*, 37 Cal.4th at p. 1195.) The court went through an equal protection analysis and concluded that the only difference between Penal Code sections 289(h) and section 261.5 was the nature of the sexual act,⁸/ and there was no rational basis for the distinction. (*Id.* at *4-5.) The court's remedy was to remand the case to determine whether discretionary registration was warranted pursuant to Penal Code section 290(a)(2)(e).⁹/ (*Id.* at *5.)

Since the *Wilson* decision, two other Courts of Appeal have acknowledged that mandatory registration for violations of Penal Code section 289(h) violates equal protection.¹⁰/

B. Penal Code section 288a(b)(2)

In *People v. Garcia* (2008) 61 Cal. App.4th 475, the Second District Court of Appeal held that mandatory sex offender registration for a violation of Penal Code section 288a(b)(2), which prohibits persons over 21 from committing an act of oral copulation with persons under 16, violates the Equal Protection clauses of the United States and California Constitutions. The court noted that a person over 21 convicted of oral copulation with a person under 16 (i.e., 14 or 15), in violation of Penal Code

section 288a(b)(2), is subject to mandatory lifetime sex offender registration under Penal Code section 290(c).¹¹/

Penal Code section 261.5(d) prohibits a person over 21 from engaging in unlawful sexual intercourse with a person under 16 (i.e., 14 or 15), but a conviction of that statute does not require mandatory lifetime sex offender registration; instead, registration is discretionary with the trial court pursuant to Penal Code section 290.006.¹²/ (*People v. Garcia, supra*, 161 Cal.App.4th at p. 482.)

The court concluded: If there is no rational reason for this disparate treatment when the victim is 16 years old, there can be no rational reason for the disparate treatment when the victim is even younger, 14 years old. Accordingly, *Hofsheier* applies whether the conviction is under subdivision (b)(2) or (b)(1) of section 288a. (*People v. Garcia, supra*, 161 Cal.App.4th at p. 482.)

Two other Courts of Appeal, in unpublished decisions, have also held that mandatory registration for violations of Penal Code section 288(b)(2) violate equal protection.¹³/

IV. PREPARE FOR COUNTER-ARGUMENTS

There are several potential counter-arguments that practitioners should be prepared for. In *People v. Manchel* (2008) 163 Cal.App.4th 1108, petition for review filed July 22, 2008, the Second District Court of Appeal declined to find an equal protection violation where mandatory sex offender registration was imposed for a violation of section 288a(b)(2). Even though the defendant pled guilty and was convicted of a violation of section 288a(b)(2), the court found that the conduct underlying the offense suggested that the defendant could have been charged with a violation of section 288(a), lewd or lascivious conduct with a minor, an offense that would subject the defendant to mandatory sex offender registration under section 290(c). The court found that this fact distinguished *Manchel* from *Garcia, supra*, 161 Cal. App.4th 475 and, "fundamentally alters the equal protection analysis." (*Id.* at p. 1114.)

The Fourth District, however, in the

unpublished case of *People v. Marquis* (Jan. 8, 2008, D050530) 2008 WL 73713, dispensed with this argument. *Marquis* held that even though the defendant may have been subject to an offense that required mandatory registration, he was not convicted of that offense.

Rather, he was convicted of the section 288a, subdivision (b)(2) oral copulation offense, and it was this offense that supported imposition of the section 290 mandatory registration requirement. Accordingly, he falls within the classification of persons convicted under section 288a, subdivision (b)(2), and it is this classification that we must scrutinize when evaluating his equal protection claim." (*People v. Marquis, supra*, 2008 WL 73713 at *5, emphasis added.)

Thus, counsel should argue that it violates due process to impose mandatory sex offender registration, because a defendant might have been subject to an offense that requires mandatory registration, but was convicted of an offense where registration is discretionary. While courts can rely on unadjudicated facts to order discretionary registration, the converse is not true where the lifetime sex offender registration imposed is mandatory.

As noted above, *Hofsheier* involved a 22-year old defendant and a 16-year old victim and oral copulation and statutory rape between individuals of those ages are punishable as wobblers under both 288a(b)(1) and 261.5.¹⁴ In contrast, Penal Code section 288a(b)(2) and 261.5(d) in some instances impose different sentences, so arguably the defendants are not "similarly situated." Penal Code section 288a(b)(2) is a straight felony punishable by up to three years in state prison, whereas 261.5(h) is a misdemeanor or a felony but, if a felony, punishable by up to four years in prison.

This argument was addressed in *People v. Dulan* (2007) 55 Cal.Rptr.3d 312, 322 [depub. opn.], where the government asserted that "[b]ecause the Legislature has chosen to punish the crimes of oral copulation and statutory rape differently when the victim is younger than 16, the Legislature may also rationally subject the crimes to different registration requirements." The

court disposed of this contention stating, "One disparity in treatment of persons similarly situated, even if presumed to rest on a rational basis, cannot justify a second, distinct disparity in treatment." (*Ibid.*) The court focused on the nature of the offenses to find that the defendants were similarly situated.

Another argument the government may make is that a large age difference between the victim and the defendant militates for mandatory sex offender registration. Violations of Penal Code section 288a(b)(2) implicate a perpetrator over 21 with victim under 16 years old, and therefore, represents a greater age disparity between the perpetrator and the victim than violations of 288a(b)(1) which deal with perpetrators over 21 and victims under 18. This argument was raised and rejected in *People v. Garcia, supra*, 161 Cal.App.4th 475. A greater age differential is not relevant for purposes of equal protection analysis if the ages of the offenders and victims in each statute are the same. So long as section 288a(b)(2) applies to offenders over 21 and victims under 16 and 261.5(d) applies to the exact same age groups, the fact that there is a greater age disparity is of no consequence for purposes of whether defendants are similarly situated.

Moreover, whether age should trigger mandatory registration is a legislative determination. As *Hofsheier* observed, "There may be a rational basis to require both adults convicted of voluntary oral copulation . . . and adults convicted of voluntary intercourse with minors of that same age to register as sex offenders." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1205, emphasis in original.)

V. HOW TO WIN THE DISCRETIONARY REGISTRATION ARGUMENT

Despite the elimination of mandatory registration under section 290(c) for some offenses, courts can still exercise their discretionary power under section 290.006 to order lifetime sex offender registration in appropriate cases. (See *People v. Hofsheier, supra*, 37 Cal.4th at pp. 1207-1208.) Indeed, section 290.006, gives the trial court discretion to order lifetime registration for any offender, even if the defendant was not convicted of a specified sex offense if the court

finds that "the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (*Ibid.*) *Dulan, supra*, stated that "the purpose of this discretionary power is to guard against 'repeat offenders' whose sexually motivated crimes do not fall within the statutes triggering mandatory registration." (*People v. Dulan, supra*, 55 Cal.Rptr.3d at p. 319.) Thus, if such findings are made, the court may order the defendant to register as a sex offender and "shall state on the record the reasons for its findings and the reasons requiring registration." (Pen. Code § 290.006.) *Dulan* found that "an order for registration can be sustained, only if the record supports a rational perception that the defendant is a likely repeat offender." (*People v. Dulan, supra*, 147 Cal. App.4th at p. 319.)

Counsel should set forth reasons why registration should not be required under the circumstances. An effective way to illustrate that lifetime registration for a particular defendant is unnecessary is to have the client undergo a psychological evaluation. The evaluator can try to ascertain whether the defendant committed the offense "as a result of sexual compulsion" or "for purposes of sexual gratification," and the report should also describe the defendant's likelihood of recidivism. In addition, letters from friends, family, professors, co-workers, etc., that describe the good character of the defendant are helpful. Illustrating that the defendant is remorseful and has been rehabilitated since the offense are also useful facts that the court may consider. Providing the court with more information about the defendant's background, and placing the offense in context, helps the court make findings and determine whether a particular defendant is likely to re-offend.

VI. CONCLUSION

Sex offender registration is an area of law that is rapidly evolving. Many politicians support legislation aimed at sex offenders, because it makes them appear "tough on crime," and sex offenders are an easy target. In practice, however, tougher sex offender registration laws often cast too wide a net, including within their ambit, individuals who present no danger to society, while effectively creating cover for those who do pose a

threat of re-offending. If defense counsel continue to press for trial courts to exercise their discretion in imposing lifetime sex offender registration, we will not only help our clients, we will also better ensure that sex offender registration is reserved only for those who truly pose a danger of re-offending.

E N D N O T E S

¹ See Penal Code section 290, subsections (a)(1)(A) and (a)(2)(E). Penal Code section 290 has recently been amended. The mandatory lifetime sex offender registration requirements of section 290, subsection (a)(1)(A), are now found in section 290, subdivision (c). (Stats.2007, ch. 579, § 8.) The discretionary registration requirements of section 290, subsection (a)(2)(E), are now found in Penal Code section 290.006. (Stats.2007, ch. 579, § 14.) Prior to *Hofsheier*, conviction for a violation of section 288a(b)(1) required mandatory lifetime registration as a sex offender pursuant to Penal Code section 290(a)(1)(A). In contrast, a violation of section 261.5, unlawful sexual intercourse with a minor, is not listed under the mandatory registration provision of section 290. A court could impose the registration requirement, but it would be discretionary pursuant to section 290(a)(2)(e)

² *People v. Hofsheier, supra*, 37 Cal.4th at pp. 1194-1195; compare Penal Code section 288a(a)-(c) with Penal Code section 261.5(a)-(d).

³ *People v. Hofsheier, supra*, 37 Cal.4th at p. 1195; Penal Code sections 288a(b)(1) and 261.5(c).

⁴ This is California's sex offender registration statute.

⁵ This is now Penal Code section 290.006.

⁶ *Ibid.*

⁷ Penal Code section 290 has recently been amended. The mandatory lifetime sex offender registration requirements of section 290, subsection (a)(1)(A), are now found in section 290, subdivision (c). (Stats.2007, ch. 579, § 8.) The discretionary registration requirements of section 290, subsection (a)(2)(E), are now found in Penal Code section 290.006. (Stats.2007, ch. 579, § 14.)

⁸ See, e.g., *People v. Bruch* (May 22, 2007, C052243) 2007 WL 1475596 (Cal.

App. 3 Dist.), an unpublished case in which the court rejected the claim that mandatory sex offender registration for those convicted of Penal Code section 288.2(b) violates equal protection because "288.2 does not distinguish between consensual and nonconsensual acts, nor does that section differentiate based upon the age of the victim . . . and therefore does not contain a progressive scheme of punishment."

⁹ This is now Penal Code section 290.006.

¹⁰ See *People v. Picklesimer* (2008) 79 Cal.Rptr.3d 526: "For purposes of this appeal we accept that the holding in *Hofsheier* applies equally to digital penetration (§ 289, subd. (h))"; and *People v. Ramsey* (July 21, 2008, D051060) 2008 WL 2793804, an unpublished opinion: "Based on *Hofsheier*, we conclude that

section 290's mandatory registration requirement for a defendant convicted of voluntary digital penetration with a minor under section 289, subdivision (h) . . . violates the constitutional right to equal protection of the laws."

¹¹ Formerly Penal Code section 290(a)(1)(A).

¹² Formerly Penal Code section 290(a)(2)(E).

¹³ See *People v. Marquis* (Jan. 8, 2008, D050530) 2008 WL 73713, an unpublished opinion; and *People v. Dulan* (2007) 55 Cal.Rptr.3d 312, unpublished; but see *People v. Manchel* (2008) 163 Cal. App.4th 1108, petition for review filed July 22, 2008.

¹⁴ *Hofsheier, supra*, 37 Cal.4th at p. 1195; Penal Code sections 288a(b)(1) and 261.5(c).

N O T E S
