Johnson v. Department of Justice – Equal Protection and Mandatory Registration for Sex Offenders

This is the first of two SCOCAblog posts on the recent opinion of Johnson v. Department of Justice. Keep a look out for a second posting with further analysis early next week.

Summary:

California's sex offender registration scheme, Penal Code section 290 et seq., treats defendants convicted of engaging in non-forcible oral sex with a minor differently than those who engage in vaginal sex with a minor. Most pertinent to this case, the statutes give judges discretion whether or not to impose registration on an adult who has non-forcible vaginal sex with a 16-year-old, but lifetime registration is mandatory for an adult who has non-forcible oral sex with a 16-year-old.

In 2006, the California Supreme Court held in *People v. Hofsheier* that there was no rational basis for this distinction, which the majority found was a historical "atavism" held over from a time when all non-vaginal sex, and specifically homosexual sex, was considered deviant. For this reason, the *Hofsheier* decision held that the disparate registration requirements for vaginal and oral sex violated federal and state equal protection guarantees and remedied the problem by making registration discretionary rather than mandatory for defendants who were convicted of engaging in non-forcible oral sex with a minor aged 16 or older. Though *Hofsheier's* holding was limited to this specific class of offenders, its equal protection analysis has been applied by lower courts to invalidate mandatory registration provisions for a variety of other sex crimes.

On January 29, 2015, the California Supreme Court decided *Johnson v. Department of Justice,* in which a 5-2 majority voted to overrule *Hofsheier*. Echoing the arguments he made in his dissent in *Hofsheier*, Justice Baxter wrote for the majority and found plausible rational reasons the Legislature may have wanted to make

registration discretionary for vaginal sex with a minor but not for oral sex with a minor. The majority further explained that it was not bound by stare decisis in light of the "broad consequences" *Hofsheier* had in nullifying portions of the sex offender registration scheme and because "correction through legislative action is practically impossible."

The consequences of overruling *Hofsheier* are threefold: 1) the crime of non-forcible oral sex with a minor 16 years of age or older is once again subject to mandatory registration; 2) lower court decisions, to the extent they relied on *Hofsheier's* analysis to invalidate mandatory registration requirements for other sex offenses, are no longer good law; and 3) lower courts are left to sort out what to do with already-convicted defendants who, based on *Hofsheier's* equal protection analysis, are not currently required to register as sex offenders.

Analysis:

Johnson arose out of a defendant's attempt to have *Hofsheier's* reasoning extended to invalidate mandatory registration for oral copulation by an adult over the age of 21 with a person under the age of 16. Though the parties did not challenge *Hofsheier's* validity, the California Supreme Court sought supplemental briefing on whether *Hofsheier* should be overruled and whether, if so, the decision should apply retroactively.

Writing for a five-justice majority, Justice Baxter, who was the lone dissenter in *Hofsheier*, explained that not only was that case wrongly decided, but that stare decisis did not compel the *Johnson* court to follow it as settled precedent. He was joined in this view by the Chief Justice, Associate Justices Chin and Corrigan, and Justice Pro Tem Franklin D. Elia. Justice Werdegar wrote a dissent which was joined by Justice Liu. In addition to arguing that *Hofsheier* was correctly decided, the dissent disagreed that there was sufficient justification for following it on stare decisis grounds.

The defendant in *Hofsheier* argued the classification in his case failed under a rational basis test, which is the most deferential standard a court may apply in considering an equal protection claim. To demonstrate an equal protection violation under this standard, the *Hofsheier* defendant had to show that: 1) for purposes of

the sex offender registration requirement, defendants who commit a violation of section 288a(b)(1) are similarly situated with defendants who commit a violation of section 261.5; and 2) there is no plausible set of circumstances which might reasonably have motivated the Legislature to distinguish between those two groups.

The *Hofsheier* majority held the two groups were similarly situated and traced the history of California's prohibitions on oral sex compared with its laws prohibiting sex with minors, determining the mandatory registration requirement for oral sex with a minor was an exceptional "historical atavism" dating back to a time when state law criminalized all oral sex, even between consenting adults. The majority did not find plausible Justice Baxter's suggestion that the distinction may have resulted from the Legislature's recognition that because vaginal sex may result in a pregnancy judges should have discretion to avoid branding the child's father a sex offender, or alternatively, that the Legislature may have believed those who engage in oral sex with a minor are more likely to reoffend than those who have vaginal sex with a minor.

Having so found, the *Hofsheier* court remedied the equal protection violation by voiding the mandatory registration requirement for violations of section 288a(b)(1) and granting judges discretion whether to impose registration on a case-by-case basis, just as they have with violations of section 261.5. Though *Hofsheier* limited its holding to violations of section 288a(b)(1), its reasoning has since been extended to a variety of sex offenses which lower courts held could no more reasonably justify mandatory registration than could a violation of section 261.5. The expansion of *Hofsheier's* reasoning to other sex crimes, according to the majority in *Johnson*, led to the denial of a "significant effect" of section 290's registration requirements.

These "broad consequences" of *Hofsheier's* equal protection analysis were cited by the *Johnson* majority as one reason the court did not feel constrained to follow that "badly reasoned" decision on stare decisis grounds. The other was the majority's view that the Legislature had been left with a "Hobson's choice" that made corrective action practically impossible – as the majority saw it, the only way the Legislature could address *Hofsheier's* erroneous holding would be to impose mandatory registration for violations of section 261.5, something the Legislature had repeatedly refused to do. Justice Werdegar countered that if the Legislature

disagreed with *Hofsheier's* analysis, there was nothing preventing it from reenacting the mandatory registration requirement for all section 288a offenders along with findings that refuted *Hofsheier's* assertion that there was no rational basis for the distinction. Further counseling against reconsidering *Hofsheier*, she argued, was that the decision had not been criticized in either judicial or academic circles, and that the basis for *Hofsheier's* holding rendered its potential application to other statutes "quite limited."

Turning to the merits of *Hofsheier's* analysis, the *Johnson* majority focused on the second prong of the equal protection analysis, whether there was a reasonably conceivable rational purpose for Legislature to distinguish between the two classes of offenders. In finding there was, the majority relied on the same justifications Justice Baxter put forth in his dissent in *Hofsheier*: that vaginal sex may result in pregnancy, as well as the possibility that "sexual predators are more successful in manipulating minors to engage in oral copulation, as opposed to sexual intercourse." The majority supported the first claim by referencing legislative history showing that when the Legislature was deciding whether or not to make registration for section 261.5 violations mandatory, one consideration was the detrimental effects of registration on a father's ability to support a child borne from an unlawful sexual encounter. The point about recidivism relies on citations to studies that found pubescent minors were more apt to engage in oral than vaginal sex and that pedophiles typically engage in acts other than vaginal sex.

The dissent found the majority's justifications to be unsupported by the historical record and as such were not plausible explanations for the disparity in registration requirements for oral and vaginal sex. Tracing California's sex offender registration scheme to its origins in 1947, Justice Werdegar explained that when the registration laws were enacted, oral sex and sodomy, even between consenting adults, were deemed registerable offenses, while vaginal sex with a minor was not. Though the oral copulation and sodomy statutes did not differentiate between homosexual and heterosexual behavior, the dissent's research indicated that these laws were generally used to punish homosexual acts and were meant to express society's disapproval of physical intimacy between persons of the same gender.

Decades later, when the Legislature separated the offense of "unlawful sexual

intercourse" from the offense of statutory rape in an effort to eliminate the social stigma of labeling those who have sex with underage girls as "rapists," oral sex, even between adults, was still banned as a "sexual perversion." It was not until 1975, in a bill informally dubbed the "homosexuals' bill of rights," that oral sex and sodomy between consenting adults was decriminalized. At that time, the dissent suggested, it would have been appropriate for the Legislature to have reevaluated whether mandatory registration for violations of section 288a should continue. Having found no evidence the Legislature ever "made an affirmative decision to impose mandatory registration differentially on those convicted of voluntary oral sex with minors," Justice Werdegar concluded that, realistically assessed, the distinction the sex offender registration scheme currently makes between oral and vaginal sex is merely "a remnant of the blanket disapproval of oral copulation prevailing before decriminalization."

Justice Baxter and Justice Werdegar appear to be talking past each other to some extent, as they arguably answer two entirely different questions in resolving the same equal protection claim. The majority believes the result turns on whether there is something unique about vaginal sex which would plausibly have motivated the Legislature to avoid requiring mandatory registration for violations of section 261.5; the dissent is concerned with whether the Legislature ever considered whether mandatory registration for violations of section 288a(b)(1) was still appropriate after oral sex between adults was decriminalized in 1975. The real dispute here appears to be not so much about which side's view finds support in the record – indeed it appears both do – but rather which inquiry is the appropriate one for assessing the equal protection challenge.

Regardless of how one thinks the equal protection claim should have been evaluated, whether *Hofsheier* was correctly decided, or whether the majority in *Johnson* demonstrated sufficient deference to precedent, one thing is certain: the lower courts are now left to sort out what *Johnson* means for the significant number of already-convicted defendants who, based on *Hofsheier* and the cases which relied upon it, are not currently required to register as sex offenders. *Johnson* says its overruling of *Hofsheier* is retroactive, at least with regard to defendants who have "taken no action in justifiable reliance" on *Hofsheier*. How the change in law will apply to others, such as those who pleaded guilty on the understanding they would

not be subject to registration or persons who live in what would be an unlawful residence for a registered sex offender, remains to be seen.