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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH MILLARD POOL,

Defendant and Appellant.

F063755

(Super. Ct. No. F08901698)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Solomon Wollack, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Levy, J. and Cornell, J.

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## INTRODUCTION

Appellant challenges the legality of a no-visitation order. Respondent concedes that the order was unauthorized. We accept the concession as properly made and will strike the no-visitation order.

## FACTS

Appellant was convicted after jury trial of two counts of continuous sexual abuse of a minor on victims T.S. and R.D. (counts 2 and 3). (Pen. Code, § 288.5.)<sup>1</sup> Appellant also was convicted of misdemeanor assault on victim B.M. (count 1) and of misdemeanor battery on victim A.D. (count 4).<sup>2</sup> (§§ 240, 242). He was sentenced under section 667.61 to two concurrent terms of 15 years to life imprisonment.

Appellant appealed the judgment. In *People v. Kenneth Millard Pool* (Jun. 10, 2011, F060131), this court reversed the conviction on count 2 due to insufficiency of the evidence. The sentence was vacated and matter was remanded for sentencing.

A probation officer's report was prepared for the resentencing hearing. In relevant part, it recommended that the court impose an order prohibiting visitation with "the victim" pursuant to section 1202.05.

Appellant was resentenced on September 27, 2011. On count 3, the mid-term of 12 years' imprisonment was imposed. The court ordered "credit for time served with respect to the misdemeanor violations." A no-visitation order was imposed, as follows:

"I don't know whether this has any possible application here, sir, but I'm ordering that you not have visitation with the victims in this case, either of them. So technically speaking, Count Two has been dismissed by the Appellate Court, that would include not only the victim on Count Three --

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<sup>1</sup> Unless otherwise specified all statutory references are to the Penal Code.

<sup>2</sup> It is not necessary to set forth the factual circumstances of the criminal offenses to resolve the issue presented in this appeal.

I'm looking for his initials here -- RD, but also the victim TS on Count Two and the victims on the misdemeanors as well. You are not to have any contact with any of them during the course of your incarceration pursuant to Penal Code Section 1202.05.”

Appellant did not object to the no-visitation order during the resentencing hearing.

The minute order for the resentencing hearing provides, in relevant part: “Court orders all visitation between the defendant and the child victim be prohibited pursuant to Penal Code [section] 1202.05.”

The no-visitation order is not reflected in the abstract of judgment.

### **DISCUSSION**

Appellant argues the no-visitation order imposed in this case is unauthorized because it improperly included the victims of counts 1, 2 and 4. He further argues that the no-visitation order is unauthorized with respect to R.D., the victim of count 3, because it remained applicable after R.D. reached the age of 18. Respondent concedes these points and we accept the concession as properly made.

An unauthorized sentence may be corrected at any time. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 995.) Therefore, appellant’s failure to object to the no-visitation order during the resentencing hearing did not result in forfeiture of appellate review.

The propriety of a no-visitation order is determined by the authorizing statute. (*People v. Robertson, supra*, 208 Cal.App.4th at p. 996.) Section 1202.05, subdivision (a) provides that when the defendant is sentenced to prison for violating certain enumerated statutes and the victim is under the age of 18, the court shall enter an order prohibiting all visitation between the defendant and the victim. The plain language of section 1202.05 “includes only child victims of offenses for which a defendant was sentenced to prison.” (*People v. Ochoa* (2011) 192 Cal.App.4th 562, 564.) Appellant was convicted in counts 1 and 4 of violating sections 240 and 242. These crimes are not listed offenses in section 1202.05, subdivision (a) and appellant was not sentenced to

prison for these convictions. Therefore, the victims of counts 1 and 4 are not properly included in a no-visitation order that is based on section 1202.05. Also, the victim of count 2 is not properly included in the no-visitation order because the conviction in count 2 was reversed. Therefore, we agree with the parties that the no-visitation order is unauthorized as to the victims of counts 1, 2 and 4.<sup>3</sup>

The victim of count 3 fell within the perimeter of section 1202.05 when the order was made. Section 288.5 is an offense enumerated in section 1202.05, subdivision (a). Appellant was sentenced to prison for this crime. The victim, R.D., was under the age of 18 when the resentencing hearing took place on September 27, 2011. However, R.D. reached the age of 18 a few months later. Section 1202.05 does not have any application to a victim who is more than 18 years old at the time of his intended visit to the defendant. (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1323.) “Nothing in the legislative history suggests any intention or expectation that the act would affect visitation between adult victims and their childhood abusers.... Once a victim has reached [the age of 18] the act has no effect on her or his ability to visit the defendant in prison.” (*Ibid.*) The no-visitation order does not provide that it is operable only while the victims are minors. To the extent that it purports to restrict visitation after R.D. reached the age of 18, it is unauthorized.

The appropriate remedy is to strike the no-visitation order. (*People v. Robertson, supra*, 208 Cal.App.4th at p. 997.) Since the abstract of judgment does not reflect the no-visitation order preparation of an amended abstract is not necessary.

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<sup>3</sup> We recognize that the minute order only referred to “the child victim.” However, the court’s oral pronouncement of sentence, which explicitly included all four victims, “prevails in cases where it deviates from that recorded in the minutes. [Citation.]” (*People v. Price* (2004) 120 Cal.App.4th 224, 242.)

## **DISPOSITION**

The no-visitation order that was imposed during the September 27, 2011, sentencing hearing is stricken. The judgment is affirmed in all other respects.