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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JAMES DRYG,

Defendant and Appellant.

H036092

(Santa Clara County

Super. Ct. No. CC330917)

Edward James Dryg appeals from a postjudgment order compelling him to register as a sex offender as a matter of discretion pursuant to Penal Code section 290.006.¹ Appellant had sought relief from mandatory sex offender registration pursuant to *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). Appellant Dryg, who is representing himself, raises a myriad of contentions. Some of his claims are not cognizable in this appeal. The remainder we reject on their merits.²

¹ All further statutory references are to the Penal Code unless otherwise stated.

² Appellant also filed a petition for writ of habeas corpus (H036990), which we considered with this appeal and address by separate order. We take judicial notice of his prior appeal (H028190). (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

I

Background

On July 20, 2004, appellant entered a negotiated no contest plea to three felony sexual offenses committed on or about August 13, 1998: unlawful sexual intercourse with minor who was more than three years younger than appellant (§ 261.5, subd. (c)) (count one), sexual penetration of a person under 18 years of age (§ 289, subd. (h)) (count two), and oral copulation with a person under 18 years of age (§ 288a, subd. (b)(1)) (count three). Before accepting the plea, the court advised appellant that he would be required to register as a sex offender.³ The plea agreement included a grant of probation conditioned upon one year in county jail.

On September 30, 2004, the court suspended imposition of sentence and placed appellant on formal probation for five years and, as a condition of probation, ordered him to serve one year in county jail.

In 2006, the California Supreme Court held in *Hofsheier* that former section 290's mandatory lifetime registration requirement violated equal protection as applied to the 22-year-old defendant convicted of violating section 288a, subdivision (b)(1). (*Hofsheier, supra*, 37 Cal.4th at pp. 1192-1193, 1207.) The court found no rational basis for distinguishing between persons, like the defendant, who were convicted of voluntary oral copulation with 16 or 17-year-old victims (§ 288a, subd. (b)(1)) and subject to mandatory registration and persons who were convicted of voluntary sexual intercourse with minors of the same age (§ 261.5) and were not subject to mandatory registration under the law. (*Id.* at pp. 1201-1207.) Although it found that the mandatory registration

³ In 2004, appellant was subject to mandatory sex offender registration by statute. (Stats. 2003, ch. 634, § 1.3, pp. 3829-3830.) The statute also provided for discretionary registration under former section 290, subdivision (a)(2)(E) (Stats. 2003, ch. 634, § 1.3, pp. 3830-3831), but there was no need to make any determination pursuant to that provision at the time appellant pleaded.

requirement could not be constitutionally applied to the defendant, the Supreme Court directed the appellate court "to remand the case to the trial court with directions to remove the requirement that defendant register as a sex offender pursuant to subdivision (a)(1)(A) of [former] section 290, to determine whether defendant is subject to discretionary registration pursuant to subdivision (a)(2)(E) of [former] section 290, and, if so, to exercise its discretion whether to require defendant to register under that provision." (*Id.* at p. 1209.)

In 2007, the Legislature repealed former section 290 and enacted the Sex Offender Registration Act (SORA) (§ 290 et seq.), a restructured and renumbered statutory scheme. (Stats. 2007, ch. 579, §§ 7-31, eff. Oct. 13, 2007, pp. 3738-3747.) The SORA imposes mandatory registration upon, among others, any person convicted of violating section 288a and 289, regardless of when the crime was committed, when the person was convicted, or when the duty to register arose.⁴ (§§ 290, subd. (c), 290.023.) Section 290.006, like former section 290, subdivision (a)(2)(E), provides: "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification."

Probation was revoked and, on March 3, 2008, appellant was sentenced to a total prison term of two years on the three sex offenses to which he had pleaded no contest. At that point in time, appellant had not sought *Hofsheier* relief from mandatory registration as a sex offender.

⁴ Section 290.023 provides: "The registration provisions of the Act are applicable to every person described in the Act, without regard to when his or her crime or crimes were committed or his or her duty to register pursuant to the Act arose, and to every offense described in the Act, regardless of when it was committed."

Following his release on parole, appellant Dryg requested relief from the mandatory lifetime sex offender registration requirement pursuant to *Hofsheier* by petition (denominated as a petition for habeas corpus) filed September 21, 2009 in Santa Clara County superior court. Attached to the petition was a letter from the California Attorney General, dated December 15, 2008, advising appellant that *Hofsheier* could have an impact on him and it was his responsibility to seek possible judicial relief pursuant to that decision.

By petition for habeas corpus filed September 29, 2009 in Santa Clara County superior court, appellant Dryg sought to withdraw his negotiated no contest pleas to the sexual crimes and proceed to trial on the charges on the grounds that (1) the trial court failed to advise him of the lifetime sex offender registration at the time of change of plea, (2) he received ineffective assistance of counsel in connection with entering his no contest pleas, and (3) post-plea modifications of probation violated the negotiated plea agreement.

On October 9, 2009, the court issued an order requesting an informal response from the People as to both petitions.

By order filed November 16, 2009, the superior court summarily denied the September 29, 2009 habeas petition on the ground Dryg failed to show a prima facie case for relief. It also issued an order to show cause with respect to the September 21, 2009 petition after the People conceded in its informal response that *Hofsheier's* holding directly applied to appellant's conviction of violating section 288a, subdivision (b)(1), and its reasoning generally applied.

In March 2010, the California Supreme Court issued its opinion in *People v. Picklesimer* (2010) 48 Cal.4th 330 (*Picklesimer*). The court held that a petition for writ of mandate is the proper procedural method for a person, who is no longer in actual or constructive custody, to assert a *Hofsheier* claim for relief from mandatory lifetime sex

offender registration based on equal protection. (*Id.* at pp. 335, 340.) It clarified that "[a] freestanding postjudgment motion for *Hofsheier* relief, such as the one Picklesimer filed, is not cognizable." (*Id.* at p. 335.) The court stated: "For a defendant still in actual or constructive custody, a petition for writ of habeas corpus in the trial court is the preferred method by which to challenge circumstances or actions declared unconstitutional after the defendant's conviction became final. [Citations.] But once a defendant has been released and is no longer subject to parole or probation, he or she is no longer in constructive custody and this avenue is foreclosed. [Citation.] . . . Thus, a party no longer in constructive custody may not challenge his or her obligation to register as a sex offender by way of a petition for writ of habeas corpus. [Citation.]" (*Id.* at p. 339.)

The court explained: "Placement in, or removal of, a person from the state sex offender registry is a ministerial act, contingent only on whether the person has suffered a conviction that lawfully mandates registration (§ 290, subd. (c)) or has been the subject of a court's discretionary order to require registration (§ 290.006)." (*Id.* at p. 340.) "[T]he Department of Justice, as the entity responsible for maintenance of the state sex offender registry, would be the nominal respondent" (*Id.* at p. 340, fn. 5.) "If a party seeking *Hofsheier* relief can establish he or she no longer should be required to register, the trial court may issue a writ directing the Department of Justice to remove the petitioner from the state sex offender registry." (*Id.* at p. 340.)

The court made clear that "defendants who assert a claim for *Hofsheier* relief and establish a right to relief from *mandatory* sex offender registration may still be subject to *discretionary* registration under section 290.006." (*Id.* at p. 335.) It declined to treat the postjudgment motion as "a mislabeled petition for writ of mandate" because "the record before [the court] [did] not conclusively establish that Picklesimer [was] exempt from discretionary registration and thus entitled to relief." (*Ibid.*) The court affirmed the judgment of the Court of Appeal dismissing the appeal "without prejudice to

Picklesimer's opportunity to file an original petition for writ of mandate in the trial court seeking whatever relief he may be entitled to under *People v. Hofsheier*, *supra*, 37 Cal.4th 1185" (*Id.* at p. 346.)

The Supreme Court in *Picklesimer*, *supra*, 48 Cal.4th 330, further stated: "We determined in *Hofsheier* . . . and reiterate today, that in cases where mandatory sex offender registration has been shown to violate equal protection, the procedure that most closely matches the legislative intent is not automatic removal of a sex offender from the state sex offender registry, but an after-the-fact discretionary determination whether removal is appropriate." (*Id.* at p. 343, fn. omitted.) The court observed: "It is true section 290.006's language provides for discretionary findings to be made 'at the time of conviction or sentencing.' However, implicit in our decision in *Hofsheier* . . . was the conclusion that the Legislature did not intend by this language to strip courts of the power to later enter findings in instances where, at the time of conviction or sentencing, any need for findings was obviated by the existence of a then valid mandatory registration requirement." (*Id.* at p. 343, fn. 8.)

At the May 14, 2010 hearing on the September 21, 2009 petition, the superior court indicated that it was treating the habeas petition as a petition for writ of mandate and redesignated its order to show cause as an alternative writ of mandate.

On July 30, 2010, following a hearing, the court exercised its discretion and ordered defendant to register as a sex offender pursuant to section 290.006.

Appellant filed a notice of appeal on September 27, 2010. The notice indicated that the appeal was from "the order entered after judgment obligating defendant to register pursuant to Penal Code § 290.006," unspecified orders after judgment, and the underlying plea agreement. The same day, appellant also requested a certificate of probable cause, which the superior court granted.

II

Scope of Review

Appellant has filed a voluminous appellant's brief. Many of the issues are not cognizable in this appeal.

The notice of appeal, while purporting to appeal from the "plea agreement" and various postjudgment orders, timely and effectively commenced an appeal only from the postjudgment order requiring appellant to register as a sex offender pursuant to section 290.006. In general, "a notice of appeal and any statement required by Penal Code section 1237.5 must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.308(a); see Cal. Rules of Court, rule 8.308(a) ["Except as provided in rule 8.66 [emergency extensions of time], no court may extend the time to file a notice of appeal"].)

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' [Citations.]" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094; *In re Jordan* (1992) 4 Cal.4th 116, 121 ["The question whether a notice of appeal has been filed in a timely manner presents a jurisdictional issue"].) "In both criminal and civil cases, 'the time requirements for the taking of an appeal are mandatory, and . . . the appellate courts are without jurisdiction to consider an appeal which has been taken subsequently to the expiration of the statutory period.' (*People v. Slobodion* (1947), 30 Cal.2d 362, 365 . . . ; *People v. Lewis* (1933) 219 Cal. 410, 413-414 . . . , and cases there cited.)" (*Ex parte Horowitz* (1949) 33 Cal.2d 534, 537.) "An untimely notice of appeal is 'wholly ineffectual: . . . the appellate court has no power to give relief' [Citation.]" (*People v. Mendez, supra*, 19 Cal.4th at p. 1094.)

In addition, "[w]hen a defendant has pleaded guilty or no contest (*nolo contendere*) to a criminal charge, the defendant may not appeal the judgment of conviction on issues 'going to the legality of the proceedings' unless, within 60 days of

rendition of the judgment, he or she files with the trial court a written statement executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds for appeal and, within 20 days after that filing, the trial court executes and files a certificate of probable cause for appeal. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 31(d) [now rule 8.304(b)].)" (*In re Chavez* (2003) 30 Cal.4th 643, 646-647, fn. omitted; see *People v. Mendez*, *supra*, 19 Cal.4th at pp. 1099, 1104 [no issue challenging the validity of the plea is cognizable on appeal unless the defendant has timely obtained a certificate of probable cause].)

Any purported errors involving the superior court's advisements or defense counsel's representation concerning appellant's 2004 plea, entry of that plea, modification of his probation conditions in November 2006, and imposition of a prison sentence in March 2008 are not reviewable in this appeal because Dryg's appeal is untimely as to these matters. Also, the validity of any parole condition imposed on appellant because of his status as a registered sex offender is not properly before us in this appeal. A petition for writ of habeas corpus is a proper means for challenging a condition of parole. (See e.g. *In re E.J.* (2010) 47 Cal.4th 1258 [parolees who were registered sex offenders filed petitions for writ of habeas corpus challenging parole condition barring them from residing within 2000 feet of any school or park where children regularly gather]; *In re Hudson* (2006) 143 Cal.App.4th 1 [parolee filed petition for habeas corpus challenging special condition of parole].) Further, any complaint that the superior court erred by denying appellant's September 29, 2009 habeas petition is not cognizable in this appeal. No appeal lies from a superior court's order denying a petition for writ of habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.)

The issues within the scope of this appeal are the challenges to the validity of the superior court's order requiring appellant to register as a sex offender pursuant to section 290.006. We do not reach appellant's other contentions, which are not cognizable.

III.

Doctrine of Stare Decisis

In attempting to make short shrift of appellant's challenges to the trial court's order pursuant to section 290.006, respondent invokes the doctrine of stare decisis. Respondent maintains that most of appellant's numerous contentions are foreclosed by *Picklesimer* and the doctrine of stare decisis because they were either addressed in *Picklesimer* or would undermine that case.

"It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citations.]" (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

But "[t]he doctrine of stare decisis applies only to judicial precedents, i. e., to the ratio decidendi or actual ground of decision of a case cited as authority. (*Hart v. Burnett* (1860) 15 Cal. 530, 598-599.)" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, disapproved on another ground in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.) "A decision 'is not authority for everything said in the . . . opinion but only "for the points actually involved and actually decided." [Citations.]' (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 . . .)" (*People v. Mendoza* (2000) 23 Cal.4th 896, 915.) Analysis that is unnecessary to a decision's holding is

dictum and lacks precedential force (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1085, fn. 17), although it may be highly persuasive.

Insofar as *Picklesimer* is not dispositive authority, we review the merits of appellant's contentions concerning the validity of that order.

IV.

Cognizable Issues

A. No Forfeiture of Discretionary Registration Determination

Appellant Dryg states that "the prosecution must raise and preserve the right for a discretionary determination hearing" on registration as a sex offender "prior to sentencing" and, in this case, this right was forfeited by the prosecution's failure to timely raise the issue. We reject this contention.

Any need for a discretionary determination regarding registration at the time of plea was "obviated by the existence of a then valid mandatory registration requirement." (*Picklesimer, supra*, 48 Cal.4th at p. 343, fn. 8.) At the time of sentencing, *Hofsheier* authorized postjudgment relief from mandatory sex offender registration on equal protection grounds but appellant had not sought relief. Where *Hofsheier* relief was both requested and warranted, *Hofsheier* required the superior court to make a fresh determination whether a defendant should be ordered to register as a sex offender as a matter of discretion. (*Hofsheier, supra*, 37 Cal.4th at pp. 1208–1209; see *Picklesimer, supra*, 48 Cal.4th at pp. 342-343.)

The People were not required to take any action, at either the time of appellant's plea or the time of sentencing, to preserve the court's right to consider discretionary registration in response to a request for *Hofsheier relief*. It was part of the equal protection remedy crafted by the California Supreme Court. (*Ibid.*)

B. *Alleged Violation of Speedy Trial*

Appellant now claims that his "right to the due process of a speedy trial [sic] sentencing was violated in the court below by the consideration of the allegations of behavior occurring subsequent to September 30, 2004," the date on which the court originally granted probation.

"[T]he Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution." (*Doggett v. U.S.* (1992) 505 U.S. 647, 655 [112 S.Ct. 2686].) Although section 290.006 provides for a discretionary registration order to be made at the time of conviction or sentencing, the requisite finding ("that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification") is not actually part of the "formal criminal prosecution" itself since it is not an element of the charged offense or a finding necessary to impose a criminal judgment or sentence. (See *Picklesimer, supra*, 48 Cal.4th at p. 343.) Even if the constitutional right to a speedy trial guarantees a criminal defendant to speedy sentencing (*Pollard v United States* (1957) 352 US 354, 361 [77 S.Ct. 481] [assuming arguendo that sentence is part of the trial for purposes of the Sixth Amendment]), appellant is not complaining that the timing of his sentencing in 2008 violated any right to speedy trial.

The determination regarding discretionary registration was a postjudgment order. Appellant cites no authority establishing that the right to speedy trial extends beyond sentencing.

We assume arguendo that appellant had a due process right not to be subjected to prejudicial governmental delay in holding a hearing to consider discretionary registration. "[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as

the prejudice to the accused." (*U. S. v. Lovasco* (1977) 431 U.S. 783, 790 [97 S.Ct. 2044] [pre-indictment delay].)

Appellant has not demonstrated any unreasonable governmental delay following his request for *Hofsheier* relief. There has been no showing of governmental bad faith or purposeful delay to gain a tactical advantage over appellant or to harass him. (Cf. *U.S. v. Marion* (1971) 404 U.S. 307, 324-325 [92 S.Ct. 455].)

In addition, there has been no showing that appellant's ability to defend himself at the section 290.006 hearing in 2010 was impaired. Appellant had ample opportunity to present evidence, and he did in fact submit numerous documents.

It is appellant's contention that he was prejudiced because the court was able to consider his later conduct in deciding whether to require him to register. This is not undue prejudice. An appellate court has stated: "Where registration is discretionary, then, one consideration before the court must be the likelihood that the defendant will reoffend. Where a *Hofsheier* hearing must be held, information regarding the defendant's behavior since the time of his original sentencing certainly is relevant to the determination as to the likelihood he will reoffend and the necessity for registration. Accordingly, . . . such information properly is considered." (*People v. Garcia* (2008) 161 Cal.App.4th at p. 485, fn. omitted, disapproved on another ground in *Picklesimer, supra*, 48 Cal.4th at p. 338, fn. 4.)

In any event, the relevant evidence available at the time probation was granted and, at the time appellant's prison sentence was imposed, clearly showed that he committed the offenses for sexual gratification purposes and the sex crimes of which he had been convicted in this case were of a predatory nature. Appellant pleaded no contest to multiple sex crimes with a minor victim who was more than three years his junior. The probation report filed September 30, 2004 indicated that appellant, in his mid-40s at the time of offenses, initially met the victim on the Internet. Appellant cultivated a

relationship and met with her in person. Although the victim initially rejected his solicitation of sex, appellant eventually elicited an agreement from her to perform a sex act in exchange for \$250. The report indicated that appellant subsequently engaged in the sex acts with the victim and paid her \$250. The report further disclosed that these crimes came to light when appellant was subsequently arrested by the FBI for traveling to another state for the purpose of engaging in sexual conduct with another underage victim. The supposed 13-year-old victim was actually an FBI agent. In this case, appellant was sentenced to prison after apparently violating probation by, among other things, using the Internet to engage in multiple exchanges discussing and arranging sexual encounters and by failing to provide his probation officer with his email account and password.

Appellant has not established any violation of a right to speedy trial or due process due to the timing of the section 290.006 order.

C. *Apprendi*

Appellant argues that the court's discretionary determination to impose a registration requirement pursuant to section 290.006 violates *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*) because the court's determination triggered the residency restriction imposed by section 3003.5, which he asserts constitutes additional punishment.

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490; see *id.* at p. 476.) *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Id.* at p. 303, see *id.* at pp. 303-304 ["In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after

finding additional facts, but the maximum he may impose *without* any additional findings"].)

Section 3003.5, subdivision (b), provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." Appellant Dryg argues that his "due process right under *Apprendi* was denied when the court below entered a lifetime sex offender registration order based on a judicial finding of fact," rather than having a jury determination of the facts beyond a reasonable doubt, because the residency restriction constitutes an increased penalty beyond the statutory maximum. This *Apprendi* issue is presently pending before the California Supreme Court in *People v. Mosley* (S187965, review granted Jan. 26, 2011).⁵

As indicated by respondent, *Picklesimer* addressed a substantially similar argument. Picklesimer had argued that "application of section 290.006 [was] unlawful because it permits imposition of heightened punishment based on findings of fact by a trial court rather than a jury, in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and its progeny." (*Picklesimer, supra*, 48 Cal.4th at p. 343.) The Supreme Court first rejected the idea that registration itself constituted criminal punishment. (*Id.* at pp. 343-344.) It then rejected the assertion that the sex

⁵ The Supreme Court's official website states: "This case presents the following issue: Does the discretionary imposition of lifetime sex offender registration, which includes residency restrictions that prohibit registered sex offenders from living 'within 2000 feet of any public or private school, or park where children regularly gather' (Pen. Code, [§] 3003.5, subd. (b)), increase the 'penalty' for the offense within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and require that the facts supporting the trial court's imposition of the registration requirement be found true by a jury beyond a reasonable doubt?" (http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1961128&doc_no=S187965 <as of October 12, 2011>.) The Supreme Court also granted review in *In re J.L.* (review granted March, 2, 2011, S189721), which had held that the residency restrictions are overwhelmingly punitive. The court has deferred briefing pending decision in *People v. Mosley*, S187965.

offender residency restrictions (§ 3003.5, subd. (b)) "are punishment, and thus that the facts required to impose those restrictions—the facts supporting continued sex offender status—must now be found beyond a reasonable doubt by a jury pursuant to *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and its progeny." (*Id.* at p. 344.) The court reasoned: "If Proposition 83's restrictions do not amount to punishment for his original crimes, there is no *Apprendi* problem and no right to a jury trial. Conversely, if Proposition 83's restrictions were to be considered punishment for his original offenses (but see *In re E.J.* (2010) 47 Cal.4th 1258, 1271–1280 . . .), they could not under the state and federal ex post facto clauses be constitutionally applied to Picklesimer, whose crimes all long predate the approval of Proposition 83. (See U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9; *People v. Grant* (1999) 20 Cal.4th 150, 158) In either event, there is no constitutional bar to having a judge exercise his or her discretion to determine whether Picklesimer should continue to be subject to registration." (*Ibid.*)

We follow the Supreme Court's conclusion that *Apprendi* is inapplicable even if its discussion of the issue is nonbinding dicta. Although the Supreme Court in *Picklesimer* did not directly answer whether the residency restriction imposed on parolees by section 3003.5, subdivision (b), constituted a "penalty for a crime beyond the prescribed statutory maximum," we specifically reject appellant's assertion that the challenged residency restriction constitutes criminal punishment.

Appellant has not shown that the residency restrictions were either intended as a criminal punishment or are so punitive in effect as to render them criminal punishment for purposes of *Apprendi*. (Cf. *Smith v. Doe* (2003) 538 U.S. 84, 92-106 [123 S.Ct. 1140] [Alaska's Sex Offender Registration Act was not criminal punishment and, therefore, its retroactive application did not violate the ex post facto clause].) Proposition 83, which added subdivision (b) to section 3003.5 (Prop. 83, § 21, eff. Nov. 8, 2006), stated: "It is

the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses." (Prop. 83, § 2, subd. (f).) "In the official ballot pamphlet, the proponents of the initiative measure told the voters the intent behind section 3003.5(b) was to create 'predator free zones around schools and parks to prevent sex offenders from living near where our children learn and play.' (Voter Information Guide, *supra*, argument in favor of Prop. 83, at p. 46.)" (*In re E.J.* (2010) 47 Cal.4th 1258, 1271.)

The California Supreme Court in *In re E.J.*, *supra*, 47 Cal.4th 1258 rejected the ex post facto argument of registered sex offender parolees who were convicted of sex offenses well before the passage of Proposition 83 but released on their current parole terms after its effective date. (*Id.* at p. 1264.) The court stated: "Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being 'additionally punished' for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present*, not to serve as additional punishment for past crimes." (*Id.* at p. 1278.)

In addition, even if "parolees are on the 'continuum' of state-imposed punishments" (*Samson v. California* (2006) 547 U.S. 843, 850 [126 S.Ct. 2193], citing *United States v. Knights* (2001) 534 U.S. 112, 119), the residency restrictions as a condition of parole do not increase the duration of parole. (See *Garner v. Jones* (2000) 529 U.S. 244, 246, 255-256 [120 S.Ct. 1362] [retroactive application of a Georgia law permitting the extension of intervals between parole considerations was not necessarily an *ex post facto* violation because prisoner failed to show as applied to his own life sentences the law created a significant risk of increasing his punishment by prolonging

incarceration]; *id.* at p. 253 ["to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, . . . we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised"]; *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 506, fn. 3 [115 S.Ct. 1597] ["After *Collins* [*v. Youngblood* (1990) 497 U.S. 37 [110 S.Ct. 2715]], the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's '*opportunity* to take advantage of provisions for early release,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"].)

Appellant has failed to establish that the residency restrictions as a condition of parole constitute criminal punishment or implicate *Apprendi* such that he was entitled to have a jury make the factual findings required by section 290.006.

D. Section 654 and Double Jeopardy

Appellant contends that the court's order pursuant to section 290.006 violated section 654 and the constitutional prohibition against double jeopardy.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed 'in jeopardy' for the 'same offense.' " (*People v. Anderson* (2009) 47 Cal.4th 92, 103.) "Although generally understood to preclude a second

prosecution for the same offense, the [U.S. Supreme] Court has also interpreted this prohibition to prevent the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.' *Witte v. United States*, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995) (emphasis and internal quotation marks omitted)." (*Kansas v. Hendricks* (1997) 521 U.S. 346, 369 [117 S.Ct. 2072].) The double jeopardy clause protects "against the imposition of multiple *criminal* punishments for the same offense [citations] . . . in successive proceedings [citation]" but it "does not prohibit the imposition of all additional sanctions that could, ' "in common parlance," ' be described as punishment. [Citations.]" (*Hudson v. U.S.* (1997) 522 U.S. 93, 98-99 [118 S.Ct. 488]; see *People v. Sloan* (2007) 42 Cal.4th 110, 121.)

Appellant argues that, by finding pursuant to section 290.006 that he acted with "sexual gratification" in committing the sex offenses, the court violated section 654 and the proscription against double jeopardy. He points out that he pleaded no contest to sexual penetration with a minor in violation of section 289, subdivision (h), and the definition of "sexual penetration" within the meaning of that section requires that penetration be done "for the purpose of sexual arousal, gratification, or abuse" (§ 289, subd. (k)(1)). He maintains that the "double use" of the "sexual gratification" "element" offends section 654 and constituted double jeopardy. He assumes that a postjudgment discretionary registration determination is a second prosecution. His reasoning is flawed.

A discretionary registration determination is not a criminal prosecution in which a prosecutor seeks a defendant's conviction of criminal charges. Sex offender registration does not constitute criminal punishment. The Supreme Court has already concluded, in the context of an ex post facto analysis,⁶ that "sex offender registration requirement

⁶ The federal Constitution's "*Ex Post Facto* Clause, which ' "forbids the application of any new punitive measure to a crime already consummated," ' has been interpreted to pertain exclusively to penal statutes. *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995)" (*Kansas v.*

serves an important and proper remedial purpose" and "the sex offender registration requirement imposed by section 290 does not constitute punishment" (*People v. Castellanos* (1999) 21 Cal.4th 785, 796 (lead opn. of George, C.J.) [upholding as constitutional the Legislature's decision to extend former 290, subdivision (a)(2)(E) (now section 290.006) to offenses committed before its effective date].) "As [the California Supreme Court has] explained, 'sex offender registration is not considered a form of punishment under the state or federal Constitution [citations]' (*Hofsheier, supra*, 37 Cal.4th at p. 1197, 39 Cal.Rptr.3d 821, 129 P.3d 29; see also *Smith v. Doe* (2003) 538 U.S. 84, 105–106, 123 S.Ct. 1140, 155 L.Ed.2d 164 [sex offender registration is not punishment for purposes of the ex post facto clause].)" (*Picklesimer, supra*, 48 Cal.4th at pp. 343-344; cf. *In re Alva* (2004) 33 Cal.4th 254, 268 ["requirement of mere *registration* by one convicted of a sex-related crime, despite the inconvenience it imposes, cannot be considered a form of 'punishment' regulated by either federal or state constitutional proscriptions against cruel and/or unusual punishment"].) Appellant's double jeopardy and section 654 claims must be rejected.

E. Due Process and the Plain Language of Section 290.006

Appellant asserts that the "plain language" of section 290.006 (requiring discretionary registration "if the court finds at the time of conviction or sentencing that . . .) put the prosecution and him "on notice that after a final judgment the judgment is

Hendricks, supra, 521 U.S. at p. 370.) "[T]he ex post facto clause prohibits only those laws which 'retroactively alter the definition of crimes or *increase the punishment for criminal acts.*' (*Collins, supra*, 497 U.S. 37, 43, 110 S.Ct. 2715, italics added; accord, *Lynce v. Mathis* (1997) 519 U.S. 433, 440–441, 117 S.Ct. 891; *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504, 506–507, fn. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588.)" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171.) The California Constitution's ex post facto provision (Cal. Const., art. I, § 9) "is analyzed in the same manner as its federal counterpart. [Citations.]" (*People v. Castellanos, supra*, 21 Cal.4th at p. 790; see *In re E.J.* (2010) 47 Cal.4th 1258, 1279 ["there is no significant difference between the federal and state ex post facto clauses"].)

just that, *final*." He argues that the Supreme Court, by authorizing a discretionary registration determination when a person requests *Hofsheier* relief, violated his "due process right to fair notice of the plain language" of section 290.006.

It is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime" (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 350-351 [84 S.Ct. 1697].) Unforeseeable judicial interpretations of a penal statute that retroactively expands the definition of a crime may violate the due process right to fair warning. (See *id.* at p. 352 ["There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language [in a criminal statute] but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language"], 353-354 ["[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [Citation.]".]) While we are aware of these principles, the Supreme Court in *Hofsheier* and *Picklesimer* did not retroactively expand the definition of the crimes of which appellant was convicted and, as already discussed, registration is not criminal punishment.

Moreover, appellant cannot claim that *Hofsheier* disturbed any legitimate reliance interest given the state of the law at the time of his crimes and when he pleaded no contest. (See Stats. 2003, ch. 634, § 1.3, pp. 3829-3831; Stats. 1997, ch. 821, § 3.5, pp. 5708-5709.) Once the 2006 *Hofsheier* decision issued, appellant was "afforded at least the possibility of being spared [the] consequence" of registration (*Picklesimer, supra*, 48 Cal.4th at p. 344) but only if the court determined that he was not required to register as a matter of discretion. Subsequent to the *Hofsheier* decision, such as in 2008 when

appellant was sentenced to prison, sex offenders had no valid reason for believing that the statutory provision regarding discretionary registration would not be applied if *Hofsheier* relief were sought.

Insofar as appellant is suggesting that the Supreme Court's remedy in *Hofsheier* was foreclosed by the statutory language, he is incorrect. " ' "It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' [Citations.]" (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.) Appellant is not entitled to rely on the "plain language" of section 290.006, or its predecessor provision (see former § 290, subd. (a)(2)(E) [Stats. 2003, ch. 634, § 1.3, pp. 3830-3831]), since *Hofsheier* in effect reformed the registration law to effectuate legislative intent when it created the equal protection remedy. (See *Picklesimer, supra*, 48 Cal.4th at pp. 342-343; see also § 290.023, former § 290, subd. (m) [Stats. 2003, ch. 634, § 1.3, p. 3835].)

F. *Exercise of Judicial Discretion Under Section 290.006*

1. *Statement of Reasons*

In *Hofsheier*, the court explained: "[T]o implement the requirements of section 290, subdivision (a)(2)(E) [now section 290.006], the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*Hofsheier, supra*, 37 Cal.4th at p. 1197; see § 290.006.)

Appellant argues that the court abused its discretion in ordering him to register as a sex offender without expressly stating that he posed a risk of reoffending in the future. He cites an opinion from this court, *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, in which we opined: "Since the purpose of sex offender registration is to keep track of persons likely to reoffend, one of the 'reasons for requiring registration' under section 290.006 must be that the defendant is likely to commit similar offenses—offenses like those listed in section 290—in the future. (Cf. *People v. Garcia* (2008) 161 Cal.App.4th 475, 484–485)" (*Id.* at p. 78.)

The "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court [Citation.]" (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) In *Lewis*, we found no basis in the record for ordering discretionary sex offender registration. It was "undisputed that, in the 20 plus years since his conviction under section 288a, subdivision (b)(1), Lewis [had] committed no offenses requiring him to register as a sex offender and no offenses similar to those requiring registration," and there was "nothing in the record" to support a finding "that it is likely Lewis will *start* committing such offenses now." (169 Cal.App.4th at p. 79.)

The Supreme Court observed in *Hofsheier*: " ' ' 'The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]' " ' [Citations.] In recent years, section 290 registration has acquired a second purpose: to notify members of the public of the existence and location of sex offenders so they can take protective measures. (See Stats.1996, ch. 908, § 1, subd. (b), p. 5105.)" (*Hofsheier, supra*, 37 Cal.4th at p. 1196.) But it never imposed an extra-statutory requirement that courts make an explicit finding regarding an offender's potential to reoffend when ordering discretionary registration.

Section 290.006's language does not compel an explicit finding regarding the offender's risk of reoffending. "If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. [Citations.]" (*People v. Johnson* (2002) 28 Cal.4th 240, 244.) In any event, the superior court in this case gave its reasons and implicitly found that appellant posed a significant risk of reoffending that warranted registration, indicating the predatory nature of the underlying offenses and a subsequent federal offense, noting subsequent probation violations, and declaring that the safety concerns of the community required registration.

2. *Sexual Gratification Finding*

As best as we can determine, appellant appears to be contending that applying section 290.006 to consensual sexual intercourse is absurd because, as he argued below, sexual gratification is the reason that people engage in sex. He suggests that the requirement that a court make a "sexual gratification" finding in effect strips the court of the discretion contemplated by the section if it is applied to consensual sex acts and "section 290.006 becomes a de facto mandatory registration statute." This conclusion is incorrect.

Section 290.006 applies to all offenses, whether or not sexual. (*Picklesimer, supra*, 48 Cal.4th 330, 345; see *People v. Garcia* (2006) 147 Cal.App.4th 913, 916 [first degree burglary].) The requirement that the court find that "the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification" may be more easily satisfied where the crime itself is sexual but, in some cases, the purpose of a sexual offense may not be sexual. In any case, a "sexual gratification" finding does not eliminate step two, which involves weighing "the reasons for and against registration in each particular case." (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) For example, a situation where a much older adult purposefully seeks out, cultivates, and sexually exploits a minor may justify discretionary registration while such registration may not be called for

in a situation involving a mutual, nonexploitive, consensual sexual relationship between a person who is barely an adult and a minor close in age.

Appellant further complains: "Without a definition of what constitutes criminal 'purposes of sexual gratification' the statute is vague and therefore unconstitutional. Here the court did not have evidence that either [he] or Jane Doe achieved sexual climax." The ordinary and usual meaning of the words "sexual gratification" provides sufficient certainty to satisfy the standards of due process. "[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations Consequently, no more than a reasonable degree of certainty can be demanded." (*Boyce Motor Lines v. U.S.* (1952) 342 U.S. 337, 340 [72 S.Ct. 329]; see *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.) Further, nothing in the statute requires proof that appellant actually achieved "sexual gratification" or "sexual climax."

The superior court did not abuse its discretion in finding that appellant acted "overwhelmingly for [purposes of] sexual gratification." Appellant committed overtly sexual offenses. In addition, the probation reports showed that he met the victim over the Internet, at some point began talking to her in "very sexual terms," and ultimately paid her to participate in the sexual acts.

G. *Equal Protection*

Appellant argues that discretionary registration violates equal protection because persons convicted outside of California and persons convicted in California of unlawful sexual intercourse (§ 261.5) are similarly situated to him but *Picklesimer* "obligates Californians receiving *Hofsheier* relief to undergo additional discretionary judicial findings" while relief "is automatically provided to non-Californians by statute" He points to subdivision (d)(2) of section 290.005. We reject this argument.

First, subdivision (d)(2) of section 290.005 is not an "automatic removal" provision as asserted by appellant. To the contrary, section 290.005 ("The following persons shall register . . .") establishes whether an obligation to register arises in California based upon convictions that occurred outside of California. Under subdivision (d)(2) of that provision, "a person convicted in another state of an offense similar to" "[u]nlawful sexual intercourse, pursuant to Section 261.5" and "required to register in the state of conviction" must register in California only if "the out-of-state offense . . . contains all of the elements of a registerable California offense described in subdivision (c) of Section 290," which does not include section 261.5. (§ 290.005.) This places out-of-state offenders in a similar position to California offenders, who are not subject to mandatory registration based on a conviction of violating section 261.5.

Second, we discern no violation of equal protection. The Fourteenth Amendment's equal protection clause is "essentially a direction that all persons similarly situated should be treated alike." (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249].) It "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (' "[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" ') (quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940))." (*Vacco v. Quill* (1997) 521 U.S. 793, 799 [117 S.Ct. 2293].) California's equal protection clause (Cal. Const., art. I, § 7, subd. (a)) is substantially the equivalent of the federal guarantee, although the state guarantee possesses "an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764.)

" ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly*

situated groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' (Cooley v. Superior Court, supra, 29 Cal.4th at p. 253) In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (People v. McKee (2010) 47 Cal.4th 1172, 1202.)

Appellant in his present situation is most similarly situated to those persons described in subdivision (b) of section 290.005. Section 290.005, subdivision (b), requires any person ordered to register by a non-California court (any other state, federal, or military court) "for any offense" to register in California if the non-California court "found at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification."

The criminal and sex offender registration laws of states other than California may differ from California's laws as interpreted and applied by our courts. Consequently, for purposes of challenging the discretionary determination that he is required to register, appellant is not in the position to claim that he is similarly situated to persons who were convicted of equivalent out-of-state crimes but are not subject to a discretionary registration requirement under the laws of those jurisdictions.

Appellant's invocation of the constitutional provision prohibiting special privileges or immunities (Cal. Const., art. I, § 7, subd. (b))⁷ does not aid him. The California Constitution's equality guarantees barring special privileges or immunities for any citizen or class of citizens have been understood as generally providing the same protection as

⁷ California Constitution, article I, section 7, subdivision (b), provides: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

the equal protection clause of the Fourteenth Amendment to the federal Constitution. (See *Department of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588 [construing former California Constitution, article I, sections 11 and 21]; see also *Serrano v. Priest*, *supra*, 5 Cal.3d at p. 596, fn. 11.) Section 290.005, subdivision (d)(2), does not grant any special immunity to offenders convicted in non-California jurisdictions.

"[N]either the Fourteenth Amendment of the Constitution of the United States nor the California Constitution [citations] precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different.' (*In re Gary W.* (1971) 5 Cal.3d 296, 303)" (*People v. Guzman* (2005) 35 Cal.4th 577, 591.)

H. *Alleged Vindictive and Selective Prosecution*

1. *Alleged Vindictive Prosecution*

Appellant Dryg contends that, after he sought *Hofsheier* relief, the "prosecution was vindictive in arguing for a new discretionary order without having raised the issue prior to" his September 30, 2004 judgment (grant of probation).

Vindictive prosecution and sentencing violate federal due process. (*Blackledge v. Perry* (1974) 417 U.S. 21 [94 S.Ct. 2098]; *North Carolina v. Pearce* (1969) 395 U.S. 711 [89 S.Ct. 2072].) The due process clauses of the California Constitution (Cal. Const., art. I, §§ 7, 15) likewise prohibit vindictive prosecution. (See *People v. Jurado* (2006) 38 Cal.4th 72, 98; *In re Bower* (1985) 38 Cal.3d 865, 876.)

A claim of vindictive prosecution cannot be raised for the first time on appeal. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 730; *People v. Edwards* (1991) 54 Cal.3d 787, 827.) Since Dryg did not object to the discretionary registration order on that ground in the superior court, the claim was not preserved for review.

In any case, *Hofsheier* and *Picklesimer* require a discretionary registration determination where *Hofsheier* relief is sought. (*People v. Picklesimer*, *supra*, 48 Cal.4th

at pp. 342-343; *People v. Hofsheier, supra*, 37 Cal.4th 1185, 1208-1209.) Consequently, no burden-shifting presumption of vindictiveness arose in this case. (See *People v. Michaels* (2002) 28 Cal.4th 486, 515 [circumstances did not present a reasonable likelihood of vindictiveness that would shift the burden of proof to the prosecution to show justification]; see also *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 374 ["once the presumption of vindictiveness is raised the prosecution bears a heavy burden of rebutting the presumption with an explanation that adequately eliminates actual vindictiveness"].)

Since appellant neither raised nor proved actual vindictiveness below, his claim of vindictive prosecution fails.

2. *Alleged Selective Prosecution*

Appellant complains that "*Picklesimer* authorizes selective prosecution in violation of the equal protection clauses of both the state and federal constitutions." He states that "[t]he *Picklesimer* decision created a 'class of persons' and enforced the jurisdiction of section 290.006 exclusively against that created class of persons" and the court "declared that only those persons who pursue their constitutional rights and achieve them shall be selected to return before the court for a discretionary determination pursuant to section 290.006." The claim of selective prosecution is meritless.

"Claims of unequal treatment by prosecutors in selecting particular classes of individuals for prosecution are evaluated according to ordinary equal protection standards. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 836 . . .)" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568; see *Wayte v. U.S.* (1985) 470 U.S. 598, 608 [105 S.Ct. 1524] ["It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. [Fn. omitted.]"].) "[Equal protection] standards require the defendant to show that he or she has been singled out deliberately for prosecution on the basis of some invidious criterion, and that the prosecution would not

have been pursued except for the discriminatory purpose of the prosecuting authorities. (*Id.* at p. 832) '[A]n invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests. . . .' (*Id.* at p. 833)" (*Manduley v. Superior Court, supra*, 27 Cal.4th at pp. 568-569.)

Of course, the Supreme Court had legitimate reasons for requiring, and the People have legitimate reasons for pursuing, a discretionary registration determination with respect to persons like appellant who seek relief from mandatory sex offender registration on equal protection grounds. Those include effectuating the legislative intent underlying SORA (see *People v. Picklesimer, supra*, 48 Cal.4th at p. 343) and promoting the state's interest in preventing recidivism by making sex offenders readily available for police surveillance and in notifying "members of the public of the existence and location of sex offenders so they can take protective measures. (See Stats.1996, ch. 908, § 1, subd. (b), p. 5105.)" (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1196.) Moreover, persons like appellant are not similarly situated to offenders to whom the mandatory registration requirements have never applied or offenders who could have sought *Hofsheier* relief but have not.

I. *Plea Agreement*

1. *Opportunity to Withdraw Negotiated Plea*

Appellant maintains that he should be allowed to withdraw his negotiated no contest pleas because at that time he erroneously believed that sex offender registration was mandatory and "plea negotiations would most likely have been resolved differently" had appellant and defense counsel known that mandatory registration was unconstitutional. While the mandatory duty to register as a sex offender cannot be avoided through a plea bargain (*Hofsheier, supra*, 37 Cal.4th at p. 1196), "a defendant charged with an offense that does not require such registration may be able to stipulate in

a plea bargain that the trial court judge will not order registration [as a matter of discretion]. (*People v. Olea, supra*, 59 Cal.App.4th at p. 1296)" (*Id.* at p. 1198.)

An argument substantially similar to petitioner's was rejected in *Picklesimer*. In that case, the Supreme Court reasoned: "Picklesimer also contends he cannot be subjected to a discretionary determination on whether he should continue to be required to register without first being permitted the opportunity to withdraw his plea. But he concedes he was aware at the time he entered his plea that sex offender registration was a mandatory, automatic consequence of the plea; he cannot complain now that he is being afforded at least the possibility of being spared that consequence. Indeed, as we explained in *People v. McClellan* (1993) 6 Cal.4th 367, 378 . . . , even had Picklesimer not been aware of the registration consequence, he would not be entitled to withdraw his plea absent a showing that he would not have pleaded guilty but for the court's omission. Where, as here, there was no misadvisement and no breach of any plea term, there certainly is no basis for a plea withdrawal. (See *People v. Walker* (1991) 54 Cal.3d 1013, 1022–1027)" (*People v. Picklesimer, supra*, 48 Cal.4th at pp. 344-345.)

This discussion was technically dicta in that it was not strictly necessary to *Picklesimer's* holding. (See *Picklesimer, supra*, 48 Cal.4th at p. 335.) But appellant has not provided us with a compelling reason to reject it. (See *California Coastal Com. v. Office of Admin. Law* (1989) 210 Cal.App.3d 758, 763 ["even dicta of the Supreme Court should not be disregarded by an intermediate court without a compelling reason"].)

2. Breach of Plea Agreement

Appellant complains that his plea agreement was breached by the discretionary registration order and by sections 3003.5, subdivision (b) (residency restriction concerning proximity to schools/parks), and 3004, subdivision (b) (lifetime GPS monitoring), which impose restrictions on sex offender registrants. Appellant acknowledges that mandatory registration did not violate his plea agreement. Since the

plea agreement contemplated that he would be required to register as a sex offender, we have no basis for concluding that the terms of his plea agreement precluded a discretionary registration order. Challenges to application of sections 3003.5, subdivision (b), and 3004, subdivision (b), to appellant are not cognizable in this appeal.

J. *Separation of Powers*

Appellant asserts that, in *Picklesimer*, the California Supreme Court "attributed to the Legislature the statutory intent to reopen final judgments," and this ascribing of intent violates the separation of powers doctrine. His analysis is flawed.

"[T]he classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (*Lockyer v. City and County of San Francisco, supra*, 33 Cal.4th at p. 1068.) "[T]he separation of powers doctrine does not create an absolute or rigid division of functions. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52)" (*Ibid.*)

It is true that "the Legislature may not readjudicate a specific controversy that has been heard by a court and resolved by final judgment. (*Mandel v. Myers, supra*, 29 Cal.3d 531, 547–550)" (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 61.) But that is not what occurred in this case.

Mandatory registration requirements and a person's placement in the state sex offender registry are not part of a judgment of conviction but rather collateral consequences of that judgment. (See *Picklesimer, supra*, 48 Cal.4th at pp. 337-338.) The postjudgment discretionary determination that appellant must register as a sex offender does not impair or "reopen" the judgment of conviction. Thus, the judicial remedy recognized in *Hofsheier* does not readjudicate any matter resolved by appellant's final judgment of conviction.

Furthermore, "[u]nder established decisions of [the California Supreme Court] and the United States Supreme Court, a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform it to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 615.) "[A] court may reform—i.e., 'rewrite'—a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute. By applying these factors, courts may steer clear of 'judicial policymaking' in the guise of statutory reformation, and thereby avoid encroaching on the legislative function in violation of the separation of powers doctrine. (See Cal. Const., art. IV, § 1; *id.*, art. VI, § 1.)" (*Id.* at pp. 660-661, fn. omitted.)

In *Hofsheier*, the California Supreme Court in effect reformed the sex offender registration law in response to a valid constitutional challenge. In *Picklesimer*, the court reiterated "that in cases where mandatory sex offender registration has been shown to violate equal protection, the procedure that most closely matches the legislative intent is not automatic removal of a sex offender from the state sex offender registry, but an after-the-fact discretionary determination whether removal is appropriate." (*Picklesimer*, *supra*, 48 Cal.4th 330, 343.)

Appellant has not demonstrated that the discretionary registration order violated the separation of powers doctrine.

K. *Notice and Vagueness*

Appellant contends that section 290.006 is "impermissibly vague" as applied to him pursuant to *Picklesimer*. He points out that the "charging document" failed to notify him of the possibility of "a discretionary determination" requiring him to register as a sex

offender based on a conviction of any offense not specified in section 290. He asserts that he was denied his "right to fair notice" that he could be required to register as a sex offender pursuant to section 290.006 based upon a conviction of violating section 261.5, subdivision (c), since that crime does not require proof of a "specific intent element of 'sexual gratification.'" He argues that he is now being punished for a new criminal offense that includes an element that he acted for purposes of sexual gratification. His arguments are meritless.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. (U.S. Const., 6th Amend. ['the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation']; *id.*, 14th Amend.; Cal. Const., art. I, § 15.)" (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) But, as already discussed, a postjudgment proceeding pursuant to section 290.006 in response to a request for *Hofsheier* relief is not a criminal prosecution and a discretionary registration order does not impose a criminal punishment. Appellant has not demonstrated that he was entitled, under principles of due process, to be notified by the accusatory pleading of the possibility of a discretionary registration order.

Hofsheier and *Picklesimer* provide notice that a person seeking *Hofsheier* relief from mandatory registration will be subject to a discretionary registration determination. Nothing in section 290.006, or its predecessor, limited the discretionary registration determination to crimes requiring proof, as an element of the offense, that the crime was committed as a result of sexual compulsion or for purposes of sexual gratification. *Hofsheier* made clear that "discretionary registration does not depend on the specific crime for which a defendant was convicted." (*Hofsheier, supra*, 37 Cal.4th at pp. 1197-1198.)

L. *Judicial Estoppel*

Appellant argues that the discretionary registration hearing violated the doctrine of judicial estoppel. But he also concedes that the court was not estopped from making the discretionary decision pursuant to section 290.006.

" ' " 'Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] *The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies.* [Citation.] Application of the doctrine is discretionary.' " [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [Citations.]' (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987 . . . , italics added (*Aguilar*); see also *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422)" (*People v. Castillo* (2010) 49 Cal.4th 145, 155.)

Appellant argues that the California Attorney General (A.G.) took inconsistent positions and points to two letters from the A.G., a May 16, 2003 letter and a December 15, 2008 letter and to the District Attorney's informal response to his September 2009 writ petitions filed in the superior court. The 2003 letter from the A.G.'s Office informs appellant that he had been "terminated from the Sex Offender Registry" "based solely on [his] 2000 Federal conviction" but that did "not in any way relieve [him] from registering as a Sex Offender should [he] be convicted of the current charges pending against [him] in Santa Clara County." The 2008 letter from the A.G.'s Office advises appellant that he might be granted relief from the mandatory registration

requirement based on *Hofsheier* but he would need to seek possible judicial relief. The letter warned: "Keep in mind that the court, in its discretion, may make a finding that you must continue to register as a sex offender" The D.A.'s informal response conceded that *Hofsheier* precluded mandatory registration but argued that Dryg should be ordered to register as a sex offender under section 290.006, which provides for a discretionary determination that registration is required.

As apparent, Dryg has not established that the People took "totally inconsistent" positions in judicial or quasi-judicial administrative proceedings. The doctrine of judicial estoppel does not apply here.

DISPOSITION

The order requiring appellant to register as sex offender pursuant to section 290.006 is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.