In the Supreme Court of the State of California

In re
WILLIAM TAYLOR, ET AL.,
On Habeas Corpus.

Case No. S206143

Fourth Appellate District, Division One, Case No. D059574
San Diego County Superior Court Case Nos. HC19742 (Taylor), HC19731 (Todd), HC19612 (Briley), HC19743 (Glynn)
The Honorable Michael D. Wellington, Judge

REPLY TO ANSWER BRIEF

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INTRODUCTION

Petitioners'[1] answering brief does not adequately analyze the relevant issues before the Court. Petitioners neglect to provide any analysis regarding the proper standard of judicial review, fail to show how the residency restriction actually infringes upon any of their rights; and, when they attempt to address the purported constitutional violations, they disregard this Court's directive that petitioners' status as parolees must inform the constitutional analysis. Without properly analyzing these crucial issues, petitioners have not shown that the California Department of Corrections and Rehabilitation's (CDCR) enforcement of the residency restriction is unconstitutional. Because petitioners have failed to demonstrate that the residency restriction impermissibly violates their constitutional rights, CDCR's enforcement of the law against them and other sex-offender parolees is constitutionally valid.

ARGUMENT

I. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE RESIDENCY RESTRICTION INFRINGES UPON THEIR CONSTITUTIONAL RIGHTS.

A. Petitioners No Longer Contend the Residency Restriction "Banishes" Them From the Community.

In the lower courts, petitioners claimed that the residency restriction banished them from San Diego County. The Court of Appeal determined that the residency restriction "effectively" banished the petitioners from the community. (Slip opn. at p. 36.) In the OB, Secretary Beard demonstrated why the banishment claim was without merit under the circumstances of

[1] As was done in the Opening Brief (OB), Secretary Beard shall refer to William Taylor, Julie Briley, Jeffrey Glynn, and Stephen Todd, who were the petitioners in the superior court actions and respondents in this matter, collectively here as the petitioners.

this case. (See OB, at p. 21.) Petitioners have not raised the banishment claim in their answering brief, and only mention the word "banish" three times in the brief, and never in the context of stating a separate claim for relief. (AB, at pp. 71 [acknowledging the residency restriction does not banish petitioners from entire county], 73 [explanatory phrase for case citation], and (76 [discussion of context of Illinois case law that upheld similar residency restriction and specifically rejected banishment claim].) Accordingly, petitioners' failure to address the banishment issue in their answering brief should be construed as a waiver of the claim. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627 [courts have made it clear that "every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."]; see also *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)

B. The Residency Restriction Does Not Implicate the Right to Intrastate Travel.

The residency restriction does not implicate the constitutional right to travel because the law neither requires nor inhibits petitioners' movement in any manner within California. (See OB, at pp. 18-20.) Without addressing the case law cited in the OB—which unambiguously requires an intrastate travel claim to be based on unlawfully compelled or restrained movement—petitioners generally allege without relevant authority that the right to travel is broader in scope. Based on this general assumption, petitioners conclude that "the residency restriction impinges upon affected parolees' freedom of intrastate travel, because it prevents them from living inside a structure in nearly every inhabitable community in the county where they are required to live." (AB, at pp. 73-74.) But this argument assumes that the right to intrastate travel includes a right to live wherever one chooses. As detailed in the OB, at pp. 20-21, that is not true. "The

right to travel does not . . . endow citizens with a right to live or stay where one will." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1103; see also *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700, 714, cert. den. (2005) 546 U.S. 1034 [rejecting sex offender's contention that the federal Constitution guarantees the right "to live where you want"].) Because petitioners do not have a constitutional right to live wherever they want, the fact that the residency restriction precludes them from living in certain designated locations does not offend the right to intrastate travel.

C. The Residency Restriction Does Not Implicate Any Rights under the Due Process Clause—the Due Process Clause does not Guarantee a Sex-Offender Parolee the Right to Live with Anyone of His or Her Choosing.

Petitioners further allege that the residency restriction infringes upon their purported substantive due process right to establish a home with whomever they want. (AB, at pp. 74-77.) But the United States Supreme Court has significantly limited the scope of substantive due process protections. In *Washington v. Glucksberg* (1997) 521 U.S. 702, the Court cautioned that it had "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." (*Id.* at p. 720.) It then noted that the due process clause maybe invoked to protect only those fundamental rights and liberties that are objectively, "deeply rooted in this Nation's history and tradition." (*Id.*) Further, the Court noted that substantive-due-process claims must carefully describe the basis of the asserted fundamental liberty interest. (*Id.* at pp. 720-721.)

In light of these limitations, petitioners' reliance on substantive due process is deficient for several reasons. First, a registered sex-offender's purported interest in living wherever they want is simply not a genuine right that is "implicit in the concept of ordered liberty." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105.) But, even if such a right was

found to be "deeply rooted" in our Nation's history (*Moore v. East Cleveland* (1977) 431 U.S. 494, 503), petitioners still have no claim because they have failed to adequately define the specific "fundamental right" they assert has been violated. Instead, they rely on a broad notion of "personal liberty" that they contend is protected under the Constitution, and they refer to decisions (some of which really are merely individual justices' concurring opinions) that similarly speak in terms of broad legal concepts that *may be* subject to due process protections, for example, "the right to live and work where [a citizen] will," (*Glucksberg, supra,* 521 U.S. at p. 760 (Souter, J., concurring); "freedom of personal choice in matters of marriage and family life," (*Cleveland Bd. of Educ. v. LaFleur* (1974) 414 U.S. 632, 639-640); or "the right . . . to establish a home," (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399).

Contrary to petitioners' reliance on these decisions, none of them specifically recognize the right that petitioners attempt to advance—the right of a paroled sex offender to live wherever he or she wishes. That no court has ever identified such a fundamental right confirms that petitioners' due process argument is meritless. (See *People v. Jeha* (2010) 187 Cal.App.4th 1063, 1078-1080 [rejection of substantive due process challenge to sex offender registration]; see also *Miller, supra,* 405 F.3d at pp. 713-714 [rejecting contention by sex offender of the existence of a federal right "to live where you want"].)

D. The Residency Restriction Does Not Implicate the Right to Association Privacy.

Petitioners also attempt to establish a claim for association privacy under the California Constitution. But a violation of the right to association privacy occurs only when the law specifically restricts or prevents individuals from residing together. (See *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 388 [distinguishing valid law allowing mobile home park

the discretion to set age restrictions from unconstitutional laws in *Moore v. East Cleveland* (1977) 431 U.S. 494, 494 and *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, where the government specifically restricted ability of plaintiffs to live with extended family (*Moore*) or unrelated persons (*Adamson*)].) Here, petitioners have failed to demonstrate how the residency restriction has specifically prevented them from living with any specific individual. Although petitioner Glynn alleges that he was prevented from living with his family (AB, at pp. 78-79), a closer look reveals that the restriction was only "where" he could live with his family, and not with whom he could live.[2] Thus, no privacy claim has been made out.

II. THE "REASONABLENESS" TEST IS NOT A VIABLE MEANS TO ANALYZE THE CONSTITUTIONALITY OF THE RESIDENCY RESTRICTION.

Assuming the enforcement of the residency restriction implicates petitioners' constitutional rights to some degree, the next step in the constitutional analysis is to identify the proper standard of review for a statutory residency restriction that is enforceable as a mandatory parole condition. Despite this being an issue of first impression in this Court, petitioners did not respond to any of the reasons detailed in the OB demonstrating why the appellate court's "reasonableness" test—a test used for analyzing the arbitrariness of *discretionary* probation and parole conditions—is irreconcilable with the mandatory nature of the residency restriction (OB, at pp. 23-24). Instead, petitioners presume that the "reasonableness" test is the appropriate standard of review based on their

[2] Other than referring to Glynn's specific circumstances, no other petitioner alleges how the residency restriction purportedly violated their privacy rights. (See AB, at pp. 78-79.) Thus, it is unclear whether the petitioners other than Glynn maintain an invasion of privacy claim in this action.

restrictive interpretation of this Court's statement of the issue on review, and because the residency restriction is being enforced against them by the parole authority. (AB, at p. 68.) But petitioners' agreement with the appellate court's "reasonableness" test without recognizing its incongruity with the circumstance of this case leaves a gaping hole in their analysis. Because the residency restriction applies as a matter of law to *all* registered sex offenders while on parole, based solely on their qualifying sex offense (Pen. Code, § 3003.5, subd. (b)), the law's constitutionality simply cannot be measured by a legal test specifically designed to apply to *discretionary* executive actions imposed against parolees based on each parolee's individual circumstances. Thus, despite petitioners' assumptions to the contrary, the "reasonableness" test is the wrong test to analyze the constitutionality of the residency restriction.

III. THE RATIONAL BASIS TEST, NOT STRICT SCRUTINY, IS THE APPROPRIATE STANDARD OF REVIEW BECAUSE AS SEX-OFFENDER PAROLEES, PETITIONERS' RIGHTS ARE NECESSARILY CIRCUMSCRIBED.

As detailed in the OB, petitioners' constitutional rights may be lawfully curtailed in many ways because of their status as sex-offender parolees.[3] (See OB, at pp. 26-27.) Petitioners first acknowledge that their constitutional rights are diminished because of their status, but then maintain that, to whatever extent their rights are abridged, that fact has no impact on the nature of their rights for purposes of judicial review. (AB, at pp. 69-70.) Their conclusion disregards this Court's prior pronouncement

[3] Contrary to the petitioners' attempts to summarize the Secretary's contentions (AB at pp. 70-71), the Secretary has never argued that parolees have no constitutional rights, only that some of the rights they possess (including the rights at issue in this matter) are lawfully circumscribed because of their status as parolees.

that the petitioners' limited status is an integral part of the relevant constitutional analysis (*In re E.J.* (2010) 47 Cal.4th 1258, 1283, fn. 10).

Then, ignoring the fact that other similar civil regulatory measures have been found to be constitutional even though the legislation when enforced does not take into account an affected party's individual circumstances (OB, at pp. 23-24), petitioners claim that CDCR's enforcement of the residency restriction against any particular sex-offender parolee must be narrowly tailored to that parolee's individual circumstances. (AB, at pp. 70-71.) But since CDCR's enforcement of the law is not discretionary, petitioners' reliance on case law analyzing discretionary executive actions is inapt. And all of the case law petitioners rely on is distinguishable on this basis. Thus, petitioners have not set forth any valid reason to apply a heighted standard of scrutiny to the residency restriction. Thus, because any rights at issue in this case are circumscribed, the residency restriction should be upheld so long as there is a rational basis supporting it. And as the Secretary has demonstrated (OB, at pp. 27- 31), under this test, the residency restriction is constitutional.

IV. THE RESIDENCY RESTRICTION IS CONSTITUTIONAL BECAUSE IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE.

Petitioners make no actual argument that the residency restriction is not rationally related to the legitimate governmental purpose of public safety. Instead, they focus their attention on attacking the law in ways unrelated to the proper constitutional analysis of the law. (AB, at pp. 80-84.)

First, petitioners allege that the law should be invalidated because it is ineffective and arguably creates more harm than it prevents.[4] (AB, at pp. 59-66, 82-84.) But contrary to this claim, social problems created by legislative policy decisions do not make a law unconstitutional. (*Tobe, supra*, 9 Cal.4th at p. 1092, fn. 12 [resolution of chronic social problems are issues for the legislature, not the judiciary and the failure to remedy social ills does not make legislative policy unconstitutional].) Further, "the wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329, 1329.) Thus, regardless of whether the residency restriction is a good law or a bad law, whether it achieves its intended purpose, or whether it has unforeseen consequences, the only relevant issue as to whether the law is constitutional is whether it rationally relates to a legitimate governmental purpose—and the goal of protecting public safety is such a valid purpose.[5]

Petitioners also claim that the law should be overturned because the ballot materials contained "demonstrably false findings." (AB, at pp. 52-59, 81-83). But "'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation *unsupported by evidence or empirical data.*'" (*In re Jenkins* (2010) 50 Cal.4th 1167, 1181,

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[4] These arguments essentially echo the arguments of the opposition to Proposition 83 in the ballot materials, which the people rejected. (See http://vote2006.sos.ca.gov/voterguide/props/prop83/argue_rebutt83.html [as of June 19, 2013], arguments in opposition to Prop. 83.)

[5] And even if the residency restriction, for whatever reason, does not achieve its intended purpose, changes to the law can occur only through the legislature or initiative process instead of through the courts. (*Federal Communications Com. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314.)

citing *Warden v. The State Bar of California* (1999) 21 Cal.4th 628, 650.) In fact, the legislative body need not even articulate a purpose or rationale for the enacted law and any reasonably conceivable set of facts are sufficient to justify upholding the law (*Heller v. Doe* (1993) 509 U.S. 312, 320), even if those facts were not the facts that actually motivated the passage of the law (*Warden, supra,* 21 Cal.4th at p. 650; see also *Tobe, supra*, 9 Cal.4th at p. 1093). Moreover, on rational-basis review, unprovable assumptions upon which the law was based will not render the law unconstitutional. (*Buhl v. Hannigan* (1993) 16 Cal.App.4th 1612, 1619.) Instead, legislative assumptions are presumed valid even if erroneous. (*Heller, supra*, 509 U.S. at p. 333.) Not even a policy maker's self-interest or politically motivated purpose for enacting a law justifies invalidating the statute. (*Warden, supra,* 21 Cal.4th at p. 650.) Thus, petitioners' contention that the residency restriction was based on false facts is immaterial to this Court's analysis of the constitutionality of the law.

But even if the reasons behind the enactment of the residency restriction were relevant to the analysis of the law's constitutionality, petitioners' claim that the ballot materials that accompanied the proposition contained "demonstrably false" facts is wrong.[6] Contrary to petitioners'

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[6] Petitioners cite *People v. McKee* (2010) 47 Cal.4th 1172, 1206-1207, for the proposition that the factual findings accompanying the ballot initiative materials are not entitled to judicial deference and that factual evidence introduced during a proceeding may properly call into question the legislative fact-finding. (AB, at pp. 81, 83.) It is unclear exactly what petitioners' purpose for this claim is since, as discussed above, a legislative purpose behind a law need not be correct, or even stated, for the law to survive a rational-basis review. Moreover, petitioners' reliance on *McKee* in this instance is misplaced. In *McKee*, the district attorney's office was relying on the legislative findings of Jessica's Law as evidentiary support to justify a distinction in treatment of sexually violent predators and mentally disordered offenders in opposition to an equal protection challenge to the

(continued...)

attempts to downplay the threats posed by convicted sex offenders, the OB details several decisions of federal and state courts, including the United States Supreme Court, expressing concerns regarding the high recidivism rates of sex offenders, which alone contradict the claim that the ballot materials were "demonstrably false." (OB, at pp. 27-29.)[7]

Further, contrary to petitioners' argument, evidence submitted during the evidentiary hearing supports the ballot materials. Although petitioners' witness Abbott testified, based on various studies he had reviewed, that the statistical recidivism rate for sex offenders appeared to be low (RT, Vol. 9, at p. 817), Thomas Tobin, Ph.D., the Vice Chair of the California Sex Offender Management Board and co-founder of Sharper Future, a sex-offender treatment facility, testified that the majority of sex offenses that are committed are not reported to the authorities, which alone calls into question Abbott's conclusions. (RT, Vol. 11, at p. 1190.) Moreover, Dr. Tobin discussed a peer-reviewed study by Andrew Harris and Karl Hanson

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law. In this case, the legislative findings are not used as evidence to show that sex offenders recidivate at a level higher than other felons, but rather to show the purpose behind the law. Accordingly, this Court's observation in *McKee* regarding the viability of legislative findings as evidence of elements of an equal protection claim is inapposite to the relevance of the legislative conclusions in this matter.

[7] Petitioners contend that some recent research studies have found a lower recidivism rate for sex-offenders in an attempt to distinguish the numerous cases cited in the OB indicating otherwise. (AB, at pp. 81-82, fn. 25.) But, as this Court recently stated in rejecting clinical evidence challenging the Board of Parole Hearings' reliance on an inmate's insight when evaluating his parole suitability, "it is not a judicial function to weigh conflicting views in the social or psychological sciences for the purpose of developing rules binding on the executive branch." (*In re Shaputis* (2011) 53 Cal.4th 192, 220.) As was the case in *Shaputis*, petitioners' dispute as to the empirical evidence pertaining to the recidivism rate of sex offenders are "more appropriately presented to the Legislature" rather than the Court. (*Ibid.*)

called *Sex Offender Recidivism: A simple question 2004-3*. Dr. Tobin explained that Harris and Hanson were considered within their field to be some of the most preeminent authorities on sex offender recidivism in the world, and that their study, which comprised 15 years of research as opposed to the limited studies Dr. Abbott relied on lasting less than five years, indicated that the recidivism rate for sex offenders increased as the years passed (i.e., 14% recidivism rate after 5 years, 20% after 10 years, 24% after 15 years). (RT, Vol. 9, at pp. 814, 817, 819-822, 836, 853; Vol. 11, at pp. 1143-1145, 1147-1148.) "Empirical research on child molesters . . . has shown that, '[c]ontrary to conventional wisdom, most re-offenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'" (See *In re Alva* (2004) 33 Cal.4th 254, 278, citing *Smith v. Doe* (2003) 538 U.S. 84, 104.)

Finally, even if some of the supporting ballot materials were not accurate, that alone would not justify invalidating the law.[8] (*Federal Communications Com. v. Beach Communications, Inc., supra,* 508 U.S. at p. 320.) So, although petitioners introduced evidence that conflicted with the ballot materials in regards to the recidivism rate of sex offenders, there is evidentiary support for the statements made in support of the residency restriction that sex offenders pose an on-going risk to society. The ballot materials, therefore, may not be considered to be based on "demonstrably false findings." Petitioners have provided no basis to undermine the constitutionality of the residency restriction.

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[8] Petitioners have never claimed that any of the purportedly false facts supporting the ballot materials were known to be false and were deliberately used to deceive the voters.

CONCLUSION

Because petitioners have failed to demonstrate that the residency restriction impermissibly violates their fundamental constitutional rights, the Court of Appeal's decision should be reversed.

Dated: June 20, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO ANSWER BRIEF** uses a 13 point Times New Roman font and contains 2,777 words.

Dated: June 20, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Taylor, et al.**
No.: **S206143**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 20, 2013, I served the attached **REPLY TO ANSWER BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 20, 2013, at San Diego, California.

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