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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.L., Defendant and Appellant.	G040507 (Super. Ct. No. DL009632-16) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Donna L. Crandall, Judge. Affirmed in part, reversed in part, and remanded.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janet Neeley and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

J.L. appeals from the juvenile court's adjudication sustaining allegations he committed four lewd and lascivious acts with three children, his cousins. (Welf. & Inst. Code, § 602; Pen. Code, § 288, subd. (a); subsequent statutory citations are to the Penal Code, unless noted.) Defendant contends the dire consequences of the adjudication — including lifetime registration as a sex offender, potential exposure to civil commitment as a sexually violent predator (SVP), and residency restrictions under Proposition 83 (Jessica's Law) — are punitive in nature. Defendant argues due process requires a jury trial before the state may impose such severe punishment. He contrasts his lifetime punishment with the less severe outcomes that mark typical juvenile adjudications, where the United States Supreme Court has sanctioned proceedings less formal than a criminal prosecution, including the absence of a jury trial, based on the rehabilitative goals of the juvenile system. (See *McKeiver v. Pennsylvania* (1971) 403 U.S. 528 (*McKeiver*).) Defendant also argues equal protection of the law requires a jury trial before a trial court may impose the lifetime punishment he faces. Defendant asserts juveniles subject to these consequences are similarly situated with adults who are subjected to these identical consequences only after a criminal conviction. Because their similarly-situated adult counterparts are entitled to a jury trial, defendant asserts equal protection requires that juveniles should have the same right.

Defendant's due process and equal protection arguments hinge on whether the consequences he identifies are punitive. As we explain below, controlling precedent establishes that neither sex offender registration, nor SVP civil commitment proceedings constitute punishment. Defendant's premise therefore fails as to these consequences.

But we agree with defendant that the lifetime residency restrictions he faces as a result of his juvenile adjudication are punitive in nature. We recently determined in

People v. Mosley (2010) 188 Cal.App.4th 1090, 1112 (*Mosley*), that the residency restrictions imposed by Jessica's Law (§ 3003.5, subd. (b)) are "overwhelmingly punitive" in effect for adult offenders, and we see no reason to reach a different conclusion for juvenile offenders. If anything, the restrictions have a harsher effect on juveniles because they are usually dependent on their parents or guardians for shelter, and therefore the family either must relocate as a consequence of the residency restrictions or expel the juvenile from the family home.

United States Supreme Court precedent teaches in *McKeiver* and elsewhere (e.g., *Duncan v. Louisiana* (1968) 391 U.S. 145 (*Duncan*)) that the constitutional interest in a jury trial includes a dignity interest in requiring community participation in the form of a jury trial before severe punishment is imposed. Because the residency restrictions are so overwhelmingly punitive in nature, we conclude the state must provide a jury trial before imposing those consequences. We conclude denial of the right to a jury trial in these circumstances violated due process and the requirement of equal protection, and therefore the residency restrictions must be enjoined as to J.L., absent a jury trial on remand. In all other respects the judgment is affirmed.

I

FACTUAL AND PROCEDURAL BACKGROUND

The juvenile court first took jurisdiction over defendant at age 14 in December 2003, based on his admitted commission of residential burglary and misdemeanors, including vandalism and assault on a schoolmate. The present appeal involves matters that surfaced four years later in 2007, when defendant was 17 years old. That summer, defendant lived with his cousin, N.V., and her husband and five children. Defendant inserted his finger into the vagina of one of the children, four-year-old L.C.,

while she sat on the toilet. L.C. screamed and, when her mother ran to the bathroom, defendant stated he merely had turned on the light for L.C.

Defendant previously lived with N.V. and her children in 2001 and 2002. Twelve-year-old R.O. testified that when he was seven, he awoke in his bedroom to find defendant touching his penis, "playing with" it, and moving it around. Defendant threatened to kill R.O. if he told his mother about the incident. Later that year, R.O. went to defendant's room to play one of defendant's video games. Defendant refused, explaining, "[F]irst you have to have sex with me." R.O. complied when defendant directed him to pull down his pants and bend over. Defendant sodomized R.O. and ejaculated. Defendant admitted in 2007 to an investigating police officer, Detective Ryan Tozzie, that he sodomized R.O. on two occasions.

A.B., the 15-year-old daughter of defendant's other aunt, testified that when she was nine or 10 years old, defendant placed his hand on her leg and moved it towards her vagina as she watched him play a video game. He warned A.B. not to tell her parents, threatening further, "And if you do tell your parents I will kill your parents." A.B. fled the room.

The defense argued defendant's relatives concocted the allegations. Defendant revealed to Tozzie no one in his extended family liked him, nor did his relatives get along with each other. Defendant's sister, C.A., testified her mother and her mother's sisters disliked each other and did not talk to one another based on "an ongoing fight" that had "always been among all the sisters." According to C.A., defendant did not live with N.V.'s family in 2001, 2002, or any time after 2000.

Finding the petition's allegations to be true beyond a reasonable doubt, the juvenile court continued jurisdiction over defendant, committed him to the Department of

Corrections and Rehabilitation, Division of Juvenile Justice (the youth authority), and ordered him to register for life as a sex offender. Defendant now appeals.

II

DISCUSSION

Defendant contends he was entitled to a jury trial because of the onerous lifetime consequences of his juvenile adjudication. Specifically, based on the allegations he committed lewd and lascivious acts against children (§ 288, subd. (a)), the consequences defendant faced at his bench trial in juvenile court included lifetime registration as a sex offender after commitment to the youth authority (§ 290.008, subds. (a) & (c)(2)), potential exposure to civil commitment as a sexually violent predator (Welf. & Inst. Code, § 6600, subds. (a)(1), (b) & (g); see Welf. & Inst. Code, § 6600.1 [violation of § 288, subd. (a), against a child under age 14 constitutes "a 'sexually violent offense' for purposes of [s]ection 6600" et seq. (SVPA)]), and permanent, mandatory residency restrictions under Jessica's Law (§ 3003.5, subd. (b)). We address these consequences in reverse order. As we explain, defendant's due process and equal protection arguments for a jury trial hinge on his premise that the consequences amount to punishment and therefore differentiate his adjudication from ordinary juvenile proceedings.

A. *Residency Restrictions*

J.L. contends the residency restrictions mandated by Jessica's Law constitute severe punishment that triggers a due process right to a jury trial. He contends the severity of the penalty, particularly its lifetime duration, distinguishes it from ordinary juvenile dispositions, which do not as a matter of due process require a jury trial. (See *McKeiver, supra,* 403 U.S. 528.) J.L. contends due process requires a different result

because the residency restrictions in Jessica's Law are punitive in nature. He argues equal protection requires a jury trial for juveniles subject to the same harsh, lifetime punishment as adults. We agree.

1. General Principles and Background

The constitutional guarantees of due process and equal protection apply in juvenile delinquency proceedings. As the United States Supreme Court has explained, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." (*In re Gault* (1967) 387 U.S. 1, 13 (*Gault*); see also *id.* at pp. 27- 28 ["it would be extraordinary if," in delinquency matters, "our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'"]; see also *id.* at p. 61 (conc. opn. of Black, J.) ["it would be a plain denial of equal protection of the laws — an invidious discrimination — to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards"].) Accordingly, juvenile adjudications "'must measure up to the essentials of due process and fair treatment.'" (*Id.* at p. 30, quoting *Kent v. United States* (1966) 383 U.S. 541, 555 (*Kent*).)

Due process is a flexible concept and calls for procedural protections as the particular situation demands. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) Equal protection of the law similarly presents a fact-intensive inquiry, turning on whether persons treated differently by the state are similarly situated. (See *People v. Romo* (1975) 14 Cal.3d 189, 196 [equal protection requires "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment"].)

Given the particularized nature of the inquiry, the high court's jurisprudence concerning due process and equal protection in the delinquency context is

marked by the restraint inherent in common law, case-by-case determinations. (See, e.g., *Gault*, *supra*, 387 U.S. at p. 13 ["We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state"].) The court has "refrained . . . from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding." (*McKeiver*, *supra*, 403 U.S. at p. 545; see *Gault*, *supra*, 387 U.S. at p. 13 ["We consider only the problems presented to us by this case"].)

Thus, early on, the court found two particular custodial confessions by juveniles to be coerced and therefore inadmissible under the Due Process Clause. (*Haley v. State of Ohio* (1948) 332 U.S. 596; *Gallegos v. State of Colorado* (1962) 370 U.S. 49.) In 1966, the court concluded a juvenile court's transfer of a child to the jurisdiction of the criminal court required notice and a hearing. (*Kent*, *supra*, 383 U.S. 541.) In an oft-quoted passage, the *Kent* court noted that despite "the original laudable purpose of juvenile courts," "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (*Id.* at pp. 555-556.) In *Gault*, the court held juveniles in delinquency proceedings are entitled to notice of the charges, counsel, confrontation, and the right to remain silent. (*Gault*, *supra*, 387 U.S. at pp. 31-59.) *In re Winship* (1970) 397 U.S. 358 established the reasonable doubt standard applies to proof of criminal acts charged in juvenile court. In *Breed v. Jones* (1975) 421 U.S. 519, the court found there was "little to distinguish" the consequences of a juvenile adjudicatory hearing from the risk traditionally associated with a criminal prosecution because the juvenile, like the adult, faced potential incarceration, even if confinement was fashioned to rehabilitate the youthful offender. (*Id.* at pp. 529-530.) Consequently,

the court concluded the Double Jeopardy Clause applied to a juvenile placed once in risk in a juvenile court adjudication.

Not all of the Bill of Rights, however, found ready incorporation into juvenile proceedings. In *Gault*, the court noted lower court holdings and commentary that a juvenile need not be afforded bail and was not entitled to indictment by a grand jury, to a public trial, or a jury trial. (*Gault*, *supra*, 387 U.S. at p. 14; citing *Kent*, *supra*, 383 U.S. at p. 1054, fn. 22; see *Pee v. United States* (D.C. Cir. 1959) 274 F.2d 556, 563; Paulsen, *Fairness to the Juvenile Offender* (1957) 41 Minn. L. Rev. 547 [hereafter *Fairness to the Juvenile Offender*].)

In *McKeiver*, the Supreme Court held the right to a jury trial does not generally apply in juvenile delinquency adjudications. The Attorney General relies on *McKeiver*'s holding as a blanket proposition that the right is *never* constitutionally required under any circumstances in a delinquency matter. But the *McKeiver* plurality expressly recognized "disillusionment" might "come one day" concerning trial of a juvenile without a jury. (*McKeiver*, *supra*, 403 U.S. at p. 551.) We conclude that day is here for imposition of Jessica's Law's punitive lifetime residency restrictions. Neither the facts nor various rationales expressed in *McKeiver* support denying a jury trial for juveniles faced with this punishment. As we explain, the opposite is true.

McKeiver consisted of consolidated cases from Pennsylvania and North Carolina with dispositions far milder than the residency restrictions imposed on J.L. In all but one of the consolidated cases, the courts returned the juveniles to their homes. None, apparently, received *any* legal punishment. Specifically, the Pennsylvania juvenile court adjudicated the named appellant, McKeiver, a delinquent on felony charges of robbery, larceny, and receiving stolen goods, and placed him on probation. The same

court committed another appellant to a youth development center after consecutive adjudications for assault on a teacher and misdemeanor assault and battery of a police officer, and conspiracy. (*McKeiver*, *supra*, 403 U.S. at pp. 534-536; *id* at p. 558 (dis. opn. of Douglas, J.).)

The North Carolina cases involved approximately 45 black children, ages 11 to 15, summoned to juvenile court following demonstrations in late 1968 concerning school assignments and a school consolidation plan; they were each charged with misdemeanor traffic obstruction. Another North Carolina petitioner faced charges of disorderly conduct in a public building and interruption or disturbance of a public or private school. (*McKeiver*, *supra*, 403 U.S. at pp. 536-538; *id* at p. 558 (dis. opn. of Douglas, J.).) All the North Carolina petitioners were adjudged delinquent in closed proceedings and initially ordered committed to the custody of county welfare authorities for placement in a "suitable institution," but the juvenile court suspended its commitment order and placed the children on probation for a year or two each. (*McKeiver*, at p. 538.) The North Carolina Supreme Court "deleted that portion of the order in each case relating to commitment, but otherwise affirmed." (*Ibid.*) As we discuss below, the United States Supreme Court concluded that the consequences for the juveniles in *McKeiver*, and in juvenile adjudications generally, do not require a jury trial as a matter of due process or equal protection. But before turning to *McKeiver*'s rationale, we first examine the residency restriction consequences of J.L.'s juvenile adjudication.

2. *Mosley* and the Punitive Nature of Jessica's Law's Residency Restrictions

In contrast with the temporary, routine probationary and juvenile custody dispositions forming the backdrop of *McKeiver*, the residency restrictions that J.L. faces impose severe measures lasting the remainder of his life. (See *Mosley*, *supra*,

188 Cal.App.4th 1090.) By enacting Proposition 83, Jessica's Law, the voters added the residency restrictions as an additional consequence of registration under California sex offender legislation. (See §§ 290 et seq. [Sex Offender Registration Act]; 290.008 [requiring juveniles to register as sex offenders after adjudication as a ward for committing designated sex crimes]; 3003.5, subd. (b) [imposing residency restriction on all registered sex offenders]; see generally *Mosley*, at p. 1106 [reviewing history of California sex offender registration laws].)

At the outset, we observe that all 50 states have some form of sex offender registration legislation, but California is in the minority, consisting of 17 states, that apply sex offender registration requirements to juveniles. (§ 290.008; see Swearingen, *Megan's Law as Applied to Juveniles: Protecting Children at the Expense of Children?* (1997) 7 Seton Hall Const. L. J. 526, 569, fn. 252 [listing 49 states, omitting Nebraska] & fn. 255 [listing 17 states, including California] [hereafter Swearingen]; see also Neb. Rev. Stat. §§ 29-4001 et seq. [Nebraska Sex Offender Registration Act, effective 2002; postdating Swearingen and making Nebraska the 50th state]; cf. Jacob Wetterling Crimes Against Children Act, 42 U.S.C. § 14071(f) [reducing federal funds for states not enacting legislation requiring registration of sexually violent offenders].)

In the minority of states that apply registration to juveniles: "Most . . . provide for lesser periods of registration, special requirements for juveniles before they can qualify for registration, or allow special waiver mechanisms for juvenile offenders. For example, in Minnesota, Oregon, and Texas, the period of registration lasts only ten years. In Mississippi, juveniles are required to register only after they have twice been adjudicated of a sex offense. Whether a juvenile is required to register in Arizona is [at] the discretion of the court issuing the delinquency adjudication, and if [required] only

lasts until the offender reaches the age of 25. Likewise, in Iowa the decision to require juvenile registration is also [at] the discretion of the juvenile court. In Indiana, juveniles are only required to register if it is proven by clear and convincing evidence that they are likely to re-offend. Similarly, in South Carolina only juveniles who were convicted in adult criminal proceedings are required to register." (Swearingen, *supra*, 7 Seton Hall Const. L. J. at pp. 570-571, fns. omitted.)

Codified in section 3003.5, subdivision (b), the residency restrictions imposed by Jessica's Law create a broad exclusion zone for adult and juvenile offenders alike: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to [s]ection 290 to reside within 2000 feet of any public or private school, or park where children gather regularly." In *Mosley*, we observed that, "in light of the large number of schools and parks in our communities and the size of the 2,000-foot exclusion zone, the residency restriction may well have the effect of banishing registered sex offenders from California's densely populated cities. One commentator reports that Jessica's Law 'effectively banned registered sex offenders from residing in half of the Sacramento urban area, nearly seventy percent of the San Francisco Bay area, and about seventy-five percent of the Los Angeles metro area.'" (*Mosley*, *supra*, 188 Cal.App.4th at p. 1109, quoting Barvir, *When Hysteria and Good Intentions Collide: Constitutional Considerations of California's Sexual Predator Punishment and Control Act* (2008) 29 Whittier L. Rev. 679, 687.)

The restrictions admit no exceptions, neither for one's youth at adjudication, nor upon attaining majority, nor based on the characteristics of the offender or offense. (See *Mosley*, *supra*, 118 Cal.App.4th at p. 1110 [noting the restrictions involve "'no individualized determination of the dangerousness of a particular registrant.

Even those registrants whose victims were adults are prohibited from living near an area where children gather'"].) As we observed in *Mosley*, "'When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.'" (*Ibid.*) Given their express lifetime duration (§ 290, subd. (b)), the restrictions apply during and after a defendant's release on probation, with no avenue to show they are unnecessary. Unlike in other jurisdictions, under Jessica's Law there is no means to demonstrate rehabilitation; the restrictions apply for life regardless of reform.[1] Accordingly, the goal of the residency restrictions cannot be said to be rehabilitation.

To the contrary, as we explained in *Mosley*, the residency restrictions are punitive in nature. In *Mosley*, we examined the residency restrictions using the "intent/effect test" to determine whether an enactment's prescribed consequences constitute punishment. (*Mosley, supra*, 188 Cal.App.4th at p. 1102.) The test requires resolving (1) "whether the [enacting body] intended the provision to constitute punishment" and (2) "whether the provision is so punitive in nature or effect that it must

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[1] Compare § 3003.5, subd. (b), with Swearingen, *supra*, 7 Seton Hall Con. L. J. at p. 572, fns. omitted ["Colorado's registration law allows any . . . offender, juvenile or adult, to petition for release from its provisions" after "a sliding scale [period] that is based on the seriousness of the offense . . . . Thus, for more serious offenses, an offender must wait 20 years before petitioning the court for release, while for less serious offenses it drops to 10 years. For the least serious offenses, petitions may be made after 5 years. Provisions such as these will help those juvenile offenders who committed only minor offenses"], and compare further with *id.* at p. 573 [noting Washington State law provides juveniles 15 or older may obtain relief from registration with a showing by clear and convincing evidence that it would not serve the registration statute's purpose; same for juveniles age 14 or less on a preponderance of evidence standard]; see also *id.* at pp. 572-573 [quoting sponsor of the Washington legislation as stating its purpose "is to make it easier for a juvenile to wash their record clean and start over as an adult"].)

be found to constitute punishment despite the [enacting body]'s contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795 (*Castellanos*).)

In *Mosley*, we concluded the intent animating the residency restrictions in Jessica's Law was nonpunitive, based on express ballot pamphlet statements and language in Proposition 83's intent clause declaring the restrictions were aimed to "control" registered sex offenders and "create predator free zones around our children's schools and parks," without mentioning punishment. (*Mosley*, *supra*, 188 Cal.App.4th at p. 1107.) We explained the issue was close based on several factors: Proposition 83 codified the residency restrictions in the Penal Code, violation of the restrictions constituted "unlawful" conduct (§ 3003.5, subd. (b)), the blanket treatment of all registered sex offenders, the lack of a grandfather clause or grace period, and authorization of local ordinances imposing stricter measures (§ 3003.5, subd. (c)). (*Mosley*, at p. 1107.)

Turning to the second prong of the intent/effect test, we found the issue of the restrictions' punitive effect was not close. Applying the multifactor *Mendoza-Martinez* test (see *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144) to determine whether government action constitutes punishment, we concluded the residency restrictions' effect was "overwhelmingly punitive"[2] (*Mosley*, *supra*, 188 Cal.App.4th at p. 1112).

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[2] *Mendoza-Martinez* set forth its punitive effect factors in the process of determining that laws divesting draft-evaders of citizenship constituted punishment. Concluding that "[t]he punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," the *Mendoza-Martinez* court identified the test factors as follows: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an

Summarizing our application of the *Mendoza-Martinez* factors, we concluded that imposition of the residency restrictions as required by section 3003.5, subdivision (b) "affirmatively restrains the right to choose a home and limits the right to live with one's family. It effectuates traditional banishment under a different name, interferes with the right to use and enjoy real property near schools and parks, and subjects housing choices to government approval like parole or probation. It deters sex offenses and comes close to imposing retribution on offenders. While it has a nonpunitive purpose of protecting children, it is excessive with regard to that purpose. It would oust a person never convicted of any offense against a child from his family home near a school or park, forcing him to leave his family or consigning the family to potential transience. Relocation would be limited to the few outskirts of town lacking a school or park. Yet the residency restriction would allow a convicted child molester to stroll past the school and eat ice cream in the park — as long as he or she retreats at night to housing far from a school or park. And there, the child molester may live undisturbed next door to small children. Building exclusion zones around all schools and parks for all registered sex offenders is excessively punitive, which clearly outweighs the proclaimed . . . regulatory, nonpunitive intent." (*Mosley*, *supra*, 188 Cal.App.4th at p. 1112.) We remain convinced that to simply label the residency restrictions as "regulatory" would do nothing to undercut the reality of their overwhelmingly punitive effect under the *Mendoza-Martinez* factors.

Mosley involved an adult offender, but we see no reason to reach a different conclusion for juveniles; indeed, the restrictions have a harsher punitive effect on

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alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." (*Mendoza-Martinez*, *supra*, 372 U.S. at pp. 168-169, fns. omitted.)

juveniles.[3] The restrictions prohibit residing in areas that are usually more important to juveniles than to adults, near parks and near schools they may be required to attend or that offer programs aiding their development and rehabilitation. Additionally, juveniles depend on their parents or guardians for shelter, but if the adult's home is in an exclusion zone, the juvenile may not reside there despite any rehabilitation achieved under juvenile court supervision and no matter how little danger he poses, nor how close his supervision by parents or elders, or how limited his access to other children. Indeed, the residency restrictions do nothing to limit his interaction with other minors during the day, while children are typically about, but only when he returns to his residence where he is under family supervision.

Subjected to relocation under the residency restrictions in section 3003.5, subdivision (b), the family faces a Hobson's choice of moving to what may only be few areas outside every exclusion radius, or else to abdicate all parental responsibility and oust the juvenile to live in these areas without their oversight. The *parens patriae* promise of the juvenile system is thus proven illusory, with the minor discharged from the protection of juvenile authorities but unable to reside with his family if they choose not to relocate. The system's rehabilitative justification similarly proves illusory because, however successful any services the juvenile may receive under the juvenile court's supervision, a juvenile's reform gains no exemption from the restrictions. Given

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[3] Specifically, we determined in *Mosley* that the trial court's discretionary imposition of the requirement to register as a sex offender (§ 290.006) constituted increased punishment beyond the statutory maximum authorized by the jury's verdict, thereby running afoul of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny. (*Mosley*, *supra*, 188 Cal.App.4th at p. 1112.) The residency restrictions apply by operation of law to all registrants. (§ 3003.5, subd. (b).) Our conclusion in *Mosley* that the residency restrictions constituted punishment under the *Mendoza-Martinez* factors did not depend on the fact that the defendant there was an adult. As we explain here, the residency restrictions are even harsher as applied to a juvenile.

the severe punitive nature of the residency restrictions, we turn to the question of whether a jury trial is required for juveniles before the restrictions may be imposed.

3. *McKeiver* and Community Participation in Imposing Serious Penalties

The *McKeiver* court concluded the asserted failings of the still-evolving juvenile court system did not "yet" require jury trials in delinquency adjudications to assure "'the essentials of due process and fair treatment.'" (*McKeiver*, *supra*, 403 U.S. at p. 534.) Before the advent of the juvenile court system with the Progressive Era at the turn of the 19th century, there was no issue of due process or equal protection for juveniles accused of criminal acts because they were tried by the same process as adults, including the right to a jury trial. (*Gault*, *supra*, 387 U.S. at pp. 16-17, fn. omitted ["At common law," children age seven and older "were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults"].)

The first juvenile court opened in Cook County, Illinois, in 1899. "The underlying ideal of that court, and the system that arose therefrom, was that children should not be dealt with as criminals. Rather the state was to act as a parent, protecting instead of punishing the child. In doing so, the function of the system was 'to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix blame.' Thus, rehabilitation became the central tenant of the juvenile justice system." (Swearingen, *supra*, 7 Seton Hall Const. L. J. at p. 549, fns. omitted.) Similar courts soon "spread to every State in the Union . . ." (*Gault*, *supra*, 387 U.S. at p. 14), including California. (See *In re Brodie* (1917) 33 Cal.App. 751, 752 [no infringement of right to jury trial in wardship adjudications because "orders of commitment in such cases were not for the purpose of inflicting punishment, but [to] provid[e] suitable guardianship"].)

Now, slightly more than 100 years later, the Kansas Supreme Court has concluded legislative changes have brought the juvenile courts there full circle, so closely "pattern[ing]" the juvenile justice system after the adult model as to "erode[] the benevolent parens patriae character that distinguished" the two — therefore requiring the right to a jury trial in all delinquency proceedings. (*In re L.M.* (Kan. 2008) 186 P.3d 164, 170.) We express no such disillusionment with our state's juvenile adjudicatory system. (Compare *ibid.* and *In re Javier A.* (1984) 159 Cal.App.3d 913, with *In re Daedler* (1924) 194 Cal. 320 [no right under state Constitution to a jury trial in juvenile proceedings].) Instead, we pass only on the precise dispositional consequences before us, including the "overwhelmingly punitive" residence restrictions. (*Mosley*, *supra*, 188 Cal.App.4th at p. 1112.) Because a disposition resulting in lifetime residency restrictions is, unlike the dispositions in *McKeiver*, so patently punitive, we conclude *McKeiver* and similar precedent are not controlling. None of the rationales expressed in *McKeiver* support denying the right to a jury trial here, but to the contrary, support it.

As our Supreme Court has explained: "The various *McKeiver* opinions offered multiple reasons for declining to recognize [a jury trial] right [for juveniles]. At least five justices cited, as a paramount concern, a reluctance to deem juvenile adjudications 'criminal proceedings' within the Sixth Amendment's ambit, given the juvenile system's greater emphasis on informality, rehabilitation, and *parens patriae* protection of the minor, as opposed to the more formal, adversary, and punitive nature of the adult criminal system." (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1019-1020 (*Nguyen*); see also Welf. & Inst. Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding"].) And "five

concurring justices in *McKeiver* also were strongly influenced by their determination that a jury is not essential to fair and reliable *factfinding* in a juvenile case." (*Nguyen*, at p. 1020, original italics.)

Specifically, the *McKeiver* majority included a plurality opinion authored by Justice Blackmun and joined by Chief Justice Burger, Justice Stewart, and Justice White. Justice White also wrote a separate concurring opinion. Justice Harlan supplied the fifth vote based on his view the right to a jury trial was not incorporated against the states, even for adults. (*McKeiver, supra*, 403 U.S. at p. 557 (conc. opn. of Harlan, J.); contra *Duncan, supra*, 391 U.S. 145.)

Justice Brennan added a sixth vote in the cases arising from Philadelphia, reasoning that public solicitude for juveniles would ensure fair process for them, provided their trials were open so the public could monitor the proceedings, as was the case under Pennsylvania law. (*McKeiver, supra*, 403 U.S. at p. 555, conc. & dis. opn. of Brennan, J.).) Justice Brennan explained that the "availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case." (*Id.* at pp. 554-555.) He noted, "Of course, the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitution for trial by jury in serious cases." (*Id.* at p. 555.) But the "reservoir of public concern unavailable to the adult criminal defendant" distinguished public juvenile proceedings. (*Ibid.*) Because the cases arising from North Carolina had been held in closed courtrooms, Justice Brennan parted with the majority and dissented in those matters.

Justice White echoed the plurality's dual rationales concerning the informal, rehabilitative, *parens patriae* nature of juvenile proceedings and the adequacy

of judicial factfinding for essential fairness in a juvenile case. He observed that, in the juvenile context, "[s]upervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties." (*McKeiver*, *supra*, 403 U.S. at p. 552 (conc. opn. of White, J.).) He also observed that, "[a]lthough the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge." (*Id.* at p. 551.) He noted, however, an important caveat concerning judicial adjudication, despite its efficacy: "Nevertheless, the *consequences of criminal guilt are so severe* that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice." (*Ibid.*, italics added.)

This caveat concerning bench trials was founded in the Supreme Court's landmark decision in *Duncan* three years earlier, holding the right to a jury trial in "serious" criminal cases is "fundamental to the American scheme of justice." (*Duncan*, *supra*, 391 U.S. at pp. 149, 156; see *id.* at p. 162 [potential two year prison commitment for simple battery requires jury trial]; see subsequently, *Baldwin v. New York* (1970) 399 U.S. 66, 69 [right to jury attaches where potential sentence is greater than six months].) *Duncan* explained: "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." (*Duncan*, at p. 155.) Thus, "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the

jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (*Id.* at p. 156.)

Because this fear of "unchecked power . . . found expression in the criminal law in [an] insistence upon community participation in the determination of guilt or innocence," the *Duncan* court held: "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." (*Duncan*, *supra*, 391 U.S. at p. 156.) The Supreme Court specified in *Duncan* that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment," requiring a jury trial. (*Id.* at pp. 159-160.)

In *McKeiver*, the plurality observed that the arguments there for a jury trial "necessarily equate the juvenile proceeding — or at least the adjudicative phase of it — with the criminal trial." (*McKeiver*, *supra*, 403 U.S. at p. 550.) Put another way, "the arguments advanced by the juveniles . . . are, of course, the identical arguments that underlie the demand for the jury trial for criminal proceedings." (*Ibid.*) The *McKeiver* court rejected the comparison, with the plurality observing it ignored "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates" — in other words, the informal, rehabilitative, and *parens patriae* nature of the system. (*Ibid.*) Focusing on the rehabilitative nature of a "typical disposition in the juvenile court" that might, for example, authorize confinement until age 21 but "no longer and within that period . . . only so long as his behavior demonstrates that he

remains an unacceptable risk if returned to his family," Justice White similarly distinguished the juvenile adjudicatory system from a criminal trial. (*Id.* at p. 552.) In sum, "Not only are those risks that mandate juries in criminal cases of lesser magnitude in juvenile adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt. This is plainly so in theory, and in practice there remains a substantial gulf between criminal guilt and delinquency . . . ." (*Id.* at p. 553.)

Here in contrast, imposition of the overwhelmingly punitive residency restrictions is of no lesser seriousness or magnitude for juveniles than adults. Indeed it is likely greater, as discussed above. Consequently, there is no meaningful distinction — let alone a substantial gulf — in the severity of consequences for one's guilt and the other's delinquency. The rehabilitative purpose that ordinarily distinguishes the juvenile system is absent. Rehabilitation is empty jargon where the residency restrictions continue to apply regardless of whether the juvenile demonstrates reform. The restrictions render hollow the juvenile court's *parens patriae* role, given that even if the court succeeds in rehabilitating the minor, the restrictions still apply. As one commentator has observed, juvenile sex offender legislation imposing a "punitive impact" that "is not only more serious than the typical juvenile sentence, but . . . the antithesis of what the juvenile system represents" creates "a special situation not so much because of how it resembles a criminal sentence, but because of how little it resembles a juvenile disposition." (Swearingen, *supra*, 7 Seton Hall. Const. L. J. at p. 566, fn. omitted.)

The residency restrictions — in a most literal fashion — similarly situate juvenile offenders with their adult counterparts by confining them to the same relocation sites, banishing each to the same areas outside exclusion zones. Because the residency

restrictions are more punitive for dependent juveniles than when applied to adults, we see no basis on which to say equal protection does not apply. (See *Fairness to the Juvenile Offender*, *supra*, 41 Minn. L. Rev. at p. 550 ["If the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling"].) We hold due process and equal protection require community participation in the form of a jury trial before the state may impose the residency restrictions on a juvenile, no less so than for an adult. Accordingly, the residency restrictions cannot be applied to J.L. absent a jury trial on remand, as reflected in our disposition below.

B. *Potential Exposure to SVPA Civil Commitment Proceedings*

We conclude the lifetime punishment defendant sees in his exposure, following his sex offense adjudication, to SVPA civil commitment proceedings does not warrant a jury trial as a matter of due process or equal protection. SVPA proceedings are civil in nature, rather than criminal. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 791-792.) And while the "civil" or "criminal" label does not by itself establish or limit constitutional rights (*In re Winship*, *supra*, 397 U.S. at p. 365), our Supreme Court has explained that SVPA proceedings are noncriminal in nature because they are for the purpose of treatment rather than punishment. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1172-1179 (*Hubbart*).) Accordingly, defendant's premise that potential SVPA proceedings constitute additional punishment is without merit. Contrary to defendant's basic premise, the risk of future SVPA proceedings does not constitute greater punishment than is meted out in typical juvenile proceedings; rather, the risk is not a form of punishment at all. (*Ibid*.)

To be sure, the risk of future SVPA civil commitment proceedings is a serious consequence of defendant's adjudication. But *Nguyen, supra*, 46 Cal.4th 1007 is instructive in demonstrating that even when serious consequences of a juvenile adjudication extend into adulthood, due process does not necessarily require a jury trial. In *Nguyen*, our Supreme Court concluded the absence of a jury trial does not preclude the use of a juvenile adjudication as a sentencing strike in adulthood. Relying on *McKeiver*, the court explained that the trustworthiness of the bench adjudication is sufficient to satisfy due process. (*Nguyen*, at pp. 1021-1022.) A fortiori, a similar conclusion is required here where, unlike a strike that may result in increased punishment and unlike the residency restrictions which are overwhelmingly punitive, the risk of potential future SVPA civil proceedings is not punitive. (*Hubbart, supra*, 19 Cal.4th at pp. 1172-1179.)

Put simply, consequences matter in determining the process due. (See *Mathews v. Eldridge* (1976) 424 U.S. 319, 334 [due process "'calls for such procedural protections as the particular situation demands'"].) The mere possibility that future SVPA civil commitment proceedings someday may arise following a juvenile adjudication is too speculative to constitute by itself a deprivation of constitutional dimension requiring community participation in the form of a jury trial. Consequently, the state may reasonably conclude, as *Nguyen* observed in weighing the possibility of future punishment based on juvenile strikes, that "the introduction of juries in [the juvenile] context would interfere too greatly with the effort to deal with youthful offenders by procedures less formal and adversarial, and more protective and rehabilitative — at least to a degree — than those applicable to adult defendants." (*Nguyen, supra*, 46 Cal.4th at p. 1023, citing *McKeiver*.)

Significantly, the SVPA only provides for commitment proceedings against defendants already in custody. (Welf. & Inst. Code, § 6601, subd. (a).) Even assuming arguendo that the definition of custody applies to juvenile sex offenders who have been released from the youth authority (see Welf. & Inst. Code, § 6600, subd. (g)(4)) but who remain under the juvenile court's jurisdiction, the juvenile court's jurisdiction extends only to age 21 for most juveniles and no later than age 25. (Welf. & Inst. Code, § 607.) Accordingly, the SVPA holds no repercussions beyond age 25 for juveniles who do not reoffend and return to law enforcement custody as adults.

Thus, the risk of civil commitment proceedings as a consequence of a juvenile adjudication is particularly attenuated — and particularly dissimilar from punitive consequences such as extended jail time or lifetime residency restrictions — because the risk is committed to the juvenile's control. In other words, if the juvenile does not reoffend and return to custody, he does not face the potential consequence of civil commitment under the SVPA as an adult. As the Supreme Court observed in *Nguyen* with respect to juvenile strikes: "If the *parens patriae* features of the juvenile justice system have succeeded in rehabilitating a youthful offender, all well and good. But if the person was not deterred, and thus reoffends as an adult, this recidivism is a highly rational basis for enhancing the sentence for the adult offense." (*Nguyen*, *supra*, 46 Cal.4th at p. 1023.)

This rationale applies even more forcefully here because civil commitment does not rise to the level of enhancing an adult sentence, since the commitment is nonpunitive in nature. If the juvenile sex offender is not deterred after his or her initial adjudication, and continues to offend as an adult, his recidivism is relevant to the outcome of potential civil commitment proceedings, as provided for in the SVPA. In

sum, we conclude the attenuated, noncriminal, and nonpunitive consequence of potential future SVPA civil commitment proceedings is not so serious that due process requires community participation in the form of a jury trial for a juvenile adjudication. Nor does the absence of a jury violate equal protection. The SVPA interposes substantial procedural protections before one may be civilly committed, included a jury trial. While the state also affords a jury trial for an adult on sex offenses that may later serve as a predicate for SVPA proceedings, the familiar distinctions between a criminal conviction and the less serious outcomes, more informal process, and *parens patriae* potential for rehabilitation in the juvenile context predominate, and therefore justify the absence of a jury trial for juveniles at the initial adjudication. (E.g., *McKeiver, supra*, 403 U.S. 528.)

C. *Sex Offender Registration*

Our Supreme Court has concluded sex offender registration, considered without the residency restrictions later attached by the voters, does not constitute punishment, but rather is regulatory in nature. (*Castellanos*, *supra*, 21 Cal.4th at p. 796; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, there is no basis to conclude, as defendant asserts, that he is entitled to a jury trial on grounds the registration requirement becomes punitive when he ages out of the juvenile court's rehabilitative oversight. Because registration does not constitute punishment under *Castellanos*, it follows that it does not constitute serious punishment for which due process would require a jury trial. Although the state provides a jury trial for adults accused of sex offenses that may require registration, equal protection does not mandate identical treatment for juveniles given the distinctions between a criminal conviction and the less serious outcomes, more informal process, and *parens patriae* potential for rehabilitation in the juvenile context. (E.g., *McKeiver*, *supra*, 403 U.S. 528.)

III

CONCLUSION AND REMEDY

We have concluded Proposition 83's residency restrictions constitute punishment so serious that due process and equal protection require the right to a jury trial before they may be imposed on juveniles, no less than adults. Section 3003.5, subdivision (b), makes the residency restrictions dependent upon the duty to register as a sex offender. Had the electorate not married the residency restrictions to the duty to register, no constitutional complication would arise in the imposition of a duty to register. But Jessica's Law did not contemplate a defendant's constitutional right to a jury trial. We have *not* held that the residency restrictions are facially unconstitutional or unconstitutional as applied based on defendant's individual characteristics. Rather, the defect lies in the unconstitutional procedure by which defendant became subject to the residency restrictions without a jury trial. We thus turn to address the appropriate remedy for this violation, according to the specifics of this case.

Defendant seeks alternate forms of relief on appeal, including remand for a jury trial on the lewd and lascivious conduct with children allegations (§ 288a) resulting in (1) his duty to register as a sex offender, (2) statutory application of the residency restrictions, and (3) his potential exposure to SVPA civil commitment proceedings. In the alternative, he asks us to strike each of these consequences in the absence of a jury trial.[4] We have concluded the state's decision not to furnish a jury trial violates due process and equal protection only with respect to application of the residency restrictions. We therefore direct the juvenile court to issue an order enjoining enforcement of the

[4] Of course, the juvenile court's judgment itself contains no reference to the consequences of registration. It merely requires registration, and the law supplies the consequences. Thus, there is nothing in the judgment to "strike" concerning the residency restrictions.

restrictions as to defendant unless and until he is afforded a new trial with a jury on the sexual offenses alleged in the petition. The prosecutor may elect to retry defendant with a jury within 30 days of the date this opinion becomes final. If the prosecutor elects not to retry defendant, the injunction barring enforcement of the residency restrictions as to defendant shall be made permanent.

IV

DISPOSITION

The juvenile court's disposition is affirmed except that the residency restrictions under section 3003.5, subdivision (b), shall not apply to defendant unless and until he is afforded a jury trial on the underlying allegations requiring registration. The matter is remanded for further proceedings consistent with this opinion.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.