

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	General
Jan. 12 2015	THE DOZEN MOST SIGNIFICANT NEW LAWS (OTHER THAN THOSE INVOLVING REALIGNMENT OR PROP 47) IMPACTING PROSECUTORS IN 2015	Venus Johnson DAG (Legislative Analyst)	30

1. When is a Sentence of a Year Less Than a Year? (SB 1310)

Previously, when a statute authorized imprisonment in the county jail up to or not exceeding a year, the defendant could potentially serve a 365-day sentence. Now, pursuant to SB 1310, a new section of the Penal Code was added: Penal Code section 18.5.

Section 18.5 provides: "Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed **364** days. (Emphasis added.)

Editor's notes:

According to the bill's author, this bill was needed because, for immigration purposes, the federal government defines a misdemeanor as a crime punishable for 364 days or less. Thus, noncitizens could suffer immigration consequences attendant to a "felony" conviction under certain circumstances. For example:

Under federal law, a noncitizen is deportable for a single conviction of a crime involving moral turpitude (e.g., theft) committed within five years of admission (or 10 years in the case of a noncitizen provided lawful permanent resident status as a result of giving information to the government), if the offense has a potential sentence of one year or more. (**See** 8 USC § 1227(a)(2)(A).) Because a California misdemeanor conviction now carries a maximum possible sentence of 364 days, it will not cause deportability on this ground.

Under federal law, the Attorney General may cancel removal of, and adjust to the status of a noncitizen (who has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application) who is inadmissible or deportable from the United States under certain conditions. (See 8 USC § 1229b(b)(1).) One of those conditions is that the person had not been convicted of an offense listed in other federal statutes. Some of those other federal statutes, including 8 USC § 1227(a)(2)(A), will not be applicable if the offense carries a maximum possible sentence of less than a year. Because a single California misdemeanor conviction now carries a maximum possible sentence of 364 days, defendants who would previously have been ineligible for cancellation of removal may not be eligible.

Under federal law, a conviction for an "aggravated felony" renders noncitizens eligible for deportation and

has

other immigration consequences. However, certain offenses become aggravated felonies only if a sentence of a year or more is imposed. This includes, among others, a federally defined crime of violence, theft, receipt of stolen property, obstruction of justice, forgery, etc. (**See** 8 USC § 1101(a)(43).) Because a single California misdemeanor conviction now carries a maximum possible sentence of 364 days, California misdemeanors will not have the potential to become aggravated felonies because a sentence of a year cannot be legally imposed.

The new law will likely apply to “wobbler” offenses if the crime is defined as a misdemeanor pursuant to Penal Code section 17(b). (See Pen. Code, § 17(b) [“When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . .”].) For immigration purposes, when a defendant is convicted of a wobbler as a misdemeanor, the conviction is deemed to carry the maximum possible sentence provided for by the misdemeanor, not the felony. (**See Ceron v. Holder** (9th Cir. 2014) 747 F.3d 773, 777.) Thus, it is likely section 18.5 will preclude deportation of some persons convicted of wobblers.

As Santa Clara County DDA Kathy Storton, author of CDAA’s 2015 Legislative Digest, points out: The case of ***In re Estrada*** (1965) 63 Cal.2d 740 supports the position that a change in the law that lightens punishment applies to every case not yet final when the change in the law becomes effective. Therefore, section 18.5 probably applies to all cases pending as of January 1, 2015, and to all cases where convictions are not yet final as of January 1, 2015 (i.e., cases in which defendants were sentenced during the 60-day period preceding January 1, 2015).

2. When is a DUI Offense That Occurs *After* Another DUI Offense an Offense That Can Elevate the Previous DUI Offense? (AB 2690)

Previously, if a defendant committed the crime of driving under the influence, he could be punished as a felon under Vehicle Code section 23550.5 if the crime occurred within ten years of a **prior** violation of (i) section 23152 that was punished as a felony under Section 23550 or 23550.5; (ii) Section 23153 that was punished as a felony; or section 192(c)(1) that was punished as a felony.

Now, it has been made clear the “elevating” offense need not have preceded the new offense. Thus, if a defendant drives under the influence in February of 2015 but is not convicted of the offense until September of 2015 and in the meantime picks up a new felony DUI with injury in July of 2015, the February DUI can still be punished as a felony under Vehicle Code section 23550.5 even though it occurred before the DUI that serves as the elevating conviction.

Specifically, section 23550.5 now reads:

(a) A person is guilty of a public offense, punishable by imprisonment in the state prison or confinement in a county jail for not more than one year and by a fine of not less than three hundred ninety dollars (\$390) nor more than one thousand dollars (\$1,000) if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of any of the following:

(1) A **separate** ~~prior~~ violation of Section 23152 that was punished as a felony under Section 23550 or this section, or both, or under former Section 23175 or former Section 23175.5, or both.

(2) A **separate** ~~prior~~ violation of Section 23153 that was punished as a felony.

(3) A **separate** ~~prior~~ violation of paragraph (1) of subdivision (c) of Section 192 of the Penal Code that was punished as a felony.”

(Emphasis added; the previous language of section 23550.5 has been double struckthrough.)

Editor’s notes:

This change renders section 23550.5(a) consistent with other Vehicle Code sections allowing elevated punishment for driving under the influence based on multiple convictions. (See Veh. Code, §§ 23540 [requiring a defendant convicted of violating § 23152 to serve a minimum of 90 days and up to a year if the violation “occurred within 10 years of a **separate** violation of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions”]; 23546 [requiring a defendant convicted of violating § 23152 to serve a minimum of 120 days and up to a year if the violation “occurred within 10 years of two **separate** violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions”]; 23550 [allowing a defendant convicted of violating § 23152 to be punished as a felon if the violation “occurred within 10 years of three or more **separate** violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions”]; 23560 [requiring defendant convicted of violating § 23153 to be punished for not less than 120 days if the violation “occurred within 10 years of three or more **separate** violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions”]; and 23566 [requiring defendant convicted of violating § 23153 to be punished as a felon and serve up to four years in prison if the violation “occurred within 10 years of two or more **separate** violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions”].) (Emphasis added throughout.)

In all the above circumstances, a defendant who commits a DUI can have his sentence elevated by a *later* occurring DUI if he is convicted of the later occurring DUI before he is convicted of the earlier occurring DUI, i.e., a defendant is subject to enhanced mandatory minimum penalties for multiple offenses within the

designated period “regardless of the order in which the offenses were committed and the convictions obtained.” (See *People v. Snook* (1997) 16 Cal.4th 1210, 1213; *People v. Baez* (2008) 167 Cal.App.4th 197, 204; *People v. Casillas* (2001) 92 Cal.App.4th 171, 176.)

The language used in subdivision (**b**) of Vehicle Code section 23550.5 has not been altered. That section provides that a defendant is subject to felony punishment if the defendant, “having previously **been convicted of** a violation of subdivision (a) of Section 191.5 of the Penal Code, a felony violation of subdivision (b) of Section 191.5, or a violation of subdivision (a) of Section 192.5 of the Penal Code, is subsequently convicted of a violation of Section 23152 or 23153[.]” (Emphasis added.) However, even subdivision (b) has been interpreted to allow enhancement where the defendant is **convicted of** the elevating offense before he is convicted of the elevated offense regardless of whether the elevating offense **occurred** before the elevated offense. (*People v. Baez* (2008) 167 Cal.App.4th 197, 204.)

3. When May a Witness’ Testimony Be Recorded by a Means Other than by Videotape? (AB 1900)

Three Penal Code sections allowed for the testimony of certain victims to be “recorded and preserved on videotape” at the preliminary hearing so that the recording could be used later at trial if the victim is later deemed unavailable at trial. (See e.g., former Pen. Code, §§ 1346 [intellectually-disabled persons and persons under 15 who are victims of various designated sex crimes]; 1346.1 [victims of spousal rape and persons who suffer corporal injury at the hands of designated relatives or co-habitants per PC section 273.5]; 1347.5(c) [disabled victims of various designated sex crimes]. Another Penal Code section allowed minors 13 years or younger of certain designated sex and violent crimes to testify via two-way closed circuit television but also required that a “videotape record the image of the minor and his or her testimony” and that a “separate videotape record the image of the support person.” (Former Pen. Code, § 1347.)

This presented a problem because most video cameras manufactured today record to a hard drive or another type of removable media card rather than to a videotape. To use any other form of video, such as a digital recording, the prosecutor would have to litigate whether these types of recordings could be used or would have to try and obtain a stipulation.

Thanks, in large part, to Vicki Long (the head of the Alameda County District Attorney’s video unit and quite possibly the hardest working and most irreplaceable employee in the entire office) new legislation (AB 1900) was introduced that substituted language allowing for “video-recording” rather than “videotaping” in these statutes (sections 1346, 1346.1, 1347, and 1347.5). This should eliminate the need for the prosecution to obtain any sort of stipulation from the defendant in order to preserve or communicate testimony by a method other than videotape and also renders these statutes

consistent with other statutes already recognizing that videotape is not the only way testimony may be recorded. (See e.g., Evid. Code, § 1294 [allowing for the use of a “video recorded” prior inconsistent statement to be admitted at trial if introduced at a preliminary hearing].)

4. When is the Punishment for Crack Cocaine the Same as for Powder Cocaine? (SB 1010)

Previously, the punishment for possession for sale of cocaine base (crack cocaine) was imprisonment pursuant to Penal Code section 1170(h) for 3, 4, or 5 years. This exceeded the punishment for possession for sale of cocaine hydrochloride (powder cocaine) which was only punishable by imprisonment pursuant to Penal Code section 1170(h) for 2, 3, or 4 years.

Now, the punishment for a violation of Health and Safety Code section 11351.5 (possession for sale of cocaine base as specified in in paragraph (1) of subdivision (f) of Section 11054) is the same as it is for a violation of Health and Safety Code section 11351 (possession for sale of, inter alia, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055): 2, 3, or 4 years.

In addition, changes were made to Health and Safety code section 11470, which allows for forfeiture of vehicles used to facilitate the manufacture of, or possession for sale or sale of, specified amounts of various controlled substances. Previously, the amount of crack cocaine (or substance containing crack cocaine) that had to be manufactured, sold, or possessed for sale only had to be 14.25 grams, while the amount of powder cocaine (or substance containing powder cocaine) that had to be manufactured, sold, or possessed for sale had to be 28.5 grams. Now, for either crack cocaine or powder cocaine, the amount must be 28.5 grams or more.

Changes were also made to Penal Code section 1203.073, which precludes probation being granted under certain circumstances unless doing so would be in the interests of justice.

Specifically, SB 1010 **eliminated** subdivisions (6) and (7) of section 1203.073(b) which, respectively, precluded probation for persons convicted of Health and Safety Code section 11352 based on “transporting for sale, importing for sale, or administering, or by offering to transport for sale, import for sale, or administer, or by attempting to import for sale or transport for sale, [crack cocaine]” and “selling or offering to sell [crack cocaine].”

In addition subdivision (b)(5) of section 1203.073 (which previously precluded probation for any person convicted of, inter alia, violating Section 11351.5 of the Health and Safety Code by possessing for sale a substance containing **14.25** grams or more of crack cocaine or 57 grams or more of a substance containing at least five grams of crack cocaine) was modified to eliminate reference to

section 11351.5. **Now**, the amended subdivision (b)(1) incorporates that preclusion but only applies it when the person is convicted of possessing for sale or selling a substance containing **28.5** grams of crack cocaine or 57 grams or more of a substance containing at least five grams of crack cocaine – which is the same amount as required for ineligibility due to possession for sale or sale of powder cocaine.

Editor’s note: As pointed out by Kathy Storton, pursuant to the case of *In re Estrada* (1965) 63 Cal.2d 740, this reduction in penalty will apply to all pending cases, regardless of when the crime was committed and to all cases where the conviction is not yet final (i.e., cases where a defendant was sentenced within 60 days before January 1, 2015, or cases with an appeal pending.)

5. **When is It Unlawful to Distribute Photos of Intimate Body Parts? (SB 1255)**

Last year the legislature enacted the so-called “revenge porn” law. That law made it a misdemeanor for a person to photograph or record the image of the “intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image” would remain private and then to distribute “the image taken, with the intent to cause serious emotional distress” when the distribution causes the depicted person to suffer serious emotional distress. (Former Pen. Code, § 647(j)(4)(A).)

This year, the revenge porn law was significantly modified by the legislature. These modifications include:

(i) expanding the definition of an intimate body part to include “the anus”;

(ii) expanding the types of images whose distribution is prohibited to include “an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates”;

(iii) eliminating the requirement that the person who distributes the image also be the person who originally photographed or recorded the image;

(iv) expanding the definition of what it means to intentionally distribute the image to include arranging, specifically requesting, or intentionally causing *another person* to distribute that image;

(v) expanding the requirement that the person distributing the image *know* that the distribution of

the image will cause serious emotional distress to include distribution when the person doing the distribution *should know* it will cause emotional distress;

(vi) identifying exceptions to the general prohibition such as when done in the course of reporting an unlawful activity, when done in the court of a lawful public proceeding, or when done in compliance with a subpoena or court order; and

(vii) making it clear that conviction for a violation of section 647(j) shall not preclude punishment under any section of law providing for greater punishment.

Section 647(j) **now** states (with significant changes highlighted) that, “except as provided in subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor . . .

(4)(A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, ***or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates,*** under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows ***or should know*** that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

(B) A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.

(C) As used in this paragraph, “intimate body part” means any portion of the genitals, ***the anus*** and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

(D) It shall not be a violation of this paragraph to distribute an image described in subparagraph (A) if any of the following applies:

(i) The distribution is made in the course of reporting an unlawful activity.

(ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.

(iii) The distribution is made in the course of a lawful public proceeding.

(5) This subdivision shall not preclude punishment under any section of law providing for greater punishment.”

Editor’s note: When initially proposed, SB 1255 included a provision allowing for the issuance of a search warrant “for any item that tends to show that non-consensual distribution of another person’s intimate body part or sexual activity has occurred or is occurring.” This provision was eliminated but, arguably, a warrant for evidence of this crime could be issued pursuant to Penal Code section 1524(3), which authorizes search warrants “[w]hen the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered.”

Editor’s note: Prosecutors should be aware that there is a Civil Code section (1708.85) that becomes operative on July 1, 2015 which creates a private cause of action “against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Section 48a.” (Civ. Code, § 1708.85(a).) There are a host of other requirements and limitations imposed on how and when a civil suit can proceed. Some, but far from all, parallel the requirements needed to conduct a section 647(j)(4) criminal prosecution. However, the definition of intimate body part for purposes of section 1708.85 does not include “the anus.” Prosecutors hesitant to go forward on a criminal prosecution (for whatever reason) can refer victims of “revenge porn” to this section.

6. When Does a Conviction for Violating Health and Safety Code Section 11550 Require a Minimum of 90 Days in Jail? (AB 2492)

Previously, a defendant who was convicted of violating Health and Safety Code section 11550 had to serve a minimum of 90 days in the county jail unless the court found it would be in the interest of justice to permit the person to complete a licensed drug rehabilitation program in lieu of part or all of the imprisonment in a county jail. Specifically, former section 11550(a), in relevant part, provided: “Any person convicted of violating this subdivision is guilty of a misdemeanor and shall be sentenced to serve a *term of not less than 90 days or more than one year in a county jail*. The court may place a person convicted under this subdivision on probation for a period not to exceed five years and, except as provided in subdivision (c), shall in all cases in which probation is granted *require, as a condition thereof, that the person be confined in a county jail for at least 90 days*.”

Other than as provided by subdivision (c), *in no event shall the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in a county jail.*” (Emphasis added.)

AB 2492 eliminated all the language requiring service of 90 days in county jail, either as a complete term or condition of probation. The relevant part of section 11550(a) **now** reads: “A person convicted of violating this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not more than one year in a county jail. The court may also place a person convicted under this subdivision on probation for a period not to exceed five years.”

7. **When Will Provocation Based on a “Panic Defense” be Unavailable as a Matter of Law to Reduce a Murder Charge to Voluntary Manslaughter? (AB 2501)**

AB 2501 amended Penal Code section 192 to eliminate the possibility that a defendant’s “discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation” could be viewed as sufficient provocation to reduce a murder charge to voluntary manslaughter. (New Pen. Code, § 192(f)(1).)

A defendant who commits an unlawful killing is guilty only of voluntary manslaughter, rather than murder, if the defendant killed in the “heat of passion.” This is because “[t]he mens rea element required for murder is a state of mind constituting either express or implied malice” and “[h]eat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter.” (*People v. Beltran* (2014) 56 Cal.4th 935, 942.)

Heat of passion arises when “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” (*People v. Beltran* (2014) 56 Cal.4th 935, 942.)

For heat of passion to arise, the defendant must have a “state of mind caused by **legally sufficient provocation** that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation.” (*People v. Beltran* (2014) 56 Cal.4th 935, 942, emphasis added.) “Provocation is adequate only when it would render an ordinary person of average disposition ‘liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.’” (*People v. Beltran* (2013) 56 Cal.4th 935, 957.)

“The heat of passion requirement for manslaughter has both an objective and a subjective component.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The defendant must actually, subjectively, kill under the heat of passion. (*Ibid.*) “But the circumstances giving rise to the heat of passion are also viewed objectively. (*Ibid.*)

“[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” (*Ibid.*)

AB 2501 amended section 192 to, effectively state that a discrete type of “facts and circumstances,” namely, “discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation” is not sufficient, ***as a matter of law***, to arouse the passions of the ordinarily reasonable man.

The amendment does not preclude the defendant from arguing that he was actually (i.e., subjectively) provoked by the victim’s disclosure of his or her gender, but that argument will not get the defendant off the hook for murder unless there are multiple bases for the provocation.

Specifically, Penal Code section 192, in newly added subdivision (f), now provides:

“(1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.

(2) For purposes of this subdivision, “gender” includes a person’s gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person’s gender as determined at birth.”

Editor’s notes:

Can the legislature actually limit what constitutes provocation? Yes. “[T]he legislature may limit the mental elements included in the statutory definition of a crime.” (*People v. Thomas* (2013) 218 Cal.App.4th 630, 642, citing to *People v. Saille* (1991) 54 Cal.3d 1103, 1116.) That is, if it wanted to, the legislature could eliminate the offense of voluntary manslaughter completely. It follows that it can limit when the crime of voluntary manslaughter is deemed to occur.

Provocation Reducing First Degree Murder to Second Degree Murder: “First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 citing to *People v. Chun* (2009) 45 Cal.4th 1172, 1181.) “Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder.” (*Ibid.*) “To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 citing to *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295–1296.) “If the **provocation** would **not** cause an average person to experience deadly passion but it precludes the defendant from **subjectively** deliberating or premeditating, the crime is second degree murder. (*Ibid.*, emphasis added by P&A.) Thus, Penal Code section 192(f) should not preclude the defendant from introducing evidence that he was reacting to the disclosure of the victim’s actual or perceived gender if offered as the provocation that can reduce a first degree murder (i.e., a premeditated murder) to a second degree murder.

8. When Does the Statute of Limitations Run on Sexual Assaults Committed on Minors? (SB 926)

Previously, Penal Code section 801.1 allowed a prosecution for various sexual acts (e.g., rape, sodomy, lewd or lascivious acts, oral copulation, continuous sexual abuse of a child, and acts of sexual penetration) committed against a victim under 18 to commence at any time before the victim’s 28th birthday.

SB 926 amended Penal Code section 801.1 to authorize the commencement of a prosecution for such acts to any time before the victim’s **40th** birthday so long as the crime was committed on or after January 1, 2015, or the previous statute of limitations had not run as of January 1, 2015.

Specifically, Penal Code section 801.1, in pertinent part, now reads:

“(a)(1) Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in Section 261, 286, 288, 288.5, 288a, or 289, or Section 289.5, as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object, that is alleged to have been committed when the victim was under 18 years of age, **may be commenced any time prior to the victim's 40th birthday.**

(2) Paragraph (1) shall only apply to crimes that were ***committed on or after January 1, 2015, or for which the statute of limitations that was in effect prior to January 1, 2015, has not run as of January 1, 2015.***” (Emphasis added to highlight changes.)

Editor’s notes:

Keep in mind that just because the statute of limitations described in Penal Code section **801.1** may have expired (i.e., because the victim had reached her 28th birthday), this does not mean a ***different*** statute of limitations period that might be applicable has expired. For example, let’s say the defendant sexually assaulted a 16- year old victim in 2001. The victim reports the crime in February of 2015 (when she is 30 years old). The limitations period of section 801.1 would have expired in 2013. However, the limitations period of section **803(f)(1)** may not have expired as of that date since that statute permits a prosecution to commence within one year of the day the victim of a sexual assault committed when the victim was under 18 reports the crime so long as: (i) the limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired; (ii) the crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual; (iii) there is independent admissible evidence that clearly and convincingly corroborates the victim’s allegation. (Pen. Code, § 803(f).)

For a list of other statutes of limitations that may potentially apply to sex crimes committed on minors aside from section 801.1, as well as a cheat sheet on figuring out whether a previous statute of limitations on a sex crime had expired before a new statute of limitations was enacted, **see** the Statute of Limitations Outline.01-23-12 located on the courthouse shared drive in the Points and Authorities directory.

9. When Can a No-Contact Protective Order Issue in a Pending Case to Protect Witnesses of Violent Crime? (AB 1850)

Penal Code section 136.2 allows a court with jurisdiction over a pending criminal matter to issue various protective orders. One of the kinds of orders that a court can issue is an order preventing a defendant from all contact with ***victims*** of the defendant’s violent crime and/or limiting defendant from contact made with the intent to annoy, harass, threaten or commits acts of violence against those ***victims***. (**See** former Pen. Code, § 136.2(a)(7)(A).)

AB 1850 amended section 136.2 to allow the court to issue similar orders when it comes to ***witnesses*** of violent crime. (Pen. Code, § 136.2(a)(1)(G)(i).) Specifically, section 136.2(a)(1)(G)(i), in pertinent part, now provides:

“Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has

occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders, including, but not limited to, the following: . . .

(G)(i) An order protecting a victim ***or witness*** of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant.”

(Emphasis added by P&A to highlight the change.)

Editor’s notes:

The reason for the differing subdivisions between the former version of section 136.2 and the current version is because AB 1850 also re-numbered/re-lettered the subdivisions in section 136.2. Former section 136.2(a)(7)(A) is now 136.2(a)(1)(G)(i).

Penal Code section 136.2 **already** allowed a court to issue most *other kinds* of orders to protect witnesses in a pending case when there was good cause to believe that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur (**See** former Pen. Code, § 136.2 (a)(1) through (4), (6)(A), 7(B).)

10. When Can a Domestic Violence Order Issue in a Pending Case to Protect Children Who Witness Domestic Violence? (AB 1850)

Penal Code section 136.2 allows a court with jurisdiction over a pending criminal matter to issue various protective orders “upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or **witness** has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders[.]” (Pen. Code, § 136.2(a)(1), formerly § 136.2(a).) Several of these orders reference “witnesses.” (**See e.g.**, Pen. Code, § 136.2(a)(1)(D), formerly § 136.2(a)(4) [“An order that a person described in this section shall have no communication whatsoever with a specified *witness* or a victim, except through an attorney under reasonable restrictions that the court may impose.”]; § 136.2(a)(1)(F)(i), formerly § 136.2(a)(6)(A) [“An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a . . . *witness* or for immediate family members of a . . . witness who reside in the same household as the . . . witness or within reasonable proximity of the . . . *witness*’ household, as determined by the court.”]; § 136.2(a)(1)(G)(i) [“An order protecting a . . . *witness* of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant.”].)

AB 1850 amended section 136.2 to add a new paragraph (§ 136.2(a)(2)) that provides the following: “For purposes of this subdivision [section 136.2(a)], a minor who was not a victim of, but who was physically present at the time of, an act of domestic violence, **is a witness** and is deemed to have suffered harm within the meaning of paragraph (1).” (Emphasis added by P&A.)

Editor’s note: According to the author, “AB 1850 makes clear in the law that a child’s presence during an act of domestic violence makes the child a witness to the act who has suffered harm, thereby permitting courts to issue protective orders for such children. This legislation is needed to protect infants and young children who cannot vocalize or otherwise testify about the harm they suffered by being powerless witnesses to acts of

domestic violence. Infants and young children cannot review and sign declarations attesting to the harm they suffered, testify in court, or be interviewed by investigators. Therefore, there is nothing in current law that would enable their protection. AB 1850 would fill that void.”

11. When Can a Domestic Violence Order Issue in a Pending Case to Protect Children of the Defendant or Victim of Domestic Violence, or Other Persons Related by Consanguinity or Affinity within the Second Degree? (SB 910)

Penal Code section 136.2 authorizes a court to issue protective or restraining orders in a pending criminal case where the defendant is charged with various offenses. Some of the provisions of section 136.2 previously applied specifically to cases in which a defendant is charged with a crime involving domestic violence as defined in Penal Code section 13700 (**See e.g.**, former Pen. Code, § 136.2(a)(7)(B)(i); former § 136.2(e)(1)&(2).) Section 136.2 also authorizes a court to issue a post-conviction restraining order for up to ten years in domestic violence cases. Previously, the provision relating to post-convictions restraining orders applied specifically to cases in which a defendant was convicted of a crime of domestic violence as defined in Penal Code section 13700. (Former Pen. Code, § 136.2(i)(1).)

Now, section 136.2 has been amended to define what constitutes “domestic violence” for purposes of section 136.2 by reference not only to Penal Code section 13700 but **also** to Family Code section 6211. (**See** Pen. Code § 136.2(a)(7)(B)(i); § 136.2(e)(1)&(2); and § 136.2(i)(1).)

This expanded the pool of defendants who are subject to section 136.2 protective and restraining orders because section 6211 defines domestic violence to include abuse perpetrated against more categories of individuals than section 13700.

Specifically, Penal Code section 13700(b) provides: “Domestic violence’ means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, “cohabitant” means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.”

Whereas, Family Code section 6211 provides: “‘Domestic violence’ is abuse perpetrated against any of the following persons: (a) A spouse or former spouse. ¶ (b) A cohabitant or former cohabitant, as defined in Section 6209.¶ (c) A person with whom the respondent is having or has had a dating or engagement relationship. ¶ **(d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).** ¶ **(e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.** ¶ **(f) Any other person related by consanguinity or affinity within the second degree.** (Emphasis added to highlight differences between sections 13700 and 6211.)

12. **When Can a Protective Order Issue in a Pending Case to Protect Sexual Assault Victims? (AB 1498)**

The sections of Penal Code section 136.2 applying to the issuance of restraining and protective orders in domestic violence cases has been expanded to apply to cases involving sexual assaults.

As noted above, Penal Code section 136.2 allows a court with jurisdiction over a pending criminal matter to issue various protective orders “upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur[.]” (Pen. Code, § 136.2(a)(1).)

Changes to subdivision (e) of section 136.2

Subdivision (e)(1) of section 136.2 previously provided that the court should consider issuing those orders on its own motion and dispense clearly marked copies of the orders “[i]n all cases in which the defendant is charged with a crime involving **domestic violence**[.]” (Former Pen. Code, § 136.2(e)(1), emphasis added.)

Subdivision (e)(2) of section 136.2 previously provided that, subject to exceptions designated in subdivision (c) of section 136.2, a restraining order or protective order against the defendant issued by the criminal court pursuant to section 136.2 has precedence in enforcement over a civil court order against the defendant” in cases in which a complaint, information, or indictment has been filed charging the defendant with a crime of **domestic violence**. (Former Pen. Code, § 136.2(e)(2), emphasis added)

Now, the language of subdivisions (e)(1) and (e)(2) has been changed so that their directives apply equally when the defendant is charged with “a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290[.]” (Pen. Code, § 136.2(e)(1)&(2).)

Changes to subdivision (h) of section 136.2

Previously, subdivision (h) laid out what courts “may consider, in determining whether good cause exists to issue an order under paragraph (1) of subdivision (a)” in “any case in which a complaint, information, or indictment charging a ***crime of domestic violence*** . . . has been filed[.]” (Former Pen. Code, § 136.2(h), now § 136.2(h)(1),

Now, former subdivision (h) has been divided into two paragraphs. The first paragraph retains the language of the original subdivision (h). The second paragraph is new, applies to sex crimes, and specifically provides the following:

“(2) In any case in which a complaint, information, or indictment charging a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, has been filed, the court may consider, in determining whether good cause exists to issue an order under paragraph (1) of subdivision (a), the underlying nature of the offense charged, the defendant's relationship to the victim, the likelihood of continuing harm to the victim, any current restraining order or protective order issued by any civil or criminal court involving the defendant, and the defendant's criminal history, including, but not limited to, prior convictions for a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, or any other forms of violence, or any weapons offenses.”

Editor's note: The provisions of section 136.2 relating to post-conviction orders already applied equally to cases involving domestic violence and various sexual assaults. (**See** Pen. Code, § 136.2(i).)

NEXT WEEK: MARY PAT DOOLEY COVERS NEW LAWS ON COMPETENCY GOING INTO EFFECT IN 2015.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks. Note: Provider status has now been formally renewed.