POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider, #172.

Week Of	Topic	Guests	General
Jan. 16 2018	**Selected 2018 New Laws (Part I)**	DA Nancy O'Malley Katy Kobal	30 min

This P&A describes a selected number of new laws and amendments.[1]

Youth Offender Parole

● **Pen. Code 3051 (amended):** Previously youth offender parole applied to offenders who were under the age of 23 when they committed their crimes. Now the statute has been amended so that youth offender parole applies to offenders who were 25 or younger at the time their crimes were committed.

The eligibility time frames remain the same. If the offender is serving a determinate sentence, he is eligible for a parole hearing after 15 years. If he's serving a sentence with the controlling offense being a life term of fewer than 25 years to life, he is eligible for a parole hearing after 20 years. If the offender is serving a sentence with the controlling offense of 25 years to life, he is eligible for a hearing after 25 years.

There are exceptions to the youth parole process: § 3051(h)

1) Adult individuals sentenced to life without the possibility of parole ("LWOP") do not qualify. Note that this exception has recently been modified so that it only applies to people over 18 years of age. True juveniles (under 18), sentenced to LWOP, are still eligible for a parole hearing after 25 years of incarceration.

2) Individuals sentenced under the "Three Strikes" statutes, (therefore having one or more strike priors), under Penal Code section 1170.12, or 667 subdivisions (b) - (i), inclusive, do not qualify for an early parole hearing.

3) Individuals sentenced under the One Strike Sex Sentencing provisions, Penal Code section 667.61, do not qualify for an early parole hearing under this section.

[1] For a more extensive review of new laws and amendments, see the CDAA Legislative Digest, 2017 Edition, prepared by Kathy Storton.

4) Individuals who, after reaching 26 years of age either a) commit an additional crime for which malice aforethought is a necessary element of the crime (murder) or b) for which the individual is sentenced to life in prison.

Note: The above provision differentiates between an individual who commits a crime for which malice aforethought is a necessary element (murder) and one for which the individual is sentenced to life in prison. For example, a defendant who murdered someone at the age of 22 and went to prison, then killed his cellmate at the age of 28, but was not convicted of the murder, may not be eligible for early parole for his first crime.

Some observations from DDA Katy Kobal: If you have a serious case, always check the age of your defendant at the time of the crime. Since the age is now under 26, youth parole will encompass a large number of defendants in our most serious cases. Prosecutors need to be aware when a defendant will be eligible for parole in order to accurately make offers and explain the ramifications of any crime to victims. Also, a defendant under the age of 26, who qualifies for an early parole hearing under this statute, will be eligible for a *Franklin* hearing at sentencing. The defendant will be eligible to put on the record at the time of sentencing various factors relating to his youth, even if the sentence is fixed. This record then carries forward with him to his first youth parole hearing.

Expansion of Sex Crimes Requiring Registration

● **Pen. Code 290 (amended):** Penal Code section 290 has been amended to add rape by fraud (Pen. Code section 261(a)(5)) and rape by threatening to use the authority of a public official (Pen. Code section 261(a)(7) to the list of crimes that require registration as a sex offender. Now all seven crimes under Penal Code section 261 require registration as a sex offender.

Reform of Sex Offender Registry (Guest Presenter Alameda County DA Nancy O'Malley)

● **Pen. Code 290 (amended):** This amendment to Penal Code section 290 replaces the current law requiring all sex offenders to register for life with a new tiered system of registry.

This new tiered system will go into effect on January 1, 2021

Tier One registration is for a minimum of 10 years. Applicable offenses are misdemeanors and any felony that is not serious (Pen. Code § 1192.7(c) or violent (Pen. Code § 667.5(c)).

Tier Two registration is for a minimum of 20 years, unless the person is subject to a lifetime registration. Applicable offenses under Tier Two are the serious felonies and violent felonies, and the following crimes: Pen. Code §§ 285 (incest); 286 (g) sodomy where victim not capable of giving legal consent; 288a (g) and (h) oral copulation where victim is not capable of giving consent and a second or subsequent conviction of Penal Code section 647 (annoying or molesting a child.)

Tier Three registration is lifetime registration. Applicable offenses include:

a. An offender committed to a state hospital as a sexually violent predator

b. An offender whose risk level on the static risk assessment instrument for sex offenders is well above average at the time of release.

c. An offender who is a habitual sex offender under Penal Code section 667.71

d. An offender convicted of Penal Code section 288(a) in two proceedings brought and tried separately

e. An offender sentenced under the one-strike sex offender law.

f. An offender convicted of any of the crimes listed for Tier Three, including murder while attempting to commit or committing a sex act and numerous others listed in the statute.

Penal Code section 290.5 provides procedures for termination hearings for Tier One and Tier Two adult offenders. An offender is eligible for registration termination if he has registered for the minimum period, the period was not tolled or extended because of incarceration or a failure to register. If the prosecution opposes termination, it must request a court hearing and meet other requirements.

Juvenile sex registration is still governed by Penal Code section 290.008. Beginning in January 2008, the statute will provide for a Tier One, for which offenders must register for a minimum of five years and Tier Two, for which offenders must register for a minimum of 10 years.

● Some wise advice noted by CDAA in its Legislative Digest: Since these changes creating the three-tier registry will not be implemented until January 1, 2021, it's possible that additional changes could be added. Presently, however, registration remains a lifetime obligation. To guard against wrong advice by a defense attorney which might be used years later to attack a conviction, a sex offender pleading guilty or no contest should be advised to assume that he or she will have to register as a sex offender for the rest of his or her life.

Collection and Testing of Sexual Assault Evidence Kits (Guest Presenter DA Nancy O'Malley)

● **Penal Code section 680.3:** As Nancy explains, the impetus of this legislation was the backlog created by sexual assault evidence kits placed in evidence at police departments, but never submitted to the crime labs.

This new law applies to sexual assault evidence kits collected on or after January 1, 2018.

Law enforcement agencies must now participate in the Department of Justice's Sexual Assault Forensic Evidence Tracking database (SAFE-T) which tracks the status of sexual assault evidence kits collected by law enforcement agencies.

Within 120 days of collecting sexual assault kit evidence, the law enforcement agencies must create an information profile on SAFE-T for the kit and report the following information: if biological evidence samples from the kit were submitted for analysis to a DNA laboratory; if the kit generated a probative DNA profile; if evidence was not submitted to the DNA laboratory for processing, then an explanation for not submitting it. This new law requires that when a public DNA laboratory or a law enforcement agency contracting with a private laboratory has not conducted testing within 120 days after the rape kit evidence was provided, the reason for failing to do so must be provided on SAFE-T.

Except for DOJ's annual report, the SAFE-T database is confidential so law enforcement agencies or laboratories cannot be compelled to provide any contents of the database in a civil or criminal case, except as required by *Brady* to a defendant in a criminal case.

Penal Code section 680: Requires a law enforcement agency, upon the request of a sexual assault victim, to inform the victim about the status of the testing of rape kit evidence or other crime scene evidence.

Rights of Sexual Assault Victims

Penal Code section 680.2: This new law requires law enforcement agencies, in consultation with sexual assault experts, to develop a card explaining the rights of sexual assault victims. In a provision that applies to *prosecutors*, the statute provides that prosecutors shall, upon written request by a sexual assault victim, provide the convicted defendant's information on a sex offender registry to the victim, if the defendant is required to register as a sex offender.

Propensity Evidence (Sex Crimes)

Evidence Code section 1108 (amended): Evidence Code 1108 provides that evidence of another sexual offense is not inadmissible to prove conduct in a current sexual offense action. This amendment adds Penal Code sections 236.1 (b) and (c), which pertain to human sex trafficking, to the list of sex crimes for which propensity/character evidence is admissible.

Jury Selection (Important Changes)

Code of Civil Procedure section 223: The Legislature repealed the existing Code of Civil Procedure section 223 that governed criminal jury voir dire and replaced it with a new version. The new version is similar to voir dire in civil cases, meaning that it's more generous for attorneys.

The new version continues to state, as did the repealed version, that the purpose of voir dire is in the aid of challenges for cause, not peremptory challenges. The new version defines an "improper question" for purpose of voir dire as one that "has as its dominant purpose, the attempt to precondition the prospective jurors to a particular result or indoctrinate the jury."

The new version of CCP section 223 states that upon completion of the trial judge's initial examination, counsel for each party shall have the right to examine the prospective jurors, and that the scope of this examination shall be within reasonable limits prescribed by the trial judge within the judge's discretion. But the new version also states that the trial judge shall not impose specific, unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire. The new version also allows for supplemental time where the responses of the prospective juror reveal that this juror may be unsuitable to serve.

The new version of CCP section 223 also expressly states that the trial judge shall permit "liberal and probing examination" calculated to discover bias or prejudice. It says the fact that a topic was already covered in the trial judge's voir dire does not preclude appropriate follow-up questioning by counsel.

The new version states: "In exercising the judge's sound discretion, the trial judge shall consider all of the following: (1) The amount of time requested by trial counsel; (2) Any unique or complex legal or factual elements in the case; (3) The length of the trial; (4) The number of parties; (5) The number of witnesses."

The new version requires the court "shall, in his or her sound discretion," consider reasonable written questionnaires when requested by counsel. If a questionnaire is used, the parties shall be given reasonable time to evaluate the responses on the questionnaire before oral questioning starts.

The new version of CCP section 223 also says that to help facilitate the jury selection process, the trial judge, at the earliest practical time, "*shall* provide the parties with the list of prospective jurors in the order in which they will be called."

Extortion: The Definition is Expanded

Penal Code section 518 (amended): The purpose of this bill is to criminalize sexual extortion. The author of the bill pointed out that California has a revenge porn law which criminalizes the distribution of sexually explicit images without consent. But with sexual extortion cases, there is no actual

distribution, just the threat of distribution. As described by the bill's author, "Faced with the fear of having their private images shared on the Internet or sent to family or friends, victims are forced to comply with the perpetrator's demands."

As a result of the amendment, extortion is now defined as "the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." In turn, "consideration" means anything of value, including sexual conduct as defined in Section 311.3 (b) or an image of an intimate body part as defined in Section 647(j)(4)(C).

However, the statute expressly states that it does not apply to a person under 18 years of age who has obtained consideration consisting of sexual conduct or an image of an intimate body part. So a minor age 17 or younger who sexually extorts an adult or other minor cannot be prosecuted for sexual extortion.

New Aggravating Factor for Violent Felony

Penal Code section 667.95: This new statute provides that in sentencing a person convicted of a violent felony listed in Section 667.5, subdivision (c), the court may consider as a factor in aggravation that the defendant willfully recorded a video of the commission of the violent felony with the intent to encourage or facilitate the offense. The author of the bill said its impetus arises from the emerging trend of recording the commission of a violent crime in order to post it on social media.

DUI's

Vehicle Code sections 23152 and 23153 (amended): These statutes are amended by the addition of a subdivision (e), going into effect on July 1, 2018, which imposes a .04 blood alcohol level on passenger- for- hire drivers who have a paying passenger in the vehicle. So, for example, this new DUI offense will apply to taxi drivers, Uber and Lyft drivers.

Penal Code Section 1001.80 (amended): This legislation applies to a pretrial diversion program for active duty military and veterans who suffer from military-related traumatic mental health conditions. The diversion program applies to "misdemeanors" and the question dividing the lower courts was whether misdemeanor DUI's or DUI's with injury fall within this diversion program. The issue had made its way to the California Supreme Court before it was resolved by the Legislature. As a result of this amendment, military diversion is available for DUI offenses. However, participation in the military diversion program does not limit the Department of Motor Vehicles' ability to take administrative sanctions against the person's driver's license.

This new law was discussed solo in last week's P&A. It's included here just to keep together the 2018 new laws discussion

Interrogating Minors

Welfare & Institutions Code section 625.6

This statute went into effect on January 1, 2018. Essentially, the law requires that a juvenile be allowed to consult with counsel before police obtain a *Miranda* waiver and conduct an interrogation. The consultation is mandatory and cannot be waived.

I. The Specific Provisions of W&I section 625.6

A. Subdivision (a): "Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived."

1. The statutory language is clear that its terms are mandatory. How is the consultation to be facilitated? The statute does not provide for any mechanism, but it appears the obligation is on law enforcement to locate and ensure that an attorney is available to the minor. In Alameda County, the Public Defender has created an "on-call" line for law enforcement contact in the event the police want to conduct a custodial interview of a minor who falls within the statute.

2. The provisions of the statute apply only to custodial interrogation, so a non-custodial interview of a minor 15 years of age or younger will not fall within its scope. The statute does not define "custodial." However, it would appear that courts will apply the standard definition of custody as defined by the Supreme Court and interpreted by the lower courts.

B. Subdivision (b): "The court shall, in adjudicating the admissibility of a youth 15 years of age or younger made during a custodial or after a custodial interrogation, consider the effect of failure to comply with subdivision (a)."

1. Kathy Storton points out in the CDAA Legislative Digest that section 625.6 does not contain the words "suppress" or "suppression" and does not provide that a violation of this statute may result in suppression. Even if the statute did so, the California Constitution would not permit suppression. As she points out, "California Constitution Article I, Section 28(f)(2) ('Right to 'Truth-in-Evidence,' a part of 1982's Proposition 8) provides that relevant evidence shall not be excluded in any criminal proceeding or hearing of a juvenile or criminal offense, except where 2/3 of the members of both houses of the Legislature enact a statute to provide for exclusion." Here, that did not happen. While the two-thirds threshold was met in the Senate, the Assembly passed the measure with less than a two-thirds vote.

Kathy states in the Legislative Digest that "a court could use a violation of the consultation requirement as a factor in deciding whether a minor's statements are voluntary or involuntary."

2. The Los Angeles District Attorney's Office maintains that state deviation from the *Miranda* rules violates the Supremacy Clause because section 625.6 imposes greater restrictions on the capacity of minors under 16 to give valid waivers of Miranda rights than the U.S. Supreme Court rulings have imposed. Because Miranda is a decision of the United States Supreme Court arising under the Fifth Amendment, only the United States Supreme Court can alter Miranda rules.

The Los Angeles County District Attorney's Office also relies on the Truth in Evidence provision of the California Constitution, emphasizing that it is a prohibitory provision that forbids courts from excluding relevant evidence unless a ruling by the United States Supreme Court compels exclusion. No United States Supreme Court decision has ever held that court must exclude statements from minors 15 or younger on the ground that they did not consult with counsel before waiving their Miranda rights. The Los Angeles County DA's Office also notes the failure of the Assembly to pass the Senate bill resulting in section 625.6 by a 2/3 vote, as required in order to override the California Constitution.

The Los Angeles County District Attorney's Office interpreting the language of section 625.6 that "the court . . . shall consider the effect of failure to comply with subdivision (a)," to mean that a court must consider this circumstance in the totality of the circumstances to determine whether a *Miranda* waiver was knowing, voluntary and intelligent. It cites this language from Fare v. Michael C. (1979) 442 U.S. 707, 725: "The totality-of-the-circumstances approach is adequate to determine whether there has been a valid waiver, even where interrogation of juveniles is involved. We discern no persuasive reason why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so."

[P&A comment: The uncertainty of how lower courts will apply subdivision (b) of section 625.6 and whether/when the California Supreme Court will be called upon to resolve the issue makes it imperative that law enforcement officers are aware of this new law and that officers ensure that minors 15 years of age or younger are given the opportunity to consult with legal counsel, absent exigent circumstances (see below).]

C. Subdivision (c): "This section does not apply to the admissibility of statements of a youth 15 years of age or younger if both the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

In other words, the statute provides for an exception. It does not apply in exigent circumstances.

D. Subdivision (d): "This section does not require a probation office to comply with subdivision (a) in the normal performance of his or her duties under Section 625, 627.5, or 628."

This is another exception, applicable to probation officers.

Finally, section 625.6 contains a sunset date of January 1, 2025, and also establishes a panel of seven members (including a representative from CDAA) to review the implementation of the law "and examine the effects and outcomes related to the implementation of this section, including, but not limited to, the appropriate age of youth to whom this section shall apply."

NEXT WEEK: More new laws will be discussed.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author deputy district attorney Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (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.