

Charging & Sentencing in Adult Sexual Assault Cases

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DEPUTY DISTRICT ATTORNEY
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Charging Decision: Overview

- ▶ Investigation
 - ▶ Pre-text phone calls
 - ▶ 911 call
 - ▶ SART and DNA

- ▶ Overall goals
 - ▶ Strike vs. non-strike
 - ▶ LIFE crime
 - ▶ Probation eligibility

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Charging Decision: Jurisdiction: PC 784.7

- ▶ Different victims okay
- ▶ Letter from other county
- ▶ Allege on the complaint
- ▶ Submit letter into the record at preliminary hearing
- ▶ Defense can contest at a PC 954 hearing, but court not jury (*P v. Posey* (2004) 32 Cal 4th 193)



OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SONOMA
1001 CALIFORNIA STREET
SONOMA, CALIFORNIA 94960

November 28, 2018

The Honorable Anne Marie Schubert
District Attorney
Sonoma County District Attorney's Office
980 G Street
Sonoma, CA 94964

RE: *People v. Joe Thomas* (SB 1128) (18)
Request to Assess Jurisdiction pursuant to Penal Code section 784.7

Dear Ms. Schubert:

This office is in reply of your request for an updated written agreement pursuant to Penal Code section 784.7 to remove jurisdiction by the Sonoma County District Attorney's Office with regard to violations of Penal Code section 261(a) committed by the above-named defendant in Riverside County. Evidence of the offense occurring in Riverside County was discovered in the course of the investigation conducted by the Sonoma County Sheriff's Department, and documented in report number 18-13094.

As requested, we have updated our response to include the following changes:

1. Corrected spelling of defendant's name from John Thomas to Joe Thomas
2. Corrected defendant's date of birth from 02/07/2002 to 12/26/1948
3. Grant permission to assess charge violations in said Penal Code sections 261 (a)(1) and Penal Code section 261 (a)(2) in addition to the original permission granted for Penal Code section 261(a)

Based on the facts that the entirety of the investigation was conducted by the Sonoma County Sheriff's Department and the fact that the defendant is currently in custody in your county, it does appear that the interests of justice would best be served by the action matter being prosecuted in Sonoma County. On behalf of District Attorney Michael Hester, we agree and assent to your exercise of jurisdiction over the violation detailed above, if we may be of further assistance in this matter, please do not hesitate to call.

Very truly yours,

MICHAEL A. HESTER
District Attorney

MICHAEL A.
Chief Assistant District Attorney

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Charging Decision: Check the Law

- ▶ Changes in the Law
 - ▶ 11/30/94: One Strike Law
 - ▶ 9/20/06: Jessica's Law (SB 1128)
 - ▶ 9/9/10: Chelsea's Law (AB 1844)
- ▶ Age of the victim (Especially 14 and 15 year olds)
- ▶ Statute of Limitations (this is a whole class)
 - ▶ Forcible
 - ▶ Substantial Sexual Conduct

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Charge Every type of Conduct

- ▶ Each individual act, can be a NEW charge
 - ▶ *People v. Scott* (1994) 9 Cal. 4th 331; *People v. Jimenez* (2002) 99 Cal. App. 4th 450
- ▶ PC 654 does NOT bar multiple punishment
 - ▶ *People v. Alvarez* (2009) 178 CA 4th 999; *People v. Scott* (1994) 9 Cal. 4th 331, fn. 6
- ▶ Devil is in the Details
 - ▶ First, second, third time vs. First time and last time
 - ▶ Happened every week
 - ▶ Important events

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Determinate Offenses

- | | |
|---|--|
| <ul style="list-style-type: none"> ▶ Rape – PC 261 ▶ Sodomy – PC 286 ▶ Sexual Penetration - PC 289 ▶ Oral Copulation - PC 287 ▶ Assault with Intent– PC 220 ▶ Sexual Battery – PC 243.4 <ul style="list-style-type: none"> ▶ Restraint + "intimate part" of victim's bare skin = Felony | <ul style="list-style-type: none"> ▶ Categories <ul style="list-style-type: none"> ▶ Force ▶ Intoxication ▶ Unconscious ▶ Incapable of giving consent ▶ Incapable of giving consent and in the hospital ▶ Impersonation ▶ Threat to retaliate ▶ By Public official |
|---|--|

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Legal Definitions and Case Law

- ▶ Penetration however slight
 - ▶ *People vs. Quintana* (2001) 89 Cal App 1362
 - ▶ *People v. Dunn* (2012) 205 Cal. App. 4th 1086
 - ▶ *People v. Rodriguez Paz* (2017) 10 Cal. App. 5th 1023 (sodomy)
- ▶ Penetration through clothing
 - ▶ *People v. Ribera* (2005) 113 Cal. App. 81
- ▶ Oral cop over clothes
 - ▶ *People v. Zepeda* (2018) 26 Cal. App. 5 211

PEOPLE'S PINPOINT REGARDING PENETRATION

Sexual intercourse means any penetration, no matter how slight, of the vagina or female genitalia by the penis. Female genitalia includes the labia majora, labia minora, clitoris or vestibule of the vagina. Ejaculation is not required.

Authority:

People v. Quintana (2001) 89 Cal. App. 4th 1362
People v. Kozart (1982) 131 Cal. App. 3d 224
People v. Dunn (2012) 205 Cal. App. 4th 1086

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Determinate Offenses: Probation Eligibility PC 1203.065(a) and 1203(e)(5)

- | | |
|---|--|
| <ul style="list-style-type: none"> ▶ Probation Ineligible <ul style="list-style-type: none"> ▶ Force ▶ Intoxication ▶ Unconscious ▶ Threat to retaliate | <ul style="list-style-type: none"> ▶ Presumptive Prison <ul style="list-style-type: none"> ▶ PC 220 ▶ By public official ▶ Most sex offenses + any other felony |
|---|--|

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Determinate Offenses: Probation

- ▶ Max 5 years
- ▶ PC 1203.067(b)
 - ▶ Sex offender management program
 - ▶ Polygraph exams
 - ▶ Waiver of psychotherapist confidentiality

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Determinate Offenses: Parole

- ▶ Parole terms: PC 3000 and 3000.1
- ▶ Most adult forcible sex crimes are 10 years
- ▶ Most Indeterminate sex offenses are lifetime parole, if released

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Determinate Offenses: Strikes and Non-Strikes

- ▶ Strikes
 - ▶ Force
 - ▶ Threat to retaliate
 - ▶ PC 220
- ▶ Non-strikes
 - ▶ Intoxication
 - ▶ Unconscious
 - ▶ Incapable of giving consent
 - ▶ Incapable of giving consent and in the hospital
 - ▶ Impersonation
 - ▶ By Public official

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Force vs. non Force

- ▶ Advantages
 - ▶ Force = Strike (credits change)
 - ▶ Full term consecutive sentencing under PC 667.6(d)
 - ▶ Probation ineligible (PC 1203.065(a))
- ▶ What is Force?
 - ▶ Fore, violence, duress, menace or fear
 - ▶ Child vs. adult

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Enough Force

- ▶ Victim reasonably "froze in fear" during rape
 - ▶ *People v. Iniguez* (1994) 7 Cal 4th 847
- ▶ Duress by difference of size and age and relationship
 - ▶ *People v. Garcia* (2016) 247 Cal. App. 4th 1013
- ▶ Holding knife to throat voided prior consent (prostitute)
 - ▶ *People v. Ireland* (2010) 188 Cal App 4th 328
- ▶ Pulling down pants, rolling over, slight penetration
 - ▶ *In re Asencio* (2008) 166 Cal App 1195
- ▶ During consensual sex, victim objected and tried to stop
 - ▶ *In re John Z.* (2002) 29 Cal 4th 756

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Enhancements

- ▶ Regular Enhancements
 - ▶ PC 12022.5(a)- Personal Use of firearm (3-4-10)
 - ▶ PC 12022.53 – Personal use (b), intentional discharge (c), causing GBI/death (d) (10-20-LIFE)
 - ▶ *** To avoid court's discretion to dismiss per 1385, charge the 667.61 (One Strike language ****)
- ▶ Dangerous Weapon: PC 12022.3
 - ▶ (a) Use of firearm or *deadly* weapon (3-4-10)
 - ▶ (b) armed w/ firearm are deadly weapon (1-2-5)
 - ▶ Applies to most sex crimes, including forcible
- ▶ GBI : PC 12022.8
 - ▶ 5 years
 - ▶ Applies to all forcible sex crimes
 - ▶ Rape of an intoxicated
 - ▶ Pregnancy = GBI (but not abortion): *People v. Woods* (2015) 241 Cal App 461

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Enhancements

- ▶ Kidnapping (PC 667.8)
 - ▶ Sex offense +9 years
 - ▶ Child under 14 + sex = +15
- ▶ Elderly or Disabled (forcible) (PC 667.9)
 - ▶ + 1 or 2
- ▶ Administers a Controlled Substance(PC 12022.75)
 - ▶ With force + 3 years
 - ▶ Intoxicated or Unconscious + 5 years
- ▶ Defendant has AIDS, or HIV positive (PC 12022.85)
 - ▶ + 3 years
- ▶ Results in the termination of pregnancy (any felony) (PC 12022.9)
 - ▶ + 5 years

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Indeterminate Crimes

- ▶ PC 220 (b)
 - ▶ Burglary + Assault with Intent = 7-LIFE
 - ▶ No completed sex act
 - ▶ May for intent *after* entry
- ▶ PC 209(b)
 - ▶ Intent to commit sex act (including non-forcible) = 7-LIFE
 - ▶ No completed sex act (if completed charge via One Strike)
 - ▶ Movement beyond incidental to sex act/ Increase of harm
 - ▶ Ride Share rapes on the rise
 - ▶ *People v. Daniels* (2009) 176 Cal.App.4th 304, 324-325, and CALCRIM 1201
 - ▶ Intoxicated = unresisting person with a mental impairment

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One Strike: PC 667.61

- ▶ No prior conviction required (One Strike and you're out)'
- ▶ Converts the underlying offense to an indeterminate
 - ▶ Not an enhancement but an alternative sentencing scheme
 - ▶ Don't get to "add" it to the offense
 - ▶ Options: 15-Life; 25-Life; LWOP
 - ▶ Effective 11/30/94

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One Strike: PC 667.61

- ▶ Applicable crimes
 - ▶ Forcible and Spousal Rape
 - ▶ Rape in Concert
 - ▶ Lewd Act on a child under 14
 - ▶ Forcible Sexual Penetration
 - ▶ Forcible Sodomy
 - ▶ Forcible Oral Copulation
- ▶ DIFFERENT from PC 667.6(e)
 - ▶ Does NOT include PC 220

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One Strike: PC 667.61

▶ MAJOR FACTORS

- ▶ Prior Qualifying Conviction
- ▶ Aggravated Kidnap
- ▶ Aggravated mayhem or torture
- ▶ Residential burglary with sex intent upon entry
- ▶ In concert and any person did kidnap, mayhem, torture, or burglary
- ▶ GBI
- ▶ Bodily harm on child under 14

▶ MINOR FACTORS

- ▶ Kidnap
- ▶ Burglary (residential or commercial or intent after entry)
- ▶ Use of Firearm or Deadly weapon
- ▶ Multiple victims
- ▶ Tying or binding
- ▶ Administer a control substance
- ▶ In concert

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One Strike: PC 667.61

▶ 1 MAJOR FACTORS OR 2 Minor Factors

- ▶ 25-Life
- ▶ If victim under 14, than LWOP
 - ▶ Excluding PC 288(a)
 - ▶ If Defendant a minor, than 25-LIFE

▶ 1 MINOR Factor

- ▶ 15- Life
- ▶ If victim under 14: 25-Life
 - ▶ Does not exclude 288(a)

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One Strike: PC 667.61

- ▶ Must be pled and proven
 - ▶ *People v. Mancebo* (2002) 27 Cal. 4th 735
 - ▶ Jury determination with instructions and verdict forms
- ▶ Allege per count, indeterminate per count
 - ▶ *People v Perez* (2015) 240 Cal. App. 1218
 - ▶ *People v. Andrade* (2015) 238 Cal. App. 4th 1274
- ▶ Court cannot strike allegation
 - ▶ *People v. Hammer* (2003) 30 Cal. 4th 756
- ▶ Can be doubled or tripled with strike priors
 - ▶ TURE EVE IF SAME PRIOR: *People v. Acosta* (2002) 29 Cal. 4th 105

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One Strike: PC 667.61 IN ACTION

1. Defendant has a prior conviction for PC 288(a)
2. Defendant is charged in your case with Ct. 1: PC 261(a)(2) on an adult victim and Ct. 2: a PC 288(a) on a child under 14 (different victims)

Count 1: PC 261(a)(2)

- + PC 667.61(e)(4): MINOR FACTOR: Multiple victims in one complaint: 15-LIFE
- + PC 667.61(d)(1): MAJOR FACTOR: Prior Qualifying Conviction = 25-LIFE

Count 2: PC 288(a)

- + PC 667.61(e)(4): MINOR FACTOR: Multiple victims in one complaint: 25-LIFE
- + PC 667.61(d)(1): MAJOR FACTOR: Prior Qualifying Conviction = 25-LIFE

PC 667(e)(2) (Three Strikes) and PC 667(a) (5 year prior)

Strike Prior: Doubled the term otherwise provided (ie for Ct. 1: 25 – life x 2= 50 to life, each count) (If 2 prior strikes, than Tripled)

5 year prior: Applies to each count

TOTAL: 55 –LIFE (each count) for total exposure of 110 –LIFE

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Consecutive Sentencing

- ▶ Full Term Consecutive Sentencing
 - ▶ PC 667.6(e): List of crimes that qualify (Forcible)
 - ▶ 1/3 Mid Term does not apply
 - ▶ May sentence to full lower, middle or upper term
 - ▶ May be mandatory or discretionary
 - ▶ If have a crime that is not a full term consecutive, choose that as the principal
 - ▶ *People v. Pelayo* (1999) 69 Cal. App. 4th 115

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Consecutive Sentencing

- ▶ List of Crimes that apply are under PC 667.6 (forcible)
- ▶ Mandatory Full Term Consecutive Sentencing: PC 667.6(d)
 - ▶ Multiple victims
 - ▶ Single victim on "separate occasion"
 - ▶ Reasonable opportunity to reflect upon his actions and nevertheless resumed sexual assaultive behavior
- ▶ Discretionary Full Term Consecutive Sentencing: PC 667.6(c)
 - ▶ Same victim, same occasion
 - ▶ Full term consecutive per 667.6(c)
 - ▶ 1/3 MT consecutive per 1170.1
 - ▶ Concurrent per 1170.1

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Sentencing Examples

- ▶ 2 counts of rape by intoxication (3-6-8)
 - ▶ Max is 10 Years (UT 8 + 1/3 MT for 2)
 - ▶ Minimum is LT of 3 years with concurrent time
 - ▶ Probation ineligible, but non-strike so done at 50%
- ▶ 2 counts of rape by force (3-6-8) (different occasions)
 - ▶ Max is 16 Years (UT 8 + UT 8 years) (FTC)
 - ▶ Min. is 6 years (LT 3 + LT 3) (MANDATORY FTC)
 - ▶ Strike so 20% credits
- ▶ 1 count of penetration by force + 1 count of oral cop by force (3-6-8) (SAME occasion)
 - ▶ Max is 16 Years (UT 8 + UT 8 years) (FTC) (DISCRETIONARY)
 - ▶ Min. is LT 3 years with concurrent time

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Sentencing Examples

- ▶ 1 count of Robbery + 2 counts of Rape (different occasions)
 - ▶ Principal term the robbery UT of 5 years
 - ▶ UT 8 years on Rape 1 + UT 8 years on Rape 2 (Mandatory)
 - ▶ Total Exposure 21 years

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Registration under PC 290

- ▶ Mandatory for all offences listed in PC 290(c)
- ▶ Discretionary for offenses listed in PC 290.006
- ▶ Cannot impose registration only as condition of probation
 - ▶ *People v. Eastman* (2018) 26 Cal. App. 5th 638
- ▶ Discretionary if offense committed for sexual compulsion or gratification
 - ▶ Must consider likeliness to reoffend
 - ▶ *People v. Garcia* (2008) 161 Cal. App. 4th 475
 - ▶ Allege it on the complaint
 - ▶ Court decides by a preponderance standard
 - ▶ *People v. Mosely* (2015) 60 Cal. 4th 1044

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Registration under PC 290

Three-Tiered Registration

| Tier One: 10 Years | Tier Two: 20 Years | Tier Three: Lifetime |
|--|--|---|
| Misdemeanors and Non-Serious/Non-Violent Felonies | Felony Offenses listed in PC 667.5 and 1192.7 and as specified. | Listed Offenses, SVP, MDO, NGI and Well Above Average Risk Offenders (per SARATSO) |
| PC 243.4 Sexual Battery | PC 285(f)-(i) Incest | PC 261(a)(2) Forcible Rape |
| PC 314 (1) Indecent Exp. 1 st Conviction | PC 288(a) Lewd Lascivious Acts with Minor (Two separate convictions is lifetime) | PC 288(b)-(c) Lewd Act on Child or Dependent Adult, PC 288.7 (sex crime on child 10 or younger) |
| PC 647.6 Annoy or Molest Child Under 18 1 st Conviction | PC 647.6 Second Offense PC 314 Second Offense | PC 311.1(a) Felony Possession of Child Pornography |

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Registration under PC 290: Be Creative

- ▶ PC 288 (a) is 20 years but PC 288(c) is lifetime
- ▶ PC 288.2 is lifetime
- ▶ PC 220 is lifetime
- ▶ PC 311.1
- ▶ Above average risk on risk assessment

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Contact Information

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