

CHARGING & SENTENCING TEEN AND CHILD SEXUAL ASSAULT CASES

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AGENDA

- Components of the Charging Decision
- Determinate, Indeterminate and "One Strike"
- Enhancements and Allegations
- Prior Convictions
- Concurrent vs. Consecutive Sentencing
- Probation Eligibility vs Parole
- 290 Registration
- Red Flag Warnings

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DISCLAIMER / WARNING

- This is an incredibly broad category
- Sexual Assault Laws change substantially and regularly
- Check statutes in effect at the *time the offense was committed*
- This includes both substantive statute (for offense) and those affecting sentencing
- Important dates to remember:
 - 9/20/06 – Enactment of Jessica's Law (SB 1128)
 - 9/9/10 – Enactment of Chelsea's Law (AB 1844)

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COMPONENTS OF THE CHARGING DECISION

- Limitations of the Charging Decision
- What **MUST** be pled/proven
- Evidence
- Specific Charging Decisions
- Specific Crimes

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<p align="center">General Information</p> <ul style="list-style-type: none"> • There are slight differences in the offenses listed in PC §§ 790(b) 801 (a) and 290(c). For example, PC §§ 261(a)(7) & 262(e)(2)-(5) are not included in PC § 290(c) • "Sex crimes" refers to offenses punishable by a maximum of 8 or more years • SOL statutes found at PC §§ 799 - 805. Extensive editing has been done in past • General SOL for most felonies is 3 or 6 years. (PC §§ 800, 801) • General SOL for misdemeanors is 1 year. Exception: PC § 647.6 on victim under 14 has SOL of 3 years. (PC § 802(b)) • For continuing offenses (e.g., PC §§ 288.5, 289), date of last incident is controlling. (P v. Terry (2005) 127 CA4 750) • If Defendant is out of state, then SOL tolled up to 3 years. (PC § 803(d)) • One Strike (PC § 667.61) is an "alternative sentencing scheme." Thus, SOL for One Strike allegations based on conduct comes under PC § 799's no SOL for indeterminate offenses. (P v. Perez (2010) 182 CA4 231) • † Enhancements are generally disregarded in determining SOL. (PC § 805(a), P v. Turner (2005) 134 CA4 1591, 1596.) This includes prior convictions under the Three Strikes Law and probably includes Habitual Offender (PC § 667.71) and the recidivist aspect of One Strike (PC § 667.81(d)(1)), but there are no cases on point. • † † For prosecution commenced prior to 1/1/15, victim must have been under 28 years of age and DOB need not be on/off. 1/2/87 (per former PC § 801.1(a)) • † † † SB 145 amended 280(c) eff. 1/1/21. There is no case law re its impact on SOL, but a conservative approach would be to assume a 3 year SOL. • For more information/analysis, see California Attorney General's "Statute of Limitation in California for Child Molestation and Sexual Assault Crimes" by DAG Kelly LeBel. 	<p align="center">Relevant Case Law</p> <p>Extending SOL</p> <ul style="list-style-type: none"> • Reviving expired SOL is un-Constitutional (Slogner v. California (2003) 536 US 607) • Extending existing SOL is okay (P v. Robertson (2003) 113 CA4 389, P v. Rendevos (2003) 114 CA4 961, P v. Superior Court (Geman) (2004) 116 CA4 1192) <p>Substantial Sexual Conduct</p> <ul style="list-style-type: none"> • "Substantial sexual conduct" means penetration of the vagina or rectum, oral copulation and masturbation, excluding masturbation that is not mutual. (PC §§ 803(f)(2)(B), 1203.066(b)) • Masturbation encompasses any touching or contact, however slight, of the genitals of either the victim of the offender. (P v. Terry (2005) 127 CA4 750, 772.) Skin to skin contact is not required. (P v. Carlin (2007) 150 CA4 322, 333.) • The term "masturbation that is not mutual" means masturbation by the offender of himself in the presence of the victim, or self-masturbation. (P v. Lamb (1999) 76 CA4 654, 676.) <p>Reporting - PC § 803(f)</p> <ul style="list-style-type: none"> • Victim himself must personally make report to California law enforcement to trigger SOL clock. (Reem v. Superior Court (1996) 48 CA4 1812, P v. Lewis (2015) 234 CA4 203) • One year filing period starts when victim makes report of substantial sexual conduct. (P v. Terry (2005) 127 CA4 750; P v. Superior Court (Maldonado) (2007) 157 CA4 694) • Law enforcement includes DA's office. (P v. Terry (2005) 127 CA4 750) <p>Corroborating Evidence - PC § 803(f)</p> <ul style="list-style-type: none"> • Evid. Code § 1108 evidence may provide corroboration. (P v. Mabini (2001) 92 CA4 654, P v. Yovanov (1999) 69 CA4 392) • Corroborating evidence does not include the opinions of experts. (PC § 803(f)(3)) • If victim 21 or over at time of report to law enforcement, corroboration must be clear and convincing. (PC § 803(f)(2)(C), P v. Zandino (2002) 100 CA4 74, 84-85) • Clear and convincing means evidence of such convincing force that demonstrates a high probability of truth. (P v. Mabini (2001) 92 CA4 654) <p>Pleading & Proving</p> <ul style="list-style-type: none"> • Prosecution is required to file charging document that is not, on its face, time-barred. (P v. Williams (1999) 21 CA 335, 345) • Must plead & prove facts that show prosecution is not time barred pursuant to PC §§ 801 (a), 803(c), (g) & (f). (P v. Crosby (1962) 58 C2 713, 724, P v. Lopez (1997) 52 CA4 233, 245, P v. Thomas (2007) 146 CA4 1278) • Telling allegations must be proved up at pretrial. (P v. Merza (2011) 158 CA4 468) <p>Evid. Issues</p> <ul style="list-style-type: none"> • SOL must be proved by preponderance of the evidence. (P v. Zamora (1976) 18 C3 538, 565, P v. Smith (2002) 98 CA4 1182, 1187, P v. Lopez (1997) 52 CA4 233, 250, P v. Linder (2005) 139 CA4 75) • SOL is normally a legal issue for the court. (P v. Castillo (2008) 168 CA4 364) • Factual allegations regarding tolling must be determined by jury. (P v. Free (1967) 52 CA4 1258, 1267, P v. Zamora (1976) 18 C3 538, 565)
<p align="center">Commencement of Prosecution</p> <p>Per PC § 804, prosecution is commenced when:</p> <ul style="list-style-type: none"> • Indictment or information is filed (felony); • Complaint is filed (misdemeanor); • Defendant is arraigned on complaint (felony), or • Arrest warrant is issued. <p>The filing of a felony complaint generally does not toll the SOL. (P v. Johnson (2006) 145 CA4 895.) Exception is for offenses under PC § 803(g) (DNA) and § 803(f) (late reporting). (P v. Yovanov (1999) 69 CA4 392, 401)</p>	
<p align="center">Indeterminate Offenses Effective Dates</p> <ul style="list-style-type: none"> • PC § 269(b) - Kidnapping for Sex Act (11/1/98) • PC § 220(b) - Assault with Intent During Residential Burglary (9/29/06) • PC § 269 - Aggravated Sexual Assault of Child (11/30/04) • PC § 288.7 - Sex Acts with Child 10 or Younger (9/20/06) • PC § 667.61 - One Strike (11/30/04) 	

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<p align="center">COMPONENTS OF THE CHARGING DECISION</p> <p align="center">Limitations of the Charging Decision</p> <ul style="list-style-type: none"> • Statute of Limitations/Statute Enactment • Jurisdiction
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COMPONENTS OF THE CHARGING DECISION

Jurisdiction

- It is often the case that long-term molestations span several different geographic locations
 - Where did the conduct take place?
 - Will that county grant me permission to prosecute in my county?
 - PC §784.7 was amended effective January 1, 2003, to allow prosecution in one jurisdiction for sexual assault offenses committed in multiple jurisdictions in California, whether or not the crimes involved the same victim.
 - This statute applies to: PC §220, 261, 262, 264.1, 269, 286, 288, 288a (287), 288.5, 288.7 and 289
 - This statute is retroactive so does not require the crimes to have been committed after its enactment (*People v. Acosta* (2009) 176 Cal.App.4th 472). This is for the benefit of the victims of sexual assault.

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COMPONENTS OF THE CHARGING DECISION

What must be Pled and Proven

The facts underlying the specific enhancements and allegations common in sex crimes must be pled and found true beyond a reasonable doubt by the trier of facts [PC §1170.1(e)]

- * Injury to the Victim [PC §12022.7, 12022.8, 12022.85, 12022.9, 203.075(b)]
- * Weapons [PC §12022, 12022.3, 12022.5, 12022.53, 1203.06(b)(1)]
- * Elderly or Disabled Victim [PC §1203.09(a), 667.9]
- * Probation Denial Allegations [PC §1203.066(a)(1)-(a)(9), (c)(1)]
- * Prior Convictions [PC §667, 667.5, 667.51, 667.6, 667.71]
- * One Strike [Factors alleged pursuant to subdivisions (d) and (e), as well as the age of the victim (if a minor)]

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COMPONENTS OF THE CHARGING DECISION

Evidence

In order to file criminal charges, what do we need?

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COMPONENTS OF THE CHARGING DECISION

Evidence

- Devil in the Details (age, force, weapons, injuries, etc)
- The 3 C's – corroboration, corroboration, corroboration
- How do we get corroboration?
 - SART Exam/medical findings
 - Pretext call
 - Suspect interview
 - Independent witnesses
 - Social media
 - Multiple victims
 - Search warrant

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COMPONENTS OF THE CHARGING DECISION

Evidence

- Distinguish Charged Offenses
 - Each individual act can result in a new and separate violation
 - PC §654 does **not** bar multiple punishment [even if one intent e.g. sexual gratification]
 - See *P v Alvarez* (2009) 178 Cal.App4th 999; *P v Harrison* (1989) 48 Cal3d 321; *P v Scott* (1994) 9 Cal.4th 331, fn. 6; *P v Jones* (1990) 51 Cal.3d 294, 316; *P v Smith* (2005) 132 Cal.4th 1547
 - Parenthetical inserts/descriptors are your friends
- Don't be shy about adding a 667.6(d) allegation to distinguish separate acts (just don't charge One Strike pre 11/30/94)

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COMPONENTS OF THE CHARGING DECISION

Specific Charging Decisions

- General vs. Specific Intent [e.g. 288(a) vs. 286(c)(1)]
 - serious and violent felony per 667.5(c)(6)?
 - 288(a) is included under "One Strike"
 - 288(a) attaches to mandate probation denials like 1203.066
 - 288(a) provides for more flexibility
 - 288(a) less restrictive on age differences
 - 288(a) elevates future 314 violations to felonies
 - 288(a) however carries a shorter parole period than certain other offense it could otherwise cover (e.g. oral cop, penetration of a minor)
 - 288(a) provides for broader restitution availability

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COMPONENTS OF THE CHARGING DECISION

Specific Charging Decisions

Attempted Crimes

► PROs

- Most attempted will require 290 reg
- Many attempted will qualify as serious and violent
- Attempt can be enhanced by GBI or deadly weapon

► CONs

- No mandatory denial of probation
- Not subject to One Strike
- Not subject to Habitual Sexual Offender punishments
- Half the general triad

Consider PC §220 as an alternative to charging attempt. It carries a higher triad, is serious and violent, denial of probation is presumed and §220 is subject to full-strength, consecutive sentencing under PC §667.6

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COMPONENTS OF THE CHARGING DECISION

Specific Crimes

- Most common offenses in Sexual Assault:
 - PC §288 – Lewd Act Upon a Child Under 14
 - PC §288.5 – Continuous Sexual Abuse of a Child
 - PC §261.5 – Unlawful Sexual Intercourse
 - PC §261 – Rape
 - PC §269 – Aggravated Sexual Assault of a Child
 - PC §286 – Sodomy
 - PC §288.7 – Intercourse, Sodomy, Oral Cop, and/or Sexual Penetration Age 10 or Under
 - PC §287 (288a) – Oral Copulation
 - PC §289 – Sexual Penetration
 - PC §220 – Assault with Intent to Commit a Sexual Offense
 - PC §243.4 – Sexual Battery
- Sadly, this list is not exhaustive

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DETERMINATE, INDETERMINATE AND ONE STRIKE

Determinate Sentencing in Sexual Assault Cases

- As with any other felony sentencing structure, sexual offenses subscribe to the rules of PC §1170.1
 - Elect the principal term
 - 1/3 the midterm of any additional counts
- Beware, however, of mandatory consecutive sentencing (coming up soon)

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DETERMINATE, INDETERMINATE AND ONE STRIKE

Indeterminate Sentencing in Sexual Assault Cases

- Indeterminate (life term) sentences are imposed pursuant to PC §1168(b) and are computed separately from determinate sentences.
- May run concurrent or consecutive to each other
- If consecutive, the 1170.1 scheme does not apply
- Enhancements to indeterminate terms are imposed as full enhancements

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DETERMINATE, INDETERMINATE AND ONE STRIKE

- If the Defendant is convicted of **both** determinate AND indeterminate term crimes, there is no principal/subordinate term relationship between the indeterminate and determinate terms
- The terms are calculated separately and the indeterminate term does not serve as a principal term.
- Unless PC §667.6(d) or some other statutory scheme mandates consecutive sentencing (still coming soon), the decision to impose the determinate terms concurrent to or consecutive to the indeterminate term is within the discretion of the Court.

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DETERMINATE, INDETERMINATE AND ONE STRIKE

"One Strike" – AKA PC §667.61

- Applies to certain sex crimes with aggravating factors
- No prior conviction(s) required
- Converts underlying offense to an indeterminate term (alternate scheme not enhancement)
- Does NOT apply to attempt
- Effective 11/30/94

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DETERMINATE, INDETERMINATE AND ONE STRIKE

"One Strike" – AKA PC §667.61

- Applicable offenses:
 - Forcible Rape [PC 261(a)(2), (a)(6)]
 - Spousal Rape [PC 262(a)(1), (a)(4)]
 - Rape in Concert [PC 264.1]
 - Lewd Act [PC 288(a) or (b) and 288.5]
 - Forcible Sexual Penetration [PC 289(a)]
 - Forcible Sodomy [PC 286(c)(2), (c)(3), (d)]
 - Forcible Oral Copulation [PC 288a(c)(2), (c)(3), (d) / now 287]
- Note: this list [667.61(c)] is different from PC 667.6(e) reference mandatory consec (still coming)
 - Includes non-forcible offenses like 288(a) and 288.5
 - Also does NOT include PC 220

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DETERMINATE, INDETERMINATE AND ONE STRIKE

"One Strike" – AKA PC §667.61

▶ **Major Factors:**

- ▶ Prior qualifying conviction
- ▶ Aggravated kidnap
- ▶ Aggravated mayhem/torture
- ▶ Res burg with Sex intent
- ▶ In concert crime and anyone did kidnap, mayhem/torture, burg as above
- ▶ Great Bodily Injury (post 9/9/10)
- ▶ Bodily Harm on victim under 14 (added 9/9/10)

▶ **Minor Factors:**

- ▶ Kidnap
- ▶ Burglary (res or commercial)
- ▶ Use of Firearm or Deadly weapon
- ▶ Multiple Victims
- ▶ Tying or Binding
- ▶ Administer a controlled substance
- ▶ In concert crime anyone did kidnap, burg, weapon, tying/binding or drugs as above
- ▶ Great Bodily Injury (pre 9/9/10)

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DETERMINATE, INDETERMINATE AND ONE STRIKE

"One Strike" – AKA PC §667.61- Punishment

▶ **1 Major Factor OR 2 Minor Factors**

- ▶ 25 to Life
- ▶ If Victim is under 14 (excluding 288(a)): LWOP [667.61(j)(1)]
- ▶ If Victim is 14-17 & specified offense: LWOP [667.61(l)]

▶ **1 Minor Factor**

- ▶ 15 to Life
- ▶ If Victim under 14 (including 288(a)): 25-Life [667.61(j)(2)]
- ▶ If Victim is 14-17 and specified offense: 25-Life

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DETERMINATE, INDETERMINATE AND ONE STRIKE

"One Strike" – AKA PC §667.61- Requirements

- Must be pled and proven
- Court cannot strike the allegation
- Probation ineligible
- Trier of Fact must make determination

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ENHANCEMENTS AND ALLEGATIONS

► Options:

- Weapons During Sex Crimes §12022.3
- Great Bodily Injury §12022.8
- Kidnapping §667.8, 667.85
- Exhibiting Harmful Material §667.15
- Daycare Provider §674
- Administering a Controlled Substance §12022.75
- Transmitting AIDS §12022.85
- Termination of Pregnancy §12022.9

► Requirements:

- In the commission of...
- Confirm it applies to your attempt
- Must be pled/proven
- Normally, 1170.1 subordinate scheme applies
- If forcible sex crime- beware of special rules (still coming soon)

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PRIOR CONVICTIONS

Habitual Offender – PC 667.71

- This additional allegation can be added if you have a qualifying current offense with prior conviction (check the list)
- Increases the term to 25-Life for each qualifying count
- Does not include attempts
- No washout period
- No “single occasion” limitation like many strike priors (potential advantage over One Strike for pre 9/20/06 crimes)

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PRIOR CONVICTIONS

Habitual Offender – PC 667.71

- This allegation cannot be stricken by Court
- No probation per PC 667.71 (e)
- CanNOT double dip with One Strike (charge in alternative or select one over the other)
- CAN double or triple dip with strike priors (even if the strike prior is the same prior)
- Must be pled/proven

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PRIOR CONVICTIONS

Lewd Act with Priors – PC 667.51 (c)

- This additional allegation enhances to 15-Life
- Current offense must be molest (288 or 288.5)
- Need 2 prior sex convictions
- Applies to most types of prior sex convictions (incl non-force and non-serious offenses (excludes 261.5 though)
- Applies even when Habitual Offender and One Strike do not
- Applies to each count/offense
- No washout period
- No separate conviction requirement
- Probation denial per PC 1203.066(a)(5)
- Possibly strikable...

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PRIOR CONVICTIONS

Other Priors

- Child molestation with 1 prior – PC 667.51(a) +5 years
- Current forcible sex crime with a prior forcible sex crime – PC 667.6 +5 or +10 years
- PC 289 with prior + Special Victim – PC 667.10 +2 years

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CONCURRENT VS. CONSECUTIVE SENTENCING

- Non-forcible sex crimes, forcible sex crimes not coming within the provisions of PC 667.6(c) and (d), and non-sex crimes are sentenced under the PC 1170.1 principal/subordinate scheme. [PC §1170.1(d)]

WHAT IS A FORCIBLE SEX CRIME PER 667.6(e)?

- Forcible Rape – PC 261(a)(2), (6), (7)
- Rape by Intox – PC 261(a)(3)
- Forcible Spousal Rape – PC 262(a)(1), (4), (5)
- Forcible in Concert Crimes – PC 264.1
- Forcible Sodomy – PC 286(c)(2)&(3), (d), (k)
- Forcible Lewd Act Upon a Child Under 14 – PC 288(b)
- Continuous Sexual Abuse – PC 288.5
- Forcible Oral Copulation/Sexual Penetration – PC 287, 289
- Assault with Intent to Commit a Sex Act – PC 220
- Aggravated Sexual Assault of a Child – PC 269

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CONCURRENT VS. CONSECUTIVE SENTENCING

MANDATORY CONSECUTIVE TERMS:

- PC §667.6(d) allows for full-strength, consecutive sentencing to be **mandated** if there are at least two forcible sex crimes listed in section 667.6(e) [previous slide] involving different victims or the same victim on separate occasions.
- When there are multiple victims, or same victim multiple occasions, the court **MUST** impose consecutive sentences (full term is set for each crime rather than the normal 1/3 midterm formula)
- Mandatory consecutive sentencing also applies to indeterminate sentencing for forcible sex crimes, incl. One Strike, Habitual Offender and Aggravated Sex Assault of a Child.

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CONCURRENT VS. CONSECUTIVE SENTENCING

DISCRETIONARY CONSECUTIVE TERMS:

- PC §667.6(c) allows for full-strength, consecutive sentencing to be **discretionary** if there are at least one forcible sex crimes listed in section 667.6(e).
- In the situation where there is only one forcible sex crime and other crimes, the Court may impose a term for the sex crime under PC 667.6(c), and then sentence the remaining crimes pursuant to PC 1170.1
- However, if the Court opts to do so, they must state the reasons for exercising his/her discretion to sentence under PC 667.6(c)

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CONCURRENT VS. CONSECUTIVE SENTENCING

Some Limitations/Guidance:

- The sentencing scheme under PC 667.6 is independent of the sentencing determination for non-sex crimes and excluded crimes where sentence is imposed pursuant to PC 1170.1 (ex a rape and robbery)
- PC 667.6 sentencing scheme does not apply to attempt
- Enhancements to forcible sex crimes listed in PC 667.6(e) are served at full term whether the sentence is imposed per 667.6 or 1170.1
- No right to a jury trial on the issue of whether terms should run consec or concurrent – judicial determination

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FORCIBLE SEX CRIMES VS ONE STRIKE

AS OF 9/20/06

PC 667.6(e) – Forcible Sex Crimes Scheme

- ▶ Rape – PC 261(a)(2), (3), (6), (7)
- ▶ Spousal Rape – PC 261(a)(1), (4), (5)
- ▶ In Concert – PC 264.1
- ▶ Sodomy – PC 286(c)(2)&(3), (d), (k)
- ▶ Forcible Lewd Act – PC 288(b)
- ▶ Continuous Abuse – PC 288.5
- ▶ Oral Cop/Sex Pen – PC 289, 287
- ▶ Assault with Intent – PC 220
- ▶ Agg Sex Assault of Child – PC 269

Notes:

- PC 261(a)(3) and PC 288.5 are the only forcible sex crimes that do not require force/threat
- Inclusion of PC 220 essentially applies statute to attempt
- PC 269 included as forcible sex crime

PC 667.67(c) – One Strike Scheme

- ▶ Rape – PC 261(a)(2), (6)
- ▶ Spousal Rape – PC 262(a)(1), (4)
- ▶ In Concert – PC 264.1
- ▶ Sodomy – PC 286(c)(2)&(3), (d)
- ▶ Lewd Act on Child – PC 288(a) AND (b)
- ▶ Continuous Abuse – PC 288.5
- ▶ Oral Cop/Sex Pen – PC 287, 289

Notes:

- PC 288(a) and PC 288.5 are the only One Strike offenses that do not require force/threat
- PC 269 included? Unsettled caselaw

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PROBATION ELIGIBILITY VS PAROLE

PROBATION

- Probation terms - PC 1203.1(a) & 1203.067
- Maximum period of probation is 5 years
- "password conditions" are deemed ok in sex cases (*P v Ebertowski* (2014) 228 Cal.App4th 1170)
- PC 1203.067(b) was amended 9/9/10
 - Includes sex offender management program
 - Polygraph exams
 - Waiver of psychotherapist confidentiality
 - Not retroactive changes

PAROLE

- Parole terms - PC 3000, 3000.1
- Recently amended by Chelsea's Law (9/9/10)
- Most sex offenses are 10 year period
- If Victim under 14 (excluding 288(a)): 20 year period
- Most indeterminate sex offenses: lifetime parole
- BUT, extension of parole terms are not retroactive

Under either post-incarceration process, the Court may impose:

- Restitution
- Fines
- No Contact Order
- AIDS education and testing

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PROBATION ELIGIBILITY VS PAROLE

PROBATION – MANDATORY DENIAL

- PC § 1203.065(a) – forcible sex crimes
- PC § 1203.066 – aggravating factor during child molest (I'll come back to this)
- PC § 1203.06(a) – use of firearm during sex act
- PC § 667.61(h) – One Strike
- PC § 667.71(e) – Habitual Offender
- PC § 1203(k) – serious/violent offense when on felony probation
- PC § 1203.085(a) – committed any non-wobbler offense while on parole for serious and violent offense
- PC § 1203.085(b) – committed serious and violent offense while on parole for any offense
- PC § 1203.075(a) – personal and intentional infliction of GBI
- PC § 1203.08 – 2 prior designated felonies within 10 years

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PROBATION ELIGIBILITY VS PAROLE

PROBATION – PRESUMPTIVE DENIAL

- PC § 1203.065(b) – certain non-forcible sex crimes (incl PC 220)
- PC § 1203.066(d) – child molest (288(a) or 288.5)
- PC § 1203(e)(5) – sex offense plus any prior felony
- PC § 1203(e)(2), (3) – use of weapon, GBI

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PROBATION ELIGIBILITY VS PAROLE

DENIAL OF PROBATION

- Mandatory denial allegation must be plead and proven
- If eligible for probation on sex case, still must comply with PC § 1203.067
 - Requires probation report or 90 day diagnostic
 - Sentencing and hearing with victim
 - Consider 288.1 report (if ordered)
 - Treatment program

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PROBATION ELIGIBILITY VS PAROLE

DENIAL OF PROBATION per § 1203.066

- In PC 288 and 288.5 offenses, the following aggravating factors require a mandate of no probation (told you I was coming back to this):
 - Force
 - GBI
 - Stranger
 - Use of Weapon
 - Prior Conviction
 - Kidnap
 - Multiple victims
 - Substantial Sex Conduct with Victim Under 14
 - Obscene matter

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AGGRAVATING FACTORS DEFINED

“Substantial Sexual Conduct”

- Applicable to no probation allegation for PC 288(a) and 288.5 offenses per § 1203.066(a)(8)
- Also applicable to late reporting statute of limitations per PC 803(f)
- Includes: Penetration of vagina or rectum, oral copulation and/or masturbation
- Masturbation encompasses any touching or contact with the genitals, however, slight, of the child or Defendant, including over the clothing

“Penetration”

- Sexual penetration is the act of causing penetration, however slight, of the genital or anal opening of any person
- Penetration of the external genital organs is sufficient (ask for a pinpoint)
- Penetration can be through the clothing!!!

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PROBATION ELIGIBILITY VS PAROLE

DENIAL OF PROBATION

- As of 1/1/06, **mandatory** denial of probation if aggravating factor is pled and proven
- If not pled and proven, probation eligible per 1203.066(d):
 - 288.1 report required
 - If D is a household member, then probation is in the best interest of Victim
 - Rehab of D is feasible and D is amenable to treatment
 - D must be removed from household
 - No physical threat to victim

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290 REGISTRATION

Fun Facts about 290 registration:

- Mandatory for all offenses listed in PC 290(c)
- Not considered a punishment (no cruel and unusual issues)
- Must be advised of the length of the registration requirement
- Later reduction to a misdemeanor does not relieve registration
- Later expungement per 1203.4 does not grant relief
- The tiers (10-20-life) are dependent on the crime for which Defendant is convicted
- Discretionary registration can be found in PC 290.006
- Court can order registration for non-listed items if evidence of a sexual compulsion or gratification
 - Best practice is to allege this request on the Complaint
 - Burden of proof for this request is preponderance of the evidence

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RED FLAG WARNINGS

ELDERLY PAROLE

- Codified in PC §3055 (began 1/1/2018)
- Ineligible:
 - Sentenced under 3 strikes law – i.e. has priors in addition to current sentence
 - LWOP
- Eligible:
 - 60 years or older
 - Served a minimum of 25 consecutive years
 - Can be a determinate or indeterminate sentence

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RED FLAG WARNINGS

YOUTHFUL OFFENDER PAROLE

- Codified in PC §3051
- Based on "scientific evidence" showing parts of the brain that control things like behavior, impulse control and understanding consequences, don't mature until a person is in their mid to late 20s.
- CA Legislature determined that with very few exceptions, offenders who commit crimes while under the age of 26 and sentenced to state prison are required to have a "meaningful opportunity for parole during their natural life"
- Eligible:
 - If a person is under 26 at the time of their "controlling offense" **AND**
 - "Controlling offense" is the crime or enhancement for which the court imposed the longest term of imprisonment
 - They've served a certain number of years (hold please) = **parole hearing**
 - EXCEPTION: the controlling offense was sentenced as 2nd/3rd strike, or LWOP if offense committed when over 18

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RED FLAG WARNINGS

YOUTHFUL OFFENDER PAROLE

- Warning –One Strike cases are not exempt (*P v Edwards* 34 Cal.App.5th 183)
- The exclusion of one strikers from youthful offender parole consideration is unenforceable.
- The breakdown:
 - If crime committed at age 25 or younger **AND**
 - IF it was a determinate sentence (eligible for release on parole 1st day of the 15th year of incarceration) **OR**
 - IF it was an indeterminate sentence of less than 25 to life (1st day of their 20th year of incarceration) **OR**
 - IF indeterminate sentence of 25 to life or greater (1st day of their 25th year of incarceration) **OR**
 - IF under 18 and sentenced to LWOP (1st day of 25th year of incarceration)
- If denied parole, they get another chance within 3-15 years
- Beware of the "Franklin Hearing" at sentencing

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RED FLAG WARNINGS

The Take Away:

- When considering your sentencing, consider the age of your offender both currently and at the time of the offense
- Example:
 - Resolution of a case for a 50 year determinate offer means nothing if the Defendant was under 26 at the time of the offense (parole date at 15 yr)
 - A resolution of anything over 25 years for a person over 60 is pointless (once they've served 25, they're getting a parole date)

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IN CONCLUSION

- This is an incredibly complicated area of the law
- Do your research
- Always write a sentencing brief
- And

- Don't be afraid to phone a friend if you need help

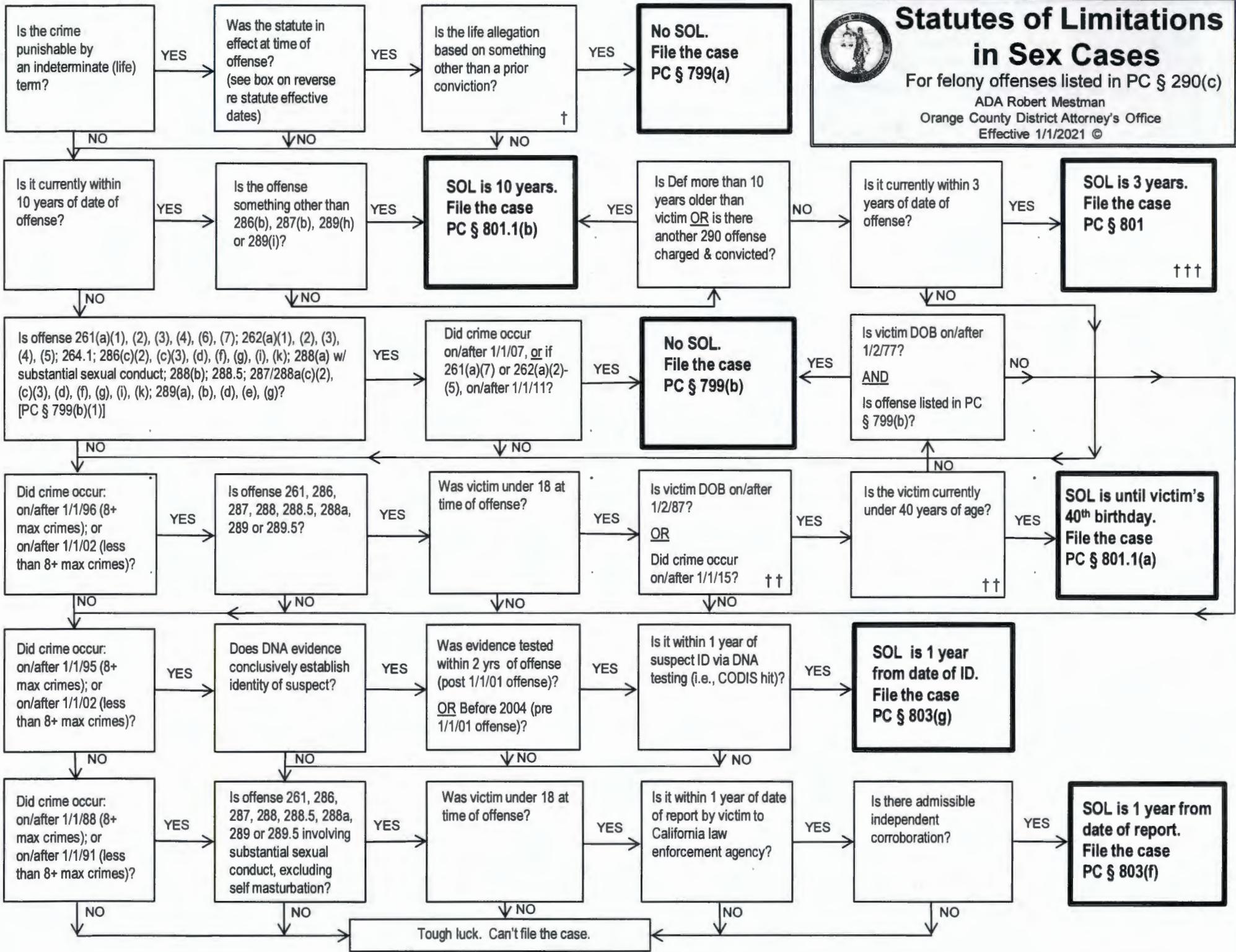
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Statutes of Limitations in Sex Cases

For felony offenses listed in PC § 290(c)
 ADA Robert Mestman
 Orange County District Attorney's Office
 Effective 1/1/2021 ©



General Information

- There are slight differences in the offenses listed in PC §§ 799(b), 801.1(a) and 290(c). For example, PC §§ 261(a)(7) & 262(a)(2)-(5) are not included in PC § 290(c).
- "8+ max crimes" refers to offenses punishable by a maximum of 8 or more years.
- SOL statutes found at PC §§ 799 – 805. Extensive editing has been done in past.
- General SOL for most felonies is 3 or 6 years. (PC §§ 800, 801.)
- General SOL for misdemeanors is 1 year. Exception: PC § 647.6 on victim under 14 has SOL of 3 years. (PC § 802(b).)
- For continuing offenses (e.g., PC §§ 288.5, 290), date of last incident is controlling. (*P v. Terry* (2005)127 CA4 750.)
- If Defendant is out of state, then SOL tolled up to 3 years. (PC § 803(d).)
- One Strike (PC § 667.61) is an "alternative sentencing scheme." Thus, SOL for One Strike allegations based on *conduct* comes under PC § 799's no SOL for indeterminate offenses. (*P v. Perez* (2010) 182 CA4 231.)
- † Enhancements are generally disregarded in determining SOL. (PC § 805(a); *P v. Turner* (2005) 134 CA4 1591, 1596.) This includes prior convictions under the Three Strikes Law and *probably* includes Habitual Offender (PC § 667.71) and the recidivist aspect of One Strike (PC § 667.61(d)(1)), but there are no cases on point.
- † † For prosecutions commenced prior to 1/1/15, victim must have been under 28 years of age and DOB need not be on/after 1/2/87 (per former PC § 801.1(a)).
- † † † SB 145 amended 290(c) eff. 1/1/21. There is no case law re its impact on SOL, but a conservative approach would be to assume a 3 year SOL.
- For more information/analysis, see California Attorney General's "Statute of Limitation in California for Child Molestation and Sexual Assault Crimes" by DAG Kelly LeBel.

Commencement of Prosecution

Per PC § 804, prosecution is commenced when:

- Indictment or information is filed (felony);
- Complaint is filed (misdemeanor);
- Defendant is arraigned on complaint (felony); or
- Arrest warrant is issued.

The filing of a felony complaint generally does not toll the SOL. (*P v. Johnson* (2006) 145 CA4 895.) Exception is for offenses under PC § 803(g) [DNA] and § 803(f) [late reporting]. (*P v. Yovanov* (1999) 69 CA4 392, 401.)

Indeterminate Offenses Effective Dates

- PC § 209(b) – Kidnapping for Sex Act [1/1/98]
- PC § 220(b) – Assault with Intent During Residential Burglary [9/20/06]
- PC § 269 – Aggravated Sexual Assault of Child [11/30/94]
- PC § 288.7 – Sex Acts with Child 10 or Younger [9/20/06]
- PC § 667.61 – One Strike [11/30/94]

Relevant Case Law

Extending SOL

- Reviving expired SOL is un-Constitutional (*Stogner v. California* (2003) 539 US 607).
- Extending existing SOL is okay. (*P v. Robertson* (2003) 113 CA4 389; *P v. Renderos* (2003) 114 CA4 961; *P v. Superior Court (German)* (2004) 116 CA4 1192.)

Substantial Sexual Conduct

- "Substantial sexual conduct" means penetration of the vagina or rectum, oral copulation and masturbation, excluding masturbation that is not mutual. (PC §§ 803(f)(2)(B), 1203.066(b).)
- Masturbation encompasses any touching or contact, however slight, of the genitals of either the victim of the offender. (*P v. Terry* (2005) 127 CA4 750, 772.) Skin to skin contact is not required. (*P v. Carlin* (2007) 150 CA4 322, 333.)
- The term "masturbation that is not mutual" means masturbation by the offender of himself in the presence of the victim, or self masturbation. (*P v. Lamb* (1999) 76 CA4 664, 678.)

Reporting - PC § 803(f)

- Victim himself/herself must personally make report to California law enforcement to trigger SOL clock. (*Ream v. Superior Court* (1996) 48 CA4 1812; *P v. Lewis* (2015) 234 CA4 203.)
- One year filing period starts when victim makes report of substantial sexual conduct. (*P v. Terry* (2005)127 CA4 750; *P v. Superior Court (Maldonado)* (2007) 157 CA4 694.)
- Law enforcement includes DA's office. (*P v. Terry* (2005)127 CA4 750.)

Corroborating Evidence - PC § 803(f)

- Evid. Code § 1108 evidence may provide corroboration. (*P v. Mabini* (2001) 92 CA4 654; *P v. Yovanov* (1999) 69 CA4 392.)
- Corroborating evidence does not include the opinions of experts. (PC § 803(f)(3).)
- If victim 21 or over at time of report to law enforcement, corroboration must be clear and convincing. (PC § 803(f)(2)(C); *P v Zandrino* (2002) 100 CA4 74, 84-85.)
- Clear and convincing means evidence of such convincing force that demonstrates a high probability of truth. (*P v. Mabini* (2001) 92 CA4 654.)

Pleading & Proving

- Prosecution is required to file charging document that is not, on its face, time-barred. (*P v. Williams* (1999) 21 C4 335, 345.)
- Must plead & prove facts that show prosecution is not time barred pursuant to PC §§ 801.1(a), 803(d), (g) & (f). (*P v. Crosby* (1962) 58 C2 713, 724; *P v. Lopez* (1997) 52 CA4 233, 245; *P v. Thomas* (2007) 146 CA4 1278.)
- Tolling allegations must be proved up at prelim. (*P v. Meza* (2011) 198 CA4 468.)

Proof Issues

- SOL must be proved by preponderance of the evidence. (*P v. Zamora* (1976) 18 C3 538, 565; *P v. Smith* (2002) 98 CA4 1182, 1187; *P v. Lopez* (1997) 52 CA4 233, 250; *P v. Linder* (2006) 139 CA4 75.)
- SOL is normally a legal issue for the court. (*P v. Castillo* (2008) 168 CA4 364.)
- Factual allegations regarding tolling must be determined by jury. (*P v. Fine* (1997) 52 CA4 1258, 1267; *P v. Zamora* (1976) 18 C3 538, 565.)