

# SENTENCING ISSUES IN SEX OFFENSE CASES

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## I. Scope/Warnings/Caveats

- A. **EX POST FACTO WARNING:** These materials are designed to outline the current sentencing schemes for sex offenses. Because sex offenses against minors can be charged many years later (see Pen. Code § 803(g); People v. Frazer (1999) 21 Cal.4th 737) watch out for *ex post facto* violations.
- B. These materials are not a comprehensive sentencing guide and assume some familiarity with California's determinate sentencing law, including the general laws and rules governing: the selection of the term, imposing concurrent v. consecutive sentences, enhancements, and limitations on multiple punishment (e.g. dual use of facts; section 654).
- C. **Applying Apprendi v. New Jersey** to sex offense sentencing is not addressed as this issue is fully explored in the Apprendi Outline.
- D. **Out-of-District Court of Appeal opinions are only controlling in the district issuing the opinion.** Examine the reasoning of those opinions and independently determine whether they are wrongly decided.
- E. **Credits** are another matter.
- F. **Juvenile delinquency** dispositions are another matter.

## II. Sources

- A. **Determinate Sentencing Law:** Unless one of many special sex offense sentencing statutes apply—and they often do—sex offense sentencing is governed by the Determinate Sentencing Law (§ 1170) which applies generally to felony sentencing (i.e. sentence for each count is determined by selecting one of three possible terms). Consecutive sentencing is governed by section 1170.1, with all but one-third the mid-term stayed for

subordinate consecutive terms. Enhancements and section 654 are applied differently in sex cases than they are in other cases. (See *infra*.)

**B. Special Statutory Sex Offense Sentencing Schemes**

1. Section 269: Aggravated Sexual Assault of a Child (15-to-life)
2. Section 667.6, subs. (c) and (d) (full consecutive terms)
3. Section 667.61: One Strike Law (15- or 25-to-life)

**C. Special Sex Offense Current Conduct Enhancements**

1. Section 667.8: Kidnapping for Sex Offense (add 9 or 15 years)
2. Section 667.9: Vulnerable Victim Enhancement (add 1 or 2 years)
3. Section 667.10: Penetration With Foreign Object Against a Vulnerable Victim With Like Prior (add 2 years)
4. Section 667.15: Exhibit Sexually Explicit Material to a Minor Prior To or During a § 288 (add 1 years) or § 288.5 Offense (add 2 years)
5. Section 674: Day Care Worker (add 2 years)
6. Section 12022.3: Firearm/Deadly Weapon (3, 4 or 10 for use; 1, 2 or 5 for arming)
7. Section 12022.85: AIDS (add 3 years)

**D. Special Sex Offense Recidivist Statutes**

1. Section 667.51: Lewd Acts on Minor With Prior Sex Offense (5 years for one prior; 15-to-life for two or more priors)
2. Section 667.6(a): Current Forcible Sex Offense with Like Prior (5 years for each prior)
3. Section 667.6(b): Prior Prison Term for Forcible Sex Offense (10 years for each prison term)
4. Section 667.71: Habitual Sexual Offender (25-to-life)

**E. Constitutional Provisions**

1. Cruel and/or Unusual Punishment (U.S. Const., Amend. VIII; Cal.Const., Art. 1, sec. 17)
2. Right to a Jury Trial (U.S. Const., Amend. VI): (see Apprendi materials)

3. Equal Protection (U.S. Const., Amend XIV; Cal.Cont., Art. 1, sec. 7); see People v. Fryman (Apr. 30, 2002, no. H020743) \_\_\_\_ Cal.App.4th \_\_\_\_.

### III. Aggravated Sexual Assault of a Child (§ 269)

- A. **15-to-life term** for the listed sexual assaults against minors under 14 who are 10 or more years younger than the defendant.
- B. **Offenses:** §§ 261(a)(2), 264.1, 286 by force, etc., 288a by force etc., 289
- C. **Applying Section 667.6 to Counts Sentenced Under § 269:** Section 667.6 and 269 are cumulative, not alternative and 667.6 can be applied to § 269 conviction where predicate offense for § 269 conviction is a listed predicate offense under § 667.6. (People v. Jiminez (2000) 80 Cal.App.4th 286, 290-92.)

### IV. Full Consecutive Terms (§ 667.6)

- A. **Full (not 1/3 the mid-term) consecutive terms** are *discretionary* (§ 667.6, subd. (c)) for the listed offenses, unless they are committed against multiple victims on separate occasions, in which case full consecutive terms are *mandatory* (§ 667.6, subd. (d)).
- B. **Predicate Offenses:**
  1. *Predicate offenses for discretionary full consecutive terms under subdivision (c):*
    - a. Assaults under section 220 with intent to commit rape, sodomy, oral copulation, rape in concert, lewd or lascivious acts on a child, forcible penetration with a foreign object (*but not with intent to commit mayhem*), with a prior violation of section 220 (*but not for assault with intent to commit mayhem*);
    - b. Rape by force, violence, duress, menace or fear of immediate and unlawful bodily injury (§ 261(a)(2)); rape by intoxication (§ 261(a)(3)); rape by threat of future retaliation § 261(a)(6),

or rape by threat to use authority of public official to arrest or deport (§ 261(a)(7));

- c. Rape of a spouse by force, etc. (§ 262(a)(1)); by threat of future retaliation (§ 262(a)(4); by threat of use of authority of public official (§ 262(a)(7));
- d. Rape or forced penetration with a foreign object in concert and by force or violence (§ 264.1);
- e. Lewd or lascivious acts on a minor under 14 with force, violence, duress, menace, or fear of immediate bodily harm on the victim or another person (§ 288(b));
- f. Continuous sexual abuse of a minor (§ 288.5);
- g. Forced penetration with a foreign object (§ 289(a));
- h. Sodomy or oral copulation by threat to use authority of public official (§§ 286(k), 288a(k));
- i. Sodomy or oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person (§§ 286, 288a).

- 2. *Predicate offenses for mandatory full consecutive terms under subdivision (d):* same as subdivision (c), **except** violations of § 288.5, which are not predicate offense under subdivision (d).
- 3. *Convictions for violating § 269* (aggravated sexual assault against a minor) can be a predicate offense for sentencing under § 667.6 where the predicate offense for sentencing under § 269 is also a listed predicate offense for sentencing under section 667.6. (People v. Jiminez (2000) 80 Cal.App.4th 286, 290-92.)
- 4. *Not all 286 and 288a convictions* are sufficient for section 667.6 (c) and (d) sentencing. Sections 286 and 288a can be violated with threats of future retaliation. If jury verdict could have been based upon a finding of threats of future retaliation, argue that 667.6 (c) and (d) sentencing was error.

5. *Jury's Duress Finding May be Insufficient*: Where the full consecutive sentence was imposed because the predicate offense was forcible (and the jury so found), be sure to examine whether the finding of force was based on "duress" erroneously defined as "hardship." The § 261 and 262 definitions of duress apply to other forcible sex offenses (e.g. 288a and 289). (People v. Valentine (2001) 93 Cal.App.4th 1241, 1249.) Those definitions were amended, effective January 1, 1994, to eliminate subjecting the victim to "hardship" as part of the definition of duress. CALJIC does not have a specific instruction on duress, but the pre-1994 definition is built into CALJIC no. 10.42 (defining forcible child molestation under § 288(b).)
6. Note re *Riffey Error*: "Prior to the amendment of section 667.6 by Statutes 1985, chapter 401, section 1 (urgency, effective July 30, 1985), subdivision (d) required the presence of 'force, violence, duress, menace, or threat of great bodily injury' (italics added) rather than the less coercive language, "fear of immediate and unlawful bodily injury on the victim or another person." (People v. Moore (1989) 211 Cal.App.3d 1400, 1417.) This created a dichotomy with sections 286 and 288a, which used the language "fear of immediate and unlawful bodily injury on the victim or another person." Thus, without a jury finding of use of force or threat of GBI, a verdict for a violation of section 286 or 288a, it was error to sentence under section 667.6(c). (Id. citing People v. Riffey (1985) 171 Cal.App.3d 419, 423-424.)
7. *Attempts*: "attempted crimes are not included within the ambit of the statute." (People v. Thomas (1990) 218 Cal.App.3d 1477, 1490 (citing People v. Reber (1986) 177 Cal.App.3d 523, 535 and People v. Le (1984) 154 Cal.App.3d 1, 10-11.)
8. *Prior Conviction Required?* Must the defendant have a prior conviction for § 667.6(c) and (d) to apply (i.e. What does "provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem" modify)? If current conviction is for a violation of § 220, § 667.6(c) and (d) apply only if the defendant had a prior conviction under section 220; for the other enumerated offenses in subdivisions (c) and (d), no prior conviction is required. (People v. Bohannon

(2000) 82 Cal.App.4th 798, 809-812; In re Rodney (1999) 73 Cal.App.4th 36.)

9. *Aider and Abettor*: may be sentenced under subdivision (d). (People v. McPherson (2001) 86 Cal.App.4th 527, 531-532; People v. Farr (1997) 54 Cal.App.4th 835.)

**C. Subdivision (c) Discretionary Sentencing:**

1. “*May*” means *may*. The trial court has discretion to choose between section 1170.1 and section 667.6, subdivision (c) in sentencing a defendant convicted of a violent sex offense and another felony. (People v. Belmontes (1983) 34 Cal.3d 335, 345.)
2. *Individual Decision as to Each Sex Offense*: “In exercising its sentencing discretion, the court should make an **individual determination as to each sex offense**. Thus, a court could choose to have a sex offense serve as the principal term if it carried the longest sentence and to treat all other offenses - regardless of whether they include sex offenses listed in section 667.6, subdivision (c) - as subordinate terms under section 1170.1. A court could alternatively choose to treat some of the sex offenses under the principal/subordinate scheme of section 1170.1, while imposing fully consecutive sentences on others under section 667.6, subdivision (c).” (Id. at 346.)
3. *667.6 and Non-667.6 Totals Are Added*: “The computations under sections 1170.1 and 667.6, subdivision (c) are to be done separately; the total of the section 667.6 computation would then be added to the section 1170.1 total.” (Id. at 346.)
4. *Criteria Channeling Discretion*: Rule 4.425 (former Rule 425) criteria for deciding between concurrent and consecutive sentences are relevant to the exercise of discretion under section 667.6(c). (Belmontes, at 346-47; Cal.R.Ct. Rule 4.426(b).)
5. *Statement of Reasons*:
  - a. A statement of reasons for *full* consecutive terms under subdivision (c) is required. (Belmontes, at 347-348; People v.

Osband (1996) 13 Cal.4th 622, 729; Cal.R.Ct. Rule 4.426(b).)

- b. Reasons for “full” consecutive sentences may be the same as those used to impose consecutive sentences. (Belmontes, at 347-348.)
- c. Harmless error: Failure to state reason for full terms not harmless, even though trial court gave reason for consecutive term. (People v. Senior (1992) 3 Cal.App.4th 765, 782 (“question[ing] whether a Belmontes error can be harmless”).)
- d. Dual Use of Facts: Error to use same fact to impose aggravated term and to impose full consecutive sentences under section 667.6(c). (People v. Osband (1996) 13 Cal.4th 622, 728 (“The court relied on the violent nature of the rape to impose a consecutive sentence and the upper term. This was error.”).)
- e. Sufficiency of Reasons
  - (1) Consecutive sentences permitted for “repenetrations”: “defendant's penis kept coming out of [victim's] vagina because [victim] was moving and defendant was hurting her. Defendant put his penis back inside [victim]'s vagina eight or nine times and threatened to kill her if she did not stop moving. ... defendant's repenetrations were clearly volitional, criminal and occasioned by separate acts of force and separately punishable by consecutive sentences” (People v. Brown (1994) 28 Cal.App.4th 591, 601.)
  - (2) No reasons given: “Here, the trial court recognized that it was making a separate and additional choice when it stated that it was sentencing under section 667.6, subdivision (c). Nonetheless, as in Belmontes, the trial court did not state why it chose the punitive provisions of section 667.6, subdivision (c). Thus, we must remand the matter for resentencing.” (People v. James (1989) 208 Cal.App.3d 1155, 1167.)

- (3) “Nature of the crimes” is insufficient reason under Belmontes. (People v. Smith (1984) 155 Cal.App.3d 539.) (Although error was harmless.)
  - (4) **WAIVER:** Failure to state reasons is not reviewable absent objection. (People v. Scott (1994) 9 Cal.4th 331.)
6. *Only One Qualifying Offense Needed:* “[W]here a defendant stands convicted of multiple felonies, subdivision (c) vests the sentencing court with discretionary authority to impose a full, consecutive term for any [enumerated sex offense] conviction, even when the defendant stands convicted of only one [enumerated sex offense].” (People v. Jones (1988) 46 Cal.3d 585, 600.)

**D. Mandatory Full Consecutive Terms/Separate Victims or Separate Occasions (§ 667.6, subd. (d)):**

1. Full consecutive terms “shall” be imposed (instead of 1/3 the mid-term under section 1170.1) for the predicate offenses ...**“If the crimes involve separate victims or involve the same victim on separate occasions.”**
2. **“Separate Occasion”**
  - a. Statutory Definition (*Added in 1986*): “In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, **the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.** Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.” (§ 667.6(d).)
  - b. Legis. Intent: “The express legislative purpose for including the explication of the phrase ‘separate occasions’ was ‘to abrogate the decision in [People v. Craft (1986) 41 Cal.3d

554], and to establish an objective test for determining whether sex crimes against a single victim occurred on separate occasions.’ (Stats. 1986, ch. 1431, § 2, p. 5129.) ... The legislative history reveals the aim to provide ‘a broader, less stringent standard to prove that multiple sex crimes occurred against the same victim on separate occasions.’ [Citation.]” (People v. Jones (2001) 25 Cal.4th 98, 104, fn.2.)

- c. Break of Specific Duration or Change in Locale Not Required: “Under the broad standard established by Penal Code section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location.” (People v. Jones (2001) 25 Cal.4th 98, 104; see also People v. Irvin (1996) 43 Cal.App.4th 1063, 1070.)
- d. Mere Change in Position Sufficient: “at sentencing a trial court could find a defendant had a ‘reasonable opportunity to reflect upon his or her actions’ even though the parties never changed physical locations and the parties ‘merely’ changed positions.” (People v. Irvin (1996) 43 Cal.App.4th 1063, 1071.)
- e. Pre-1986 Amendment: “Craft had construed Penal Code section 667.6, subdivision (d) ‘in a narrow manner,’ as applying only when, between sexual assaults on a single victim, a defendant temporarily lost or abandoned the opportunity to continue his attack.” People v. Jones (2001) 25 Cal.4th 98, 104, fn.2 (quoting People v. Craft (1986) 41 Cal.3d 554, 561.) *Note: It would arguably violate the ex post facto clause to apply the stricter post-amendment definition of “separate occasion” to offenses committed prior to the amendment. This may arise in § 803(g) cases.*
- f. Standard of Review: “[O]nce the trial judge resolves the issue of ‘separate occasions,’ an appellate court is ‘not at liberty to overturn the result unless no reasonable trier of fact could decide that there was a reasonable opportunity for reflection.’” (People v. Pena (1992) 7 Cal.App.4th 1294,

1314-1315 (quoting (People v. Corona (1988) 206 Cal.App.3d 13, 18, fn. 2.)

- g. Adequacy of Reasons: Remand required because COA found trial court's following factual findings inadequate to affirm separate occasion finding as to all 20 counts: "...I am making the determination ... that there was opportunity for a reflection on behalf of the defendant. This went over a duration of time these various acts were committed, then there was a brief interval. As Miss Frazier indicated, he would stop, have a brief conversation, catch his breath, go back and commit other acts. There was some moving around within the house when these acts were committed. In other words, at one point in time several of the acts were in one room, they went on into another room when the acts continued there.'" (People v. Irvin (1996) 43 Cal.App.4th 1063
- h. Examples *Finding Separate Occasions*:
- (1) All of the acts took place in the victim's apartment, with no break in the defendant's control over the victim. Separate occasions (i.e. five acts with opportunity to reflect before each act): (1) forced oral copulation in bathroom; (2) moved V to bedroom before digital penetration; (3) listened to answering machine and punched holes in wall before another act of oral copulation; (4) did not get up, but stopped oral cop., slid down and slapped victim for five minutes before raping her; (5) further acts of oral cop and rape and three phone calls preceded final act of oral copulation. (People v. Plaza (1995) 41 Cal.App.4th 377, 385.)
  - (2) Mandatory consecutive sentence for a rape was proper where defendant committed various sexual assaults in his car, left the car for five minutes, and then returned to he car to commit the rape which was subject to the mandatory consecutive term. (People v. Corona (1988) 206 Cal.App.3d 13, 18.)

- (3) Multiple perpetrators: “sexual assaults on the same victim occur on ‘separate occasions’ as that term is used in section 667.6, subdivision (d) when the assaults are personally committed by different persons even if one follows the other in rapid succession.” (People v. McPherson (2001) 86 Cal.App.4th 527, 530.) *But query: how could the defendant reflect on his actions and resume behavior?*
- (4) Mandatory full consecutive sentences for seven counts against one victim proper where offenses were committed on different days or by different men and defendant was prosecuted as actual perpetrator as to some counts and under vicarious liability for others. (People v. Roberson (1988) 198 Cal.App.3d 860 (applying Craft pre-amendment standard.)

i. Examples Finding Offenses Not Separate Occasions:

- (1) Trial court erred in sentencing under 667.61(d) where change of positions (from rape to oral copulation) were separated by seconds, i.e. there was no opportunity to reflect. (People v. Pena (1992) 7 Cal.App.4th 1294, 1314.)
- (2) Mandatory consecutive sentences for digital penetration, oral cop and rape—all in car under D’s control—*improper* where there was no evidence of “any interval ‘between’ these sex crimes affording a reasonable opportunity for reflection; there was no cessation of sexually assaultive behavior hence defendant did not ‘resume sexually assaultive behavior.’” (People v. Corona (1988) 206 Cal.App.3d 13, 18.)

3. *Separate Victim*

- a. Two Victims is All that is Required. “The plain meaning of the term “separate victims” is different, i.e., the crimes involved different victims. The statute makes no other

requirement for its imposition. Thus, it does not matter whether the defendant commits his sexual acts upon more than one victim on the same day at the same time, or upon two victims a day apart. So long as there are two victims, subdivision (d) of section 667.6 applies.” (People v. Huber (1986) 181 Cal.App.3d 601, 631.)

**E. Right to Jury Trial:**

1. No Statutory Right: Section 667.6 does not provide a statutory right to a jury trial on multiple victim and/or separate occasion findings.
2. Post-Apprendi: People v. Vargas (2002) WL 244982 (unpublished) the Sixth Appellate District held that because a trial court’s separate occasion finding under section 667.6(d) only raises the minimum mandatory sentence, there is no federal constitutional right to a jury trial on the separate occasion finding. This appears to be correct: full term consecutive sentences are already permitted under subdivision (c), *without* the multiple victim/separate occasion finding. But, a fact used to impose discretionary full consecutive terms does increase the statutory maximum (unless the predicate offense was a § 269 offense, which already has a life top).
3. See Apprendi materials. If in Harris v. U.S. the Court expands Apprendi to provide a right to a jury trial on facts which require imposition of a minimum mandatory term, Apprendi would surely apply

**F. Upper Term Is Not Required:** When sentencing under either subdivision (c) or (d) of section 667.6, a full consecutive term does not mean an aggravated term. The sentencing court must still weigh aggravating and mitigating factors and decide on whether to impose a low, middle or upper term. (See People v. Jones (1984) 155 Cal.App.3d 153, 187.)

**G. Sentencing § 667.6(c)/(d) Counts and 1170.1 Counts Together:**

1. A term imposed consecutively under subdivisions (c) or (d) “shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any

determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.” (§ 667.6(c) and (d).)

2. “[W]hen a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1.” (People v. Pelayo (1999) 69 Cal.App.4th 115, 124.)
3. In Pelayo, sentence was **unauthorized** and re-sentencing required where court had imposed full consecutive terms on two subdivision (d) offenses and 1/3 the mid-term on two non-667.6 offenses: “by treating both of the nonviolent sex offenses as subordinate counts under the one-third the middle term rule of section 1170.1, the court effectively made one of the violent sex offenses a principal term under section 1170.1. This is not authorized by section 667.6, subdivision (d).” (Pelayo, 69 Cal.App.4th at 123.)
4. Computation Must be Done Separately: “computations under sections 1170.1 and 667.6, subdivision (d) must always be done separately and the total of the section 667.6, subdivision (d) sentences added to any sentence computed independently under section 1170.1.” (Id. at 125.)
5. Sentencing under § 667.6(d) is not permitted when there is only one violent sex offense. (People v. Rojas (1988) 205 Cal.App.3d 795, 800.)

**H. Applying Section 667.6 to Counts Sentenced Under 667.61 (One-Strike Law):** Where full consecutive life terms are mandatory under § 667.6(d), indeterminate life terms imposed for counts sentenced under section 667.61 must be imposed consecutively. (People v. Jackson (1998) 66 Cal.App.4th 182.)

**I. Applying Section 667.6 to Counts Sentenced Under § 269:** Section 667.6 and 269 are cumulative, not alternative and 667.6 can be applied to § 269 conviction where predicate offense for § 269 conviction is a listed predicate

offense under § 667.6. (People v. Jiminez (2000) 80 Cal.App.4th 286, 290-92.)

**J. Applying Section 654 To Sentencing Under Section 667.6**

1. *Single Act/Omission*: Section 654 bars multiple punishments of single acts or omissions, even when used to impose consecutive sentences under section 667.6(c). (People v. Siko (1988) 45 Cal.3d 820 (full consecutive sentences for forcible rape, forcible sodomy, and forcible lewd conduct with a child under the age of 14 years barred by section 654 where the lewd act consisted of only the rape and sodomy).)
2. *Indivisible Course of Conduct/Single Intent*: In enacting section 667.6(c), Legislature intended that multiple punishments be imposed for multiple acts committed in an indivisible course of conduct and with a single intent, i.e. section 654's single intent prong does not apply. (People v. Hicks (1993) 6 Cal.4th 784 (§ 654 did not bar multiple punishment for sex offenses and for burglary committed with intent to commit those sex offenses); see also People v. Brown (1994) 28 Cal.App.4th 591, 600 (separate acts of kidnapping and rape may be punished separately even if the intent of the kidnapping was the rape); and People v. Anderson (1990) 221 Cal.App.3d 331 (even though sole purpose of offense of penetration with a foreign objection (shotgun in the rectum) was to facilitate robbery, § 654 did not bar punishing the robbery and the penetration offenses separately because § 654's intent prong does not apply to sentencing under section 667.6(c).).)

**K. Notice**: Notice is required for sentencing under section 667.6. (People v. Belasco (1981) 125 Cal.App.3d 974.)

**V. One-Strike Law (§ 667.61)**

- A. 25 years to Life** for Any Offense Listed in Subdivision (c) under one or more circumstance listed under subdivision (d) or two or more circumstances listed under subdivision (e). (**§ 667.61(a).**)
- B. 15 years to Life** for Any Offense Listed in Subdivision (c) under one circumstance listed in subdivision (e). (**§ 667.61(b).**)

**C. Qualifying Current Offenses (§ 667.61(c)):**

1. Forcible rape (§ 261(a)(2))
2. Forcible spousal rape (§ 262(a)(1))
3. Rape or forced penetration with a foreign object in concert and by force or violence (§ 264.1)
4. Forcible lewd or lascivious acts on a minor under 14 (§ 288(b))
5. Forced penetration with a foreign object (§ 289(a))
6. Forced sodomy or oral copulation (§§ 286, 288a)
7. Lewd or lascivious acts on a minor under 14 (§ 288(a)), “unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.”
  - a. § 288.5 (continuous sexual abuse of a minor) is not a predicate offense, even though § 288 violations (which are listed in subdivision (c)) could constitute the conduct underlying the § 288.5 violation. (People v. Palmer (2001) 86 Cal.App.4th 440.)

**D. Subdivision (d) Circumstances (only one needed for 25-to-life)**

1. “The defendant has been previously convicted of an offense specified in subdivision (c) ...” (can be from foreign jurisdiction). (§ 667.61(d)(1).)
  - a. Subdivision (c)(7) is “A violation of subdivision (a) of Section 288, *unless the defendant qualifies for probation under subdivision (c) of Section 1203.66.*” Review is pending on the question of whether a prior § 288(a) conviction is a subdivision (d)(1) circumstance where the defendant was granted probation in the prior case. (People v. Hammer (S104303), rev. gr. April 17, 2002.) The Court of Appeal, analogizing to the Three Strikes Law, held that a prior conviction is a conviction even if the defendant was

granted probation. (People v. Hammer (2002) 94 Cal.App.4th 1443, 1450-1452.) The Court of Appeal, however, did not address the plain language of subdivision (c)(7).

2. Kidnapped victim & movement substantially increased risk of harm above that inherent in offense. (§ 667.61(d)(2).)
  - a. “Any substantial asportation which involves forcible control of the ... victim will satisfy the risk of harm test. ... The risk of harm test is satisfied when the victim is forced to travel a substantial distance under the threat of imminent injury by a deadly weapon.” (People v. Jones (1997) 58 Cal.App.4th 693, 713-714 (internal brackets, quotation marks and citations omitted).)
  - b. “On the other hand, when a defendant does no more than move his victim around inside the premises in which he finds him, the movement generally will be deemed insufficient.” (People v. Jones (1997) 58 Cal.App.4th 693, 713-714 (internal quotation marks and citations omitted).)
  - c. “[K]idnapping within the meaning of section 667.61, subdivision (d)(2) requires movement of the victim that is more than incidental to the underlying sex offense.” (People v. Diaz (2000) 78 Cal.App.4th 243, 246.)
  - d. **Incidental:** “[I]ncidental movements are brief and insubstantial, and frequently consist of movement around the premises where the incident began. (See, e.g., People v. Stanworth (1974) 11 Cal.3d 588, 597-600 [**25 feet from road to open field**]; People v. Mutch (1971) 4 Cal.3d 389, 397-399 [**30 to 40 feet from one room to another in business establishment**]; People v. Williams (1970) 2 Cal.3d 894, 902 [**around gas station premises**]; People v. Daniels, supra, 71 Cal.2d at pp. 1122-1125 [**5 to 30 feet within victims’ own homes**]; Cotton v. Superior Court, supra, 56 Cal.2d at pp. 463-464 [**dragging an assault victim 15 feet** insufficient to support kidnapping].)” (People v. Diaz (2000) 78 Cal.App.4th 243, 247, emphasis added.)

- e. **Not Incidental:** By contrast, relatively short distances have been found not to be incidental where the movement results in a substantial change in "the context of the environment." (See, e.g., People v. Rayford [(1994) 9 Cal.4th 1, 23] [**105 feet at night from parking lot to less visible location next to wall in adjacent empty lot** not incidental to intended rape]; People v. Jones (1999) 75 Cal.App.4th 616, 629-630 [**25 to 40 feet across a school parking lot and into the victim's own car** not incidental to intended robbery, where defendant intended to drive away but victim immediately escaped]; People v. Salazar (1995) 33 Cal.App.4th 341, 347 [**29 feet from outside motel room door, through the room, and into a bathroom** not incidental to intended sexual assault].)" (People v. Diaz (2000) 78 Cal.App.4th 243, 247.)

- 3. Inflicted aggravated mayhem (§ 205) or torture (§ 206) of victim or another person. (§ 667.61(d)(3.))
- 4. During a burglary committed with intent to commit a subdivision (c) offense. (§ 667.61(d)(4.))

**E. Subdivision (e) Circumstances (two needed for 25-to-life; one needed for 15-to-life)**

- 1. *Kidnapping* (except as described in 667.61(d)(2))
- 2. *Except as described in subdivision (d)(4), during a burglary as defined in § 460(a) or during "a burglary of a building, including any commercial establishment, then closed to the public ...."*
  - a. "the commission of a specified sex offense during a burglary is within the statute if the business is closed when the sex offense is committed," i.e. the business need not be closed when the burglary was committed (People v. Palmore (2000) 79 Cal.App.4th 1290, 1296.)
- 3. *Personally inflicted GBI*

4. *Personally used a dangerous or deadly weapon or firearm* “in the commission of” the current offense.
  - a. “[T]he phrase ‘in the commission of’ has the same meaning for the purposes of [§] 12022.3, subdivision (a), and 667.61, subdivision (e)(4), as it does under the felony murder provisions.” (People v. Jones (2001) 25 Cal.4th 98, 109.)
  
5. *Multiple victims* in the current subdivision (c) case
  - a. Legislature intended that multiple victim circumstance can be used to impose separate life terms under § 667.61 for each victim, and this does not violate § 654 or double jeopardy protections. (People v. DeSimone (1998) 62 Cal.App.4th 693; People v. Murphy (1998) 65 Cal.App.4th 35, 40-41.)
  
6. *Tying or binding*
  - a. Covering eyes with tape qualifies: “[Defendant’s] actions here came within the statutory prohibition on tying or binding of the victim during the course of the forcible sodomy he committed, in that binding the victim’s head with tape rendered her more vulnerable, the superior court erred in setting aside the tying or binding allegation.” (People v. Campbell (2000) 82 Cal.App.4th 71, 79.)
  - b. Tying or binding provision is not unconstitutionally vague. (Id. at 79-80.)
  
7. Forcibly administered a controlled substance to the victim

**F. Subdivision (d) and (e) Circumstances Must be Used Under the One Strike Law First. (§ 667.61(f))**

1. “If only the minimum number of circumstances specified in subdivision (d) or (e) ... have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty.” (§ 667.61(f))

2. If the minimum number of circumstances are used, “any other additional circumstances shall be used to impose any punishment or enhancement authorized under any other law.” (§ 667.61(f))

**G. Single Victim:**

1. *Only One Enhanced Term For “Single Occasion”*: The enhanced terms under § 667.61 “shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion.” (§ 667.61(g).)
2. “[S]ex offenses occurred on a ‘single occasion’ if they were committed in a close temporal and spatial proximity.” (People v. Jones (2001) 25 Cal.4th 98, 107.)
3. The meaning of “single occasion” is not the same as “separate occasion,” as that term is used in section 667.6(d). (People v. Jones (2001) 25 Cal.4th 98, 104-107.)
4. “Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.” (§ 667.61(g).)

**H. Once for Each Victim:**

1. “If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim.” (§ 667.61(g).)
2. Multiple terms under § 667.61 are required even when the only circumstance alleged is multiple victims. (People v. Murphy (1998) 65 Cal.App.4th 35, 40-41.)

- I. Probation:** No probation for any of the listed offenses, except for the offense described in (§ 667.61(c)(7)--Lewd or lascivious acts on a minor under 14 (§ 288(a)).)

**J. Plead & Proved:**

1. *Statutory Language:* “For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (§ 667.61(I).)
2. *Must Be Expressly Alleged in Charging Document:* Where multiple-victim circumstance (§ 667.61(e)(5)) was not alleged in information, it could not be used to impose a one-strike sentence, despite the fact that the information alleged subdivision (c) offenses against more than one victim and the jury convicted on those offenses. (People v. Mancebo (2002) 27 Cal.4th 735.)
  - a. The Court in Mancebo relied heavily on the express language of subdivisions (f) and (I), and explained it is not just the *facts* that must be plead and proven, but the *circumstances* as described in subdivisions (d) and (e). (Id. at 744-745.) Subdivision (f) was implicated because the trial court had used the un-alleged multiple victim circumstance to impose the one-strike sentence in order to free up a gun-use allegation, which had been alleged as a one-strike predicate circumstance, to impose a separate and consecutive 10-year 12022.5(a) term.
  - b. The decision turned, in part, on the Court’s perception of a due process lack-of-notice problem. (Id. at 747, 755.)
  - c. The prosecutor’s failure to allege the circumstance in the information “must be deemed a discretionary charging decision. ... Under these circumstances, the doctrines of waiver and estoppel, rather than harmless error, apply.” (Id. at 749.)
3. *Failure to Instruct*
  - a. There is a *sua sponte* duty to instruct on the elements of the subdivision (d) and (e) circumstances. (People v. Jones

(1997) 58 Cal.App.4th 693, 708; People v. Estrada (1997) 57 Cal.App.4th 1270, 1275.)

- b. Failure to instruct on subdivision (d) and (e) circumstances is subject to harmless error analysis and there is no error if the jury necessarily found the allegations true under other properly given instructions. (People v. Jones (1997) 58 Cal.App.4th 693.)
- c. In Jones, the circumstance was alleged in the information. “The Jones case simply did not present the due process lack of notice/pleading problems implicated here ....” (Mancebo, supra, 27 Cal.4th at 748.)
- d. Because right is only statutory, instructional error is reviewed for prejudice under Watson. (People v. Estrada (1997) 57 Cal.App.4th 1270, 1276.)
- e. See Apprendi Materials as to why there is a federal constitutional right and erroneous instruction should be reviewed under Chapman.

**K. No Romero/PC § 1385 Discretion to Strike a Subdivision (d) or (e) Circumstance (§ 667.61(f)).** “Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).” (§ 667.61(f)) People v. Estrada (1997) 57 Cal.App.4th 1270, 1277; People v. Espino (1997) 53 Cal.App.4th 92, 95- 96.

**L. Applying Section 667.6 to Counts Sentenced Under 667.61 (One-Strike Law):** Where full consecutive life terms are mandatory under § 667.6(d), indeterminate life terms imposed for counts sentenced under section 667.61 must be imposed consecutively. (People v. Jackson (1998) 66 Cal.App.4th 182.)

**M. Sentencing Under Both One Strike and Three Strike Laws. (REVIEW PENDING)**

- 1. *Using One Prior Twice (Under Both Laws):* Because section 667.61(f) limits the use of one-strike “circumstances,” a single prior conviction can be used only once to impose a 25-to-life term and

may not be used as both a § 667.61(d)(1) circumstance and as a strike. (People v. Acosta (2000) 80 Cal.App.4th 714, rev. gr. 8/23/2000, no. S089120, (TO BE ARGUED MAY 29, 2002); People v. Cervantes (2002) 95 Cal.App.4th 598, rev. gr. 4/10/2002, no. S104974 (grant and hold); People v. Johnson (2002) 96 Cal.App.4th 188, 195-198.)

2. *One-Strike and Three-Strike Laws are Cumulative:* A 25-to-life term imposed under § 667.61 must be doubled under the Three Strikes Law, when the defendant has one prior strike. (*Id.*; People v. Graves (2000) 80 Cal.App.4th 1336, rev. gr. 8/23/2000, no. S089533 (grant and hold); People v. Johnson (2002) 96 Cal.App.4th 188, 195-198.)
3. *Dual Use of One Prior as a § 667.61(d)(1) Circumstance and As a Strike to Enhance an Offense Not Sentenced Under § 667.61 is Permitted.* (People v. Johnson (2002) 96 Cal.App.4th 188, 198.)

**N. Sentencing Under Both One-Strike Law and § 667(a) (5-Year Priors):** Dual use of one prior as a § 667.61(d)(1) circumstance and to impose a five-year § 667(a) prior serious felony enhancement is permitted. (People v. Johnson (2002) 96 Cal.App.4th 188, 198-202.)

**O. Sentencing Under Both One-Strike (§ 667.61) and Habitual Sexual Offender Law (§ 667.71)**

1. *Pre-1998 Amendment:*
  - a. *Alternative Schemes:* One-Strike Law and Habitual Sexual Offender Law are alternative sentencing schemes. Sentencing under both is not permitted. Prior to a 1998 amendment, section 667.71 specified that “at the request of the prosecutor,” and “in lieu of” sentencing under section 667.71, the sentencing court could sentence under, among other provisions, § 667.61. Thus, prior to the amendment, “section 667.61 was considered a possible sentencing alternative to the exclusion of section 667.61, provided the prosecutor requested such alternative sentence.” (People v. Johnson (2002) 96 Cal.App.4th 188, 204-206, esp. 205.)

- b. *Prosecutor's Request Not Required:* On remand, trial court could exercise its discretion to sentence under § 667.71, instead of § 667.61, even though there was no prosecutorial request. Eliminating requirement of prosecutorial request eliminates constitutional problems. (People v. Johnson (2002) 96 Cal.App.4th 188, 206-207.)
2. *Post-1998 Amendment:* The 1998 amendment deleting the “in lieu of” provision, did not manifest an intent to permit cumulative sentencing under §§ 667.61 and 667.71. Rather, the intent was merely to eliminate any separation of powers problems creating by allowing the court to make the decision only on the request of the prosecutor. Accordingly, §§ 667.61 and 667.71 remain alternative, not cumulative sentencing schemes. (People v. Snow (2002) 96 Cal.App.4th 239, rev. gr. 5/1/2002, no. S105345, gr. & hold pending People v. Acosta, S089120 and People v. Cornelius, S068743.)

**P. Applying § 654 to Sentencing Under § 667.61:**

1. Imposition of a One Strike sentence for rape during a burglary and a separate sentence for robbery does not violate section 654. (People v. Alvarado (2001) 87 Cal.App.4th 178, 196; People v. Palmore (2000) 79 Cal.App.4th 1290, 1297-1298 (Appellant “claim[ed] the robbery was ‘the predicate offense of the burglary,’ and therefore he cannot be sentenced for both robbery and the special circumstance contained in section 667, subdivision (e)(2).”)

**Q. Cruel and Unusual Punishment:**

1. 15-to-life term for rape in the commission of a burglary not cruel and/or unusual. (People v. Alvarado (2001) 87 Cal.App.4th 178, 199-201.)
2. 25-to-life for rape in commission of a burglary not cruel and/or unusual where “[Defendant] stresses he was 38 years old when he committed this offense, he has **no prior felony convictions** of any kind and his only previous brush with the law was one incident which resulted in his being convicted of vandalism and disturbing the peace. In committing the present offense, he **used no weapon** and made **no threats** of present or future harm to the victim.

Although some pushing and shoving occurred during the rape, he **did not strike the victim or choke her or cause any harm to her beyond the physical and psychological harm inherent in the crime of rape.** When the rape was completed he **expressed remorse and asked the victim to forgive him.**” (People v. Estrada (1997) 57 Cal.App.4th 1270, 1277-1282, emphasis added.)

## VI. Enhancements Generally

- A. **No limitation on Enhancements for Offenses Listed in § 667.6:** Section 1170.1(h) provides that “For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.” (See e.g. People v. Crooks (1997) 55 Cal.App.4th 797 (construing former subd. (i), the predecessor to current subd. (h)).)

## VII. Kidnapping Victim to Commit Sexual Offense (§ 667.8)

- A. **Additional 9 years for kidnapping** (§§ 207 or 209), for the purpose of committing felony violations of §§ 261 (rape), 262 (spousal rape); 264.1 (rape or penetration with foreign object in concert); 286 (sodomy); 288a (oral copulation); 289 (penetration with a foreign object). (§ 667.8(a))
- B. **Additional 15 years for kidnapping victim under 14** for purpose of committing a felony violation of §§ 286(c) (sodomy with minor under 14 and 10 years younger than D, or by force, or by threat of retaliation); 288 (lewd acts); or 288a(c) (oral copulation with minor under 14 and 10 years younger than D, or by force, or by threat of retaliation). (§ 667.8(b))
- C. **Limitations**
1. Only one enhancement “for a victim per incident” (§ 667.8(c)(1))
    - a. “In enacting the kidnapping enhancement, the Legislature intended it to be imposed **only once per kidnapping**, regardless of how many sexual offenses are committed during the kidnapping.” (People v. Douglas (1995) 39 Cal.App.4th 1385, 1392, emphasis added.)

2. “one enhancement can be imposed for each victim per incident.” (§ 667.8(c)(2))
3. § 667.8 enhancement may be in addition to punishment for either, but not both, the kidnapping or the sexual offense. (§ 667.8(c)(3).)

**D. Pled and Proven:** Although section 667.8 does not contain a pleading and proof requirement, one is implied as a matter of due process. (People v. Hernandez (1988) 46 Cal.3d 194, 197.)

### **VIII. Vulnerable Victim Enhancement (§ 667.9)**

- A. One-year enhancement for listed crimes against vulnerable victims. (§ 667.9(a).) (Two years if defendant has a prior conviction for one of the listed offenses. (§ 667.9(b).))
- B. Section 667.9(c) lists the **predicate crimes** which include the following sex offenses: “...(5) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261. (6) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262. (7) Rape, spousal rape, or sexual penetration in concert, in violation of Section 264.1. (8) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286. (9) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a. (10) Sexual penetration, in violation of subdivision (a) of Section 289...”
- C. **Vulnerable victims include:** “a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, a paraplegic, or a quadriplegic, or against a person who is under the age of 14 years, and that disability or condition is known or reasonably should be known to the person committing the crime.” (§ 667.9(a).)

### **IX. Penetration With Foreign Object Against a Vulnerable Victim With Like Prior (§ 667.10.)**

- A. **Two years** are added for each § 289 violation against a vulnerable victim when the defendant has a prior § 289 conviction. (§ 667.10(a).)
- B. **Must be Pled and Proven.** (§ 667.10(b).)

**X. Exhibiting Sexually Explicit Material to a Minor Prior To or During a § 288 or § 288.5 Offense (§ 667.15.)**

- A. Proscribed Conduct: Showing to a minor sexually explicit material—the production of which depicts a minor under 14 engaged in sexual conduct—prior to or during the commission (or attempted commission) of a violation of section 288 or 288.5, with intent to seduce the minor or with the intent to arouse the defendant or the minor.
- B. Applies to adult defendants only.
- C. Punishment
  - 1. One additional year if convicted of a violation of § 288.
  - 2. Two additional years if convicted of a violation of § 288.5

**XI. Day Care Worker Committing Sex Offense Against Minor (§ 674)**

- A. **Additional Two Years:** Day care worker convicted of violating 261, 285, 286, 288, 288a, or 289 against “a minor entrusted to his or her care ... may be punished by an additional term of two years.” (§ 674(a).)
- B. **Additional Three Years if Acting in Concert** (§ 674(b).)

**XII. Firearm or Deadly Weapon In Commission of Listed Sex Offenses (Pen. Code § 12022.3)**

- A. **Use of a Firearm or Deadly Weapon** “in the commission of” violations of 261, 262, 264.1, 286, 288, 288a or 289: additional **3, 4 or 10** years. (§ 12022.3(a).)
- B. **Arming With Firearm or Deadly Weapon:** additional **1, 2 or 5** years. (§ 12022.3(b).)
- C. **Use or Arming Must Be *Personal*:** “an enhancement pursuant to Penal Code section 12022.3 for using or being armed with a firearm or deadly weapon during the commission of certain sex crimes can be imposed only when the defendant “personally” uses or is armed with the weapon. (People v. Rener (1994) 24 Cal.App.4th 258, 259.)

**D. “In the Commission of.”**

1. “[T]he phrase ‘in the commission of’ has the same meaning for the purposes of [§] 12022.3, subdivision (a), and 667.61, subdivision (e)(4), as it does under the felony murder provisions.” (People v. Jones (2001) 25 Cal.4th 98, 109.)
2. The commission of a sex offense “does not end with the completion of the sex act, but continues as long as the assailant maintains control over the victim.” (People v. Jones (2001) 25 Cal.4th 98, 109.)
3. Gun use is “in commission of” sexual offense when D displayed gun right before tying victims, although an hour passed—during which he robbed and tortured victims—before he raped and sodomized one victim. (People v. Masbruch (1996) 13 Cal.4th 1001, 1006 -1007.)

**E. Enhancement Applies to Unloaded/Inoperable Firearms:** “Section 12022.3(a) applies even though the firearm was unloaded or inoperable at the time of the crime. (See People v. Bland [(1995) 10 Cal.4th 991], 1004-1005 [§ 12022, subd. (a)(2), applicable although gun unloaded]; People v. Nelums (1982) 31 Cal.3d 355, 358-360 [§ 12022, subd. (a), applicable although firearm inoperable]; People v. Steele (1991) 235 Cal.App.3d 788, 795 [§ 12022.3(a) applicable although firearm unloaded].)” (People v. Masbruch (1996) 13 Cal.4th 1001, 1006 -1007.)

**F. Multiple Enhancements For Same Sexual Offense Not Permitted:** “the trial court could have imposed an enhancement either for defendant's personal use of a knife during the crime or for defendant's personal use of a knife during the crime or for defendant's being armed with a rifle during the crime, but not both.” (People v. MacIel (1985) 169 Cal.App.3d 273, 279.)

**G. Section 12022.53 May Supersede § 12022.3 in Some Cases**

1. § 12022.53 (added in 1997) applies to all of the offenses which can be enhanced under § 12022.3. (Compare § 12022.3 with § 12022.53, subd. (a)(8)-(13).)
2. § 12022.53 provides for 10-year enhancement for personal firearm use (subd. (a)); 20-year enhancement for personally discharging

firearm (subd. (b)); 25-to-life for personally discharging firearm and causing GBI or death (subd. (c)).

3. If § 12022.53 applies, section 12022.3 does not. (§ 12022.53(f)). This means that the low-terms (3 years) and mid-terms (4 years) provided for in § 12022.3(a) for personal firearm use are obsolete (assuming the district attorney charges under § 12022.53).
4. § 12022.53 applies to firearm use only. The low- and mid- terms provide for in § 12022.3(a) still are available to non-firearm weapon use.
5. § 12022.53 enhancements apply to all principals when the offense is committed for the benefit of a criminal street gang; § 12022.3(a) always requires personal use.

### **XIII. Committing Sex Offense With Defendant Knowing That He/She is HIV-Positive (§ 12022.85)**

- A. **Underlying Offenses:** violations of 261, 261.5, 262, 286, 288a. (§ 12022.85(b))
- B. **Three-year enhancement** if commits listed offense “with knowledge that he or she has acquired immune deficiency syndrome (AIDS) or with knowledge that he or she carries antibodies of the human immunodeficiency virus at the time of the commission of those offenses.” (§ 12022.85(a))

### **XIV. Penal Code section 654**

#### **A. Multiple Sex Offenses: *Single Act***

1. § 654 bars punishing same act twice. (People v. Siko (1988) 45 Cal.3d 820 (full consecutive sentences for forcible rape, forcible sodomy, and forcible lewd conduct with a child under the age of 14 years barred by section 654 where the lewd act consisted of only the rape and sodomy).) (People v. Scott (1994) 9 Cal.4th 331,344, fn.6 (“A defendant who sexually assaults a child under age 14 can be convicted under section 288 and another applicable statute for the same criminal act. However, he cannot be separately punished for each such offense.”))

**B. Multiple Sex Offense: *Multiple Acts***

1. *Sex is Different*: As described below, the single intent test of section 654 operates differently in the sex offense context.
2. Because a “defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act,” the Supreme Court has declined “to extend the single intent and objective test of section 654” beyond the framework set forth in Neal v. State of California (1960) 55 Cal.2d 11, 19. (Perez (1979) 23 Cal.3d 545, 553.)
3. “Section 654 in the sexual offense area means that the prohibition against double punishment will apply when one offense is committed as a means of committing another, facilitates commission of any other, or is incidental to commission of any other. (People v. Perez (1979) 23 Cal.3d 545, 553-554).” (People v. Roberson (1988) 198 Cal.App.3d 860, 871 (Section 654 violated where appellant was sentenced for both procuring a minor for lewd acts (§ 266j) and for the lewd acts committed by a third party (§ 288(b)).)
4. “[S]ection 654 does not bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim with the ‘sole’ aim of achieving sexual gratification.” (People v. Harrison (1989) 48 Cal.3d 321, 325 (three digital penetrations separated by and interrupted by victim pulling away.)
5. Perez test applies even when “wholly identical sex offenses have been committed in sequence.” (Harrison, 48 Cal.3d at 336.)
6. *Multiple Convictions* (this is not a § 654 analysis but gives context to § 654 considerations): “[M]ultiple, nonconsensual sex acts of an identical nature, committed in short succession against a single victim, constitute a single offense.” (People v. Harrison (1989) 48 Cal.3d 321, 334 (“each of the digital penetrations committed in the course of defendant’s assault upon Virginia N., and highlighted by intervening acts of force, constituted a separate violation of section 289, subdivision (a)”.)

7. *“Independent Sexual Gratification” Supplants “Incidental”*: “Courts no longer assume that fondling offenses are ‘incidental’ to other sex crimes within the meaning of section 654, or that they are exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act.” (People v. Scott (1994) 9 Cal.4th 331,348 fn.9 (citing People v. Madera (1991) 231 Cal.App.3d 845, 855; People v. Bright (1991) 227 Cal.App.3d 105, 110; People v. Blevins (1984) 158 Cal.App.3d 64, 71-72.)
8. Multiple § 288 lewd acts convictions and punishment is permitted for fondling of breast, buttocks and vagina during intercourse. (People v. Scott (1994) 9 Cal.4th 331.)
9. Sentence for sexual battery must be stayed under § 654 where that offense shared the same intent as the separately punished assault with intent to commit rape. (People v. Bradley (1993) 15 Cal.App.4th 1144, 1158 (disagreed with on other grounds in People v. Rayford (1994) 9 Cal.4th 1).)
10. Although offenses may have shared broad common objective of sexual gratification, multiple punishment for kidnapping and assault to commit rape was permitted where the movement of the victim which constituted the kidnapping was an act distinct from the assault and where the assault enhanced his culpability over the kidnapping. (Bradley, 15 Cal.App.4th at 1157-1158.)
11. Multiple punishment for digital penetration of rectum and for sodomy is permitted because of distinct purposes of degradation and sexual gratification, no matter that insertions were close in time. (People v. Saffle (1992) 4 Cal.App.4th 434, 441-443.)
12. This section did not preclude separate sentences on separate counts of lewd and lascivious acts upon a child under the age of 14 years, where none of the lewd acts were necessary for or incidental to any other charged lewd act. (People v. Bright (1991) 227 Cal.App.3d 105 (post-Harrison.)

**C. Sex Offenses and Non-Sex Offenses**

1. If intent in committing burglary was to commit sex offense, separate punishment for burglary is barred by § 654 (People v. Mixon (1990) 225 Cal.App.3d 1471, 1487), unless sentencing is pursuant to section 667.6 (see section D below).
2. Where intent behind kidnapping was to facilitate rapes, defendant could not be punished for both rapes and kidnapping. (People v. Latimer (1993) 5 Cal.4th 1203.)

**D. Application of Section 654 to Sentencing Under § 667.51:** § 654 does not bar multiple 15-life-terms under § 667.51 based on same prior convictions. (People v. Decker (1988) 199 Cal.App.3d 694.)

**E. Application of Section 654 to Sentencing Under § 667.6**

1. *Single Act/Omission:* Section 654 bars multiple punishments of single acts or omissions, even when used to impose consecutive sentences under section 667.6(c). (People v. Siko (1988) 45 Cal.3d 820 (full consecutive sentences for forcible rape, forcible sodomy, and forcible lewd conduct with a child under the age of 14 years barred by section 654 where the lewd act consisted of only the rape and sodomy).)
2. *Indivisible Course of Conduct/Single Intent:* In enacting section 667.6(c), Legislature intended that multiple punishments be imposed for multiple acts committed in an indivisible course of conduct and with a single intent, i.e. section 654's single intent prong does not apply. (People v. Hicks (1993) 6 Cal.4th 784 (§ 654 did not bar multiple punishment for sex offenses and for burglary committed with intent to commit those sex offenses); see also People v. Brown (1994) 28 Cal.App.4th 591, 600 (separate acts of kidnapping and rape may be punished separately even if the intent of the kidnapping was the rape) and People v. Anderson (1990) 221 Cal.App.3d 331 (even though sole purpose of offense of penetration with a foreign objection (shotgun in the rectum) was to facilitate robbery, § 654 did not bar punishing the robbery and the penetration offenses separately because § 654's intent prong does not apply to sentencing under section 667.6(c).)

3. Multiple punishment permitted for sex offense and for false imprisonment committed after completion of sex offense where purpose of false imprisonment was prevent victim from reporting the sex offenses. (People v. Saffle (1992) 4 Cal.App.4th 434, 437-440.)

**F. Using One Prior As Strike and as Prior Conviction Under § 667.71.**

Using same prior as a strike and as a prior conviction under § 667.71 does not violate § 654 because “both the Three Strikes Law and section 667.71 apply to the *fact* of the defendant’s recidivism, not to an act or omission within the meaning of section 654.” (People v. Murphy (2001) 25 Cal.4th 136, 155.)

**G. Applying § 654 to Sentencing Under § 667.61:**

1. Imposition of a One Strike sentence for rape during a burglary and a separate sentence for robbery does not violate section 654. (People v. Alvarado (2001) 87 Cal.App.4th 178, 196; People v. Palmore (2000) 79 Cal.App.4th 1290, 1297-1298 (Appellant “claim[ed] the robbery was ‘the predicate offense of the burglary,’ and therefore he cannot be sentenced for both robbery and the special circumstance contained in section 667, subdivision (e)(2).”))

**H. Multiple Uses of Multiple-Victim Circumstance Under Section**

**667.61(e)(5):** Legislature intended that multiple victim circumstance can be used to impose separate life terms under § 667.61 for each victim, and this does not violate § 654 or double jeopardy protections. (People v. DeSimone (1998) 62 Cal.App.4th 693; People v. Murphy (1998) 65 Cal.App.4th 35, 40-41.) DeSimone distinguished the multi-murder special circumstance which can be alleged only once per case. Desimone reasoned that the due process concerns present in the death penalty context—i.e. more than one multi-murder special circumstance allegation inflates the risk that the jury will vote for death based on the sheer number of special circumstances—are not present in a One-Strike sex offense case. (62 Cal.App.4th at 701-702.) Arguably DeSimone is simply wrong and similar due process concerns are present in the One Strike situation..

## XV. Recidivist Statutes

### A. Lewd/Lascivious Acts on Minor With Prior Sex Offense (§ 667.51.)

1. Current § 288 conviction with one prior conviction for violating either § 261, 264.1, 285, 286, 288, 288a, 288.5 or 289. (§ 667.51(a) and (b).)
  - a. 5-year enhancement for each prior
  - b. 10-year washout period.
2. Current § 288 conviction with two or more prior convictions for violating § 261, 264.1, 286, 288, 288a, 288.5 or 289. (§ 667.51(c) and (d).)
  - a. 15-to-life
  - b. no washout period
  - c. Caveat: “[I]f two or more prior convictions were for violations of Section 288, this subdivision is applicable only if the current violation or at least one of the prior convictions is for an offense other than a violation of subdivision (a) of section 288.” (§ 667.51(d).)
3. *Mandatory/No Reasons Required*: Section 667.51 is a mandatory sentencing provision and the sentencing court is not required to state reasons for sentencing under § 667.51. (People v. Vargas (1985) 175 Cal.App.3d 271.)
4. *Sentencing Provision (Not a discrete crime)*: Section 667.51 is a sentencing provision, not an offense. Defendant may admit a section 667.51 prior conviction allegation in order to keep it from the jury. (People v. Webb (1992) 7 Cal.App.4th 575.)

5. *Multiple Current Counts*

- a. 15-to-life term under § 667.51(d) (formerly (c)) is a sentencing provision, not an enhancement. Accordingly it may be imposed as to each current count. (People v. Decker (1988) 199 Cal.App.3d 694 (distinguishing § 667.6 prior conviction enhancements which may be imposed just once per case. (People v. Tassell (1984) 36 Cal.3d 77, 90.)
- b. § 654 does not bar multiple 15-life-terms under § 667.51 based on same prior convictions. (People v. Decker (1988) 199 Cal.App.3d 694.)

**B. Prior Forcible Sex Offense (§ 667.6.)**

1. *Current Forcible Sex Offense with Prior Forcible Sex Offense* (§ 667.6(a)):
  - a. Current forcible sex offense is enhanced by *five years* for each prior forcible sex offense *conviction*. (§ 667.6(a).)
  - b. Qualifying current and prior offenses: same as those listed under subdivisions (c) (*supra*), except a violation of section 220 (assault with intent to commit listed sex offenses) is not included under subdivision (a).
  - c. **Washout period:** no enhancement for any conviction prior to any 10-year period in which the defendant was free of prison custody and the commission of any offense resulting in a felony conviction.
2. *Prior Prison Term for Forcible Sex Offense* (§ 667.6(b)): Current forcible sex offense is enhanced by ten years for each prior prison term for any qualifying offense, if the defendant has at least two such prior prison terms (as defined in section 667.5).
3. *Foreign Convictions:* Although subdivision (b) contains no reference to foreign convictions, such convictions can be prior offenses under section 667.6. (People v. Johnson (1995) 33 Cal.App.4th 623.)

4. *Dual Use of Priors*

- a. Single Current Offense: Same prior conviction cannot be used to enhance current conviction under both § 667(a) (five year serious felony prior) and § 667.6(a) (prior forcible sex offense). (People v. Flournoy (1994) 26 Cal.App.4th 1695, 1697-1702.)
- b. Flournoy was not decided under section 654, rather on the basis that “in enacting section 667 when section 667.6 was already law, the voters undoubtedly did not intend the two enhancements to be cumulative.” (Id. at 1701.)
- c. Because section 1385(b) prohibits striking a section 667(a) enhancement, remedy is to strike the section 667.6(a) enhancement. (Id. at 1702.)
- d. Multiple Current Offenses: § 667.6 prior conviction enhancements are to be added once, as a component of the aggregate term, and not on each count or conviction. (People v. Tassell (1984) 36 Cal.3d 77, 90, overruled on another ground in People v. Ewoldt (1994) 7 Cal.4th 380, 386-387.)
- e. Multiple Convictions “Brought and Tried” Together:
  - (1) A rape conviction “brought and tried” with a kidnapping conviction can be used to enhance under section 667.6(a), even when the kidnapping conviction is used to impose a 5-year serious felony enhancement under section 667(a). (People v. Shea (1995) 39 Cal.App.4th 1257, 1275.)
  - (2) “There is little doubt that in enacting section 667.6, the Legislature had a purpose distinct from section 667, subdivision (a). Clearly, it intended that violent sex offenders, the most incorrigible subset of ‘serious’ felons, be subject to greater prison terms than mere ‘serious’ offenders. It accomplished that purpose by omitting from section 667.6 the ‘on charges brought and tried separately’ restriction included in section

667, subdivision (a).” (People v. Shea (1995) 39 Cal.App.4th 1257, 1275 (disagreeing with People v. Jones (1993) 12 Cal.App.4th 1106).)

5. *Dual Use of Facts*: “Although the dual use of facts rule consequently applies to this case, it was not violated. The aggravating factor that defendant was on parole when he committed these crimes reflects the breach of the terms of his special custodial status; the consecutive enhancement, on the other hand, was imposed for the repeated commission of forcible sex offenses within a period of time specified in section 667.6, subdivision (a). Palpably different factors are involved.” (People v. Jerome (1984) 160 Cal.App.3d 1087, 1098.)

### C. **Habitual Sexual Offender (§ 667.71)**

#### 1. *Elements*:

- a. An habitual sexual offender is a person convicted in the current case of an offense listed under subdivision (c), and who has one or more prior convictions for a subdivision (c) offense. (§ 667.71(a).)
- b. Listed offenses are extensive and includes foreign convictions. (See § 667.71(c) for complete list.)

#### 2. *Penalty*:

- a. A habitual offender is sentenced to 25 years to life. (§ 667.71(b).)
- b. *Multiple Current Offenses*: consecutive 25-to-life terms may be imposed for each new qualifying conviction. (People v. Murphy (2001) 25 Cal.4th 136, 151.)

3. *Plead and Proven*: Habitual offender status must be alleged and either admitted or found true by jury or court. (§ 667.71(d).)

4. *Sentencing as Both Habitual Sexual Offender and as Three Striker*
  - a. No § 654 Violation: Using same prior as a strike and as a prior conviction under § 667.71 does not violate § 654 because “both the Three Strikes Law and section 667.71 apply to the *fact* of the defendant’s recidivism, not to an act or omission within the meaning of section 654.” (People v. Murphy (2001) 25 Cal.4th 136, 155, emphasis in original.)
  - b. Legislative Intent: “[T]he statutes disclose a legislative intent that the Three Strikes law apply *in addition to* section 667.71.” (People v. Murphy (2001) 25 Cal.4th 136, 157, emphasis in original.)
  - c. 25-to-life term under § 667.71 is tripled under the Three Strikes Law. (People v. Murphy (2001) 25 Cal.4th 136, 158-159.)
5. *Sentencing Under Both § 667.61 and § 667.71*: See discussion of § 667.61.

**XVI. Probation**

**A. Ineligible (Absolute Bar)**

1. § 1203.065(a): No probation for rape (§ 261(a)(2)); rape/penetration w/foreign object in concert (§ 264.1); pimping (§ 266h); pandering (§ 266i); procurement of minor under 14 for lewd acts (§ 266j); penetration with foreign object (§ 289(a)), forcible sodomy (§ 286); forcible oral copulation (§ 288a); non-commercial filming of minor in sexual conduct (§ 311.4(c)).
  - a. Because subdivision (c) of section 311.4 is expressly listed in subdivision (a) of section 1203.065, a defendant convicted of violating subdivision (c)---noncommercial filming of sexual conduct—is probation ineligible, even though a defendant convicted of violating subdivision (b) of Section 311.4 *commercial* filming of sexual conduct, would not be ineligible for probation. (People v. Pecci (1999) 72 Cal.App.4th 1500, 1503-1505.)

- b. Cruel and Unusual? Absolute bar to probation for defendant convicted of pimping and/or pandering is not cruel and unusual punishment. (People v. McNulty (1988) 202 Cal.App.3d 624; People v. Jeffers (1987) 188 Cal.App.3d 840.) Absolute bar to probation for forcible oral copulation is not cruel and unusual. (People v. Hesslink (1985) 167 Cal.App.3d 781, 794-795.)
    - c. § 1385 Does Not Apply: “when proper findings under section 1203.065, subdivision (a), have been made, the mandatory provisions of that section may not be avoided by the court’s exercising its authority under section 1385.” (People v. Hesslink (1985) 167 Cal.App.3d 781, 794.)
- 2. § 1203.066: No probation for violations of § 288 or 288.5 which (1) are forcible; (2) caused bodily injury; (3) committed by a stranger or person who befriended child for purposes of offense; (4) used a weapon; (5) prior convictions for specified sex offenses; (6) kidnapping; (7) multiple victims; (8) substantial sexual contact with victim under 14; (9) used obscene matter or matter depicting sexual conduct. § 1203.066(a)
  - a. Plead and Proven: Facts rendering defendant probation ineligible under § 1203.066(a) must be plead and proven. (§ 1203.066(d).)
  - b. § 1385 Does Not Apply: Court may not strike probation ineligibility allegation under § 1385. (§ 1203.066(a); People v. Cowan (1987) 194 Cal.App.3d 756.)
- 3. EXCEPTION (§ 1203.066(c)): The probation bar for 288 and 288.5 convictions involving multiple victims; substantial sexual contact with victim under 14, or use of obscene matter or matter depicting sexual conduct (subds. (c)(7), (8) & (9)), does not apply if (1) the defendant is a relative or member of the victim’s household; (2) a grant of probation is in the child’s best interest; (3) rehabilitation is feasible, defendant is amendable to rehab and immediately enters child molestation program; (4) defendant is removed from the household until court determines returning is in the child’s best interest; (5) there is no threat of physical harm to the child.

4. *Definition of Relative*: Review is pending on whether the long-time, live-in companion of the grandmother of the victims, qualifies as a “relative” of the victims, within the meaning of § 1203.066(c)(1), and thus is eligible to be granted probation for a § 288(a) offense. (People v. Wutzke (2000) 83 Cal.App.4th 622, rev. gr. Dec. 20, 2000, no. S092179 (TO BE ARGUED May 30, 2002).)

**B. Presumptive Ineligibility**

1. *1203.065(b)*: No probation “except in unusual cases where the interests of justice would best be served ..” for any rape, sodomy, force oral copulation committed with use of a threat to use authority to arrest or deport (§ 261(a)(7); 286(k); 288a(k)) or any assault with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, subdivision (b) of Section 288, or Section 289.”

**XVII. Registration (§ 290)**

**A. Is registration punishment?**

1. *For ex post facto purposes*. People v. Castellanos (1999) 21 Cal.4th 785 (lead opinion, but not a majority) holds that registration is not punishment for ex post facto purposes, disapproving of In re Reed (1983) 33 Cal.3d 914, which had held that section 290’s registration requirements were punishment under article I, section 17 of the California Constitution as applied to a misdemeanor conviction of section 647, subdivision (a), soliciting lewd or dissolute conduct. (See also Doe v. Otte (9th Cir. 2001) 259 F.3d 979 (Alaska registration statute is punishment for ex post facto purposes); cf. Russell v. Gregoire (9th Cir. 1997) 124 F.3d 1079 (Washington registration statute not punishment).) Argument can be made that California’s statute has become more like Alaska’s. (See Forecite, § 18.56, n.7.)
2. *For Cruel and/or Unusual Punishment purposes*: People v. Alva (2001) 89 Cal.App.4th 758, rev. granted Sept. 19, 2001, no. S098928) (registration is not punishment under 8th Amendment, but—as is compelled by In re Reed (1983) 33 Cal.3d 914, it is punishment under Cal.Const., Art. 1, sec. 17). NOTE: Alva is fully briefed, but not yet argued.

**B. Does Registration Requirement Violate Art 1, Sec. 17?**

1. In re Reed (1983) 33 Cal.3d 914: which had held that section 290's registration requirements were punishment under article I, section 17 of the California Constitution as applied to a misdemeanor conviction of section 647, subdivision (a), soliciting lewd or dissolute conduct. (Note: In 1985, the California Legislature amended section 290 to eliminate the registration requirements for a violation of section 647, subdivision (a).)
2. People v. Alva (2001) 89 Cal.App.4th 758 (REVIEW GRANTED): registration for a violation of section 311.11 (possession of child pornography) does not constitute cruel and unusual punishment under Lynch.
3. In re King (1984) 157 Cal.App.3d 554: registration for indecent exposure (§ 314.1) constitutes cruel and unusual punishment.

**C. Sentencing for Registration Violation**

1. A felony registration/§ 290 offense can be sentenced under the Three Strikes Law, and the prior conviction which created the defendant's registration requirement can be used as a strike. (People v. Garcia (2001) 25 Cal.4th 744.)
2. Where the defendant received a 25-to-life Three Strikes Sentence for a current conviction of failing to update his registration on his birthday, where the defendant still could be found at the address he provided authorities when he last registered ("the most technical violation of the section 290 registration requirement we have seen") and where the reasons given for not striking the strikes was not supported by the record, denial of Romero motion was an abuse of discretion. (People v. Cluff (2001) 87 Cal.App.4th 991.)

## **RELEVANT STATUTES**

### **§ 269 Aggravated Sexual Assault Against Minors**

(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child:

- (1) A violation of paragraph (2) of subdivision (a) of Section 261.
- (2) A violation of Section 264.1.
- (3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (5) A violation of subdivision (a) of Section 289.

(b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life.

### **§ 667.51 Lewd Acts on Child Under 14 With Prior Conviction**

(a) Any person who is found guilty of violating Section 288 shall receive a five-year enhancement for a prior conviction of an offense listed in subdivision (b), provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction.

(b) Section 261, 264.1, 285, 286, 288, 288a, 288.5, or 289, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses set forth in this subdivision.

(c) Section 261, 264.1, 286, 288, 288a, 288.5, or 289, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses set forth in this subdivision.

(d) A violation of Section 288 by a person who has been previously convicted two or more times of an offense listed in subdivision (c) is punishable as a felony by imprisonment in the state prison for 15 years to life. However, if the two or more prior convictions were for violations of Section 288, this subdivision is applicable only if the current violation or at least one of the prior convictions is for an offense other than a violation of subdivision (a) of Section 288. For purposes of this subdivision, a prior conviction is required to have been for charges brought and tried separately. The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term in a state prison imposed pursuant to this section, but that person shall not otherwise be released on parole prior to that time.

**§ 667.6 Prior Sex Offenses; Full Consecutive Sentences**

- (a) Any person who is found guilty of violating paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person who has been convicted previously of any of those offenses shall receive a five-year enhancement for each of those prior convictions provided that no enhancement shall be imposed under this subdivision for any conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the five-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars (\$20,000) for anyone sentenced under these provisions. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.
- (b) Any person convicted of an offense specified in subdivision (a) who has served two or more prior prison terms as defined in Section 667.5 for any offense specified in subdivision (a), shall receive a 10-year enhancement for each of those prior terms provided that no additional enhancement shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the 10-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars (\$20,000) for any person sentenced under this subdivision. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.
- (c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (6), (3), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force,

violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction. If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. **The term shall not be included in any determination pursuant to Section 1170.1.** Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

- (d) A full, separate, and consecutive term shall be served for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions.

In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

- (e) If the court orders a fine to be imposed pursuant to subdivision (a) or (b), the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

**Penal Code § 667.61 (One Strike Law)**

- (a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).
- (b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).
- (c) This section shall apply to any of the following offenses:
  - (1) A violation of paragraph (2) of subdivision (a) of Section 261.
  - (2) A violation of paragraph (1) of subdivision (a) of Section 262.
  - (3) A violation of Section 264.1.
  - (4) A violation of subdivision (b) of Section 288.
  - (5) A violation of subdivision (a) of Section 289.
  - (6) Sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
  - (7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.
- (d) The following circumstances shall apply to the offenses specified in subdivision (c):
  - (1) The defendant has been previously convicted of an offense specified in subdivision (c), including an offense committed in another jurisdiction that includes all of the elements of an offense specified in subdivision (c).
  - (2) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c).
  - (3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.
  - (4) The defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

- (e) The following circumstances shall apply to the offenses specified in subdivision (c):
- (1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.
  - (2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, or during the commission of a burglary of a building, including any commercial establishment, which was then closed to the public, in violation of Section 459.
  - (3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.
  - (4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.
  - (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.
  - (6) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.
  - (7) The defendant administered a controlled substance to the victim by force, violence, or fear in the commission of the present offense in violation of Section 12022.75.
- (f) If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).
- (g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If

there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.

- (h) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section for any offense specified in paragraphs (1) to (6), inclusive, of subdivision (c).
- (l) For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.
- (j) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce the minimum term of 25 years in the state prison imposed pursuant to subdivision (a) or 15 years in the state prison imposed pursuant to subdivision (b). However, in no case shall the minimum term of 25 or 15 years be reduced by more than 15 percent for credits granted pursuant to Section 2933, 4019, or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison.

## § 667.71 Habitual Sexual Offender

(a) For the purpose of this section, a habitual sexual offender is a person who has been previously convicted of one or more of the offenses listed in subdivision (c) and who is convicted in the present proceeding of one of those offenses.

(b) A habitual sexual offender is punishable by imprisonment in the state prison for 25 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term of 25 years in the state prison imposed pursuant to this section. However, in no case shall the minimum term of 25 years be reduced by more than 15 percent for credits granted pursuant to Section 2933, 4019, or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 years in the state prison.

(c) This section shall apply to any of the following offenses:

- (1) A violation of paragraph (2) of subdivision (a) of Section 261.
- (2) A violation of paragraph (1) of subdivision (a) of Section 262.
- (3) A violation of Section 264.1.
- (4) A violation of subdivision (a) or (b) of Section 288.
- (5) A violation of subdivision (a) of Section 289.
- (6) A violation of Section 288.5.
- (7) A violation of subdivision (c) of Section 286 by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (8) A violation of subdivision (d) of Section 286.
- (9) A violation of subdivision (c) or (d) of Section 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (10) A violation of subdivision (b) of Section 207.
- (11) A violation of former subdivision (d) of Section 208 (kidnapping to commit specified sex offenses).
- (12) Kidnapping in violation of Section 209 with the intent to commit rape, spousal rape, oral copulation, or sodomy or sexual penetration in violation of Section 289.
- (13) A violation of Section 269.
- (14) An offense committed in another jurisdiction that has all the elements of an offense specified in paragraphs (1) to (13), inclusive, of this subdivision.

(d) This section shall apply only if the defendant's status as a habitual sexual offender is alleged in the information, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by court sitting without a jury.

### **667.8 Kidnapping To Commit Sex Offense**

- (a) Except as provided in subdivision (b), any person convicted of a felony violation of Section 261, 262, 264.1, 286, 288a, or 289 who, for the purpose of committing that sexual offense, kidnapped the victim in violation of Section 207 or 209, shall be punished by an additional term of nine years.
- (b) Any person convicted of a felony violation of subdivision (c) of Section 286, Section 288, or subdivision (c) of Section 288a who, for the purpose of committing that sexual offense, kidnapped the victim, who was under the age of 14 years at the time of the offense, in violation of Section 207 or 209, shall be punished by an additional term of 15 years. This subdivision is not applicable to conduct proscribed by Section 277, 278, or 278.5.
- (c) The following shall govern the imposition of an enhancement pursuant to this section:
  - (1) Only one enhancement shall be imposed for a victim per incident.
  - (2) If there are two or more victims, one enhancement can be imposed for each victim per incident.
  - (3) The enhancement may be in addition to the punishment for either, but not both, of the following:
    - (A) A violation of Section 207 or 209.
    - (B) A violation of the sexual offenses enumerated in this section.