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Criminal Procedure

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Criminal Procedure; change of venue

Penal Code § 1033.1 (new).
SB 537 (McCorquodale); 1993 STAT. Ch. 837

Existing law provides that a court may order a change of place of trial in a criminal action or proceeding upon the motion of the defendant when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the original county.[1] Additionally, the court may change the place of trial on its own motion or the motion of any party when it appears that it will be impossible to secure a jury due to the exhaustion of the jury panels.[2]

Chapter 837 provides that a court may return a criminal action or proceeding to the original place of trial if: (1) The criminal action or proceeding is before the court after reversal of the original judgment by the appellate court; and (2) the court finds that the reasons for changing

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1. CAL. PENAL CODE § 1033(a) (West Supp. 1993); *see* 28 U.S.C. § 2254 (Law Co-op. Supp. 1993) (providing that a defendant may seek federal review of the denial of the defendant's change of venue motion by a petition for a writ of habeas corpus on the ground that the defendant's constitutional due process right to a trial by an impartial jury was violated); People v. Salas, 7 Cal. 3d 812, 815, 500 P.2d 7, 10, 103 Cal. Rptr. 431, 434 (1972) (holding that in determining whether change of venue is proper, the court should consider the nature, frequency and timing of the publicity; evidence of continued community interest; the size of the community in which the crime occurred; and the standing of the victim and the defendant in the community); Maine v. Superior Court, 68 Cal. 2d 375, 383, 438 P.2d 372, 377, 66 Cal. Rptr. 724, 729 (1968) (holding that, when pretrial publicity creates a reasonable likelihood that a defendant will be unable to receive a fair trial, the trial court should either continue the case until the controversy diminishes or transfer the case to another county); *id.* at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729 (determining that a transfer of venue is required if there is a reasonable likelihood that, if such a transfer is not granted, a fair trial will be impossible); Powell v. Superior Court, 232 Cal. App. 3d 785, 793, 283 Cal. Rptr. 777, 781 (1991) (affirming the holding in *Maine*); People v. Jurado, 115 Cal. App. 3d 470, 483, 171 Cal. Rptr. 509, 514 (1981) (following the factors set forth in *Salas*); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 537, at 1 (Apr. 29, 1993) (noting that according to practitioners of criminal law, the most common reason for a change of venue is the large amount of pre-trial publicity the case has received). *See generally* Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 704 (1983) (discussing the state and federal standards for review of change of venue rulings and suggesting that California has begun to adopt the stricter federal standard).

2. CAL. PENAL CODE § 1033(b) (West Supp. 1993); *see* Yount v. Patton, 710 F.2d 956, 963 (3d Cir. 1985) (detailing the jury selection in a murder case in which the process took ten days, seven jury panels, 292 veniremen and 1186 pages of testimony and holding that since of those jurors selected, most indicated they had an opinion of the defendant, a fair trial was impossible in the county in which it was held); *c.f.* Commonwealth v. Yount, 314 A.2d 242, 248 n. 5 (Pa. 1974) (remarking that it may happen that there are so many disqualified or excused jurors that the selection is not large enough to allow for the completion of the panel and that this most often occurs in murder trials); Hewitt v. Florida, 30 So. 795, 796 (Fla. 1901) (noting that a trial court authorized a change of venue when three special veniries were exhausted, one for 100 jurors, another for 25, and one for 30).

the place of trial no longer prevail.[3] Prior to ruling on the motion to return the case to the original place of trial, the court must conduct a hearing at which the burden will be on the prosecution to establish that the reasons for transfer no longer apply unless the defendant and the defendant's counsel agree to return the proceeding to its original location.[4]

JLM

Criminal Procedure; court appointed counsel—access to information

Penal Code § 987.2 (amended).
AB 1170 (Johnson); 1993 STAT. Ch. 629

Under existing law, a person who is unable to afford counsel is assigned an attorney in the superior, municipal, or justice court to represent that person in a criminal trial, proceeding, or appeal.[1] Chapter 629 mandates that such court-appointed counsel, as well as any licensed private

3. CAL. PENAL CODE § 1033.1 (enacted by Chapter 837); *see* People v. Easley, 34 Cal. 3d 858, 885, 671 P.2d 813, 831, 196 Cal. Rptr. 309, 327 (1983) (remanding a death penalty conviction due to an error in jury instructions); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 537, at 2 (Apr. 29, 1993) (suggesting that in reality this legislation may lead to more hearings to ensure fairness and therefore cost the county more money; noting that the California Attorneys for Criminal Justice believe that this legislation imposes a substantial and unfair burden upon the defendant to prove that the reasons for the change of venue still prevail); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 537, at 1-2 (May 12, 1993) (noting that *Easley* was originally transferred to Monterey from the county of Stanislaus in 1977 and is now set for retrial; since the publicity has long since diminished, the county argues that there is no remaining logical reason it should pay to try the case in Monterey); *id.* (noting that SB 537 is in response to the County of Stanislaus' complaints over the costs it will incur in *Easley*; noting also that the bill is designed to relieve a county of the extra costs of supporting a trial in a different venue once it is able to provide for a fair trial within its own jurisdiction).

4. CAL. PENAL CODE § 1033.1(b) (enacted by Chapter 837).

1. CAL. PENAL CODE § 987.2 (amended by Chapter 629); *see* People v. Carlton, 161 Cal. App. 3d 1193, 1196, 208 Cal. Rptr. 18, 20 (1984) (holding that if a defendant is indigent, the defendant has a right to have counsel appointed); 43 Op. Cal. Att'y Gen., 33, 34 (1964) (stating that indigent defendants have a right to appointed counsel when they are prosecuted in the California's superior, municipal, and justice courts); *cf.* IDAHO CODE §§ 19-852(a)(2),(b) (Michie 1987) (providing that needy persons are entitled to be represented by legal counsel to the same extent as persons having their own counsel, and that needy persons are entitled to be provided with the necessary services and facilities of representation).

investigator appointed by the court, have the same access to information as the public defender and the public defender investigator.[2]

LAE

Criminal Procedure; domestic violence—protective orders

Penal Code §§ 836, 853.6 (amended).
AB 1850 (Nolan); 1993 STAT. Ch. 995

Existing law provides that it is a misdemeanor[1] for a person to violate a protective order[2] issued against him or her.[3] Existing law dictates that for a peace officer[4] to arrest a person without a warrant[5] for a

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2. CAL. PENAL CODE § 987.2(f) (amended by Chapter 629); *see id.* (stating that the intent of the Legislature in enacting this provision is to equalize any disparity that exists between the ability of private, court-appointed counsel and investigators, and public defenders and public defender investigators, to represent their clients); *id.* (stating that the provision is not intended to grant private investigators access to any confidential Department of Motor Vehicles' information not otherwise available to them); CAL. PENAL CODE § 13300(b) (West Supp. 1993) (excluding licensed private investigators from those persons having access to criminal history information). *See generally* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1993) (setting forth discovery provisions for criminal cases).

1. *See* CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining misdemeanor).

2. *See* CAL. FAM. CODE § 2035 (West Special Pamphlet 1993) (stating that a court may issue an ex parte order: (1) Restraining a person from transferring, encumbering, or disposing of any real or personal property; (2) enjoining a party from specified behavior; (3) deciding temporary custody of minors and visiting rights; (4) determining temporary use of real or personal property); or (5) excluding one party from the dwelling place of another); CAL. PENAL CODE § 136.2(c) (West Supp. 1993) (authorizing that court to issue an order specifying that a person shall have no communication with any specified victim or witness upon a good cause belief that intimidation or dissuasion of the victim or witness is likely to occur); *see also* CAL. FAM. CODE § 2045 (West Special Pamphlet 1993) (indicating that protective orders may be included in the judgment); *id.* § 5530 (West Supp. 1993) (providing that a temporary restraining order may be granted upon an affidavit which shows reasonable proof of past acts of abuse); *id.* § 5650(a) (West Special Pamphlet 1993) (empowering a judge to issue an ex parte emergency protective order when a police officer asserts reasonable grounds to believe that a person is in immediate danger).

3. CAL. PENAL CODE § 273.6(a) (West Supp. 1993). *See generally* Blazel v. Bradley, 698 F. Supp. 756, 757 (W.D. Wis. 1988) (stating that ex parte orders should be issued only upon an allegation of risk of imminent harm based on personal knowledge); Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989) (maintaining that a protective order is justified when a former spouse manifests a present intention to inflict fear of imminent physical harm, and when prior abuse is a factor).

4. *See* CAL. PENAL CODE § 830 (West Supp. 1993) (defining peace officer).

5. *See id.* § 813(a) (West Supp. 1993) (stating that when a complaint is filed with a magistrate and the magistrate believes an offense has been committed, and if there is reasonable ground to believe that the defendant has committed it, then the magistrate must issue a warrant for the arrest of the defendant, unless the prosecutor requests a summons instead).

misdemeanor, the officer must have reasonable cause[6] to believe that the person has committed a public offense in the officer's presence.[7]

Chapter 995 provides that if an officer is responding to a call alleging a violation of a protective order by a person against whom a protective order has been issued, and the officer has reasonable cause to believe that the person has notice of the order,[8] then the officer may arrest the person without a warrant whether or not the violation occurred in the presence of the officer.[9] Chapter 995 specifies that where a mutual protective order has been issued, the liability for arrest applies only to the person who is

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6. *See* Hill v. California, 401 U.S. 797, 804 (1971) (stating that a subjective good-faith belief does not in itself justify either arrest of a person mistakenly believed to be the person that the police had probable cause to arrest or search the apartment in which the arrest took place); People v. Hernandez, 47 Cal. 3d 315, 341, 763 P.2d 1289, 1303, 253 Cal. Rptr. 199, 213 (1988) (stating that for an officer to satisfy the probable cause requirement, the officer must have more than a mere hunch).

7. CAL. PENAL CODE § 836(a)(1) (amended by Chapter 995); *see* Music v. Department of Motor Vehicles, 221 Cal. App. 3d 841, 848, 270 Cal. Rptr. 692, 696 (1990) (stating that an officer must be able to testify, based on that officer's senses, to acts that constitute every material element of the misdemeanor in order to reasonably believe that the misdemeanor was committed in the officer's presence); *see also* People v. Price, 1 Cal. 4th 324, 409, 821 P.2d 610, 656, 3 Cal. Rptr. 2d 106, 152 (1991) (stating that in determining whether an officer had cause to arrest a person, a court must ascertain when the arrest occurred and what the arresting officer then knew, and whether the officer's knowledge at the time of the arrest constituted adequate cause), *cert. denied*, 113 S. Ct. 152 (1992); People v. Campa, 36 Cal. 3d 870, 878, 686 P.2d 634, 637, 206 Cal. Rptr. 114, 117 (1984) (stating that an officer may generally arrest a person without a warrant whenever the officer has reasonable cause to believe that the person has committed a felony, but that the federal and California constitutions prohibit warrantless arrests within the home, even with probable cause, unless there are exigent circumstances); People v. Crovedi, 253 Cal. App. 2d 739, 743, 61 Cal. Rptr. 349, 352 (1967) (stating that reasonable cause exists when an officer knows from the circumstances at the moment of arrest that an offense has been committed and a person with reasonable caution would have found it so). *See generally* Coverstone v. Davies, 38 Cal. 2d 315, 320, 239 P.2d 876, 878-79 (1952) (holding that students present at a "hot rod" race could be arrested by an officer pursuant to California Penal Code § 836), *cert denied*, 344 U.S. 840 (1952).

8. *See* CAL. PENAL CODE § 836(c)(2) (amended by Chapter 995) (providing that a person against whom a protective order has been issued is deemed to have notice of the order if the victim shows the officer proof of service of the order, the officer confirms that the order is on file with the appropriate authorities, or the person against whom the order was issued was present at the hearing).

9. *Id.* § 836(c)(1) (amended by Chapter 995); *cf.* ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1993) (providing that an officer may forego a warrant and arrest a person if there is probable cause that domestic violence has been committed whether within or outside of the officer's presence); MISS. CODE ANN. § 99-3-7(3) (Supp. 1992) (providing that an officer may arrest a person without a warrant when there is probable cause to believe that the person has, within 24 hours, knowingly committed a misdemeanor which constitutes an act of domestic violence or that the person has knowingly violated provisions of a protective order); N.C. GEN. STAT. § 50B-4(b) (1992) (providing that an officer shall arrest a person without a warrant if the officer has probable cause to believe that the person has violated a protective order and the victim of domestic violence presents the officer with a copy of the order, or the officer otherwise determines that the order exists); UTAH CODE ANN. § 77-36-2(3) (Supp. 1993) (providing that an officer, who responds to a domestic violence call and has probable cause to believe that a crime has been committed, may arrest without a warrant).

reasonably believed to have been the primary aggressor.[10] Chapter 995 adds that the officer may then arrest the primary aggressor.[11]

Under existing law, any person arrested for a misdemeanor violation of a protective court order involving domestic violence[12] may be released if the arresting officer believes that there is no reasonable likelihood that the offense will continue.[13] Chapter 995 mandates that each city, county, or city and county establish a committee[14] to develop a protocol to assist officers in determining when arrest and release is appropriate.[15]

SVB

Criminal Procedure; domestic violence—videotaping testimony

Penal Code § 1346.1 (new).
SB 178 (Hughes); 1993 STAT. Ch. 344

Existing law allows the videotaping of testimony at a preliminary hearing of a victim of designated crimes[1] who is fifteen years of age or

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10. CAL. PENAL CODE § 836(c)(3) (amended by Chapter 995); *see id.* (defining primary aggressor as the most significant, rather than the first, aggressor). In identifying the primary aggressor, the officer must consider the intent of the law to prevent continued domestic abuse, the threats creating fear of injury, the history of domestic violence between the persons, and whether either person was acting in self-defense. *Id.*

11. *Id.*

12. *See id.* § 13700(b) (West Supp. 1993) (defining domestic violence as abuse committed against an adult or fully emancipated minor who is a current or former spouse, cohabitant, or person with whom the suspect has had a child or is dating).

13. *Id.* § 853.6(a) (amended by Chapter 995).

14. *See id.* (providing that the committee shall consist of, at a minimum, the police chief or county sheriff, district attorney, county counsel, city attorney, representatives from domestic violence shelters, domestic violence councils, and other relevant community agencies).

15. *Id. See generally Statehouse News Briefs*, UPI, Oct. 27, 1986, *available in* LEXIS, Nexis Library, UPI File (suggesting that police reports have shown that once a person acts in a violent manner against this person's family, the offense is usually repeated); Susan Sward, *Arrests Soar in Domestic Abuse Cases*, S.F. CHRON., Mar. 29, 1993, at A1 (quoting criminology professor Lawrence Sherman in arguing that mandatory arrest policies often end up back-firing, especially in poor areas, due to increased violence once the families are reunited).

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1. *See* CAL. PENAL CODE § 243.4 (West Supp. 1993) (defining sexual battery); *id.* § 261 (West Supp. 1993) (defining rape); *id.* § 261.5 (West 1988) (defining unlawful intercourse with a female under 18); *id.* § 264.1 (West 1988) (defining rape by force in concert with another); *id.* § 273a (West 1988) (defining willful cruelty or unjustifiable punishment of a child); *id.* § 273d (West 1988) (defining corporal punishment or injury of a child); *id.* § 285 (West 1988) (defining incest); *id.* § 286 (West Supp. 1993) (defining sodomy); *id.* § 288 (West Supp. 1993) (defining lewd and lascivious acts with a child); *id.* § 288a (West Supp. 1993) (defining oral copulation); *id.* § 288.5 (West Supp. 1993) (defining continuous sexual abuse of a child); *id.* § 289 (West Supp.

less, or who is developmentally disabled.[2] Existing law further provides that this testimony may be introduced into evidence at trial if the court finds that further testimony would result in further emotional trauma for the victim so that the victim is rendered unavailable.[3]

Chapter 344 authorizes the videotaping of a victim's testimony at a preliminary hearing for a case in which the defendant has been charged with spousal rape[4] or inflicting corporal injury[5] on specified persons[6]

1993) (defining penetration with a foreign object).

2. *Id.* § 1346(a) (West Supp. 1993); *see* CAL. WELF. & INST. § 4512(a) (West Supp. 1993) (defining a developmental disability as a disability which originates before an individual attains age 18, including disabling conditions found to be closely related to mental retardation); *cf.* COLO. REV. STAT. § 18-6-401.3(1) (1992) (permitting the videotaped testimony of a child less than 15 years of age who was a victim of child abuse); FLA. STAT. ch. 92.53(1) (1992) (authorizing the videotaping of testimony if the victim or witness is under the age of 16 and there is a substantial likelihood that the victim or witness would suffer at least moderate emotional harm if required to testify in open court); HAW. REV. STAT. § 616(a) (1992) (authorizing the videotaping of the testimony of a child under the age of 16 who was the victim of an abuse offense or sexual abuse); MASS. ANN. LAWS ch. 278, § 16D(b) (Law. Co-op 1993) (designating criteria and procedures for videotaping testimony of child witnesses).

3. CAL. PENAL CODE § 1346(d) (West Supp. 1993); *see id.* (specifying that when further testimony would render the victim unavailable, the court may admit the video tape of the testimony at the preliminary hearing as former testimony); *see also* FED. R. EVID. 804 (1993) (providing an exception to the hearsay rule for unavailable witnesses); CAL. EVID. CODE § 240(a)(3) (West Supp. 1993) (providing that a witness is unavailable when unable to testify at the hearing because of a then existing physical or mental illness or infirmity); People v. Gomez, 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80, 83-84 (1972) (holding that in order to establish the unavailability of a witness on the grounds of mental illness or infirmity, the prosecution must show that the illness or infirmity is of such a degree as to render the witness' attendance or his testifying, relatively impossible); *cf.* MISS. CODE ANN. § 13-1-407(1)(a);(b) (1991) (permitting videotaped testimony upon a showing that a child under age 16 would suffer traumatic emotional or mental distress if required to testify in open court); Maryland v. Craig, 497 U.S. 836, 837 (1990) (stating that a defendant's right to confrontation is satisfied when the reliability of the testimony is assured and when the denial of confrontation is necessary to further an important public policy); Thomas v. Gunter, 962 F.2d 1477, 1484 (10th Cir. 1992) (holding that a defendant was not denied his Sixth Amendment right to confrontation by a videotaped deposition which was admitted into evidence at his trial); McGuire v. State, 706 S.W.2d 360, 393 (Ark. 1986) (holding that the videotape of the child rape victim's deposition played at the trial in lieu of the child testifying in open court did not violate the Confrontation Clause because the relevant statute required face-to-face confrontation between the victim, the defendant, and the defense attorney at the time the deposition was taken and provided for the opportunity for cross-examination of the victim by the defendant). *But cf.* Douglas v. Alabama, 380 U.S. 415, 419 (1965) (overturning the conviction of a defendant who was not given the opportunity to confront an adverse witness). *See generally* Deborah Clark Weintraub, *The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma*, 14 HOFSTRA L. REV. 261 (1985) (discussing videotaped testimony of children and the potential constitutional problems which may arise).

4. *See* CAL. PENAL CODE § 262(a) (West Supp. 1993) (defining spousal rape as the rape of a person who is the spouse of a perpetrator).

5. *See id.* § 273.5(a) (West Supp. 1993) (defining the infliction of corporal injury as inflicting corporal injury resulting in a traumatic condition).

6. *See id.* (designating the persons as a spouse, or any person of the opposite sex with whom the inflicting defendant is cohabitating, or any person who is the mother or father of the defendant's child).

resulting in a traumatic condition.[7] If the victim's prior testimony given at the preliminary hearing is admissible, then the videotaped testimony may also be introduced as evidence at trial.[8]

LAE

7. *Id.* § 1346.1(a) (enacted by Chapter 344); *see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 178, at 2 (May 24, 1993) (stating that according to the State Bar of California, the California Legislature has recognized that victims of specific sexual offenses may be particularly traumatized when giving courtroom testimony); *id.* (noting that it is not uncommon for sexual assault victims or victims of child abuse to recant their testimony prior to trial and that a similar problem exists with victims of domestic violence); *id.* (stating that opponents to videotaped testimony contend that the defendants should have the right to confront their accusers in person); *id.* (stating that public defenders claim that permitting videotaped testimony would lead to "chronic" unavailability of victims to testify at trials); *see also* Brent J. Fields, Comment, Maryland v. Craig: *The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167, 196 (1990) (stating that there is a plausible argument to allow rape victims to use closed circuit testimony because the trauma suffered by a rape victim is arguably no less severe than that of a victim of child abuse); Carolyne R. Hathaway, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 689 (1986) (stating that victims of spousal abuse often fail to testify probably because of the lack of support and protection offered by the law enforcement system and the social attitudes that disfavor the victims of spousal abuse). *See generally* Lisa Hamilton Thielmeyer, Note, Maryland v. Craig: *Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797 (1992) (discussing the extension of Maryland v. Craig to adult rape victims).

8. CAL. PENAL CODE § 1346.1 (d) (enacted by Chapter 344).

Criminal Procedure; limitations of actions

Penal Code § 803 (amended).
AB 290 (Boland); 1993 STAT. Ch. 390

Existing law mandates that a criminal action[1] be commenced[2] within three years after the offense[3] if the offense is punishable by imprisonment[4] of eight years or more.[5] Existing law also mandates that, if the offense is generally punishable by imprisonment, a criminal action must be commenced within six years of the offense.[6] Under existing law, misdemeanor[7] sex crimes against a child under the age of fourteen must be commenced within two years from the offense.[8] Existing law

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1. *See* CAL. PENAL CODE § 683 (West 1985) (defining a criminal action as the proceeding by which a party charged with a public offense is accused and brought to trial and punishment); *see also* Gibson v. County of Sacramento, 37 Cal. App. 523, 526, 174 P. 935, 936 (1918) (defining a criminal proceeding as meaning an authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law).

2. *See* CAL. PENAL CODE § 804 (West 1985) (providing that a prosection is commenced when an indictment or information is filed, a complaint is filed with an inferior court charging a public offense of which the inferior court has original jurisdiction, a case is certified to the superior court, or when an arrest warrant or bench warrant is issued).

3. *See id.* § 15 (West 1988) (defining a crime or public offense as an act committed or omitted in violation of a law forbidding or commanding it); *id.* (providing for any of the following punishments if convicted of an offense: (1) Death; (2) imprisonment; (3) fine; (4) removal from office; or (5) disqualification to hold and enjoy any office of honor, trust, or profit in this state); *see also* Keeler v. Superior Court, 2 Cal. 3d 619, 631-32, 470 P.2d 617, 624-25, 87 Cal. Rptr. 481, 488-89 (1970) (holding that, because there are no common law crimes in California, no common law or unwritten law may legally provide the basis of a public offense). For a conviction, a statute, ordinance, or regulation denouncing an act or omission existing prior in time to the commission of that act or omission. *Id.*

4. *See* CAL. PENAL CODE § 2002 (West 1982) (specifying the purpose for imprisonment of men); *id.* § 3201 (West 1982) (specifying the purpose for imprisonment of women).

5. *Id.* § 800 (West 1985).

6. *Id.* §§ 800-801 (West 1985); *see id.* (providing a statute of limitations for offenses punishable by imprisonment in the state prison); *see also* People v. Callan, 174 Cal. App. 3d 1101, 1107-08, 220 Cal. Rptr. 339, 342 (1985) (providing that the amendment to the statute of limitations for a lewd or lascivious offense from five years to six years applied to the defendant who was prosecuted within six years of the offense).

7. *See* CAL. PENAL CODE § 17 (West Supp. 1993) (distinguishing a misdemeanor from a felony); *id.* § 19 (West 1988) (prescribing the punishment for a misdemeanor except where a different punishment is proscribed by any law of this state); *see also* Pillsbury v. Brown, 47 Cal. 477, 480 (1874) (holding that a misdemeanor is an act or omission for which punishment, other than death or imprisonment in state prison, is provided by statute).

8. CAL. PENAL CODE § 802(b) (West Supp. 1993); *see id.* § 802(a) (providing for a one year statute of limitation for offenses not punishable by death and a two year statute of limitation for offenses of California Penal Code §§ 647a and 647.6 committed on a child under age 14); *see also id.* § 288 (West Supp. 1993) (defining lewd or lascivious acts with a child under 14); *id.* § 647a (West 1988) (mandating that soliciting or engaging in lewd conduct in any public or non-private place is a misdemeanor); *id.* § 647.6 (West 1988) (providing that annoying or molesting a child under 18 is punishable by a fine of $1000, imprisonment in the county jail for not longer than one year, or both); People v. Catelli, 227 Cal. App. 3d 1434, 1447-48, 278 Cal. Rptr. 452, 461 (1991) (stating that forcing the victim to lick a defendant's scrotum constituted lewd and

additionally provides that a criminal complaint may be filed after a report[9] of a sexual assault[10] upon a child under the age of seventeen is made to a responsible adult or agency.[11]

Chapter 390 provides that whenever persons of any age allege that they were victims of substantial sexual conduct[12] when under the age of eighteen, a criminal complaint may be filed within one year after a report of the offense to a law enforcement agency, notwithstanding other limitations of time.[13] Chapter 390 specifies that the complaint will stand

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lascivious conduct, whether or not it was oral copulation), *appeal denied* 1991 Cal. LEXIS 2221 (May, 16, 1991); People v. Thompson, 206 Cal. App. 3d 459, 464, 253 Cal. Rptr. 564, 567 (1988) (stating that a conviction under California Penal Code § 647.6 requires proof of articulable objective acts which would cause a normal person to be unhesitatingly irritated, provided that the acts are motivated by an unnatural sexual interest in the child victim); People v. Tate, 164 Cal. App. 3d 133, 138, 210 Cal. Rptr. 117, 120 (1985) (requiring a motivation of unnatural sexual interest in children for a conviction under California Penal Code § 647.6).

9. *See* CAL. PENAL CODE § 11164-74.5 (West 1992 & Supp. 1993) (encompassing the Child Abuse and Neglect Reporting Act); *see generally* Susan A. Collier, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189 (1983) (discussing child abuse and neglect reporting statutes).

10. *See* CAL. PENAL CODE § 261 (West Supp. 1993) (defining rape); *id.* § 288 (West Supp. 1993) (defining lewd or lascivious acts with a child under 14); *id.* § 289 (West Supp. 1993) (defining the crime of penetration of genital or anal openings by a foreign object); *see also* People v. Harrison, 48 Cal. 3d 321, 329, 768 P.2d 1078, 256 Cal. Rptr. 401, 405 (1989) (holding that each act of penetration which occurs during the course of a sexual assault constitutes a separate violation of California Penal Code § 288).

11. CAL. PENAL CODE § 803(f) (amended by Chapter 390); *see id.* (defining responsible adult or agency as a person or agency required to report under the Child Abuse and Neglect Act); *id.* § 11166 (West Supp. 1993) (mandating that any child care custodian, health practitioner, employee of a child protective agency, or child visitation monitor who knows or sees the manifestations of child abuse or infliction of mental suffering has a duty to report); *id.* § 11166.(b) (West Supp. 1993) (providing that any child care custodian, health practitioner, employee of a child protection agency, or child visitation monitor who has knowledge or suspects mental suffering has been or inflicted on a child or whose emotional well-being is being endangered in any other way may report the known or suspected instance of child abuse).

12. *See id.* § 803(g)(2) (amended by Chapter 390) (excluding non-mutual masturbation from the meaning of substantial sexual contact); *id.* § 1203.066(b) (West Supp. 1993) (defining substantial sexual contact as penetration of the vagina or rectum by the penis of the offender or by any foreign object, oral copulation or masturbation of either the victim or the offender); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 290, at 2 (Apr. 13, 1993) (stating that the language, excluding masturbation which is not mutual, from the definition of substantial sexual conduct, was added by the Senate Judiciary Committee when an identical bill was pending which did not pass during the 1992 legislative session).

13. CAL. PENAL CODE § 803(f) (amended by Chapter 390); *see id.* (adding the continuous sexual abuse of a child as an offense which will be effected by Chapter 390); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 290, at 2, (Apr. 13, 1993) (stating that the purpose of AB 290 is to remedy the current statute of limitation provisions that bar criminal actions for child victims of sexual abuse that have come forward with their charges when they are adults); Roxana Kopetman, *"So Many Victims"; After Two Decades, Molester is Finally Brought to Justice*, L.A. TIMES, Mar. 25, 1993, at 1 (describing the conviction of a Long Beach man with a history of child molestation and the changing attitudes toward convicting child molesters); Ulysses Torassa, *Stepdaughter's Sex Charges Too Late, Tossed Out*, PLAIN DEALER, Feb. 20, 1993, at 2B (reporting how a woman attempted to bring charges against her stepfather for sexual abuse that occurred in the 1970's but was prevented from doing so because a judge ruled that she had waited too long to bring the charges).

only if the offense can be corroborated by clear and convincing,[14] independent evidence of the victim's allegation.[15]

JCB

Criminal Procedure; motions to suppress evidence

Penal Code § 1538.5 (amended).
SB 933 (Kopp); 1993 STAT. Ch. 761

Existing law mandates that a special hearing may be held in a felony matter to determine the validity of a defendant's motion to return property or suppress evidence.[1] Under existing law, if the defendant's motion is granted, and the prosecution has additional evidence that was not presented at the special hearing, the prosecution either must show good cause why the decision of the special hearing should not be binding,[2] or may seek

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14. *See In re* Jost, 117 Cal. App. 2d 379, 383, 256 P.2d 71, 74 (1953) (defining clear and convincing evidence as clear, explicit, and unequivocal evidence, which is so clear as to leave no substantial doubt and which is sufficiently strong to command unhesitating assent of every reasonable mind).

15. CAL. PENAL CODE § 803(g)(1)(2) (amended by Chapter 390); *see id.* (providing that the evidence of the allegation must be admissible at trial); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 290, at 2 (Apr. 13, 1993) (stating that independent evidence must not include opinions of mental health professionals). *See generally* Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185 (1992) (discussing the admissibility of hypnotic memories in civil trials); Diana Younts, *Constitutional Perspectives: Note: Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691 (1991) (providing an overview of the current controversy of psychological expert testimony in child abuse cases); Katy Butler, *Some Medical Professionals Dispute Patients' "Memories" of Child Abuse*, ATLANTA J. & CONST., May 28, 1993, at F2 (discussing the dispute over whether therapists are helping sexual abuse victims to recover from devastating childhoods or implanting false memories and encouraging deluded attempts at revenge).

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1. CAL. PENAL CODE § 1538.5(j) (amended by Chapter 761); *see id.* (explaining that the decision to grant a motion to suppress evidence is binding at a preliminary hearing unless the prosecution requests that the superior court hold a special hearing within 15 days to determine the validity of the search or seizure); *id.* (providing that a special hearing may be held if: (1) The property or evidence relates to a felony; (2) the defendant's motion for the return of the property or suppression of the evidence at a preliminary hearing is granted; and (3) the defendant is held to answer at the preliminary hearing); People v. Lankford, 55 Cal. App. 3d 203, 209, 127 Cal. Rptr. 408, 412 (1976) (stating that the superior court lacked jurisdiction when the prosecutor's motion for a special hearing was made after the time allotted). *See generally* 4 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence*, §§ 2249-2272 (2d ed. 1989 & Supp. 1993) (providing an overview of California's suppression of evidence rule).

2. *See* CAL. PENAL CODE § 1538.5(j) (amended by Chapter 761) (stating that the prosecution has the right at trial to show good cause why the evidence was not presented at the special hearing and why the decision of that hearing should not be binding at trial); Hewitt v. Superior Court, 5 Cal. App. 3d 923, 929, 85 Cal. Rptr. 493, 496 (1970) (holding that the prosecution may present competent evidence at trial relating to the lawfulness

appellate review.[3] These options are not available to the prosecutor if the court has dismissed the case.[4]

Chapter 761 provides that if the case is dismissed by the court[5] or voluntarily dismissed[6] by the prosecution, then the prosecution may file a new complaint or seek a new indictment and the ruling at the special hearing will not be binding.[7] If the defendant's motion to return property or suppress evidence in a felony matter has been granted twice, however,

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of a search on procedural grounds).

3. CAL. PENAL CODE § 1538.5(j) (amended by Chapter 761); *see id.* § 1538.5(o) (amended by Chapter 761) (providing that the prosecution may, within 30 days after the granting of the defendant's motion in a special hearing, file a petition for a writ of mandate or prohibition, seeking appellate review of the ruling on the motion). If a search or seizure motion is granted pursuant to this section, the property or evidence will not be admissible against the movant at trial unless otherwise provided by California Penal Code §§ 1538.5, 871.5, 1238, 1466. CAL. PENAL CODE § 1538.5(d) (amended by Chapter 761); *see also id.* § 871.5 (West 1985) (providing that a prosecutor may make a motion in superior court to compel the reinstatement of a complaint when the action was dismissed by a magistrate); *id.* § 1238(a)(7) (West Supp. 1993) (providing that an appeal may be made by the people from an order dismissing a case prior to trial based upon the return or suppression of property or evidence); *id.* § 1466(a)(1)-(2) (West Supp. 1993) (providing that, in infraction or misdemeanor cases, an appeal may be taken from a judgment in an inferior court to the superior court by the prosecution or by the defendant); People v. Belleci, 24 Cal. 3d 879, 889, 598 P.2d 473, 480, 157 Cal. Rptr. 503, 510 (1979) (holding that it was prejudicial error to include suppressed evidence in a probation department presentence report); *cf.* U.S. CONST. amend. IV (providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (making the federal exclusionary rule mandatory for the states as well as for the federal courts).

4. CAL. PENAL CODE § 1538.5(j) (amended by Chapter 761); *see* Schlick v. Superior Court, 4 Cal. 4th 310, 316, 841 P.2d 926, 930, 14 Cal. Rptr. 2d 406, 410 (1992) (holding that the prosecution cannot dismiss the case and refile the matter upon an adverse decision on a motion to suppress evidence).

5. *See* CAL. PENAL CODE § 1385(a) (West Supp. 1993) (explaining that a judge or magistrate may dismiss an action in furtherance of justice).

6. *See* CAL. CIV. PROC. CODE § 581(b)(1) (West Supp. 1993) (providing that an action may be dismissed upon written request of the plaintiff to the clerk, or by oral or written request to the court at any time before trial).

7. CAL. PENAL CODE § 1538.5(j) (amended by Chapter 761); *see* SENATE FLOOR ANALYSIS OF SB 933, at 2 (Aug. 30, 1993) (stating that the decision in *Schlick* creates a problem for prosecutors who do a poor job in presenting their evidence, due to the vast number of cases that the prosecutors must manage, and that Chapter 761 will give them another chance to present the forgotten evidence).

Chapter 761 provides that the prosecution may not file a new complaint or indictment unless new evidence is discovered that was not reasonably discoverable at the time of the second suppression hearing.[8]

SVB

Criminal Procedure; release of persons found not guilty by reason of insanity

Penal Code §§ 1026.2, 1603 (amended).
SB 476 (Mello); 1993 STAT. Ch. 1141

Under existing law, a person,[1] who has been found not guilty by reason of insanity,[2] may apply for release on the basis of sanity being restored.[3] In addition, existing law provides that, in response to such an application, the court[4] must hold a hearing to determine if the applicant

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8. CAL. PENAL CODE § 1538.5(p) (amended by Chapter 761); *cf.* CAL. CIV. PROC. CODE § 657 (West 1976) (providing that a verdict may be vacated and a new trial granted on the basis of newly discovered evidence if the evidence could not, with reasonable diligence, have been discovered and produced at trial); *id.* § 909 (West Supp. 1993) (providing that a reviewing court may, for the purpose of making factual determinations in cases where trial by jury is not a matter of right or where trial by jury has been waived, take additional evidence, occurring at any time prior to the decision of the appeal); Laverne v. Dold, 17 Cal. App. 2d 180, 183, 61 P.2d 497, 498 (1936) (stating that a new trial based on newly discovered evidence is a matter within the discretion of the trial court, but the evidence must be the best evidence, must be newly discovered, more than cumulative, and must render a different result probable).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person for purposes of the California Penal Code).

2. *See id.* § 1201 (West Supp. 1993) (setting forth insanity as a cause which may be shown against a judgment and requiring a trial on the question of insanity); *cf.* D.C. CODE ANN. § 24-301(a) (1992) (providing for acquittal to an offense by reason of insanity).

3. CAL. PENAL CODE § 1026.2 (amended by Chapter 1141); *see id.* § 1026.2(e) (amended by Chapter 1141) (defining "restoration of sanity" as a person no longer being a danger to the health and safety of others); People v. Tilbury, 54 Cal. 3d 56, 59, 813 P.2d 1318, 1319, 284 Cal. Rptr. 288, 291 (1991) (holding that an applicant for outpatient status is not entitled to a jury trial for the hearing on the applicant's eligibility for outpatient status); People v. Superior Court, 219 Cal. App. 3d 614, 617, 268 Cal. Rptr. 379, 380 (1990) (stating that California Penal Code § 1026.2 sets up a two step process for determining an applicant's release after having been found not guilty by reason of insanity: (1) The court must determine if release to outpatient status is appropriate; and (2) after one year of outpatient status, the court must determine whether the applicant's sanity has been restored); *see also* People v. Mallory, 254 Cal. App. 2d 151, 157, 61 Cal. Rptr. 825, 829 (1967) (upholding a finding that an applicant's sanity had not been restored, based on the testimony of two physicians, appointed by the court, specifying that the applicant was quite mentally ill, certainly would have more difficulties if released, and had changed very little since his commitment).

4. *See* CAL. PENAL CODE § 1026.2(a) (amended by Chapter 1141) (stating that the court, from which the applicant may request release, is the superior court of the county where the commitment of the applicant was made). *See generally* Janet L. Polstein, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in*

is a danger to the health and safety of others.[5] Under Chapter 1141, the determination the court must make, at the time of the applicant's hearing, is whether or not the applicant would be a danger to the health and safety of others due to mental defect,[6] disease,[7] or disorder.[8]

Under existing law, if the court grants the applicant outpatient status,[9] then it must notify the victim of the applicant's offense that the applicant

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Jones v. United States, 34 AM. U. L. REV. 479, 498 (1985) (stating that the public policy objective of commitment following an acquittal by reason of insanity is to treat, and not punish, the acquittee).

5. CAL. PEN. CODE § 1026.2(a) (amended by Chapter 1141); *see* Foucha v. Louisiana, 112 S. Ct. 1780, 1780 (1992) (holding that, in order for a state to continue to confine a person acquitted by reason of insanity, the person must be both dangerous and mentally ill); *In re* Franklin, 7 Cal. 3d. 126, 130, 101 Cal. Rptr. 553, 554-55, 496 P.2d 465, 466 (1972) (finding the release provisions of California Penal Code § 1026.2 constitutional and not violative of due process, and stating that the appropriate standard to apply, in a proceeding to determine the release of a person found not guilty by reason of insanity, is whether he has improved to the extent that he is no longer a danger to the health and safety of others or to himself); People v. Allesch, 152 Cal. App. 3d 365, 372, 199 Cal. Rptr. 314, 317 (1984) (including within the definition of "a danger to the health and safety of others," the danger of damaging the property of others, because an individual's health includes the freedom from damage to one's personal property); People v. Blackwell, 117 Cal. App. 3d 372, 378, 172 Cal. Rptr. 636, 639 (1981) (upholding the definition of a dangerous person as one who is likely to cause injury or pain, or is reasonably likely to expose himself or others to injury); *cf.* GA. CODE ANN. § 17-7-131 (Michie 1993) (setting forth the procedures following a plea of insanity at the time of a crime); IDAHO CODE § 66-337(b)-(d) (1989) (setting forth the conditions for discharge of a person acquitted of a crime based on insanity); N.Y. CRIM. PROC. LAW § 330.20 (McKinney's 1983 & Supp. 1993) (delineating the procedure for release of a person found not responsible by reason of mental disease or defect).

6. *See In re* Ramon M., 22 Cal. 3d 419, 427-28, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978) (defining mental defect as a condition not considered capable of either improving or deteriorating and which may be either congenital, the result of injury, or the residual effect of a physical or mental disease).

7. *See id.* at 427, 584 P.2d at 530, 49 Cal. Rptr. at 393 (defining mental disease as a condition which is considered capable of either improving or deteriorating).

8. CAL. PENAL CODE § 1026.2(e) (amended by Chapter 1141); *id.* § 1026.2(m) (amended by Chapter 1141); *see* Conservatorship of Roulet, 23 Cal. 3d 219, 234, 590 P.2d 1, 10, 152 Cal. Rptr. 425, 434 (1979) (defining mental disorder as any of the mental disorders as set forth in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association); *see also* SENATE FLOOR ANALYSIS OF SB 476, at 2 (Aug. 30, 1993) (stating that this higher standard for release is necessary for the protection of the public, and stating that the requirement for an applicant to be committed to an outpatient program one year should remain in effect in order for the courts to determine future dangerousness).

9. *See* People v. Harner, 213 Cal. App. 3d 1400, 1414, 262 Cal. Rptr. 422, 431 (1989) (stating that outpatient status means a one-year community-based supervised transition to complete discharge to be completed before consideration for final release).

has been released.[10] Chapter 1141 extends the operative affect of this provision to January 1, 1995.[11]

JSE

Criminal Procedure; sentence enhancements

Penal Code §§ 667.6, 1203.065 (amended).
SB 468 (Lockyer); 1993 STAT. Ch. 127

Existing law provides for sentence enhancements[1] where any person is convicted of committing sex crimes including: (1) Rape,[2] oral copulation,[3] or sodomy[4] by force, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person; (2) rape by the use of an intoxicating or anesthetic substance;[5] (3) rape or penetration of the genital or anal orifices by a foreign object;[6] (4) lewd or lascivious acts with a child under the age of fourteen;[7] and (5) continuous sexual abuse of a child.[8] Such sentence enhancements may be employed when the

10. CAL. PENAL CODE § 1603(a) (amended by Chapter 1141); *see id.* § 1603(a)(3) (amended by Chapter 1141) (requiring actual notice to the victim, or the victim's next of kin, to the prosecuting attorney, and to the defense attorney); *see also id.* § 1603(d) (amended by Chapter 1141) (extending the repeal date for this provision and the operative affect of alternative provisions from January 1, 1994 to January 1, 1995); SENATE COMMITTEE ON PUBLIC AFFAIRS, COMMITTEE ANALYSIS OF SB 476, at 2 (Aug. 7, 1993) (emphasizing that if Chapter 1141 had not been repealed, former law would have come into effect which did not require notice to the next of kin).

11. CAL. PENAL CODE § 1603(d) (amended by Chapter 1141).

1. *See* CAL. PENAL CODE § 667.6(a) (amended by Chapter 127) (providing that anyone convicted of specified sex crimes, who has previously been convicted of any of those same offenses, except for where the prior offense was ten or more years before the present offense, may receive a five year sentence enhancement for each conviction, and granting the court discretion to impose a fine not exceeding $20,000); *id.* § 667.6(b) (amended by Chapter 127) (providing that anyone who has previously served two or more prison terms for any of the offenses specified in California Penal Code § 667.6(a) where the prior offenses were 10 or more years before the present offense, may receive a 10-year sentence enhancement for each conviction and authorizing the court to impose a fine not exceeding $20,000).

2. *See id.* § 261(a) (West Supp. 1993) (defining rape).

3. *See id.* § 288a(a) (West Supp. 1993) (defining oral copulation).

4. *See id.* § 286(a) (West Supp. 1993) (defining sodomy).

5. *See id.* § 261(a)(3) (West Supp. 1993) (setting forth the defining elements of rape by the use of an intoxicating or anesthetic substance).

6. *See id.* §§ 289, 264.1 (West Supp. 1993) (defining rape by penetration of the vaginal or anal openings with a foreign object).

7. *See id.* § 288(a) (West Supp. 1993) (defining what constitutes lewd and lascivious acts with a minor).

8. *Id.* § 667.6(a) (amended by Chapter 127); *id.* § 288.5(a) (West Supp. 1993) (defining continuous sexual abuse of a child).

person has previously been convicted of any of these offenses.[9] Existing law also provides that a person convicted of multiple counts of these enumerated sex crimes or assault with the intent to commit any of these offenses may be subject to the imposition of a full, separate, and consecutive term for each count.[10]

Chapter 127 expands the list of these enumerated sex crimes to include rape, oral copulation, and sodomy when the act is accomplished against the victim's will by the perpetrator's threats to use the authority of a public official[11] to incarcerate, arrest, or deport the victim or another person, and the victim has a reasonable belief[12] that the aggressor is a public official.[13]

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9. *Id.* § 667.6(a) (amended by Chapter 127).

10. *Id.* § 667.6(c)-(d) (amended by Chapter 127).

11. *See id.* § 261(a)(7) (West Supp. 1993) (defining public official as a person employed by a governmental agency who has the authority as part of that position to incarcerate, arrest, or deport another and providing that the perpetrator does not actually have to be a public official so long as the victim reasonably believes that the perpetrator is one); *id.* (providing that it is rape to engage in sexual intercourse against another's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another and the victim has a reasonable belief that the perpetrator is a public official); *id.* § 286(k) (West Supp. 1993) (regarding forced sodomy under color of authority); *id.* § 288a(k) (West Supp. 1993) (regarding forced oral copulation under color of authority).

12. *See* People v. Hesslink, 167 Cal. App. 3d 781, 790, 213 Cal. Rptr. 465, 472 (1985) (upholding the conviction of a man who impersonated an officer and under a threat of arrest forced a prostitute to orally copulate him and holding that the victim's belief that the accused was an officer was believable since he displayed a badge and handcuffs to her, threatened to arrest her and mentioned other vice officers who might be interested in "working out a deal"); Commonwealth v. Caracciola, 569 N.E.2d 774, 779 (Mass. 1991) (upholding the conviction of a man who impersonated an officer and under threat of arrest forcibly raped a prostitute and finding that the victim's belief that the accused was a public official was reasonable since he represented to her that he was a police officer and threatened to arrest her if she failed to comply with his requests).

13. CAL. PENAL CODE § 667.6(a) (amended by Chapter 127); *see* People v. Alford, 235 Cal. App. 3d 799, 805, 286 Cal. Rptr. 762, 765 (1991) (upholding a conviction for the sexual assault of two women by a public official acting under the color of authority); *see also* SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 468, at 2 (March 30, 1993) (noting that the motivation for SB 468 was a 1991 incident in Los Angeles where a county deputy sheriff used his authority to commit sex crimes but received half the jail time that a non-public official committing the same offenses would have received, due to the structure of the sentencing rules); *id.* (stating that SB 468 is expected to assure that law enforcement officers who commit sexual offenses will receive the same punishment as civilians who commit such offenses); *Ex-Deputy Gets 14 Years For Rapes of Motorists*, L.A. TIMES, Feb. 27, 1993, at B2 (reporting that L.A. county deputy sheriff, Lloyd Shoemaker, was sentenced to 14 years in prison and fined $10,000); Andrea Ford, *Deputy Accused of Sex Assaults While On Duty*, L.A. TIMES, Oct. 25, 1991, at A1 (noting that L.A. county deputy sheriff, Lloyd Shoemaker, was subject to 24 years imprisonment for using the threat of arrest to rape and sexually assault three women he encountered during routine traffic stops); *c.f.* Walter v. State, 264 A.2d 882, 887 (Md. 1970) (upholding the conviction of a police officer for the rape of the female companion of a motorist he apprehended); *id.* (suggesting that the policeman used his authority to place the victim in a fearful situation with the expectation that she would yield to his demands without physical resistance); State v. Burke, 522 A.2d 725, 736 (R.I. 1987) (upholding the conviction of a police sergeant for the sexual assault of a female hitchhiker); *id.* at 735 (noting that when an armed police officer speaks in terms of peremptory command, he creates a reasonable fear in the victim and no physical force need be shown to sustain a conviction for rape); Davis v. Commonwealth, 45 S.E.2d 167, 173 (Va. 1947) (upholding the convictions of two police officers for the forcible rape of a married woman they encountered walking on the street on her way home from a late night friendly

Under existing law, notwithstanding any other provision of law, probation will not be granted to, nor the execution of the sentence suspended for, any person convicted of committing certain sex crimes.[14] Existing law also provides that except for unusual cases wherein the interests of justice would best be served by granting probation, probation must not be granted to a person convicted of a violation of assault with intent to commit rape, sodomy, oral copulation, rape by foreign object, or lewd or lascivious acts with a child under the age of fourteen.[15]

Chapter 127 also expands this list of offenses to include rape, oral copulation, or sodomy when those acts are accomplished against the victim's will by threatening to use the authority of a public official to

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gathering). *See generally* Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 205, 814 P.2d 1341, 1343, 285 Cal. Rptr. 99, 101 (1991) (holding that a public entity may be held vicariously liable for a sexual assault committed by a police officer acting within the scope of his duty); *Recent Case: Respondeat Superior California Supreme Court Holds Police Department Vicariously Liable For Rape Committed By On-Duty Police Officer*, 105 HARV. L. REV. 947, 950 (1992) (noting with approval the court's decision and maintaining that rape is a foreseeable result of the authority bestowed by the public on police officers); Leslie Berkman, *Officer Abused Them, Women Say*, L.A. TIMES, July 10, 1991, at B1 (reporting that three women in San Clemente accused a police officer of rape and assault under color of authority); Joe Hughes, *Woman Reports Being Raped By a Man With Badge*, S.D. UNION-TRIB., Apr. 7, 1992, at B1 (stating that a young woman was pulled over and raped at gunpoint by a man claiming to be a police officer); Karen Kucher, *Man Impersonating Cop Rapes Teen Motorist at Gunpoint*, S.D. UNION-TRIB., Feb. 21, 1993, at B3 (reporting that a man purporting to be a police officer pulled over a sixteen-year-old girl and raped her at gunpoint); Priscilla Nordyke, *Apple Valley Deputy Arrested on Rape, Assault Charges*, SAN BERNARDINO COUNTY SUN, July 11, 1991, at A1 (noting that a sheriff's deputy was charged with raping a young female petty theft suspect after offering leniency for sex); *Officer Charged With Four On-Duty Rapes*, L.A. TIMES, Jan. 14, 1992, at B1 (reporting that a veteran officer was charged with raping four women while on duty); *Other O.C. Officers Accused of Sex Crimes*, L.A. TIMES, Apr. 6, 1991, at A29 (noting that from 1987-1991 at least four Orange County officers were charged with sex crimes ranging from molestation to rape); Mark Platte, *Officer Probably Aware of Police Beach Stakeouts*, L.A. TIMES, Aug. 17, 1991, at B1 (reporting that a San Diego patrol officer was arrested for a series of attempted robberies and sexual assaults at local beaches).

14. CAL. PENAL CODE § 1203.065(a) (amended by Chapter 127); *see id.* (listing the sex crimes for purposes of this section as rape, rape by penetration of the vaginal or anal openings with a foreign object, pimping, pandering, procuring a child under the age of 16 for lewd or lascivious acts, sodomy, oral copulation, and employment or use of a minor to perform prohibited acts).

15. *Id.* § 1203.065(b) (amended by Chapter 127).

incarcerate, arrest, or deport the victim or another and the victim has a reasonable belief that the aggressor is a public official.[16]

JLM

16. *Id.*; *see County Settles Lawsuit From Rape By Sheriff's Deputy*, L.A. TIMES, May 17, 1993, at B2 (quoting the attorney for a rape victim who sued the county for her rape by a sheriff's deputy as asserting that rape by a police officer is a most horrible crime since it involves the "ultimate betrayal of trust" by someone whom citizens are both taught to trust and required to obey); Carol Perruso, *Police Pedestal No Longer Intact*, L.A. TIMES, Aug. 25, 1991, at B2 (maintaining that structural repair is needed in police departments and that citizens are entitled to know not only that criminal officers are being prosecuted but what steps are being taken to prevent such persons from being a part of the force); Marke Platte & Michael Granberry, *Some See Trust In Law Enforcement Eroding*, L.A. TIMES, Aug. 16, 1991, at B1 (noting that women are increasingly afraid of police officers and are reluctant to report crimes by officers for fear of being disbelieved).