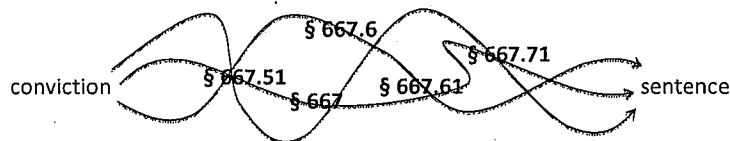


**Disentangling Sex Crime Sentencing:  
An Overview of Penal Code sections 667.6 and 667.61  
and their Relations to Other Sentencing Laws**



## **Penal Code § 667.51**

### **Conviction of PC 288 or 288.5 with qualifying priors**

- (a) current conviction of 288 or 288.5 with qualifying prior  
= 5 year enhancement
- (c) current conviction of 288 or 288.5 with 2+ qualifying priors  
= 15 years to life

Qualifying priors (subd. (b)):

261, 262, 264.1, 269, 285, 288, 288a, 288.5, 289

(c) is NOT an enhancement, but an alternative sentence

## Penal Code § 667.51

### Conviction of PC 288 or 288.5 with qualifying priors

Amendments effective Nov. 8, 2006

subd. (a) removed 10-year washout

subd. (b) added 285 to qualifying priors;

removed "brought and tried separately" requirement

\* Enhancement under (a) can be imposed on every current conviction if indeterminate term ?

(Unpublished case *People v Pepper* 2006 WL 3378463 says yes, following logic of *People v. Williams* (2004) 34 Cal.4th 397; *People v. Tassell* (1984) 36 Cal.3d 77.)

\* (a) + (c) ?

\* Relation to Three Strikes ? 667.61? 667.6?

## Penal Code § 667.6

### Prior-based enhancements (subds. (a) & (b)) and consecutive sentences (subds. (c) & (d)) in qualifying sex crime cases

#### Prior enhancements (subds. (a) & (b))

(a) Current conviction for qualifying crime (subd. (e))

PLUS

prior **conviction** of qualifying crime

= 5 year enhancement for each prior

(b) Current conviction for qualifying crime (subd. (e))

PLUS

2+ prior **prison terms** served for qualifying crime

= 10 years for EACH such term

## **Penal Code § 667.6**

### **Prior-based enhancements in qualifying sex crime cases (subds. (a) & (b))**

Qualifying crimes (subd. (e)):

PC §§ 261(a)(2),(3),(6) or (7)

262(a)(1),(4) or (5), 264.1,

286(d),(k) or (c)(2) or (3),

288(b), 288.5

288a(d),(k) or (c)(2) or (3), 289(a) or (g),

as a prior, conviction in other jurisdiction with same  
elements as an offense in (e)

- \* Out of state priors can qualify for enhancements (e)(10)
- \* PC 220 as a current offense triggers consecutive sentence provisions (c) or (d), but not prior enhancement (a) or (b) (see subd. (e)(9))
- \* If (a) or (b) applies, discretionary \$20,000 fine (subd. (f))

## **Penal Code § 667.6**

### **Prior-based enhancements in qualifying sex crime cases (subds. (a) & (b))**

- \* No dual use of priors for 5-year enhancements  
if 667.6 prior is also a serious felony prior under 667, subd. (a),  
can't impose both. (*People v. Flourney* (1994) 26 Cal.App.4th 1695)
- \* Multiple priors from same trial can result in multiple enhancements  
-- 667.6 does NOT include "brought and tried separately" limitation  
(*People v. Shea* (1995) 39 Cal.App.4th 1257)
- \* Term added only once to a determinate sentence even if more  
than one current conviction.  
(PC 1170.1(a); *P. v. Tassell* (1984) 36 Cal.3d 77, 90; cf. *P. v. Williams* (2004) 34 Cal.4th 397,  
403)
- \* Discretion to strike priors under PC 1385 – reasons required  
(See *People v. Melony* (2003) 30 Cal.4th 1145, 1155 [Generally, a court has discretion under section  
1385, subdivision (c), to dismiss or strike an enhancement, or to strike the additional punishment for that  
enhancement in the furtherance of justice and retains its authority under section 1385 absent a clear  
legislative direction to the contrary.])
- \* Amended effective Nov. 8, 2008  
-- removed 10-year washout

## Penal Code § 667.6

### Consecutive sentences in qualifying sex crime cases (subds. (c) & (d))

#### **MANDATORY CONSECUTIVE (subd. (d))**

If **multiple** current convictions of qualifying offenses  
terms **MUST** be full, consecutive  
IF separate victims OR same victim on separate occasions

#### **DISCRETIONARY CONSECUTIVE (subd. (c))**

If at least **ONE** current conviction of qualifying offense  
terms **MAY** be full, consecutive IF same victim on same occasion

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#### **QUALIFYING OFFENSES (subd. (e))**

PC §§ 261(a)(2,3,6 or 7), 262(a)(1,4 or 5), 264.1,  
286(d),(k) or (c)(2 or 3), 288(b), 288.5, 288a(d),(k) or (c)(2 or 3),  
289(a) or (g), OR as present offense 220

## Penal Code § 667.6

### Consecutive sentences in qualifying sex crime cases (subds. (c) & (d))

- \* Subd. (d) provides parameters for "separate occasion" determination  
(*People v. Fuller* (2006) 135 Cal.App.4th 1336; *People v. Jones* (2001) 25 Cal.4th 98.)
- \* Determination of "separate occasions" can be made by court  
and by preponderance of evidence  
(*People v. Groves* (2003) 107 Cal.App.4th 1227; *People v. Martinez* (2008) 166 Cal.App.4th 1598.)
- \* No notice requirement  
(*People v. Belasco* (1981) 125 Cal.App.3d 974.)
- \* Trial court retains discretion to impose upper, middle, lower terms.  
(*People v. Jones* (1988) 46 Cal.3d 585, 600.)

## Penal Code § 667.6

### Consecutive sentences in qualifying sex crime cases (subds. (c) & (d))

- \* Discretionary consecutive under subdivision (c)
  - only one conviction need be subd. (e)
- \* Trial court must provide reasons for discretionary sentencing choices:
  - choice (1) to impose a consecutive sentence **AND**
  - choice (2) to make the consecutive sentence full terms under 667(c)
- reasons can be the same  
*(People v. Quintanilla (2009) 170 Cal.App.4th 406; People v. Belmontes (1983) 34 Cal.3d 335.)*
- \* Amended effective Nov. 8, 2006
  - subdivision (c) was changed in an apparently unintentional way
  - & now *only* applies if same victim, same occasion  
*(People v. Goodliffe (2009) 177 Cal.App.4th 723)*

## Penal Code § 667.6

### Consecutive sentences in qualifying sex crime cases (subds. (c) & (d))

- \* *People v. Goodliffe (2009) 177 Cal.App.4th 723*  
Defendant pled guilty to 4 sex offenses involving 4 separate victims.  
Sentence imposed:
  - ct 1: 288 (a) --- 8 years (upper)
  - ct 2: 288 (a) --- 2 years consecutive (1/3 middle)
  - ct 3: 288 (c)(1) --- 8 months consecutive (1/3 middle)
  - ct 4: 288 (b)(1) --- 8 years consecutive (full upper / 667.6(c))

## Penal Code § 667.6

### Consecutive sentences in qualifying sex crime cases (subs. (c) & (d))

- \* "TWO BOXES" sentencing  
consecutive terms under (c) or (d) must be calculated separately from other sentences, and start to run when person would have otherwise been released from prison

Box 1: 667.6 sentences + Box 2: 1170 sentences  
(*P. v. Ottombrino* (1982) 127 Cal.App.3d 574.)

- \* Example convictions:

- event 1, victim A: 459, 211, 288(b)
- event 2, victim B: 459, 220, 289(a)
  
- one occasion, one victim: 288(a), 288(a), 288(b)]
- three occasions, one victim: 288(a), 288(a), 288(b)]
- one occasion, two victims: v1 – 288(a), 288(a); v2 – 288(b)]

## Penal Code § 667.61

### "One Strike" law for violent sex crimes

- ⊙ NOT an "enhancement" or "added term," an alternative base term for a qualifying offense.

(*People v. Acosta* (2002) 29 Cal.4th 105, 118-119.)

- ⊙ Qualifying crimes (c) committed in particular circumstances ((d) and (e)) bring life sentences:

c + d = 25 to life (subd. (a))  
c + e = 15 to life (subd. (b))  
c + 2e = 25 to life (subd. (a))

- ⊙ Qualifying crimes (c):  
PC §§ 261(a)(2) or (6), 262(a)(1) or (4), 264.1,  
286(d) or (c)(2) or (3), 288(a) or (b), 288.5,  
288a(d), or (c)(2) or (3), 289(a)

## The "One Strike" Law – § 667.61

current conviction is for:

(1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.

(2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.

(3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

(4) Lewd or lascivious act, in violation of subdivision (b) of Section 288.

(5) Sexual penetration, in violation of subdivision (a) of Section 289.

(6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.

(7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.

(8) Lewd or lascivious act, in violation of subdivision (a) of Section 288.

(9) Continuous sexual abuse of a child, in violation of Section 288.5.

(§ 667.61, subd. (c))

sentence is 25 to life if ONE of following circumstances is pled and proved:

(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 of the first degree, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

(5) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (2), (3), or (4) of this subdivision.

(§ 667.61, subd. (d))

## The "One Strike" Law – § 667.61, contd.

current conviction is for:

- (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
- (2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.
- (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
- (4) Lewd or lascivious act, in violation of subdivision (b) of Section 288.
- (5) Sexual penetration, in violation of subdivision (a) of Section 289.
- (6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.
- (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.
- (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288.
- (9) Continuous sexual abuse of a child, in violation of Section 288.5.

(§ 667.61, subd. (c))

sentence is 15 to life if ONE of the following circumstances is pled and proved,

OR 25 to life if TWO are pled and proved:

- (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 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 a 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 in the commission of the present offense in violation of Section 12022.75.
  - (8) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (1), (2), (3), (4), (6), or (7) of this subdivision.
- (§ 667.61, subd. (e))



## Penal Code § 667.61, cont'd.

### "One Strike" law for violent sex crimes

- ⊙ Circumstances must be pled and proved (subd. (j))
  - fall within *Apprendi*/Sixth Amendment requirement of jury trial and proof beyond a reasonable doubt.  
*(People v. Anderson (2009) 47 Cal.4th 92, 108.)*
  - separate instructions defining necessary act and mental state
  - separate findings on verdict forms
  - hung jury on alleged circumstance can be retried without violating double jeopardy principles  
*(People v. Anderson (2009) 47 Cal.4th 92.)*

## Penal Code § 667.61, contd.

### "One Strike" law for violent sex crimes

- ⊙ Consecutive sentences **required** for separate victims or same victim separate occasions (subd. (i))
  - Examples:
    - 1) one victim, one occasion, kidnap, 288(b), 288a(d)
    - 2) v1: 10 288(a) convictions, separate occasions  
v2: 288(a) and 289(a) convictions, same occasion
- ⊙ 667.61 sentences **are** subject to doubling or tripling under the strikes law (667)
  - Same prior(s) can be used to trigger .61 and 667 strikes law  
*(People v. Acosta (2002) 29 Cal.4th 105.)*
  - Example:
    - 1) current 288(a) conviction, one prior 288(a)
    - 2) 5 current, sep occasion 288(a), prior 288(a), prior 211
  - Romero* motion can remove two or three strike consequences.  
*(People v. Hammer (2003) 30 Cal.4th 756, 771.)*

## Penal Code § 667.61, contd.

### "One Strike" law for violent sex crimes

#### Subdivision (f)

- ⊙ Circumstances pled and proved *must* be used to determine sentence under this section – no striking within 667.61.

Use of circumstances under this section precludes sentencing on those circumstances under any other provision of law

UNLESS

there are more circumstances than needed to reach 25 to life.

Then any extra *can* bring separate punishment, but courts retain discretion under 1385 to strike the 'extra' circumstance punishment.

*(People v. Rivas (2004) 119 Cal.App.4th 565, 572-574.)*

#### Examples:

- 1) 289(a), kidnap 207, GBI 12022.7, tying or binding
- 2) 289(a), tying or binding, prior 288(a)

## Penal Code § 667.61, contd.

### "One Strike" law for violent sex crimes

- ⊙ ENACTED 1994, effective 1/1/95
  - minor changes 1997 and 1998 – (e)(3) & (4)
  - rewritten 2006, effective Nov. 8, 2006
    - 15% credits under 2933.1 taken away
    - removed discretion for concurrent sentences
      - (for pre-11/06 offenses, see P. v. Rodriguez (2005) 130 Cal.App.4th 1257.)*
    - added a few qualifying subdivisions of crimes,
    - under (d), added vicarious liability for circumstances (2)(3)(4) in "in concert" situations
    - under (e), added vicarious liability for circumstances (1)-(4), (6), and (7) in "in concert"
    - new subdivision (g)

## **Penal Code § 667.71**

### **Habitual Sex Offender – "Two Strikes" Law**

- ⊙ Qualifying conviction + prior qualifying conviction = 25 to life
- ⊙ Most qualifying convictions are also in .61
- ⊙ Stay or strike when .61 also pled and proved?  
(compare *People v. McQueen* (2008) 160 Cal.App.4th 27  
& *People v. Snow* (2003) 105 Cal.App.4th 271)
- ⊙ Section must be pled and proved (subd. (f))
- ⊙ *Can* be tripled or doubled under the strikes law  
(*People v. Murphy* (2001) 25 Cal.4th 136)
- ⊙ Amended 2006, effective 11/8/2006
  - no 2933.1 credits
  - prior can no longer be stricken for sentencing purposes (d)

Qualifying convictions under Penal Code §§ 667.71 & 667.61

§ 667.61

- (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
- (2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.
- (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
- (4) Lewd or lascivious act, in violation of subdivision (b) of Section 288.
- (5) Sexual penetration, in violation of subdivision (a) of Section 289.
- (6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.
- (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.
- (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288.
- (9) Continuous sexual abuse of a child, in violation of Section 288.5.

§ 667.71

- (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
- (2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.
- (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
- (4) Lewd or lascivious act, in violation of subdivision (a) or (b) of Section 288.
- (5) Sexual penetration, in violation of subdivision (a) or (j) of Section 289.
- (6) Continuous sexual abuse of a child, in violation of Section 288.5.
- (7) Sodomy, in violation of subdivision (c) or (d) of Section 286.
- (8) Oral copulation, in violation of subdivision (c) or (d) of Section 288a.
- (9) Kidnapping, in violation of subdivision (b) of Section 207.
- (10) Kidnapping, in violation of former subdivision (d) of Section 208 (kidnapping to commit specified sex offenses).
- (11) Kidnapping, in violation of subdivision (b) of Section 209 with the intent to commit a specified sexual offense.
- (12) Aggravated sexual assault of a child, in violation of Section 269.
- (13) An offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision.