

# **THIRD DEGREE COMMUNICATIONS, INC.**

## **TRAINING BULLETIN: LEGAL UPDATE**

### ***PROPOSITION 83 (JESSICA'S LAW) AND CHANGES TO SEXUAL ASSAULT STATUTES***

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A few states, like California, have ballot initiatives, allowing voters to directly enact or reject legislation. Often what succeeds in one state is adopted by another. For example, Virginia's all felon DNA database was the inspiration for California's ballot initiative on the same subject, which was enacted by the voters here in California in the last general election. Sometimes a really good idea, like Megan's Law, which allows online access to sex offender registration records, is adopted by almost all states.

In November California voters will consider Proposition 83, also known as Jessica's Law. Whenever a statute is named after someone, you can be pretty sure something terrible happened to that someone. In this case, Jessica was a nine year old girl who was kidnapped, sexually assaulted and murdered by a previously convicted sex offender.

It is likely that Proposition 83 will pass. If it does, it will become effective on January 1, 2007. This means that your investigations, especially in child molest cases, should focus on whether a crime occurred before or after that date. Since Proposition 83 both creates new crimes and expands old ones, it would violate the ex post facto rule to impose it retroactively. The ex post facto rule is a lawyer's way of saying "no fair."

In addition to expanding the scope of Sexually Violent Predator civil commitments and imposing a lifetime GPS monitoring requirement to go with the lifetime registration requirement of Penal Code section 290, Proposition 83 has some interesting provisions. Here are a few of them.

#### ***New Crime***

First, it creates the new crime of Penal Code section 288.3, which makes it a crime to "contact or communicate with a minor", or attempt to do so, knowing that the person is a minor, with the specific intent to commit a specified crime, including child molesting under Penal Code section 288 (including non-forcible child molesting) and showing harmful matter to the minor under Penal Code section 288.2. It is that specific intent language which saves this crime from being protected by the First Amendment.

Note that the content of the communication need not be obscene, harmful, sexually explicit or anything else. This crime would apply to the child molester who makes

friends with the victim first in order to trick the victim into sexual acts. It's a felony, not a wobbler, it applies to Internet communication, and it's punishable by the same sentence that would apply for the attempted target offense (i.e. it's half off). For example, if the target offense is Penal Code section 288, which has a 3-6-8 determinate sentence, the violation of Penal Code section 288.3 would be punishable by 18 months, 3 years, or 4 years in state prison.

There's no probation ineligibility language in this statute, but it does provide that a prior conviction for the same offense carries a five year prison enhancement, so please consider proving the elements of this crime in your investigations and asking your prosecutors to charge it.

How could you prove that the specific intent required for Penal Code section 288.3 exists? The easiest way is to charge it in conjunction with a violation of Penal Code section 288(a) or (b). The molester who enlists children in an apartment complex to help him find his "lost puppy" and then molests one of the children would be an example of a violation of both Penal Code sections 288.3 and 288. Another solution would be to wait until the communication becomes overtly sexual before charging this crime.

### ***Consecutive Terms for PC 269***

Second, it expands Penal Code section 269, aggravated sexual assault of a child, the subject of a previous article in this series. The age difference between the defendant and the victim is reduced from ten years to seven, although the victim must still be under the age of 14. The definition of the sexual assault is expanded from actual force to include a threat to retaliate in the future as well. The new version of 269 also adds language that parallels the language of Penal Code section 667.61; consecutive sentences (of 15 to life each) must be imposed if the counts involve separate victims or the same victim on separate occasions. Your interview of the child should be sure to establish that different assaults took place on different days, if they did.

### ***No Probation for PC 220***

Third, Penal Code section 220 is now a non-alternative felony. No probation is possible, and the only issue is whether the defendant will serve his or her 2, 4 or 6 years in state prison. This statute is also changed in an important respect. A person who violates section 220 (including assault with the intent to commit child molesting) during a first degree burglary (burglary of a dwelling) gets life in prison with the possibility of parole (after 7 years).

Remember that first degree burglary in California is *entering* the dwelling of another with the intent to commit theft or any felony, not *breaking and entering*, so the molester who tricks his way into the house, or is invited in by unsuspecting caretakers, violates this statute if he entered with the intent to commit child molesting.

### ***Child Pornography is Now a Wobbler***

Fourth, possession of child pornography under Penal Code section 311.11 is now a wobbler, instead of a misdemeanor, and a second offense is a felony, punishable by 2, 4 or 6 years in prison.

### ***GBI and PC 288***

Fifth, the personal infliction of great bodily injury during a violation of Penal Code section 288, whether forcible or non-forcible, section 288.5 (continuous sexual abuse of a child) and 269 (aggravated sexual assault of a child) are finally on the list of crimes that make a defendant probation ineligible. "Great bodily injury" means a "significant or substantial" injury, not a permanent injury, so a positive SART exam should be able to support this enhancement.

Several of the provisions of Jessica's Law contain language that prohibit the judge from using Penal Code section 1385 to dismiss an enhancement or crime. Penal Code section 1385 is an all purpose escape hatch that allows a judge to dismiss any part of an action "in the furtherance of justice." This same language was in the "three strikes" sentencing statutes and the California Supreme Court rejected it, which is why we have *Romero* hearings. Whether we'll get the same result in Jessica's Law is anybody's guess.

*But wait, there's more!*

### ***Meet PC 288.7***

On September 20, 2006 The Sex Offender Punishment, Control and Containment Act, after much hard work by Sen. Elaine Alquist, became law. This act, a.k.a. Chapter 337, makes most of the changes that Proposition 83 does, but it has an "emergency" clause that makes it effective immediately. If Proposition 83 passes, it will control these issues, with one exception.

The Sex Offender Punishment, Control and Containment Act creates a new crime not found in Jessica's Law. This is Penal Code section 288.7, which makes it a felony for anyone 18 or older to have sexual intercourse, sodomy, or oral copulation, forcible or not, with a minor under the age of 10 years. Think of your investigations and how many of them fit the elements of this crime.

If the act involved is sexual intercourse or sodomy, the punishment is 25 to life. If the act involved is oral copulation the punishment is 15 to life. This will become an increasingly important crime to charge, so remember the effective date and try to establish in your interview of the victim whether or not the victim was under ten years of age on or after September 20, 2006.

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