

AMENDED IN ASSEMBLY AUGUST 31, 2005

AMENDED IN SENATE JUNE 2, 2005

AMENDED IN SENATE MAY 27, 2005

AMENDED IN SENATE APRIL 14, 2005

AMENDED IN SENATE FEBRUARY 16, 2005

**SENATE BILL**

**No. 33**

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**Introduced by ~~Senator Battin~~ *Senators Battin and Poochigian***  
**(Principal coauthor: Senator Alquist)**  
*(Coauthor: Assembly Member Cohn)*

December 13, 2004

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An act to amend Sections 285, 288.1, 1000.12, and 1203.066 of, and to repeal Section 1000.13 of, the Penal Code, relating to sexual abuse.

LEGISLATIVE COUNSEL'S DIGEST

SB 33, as amended, Battin. Child sexual abuse.

Existing law provides that it is a ~~crime punishable by imprisonment in the state prison~~ *felony* for persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void to commit fornication or adultery with one another.

This bill would provide that it is a ~~crime punishable by imprisonment in the state prison~~ *felony* for persons within specified degrees of consanguinity who are 14 years of age or older to commit fornication or adultery with one another.

Existing law provides that any person convicted of committing any lewd or lascivious act upon a child under 14 years of age shall not have his or her sentence suspended until the court obtains a report as

to the mental condition of that person from a reputable psychiatrist or psychologist, or from a recognized treatment program.

~~This bill would also provide that if the defendant is a member of the victim's household, he or she shall not be granted probation unless they are removed from the victim's household until the court determines that the best interests of the victim would be served by his or her return. This bill would also provide that while removed from the household, the court shall prohibit contact by the defendant with the victim, as specified delete the option of receiving a report from a recognized treatment program.~~

Existing law provides that, in lieu of prosecuting a person suspected of committing an act of abuse or neglect involving a minor victim, the prosecuting attorney may refer that person for counseling and psychological treatment.

This bill would specify that these provisions only apply to a person suspected of committing physical abuse or neglect.

Existing law also provides that, in lieu of trial, the prosecuting attorney may make a motion to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of molestation or sexual abuse, upon written agreement between the prosecuting attorney and the suspect, if he or she is a family member of the victim, the person has no prior violent or sexual felony convictions, and no adverse diversion or counseling history, as specified, provided that rehabilitation is feasible, there is no threat of harm to the minor, the charged offense is not a lewd or lascivious act or any other sexual offense committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the defendant pleads guilty and completes an approved treatment program, 5 years after which, the court shall dismiss the charges against the defendant.

This bill would repeal these provisions.

Existing law provides that a person who is convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child, if the violation involved more than one victim, substantial sexual conduct with a victim who was under 14 years of age, or the use of obscene matter depicting sexual conduct, as specified, shall be ineligible for probation, a suspended sentence, nor shall any of the charges against him or her be dismissed, as specified, unless the court makes several findings including that the defendant is the victim's parent or relative, grant of probation is in the best interest

of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.

This bill would instead provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for any person convicted of committing these offenses if the existence of any fact required to prove the allegation is alleged in the accusatory pleading and either admitted by the defendant or found to be true by the trier of fact. Further, for the existence of any fact relating to lewd and lascivious acts against multiple victims, in order for these provisions to apply, the allegation must specifically reference these provisions. *The bill would specify the conditions under which a person convicted of lewd and lascivious acts upon a child or continuous sexual abuse of a child may be granted probation.*

This bill would make other conforming changes.

Because this bill would increase local incarceration costs and change the punishment for a crime, it would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 285 of the Penal Code is amended to  
2 read:

3 285. Persons being within the degrees of consanguinity  
4 within which marriages are declared by law to be incestuous and  
5 void, who intermarry with each other, or who being 14 years of  
6 age or older, commit fornication or adultery with each other, are  
7 punishable by imprisonment in the state prison.

8 SEC. 2. Section 288.1 of the Penal Code is amended to read:

9 288.1. ~~(a)~~ Any person convicted of committing any lewd or  
10 lascivious act including any of the acts constituting other crimes  
11 provided for in Part 1 of this code upon or with the body, or any  
12 part or member thereof, of a child under the age of 14 years shall

1 not have his or her sentence suspended until the court obtains a  
2 report from a reputable psychiatrist, from a reputable  
3 psychologist who meets the standards set forth in Section 1027,  
4 as to the mental condition of that person.

5 ~~(b) If the defendant is a member of the victim's household,  
6 probation shall not be granted unless the defendant is removed  
7 from the household of the victim until the court determines that  
8 the best interests of the victim would be served by his or her  
9 return. While removed from the household, the court shall  
10 prohibit contact by the defendant with the victim, with the  
11 exception that the court may permit supervised contact, upon the  
12 request of the director of the court ordered supervised treatment  
13 program, and with the agreement of the victim and the victim's  
14 parent or legal guardian, other than the defendant. As used in this  
15 subdivision, "contact with the victim" includes all physical  
16 contact, being in the presence of the victim, communicating by  
17 any means, including by a third party acting on behalf of the  
18 defendant, or sending any gifts.~~

19 SEC. 3 Section 1000.12 of the Penal Code is amended to  
20 read:

21 1000.12. (a) It is the intent of the Legislature that nothing in  
22 this chapter deprive a prosecuting attorney of the ability to  
23 prosecute any person who is suspected of committing any crime  
24 in which a minor is a victim of an act of physical abuse or  
25 neglect to the fullest extent of the law, if the prosecuting attorney  
26 so chooses.

27 (b) In lieu of prosecuting a person suspected of committing  
28 any crime, involving a minor victim, of an act of physical abuse  
29 or neglect, the prosecuting attorney may refer that person to the  
30 county department in charge of public social services or the  
31 probation department for counseling or psychological treatment  
32 and such other services as the department deems necessary. The  
33 prosecuting attorney shall seek the advice of the county  
34 department in charge of public social services or the probation  
35 department in determining whether or not to make the referral.

36 (c) This section shall not apply to any person who is charged  
37 with sexual abuse or molestation of a minor victim, or any sexual  
38 offense involving force, violence, duress, menace, or fear of  
39 immediate and unlawful bodily injury on the minor victim or  
40 another person.

1 SEC. 4. Section 1000.13 of the Penal Code is repealed.

2 SEC. 5. Section 1203.066 of the Penal Code is amended to  
3 read:

4 1203.066. (a) Notwithstanding Section 1203 or any other  
5 law, probation shall not be granted to, nor shall the execution or  
6 imposition of sentence be suspended for, nor shall a finding  
7 bringing the defendant within the provisions of this section be  
8 stricken pursuant to Section 1385 for, any of the following  
9 persons:

10 (1) A person who is convicted of violating Section 288 or  
11 288.5 when the act is committed by the use of force, violence,  
12 duress, menace, or fear of immediate and unlawful bodily injury  
13 on the victim or another person.

14 (2) A person who caused bodily injury on the child victim in  
15 committing a violation of Section 288 or 288.5.

16 (3) A person who is convicted of a violation of Section 288 or  
17 288.5 and who was a stranger to the child victim or befriended  
18 the child victim for the purpose of committing an act in violation  
19 of Section 288 or 288.5, unless the defendant honestly and  
20 reasonably believed the victim was 14 years of age or older.

21 (4) A person who used a weapon during the commission of a  
22 violation of Section 288 or 288.5.

23 (5) A person who is convicted of committing a violation of  
24 Section 288 or 288.5 and who has been previously convicted of a  
25 violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286,  
26 288, 288.5, 288a, or 289, or of assaulting another person with  
27 intent to commit a crime specified in this paragraph in violation  
28 of Section 220, or who has been previously convicted in another  
29 state of an offense which, if committed or attempted in this state,  
30 would constitute an offense enumerated in this paragraph.

31 (6) A person who violated Section 288 or 288.5 while  
32 kidnapping the child victim in violation of Section 207, 209, or  
33 209.5.

34 (7) A person who is convicted of committing a violation of  
35 Section 288 or 288.5 against more than one victim.

36 (8) A person who, in violating Section 288 or 288.5, has  
37 substantial sexual conduct with a victim who is under 14 years of  
38 age.

39 (9) A person who, in violating Section 288 or 288.5, used  
40 obscene matter, as defined in Section 311, or matter, as defined

1 in Section 311, depicting sexual conduct, as defined in Section  
2 311.3.

3 (b) “Substantial sexual conduct” means penetration of the  
4 vagina or rectum of either the victim or the offender by the penis  
5 of the other or by any foreign object, oral copulation, or  
6 masturbation of either the victim or the offender.

7 (c) (1) Except for a violation of subdivision (b) of Section  
8 288, this section shall only apply if the existence of any fact  
9 required in subdivision (a) is alleged in the accusatory pleading  
10 and is either admitted by the defendant in open court, or found to  
11 be true by the trier of fact.

12 (2) For the existence of any fact under paragraph (7) of  
13 subdivision (a), the allegation must be made pursuant to this  
14 section.

15 (d) (1) *If a person is convicted of a violation of section 288 or*  
16 *288.5, and the factors listed in subdivision (a) are not pled or*  
17 *proven, probation may be granted only if the following terms and*  
18 *conditions are met:*

19 (A) *If the defendant is a member of the victim’s household, the*  
20 *court finds that probation is in the best interest of the child*  
21 *victim.*

22 (B) *The court finds that rehabilitation of the defendant is*  
23 *feasible and that the defendant is amenable to undergoing*  
24 *treatment, and the defendant is placed in a recognized treatment*  
25 *program designed to deal with child molestation immediately*  
26 *after the grant of probation or the suspension of execution or*  
27 *imposition of sentence.*

28 (C) *If the defendant is a member of the victim’s household,*  
29 *probation shall not be granted unless the defendant is removed*  
30 *from the household of the victim until the court determines that*  
31 *the best interests of the victim would be served by his or her*  
32 *return. While removed from the household, the court shall*  
33 *prohibit contact by the defendant with the victim, with the*  
34 *exception that the court may permit supervised contact, upon the*  
35 *request of the director of the court-ordered supervised treatment*  
36 *program, and with the agreement of the victim and the victim’s*  
37 *parent or legal guardian, other than the defendant.*

38 (D) *The court finds that there is no threat of physical harm to*  
39 *the victim if probation is granted.*

1     (2) *The court shall state its reasons on the record for whatever*  
2 *sentence it imposes on the defendant.*

3     (3) *The court shall order the psychiatrist or psychologist who*  
4 *is appointed pursuant to Section 288.1 to include a consideration*  
5 *of the factors specified in subparagraphs (A), (B), and (C) in*  
6 *making his or her report to the court.*

7     (4) *The court shall order the defendant to comply with all*  
8 *probation requirements, including the requirements to attend*  
9 *counseling, keep all program appointments, and pay program*  
10 *fees based upon ability to pay.*

11     (5) *No victim shall be compelled to participate in a program*  
12 *or counseling, and no program may condition a defendant's*  
13 *enrollment on participation by the victim.*

14     (e) *As used in subdivision (d), the following definitions apply:*

15     (1) *"Contact with the victim" includes all physical contact,*  
16 *being in the presence of the victim, communicating by any*  
17 *means, including by a third party acting on behalf of the*  
18 *defendant, or sending any gifts.*

19     (2) *"Recognized treatment program" means a program that*  
20 *consists of the following components:*

21     (A) *Substantial expertise in the treatment of child sexual*  
22 *abuse.*

23     (B) *A treatment regimen designed to specifically address the*  
24 *offense.*

25     (C) *The ability to serve indigent clients.*

26     (D) *Adequate reporting requirements to ensure that all*  
27 *persons who, after being ordered to attend and complete a*  
28 *program, may be identified for either failure to enroll in, or*  
29 *failure to successfully complete, the program, or for the*  
30 *successful completion of the program as ordered. The program*  
31 *shall notify the court and the probation department, in writing,*  
32 *within the period of time and in the manner specified by the court*  
33 *of any person who fails to complete the program. Notification*  
34 *shall be given if the program determines that the defendant is*  
35 *performing unsatisfactorily or if the defendant is not benefiting*  
36 *from the education, treatment, or counseling.*

37     SEC. 6. *No reimbursement is required by this act pursuant to*  
38 *Section 6 of Article XIII B of the California Constitution because*  
39 *the only costs that may be incurred by a local agency or school*  
40 *district will be incurred because this act creates a new crime or*

1 infraction, eliminates a crime or infraction, or changes the  
2 penalty for a crime or infraction, within the meaning of Section  
3 17556 of the Government Code, or changes the definition of a  
4 crime within the meaning of Section 6 of Article XIII B of the  
5 California Constitution.

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