PENAL CODE § 288.5 AND THE DILUTION OF THE CONSTITUTIONAL REQUIREMENT FOR JURY UNANIMITY

From the intersection of due process and the right to trial by jury evolves a defendant's right to require the prosecution to prove each element of a charged offense beyond a reasonable doubt to each juror. The right to jury unanimity on each element is fundamental to the legitimacy of our criminal justice system.

Plainly, that constitutional requirement can be an impediment to quick conviction. Some are willing to sacrifice this constitutional mandate in the interest of expediency, particularly when the perceived "public interest" in certain punishment is strong. Such is the case with sex crimes involving minors.

In 1989, the Legislature enacted Penal Code § 288.5:

> (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.
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> (b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts

occurred not on which acts constitute the requisite number.

There is no doubt that an element of the crime in section 288.5 is that the defendant must have committed three or more separate acts of lewd and lascivious conduct on the victim over a period of not less than three months. If a defendant committed only two such acts, that defendant did not violate section 288.5. However, subdivision (b) declares that if the minor claims three or more acts of lewd and lascivious conduct or substantial sexual conduct, there is no requirement that the jurors agree which criminal acts of molestation by the defendant were proved beyond a reasonable doubt to establish the charged crime.

Assume a child alleges that he/she was the victim of lewd and lascivious conduct once a month from 2008 through the end of 2010. The defendant denies any such sex acts, offering alibi, lack of access to the child, and other evidence to dispute the prosecution's evidence. At the end of all the evidence, each juror believes some acts of molestation occurred, but each believes the acts occurred in a different three-month period of a different year. That is, juror 1 believes that three acts occurred from January through March 2008; the 11 other jurors reject that evidence. Juror 2 believes the three acts occurred from April through June 2008; the 11 other jurors reject that claim. And so on. Nevertheless, because each juror believes three acts of molestation occurred over a three-month period within the time charged in the Information (2008 to 2010), even though no

two jurors agree beyond a reasonable doubt which three acts were committed, the jury can convict the defendant under subdivision (b).

Subdivision (b) is unique in California jurisprudence – in no other statute has the Legislature prescribed specific acts by a defendant (three separate acts of molestation) as elements of a crime and then proclaimed that jury unanimity is not required. As further detailed below, the purported authority in subdivision (b) to undermine the requirement for juror unanimity is incompatible with both California and federal constitutional guarantees of due process and the right to trial by jury and is contrary to the dictates of the California Supreme Court in People v. Jones (1990) 51 Cal.3d 294.

Nevertheless, numerous appellate decisions by the California Court of Appeal have found no constitutional defect in the permission granted in section 288.5 to ignore the unanimity requirement. Careful consideration of those decisions reveals that they rest on analogies that do not withstand scrutiny. No other crime upon which those decisions rely to support their conclusion dispensing with juror unanimity for this allegedly "continuing" crime contains statutory language analogous to the express requirement of section 288.5 that the defendant commit three separate acts of molestation. Further, these California decisions failed to consider, or preceded, the United States Supreme Court's decision in Richardson v. United States (1999) 526 U.S. 813, as well as a more recent series of United States

Supreme Court decisions reasserting the importance of unanimous jury decisions on facts found beyond a reasonable doubt as a prerequisite to subjecting the defendant to more punitive sentencing.

The California Supreme Court has not directly addressed this provision of section 288.5, though that Court has considered other aspects of that statute. When that Court does, it should reject the analysis adopted by the Courts of Appeal and hold that jury unanimity is required for each of the predicate crimes required by section 288.5.

A. DUE PROCESS AND UNANIMOUS JURY VERDICTS

Among the most basic principles embedded in the Due Process Clause of both the federal and California Constitutions (U.S. Const., 14th Amend.; Cal. Const. art I, §13) is the requirement that the jury must find the evidence proves the defendant guilty beyond a reasonable doubt. (In re Winship (1970) 397 U.S. 358, 363-364; People v. Dillon (1983) 34 Cal.3rd 441, 473.) "Beyond a reasonable doubt" means proof to an "evidentiary certainty" (Cage v. Louisiana (1990) 498 U.S. 39, 41), that each juror has a "subjective state of near certitude of the guilt of the accused." (Victor v. Nebraska (1994) 511 U.S. 1, 15. Accord Johnson v. Louisiana (1968) 406 U.S. 356, 360.)

Due Process is not satisfied simply because jurors somehow agree that the defendant committed the charged crime. A criminal defendant is

entitled to "'a jury determination that [he] is guilty of **every element of the crime** with which he is charged, beyond a reasonable doubt.'" (Apprendi v. New Jersey (2000) 530 U.S. 466, 477, quoting United States v. Gaudin (1995) 515 U.S. 506, 510 (emphasis added).) Indeed, in the emphatic statement of the Winship court,

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact necessary to constitute the crime with which he is charged**. (397 U.S. at 364, emphasis added.)

The legislative enactment of section 288.5 undermines that constitutional mandate.

B. CALIFORNIA COURT OF APPEAL DECISIONS

Among the decisions of the California Courts of Appeal that have rejected constitutional challenges to section 288.5, one of the most prominent and often cited is People v. Whitham (1995) 38 Cal.App.4th 1282. There, the trial judge instructed the jury that unanimity on which three acts of molestation constituted the crime was not required.[1]

[1] The California Supreme Court has not considered a challenge to the no-need-for-unanimity instruction when a defendant is charged with a violation of section 288.5. That court considered an *ex post facto* challenge in People v. Grant (1999) 20 Cal.4th 150, concluding a defendant could be prosecuted under section 288.5 where defendant molested victim before and after enactment of statute. In People v. Johnson (2002) 28 Cal.4th 240, the Court considered the limitation on concurrent charges in subdivision (c), concluding a defendant could not be convicted of both a violation of 288.5 and a forcible sex offense on the same

Whitham acknowledged that article I, § 16 of the California Constitution requires jury unanimity in order to convict a defendant of a crime. However, Whitham explained that constitutional unanimity requirement did not apply to a crime which the statute contemplates as a "continuous course of conduct." (Id., at 1295.)

> "When the evidence tends to show a larger number of distinct violations of the charged crime than have been charged and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge.
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> "'Neither instruction nor election are required, however, if the case falls within the continuous course of conduct exception. This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when ... the statute contemplates a continuous course of conduct of a series of acts over a period of time.'"

People v. Whitham, supra, 38 Cal.App.4th at 1295, quoting People v. Avina (1993) 14 Cal.App.4th 1303, 1309, citations omitted.)

Further, quoting from the dissenting opinion by Justice Mosk in People v. Jones, supra, 51 Cal.3d at 329, Whitham explained,

> [t]he continuous-course-of-conduct crime does not require jury unanimity on the specific act, because it's not the specific act that is criminalized. The *actus reus* of such a crime is a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury. The agreement required for conviction is directed at the appropriate *actus reus*: unanimous assent that the defendant engaged in a criminal course of conduct.

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victim during the same time period.

Whitham noted that prior appellate decisions had concluded that a unanimity instruction was not required for certain crimes which had been characterized as punishing continuous course-of-conduct activity. Whitham opined that section 288.5 was no different, and thus concluded that the mandate in subdivision (b) that unanimity is not required on which acts constitute the crime did "not transgress the California Constitution." (Id., at 1296.) Further, subdivision (b) and the resulting jury instruction given at Whitham's trial did not violate the Due Process Clause of the United States Constitution because, Whitham explained, there is no federal requirement for unanimous jury verdicts in state criminal prosecutions, citing Johnson v. Louisiana (1972) 406 U.S. 356. (38 Cal.App.4th at 1298.) The Whitman court opined that the absence of unanimity did not dilute the "fundamental requirement that the offense be proven beyond a reasonable doubt." (Ibid.)

The key to Whitham's conclusion was that the crime defined in section 288.5 was no different than other course-of-conduct crimes that had been considered by prior courts. In this, and in its constitutional conclusions, Whitham was mistaken.[2]

[2] Whitman and its companion cases continued to be relied upon by later appellate decisions. For example, People v. Cissna (2010) 182 Cal.App.4th 1105, 1124, in dicta, rejected a challenge to section 288.5 on the ground that unanimity was not required for conviction: "There is no violation of the constitutional right to unanimous agreement on the criminal conduct because the *actus reus* of the

Whitham cited the following cases that allegedly supported the proposition that no unanimity instruction is needed where the charged crime involves a course of conduct (38 Cal.App.4th at 1295-1296):[3]

Decision	Statute	Statutory Language/Comment
Diedrich (1982) 31 Cal.3d 263	PC 165, bribery	"who gives or offers a bribe to … with intent to corruptly influence such member in his action on any matter or subject pending before him
Jenkins (1994) 29 Cal.App.4th 287	PC 206, torture	"…with intent to cause cruel or extreme pain …inflicts great bodily injury"
Brown (1991) 234 Cal.App.3d 918	Bus. & Prof. 2053, practicing medicine without a license	Any person who willfully, under circumstances or conditions which cause or create risk of great bodily harm . . . practices or attempts to practice . . . any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any . . . disease . . . or other physical or mental condition of any person, without having at the time of so doing a valid . . . certificate as provided in this chapter

offense is the course of conduct, not a specific act. [Cit.] 'The agreement required for conviction is directed at the appropriate *actus reus:* unanimous assent that the defendant engaged in the criminal course of conduct.'"

[3] Whitman also cited several prior Court of Appeal decisions that had rejected a constitutional challenge to this part of section 288.5: People v. Gear (1993) 19 Cal.App.4th 86; People v. Avina (1993) 14 Cal.App.4th 1302; People v. Higgins (1992) 9 Cal.App.4th 294.

Salvato (1991) 234 Cal.App.3d 872	PC 136.1, dissuading a witness by threat; PC 422, threatening a person with death or great injury	136.1 - Knowingly preventing or dissuading a witness from testifying; 422 – threatening to commit a crime that will cause death or great bodily injury with the intent that the statement be taken as a threat and which reasonably causes sustained fear
Gunn (1987) 197 Cal.App.3d 408	PC 32, accessory after the fact	"every person who after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that such principal may avoid or escape arrest, trial …
Laport (1987) 189 Cal.App.3d 281	PC 487, grand theft	Embezzlement from the same victim over a period of time can constitute a continuing course of conduct and only one count of grand theft, for which no unanimity instruction required. However, where single count of grand theft charged, but evidence showed defendant embezzled funds by check and stole paintings, unanimity instruction required on how defendant committed crime
Daniel (1983) 145 Cal.App.3d 168	PC 487, grand theft	Where basis of grand theft was ongoing taking of funds belonging to same business victim, no unanimity instruction required

Crawford (1982) 131 Cal.App.3d 591	PC 12021, possession of firearm by felon	Court states that "where the offense defendant is charged with constitutes a continuing course of conduct over a period of time, rather than a particular act on a specified date, no instruction is appropriate." (131 Cal.App.3d at 597.) However, as several guns were found in the residence, but only a single count charged, unanimity instruction required on which gun, and under which circumstance, constituted crime
Madden (1981) 116 Cal.App.3d 212	PC 286, 288a, forcible sodomy and forcible oral copulation	"Where evidence is introduced as to several criminal acts of oral copulation, all of which occurred within a relatively short time span but an accused is not charged with a violation of all of those acts, does the trial court commit reversible error in not giving a *sua sponte* instruction stating that the jurors must all agree that the accused committed the same act or acts? Yes." (116 Cal.App.3d at 214.)[4]

The conclusion in Whitham that juror unanimity is not required when a defendant is charged with violating section 288.5 because juror

[4] In its analysis, the Court commented on the scope of the continuous course of conduct crimes: "Conceptually, the exception of continuous conduct resulting in but one offense is quite limited. There is a fundamental difference between a continuous crime spree and continuous conduct resulting in one specific offense. The continuous conduct exception only really applies, if at all, to those types of offenses where the statute defining the crime may be interpreted as applying, on occasion, to an offense which may be continuous in nature such as failure to provide, child abuse, contributing to the delinquency of a minor, driving under the influence and the like." (116 Cal.App.3d at 218.) The Court proceeded to list

unanimity was not required in these other decisions for certain other crimes is analytically incorrect.[5]

None of the crimes discussed in any of those cases contain any language like that in section 288.5. It is true that, for example, practicing medicine (or law) without a license is not a crime that occurs in a single second. However, none of the statutes in issue in those decisions contain an express requirement of three (or two or 100) specific criminal acts by the defendant in defining the crime, and nothing declares that the jurors need not be unanimous on an element of the crime. Section 288.5 simply is not a crime that is "continuous" in the way that practicing medicine or law without a license, or driving under the influence of alcohol, can be.

At least one decision, People v. Martinez (1988) 197 Cal.App.3d 767, 774, has so held.[6]

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crimes that fall within that category, such as concealing stolen property, driving under the influence and unlicensed fruit seller.

[5] Whitman also cited People v. Ainsworth (1988) 45 Cal.3d 984. (38 Cal.App.4th at 1296.) However, the issue in that capital murder case was the application of the felony-murder rule and the relationship of the homicide to the felony committed. Ainsworth offers no support to the analysis in Whitman.

[6] See People v. Perez (1979) 23 Cal.3d 545 [separate sex acts committed on victim, even close in time, may be separately punished; multiple punishment would be barred if the acts were part of one continuing criminal action].

> abuse, contributing to the delinquency of a minor, driving under the influence and the like [citing many cases]. Insofar as cases cited herein might be read as holding that multiple sex offenses constitute a continuous course of conduct or a single act, we disagree. **Multiple sex acts cannot be held to be continuous conduct on a theory of there being but one act of sexual abuse.** (People v. Madden, supra, 116 Cal.App.3d at 218, emphasis added.)

The issue is not whether a crime can be labeled as falling within a broad category of crimes deemed to be "continuous" or categorized as involving a "course of conduct." Similarly, the issue is not whether the state can enact a statute that punished more harshly those who commit a sex offense on a child with whom the defendant lives. Rather, the issue is when a statute in precise detail identifies as an element of the crime that the defendant must commit a specific number of criminal acts – here, three acts of child molestation -- can the statute constitutionally authorize a jury instruction that undermines the requirement that all jurors agree beyond a reasonable doubt the defendant committed the same three or more crimes.

The error made in Whitham, Avina and similar decisions is the failure to recognize the differences between real "continuous crimes" and the crime defined in section 288.5. Those decisions identify crimes as "torture" in violation of section 206 (cited in Whitham) and "pimping" in violation of section 266h (cited in Avina) as "continuous" crimes. Torture requires proof that the defendant "…with intent to cause cruel or extreme pain …inflicts great bodily injury" on the victim. Pimping outlaws "any

person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earning or proceeds of such person's prostitution." The violation of either statute requires acts that occur over time – likely somewhat less time for torture, likely more time to show one is living off a prostitute's earnings. However, the acts committed by the defendant lead to one crime – the victim is tortured by the defendant, or the defendant is shown to be living off a prostitute's earnings.

Section 288.5 defines the prohibited conduct differently. The elements are 1) the victim must be under 14; 2) the defendant had ongoing access to the victim; and 3) the defendant molested the victim at least three times over a period that equals or exceeds three months. (CALCRIM 1120.) The illegal conduct in section 288.5 does not lead to a single crime in the way that living off a prostitute does.[7]

[7] The application of one other statute in California has been affected by the analysis in Avina, Gear and similar cases. Penal Code § 186.22 defines the crime of being a member of, or committing a crime for, a criminal street gang. To prove there was a criminal street gang, the prosecution must show that the gang engaged in a pattern of "criminal gang activity," which is in turn means "means the commission ... of two or more [specified offenses within a three year period], [which] are committed on separate occasions, or by two or more persons...." (Pen. Code § 186.22, subd. (e).)

Expressly relying on Avina, People v. Funes (1994) 23 Cal.App.4th 1506, 1525-1529 held that the jury need not unanimously agree on which specific crimes were committed to establish a pattern of criminal gang activity, so long as the jury agrees there were two or more such separate crimes. Funes adopted the same continuous course of conduct analysis used in Avina and similar cases, even though the prosecution's evidence may involve different crimes, committed years apart, by entirely different individuals. (Accord People v. Bragg (2008) 161 Cal.App.4th 1385, 1402 ["there was no requirement for a unanimity instruction because commission of the predicate crimes falls within the "continuous-course-

Consider the language of section 288.5. After stating the elements of the crime, subdivision (a) provides in its final two clauses that one who commits the elements identified therein "is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." If the first of those two clauses were not included in the statute – "guilty of the offense of continuous sexual abuse of a child" – the crime would still be the same. Like most penal statutes, section 288.5 would recite that if an individual committed the crime defined, he/she "shall be punished" by a particular sentence. The phrase "continuous sexual abuse" is used only as a label that adds nothing to the offense defined.

Section 288.5 is one of a small class of crimes that include within the definition of the crime more than one "criminal" act, such as being a felon in possession of a firearm prohibited in section 12021. (See Richardson v. United States (1999) 526 U.S. 813, discussed *infra*.) As the language of section 12021 and its jury instruction (e.g., CALCRIM 2510) make clear, whether the defendant has suffered a prior felony conviction is an element of the crime. The jury must be convinced beyond a reasonable doubt that the defendant had been so convicted and must unanimously agree on which prior conviction he suffered, if evidence of more than one prior conviction is introduced. Indeed, if there is evidence of more than

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of-conduct" exception to the rule requiring unanimity [citing Funes]."].)

one firearm, the jury must agree on which firearm is the basis of any conviction. (E.g., People v. Sapp (2003) 31 Cal.4th 240, 261; People v. Wolfe (2003) 114 Cal.App.4th 177.)[8]

Although the Legislature characterized the crime in section 288.5 as "continuous sexual abuse," choosing a label or characterization of the crime or selecting a title for it does not change the crime's elements. Section 288.5 cannot be committed without the commission of three separate acts of child molestation over a particular period. If the defendant is found to have committed one sex act with three different children in the same house, or 10 sex acts with the same child in only one month, the jury must find insufficient evidence of a violation of section 288.5.

Concluding that juror unanimity is not constitutionally required on which acts constitute the bases for a conviction of section 288.5 leads to an incongruous results.

Subdivision (c) bars the prosecutor from charging the defendant with any individual violation of lewd or lascivious act under section 288 that allegedly occurred during the period of the charged violation of section 288.5. Thus, where the prosecutor charges the violation of section 288.5

[8] If the prosecutor alleges that a defendant has suffered prior convictions, and the defendant does not request a bifurcated trial or to have those allegations tried by the court without a jury, the jury is told it cannot find each alleged prior conviction true unless it is satisfied beyond a reasonable doubt as to each one – the jury cannot collectively decide that at least one of the priors is true and thereby end the matter. (CALCRIM 3100.) Each criminal act/prior must be

occurred during a five-year period, the jury may not convict the defendant of individual violations of section 288 on the same victim during that period.

A violation of section 288.5 is punishable by 6, 12 or 16 years in prison. By contrast, a single violation of section 288 is punishable by 3, 6 or 8 years. Where the complainant alleges repeated acts of sexual abuse, a prosecutor can charge many violations of section 288 instead of a single violation of section 288.5.

Assume a young victim alleges three acts of sexual abuse over four months. The prosecutor could, hypothetically, charge three violations of section 288, subdivision (b), instead of a single violation of section 288.5 during the same time period. If the crimes were charged individually, a defendant so convicted could be sentenced under section 667.6, subdivision (c) or (d), to a 24-year sentence, instead of a maximum 16-year sentence for a conviction under section 288.5.

There is no doubt that if the accused was charged with separate violations of section 288, the jury would be instructed that it must unanimously agree which act constituted each charged crime. (See e.g., CALCRIM 3500.) No less is required under the Due Process Clause for a violation of section 288.5.

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weighed individually.

In the face of an accusation of child sexual abuse, it is easy to seek a path to speedy conviction, as some courts and jurors have done so. However, ease of prosecution is not a constitutional goal; guaranteeing an accused's constitutional rights is one of the judiciary's most sacred duties.[9] As Justice Douglas observed in his penetrating opinion opposing the adoption of non-unanimous jury verdicts in criminal cases, "it is my belief that a unanimous jury is necessary if the great barricade known as proof beyond a reasonable doubt is to be maintained." (Johnson v. Louisiana (1972) 406 U.S. 380, 391-392 (dissenting).)

C. THE RIGHT TO A UNANIMOUS JURY UNDER THE CALIFORNIA CONSTITUTION

Article I, § 16 of the California Constitution guarantees a defendant the right to juror unanimity on each element of a charged crime. (People v. Collins (1976) 17 Cal.3d 687, 693.) Indeed, California law has long held that if there is evidence to suggest more than one distinct crime, either the prosecution must elect upon which evidence the charged crime is based or the trial court must instruct the jury that it must agree on the same criminal act to convict the defendant. (E.g., People v. Jones (1990) 51 Cal.3d 294, 307 [collecting cases]; People v. Castro (1901) 133 Cal.11, 13; People v. Williams (1901) 133 Cal. 165, 168.)

[9] "Any person faced with the awesome power of government is in great jeopardy,

"A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (People v. Maury (2003) 30 Cal.4th 342, 422.) Unanimity is required to eliminate the danger that a defendant will be convicted even though there is no single act which the jurors unanimously agree the defendant committed. (People v. Deidrich (1982) 31 Cal.3d 263, 280-283. Accord People v. Ramos (2001) 25 Cal.4th 1124, 1132.) The unanimity instruction is designed

> to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count. (People v. Deletto (1983) 147 Cal.App.3d 458.

If the prosecution offers evidence of more criminal acts than crimes charged, the trial court has a *sua sponte* duty to instruct the jurors they must agree unanimously and beyond a reasonable doubt which particular act constitutes the charged crime before they may convict the defendant. (See, e.g., People v. Martinez (1988) 197 Cal.App.3d 767, 772; People v. Madden, supra, 116 Cal.App.3d 212.)

The Supreme Court decision in Deidrich is instructive. Deidrich, a member of a county board of supervisors, was charged with bribery in Count 1, an offense allegedly committed over several months. The prosecutor introduced evidence that during the period charged in the

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even though innocent." (Johnson, 406 U.S. at 392 (dis. opn. of Douglas, J.).)

Information, Deidrich had tried to get a businessman, who wanted to secure Deidrich's vote for a particular project, to buy some land owned by his friend and campaign manager. The land was not bought. Within the same period, Deidrich suggested that businessman retain Deidrich's personal attorney for work on the project. The businessman did so, and that attorney in turn gave money to Deidrich for his personal use. (31 Cal.3d at .)

At Deidrich's trial, his attorney asked the trial judge for a unanimity instruction on which acts constituted the alleged bribery in Count 1; the trial court refused. The Supreme Court unanimously found that refusal was prejudicial error – the jurors heard evidence of two separate transactions that may have constituted bribery, but did not have to all agree that either was proved beyond a reasonable doubt. The court held that the trial court's refusal to instruct on unanimity required that a new trial. (31 Cal.3d at 281-282.)

Deidrich acknowledged there was a limited exception to the unanimity rule – where the charged criminal acts were "so closely connected in time they formed part of one transaction" or constituted a "continuous course of conduct," such as pandering or contributing to the delinquency of a minor. (31 Cal.3d at 282.) However, those exceptions did not apply in Deidrich even though the participants were overlapping and the object of the alleged bribery – a vote on a particular project – was the same.

In other words, a limited exception to the requirement for explicit unanimity among jurors applies if the evidence shows only one crime, but leaves room for disagreement as to exactly how the crime was committed – for example, was the defendant or the codefendant the principal or the aider-and-abettor where one defendant held the victim and the other stabbed him. The jury need not unanimously "agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (People v. Ramos, supra, 25 Cal.4th at 1132.)[10] However, the exception must not be so broad as to overwhelm the constitutional rule.[11]

Deidrich in turn relied on People v. Alva (1979) 90 Cal.App.3d 418 to illustrate a case in which there must be a unanimous jury verdict. There, defendant's 12-year-old daughter claimed that every week or two for a five-month period her father had sexual intercourse with her in her father's home (her parents were divorced). The daughter reported those acts shortly

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[10] As Ramos characterized the exception, "unanimity as to exactly how the crime was committed is not required." Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal acts,' but not 'where multiple theories or acts may form the basis verdict as to one discrete criminal event.'" (25 Cal.4th at 1135.)

[11] People v. Maury, supra, 30 Cal.4th 342 illustrates when a unanimity instruction is not needed. There, the defendant contended the victim might have been killed by strangulation or blunt trauma to the head. Maury argued in defense that another man had strangled the victim and had forced Maury to throw a rock at the victim's head; the state claimed Maury was directly involved in killing the victim. The court explained that even under the defendant's theory, there was a continuous course of conduct, which effectively resulted in one transaction leading to the victim's death. The court re-affirmed that the jury need not decide if the defendant was liable for murder as the principal or as an aider and abettor. Hence, the trial court properly refused to give a unanimity instruction. (30

after she moved back with her mother. Defendant denied he did so and other witnesses testified in support of that defense.

The prosecutor charged Alva with one count each of incest, child molestation (violation of section 288) and unlawful sexual intercourse occurring during that 5-month period. The prosecutor did not elect which act would constitute each charged crime, and the trial court did not give a unanimity instruction.

The court's analysis was succinct. Because the trial court failed to tell the jurors that they had to unanimously agree on which of the numerous acts alleged by the victim had occurred and formed the basis of each charge, no unanimity required by the California Constitution had been demonstrated. Concluding the failure to instruct the jurors that unanimous agreement on the acts constituting the charged crimes was required – "when faced with proof of continuous criminal conduct, although only one criminal act was charged in each count" -- Alva reversed each conviction. (90 Cal.App.3d at 425-426.)

The Supreme Court returned to the analysis and conclusion in Alva and similar cases in People v. Jones, supra, 51 Cal.3d 294. While a quick reading of Jones might lead one to conclude that section 288.5, subdivision (b), is constitutional, the opposite conclusion is more accurate: Jones in fact

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Cal.4th at 422-423.)

undermines any contention that the non-unanimous jury provision of section 288.5 is constitutional.

The prosecutor accused Jones of 28 counts of lewd contact with four minor-victims; a specific victim was named in each count. The minors alleged many more acts of molestation than charged; the jury convicted Jones of some counts, acquitted him of others, and failed to reach a verdict on other charges. In the main, the testimony of each child was generic and non-specific, alleging periodic acts of molestation over several years.

The court identified the following issues for its review:

1) whether an appellate court could find substantial evidence to support a conviction for an act of child molestation based only on generic testimony from a minor victim of repeated acts of molestation. The court held it could (51 Cal.3d at 311 et seq.);

2) whether a defendant's due process right to fair notice of the charges is violated if a minor can offer only generic testimony of repeated acts of molestation over a period of time. The court held it was not (51 Cal.3d at 317 et seq.);

3) whether a defendant's due process right to present a defense was fatally undermined by the inability of a minor to relate specific dates, locations and other details of the alleged molestations. The Court it was not (51 Cal.3d at 319 et seq.); and

4) whether a defendant's constitutional right to a unanimous jury verdict was denied where the minor could relate only generic testimony without any specification of dates, locations, etc. The court held that *where the jury was instructed it must unanimously agree which act constituted each charged crime*, the defendant's rights were not violated (51 Cal.3d at 321).

With regard to the fourth issue, the trial judge in Jones in fact instructed the jurors they must unanimously agree, beyond a reasonable doubt, on "the same specific act or acts constituting said crime." (Id., at 300.) The majority opinion in Jones held the defendant's right to a unanimous jury was not denied because the minor was able to provide only generic, non-specific testimony about molestations over an extended period of time. However, it was critical to the court's analysis that the jury had been instructed that the jurors had to agree unanimously which act by Jones constituted the basis for each crime.

Jones did not hold that the "no-unanimity-is-required" instruction rooted in section 288.5, subdivision (b), was proper. The Jones majority did not hold that the failure to give any unanimity instruction would be constitutional. Indeed, even with only the victim's generic testimony, the Court explained that the unanimity instruction was vital: "the unanimity instruction assists in focusing the jury's attention on each such act related by the victim and charged by the People." (Id., at 321.)

Under the analysis set forth in Jones, the absence of a unanimity instruction would have been fatal.

> [I]f an information charged *two* counts of lewd conduct during a particular time period, the child victim testified that such conduct took place *three times* during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude conviction of the two counts charged, **so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts.** (Ibid., emphasis added.)

Following the court's reasoning, if the jurors might disagree as to the defendant's guilt at to any particular act or charge, the standard unanimity instruction must be given. In other words, a guilty verdict based on generic, non-specific testimony does not run afoul of the unanimity requirement so long as the jurors are instructed they must in fact unanimously agree on which acts constituted the charged crime.

Jones crafted an accommodation for those cases where there is no differentiation by the minor about the details of the molestation – that is, for example, where the child-victim claims he/she was molested once or twice a week for six months in the bedroom, and the defendant denies any acts of molestation. Only in those cases, where the jury could conclude only that the defendant committed all the alleged acts of molestation or none of them, the court agreed that the unanimity instruction could be modified (not eliminated):

> [T]he jury should be given a modified unanimity instruction which, in addition to allowing conviction if the jurors

> unanimously agree on specific acts, also allows conviction if the jury unanimously agrees that defendant committed all the acts described by the victim. (People v. Jones, supra, 51 Cal.3d at 322. See CALCRIM 3501.)

In holding that the defendant's right to a unanimous jury verdict had not been violated, Jones relied on the fact that the trial court had given a standard unanimity instruction. Jones did not hold that in child molestation cases based on generic testimony that the standard unanimity instruction was unnecessary or should be deleted. Jones did not hold that the jury should be told unanimity was not required to convict the defendant of each charge. The words and the logic of Jones rejected the instruction rooted in section 288.5, subdivision (b).

CALJIC No. 17.01 embodies the constitutional requirement for juror unanimity as a prerequisite to conviction:

> The defendant is accused of having committed the crime of _____ [in Count]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count], **all jurors must agree that [he] [she] committed the same [act]** [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict. (Emphasis added.)

While observing this instruction need not be given in the "limited" circumstances of a continuous crime, such as driving under the influence of

alcohol, the "Use Note" to CALJIC No. 17.01 advises trial judges and counsel

> this instruction must be given sua sponte unless the prosecution specifically elects to rely upon one act only for conviction. For example, if a defendant is charged with a single sex act and there is evidence that he or she engaged in more than one sex act, **then the instruction must be given**. (Emphasis added.)

If, as the CALJIC 17.01 Use Note instructs, a unanimity instruction must be given where the defendant is charged with a single sex crime and there is evidence of more than one act, the same logic – and constitutional mandate – compels giving a unanimity instruction where the element of the crime is the commission of three separate sex acts, as required for a conviction under section 288.5.[12]

In summary, California law clearly holds that the jury must be instructed it can not convict a defendant unless the jurors unanimously agree on the act allegedly constituting the charged crime. There are only a very limited number of cases where the failure to give a unanimity instruction is not fatal – e.g., where the only issue is the "theory" of guilt or where the single act by the defendant occupies a continuing space, as where the defendant is alleged to have been driving drunk over some distance

[12] As the Supreme Court has long recognized, "the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* . . . . in a criminal prosecution." (Francis v. Franklin (1985) 471 U.S. 307, 326.)

while followed by a police car. As the Ramos Court characterized the exception,

> unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal acts," but not "where multiple theories or acts may form the basis for the verdict as to one discrete criminal event." (25 Cal.4th at 1135.)

To convicted for a violation of section 288.5, a jury has to find the defendant committed three distinct acts of molestation over at least a three month period. If the prosecutor elicits evidence of more than three separate acts of molestation, that is precisely the kind case in which the unanimity instruction is necessary. The contrary conclusion in Whitman and similar decisions, upholding the constitutionality of section 288.5, subdivision (b), results from an insufficient fidelity to the constitutional demands of due process and proof beyond a reasonable doubt.

That the Legislature names the crime "continuous" sexual assault or abuse is of no moment. The crime has been defined so that section 288.5 is committed only if the defendant commits three separate acts of molestation. The principle of juror unanimity has as compelling an application to a violation of section 288.5 as to any crime in the Penal Code, as the standards articulated in the cases discussed above make that clear.

Thirty years ago, a prosecutor sought to excuse the failure of the trial court to give a unanimity instruction where the complainant offered

testimony of more sex acts (oral copulation and sodomy) than charged. The prosecutor contended the crimes were "continuous," obviating the need for a unanimity instruction. Although mindful that some statutes did genuinely encompass crimes continuous in nature, Justice Hopper, joined by Justices Zenovich and Stone, would have none of it. They responded that cases cited by the state

> which conclude that multiple sex offenses, assaults or similar offenses are continuous in nature or part of a continuous course of conduct are either situations where only the election issue is discussed (and not the instruction issue) or are simply wrong (perhaps resulting from the natural revulsion to some of the brutal attacks involved). (People v. Madden, supra, 116 Cal.App.3d at 217.)

Madden expressed a view rarely heard, though more often true. The testimony at trials of defendants charged with violating section 288.5 is often very disturbing. Revulsion may induce legislators to attempt to make convictions more likely and to punish more harshly. But judges – especially in cases where passions are aroused – must adhere fast to fundamental constitutional principles and not permit revulsion to lead to "wrong" decisions.[13]

[13] For example, the expanding circumstances under which trial courts were admitting out-of-court statements, particularly in domestic violence and sexual assault cases, undoubtedly permitted easier prosecution and conviction. Much of that was brought to an abrupt halt when the United States Supreme Court re-affirmed and re-asserted a defendant's Sixth Amendment right to confront witnesses. (Crawford v. Washington (2004) 541 U.S. 36.) That court re-affirmed the primacy of constitutional rights over "easier" prosecutions and "greater protections" for alleged victims. (See People v. Cage (2007) 40 Cal.4th 965, 970 [the new limitation on admissible out-of-court statements "has particular impact

D. JUROR UNANIMITY REQUIRED UNDER THE FEDERAL DUE PROCESS CLAUSE

A defendant charged in a federal criminal prosecution is entitled by the Due Process Clause of the Fifth Amendment to unanimous jury verdict before the defendant may be convicted. Yet, in decisions issued 30 to 40 years ago, the United States Supreme Court provided narrow support for the conclusion that state convictions arising from *certain* non-unanimous jury verdicts do not violate federal due process or right to trial by jury.[14]

However, those opinions did not completely eliminate need for some jury agreement in criminal cases. Further, in light of more recent Supreme Court decisions, a strong argument can be made that affirmatively advising

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in domestic abuse cases, where the prosecution may have to depend on information supplied outside of court by the victims - often victims of tender years - because they are not available to testify at trial].)

[14] As the Supreme Court has recognized, its position on jury unanimity in state prosecutions is anomalous. A defendant is entitled to a unanimous jury verdict under the 5th Amendment. Yet, almost alone, the 5th Amendment right to a unanimous verdict has not been incorporated in the 14th Amendment and thus made binding on criminal prosecutions in state courts. While the Supreme Court has taken a strong position on incorporation of virtually all rights in the Bill of Rights, the right to a unanimous ruling by all 12 jurors has been placed outside the incorporation doctrine.

> [T]he Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." [Cit.]. Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." ((See McDonald v. City of Chicago (2010) _ U.S. _, 130 S.Ct. 3020, 3035.)

the jurors with the instruction in section 288.5, subdivision (b), that they need not agree beyond a reasonable doubt on one element of the charged crime violates the Due Process Clause in the 14th Amendment.

Forty years ago, the Supreme Court held that the Sixth Amendment requires that the jury in a federal criminal prosecution reach a unanimous verdict. (Apodaca v. Oregon (1972) 406 U.S. 404, 407-408.) Jurors must unanimously agree as to each element of the charged offense, not just that guilt has been proved. (Richardson v. United States, supra, 526 U.S. at 817.) The Supreme Court observed that the requirements for 12-person juries and for unanimous jury verdicts in criminal cases are of ancient origin, rooted in the common law and having arisen during the Middle Ages. (Apodaca, 406 U.S. at 407-408.)

The Supreme Court has also held that the Sixth Amendment right to trial by jury is made fully applicable to state criminal trials by the Fourteenth Amendment. (Duncan v. Louisiana (1968) 391 U.S. 145.) Indeed, "trial by jury in criminal cases is fundamental to the American scheme of justice." (Id., at 149.) As the Supreme Court observed in Williams v. Florida (1970) 399 U.S. 78, 100,

> The purpose of the jury trial … is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecution and against the compliant, biased or eccentric judge." [Cit.]

However, in a series of divided or plurality opinions,[15] the Supreme Court held that notwithstanding the Sixth and Fourteenth Amendments, a defendant subject to prosecution in a *state* court has a diminished right to trial by jury. Rejecting its own precedents to the contrary, the court held in Williams v. Florida, supra, 399 U.S. 78, 90-92, that a state criminal defendant was not entitled to a 12-person jury, and that a six-person jury did not violate 6th Amendment. The Supreme Court also has held that a state prosecution in which the defendant is convicted by a 9-to-3 or 10-to-2 verdict passed constitutional muster. (Johnson v. Louisiana (1972) 406 U.S. 356 [9-3 verdict constitutional]; Apodaca v. Oregon, supra, 406 U.S. 404 [10-2 verdict constitutional].)

However, the Supreme Court ruled in a subsequent Louisiana case that where a state empanels only a six-person jury, the verdict must be unanimous to satisfy the constitutional right to a jury trial under the Sixth Amendment. (Burch v. Louisiana (1979) 441 U.S. 130 [a jury with less than six jurors is *per se* unconstitutional].) The court held that Louisiana's scheme requiring that only five of six jurors agree on a verdict presented a "threat to preservation of the substance of the jury trial guarantee." (Id., at

[15] Apodaca contained a four-member plurality opinion, a concurring opinion by Justice Powell, and four Justices joining several dissenting opinions. The Justices authored five opinions in Ballew v. Georgia (1978) 435 U.S. 223 though all Justices held that five-member, unanimous juries unconstitutional.

138.)[16] Non-unanimous verdicts by six-person criminal juries "sufficiently threate[n] the constitutional principles [animating the jury trial guarantee] that any countervailing interest of the State should yield." (Id., at 139.)

The prior year Ballew v. Georgia (1978) 435 U.S. 223 ruled that a five-person jury violated Sixth Amendment. The court explained that as the jury size is reduced below 12, the jury is "less likely to foster effective group deliberations." (Id., at 232.) The decline in the size of the jury "leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." (Ibid.) Indeed, where fewer jurors are required to deliberate to a common verdict, there is an increasing danger that when a jury verdict is most important – where the evidence is not overwhelming – the jury will fail to evaluate the evidence fully and accurately. (Id., at 236-238.)

However, those decisions do not lead to the conclusion that the no-unanimity-required instruction in section 288.5 satisfies the 14th Amendment's Due Process Clause. Johnson and Apodaca concluded that the 10-2 and 9-3 verdicts allowed in the state prosecutions at issue did not violate the Sixth Amendment right to trial by jury. As the Supreme Court later observed, those decisions had "approved the use of *certain* nonunanimous verdicts in cases involving 12 person juries." (Burch v.

[16] At least three of the Justices agreed, but expressly noted they believed only 12-person, unanimous juries satisfied the Sixth Amendment.

Louisiana (1979) 441 U.S. 130, 137, emphasis added.) The court did not approve all non-unanimous juries. Indeed, in Johnson itself, the Court pointedly noted that the "heavy majority" and "substantial majority" required were critical in upholding those state practices. (406 U.S. at 362.) A few years later, the court in Burch held that a six-person jury must be unanimous, and in Ballew that a five-person unanimous jury violated Due Process. As the court concluded in Brown v. Louisiana (1980) 447 U.S. 323, 334, "the concurrence of six jurors [is] constitutionally required to preserve the substance of the jury trial right and to assure the reliability of its verdict."

Synthesizing the analysis in this line of cases, the Sixth and Fourteenth Amendments require agreement by at least a *majority* (and likely a "substantial majority") of a 12-person jury to render a constitutional verdict. Without such a requirement, the "essential feature" of the jury is lost – if a state permits the finding of any element of a crime with agreement of less than a majority of a jury, the defendant has lost the essential safeguard against arbitrary law enforcement that lies at the heart of the right to trial by jury. (Ballew, 435 U.S. at 232, 234, 236.) Although Johnson/Apodaca permit some deviation from the requirement of a verdict by a completely unanimous, 12-person jury, they simultaneously impose strict limits on what passes constitutional muster. Thus, an agreement by 12 jurors in a state criminal trial that the defendant committed a charged

crime, but with each juror resting that conclusion on a different acts, constitutes an unconstitutional verdict under the U.S. Constitution.

Section 288.5 does not require 9 or 10 of the 12 jurors to agree on each of the three acts of child molestation that the defendant must be found to have committed. Four jurors could agree on one set of three acts of child molestation, four other jurors on three other acts, and the final four jurors on a different three acts. These circumstances would suffice to convict a defendant under the language of section 288.5, even though a majority of jurors found the evidence as to each alleged act insufficient to establish their commission beyond a reasonable doubt. Thus, because section 288.5 does not require agreement by a "substantial majority," or even a majority, of the jurors as to which three acts of molestation the defendant committed to prove that element of the crime, subdivision (b) and the jury instruction based thereon violate the 14th Amendment's Due Process Clause under this body of decisions.

Recent decisions from the United States Supreme Court on a related due process issue reinforce the conclusion that California's no-unanimity-required instruction under section 288.5 contravenes due process.

In the past decade the Supreme Court has re-examined the role of a defendant's right to trial by jury and related rights, such as proof beyond a reasonable doubt, and re-affirmed the fundamental nature of those rights imposed on the state through the 14th Amendment Due Process Clause.

In Apprendi v. New Jersey, supra, 530 U.S. 466, the defendant pled guilty in a state court to a firearms offense. Thereafter, the sentencing judge found that because Apprendi was motivated by racial bias while committing that crime, his crime triggered the imposition of an enhanced sentence. On appeal, Apprendi argued the state's procedure violated his right to due process under the 14th Amendment.[17]

At issue was whether a fact or element of a crime that could increase a defendant's sentencing range – here, whether the defendant had been motivated in firing his gun by racial bias – could be decided by a judge, rather than a jury, and whether such a fact or element must be proved beyond a reasonable doubt. New Jersey had allocated that decision to a judge, to be decided by a preponderance of the evidence, by legislatively designating the defendant's motivation as a sentencing factor, rather than an element of a crime.

The Supreme Court explained that what was at issue was the procedure for determining a defendant's guilt.

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused

[17] Apprendi "relies entirely on the fact that the 'due process of law' that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and the right to have every element of the offense proved beyond a reasonable doubt [established in In re Winship]." (530 U.S. at 477, fn. 3.)

> shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Winship, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). (530 U.S. at 476-477.)

Further, Apprendi explained that as it had unanimously ruled in Gaudin,

> "to guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," [cit.], trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." [Cit.] (530 U.S. at 477, emphasis added.)

With these guiding constitutional principles, the court held that the 14th Amendment's Due Process Clause requires that a jury unanimously find beyond a reasonable doubt any fact or act that may increase a defendant's sentencing range. Thus, if New Jersey wished to impose a harsher penalty, a jury, not a judge, had to find beyond a reasonable doubt that Apprendi acted out of racial bias when he fired the gun.

> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that

> increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (530 U.S. at 476.)

The state argued that Apprendi's discharge of the weapon was a crime that subjected him to serious punishment, and the fact that he did so had been subjected to jury determination. Aggravation of his sentence because of his motivation, the state argued, did not require the full panoply of due process protections.

The Court firmly rejected that contention.

> Since Winship, we have made clear beyond peradventure that Winship's due process and *associated jury protections* extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." [Cit.] This was a primary lesson of Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), in which we invalidated a Maine statute that presumed that a defendant who acted with an intent to kill possessed the "malice aforethought" necessary to constitute the State's murder offense (and therefore, was subject to that crime's associated punishment of life imprisonment). The statute placed the burden on the defendant of proving, in rebutting the statutory presumption, that he acted with a lesser degree of culpability, such as in the heat of passion, to win a reduction in the offense from murder to manslaughter (and thus a reduction of the maximum punishment of 20 years).
>
> The State had posited in Mullaney that requiring a defendant to prove heat-of-passion intent to overcome a presumption of murderous intent did not implicate Winship protections because, upon conviction of either offense, the defendant would lose his liberty and face societal stigma just the same. Rejecting this argument, we acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed. 421 U.S., at 697-698, 95 S.Ct. 1881. Because the "*consequences*" of a guilty verdict for murder and for

> manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of Winship merely by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S., at 698, 95 S.Ct. 1881. (530 U.S. at 484-485, emphasis added.)[18]

Apprendi summarized its analysis with this quotation from Jones: "'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" (523 U.S. at 490.) And, that determination must be made unanimously, as unanimity would seem to be one of those "associated jury protections."

Apprendi initiated a broad review and reinvigoration of the jury's role in deciding guilt and punishment, and has been cited in countless judicial decisions in the past decade. (E.g., Blakely v. Washington (2004) 542 U.S. 296.) As the Supreme Court itself characterized Apprendi's core holding,

> In Apprendi v. New Jersey, this Court held that, under the Sixth Amendment, any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely

[18] Apprendi went to considerable lengths to explain that its prior decision in Almendarez-Torres v. United States (1988) 523 U.S. 224, which permitted a court to find that a defendant had suffered a prior conviction that could trigger an enhanced sentence, if it survived at all – which the dissent claimed it did not – was limited to the circumstance of an alleged prior conviction. (530 U.S. at 487-489.)

by a preponderance of the evidence. (Cunningham v. California, supra, 127 S.Ct. at 857.)

Apprendi calls into question the continuing validity of the claim that the federal Due Process Clause does not guarantee a unanimous jury on each element of the crime in a state prosecution. Agreement by all jurors that the prosecution has proved each aspect of a crime, however denominated by state law or legislative enactment, beyond a reasonable doubt is clearly one of the hallmarks of due process and was plainly key to the Court's analysis in Apprendi itself, as the quotations above make clear. The California Supreme Court itself has noted that Apprendi and its progeny may well have undermined its own decisions that a jury trial was not required under California law in certain circumstances. (See People v. Epps (2001) 25 Cal.4th 19, 28.)

The California Legislature's explanation of its enactment of section 288.5 -- a legislative purpose to increase the penalty for resident child molesters who commit several acts of molestation on the same victim over a period of time – mirrors New Jersey's defense of the law in issue in Apprendi. (See 2008 Deering's Penal Code, § 288.5, 1989 note, at p. 138.) A defendant charged with violating section 288.5 is not eligible for the harsh penalty prescribed by section 288.5 unless the jury finds he in fact committed three distinct acts of molestation on the same minor. Just as the Supreme Court in Apprendi concluded that the Due Process Clause

required that a New Jersey jury had to find unanimously and beyond a reasonable doubt that the purpose of firing the gun was racial bias or intimidation, a California jury considering a violation of section 288.5 should have to find unanimously that the defendant in fact committed each of the three acts of child molestation. If the jurors cannot agree that three specific acts were proved, the defendant should not be subject to the enhanced punishment of section 288.5.

G. RICHARDSON V. UNITED STATES

The above conclusion is reinforced by a United States Supreme Court decision outside the Apprendi line of cases.

In deciding Whitham, the Court of Appeal did not have the benefit of the later decision in Richardson v. United States, supra, 526 U.S. 813. Richardson examined an analytically indistinguishable federal statute and came to a conclusion about the need for jury unanimity opposite to that reached in Whitham: the Supreme Court held the jury must unanimously find each act that constituted part of a course of conduct or series of crimes. Hence, it is worth considering in detail both the statute in issue in Richardson and the Supreme Court's analysis of it.

Richardson was charged and convicted of engaging in a "continuing criminal enterprise" ("CCE"). That crime is committed where the defendant violates a felony drug statute and "such violation is part of a

continuing series of violations of [the federal drug laws]." A defendant commits a continuing series of violations if he commits three or more drug offenses. Richardson was alleged to have violated that statute while running the violent, notorious Chicago street gang called the Undertaker Vice Lords. (Id., at 815-816.)

The commission of a "continuous series" of crimes was clearly an element of the charged crime. Richardson's trial counsel asked the federal trial court to instruct the jurors that they had to agree unanimously on each of the three acts (crimes) that constituted the "continuing series." The trial court refused and instructed the jury – very much like the provision in section 288.5, subdivision (b) -- that it "must unanimously agree that the defendant committed at last three federal narcotics offenses," but added, "[y]ou do not have to agree as to which particular three or more federal narcotics offense [were] committed by the defendant." (Id., at 816.)

The Supreme Court agreed to decide whether the jurors had to unanimously agree on each of the alleged crimes that constituted the continuing series. The majority opinion started with the fundamental proposition that a defendant may not be convicted unless the jurors unanimously agree the government has proved each element beyond a reasonable doubt. (Id., at 817.) The court noted that if the question before the jury is by which of several "means" or theories the defendant committed the charged crime – for example, whether the defendant's

conduct constituted first-degree murder as a result of premeditation and deliberation or under a felony-murder (robbery) theory – unanimity as to which theory applies is not required, citing Schad v. Arizona (1991) 501 U.S. 624. (Ibid.)[19]

Turning to the statutory language, the court noted that the CCE statute described the acts that the prosecutor must prove as violations. Each of the three acts the prosecutor must prove had to be a violation of the law.

> To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold to the contrary is not. (Id., at 818-819.)

The court next noted that the breadth of the CCE statute allows many different acts to satisfy the three crimes required for conviction, raising a risk of unfairness if the jurors need not unanimously agree on the acts the defendant committed. There is an increased likelihood

> that treating the violations simply as alternative means, by permitting the jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just the defendant did, or did not, do. [Second, there is an aggravated risk] that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from the testimony, say, of bad reputation, that where there is smoke there is fire. (Id., at 819.)

[19] Even here, thecCourt expressed caution. The majority explained that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition adopted risks serious unfairness and lacks support in history or tradition. (526 U.S. at 820.)

The court was not dissuaded from its conclusion that the jurors must unanimously agree as to each of the three acts by the fact that the CCE statutory language characterizes the acts as a "statutory series of violations." That language did not obviate the requirement that the defendant must have committed three separate drug crimes. (Id., at 820-821.)

Finally, the court explained that prosecutions often require the relevant factfinder – whether jury or judge -- to decide if the defendant has committed a prior crime. This issue is raised where the defendant is charged with being a felon in possession of a gun or for certain crimes that punish the defendant more harshly if he is a recidivist, i.e., has suffered one or more prior convictions. In each instance, the factfinder must decide the existence of each prior crime separately – it is not enough for the jury to conclude the defendant had been convicted of "some" prior felony or crime. Requiring the jury to find only that the defendant has committed a series of crimes, without unanimity on each part of the series, as the prosecutor argued in Richardson, "is inconsistent with this practice, for it, in effect, imposes punishment on the defendant for the underlying crimes without any factfinder having found the defendant committed those crimes." (Id., at 822.)

In light of each of these areas of prior judicial rulings, the Supreme Court held that juror unanimity was required with regard to each of the three crimes that constituted the alleged "series" of crimes required to prove a CCE offense. The court reached that conclusion by construing the statute to require unanimity on each "violation," rather than reach the constitutional issue of whether the Due Process Clause required unanimity before the crime was proved. In so ruling, the Supreme Court noted the well-settled statutory maxim that it should construe a statute in a way that avoids a finding of unconstitutionality rather than reach the constitutional issue. "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." (Id., at 821.)

Because the trial court had not so instructed the jury that it could not convict the defendant of a CCE violation unless it found each of the three violations unanimously, the Court reversed Richardson's conviction for the charged CCE offense. As the California Supreme Court later characterized Richardson's holding, "[t]he court held that a jury must unanimously agree not only that the defendant committed some continuing series of violations, but also about which specific violations make up that continuing series." (People v. Williams (2006) 40 Cal.4th 287, 338 [holding Richardson did not apply to factors in aggravation in capital cases].)

Richardson noted that certain state statutes, not then before the Court, might not *necessarily* be subject to the same analysis. (526 U.S. at 821-522.) That list of state decisions included People v. Gear, supra 19 Cal.App.4th 86, which upheld the constitutionality of section 288.5, as noted in footnote 3, supra.[20]

The parallels between the statute in Richardson and section 288.5 are striking. First, like the statute at issue in Richardson, section 288.5 requires that the jurors find the defendant committed three acts. As in the CCE statute, those acts are defined in terms of criminal acts under the Penal Code. Hence, as Richardson found, that delineation of the conduct in which a defendant must have engaged is consistent with finding each act is a distinct element of the crime in issue.

Second, although the number of statutes identified in section 288.5 is smaller than in the federal CCE statute, the kinds of conduct that can constitute any of the three crimes required under section 288.5 remains enormously varied. That is, any touching of a minor under 14 with the

[20] Some decisions have stretched the Supreme Court's observation that peculiar problems of proof in certain state prosecutions may justify a different outcome into the contention that the Supreme Court has upheld the constitutionality of non-unanimity provisions in statutes such as section 288.5. (E.g., People v. Cissna, supra, 182 Cal.App.4th at 1125-1126 ["Richardson supports the constitutionally of the continuous-course-of-conduct exception applied by the Legislature in section 288.5, subdivision (b)"].) That strained interpretation of the Supreme Court's comment fails to account for the court's contrary analysis and the statement in Richardson that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about

requisite intent violates section 288, even if the touching by itself does not involve a sexual organ/area and is otherwise innocuous. (People v. Martinez (1995) 11 Cal.4th 434, 442.) Accordingly, where a defendant has recurring access to, or resides with, the alleged victim, there may be many interactions with the minor that may qualify as violations of section 288, just as Richardson noted the CCE statute covered "many different kinds of behavior of varying degrees of seriousness." (526 U.S. at 819.)

Third, the CCE statute referred to the specific crimes committed by the defendant as a "series." The court found the use of that word did not vitiate the requirement for juror unanimity as to each such act. By contrast, section 288.5 does not even characterize the acts of molestation as a "series" – indeed the acts could occur a year apart. Rather, section 288.5 simply deems a defendant who commits three or more distinct crimes, while have recurring access to the minor, as having committed "continuous sexual abuse." If the inclusion of the word "series" in the CCE statute did not undermine the need for jury unanimity for each of the three crimes, simply labeling the offender who commits three crimes on the same victim over three or more months as guilty of "continuous" sexual abuse logically does not undermine the requirement for juror unanimity as to each of the acts supporting that conclusion.

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means, at least where that definition risks serious unfairness and lacks support in history or tradition." (526 U.S. at 820.)

While Richardson was construing a federal statute in light of the command of the U.S. Constitution for juror unanimity on each element of a crime, a defendant in a California crime is entitled, at least by the California Constitution, to juror unanimity as to each element of a state crime. Hence, Richardson's logic and holdings carry great weight. The logic in Richardson argues for finding that jurors weighing whether a defendant has violated section 288.5 must unanimously find each of the three acts of molestation required as elements of the offense.[21]

CONCLUSION

More than 40 years ago, the voters of this state enacted article I, section 26 of the California Constitution, that, *inter alia*, permitted a landlord to refuse to rent an apartment to anyone he/she chose without regard to the anti-discrimination laws. The enactment allowed a landlord to discriminate on the basis of race. By definition, this law was popular as it was adopted by popular vote.

An African-American couple challenged the constitutionality of that enactment after a landlord refused to rent them an apartment on the basis of

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[21] One federal district court found that because Richardson reached its decision as a matter of statutory interpretation, that decision did not require a finding that section 288.5 was unconstitutional. As that court explained, Richardson "did not create a federal jury unanimity requirement, nor did it hold that 'continuous course of conduct' statutes violate the federal constitution." Hernandez v. Virga, 2011 WL 109479, 7 (N.D.Cal. 2011)

their race. A courageous – but divided – California Supreme Court struck down this constitutional-permission-to-discriminate as a violation of the Equal Protection Clause of the United States Constitution. (Mulkey v. Reitman (1966) 64 Cal.2d 529.)

Mulkey made clear that popular is not necessarily right, or constitutional. The protection of the young, and the imposition of harsh punishment on those who repeatedly abuse the young -- particularly when we expect such persons to be their protectors, not abusers – are laudable goals. However, constitutional protections must not be bent in pursuit of that goal, even if the goal would be applauded by a majority.

In every other part of our constitutional jurisprudence, jurors must unanimously agree on the elements and acts in offenses that constitute the charged crime. There is no reasonable basis for applying a different standard for the offense defined in section 288.5. California appellate decisions that have rejected constitutional challenges to the no-unanimity-is-required provision in subdivision (b) have failed to follow the mandate and implications of the United States Supreme Court decisions applying the federal Due Process Clause, while insufficiently adhering to the continuing crimes limitation developed under the California Constitution's Due Process Clause. Defendants faced with the lengthy sentences required under section 288.5 should not be accorded second-class justice. Each is

entitled to have his/her conviction based on the jury's unanimous finding beyond a reasonable doubt on each predicate act.

I would like to acknowledge the invaluable and thoughtful editorial assistance of Michael Millman and Charles Sevilla. Whatever flaws of language or logic remain are mine.