EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX CASES (BUT WERE AFRAID TO ASK)

By: Dallas Sacher
and Jonathan Grossman

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◇ "A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt. It is not enough that a trial goes through the forms of law. . . . Of course society must protect itself. But surely it is not self-protection for society to take life without the most careful observance of its own safeguards . . . ." (*Fisher v. United States* (1946) 328 U.S. 463, 477 (dis. opn. of Frankfurter, J.).) ◇

A. Rape Shield Law

Often in sexual assault cases, the credibility of the complaining witness is the only issue. A challenge in impeaching the complaining witness is the rape shield law. Evidence Code section 1103, subdivision (c) generally prohibits admission of prior sexual conduct of the complainant with someone other than the defendant. Evidence Code section 782 creates procedural hurdles for the defendant who wishes to present evidence of the complaining witness's sexual conduct.

In short: "A defendant may not introduce evidence of specific instances of the complaining witness's sexual conduct, for example, in order to prove consent by the complaining witness. (Evid. Code, § 1103, subd. (c)(1).) Such evidence may be admissible, though, when offered to attack the credibility of the complaining witness and when presented in accordance with the following procedures under section 782: (1) the defendant submits a written motion stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness (*id.*, § 782, subd. (a)(1)); (2) the motion is accompanied by an affidavit, filed under seal, that contains the offer of proof (*id.*, subd. (a)(2)); (3) [i]f the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant (*id.*, subd. (a)(3)); and (4) if the court, following the hearing, finds that the evidence is relevant under Evidence Code section 780 and is not inadmissible under section 352, then it may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. (*Id.*, § 782, subd. (a)(4).)" (*People v. Fontana* (2010) 49 Cal.4th

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[1]Parts of this article are derived from material written by Dallas Sacher.

351, 362.)

The rape shield law applies only in those instances where the defendant seeks to introduce "evidence of sexual conduct." (Evid. Code, § 782, subd. (a).) Thus, there is no need to comply with section 782 when the defense seeks to admit evidence of false statements made by the complainant. (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334-335.) It does not bar the admission of prior false allegations of sexual assault. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456; *People v. Adams* (1988) 198 Cal.App.3d 10, 18-19; *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 597-600; *Franklin,* at p. 335; see *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1272-1273, overruled on other grounds in *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1218 (en banc); see also *People v Wall* (1979) 95 Cal.App.3d 978, 983-989.) The courts, however, have permitted excluding evidence of prior allegations under Evidence Code section 352 if it is not clear the prior allegations were false. (*Tidwell,* at pp. 1457-1458; *People v. Bittaker* (1989) 49 Cal.3d 1046, 1097; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424-1426.)

A defendant should be able to introduce evidence of molestation by others of the complaining child witness to refute the inference that a victim's age-inappropriate sexual knowledge could only be derived from the defendant's charged misconduct. (*In re Edward S.* (2009) 173 Cal.App.4th 387, 408; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757; see *Fowler v. Sacramento County Sheriff's Dept.* (9th Cir. 2005) 421 F.3d 1027, 1038-1041 [prohibiting cross-examining molest victim on prior molestation violated Sixth Amendment and should not have been excluded under Evid. Code, § 352]; *LaJoie v. Thompson* (9th Cir. 2000) 201 F.3d 1166 [prior molest showed the source of victim's injuries, knowledge]; contra *People v. Mestas* (2013) 217 Cal.App.4th 1509, 1517-1518; *People v. King* (2010) 183 Cal.App.4th 1281, 1311-1315 [despite evidence the complaining witness was naive and a virgin, the defense could not admit evidence from her social media Website showing raunchy information].) As the court said in *Daggett* at page 757: "A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. [¶] In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted."

The defense should be able to cross-examine a molest victim concerning a morbid fear of molestation of the victim or family members. (Compare *People v. Scholl* (1964) 225 Cal.App.2d 558, 592-564 [permissible] with *People v. Foss* (2007) 155 Cal.App.4th 113, 128-130 [can be excluded].)

The supreme court has held the court should admit evidence of the complaining witness having consensual sex with the defendant around the time of the alleged crime in order to explain her injuries. (*People v. Fontana* (2010) 49 Cal.4th 351, 363.)

Nonetheless, courts resist admitting evidence of the complaining witness's sex acts. Evidence of the complaining witness's other sexual acts were inadmissible for the theory that a teenager's relationship with her boyfriend caused her to make false allegations of molestation. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781-783; but see *People v. Randle* (1982) 130 Cal.App.3d 286, 294 [prior acts of prostitution were admissible to show the charged act was consensual].) Another court found proper the exclusion of prior consensual sex by a person with her boyfriend when it was alleged she lacked the capacity to consent to have sex with the defendant. (*People v. Vukodinovich* (2015) 238 Cal.App.4th 166, 174-175.) On the other hand, a court permitted the prosecution to introduce evidence of the complaining witness's preference for black men to show sex with a white defendant was not consensual. (*People v. Geier* (2007) 41 Cal.4th 555, 585-586.)

The voters approved in a 2012 initiative aimed at protecting victims of "human trafficking." As part of the initiative, Evidence Code section 1161 bars evidence of acts of the victim resulting from "sexual slavery." Human trafficking is very broadly defined and includes using a minor (or an adult) as a prostitute. However, courts in juvenile cases have resisted using Evidence Code section 1161 to bar evidence used to prosecute a minor for prostitution. (*In re M.D.* (2014) 231 Cal.App.4th 993, 999-1002 [though the minor was with a woman arrested for pimping]; *In re M.V.* (2014) 225 Cal.App.4th 1495, 1521-1526 [the court can make the 15 year-old a ward for prostitution, though she was accompanied by a pimp]; *In re Aarica S.* (2014) 223 Cal.App.4th 1480, 1488 [teenager can be adjudicated for prostitution when she was between pimps].)

B. Accommodating the Prosecution Witnesses

◊ "The rules haven't changed, at least not on paper. But legal rules are only as good as their last application." (*United States v. Black* (9th Cir. 2007) 482 F.3d 1044, 1045.) ◊

Because of the special nature and sensitivity of victims of sex crimes and child witnesses, special accommodations are required by law. Penal Code section 868.5 permits a support person for prosecution witnesses in trials for certain crimes, even if they are not a complaining witness. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1076-1079 [does not violate due process]; *People v. Adams* (1993) 19 Cal.App.4th 412; *People v. Patten* (1992) 9 Cal.App.4th 1718; *People v. Karbonic* (1986) 177 Cal.App.3d 487.) The court can permit a support dog; because it is not a person, Penal Code section 868.5 does not apply. (*People v. Chenault* (2014) 227 Cal.App.4th 1503, 1515-1521; *People v. Spence* (2012) 212 Cal.App.4th 478, 516-517.) The court does not have a sua sponte duty to instruct on the

limited purpose of support people. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1169-1172.)

The Sixth Amendment right to confrontation includes a right to a face-to-face confrontation. (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846; *Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) Nonetheless, a witness may testify on closed circuit television or by other arrangements where the defendant can see the witness if the witness would not otherwise be able to testify effectively. (*Ibid.*; *People v. Powell* (2011) 194 Cal.App.4th 1268, 1282-1284 [molest victim (defendant's daughter) testified by CCTV when defendant was disruptive and social worker said testifying in court would affect her testimony]; *People v. Williams* (2002) 102 Cal.App.4th 995, 1004-1006, 1008-1009 [victim testified by videotape, where defendant could hear her in the holding cell and was able to communicate with counsel, when the victim was under psychiatric care for PTSD, depression, panic attacks, suicidal tendencies, and seizures]; *People v. Sharp* (1994) 29 Cal.App.4th 1772 [victim faced away from defendant]; but see *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1157-1158 [cannot block witness's view of defendant without determining if defendant was the cause of her anxiety]; *Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777, 780-782, 793-794 [lack of cause for letting victim testify by videotape].)

There is a special test for prejudice when the defendant is not permitted to directly confront a witness. The testimony of the witness must be entirely disregarded and the judgment may only be affirmed on the basis of the remaining evidence. (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022; *Adams, supra,* 19 Cal.App.4th at p. 444.)

C. Extrajudicial Statements

◊ "I don't see them [the statements] as so inherently trustworthy that I ought to make my own exception to the hearsay rule. The things people say in the middle of difficult emotional entanglements are, I think, historically not the kinds of things that are necessarily reliable." (*People v. Prince* (2007) 40 Cal.4th 1179, 1241, brackets in original [a court commissioner discussing extrajudicial statements of an estranged girlfriend the defendant sought to introduce].) ◊

1. Fresh complaint doctrine

Under California law, the prosecution is entitled to introduce "evidence that the alleged victim of a sexual offense disclosed or reported the incident to another person shortly after its occurrence. . . ." (*People v. Brown* (1994) 8 Cal.4th 746, 748; see also *People v. Loy* (2011) 52 Cal.4th 46, 66.) The alleged victim's extrajudicial statement "is admissible for a limited, nonhearsay purpose - namely, simply to establish that such a complaint was made - in order to forestall the trier of fact from inferring erroneously that no complaint was made,

and from further concluding, as a result of that mistaken inference, that the victim in fact had not been sexually assaulted. [Citation.]" (*Id.*, at pp. 748-749.) In determining whether to admit a "fresh complaint" made by the alleged victim, the trial court must apply the "ordinary standard of relevance. [Citation.]" (*Id.* at p. 763.) In so doing, the court should consider whether the "complaint was made immediately following the alleged assault or was preceded by some delay" and "whether the complaint was volunteered spontaneously by the victim or instead was prompted by some inquiry or questioning from another person." (*Ibid.*) However, neither of these factors is dispositive. (*Ibid.*)

It is essential to note that "only the fact that a complaint was made, and the circumstances surrounding its making" are admissible. (*Brown, supra*, 8 Cal.4th at p. 760.) Since the evidence is not admissible for the truth of the matter asserted, "the details of the victim's extrajudicial complaint" may not be introduced. (*Id.*, at p. 763.) Upon request, it is the court's duty to "instruct the jury to consider such evidence only for the purpose of establishing that a complaint was made, so as to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement. [Citations.]" (*Id.*, at p. 757.) "[I]f the details of the victim's extrajudicial complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault . . . ." (*Id.* at p. 763.)

2. Victim under 12 to establish corpus delicti (Evid. Code, § 1228)

Under Evidence Code section 1228, reliable statements by a molest victim under the age of 12 years old who is unavailable to testify, are admissible to establish the corpus delicti of the defendant's confession. "The statement must be made by a victim under the age of 12. Its contents must have been included in a written report of a law enforcement official or county welfare department employee. (§ 1228, subd. (a).) The statement must describe the child as a victim of sexual abuse. (*Id.*, subd. (b).) It must be made prior to the defendant's confession. (*Id.*, subd. (c).) There must be no significant inconsistencies (or other circumstances that would render the child's statement unreliable) between the defendant's confession and the child's statement 'concerning material facts establishing any element of the crime or the identification of the defendant . . . .' (*Id.*, subd. (d).) The child must be unavailable or refuse to testify. (*Id.*, subd. (e).) And the defendant's confession must have been memorialized 'in a trustworthy fashion by a law enforcement official.' (*Id.*, subd. (f).) If these conditions are met and the child's statement is found admissible, it is to be admitted 'solely for the purpose of determining the admissibility of the confession of the defendant.' (§ 1228.)" (*In re J.A.* (2011) 198 Cal.App.4th 914, 918.) There must be a full confession. (*Creutz v. Superior Court* (1996) 49 Cal.App.4th 822, 828-833 [defendant denied wrongful intent]; but see *In re J.A.* (2011) 198 Cal.App.4th 914, 923-924 [there was a full confession though defendant was silent on wrongful intent].)

3. Victim's statements to a medical examiner (Evid. Code, § 1253)

Under Evidence Code section 1253, "a hearsay statement revealing the identity of a sexual abuser who is a member of the victim's family or household is admissible where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment." (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1331; see *Brodit v. Cambra* (9th Cir. 2003) 350 F.3d 985, 989-990; see also *In re Daniel W.* (2003) 106 Cal.App.4th 159, 165.)

4. Child victim of abuse (Evid. Code, § 1360)

Evidence Code section 1360 permits the admission of extrajudicial statements of a witness under the age of 12 years concerning child abuse, sex abuse, or neglect, if the statements are reliable, and the witness testifies or if the witness is not available and there is corroboration. (Evid. Code, § 1360; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 64 Cal.App.4th 1312; *Brodit v. Cambra* (9th Cir. 2003) 350 F.3d 985, 989-990; but cf. *Idaho v. Wright* (1990) 497 U.S. 805.) The prosecution is required to give notice to the defendant before the jury is sworn and before opening statements. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1372-1373.) Note, however, a court has held the victim's videotaped statement to a multidisciplinary interviewer after charges were brought was testimonial, though the interviewer was not a government employee, and this creates a confrontation clause issue. (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401, 1403.) However, the United States Supreme Court has since said that the fact a person is a mandated reporter does not in itself make the statement testimonial. (*Ohio v. Clark* (2015) 135 S.Ct. 2173, 2182-2183.)

5. Diaries (Evid. Code, § 1370)

In reaction to the prosecution's attempt to admit entries from Nicole Simpson's diary in the O.J. Simpson trial, the Legislature enacted Evidence Code section 1370. (*People v. Quitiquit* (2007) 155 Cal.App.4th 1, 15, fn. 4 (conc. opn. of Haller, J.); *Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 938.) The statute is broad, applying to any reliable statement describing domestic violence made at or near the time of the event. (See, e.g., *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 90-92 [disclosing to counselor, but disclosures two weeks after the incident were not "at or near the time"]; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 15 [declaration in application for protective order, but it was not reliable when describing events in the more distant past]; see *Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1038-1042 [diary entries were not testimonial].)

D. Evidence Code section 1108

◊ "As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that - instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt - in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt." (*People v. Adams* (1939) 14 Cal.2d 154, 167, overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352.) ◊

Evidence Code section 1108 allows evidence of prior sex acts to show the propensity of the defendant in the prosecution of sex cases. (*People v. Falsetta* (1999) 21 Cal.4th 903, 910, 922; see also *People v. Jones* (2012) 54 Cal.4th 1, 49-51; *People v. Loy* (2011) 52 Cal.4th 46, 60-64; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185; see *Mendez v. Knowles* (9th Cir. 2009) 556 F.3d 757, 767-774 [statute does not violate due process]; *Mejia v. Garcia* (9th Cir. 2008) 534 F.3d 1036, 1046 [same].)

Section 1108 evidence can include a charged crime. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159-1167.) However, an uncharged sex crime against the same complaining witness is deemed to have little probative value because it does little to resolve whether the complaining witness is credible. (*People v. Ennis* (2010) 190 Cal.App.4th 721, 733.)

Prior sexual misconduct by the defendant can also be admissible under Evidence Code section 1101 to show motive, intent, lack of mistake, knowledge, etc. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1288; *People v. Memro* (1995) 11 Cal.4th 786, 865 [child pornography to show murder with intent to molest]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281.)

Section 1108 evidence can corroborate the crime for statute of limitations purposes. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 403-405; *People v. Mabini* (2001) 92 Cal.App.4th 654, 659; see also *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 687-688.)

Whether section 1108 evidence is admissible depends on the current charges, not the underlying conduct. (*People v. Walker* (2006) 139 Cal.App.4th 782, 800.) Section 1108 evidence is admissible if the defendant's prior conduct was sexual, though he was convicted only of non-sex offenses. (*People v. Lopez* (2007) 156 Cal.App.4th 1291, 1298-1299.) Section 1108 evidence "is limited to the defendant's sex offenses, and it applies only when

he is charged with committing another sex offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 916; *People v. Jandres* (2014) 226 Cal.App.4th 340, 359; see *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1119-1120 [error to admit the evidence for non-sex offenses].) It applies to felony murder, however, when the underlying felony is a sex offense. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1283; *People v. Story* (2009) 45 Cal.4th 1282, 1291-1294.)

Juvenile offenses are admissible under Evidence Code section 1108, but if the minor was under the age of 14, the prosecution must prove to the court by clear and convincing evidence that he understood the wrongfulness of his acts (Pen. Code, § 26, subd. one) before the evidence can be admitted. (*People v. Cottone* (2013) 57 Cal.4th 269, 281-287, 292.) While the jury can consider the minor's age, there is not a sua sponte duty to instruct on it. (*Id.* at pp. 292-294.)

Once the evidence qualifies under section 1108, the only grounds for excluding it are under Evidence Code section 352 and due process. In considering whether to admit evidence of uncharged sex crimes, the court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant to defend against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's sex offense, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) The prejudice is reduced if the defendant was convicted of the prior crimes and the jury is informed of this. (*Ibid.*) One would think that if the prior offense was similar to the charged offense, this would be more prejudicial. But the courts have said "the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent source of evidence (the victims) in each offense." (*Ibid.*)

Although older misconduct becomes less probative, the court has discretion to admit ancient acts of sexual misconduct by the defendant. (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1384 [40 year old prior rape, ten years before the charged murder]; *People v. Robertson* (2012) 208 Cal.App.4th 965, 992-994 [30 year old prior rape]; *People v. Hernandez* (2011) 200 Cal.App.4th 953, 965-969 [molestations going back 40 years].)

There are three cases that have found admission of section 1108 evidence to be an abuse of discretion. In *People v. Harris* (1998) 60 Cal.App.4th 727, evidence of a prior violent rape was inadmissible to prove sex with one who could not consent. (*Id.* at p. 740.) In *People v. Jandres* (2014) 226 Cal.App.4th 340, evidence of an attempt to annoy a child and kidnap her from her home was not relevant to the charge of raping an adult. (*Id.* at pp.

355-357.) In *People v. Earle* (2009) 172 Cal.App.3d 372, a prior indecent exposure was inadmissible in a sexual assault case. (*Id.* at p. 397.) Although not specifically a case concerning section 1108 evidence, a court recently held the defendant's homosexuality was irrelevant in a molestation case involving a child who was the same gender as the defendant. (*People v. Garcia* (2014) 229 Cal.App.4th 302, 310-312.) Nonetheless, many courts do not have a problem with admitting prior sexual misconduct that was dissimilar to the charged offense, stating many sex offenders are not specialists but commit a variety of sex crimes. (See, e.g., *Earle,* at pp. 389-393; *People v. Escudero* (2010) 183 Cal.App.4th 32, 310-312 [prior rape against a disabled person was admissible in a case charging a violation of Pen. Code, § 288, subd. (a)].)

The defense may introduce evidence of a lack of a propensity to commit sex crimes to rebut section 1108 evidence. In *People v. Callahan* (1999) 74 Cal.App.4th 356, the defendant was charged with child molestation. Pursuant to section 1108, the prosecutor adduced evidence that the defendant had committed other acts of child molestation. In order to counter this evidence, defendant sought admission of the testimony of other children to show that he had not molested them even though he had the opportunity to do so. The court of appeal held that the proffered evidence was admissible. (*Id.* at pp. 374-379.)

E. Expert testimony

◊ "We readily acknowledge the self-evident truth, . . . that in our judicial system the outcome of important appellate cases can vary based on the composition of the judicial body or panel deciding those cases." (*Carver v. Lehman* (9th Cir. 2009) 558 F.3d 869, 878.) ◊

1. Rape trauma syndrome

In 1984, the California Supreme Court discussed the then fairly recent concept of rape trauma syndrome (RTS). (*People v. Bledsoe* (1984) 36 Cal.3d 236, 247.) Generally speaking, the syndrome serves to explain the physical, psychological and emotional reactions which are common to rape victims. (*Id.*, at pp. 241-242, fn. 4.) Expert testimony concerning the syndrome is not admissible to prove that the alleged victim was raped. (*Id.*, at p. 251.) However, the expert may testify to disabuse "the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths. [Citations.]" (*Id.*, at pp. 247-248.) One such myth is that rape victims do not delay in reporting the crime. (*Id.*, at p. 247.)

The Supreme Court has indicated that an expert witness may also testify about related matters in a sexual assault case. In *McAlpin*, the defendant was charged with molesting his girlfriend's eight year old daughter. Although the girlfriend corroborated the daughter's account, she did not contact the police. On these facts, the Supreme Court held that the

prosecutor properly called an expert witness to testify that: (1) parents sometimes do not report the molestation of their children; and (2) there is no "profile" of a typical child molester. (*McAlpin, supra*, 53 Cal.3d at pp. 1298-1304.) The testimony was not admitted to prove that a molestation had occurred but only to: (1) rehabilitate the girlfriend's credibility; and (2) disabuse the jury of false stereotypes concerning the identity of child molesters. (*Ibid.*)

2. Child Sexual Abuse Accommodation Syndrome

Following *Bledsoe*, the Supreme Court has also held that an expert witness may testify about the child sexual abuse accommodation syndrome (CSAAS). (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301.) As is the case with rape trauma syndrome evidence, "expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident - e.g., a delay in reporting - is inconsistent with his or her testimony claiming molestation. [Citations.]" (*Ibid*, fn. omitted.) CSAAS evidence is limited as it is for RTS evidence.

It has been more than twenty years since the "syndrome" experts have been allowed to testify. Given the intervening proliferation of media discussion about sexual assault, one would think that the strength of false stereotypes would have receded. Thus, it might be time to challenge the validity of the *Bledsoe* - *McAlpin* assumption.

Trial counsel has a duty to request the standard limiting instruction concerning the use of expert testimony regarding the various "syndromes." If there was no request for the instruction, a claim of ineffective assistance of counsel may lie. (See *United States v. Myers* (7th Cir. 1990) 892 F.2d 642, 648-649 [counsel erred by failing to request a limiting instruction on the use of a co-defendant's statement].)

Finally, appellate counsel must be alert to any attempt by the government to expand the use of expert testimony. The First District put a halt to one attempted expansion. In *People v. Robbie* (2001) 92 Cal.App.4th 1075, the prosecutor called a Department of Justice special agent, Sharon Pagaling, to testify regarding the characteristics of rapists. The evidence was proffered for the purpose of showing that the defendant's behavior was consistent with that of a rapist. In reversing the judgment, the court of appeal found that the expert's testimony constituted improper "profile" evidence (i.e. that the defendant was guilty since his conduct matched that of the typical rapist). (*Id.*, at pp. 1083-1087.) In reaching this conclusion, the court carefully distinguished *McAlpin*:

> "Pagaling properly could have testified that rapists behave in a variety of ways and that there is no 'typical rapist.' Had she done so her testimony would have been similar to that permitted in *McAlpin*. The problem here is that Pagaling did not merely attack the stereotype by explaining that there is no 'typical sex offender.' Instead, she replaced the brutal rapist archetype with another image: an offender whose behavioral pattern exactly matched defendant's."

(*Id.* at p. 1087.)

3. Intimate partner battery and its effects

There may be some sex cases where the prosecution seeks to introduce expert testimony that the complainant suffers from battered women's syndrome (BWS). It is now called "intimate partner battering and its effects." (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.) Insofar as the Legislature has specifically authorized the use of this type of evidence (Evid. Code, § 1107), there is little that the defense can do to challenge its admissibility, assuming that a foundation is laid that the complainant is in fact a battered woman. Like the other syndromes, BWS evidence may not be adduced as substantive evidence of the defendant's guilt. (Evid. Code, § 1107, subd. (a).) However, the evidence may be admitted to shore up the credibility of the complainant. (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 594.) In such a case, a proper limiting instruction should be given. (*People v. Moran* (1997) 58 Cal.App.4th 1210, 1216-1217.)

BWS evidence is a summary of common characteristics that appear in women who are abused over an extended period of time by the male dominant figure. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1193-1199.) In order to be classified a battered woman, logic dictates that she must have been abused at least twice. (*Gadlin, supra,* 78 Cal.App.4th at p. 593; *People v. Gomez* (1999) 72 Cal.App.4th 405, 415-418 [BWS evidence was improperly allowed where there was no evidence that the victim had previously been assaulted]; but see *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126-1130 [BWS evidence is admissible even if there has been no prior assault].) Although evidence of battered woman syndrome is inadmissible under Evidence Code section 1107 when there is no evidence of prior abuse, the evidence can be admitted under Evidence Code section 801 as proper expert testimony. (*People v. Brown* (2004) 33 Cal.4th 892, 895-896.) It does not require the jury to assume the crime is true. (*Id.*, at p. 906.) Ether way, the evidence is inadmissible to show the crime occurred; it is only admissible to show the victim's credibility. (*Ibid.*)

4. SART nurse

In the 1980's, California counties developed Sexual Assault Response Teams (SART). These teams provide services in the form of examination and treatment of reported victims of sexual assault. Typically, a professionally trained nurse will perform an examination of a person who has indicated that he or she has been the victim of a sexual assault.

A SART nurse is often called to testify to his observations of the complainant's physical condition. Such testimony might consist of observations that the victim was bruised or that there were tears or cuts to a sexual organ. This type of testimony is appropriate. However, the problem is that SART nurses often give testimony which is beyond their expertise and which is inadmissible. (See, e.g., *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1464-1466.)

The problem is further exacerbated since many defense lawyers appear to be completely unequipped to render proper objections. In recent years, there have been countless jury trials where defense counsel sat mute as SART nurses offered improper opinions. Given this poor performance by many trial lawyers, it is incumbent upon appellate counsel to closely scrutinize SART testimony. In so doing, viable claims of ineffective assistance of counsel may be uncovered.

A frequent opinion offered by SART nurses is that the complainant's injuries are "consistent" with the allegation of sexual assault. This opinion testimony is flatly inadmissible. Under California law, "the qualifications of an expert must be related to the particular subject upon which he is giving expert testimony." (*People v. Hogan* (1982) 31 Cal.3d 815, 852, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) Thus, while a criminalist might be qualified to testify concerning whether a certain fluid is blood, he is not qualified to testify as a "spatter" expert absent a showing of his special knowledge and training on that subject. (*Id.*, at pp. 852-853.)

In the case of a SART nurse, the witness usually has absolutely no training regarding the genesis of physical injury to a sexual organ. While the nurse is certainly qualified to testify about the appearance of an injury, he ordinarily has no special knowledge regarding whether a cut might be inflicted by consensual sex rather than rape. Thus, unless the prosecutor has laid a foundation concerning the SART nurse's training or knowledge of expert studies on the genesis of injuries, he may not offer an opinion that a particular injury is "consistent" with sexual assault.

On this last point, it must be emphasized that there are few scientific studies which purport to correlate certain physical injuries with the conclusion that they were inflicted by sexual assault. Absent such studies, no witness should be allowed to testify that an injury

is "consistent" with sexual assault. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 ["[w]here an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value."]; see *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 590 ["in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method"].)

Aside from a lack of foundation objection, a SART nurse's opinion testimony is inadmissible for a more fundamental reason. As a general proposition, a witness is barred from offering an opinion regarding the defendant's guilt or innocence. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) Thus, even an expert is precluded from testifying that a witness has been truthful. (*People v. Johnson* (1993) 19 Cal.App.4th 778, 786-791; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.) When a SART nurse testifies that the complainant's version of events is "consistent" with sexual assault, the testimony is a thinly veiled opinion that the complainant is a credible witness. Indeed, the entire SART exam proceeds on the assumption that the complainant is telling the truth. Viewed from this perspective, the SART nurse should not be allowed to testify to an opinion which implicitly advises the jury that the complainant is credible. (See *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099-1100 [trial court erred in allowing expert testimony that the complainant was a victim of child molestation].)

There is currently a pending case in the California Supreme Court concerning whether the admission of extrajudicial statements for the "basis" of an expert's opinion violates the confrontation clause. (See *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681.)

5. *Stoll* evidence

In *People v. Stoll* (1989) 49 Cal.3d 1136, the defendant was charged with child molestation. He sought to call a psychologist who had performed tests on him. Based on the tests and his interviews with the defendant, the psychologist was prepared to testify that the defendant did not bear the characteristics of a child molester. The Supreme Court held that the psychologist's expert opinion was admissible character evidence which the jury could consider. (*Id.*, at pp. 1152-1154.)

Several years later, the Supreme Court reached the same result with respect to lay opinions. In *McAlpin, supra*, 53 Cal.3d 1289, the defense sought to call the defendant's friends who were prepared to testify that he was not someone who would molest children. The Supreme Court held that such testimony is admissible so long as it is based on the witness' "personal observation of defendant's 'conduct with children'; . . . ." (*Id.*, at pp.

1308-1309.) While Evidence Code section 1102 precludes the witness from testifying to specific instances of the defendant's behavior, the witness' opinion is admissible. (*Id.*, at pp. 1309-1310.)

A second aspect of *McAlpin* is of great help to the defense. In excluding the testimony of the defense witnesses, the trial court relied on Evidence Code section 352. The Supreme Court found that this ruling constituted an abuse of discretion since: (1) the evidence could have been quickly presented; and (2) it went to the central issue in the case. (*McAlpin, supra*, 53 Cal.3d at p. 1310, fn 15.) Thus, *McAlpin* is powerful authority for the proposition that the trial court may not arbitrarily exclude proffered defense evidence.

In this regard, it must be emphasized that section 352 allows for the exclusion of evidence only when "its probative value is substantially outweighed" by its prejudicial effect. Thus, in a sex case where the defense is trying to prove a negative (i.e. the defendant did not commit the act), the trial court should not use section 352 to exclude defense evidence. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 292 ["[w]here the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, the testimony must be received over a section 352 objection absent highly unusual circumstances."].)

F. Admissions

◊ "A legal fiction is an 'assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is directed from its original purpose to accomplish indirectly some other object.' (Black's Law Dict. (8th ed. 2004) p. 913, col 1.)" (*People v. Najera* (2006) 138 Cal.App.4th 212, 220-221.) ◊

Often, the most damaging evidence will be the defendant's admissions in a police interrogation or in a pretext call.

The case law concerning interrogations ha become abysmal in the last 30 years. (See, e.g., *Berghuis v. Thompkins* (2010) 560 U.S. 370, 375-376, 381, 387-388 [staying silent for 2¾ hours of the interrogation was not an invocation of the right to silence]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1104-1108 ["I think it'd probably be a good idea for me to get an attorney" was not an unequivocal request for an attorney]; *People v. Davis* (2009) 46 Cal.4th 539, 586-588 ["Well then book me and let's get a lawyer, and let's go for it, you know . . . That's the end, the end" was not an unequivocal invocation of the right to counsel].)

The United States Supreme Court recognized in *Miranda v. Arizona* (1966) 384 U.S. 436 that police officers often employ a coercive technique of interrogation, called the Reid

technique, that is aimed at getting the defendant to confess to the crime, and it had often led to false confessions. Since then, the courts have held that the various methods used in the Reid technique, at least in isolation or coupled with only a few of the methods are not coercive. Recently, there has been some good case law suppressing coerced confessions, especially concerning youthful offenders. In *In re Elias V.* (2015) 237 Cal.App.4th 568, the court discusses the Reid technique in depth and explains how the officers step by step trap the unwary defendant. Techniques include assuring the defendant that they know he did it, they just want his side of the story and his denials are unreasonable. The officers work on the defendant's sense of honor or desire for respect and suggest two possible scenarios, both equally inculpatory, while suggesting that one of them is at least morally understandable or less blameworthy. Left with no better alternative, the accused adopts the less onerous scenario. The case also shows how even the people who have developed and trained others in the Reid technique have said that these methods should not be used for youthful offenders because false confessions arise too easily in this context. Notwithstanding the opinion's emphasis on youthful offenders, the case can be useful for explaining to a court why the defendant's confession was coerced, assuming there is a sufficient factual basis or such a claim.

Pretext calls are also devastating. Such calls rest on the assumption that a person would not admit sexual misconduct or fail to deny it when it is alleged unless it were true. This assumption is questionable when the defendant has had a long-standing relationship with the caller in what is purportedly a private conversation; if the caller appears to be in distress, which is commonly the case, the defendant might reasonably believe this is the wrong time to pick a fight. Many defendants are also caught off guard and cannot even fully comprehend what is being alleged. Nonetheless, it is incredibly convincing in court, and there is often little that can be done with it, especially on appeal.

Nonetheless, there is one potential avenue for attacking a pretext call. The call is not made spontaneously. Instead, the investigating officer spends a considerable amount of time with the complaining witness preparing him or her, going over what questions to ask, and discussing how to respond if the defendant reacts in certain ways. The officer is present during the call, sometimes passes notes to the caller, and almost always records the call. The caller is thus a police agent, and the conversation is a police interrogation. To the extent the caller might have made threats or promises of a benefit (e.g., "I won't call the cops if you tell me what really happened"), it can be argued the admissions were involuntary under the due process clause of the Fourteenth Amendment. (*Hutto v. Ross* (1996) 429 U.S. 24, 30; *People v. Neal* (2003) 31 Cal.4th 63, 79.)

G. Statute of Limitations

A SDAP panel attorney has called this the statute of lamentations. This is because it involves a careful review of all of the charges and when they allegedly occurred. Counsel must then trace all of the numerous amendments to the applicable statutes to see if the statute of limitations for any of the charges has lapsed. Even when you think you have an answer, check again, as there are many traps for the unwary. This discussion gives the highlights.

1. Cognizability, standard of review, remedy

It used to be that the failure to prosecute within the statute of limitations was a jurisdictional issue, and the claim could be raised without an objection below. (See *People v. Williams* (1999) 21 Cal.4th 335, 337.) In 1999, the California Supreme Court held the trial court had fundamental jurisdiction to prosecute a matter that was time barred, but in some circumstances the claim is not forfeited despite the failure to raise it below. "[W]hen the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time." (*Id.* at p. 341.) If the prosecution fails to plead the statute of limitations but there is no objection, the court will affirm if review of the record shows the crime was within the period. (*Id.* at p. 346; *People v. Smith* (2002) 98 Cal.App.4th 1182, 1189.) This is so even if an appeal is from a plea of guilty or no contest. (*Williams, supra,* 21 Cal.4th at pp. 339-340.)

The *Williams* rule "does not apply to an information that, as it should, either shows that the offense was committed within the time period or contains tolling allegations. Although under our cases, defendants may not forfeit the statute of limitations if it has expired as a matter of law, they may certainly lose the ability to litigate factual issues such as questions of tolling." (*Williams, supra,* 21 Cal.4th at p. 344.) If the prosecution fails to prove the statute of limitations at trial, but there is no objection, the appellate court will affirm if review of the record shows the crime was within the statute of limitations. (*Id.* at p. 341; *Smith, supra,* 98 Cal.App.4th at pp. 1191-1192.) If the question relies on the evidence, the question is waived without an objection. (*Smith, supra,* 98 Cal.App.4th at pp. 1192-1193.) Failure to request a jury instruction on the statute of limitations waives the issue. (*Id.* at p. 1193; *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1287-1289, disapproved on other grounds in *People v. Shockley* (2013) 58 Cal.4th 400, 406.)

It is not clear if the statute of limitations is waived on a lesser included offense when there is no objection below. (Compare *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1150 [forfeited] with *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1089-1090 [when there is nothing in the record that defendant acquiesced or requested instruction on a lesser included offense, defendant did not waive statute of limitations on the lesser because the court has a sua sponte duty to give the instruction].) But the claim is waived if the defendant pleads to

a lesser offense as part of a plea bargain. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373-374.)

When the prosecution fails to adequately plead whether the statute of limitations was met, and it cannot be determined from the record on appeal if the offense occurred within the statute of limitations, the remedy is to remand the matter for a hearing in the trial court. (*Williams, supra,* 21 Cal.4th at pp. 341, 345; *People v. Chadd* (1981) 28 Cal.3d 739, 458; *People v. Lynch* (2010) 182 Cal.App.4th 1262, 1271-1277.) When the prosecutor fails to prove the statute of limitations at trial, the judgment is reversed if there was not substantial evidence. (*People v. Zamora* (1976) 18 Cal.3d 538, 565-574; cf. *People v. Lee* (2000) 82 Cal.App.4th 1352, 1360-1362 [remand for a new hearing if it was not raised at trial and it cannot be determined from the entire record on appeal if the prosecution was timely].) When the court erroneously denies a pretrial statute of limitations motion, and the reviewing court cannot determine from the record on appeal if the offense occurred within the statute of limitations, the court must remand the matter for a hearing. (*Williams, supra,* 21 Cal.4th at p. 341.)

2. Purpose

"The statute of limitations serves valuable purposes in a criminal prosecution. Chief among them are the avoidance of prejudice to both the People and the defendant resulting from the loss of evidence with the passage of time, as well as respect for the right of a defendant to a speedy trial. (*People v. Zamora* [(1976)] 18 Cal.3d [538,] at pp. 546-547.)" (*People v. Wetherell* (2014) 223 Cal.App.4th Supp. 12, 17.)

The court is required to construe the statute of limitations strictly in favor of the defendant. (*People v. Zamora* (1976) 18 Cal. 3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

3. Which time limit applies

The longest statute of limitation applies. (Pen. Code, § 803.6.)

The statute of limitations for a wobbler is what it would be if it were a felony, even if it is charged as a misdemeanor. (*People v. Soni* (2005) 134 Cal.App.4th 1510, 1514-1517 [four years for fraud].)

The statute of limitations does not depend on enhancements. (Pen. Code, § 805, subd. (a); see *People v. Turner* (2005) 134 Cal.App.4th 1591, 1600.)

The statute of limitations can depend on alternate sentencing schemes or penalty provisions. (*People v. Hale* (2012) 204 Cal.App.4th 961, 971-974 [for a sex crime punishable by life under Pen. Code, § 269, there is no limitation]; *Anthony v. Superior Court* (2010) 188 Cal.App.4th 700, 720 [attempted murder with premeditation is a penalty provision, not an enhancement, so the statute of limitations is life]; *People v. Perez* (2010) 182 Cal.App.4th 231, 236-242 [for molest with one strike offense, there is no statute of limitations because it carries a life term]; *People v. Johnson* (2006) 145 Cal.App.4th 895, 907 [indecent exposure charged as a felony]; see also *People v. Shaw* (2009) 177 Cal.App.4th 92, 97-101 [felony Pen. Code, § 647.6 with a prior]; *In re McSherry* (2007) 157 Cal.App.4th 324, 328 [same]; *People v. San Nicholas* (1986) 185 Cal.App.3d 403, 407 [same]; but see *People v. Turner* (2005) 134 Cal.App.4th 1591, 1597-1600 [statute of limitations for robbery with two prior strikes is three years, though it is a life crime].)

4. When the clock starts

The applicable statute of limitations for a continuing crime is when the last act occurred. (*People v. Keehley* (1987) 193 Cal.App.3d 1381, 1385.) Thus, "in conspiracy cases . . . a limitation period begins to run from the time of the last overt act committed in furtherance of the conspiracy." (*People v. Zamora* (1976) 18 Cal.3d 538, 548.)

When an offense or series of offenses is alleged to have been committed within a range of dates, as opposed to a specific date, some courts hold the statute of limitations runs from the earliest date the offense could have been committed. (See, e.g., *People v. Simmons* (2012) 210 Cal.App.4th 778, 788-791; *People v. Angel* (1999) 70 Cal.App.4th 1141, 1146-1147; see also *People v. Gordon* (1985) 165 Cal.App.3d 839, 852, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292.) Other courts have examined if there is sufficient evidence the crime was committed within the statute of limitations. (See, e.g., *People v. Ortega* (2013) 218 Cal.App.4th 1418, 1433; *People v. Smith* (2002) 98 Cal.App.4th 1182, 1188-1190, 1191-1192.)

5. Specific applications to sex crimes

The ex post facto clause (U.S. Const., art. I, § 10) prohibits reviving a statute of limitations after the time for prosecuting a crime has expired. (*Stogner v. California* (2003) 539 U.S. 607, 632, overruling *Stogner v. Superior Court* (2001) 93 Cal.App.4th 1229 and *People v. Frazer* (1999) 21 Cal.4th 737 concerning Pen. Code, § 803, former subd. (g).) The "ex post facto [clause] does not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred." (*Ibid.*; see, e.g., *People v. Simmons* (2012) 210 Cal.App.4th 778, 788-791; *In re White* (2008) 163 Cal.App.4th 1576, 1580-1583.)

Pursuant to Penal Code section 803, subdivision (f)(1), a complaint is timely filed if it is brought within one year of a report to a California law enforcement agency. Corroboration of the allegation is required. (Pen. Code, § 803, subd. (f)(2)(C).) The corroboration does not require evidence of every element. (*People v. Smith* (2011) 198 Cal.App.4th 415, 427-428 [corroboration sufficient where defendant admitted molesting the child by touching her though he denied the substantial sexual conduct necessary to show the statute of limitations permitted prosecution].) Evidence of other sex crimes by the defendant under Evidence Code section 1108 can serve as corroboration. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659; see *People v. Yovanov* (1999) 69 Cal.App.4th 392, 403.)

Former Penal Code section 803, subdivision (g) (effective Jan. 1, 1994), extending the statute of limitations upon reporting the crime to law enforcement, applied only if the report was to a law enforcement agency in California. (*People v. Lewis* (2015) 234 Cal.App.4th 203, 208-211.)

Under Penal Code section 801.1, a molest victim has until he or she is 40 years old to report the molestations. (*People v. Simmons* (2012) 210 Cal.App.4th 778, 786-788; *People v. Hernandez* (2011) 200 Cal.App.4th 953, 970; *People v. Shaw* (2009) 177 Cal.App.4th 92, 102.)

6. Commencing prosecution

Issuing an arrest warrant tolls the statute of limitations. (See *People v. Robinson* (2010) 47 Cal.4th 1104, 1135-1142.) It is sufficient that the warrant only lists the person's DNA profile. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1135-1142.)

Arresting defendant on another case does not toll the statute of limitations. (*People v. Lee* (2000) 82 Cal.App.4th 1352, 1356-1358.)

Filing the complaint is sufficient to toll the statute of limitations in sex cases. (*People v. Johnson* (2006) 145 Cal.App.4th 895, 900-901.)

7. Tolling for "the same conduct"

Filing the information tolls the statute of limitations for lesser included offenses. (Pen. Code, § 805, subd. (b); *Cowan v. Superior Court* (1996) 14 Cal.4th 367; see *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1150.)

Filing the information tolls the statute of limitations "for the same conduct [that] is pending in a court of this state . . . . " (Pen. Code, § 803, subd. (b); *People v. Hamilton* (2009) 170 Cal.App.4th 1412, 1438-1442 [same conduct charged in a different complaint];

People v. Whitfield (1993) 19 Cal. App. 4th 1652, 1659 [same].) This principle is derived from former Penal Code section 802.5. (*Whitfield, supra,* 19 Cal. App. 4th at p. 1659, fn. 8.)

Courts have said the meaning of "same conduct" requires some "flexibility" and can include separate incidents from continuing criminal conduct. (See, e.g., *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1439-1440 [child abuse]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 369 [kidnapping in the course of a murder]; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1064 [forgery and filing false documents in connection with a rent skimming scheme]; see also *People v. Smith* (2002) 98 Cal.App.4th 1182, 1191-1193 [molestations]; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1659-1660 [prostitution in connection with rape].) Generally, section 803(b) must be pled and proved. (See *Hamlin, supra,* at pp. 1439-1440.)

Section 803, subdivision (f) and former subdivision (g) have permitted prosecution for sex crimes within one year of a report if certain conditions were met. It did not permit the prosecution for other sex crimes not reported. (*People v. Superior Court (Maldonado)* (2007) 157 Cal.App.4th 694, 702; *People v. Terry* (2005) 127 Cal.App.4th 750, 767, 769.)

An amended information alleging the same conduct relates back to the original information and must be deemed timely. (*People v. Ortega* (2013) 218 Cal.App.4th 1418, 1427-1433, 1429 [though information alleged three counts in 1994 and three counts in 1995, evidence was that there were at least six incidents in 1995, so all of the counts were within the statute of limitations]; *Harris v. Superior Court* (1988) 201 Cal.App.3d 624, 627-628.)

8. Burden of proof

Defendant has the burden of proof in a pretrial motion. (*People v. Moore* (2009) 176 Cal.App.4th 687, 693.)

The prosecution has the burden of proof by a preponderance of the evidence at trial. (*People v. Zamora* (1976) 18 Cal.3d 538, 562; *People v. Fine* (1997) 52 Cal.App.4th 1258, 1267.) Corroboration under section 803, subdivision (f)(2)(C) requires clear and convincing evidence. The burden of less than a reasonable doubt does not violate the right to a jury trial as interpreted by the Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1285-1286; *People v. Riskin* (2006) 143 Cal.App.4th 234, 240-241; *People v. Linder* (2006) 139 Cal.App.4th 75, 85-86; see *Renderos v. Ryan* (9th Cir. 2006) 469 F.3d 788, 796-797.) The statute of limitations is not an element of a crime. (*People v. Frazer* (1999) 21 Cal.4th 737, 757-760, overruled on other grounds in *Stogner v. California* (2003) 539 U.S. 607.)

H. Instructions

◊ "Perhaps some would say that [defendant]'s innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail." (*Dretke v. Haley* (2004) 541 U.S. 386, 399-400.) (dis. opn. of Kennedy, J.).) ◊

1. Molestation

Penal Code section 288.5 and section 288, subdivisions (a) and (b)(1) proscribe touching a minor under the age of 14 years with lewd intent. The lewd touching need not be made to an intimate part of the victim's body, so long as it is done with lewd intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 442.) Until 2013, however, CALCRIM No. 1110 stated "[t]he touching need not be done in a lewd or sexual manner." This phrase was meant to address the point made in *Martinez*, that the touching with lewd intent does not require contact with an intimate part of one's body. But the sentence can instead convey the message the crime did not require the touching to be accompanied with lewd intent, which is wrong. (*People v. Cuellar* (2012) 208 Cal.App.4th 1067, 1071-1072; but see *People v. Sigala* (2011) 191 Cal.App.4th 695, 700.)

A related problem arises when the alleged offense consists of an outwardly innocent touching that has not led to sexual exploitation, but the prosecution alleges the defendant was grooming the child. Since the touching was made with the purpose of some future sexual conduct, so goes the theory, the apparently innocent touching was with "lewd intent." The pattern jury instruction is not clear on this point, but section 288 requires that the sexual gratification must occur during the time of the touching. (See *Martinez, supra,* 11 Cal.4th at p. 444.)

Yet another issue that arises is from the standard jury instruction that motive is not an element of the offense. The courts have generally held the instruction does not mislead the jury regarding the specific intent element. (See, e.g., *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 191 & fn. 32.) The instruction, however, should not be given when motive is an element of the crime, such as annoying a child (Pen. Code, § 647.6) and meeting a minor for lewd purposes (Pen. Code, § 288.4). (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.)

2. Mistake

A reasonable, good faith belief an adult victim consented is a defense to forcible sex offenses. (*People v. Mayberry* (1975) 15 Cal.3d 143, 153-158.) The courts have applied this defense in limited circumstances where the defendant alleges the victim's equivocal conduct

led the defendant to believe consent existed when it did not. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1149.) The defense did not apply when the victim withdrew her consent during intercourse. (*In re John Z.* (2003) 29 Cal.4th 756, 760.) It did not apply to rape of an unconscious person. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 36-37 [wife's purported advance consent to have sex when she passed out was not reasonable]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471.) It applies to misdemeanor sexual battery. (*People v. Andrews* (2015) 234 Cal.App.4th 590, 602-603.) The court has a sua sponte duty to give the instruction in an appropriate case. (*Williams,* at p. 362; see also *Mayberry,* at pp.153-158.) The defendant has the burden of pointing to substantial evidence that raises a reasonable doubt. (*Id.* at pp. 361-364.)

A reasonable mistake of age is a defense to statutory rape (*People v. Hernandez* (1964) 61 Cal.2d 529, 532-534; but see *People v. Scott* (2000) 83 Cal.App.4th 784, 800 [not a defense to intercourse with a minor younger than 16 when the defendant believed she was a minor]) and oral copulation with a minor (*People v. Peterson* (1981) 126 Cal.App.3d 396, 397). It is a defense to arranging to meet with a minor for lewd purposes under Penal Code section 288.4. (*People v. Hanna* (2013) 218 Cal.App.4th 455, 461-462), annoying a minor (*People v. Atchison* (1978) 22 Cal.3d 181), and contributing to the delinquency of a minor (*People v. Atchison* (1978) 22 Cal.3d 181).

But mistake of age is not a defense to lewd conduct with a minor under the age of 14 years (*People v. Olsen* (1984) 36 Cal.3d 638, 647-648; *In re Donald R.* (1993) 14 Cal.App.4th 1627, 1629-1631), attempted lewd conduct with a minor under the age of 16 years (*People v. Paz* (2000) 80 Cal.App.4th 293, 294; see also *People v. Reed* (1997) 53 Cal.App.4th 389, 399 [attempted offense on a minor under 14]), aggravated kidnapping of a minor under the age of 14 (*People v. Magpuso* (1994) 23 Cal.App.4th 112, 118), pimping or pandering a minor under the age of 16 (*People v. Branch* (2010) 184 Cal.App.4th 516, 520-522), or giving drugs to a minor (*People v. Williams* (1991) 233 Cal.App.3d 407, 410-412; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760-761; but see *People v. Goldstein* (1982) 130 Cal.App.3d 396).

3. On review

Currently pending before the state supreme court is the question of whether a defendant can be convicted of both rape of an intoxicated person and rape of an unconscious person for a single act of sexual intercourse. (*People v. White* (2015) 237 Cal.App.4th 1087, review granted Sept. 30, 2015, S228049.) The court is also considering whether misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1)) is a lesser included offense of sexual battery by fraudulent representation (Pen. Code, § 243.4, subd. (c)). (*People v. Robinson* (2014) 227 Cal.App.4th 387, review granted Sept. 24, 2014, S220247.)

I. Sentencing

◊ "Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that 'speech, or . . . the press' also means the Internet, see *Reno v. ACLU,* 521 U.S. 844 (1997), and that 'persons, houses, papers, and effects' also mean public telephone booths, see *Katz v. United States*, 389 U.S. 347 (1967). When a particular right comports especially well with our notion of good social policy, we build magnificent legal edifices on elliptical constitutional phrases—or even the white spaces between lines of constitutional text. *See, e.g., Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), rev'd sub nom. *Washington v. Gluckberg*, 521 U.S. 702 (1997). But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there." (*Silveira v. Lockyer* (9th Cir. 2003) 328 F.3d 567, 568 (dis. opn. of Kozinski, J., of order denying rehearing en banc).) ◊

Special care must be used in calculating the sentence for sex offenses. First, indeterminate terms generally may be imposed consecutively or concurrently to the determinate term. (Pen. Code, § 669.) Second, in certain circumstances, the determinate term for each violent sex offense may be or must be fully consecutive, and the total determinate term for violent sex offense must be consecutive to the determinate term for nonqualifying sex offenses. (Pen. Code, § 667.6, subds. (c) & (d).)

Concerning violent sex offenses: "Section 667.6, subdivision (c) provides that if a person is convicted of a violent sex offense against a single victim on one occasion, the trial court may, in its discretion, impose a full, separate and consecutive sentence for such an offense. Alternatively, it may sentence the defendant more leniently in the manner prescribed by section 1170.1. (*People v. Jones* (1988) 46 Cal. 3d 585, 593; *People v. Belmontes* (1983) 34 Cal. 3d 335, 346.) Subdivision (d) removes the trial court's discretion to impose a more lenient sentence under section 1170.1 where two or more violent sex crimes are committed against more than one victim or where they are committed against the same victim on more than one occasion. In such an instance, the defendant must serve a full, separate and consecutive sentence for each conviction of an enumerated violent sex offense. (§ 667.6, subd. (d); *Jones,* at p. 595; *People v. Reeder* (1984) 152 Cal.App.3d 900, 911.) Further, the term imposed under section 667.6, subdivision (d) 'shall not be included in any determination pursuant to Section 1170.1.' Thus, when a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1." (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 123-124; accord, *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 211-212.)

A separate occasion exists if the defendant had a "reasonable opportunity to reflect upon [his or her] actions and nonetheless resumed sexually assaultive behavior." (Pen. Code, § 667.6, subd. (d), ¶ 2; *People v. Jones* (2001) 25 Cal.4th 98, 104, fn. 2; *People v. Irwin* (1996) 43 Cal.App.4th 1063, 1070-1071.) The court may choose the lower, middle, or upper term for the fully consecutive term. (*People v. Craft* (1986) 41 Cal.3d 554, 559; *People v. Coleman* (1989) 48 Cal.3d 112, 162.)

The punishment for some sex offenses is an indeterminate term. (See, e.g., Pen. Code, §§ 667.61, 667.71.) Originally, a consecutive indeterminate sentence was required under section 667.61 if the offenses did not occur within a "single occasion" with the same victim. (Pen. Code, § 667.61, subd. (g).) A "single occasion" with the same victim under Penal Code section 667.61, subdivision (g) was broader than under section 667.6, subdivision (d); the punishments could be concurrent if the offense were committed in close temporal or spacial proximity. (*Jones, supra,* 25 Cal.4th at p. 104.) Under a 2006 amendment, however, a consecutive sentence must be imposed if it would be required under section 667.6, subdivision (d). (Pen. Code, § 667.61, subd. (i); *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 213-214.)

Because new sex crimes are always being created, the punishment for sex offenses has changed frequently over the years, and the statute of limitations for sex offenses has been extended or eliminated, counsel should be careful to make sure the defendant is punished for a crime and a sentence that existed when the crime was committed and for crimes for which the statute of limitations has not lapsed. (See, e.g., *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173-1174 [defendant was convicted of violating Pen. Code, § 288, subd. (c)(1) for conduct occurring before the crime existed]; *id.* at pp. 1174-1178 [Pen. Code, § 288.5 was not a one strike offense until 2006].) Imposing a punishment that is greater than what existed when the crime was committed violates the ex post facto clause of the state and federal constitutions. (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.) The courts have allowed, however, a one strike sentence for multiple victims if only one of the victims was abused after the statute was enacted. (*Id.* at p. 1179.) The same care must be given for the sex registration fine (Pen. Code, § 290.3), which was increased in 2006. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) And of course, one must make sure the penalty assessments imposed are the ones in effect when the crime was committed. (*People v. High* (2004) 119 Cal.App.4th 1192, 1196-1199.)

Effective July 2012, Penal Code section 1203.067, subdivision (b) requires people placed on probation for a sex offense to undergo polygraph testing and counseling while waiving the therapist-patient privilege and the right against self-incrimination. The supreme court is currently considering whether the provisions are constitutional. (*People v. Friday* (2014) 225 Cal.App.4th 8, review granted July 16, 2014, S218288; *People v. Garcia* (2014) 224 Cal.App.4th 1283, review granted July 16, 2014, S218197; *People v. Klatt* (2014) 225 Cal.App.4th 906, review granted July 16, 2014, S218755.)