Evidentiary Issues Frequently Arising in Sex Cases

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Introduction

As all experienced criminal defense lawyers know, it is extremely difficult to handle a case where the client has been charged with a serious sex offense. Due to the nature of the charge, many jurors instinctively presume that the defendant is guilty. Moreover, the Legislature has devised a set of rules which make it tremendously hard to obtain a fair trial.

Once a defendant is convicted, it is difficult to obtain an appellate remedy. In an era of hot button politics, appellate justices are not eager to provide relief to a defendant who is despised by a majority of the citizenry.

Given this reality, appellate counsel must display extraordinary skill and desire in order to persuade an appellate court that a new trial must be ordered in a sex case. Although appellate counsel is certain to be disappointed by the result in a great many cases, it is nonetheless true that a large number of evidentiary issues are potentially available in a sex case.

The purpose of this article is twofold. First, the general rules of law concerning garden variety evidentiary issues will be discussed. It is hoped that the reader will thereby obtain a background in the relevant black letter law. Second, my primary goal is to encourage counsel to think outside the box. In all too many cases, an appellate lawyer will read a record with the assumption that a sex trial was conducted pursuant to a rational and

well defined set of evidentiary principles. While this may be true in most cases, it is not true in all cases. Appellate counsel should be ever sensitive to the core question of whether a particular rule of evidence or type of evidence makes any sense in terms of our traditional notions of relevance and fairness. If a piece of evidence fails this test, a legal issue should be raised.

A final introductory word is in order. Having read many transcripts in sex cases, I have reached the unfortunate conclusion that a substantial number of trial lawyers are woefully ignorant of the rules of evidence as they apply to sex charges. Trial counsel often fail to make appropriate objections and ignore helpful evidence which they could have presented. Thus, it is often necessary to pursue a claim of ineffective assistance of counsel in order to reach the merits of evidentiary issues.

I.

A SUGGESTED APPROACH FOR READING THE RECORD: WAS ADMISSION OF A PARTICULAR PIECE OF EVIDENCE IN ACCORD WITH TRADITIONAL NOTIONS OF RATIONALITY AND FAIRNESS?

Having practiced law for over twenty five years, I am constantly struck by the fact that the legal "norms" of criminal law are incredibly different today than they were in 1980. For example, very few lawyers in 1980 would have prognosticated that a 2007 California defendant could receive a sentence of 25 years to life for the commission of a petty theft. Similarly, virtually no lawyer in 1980 would have predicted that prior sex crimes evidence would be admissible in 2007 in order to show a defendant's propensity to commit a sex crime. Yet, these circumstances are now a settled reality in California.

Notwithstanding our new "reality," defense counsel should not accept today's status quo without protest. Rather, it remains our duty to challenge a "reality" which is either irrational or serves to reduce a defendant's right to a fair trial. Such a challenge can be mounted on the basis of both fairness and our rich legal traditions.

Our rules of evidence have evolved over centuries of trial and error in common law courts. The result of this evolution is a set of principles which were designed to afford a fair trial for the parties. In particular, a number of principles were created for the special purpose of protecting criminal defendants from specific forms of prejudicial evidence. With the rise of an ever increasing cacophony of media howlers, these venerable principles have been chipped away in order to make sex convictions (if not all convictions) easier to obtain.[1]/ In order to combat the changing landscape, it is incumbent upon defense counsel to revert to our common law norms of fair play.

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[1]The most absurd innovation flowed from O.J. Simpson's criminal trial. Traditionally, hearsay exceptions have allowed for the admission of reliable evidence. (2 McCormick, Evidence (6th ed. 2006) sections 245 and 325, pp. 127-128, 419-420.) At Simpson's trial, the prosecution sought to introduce Nicole Simpson's diary wherein she memorialized certain threats allegedly made by O.J. The trial court properly excluded the diary as hearsay. In response, the Legislature enacted Evidence Code section 1370 which allows for the admission of a "writing" which chronicles threats of violence. (See *Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 938.) The new exception is ridiculous when it is measured under the common law understanding of the hearsay rule. Insofar as a diary is a private document which is not to be viewed by others, it simply cannot be said that the author has any obligation to write the truth. However, the California Legislature no longer cares about the common law rules of evidence. (*Simpson*, supra, 67 Cal.App.4th at p. 938 [legislative history of section 1370 states that Nicole Simpson could not have imagined that her diary would be inadmissible under an "archaic legal rule."]; but see *Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1035-1042 [diary entries were sufficiently reliable to be admissible].)

Practically speaking, this approach requires appellate counsel to ask a simple question in reading the record: Does the application of a particular rule or admission of a specific piece of evidence make sense? If not, a legal challenge of some sort should be formulated.

An example from one of my own cases illustrates the approach. In *People v. Valencia* (2006) 146 Cal.App.4th 92, the defendant was charged with two counts of continuous sexual abuse of a minor (Penal Code section 288.5) and two counts of forcible lewd and lascivious acts with a minor (Penal Code section 288, subd. (b)). The alleged victims were the defendant's three sisters. Although the sisters had told the police that Mr. Valencia had molested them, each of the sisters recanted at trial. The case was a close one as evidenced by a hung jury at the first trial.

The prosecutor put on a very strange piece of evidence. The youngest sister told the police that she saw the oldest sister exiting Mr. Valencia's bedroom with a "red stain" on her clothing. In turn, the oldest sister told the police that she had gotten drunk and fallen asleep in Mr. Valencia's room. However, she categorically denied that she had been sexually touched on this occasion.

In light of this evidence, the prosecutor admitted during his closing argument that he could not prove beyond a reasonable doubt that Mr. Valencia had committed a sexual act on the night in question. Nonetheless, the prosecutor urged the jury to conclude that Mr. Valencia had engaged in sexual intercourse with his sister while she was menstruating. For good measure, the prosecutor threw in the claim that Mr. Valencia had stolen his sister's

virginity.

Plainly, the "red stain" evidence was not relevant within the meaning of Evidence Code section 210. This is so since there was no proof that the "red stain" was blood. Absent such a showing, the evidence proved nothing. (*People v. Morrison* (2004) 34 Cal.4th 698, 711 [evidence is irrelevant "if it leads only to speculative inferences. [Citation.]."].)

The lesson to be learned from this tale is a simple one. At first blush, the evidence may have appeared to be admissible since it involved a firsthand account of activity in a bedroom. However, upon closer examination, the evidence was truly worthless since the prosecutor quite simply had no proof that the "red stain" was blood. Absent such proof, the evidence could serve only to mislead the jury. (See *Miller v. Pate* (1967) 386 U.S. 1, 6-7 [murder conviction reversed where the prosecutor falsely told the jury that paint stained shorts actually contained blood].)[2]/

The *Valencia* case also presents a second example where a careful review of the record led to the conclusion that something was amiss. An element of Penal Code section 288.5 is that the abuse of the minor must have occurred over a period of at least three months. In presenting its case, the People had very little evidence as to exactly when the acts of abuse took place. In order to prove the three month element, the prosecutor adduced the testimony of a school employee, Ms. Correa, that one of the sisters (Laura) had told her that

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[2]The discussion of the "red stain" evidence does not appear in the published portion of the *Valencia* opinion. The Court of Appeal held that admission of the evidence was not prejudicial.

another sister (Denisse) had been molested by Mr. Valencia since she was four years old. Since Denisse was eight at the time of trial, the evidence was sufficient to prove the three month element. However, the remainder of the record established that Laura's statement was not admissible evidence.

In both her pretrial statements and trial testimony, Laura categorically denied that she had any knowledge of when Mr. Valencia had molested Denisse. Rather, she indicated that she had only recently learned of the alleged acts of molestation. Given this record, Laura's statement to Ms. Correa fell afoul of a long settled rule of evidence.

As is memorialized in Evidence Code section 702, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." In the case of Laura's statement, the record plainly established that she lacked personal knowledge that Denisse had been molested since she was four. Thus, the statement was inadmissible.

Interestingly, no California case has applied section 702 to a hearsay statement since the statute refers only to a "witness." However, citing out-of-state and federal authority, the Court of Appeal held that Laura's statement was inadmissible under section 702 since the "rationale for requiring a hearsay declarant to have personal knowledge when the declarant's statement is admitted for its truth is identical to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness's testimony." (*Valencia*, *supra*, 146 Cal.App.4th at p. 103.)

The foregoing resume of the *Valencia* case yields a fundamental lesson. In reviewing a record, appellate counsel must carefully examine each piece of important evidence in order to ascertain if it was properly admitted under our standard notions of fair play and relevance. In a number of cases, this type of review will lead counsel to raise a potentially meritorious issue.

II.

APPELLATE COUNSEL SHOULD NOT HESITATE TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN AN ADEQUATE OBJECTION WAS NOT MADE IN THE TRIAL COURT.

It is an unfortunate reality that trial attorneys often fail to make appropriate objections to the admission of particular pieces of evidence or make the wrong objection. Being the nice people that we are, appellate counsel are often hesitant to point the finger at trial counsel by advancing a claim of ineffective assistance of counsel. Nonetheless, such a claim is a necessary one in many cases.

Under California law, an appellant bears the burden of establishing that he made an adequate record in the trial court. In order to complain about the improper admission of evidence, appellant must show that he made a "timely" objection on the "specific ground" which is raised on appeal. (Evidence Code section 353, subd. (a).) Although "timeliness" and "specificity" are matters which can be disputed by reasonable minds, the truth is that the appellate courts are quite willing to avoid difficult issues by finding that an objection was inadequate. Thus, if there is any question as to whether trial counsel made a sufficient

objection, a claim of ineffective assistance of counsel should be made.

The same principle holds true when the issue on appeal is whether defense evidence was wrongly excluded. In this situation, appellant must show that the "substance, purpose, and relevance of the excluded evidence was made known" to the trial court. (Evidence Code section 354, subd. (a).) Thus, if trial counsel failed to make an adequate offer of proof, it is necessary to advance a claim of ineffective assistance of counsel. Typically, this type of claim will have to be made via habeas corpus where a full showing of the nature of the excluded evidence can be made.

It is never pleasant to raise a claim of ineffective assistance of counsel. However, it is worth noting that the proper presentation of the claim can provide two distinct advantages for the client.

First, in some cases, trial counsel will have truly butchered the case by making several mistakes or omissions. In this situation, the use of a claim of ineffective assistance of counsel can be liberating in that appellate counsel can essentially provide an alternative trial for the client by demonstrating how the trial should have been conducted in the first instance. In this way, appellate counsel can hopefully persuade the appellate court that the trial actually conducted was unfair. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 940 [in order to assess the prejudice flowing from ineffective assistance of trial counsel, it is "'essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.' [Citation.]."]

Second, a claim of ineffective assistance of trial counsel will allow the client to take his case to federal court whereas a mere claim of state evidentiary error may not.[3]/ Moreover, since the case law is so well settled in the area of ineffective assistance of counsel, a federal court may be more inclined to grant relief on this ground rather than on the more amorphous standards which surround evidentiary error.

As defense lawyers, we should never lose sight of the fact that our highest duty is owed to our clients. While it is unpleasant to accuse another lawyer of being ineffective, it sometimes has to be done in order to vindicate the client's rights.

III.

WHEN FACED WITH AN ISSUE ARISING UNDER EVIDENCE CODE SECTION 1108, COUNSEL MUST ENGAGE IN A SKILLFUL USE OF THE RECORD.

In 1995, the Legislature enacted Evidence Code section 1108 which allows for the admission of any uncharged "sexual offense" when the present charge involves a major sex crime. The term "sexual offense" has an incredibly broad meaning which includes circumstances where the defendant merely conspired to assist in a sex crime and did not actually perform the sex act himself. (Section 1108, subd. (d)(1)(F).)

As our Supreme Court has acknowledged, section 1108 was intended to allow juries to consider the defendant's propensity to commit sex crimes. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907.) Under section 1108, the trier of fact may consider the defendant's

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[3]This point will be further explored in Section XI. (See pages 44-49, infra.)

commission of a prior sex crime “‘”as evidence of the defendant’s disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.”’ [Citation.]” (*Id*., at p. 912.)

Remarkably, the California Supreme Court has unanimously held that section 1108 is not violative of the Due Process Clause of the federal Constitution. (*Falsetta, supra,* 21 Cal.4th 903, 910-922.) To date, the U.S. Supreme Court has not weighed in on this issue. While it is unlikely that the U.S. Supreme Court will take a section 1108 case at this late date, there is nothing to be lost by preserving a federal due process challenge to the statute. Since your client may well be serving a life sentence, it would certainly be reasonable to file a petition for writ of certiorari regarding the constitutionality of section 1108.

Aside from a due process challenge, there are only three conceivable avenues of appellate relief when section 1108 evidence has been admitted at trial: (1) the prosecutor failed to provide sufficient notice of the propensity evidence; (2) the evidence should have been excluded under Evidence Code section 352; and (3) in a case where the crime was committed prior to January 1, 1996, a viable ex post facto claim can be made. As will be discussed below, the first theory will almost never prevail, but there is hope for the other two in an appropriate case.

Section 1108, subdivision (b) provides that the prosecutor must disseminate written discovery to the defense “in compliance with the provisions of Section 1054.7 of the Penal Code.” In turn, section 1054.7 requires that discovery must be provided “at least 30 days

prior to the trial" absent "good cause" for delay. If the prosecutor provided late discovery and defense counsel objected, this is certainly a potentially worthy issue for appeal. Of course, the strength of the issue will depend upon the record made below (i.e. if the prosecutor had no excuse for failing to provide timely discovery, the court may have erred in allowing use of the evidence).

It should be noted that California law specifically provides that evidence may be excluded for a willful discovery violation. (Penal Code section 1054.5, subd. (b); *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1623-1624.) Thus, if the prosecutor has played fast and loose, a viable issue may exist. However, it is highly unlikely that an appellate court will find reversible error due to a discovery violation absent an unusually egregious set of facts. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1747 ["prohibiting the testimony of a witness is not an appropriate discovery sanction in a criminal case absent a showing of significant prejudice and of willful conduct."].)

Section 1108, subdivision (a) specifically provides that otherwise admissible propensity evidence may be rendered "inadmissible pursuant to Section 352." In exercising its discretion under section 352, the trial court is to consider several factors:

> "Rather than admit or exclude every sex offense a defendant commits, trial judges 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 in defending 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 other sex offenses, or excluding

irrelevant though inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta, supra*, 21 Cal.4th 903, 917.)

Obviously, every section 352 issue must be litigated with reference to the details of the case. However, given the highly inflammatory nature of propensity evidence, a persuasive argument can often be made that the trial court erred in admitting certain evidence. Although existing case law is not particularly helpful, there is at least one Court of Appeal opinion which demonstrates the manner in which a section 352 claim should be made.

In *People v. Harris* (1998) 60 Cal.App.4th 727, the defendant was employed as a mental health nurse. He was accused of committing various sexual touchings of two female patients. Defendant relied on the defense of consent as to one woman and denied that he committed any acts against the second woman. Over a section 352 objection, the prosecutor was allowed to introduce a "sanitized" version of the facts underlying the defendant's 1972 conviction for first degree burglary with great bodily injury. Essentially, the jury learned that the police went to the home of a 23 year old woman and found that she was bleeding from the vagina. The defendant had blood on his penis and underwear.

In holding that the evidence should have been excluded under section 352, the *Harris* court made several findings: (1) the evidence was highly inflammatory since it included a violent attack on a person whom the jury would have presumed to be a stranger to the defendant; (2) the jury would have been confused since the defendant was convicted of burglary instead of rape; (3) the crime was remote since it was 23 years old; and (4) the

evidence was not probative. (*Harris, supra*, 60 Cal.App.4th at pp. 737-741.) Regarding the last factor, the court reasoned:

> "The prior conduct evidence is so totally dissimilar to the current allegations that the trial court's finding that it was very probative fails to answer the question: Probative of what? The trial court pointed to the fact all 3 women were Caucasian and in their 20's or 30's. These 'similarities' are not significant. The defendant is also Caucasian and the '20's or 30's' is a wide age group that includes the majority of the victims of sexual assaults. This altered version of a 23-year-old act of inexplicable sexual violence while heavy with 'undue prejudice' and dangerous in the hands of a jury was not particularly probative of the defendant's predisposition to commit these 'breach of trust' sex crimes." (*Harris, supra*, 60 Cal.App.4th at pp. 740-741, emphasis in original.)

As the foregoing quote demonstrates, a key factor in a persuasive section 352 argument is any significant degree of dissimilarity between the propensity evidence and the present offense. In *Harris*, there was a vast difference between the egregious prior crime (a vicious rape) and the present crimes (non-violent touchings of the breasts and vagina). Since there are often significant factual distinctions between sex crimes, *Harris* shows that a viable section 352 argument can often be made.

The central point concerning any section 352 analysis is that defense counsel must pay close attention to the facts. Even the worst record will include some facts which are helpful. For example, if the present and past crimes are fairly similar, it may be that the prior offense is remote in time. Or, it might be that the defendant escaped conviction in the past. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [the prejudicial effect of character evidence is heightened if the defendant's "uncharged acts did not result in criminal convictions."].) By

massaging the positive facts in a record, counsel can often make a credible section 352 argument.

In so doing, it should be emphasized that sex crimes quite naturally evoke strong emotional reactions in many jurors. Since one of the purposes of section 352 is to protect a party from emotional bias (*People v. Branch* (2001) 91 Cal.App.4th 274, 286), it goes without saying that there are many cases where evidence of a prior sex offense is quite simply too evocative to be admissible.

Aside from a standard section 352 claim, it should not be forgotten that defense counsel has a duty to advocate for "changes in the law if argument can be made supporting change." (*People v. Feggans* (1967) 67 Cal.2d 444, 447.) In a proper case, the creative use of existing case law may provide for a basis to change section 352 law as it relates to propensity evidence.

In *People v. Wilson* (1992) 3 Cal.4th 926, the Supreme Court reaffirmed the longstanding rule that evidence of a defendant's poverty is per se inadmissible under section 352 in a theft case. (*Id*., at pp. 938-939.) The rationale for this rule is that "reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice. [Citations.]" (*Id*., at p. 939.) This rule of per se exclusion could conceivably be extended to some sex cases. A hypothetical will illustrate the point.

Assume that a 12 year old girl told the police in 1987 that the defendant raped her.

At that time, the police investigated the allegation and interviewed a woman who provided an alibi for the defendant. As a result, no charges were filed. However, in a present prosecution, the People propose to call the now 32 year old woman to testify about the 1987 incident. In the meantime, the defendant's alibi witness cannot be found.

On these facts, it can be argued that the evidence should be per se inadmissible under section 352. In 1987, the government had a full and fair opportunity to prosecute the defendant. It failed to do so. Given the government's inaction, it is quite simply too late for this highly prejudicial evidence to be used. (See *People v. Ellis* (1987) 195 Cal.App.3d 334, 345-346; fn. 4 [defendant is estopped to complain about an illegal plea bargain since "the passage of time will . . . make it more difficult for the People to carry their burden of proving the criminal conduct at issue."].)

As the hypothetical reveals, there may be situations where it is simply unfair to allow admission of propensity evidence involving sex crimes. Thus, defense counsel should not be hesitant to seek expansion of those types of evidence which are per se inadmissible under section 352. (*People v. Wilson, supra*, 3 Cal.4th 926, 938-939.)

Section 1108 became effective on January 1, 1996. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 185.) In a case where the crime was committed prior to that date, the defense should argue that the federal prohibition against ex post facto laws precludes the use of section 1108.

The ex post facto clauses of the federal Constitution preclude the government from

retroactively employing a new law which "'alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.' [Citation.]" (*Carmell v. Texas* (2000) 529 U.S. 513, 522, emphasis in original.) While there is no ex post facto bar to the retroactive application of changes in the ordinary rules of evidence, the government is precluded from relying on changes which are not "evenhanded." (*Id*., at p. 533, fn. 23.) Thus, if a new rule runs "in the prosecution's favor" and affects a change in the way that the jury will view the sufficiency of the evidence, an ex post facto violation must be found. (*Id*., at p. 546.)

Under *Carmell*, section 1108 may not be retroactively applied. Prior to 1996, the People were absolutely barred from introducing prior sex offenses in order to establish the defendant's propensity to commit such crimes. (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) However, section 1108 now allows prosecutors to adduce evidence of the defendant's propensity to commit sex crimes. Obviously, this change in the law favors only the government and affects the jury's view of the sufficiency of the evidence since it allows for "'added'" evidence to bolster the government's case. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 915, 920.) In the words of the Supreme Court, section 1108 is unconstitutional since it was enacted "'in order to convict the offender.' [Citation.]" (*Carmell, supra*, 529 U.S. at p. 522, emphasis in original.)

At the moment, there is only a single published case which addresses the ex post facto issue. (*People v. Fitch, supra,* 55 Cal.App.4th 172, 185-186.) However, *Fitch* is of no

persuasive value since it preceded *Carmell* and erroneously held that changes in the rules of evidence can never be violative of the ex post facto rule. (*Ibid*.)

It is unlikely that you will be called upon to handle a case where the crime occurred before 1996. However, if you are fortunate enough to receive such an assignment, a strong constitutional issue will be available.

A. The Defense Bar Should Not Concede That *People v. Wesson* (2006) 138 Cal.App.4th 959 Was Correctly Decided.

In a disturbing development, the Court of Appeal recently held that the People need not call a live witness in presenting section 1108 evidence. (*People v. Wesson*, *supra*, 138 Cal.App.4th 959, 965-970.) Rather, the court held that the prosecutor may use an abstract of judgment in order to show that the defendant has previously committed a sex crime. (*Ibid*.) There are at least two fundamental problems with the court's holding.

First, the legislative history underlying section 1108 specifically provides that the statute was intended to allow admission of " 'evidence of the defendant's commission - not conviction - of another sexual offense . . . . ' " (*Wesson*, *supra*, 138 Cal.App.4th at p. 968, fn. 3.) Importantly, the *Wesson* court gave no explanation as to why this legislative history was not controlling.

Rather, the court found significance in the fact that Evidence Code section 452.5 allows for the admission of an abstract of judgment as an exception to the hearsay rule. (*Wesson*, *supra*, 138 Cal.App.4th at p. 968.) However, in relying on section 452.5, the court missed an important point. Section 452.5 was enacted a year *after* section 1108. Thus,

section 452.5 can scarcely be deemed determinative of the legislative intent underlying section 1108. This is especially true since nothing in the legislative history of section 452.5 evinced an intent to overrule prior case law which held that an abstract of judgment is inadmissible to prove criminal conduct. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300, fn. 13.)

Legislative history aside, the holding in *Wesson* is entirely inconsistent with the Supreme Court's thesis as to why section 1108 is constitutional. In upholding section 1108, the Supreme Court reasoned that Evidence Code section 352 provides a substantial protection to defendants since it allows the trial court to exclude evidence based *inter alia* on a showing that the prior conduct was dissimilar to the charged conduct. (*Falsetta, supra*, 21 Cal.4th at p. 917.) Obviously, this section 352 analysis cannot be conducted in the absence of a live witness.

In answering this argument, the Court of Appeal indicated that there is nothing in section 1108 which precludes the defense from subpoenaing the complainant from the prior case. (*Wesson*, *supra*, 138 Cal.App.4th at p. 969.) However, this suggestion does not deal with the constitutional problem.

In many cases, the prior conduct may have occurred years or decades earlier. Thus, the complainant from the prior case may be dead, missing or forgetful. Under these circumstances, there is quite simply no way for the defendant to make the showing which *Wesson* requires.

Moreover, as the proponent of the evidence, the People bear the burden of showing the admissibility of the evidence. (Evidence Code section 353, subd. (b).) It is unfair to shift the burden to the defendant to show that the evidence is insufficiently probative to be admissible.

The holding in *Wesson* provides a powerful tool to the prosecution. By using an abstract of judgment, the prosecutor can tar the defendant with his prior misconduct without giving the defense an opportunity to cross-examine the complainant from the prior case. Unless and until the California Supreme Court affirms *Wesson*, we should continue to protest its holding.

B. <u>If the Prosecution Is Allowed to Produce Propensity Evidence under Section 1108, the Defense May Rebut the Evidence by Introducing Character Evidence That the Defendant Has Not Committed Sexual Assaults under Similar Circumstances.</u>

Oftentimes, a sexual assault trial will be a credibility contest between the complainant and the defendant. In order to enhance the credibility of the complainant, the prosecution will adduce section 1108 evidence if it is available. If section 1108 testimony is heard by the jury, the defense is allowed to rebut the evidence by producing evidence that the defendant has not committed sexual assaults even though he had an opportunity to do so.

People v. Callahan (1999) 74 Cal.App.4th 356 establishes this conclusion. In *Callahan*, the defendant was charged with child molestation. Pursuant to Evidence Code 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.)

In most cases, this type of evidence can be found by a thorough defense attorney. Thus, a solid investigation should usually turn up some defense witnesses who can testify that the defendant did not sexually assault them when they were alone.

IV.

THE DEFENDANT IS ENTITLED TO ATTACK THE CREDIBILITY OF THE COMPLAINANT WITH ALL RELEVANT IMPEACHING EVIDENCE.

The primary issue in most criminal trials is whether the alleged victim is a credible witness. This is particularly true in sexual assault cases where the credibility of the complainant is often the only issue. Given this reality, the cases are legion where defense counsel have sought to destroy a complainant's credibility by showing that she told false stories about unrelated incidents. (*Fowler v. Sacramento County Sheriff's Department* (9th Cir. 2005) 421 F.3d 1027, 1039 and fn. 7; *People v. Adams* (1988) 198 Cal.App.3d 10, 18; *People v. Wall* (1979) 95 Cal.App.3d 978, 983-989.)

This type of impeaching evidence is critical to the defense since "[t]he fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she fabricated the incident or fantasized it." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335, overruled on another point in *Franklin v. Henry* (9th Cir. 1997) 122

F.3d 1270.) Given the importance of such evidence, it is manifest that defense counsel has a duty to conduct a diligent investigation in search of witnesses who will testify to the complainant's lack of credibility. (*People v. Pope* (1979) 23 Cal.3d 412, 425 [defense counsel has a duty to investigate all defenses of fact.].)

It is important to note that Proposition 8 has greatly broadened the parameters of admissible impeachment evidence. As the Supreme Court has held, Proposition 8 effected a repeal of almost all of the Evidence Code sections which formerly governed the admissibility of impeachment evidence. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082.) Thus, so long as impeaching evidence is relevant and reliable, it must be admitted subject to any limitation found in section 352. (*Ibid*.)

In a sexual assault case, there is often only the testimony of the complainant and the defendant. Since the complainant's credibility is the key to the case, a skillful defense lawyer will marshal all of the impeaching evidence which can possibly be obtained. The more the better. (See *People v. Randle* (1982) 130 Cal.App.3d 286, 292-294 [defendant was entitled to impeach the complainant with evidence of her reputation for drunkenness, dishonesty and for being a thief.].)

The best form of impeachment is evidence that the complainant has previously told a false story about being sexually assaulted. This type of evidence goes to the heart of the case and its exclusion is bound to be prejudicial error. (*Franklin v. Henry, supra*, 122 F.3d 1270, 1273, overruled on other grounds in *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815,

829, fn. 11; *People v. Adams, supra*, 198 Cal.App.3d 10, 19.)

People v. Wall, supra, 95 Cal.App.3d 978 is the paradigmatic case in this genre. There, the defendant was charged with raping an 18 year old woman. The defense was that a sex act had not occurred. In order to impeach the complainant, the defense sought to call her former boyfriend who would have testified that she had threatened to make a false claim of rape against him. In reversing the trial court's exclusion of the witness, the Court of Appeal held that the evidence was admissible since it tended "to disprove the truthfulness" of the complainant's testimony. (*Id*., at p. 989; accord, *People v. Adams, supra*, 198 Cal.App.3d 10, 16-19 [judgment reversed where the trial court refused to admit evidence of prior false claims of rape.].)

Notwithstanding the general rule that impeachment evidence is admissible, Proposition 8 left Evidence Code section 782 in place. In relevant part, section 782 provides that "evidence of sexual conduct of the complaining witness" is admissible to attack credibility when the defendant files a written motion supported by an affidavit which makes an offer of proof regarding the relevance of the evidence. Three primary points must be made regarding section 782.

First, section 782 applies only in those instances where the defendant seeks to introduce "evidence of sexual conduct." (Section 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, supra*, 25 Cal.App.4th 328, 334-335; but see

People v. Casas (1986) 181 Cal.App.3d 889, 895 [solicitation of an act of prostitution falls within section 782 since the "willingness to engage in sexual intercourse" is encompassed by the statute.].)

Second, section 782 only allows for the admission of credibility evidence. Under Evidence Code section 1103, subdivision (c) (colloquially known as the rape shield law), evidence of a complainant's prior sexual relations is strictly inadmissible for the truth of the matter (i.e. that the complainant consented to sex with the defendant or anyone else). (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 707-708.)

Third, section 782 is not a rule of exclusion. So long as the proffered evidence is truly relevant to an issue in the case, the court must allow its admission if there is compliance with the statutory procedure.

People v. Randle, supra, 130 Cal.App.3d 286 illustrates this principle. In *Randle*, the complainant alleged that the defendant had forced her to orally copulate him in a bathroom at the Embarcadero Center. The defendant testified that the act was consensually performed for money. On a motion for new trial, the defense presented numerous declarations establishing that the complainant had previously performed sex acts for compensation. In holding that a new trial was in order, the Court of Appeal observed that "the evidence of her lack of chastity and of soliciting drinks or money for sexual acts goes to the issue of credibility." (*Id*., at p. 294.) Thus, the evidence would be admissible at a new trial since section 782 merely provides "the procedure to be used for the offer of proof to attack" the

complainant's credibility. (*Ibid*.)

As the foregoing cases reveal, impeachment of the complainant is a critical factor in any sexual assault trial. If the trial court improperly excludes credibility evidence, an excellent issue will be available for appeal.

V.

APPELLATE COUNSEL SHOULD BE ESPECIALLY ALERT TO THE IMPROPER ADMISSION OF OPINION TESTIMONY BY A SART NURSE.[4]/

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. Without doubt, this type of testimony is entirely appropriate. However, the problem is that SART nurses often give testimony which is far beyond their expertise and which is patently inadmissible.

The problem is further exacerbated since many defense lawyers appear to be completely unequipped to render proper objections. In recent years, there have been

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[4] The ideas expressed in this section are drawn from an outstanding brief prepared by attorneys Donald Horgan and Dennis Riordan.

countless jury trials where defense counsel sat mute as SART nurses offered improper opinions. Given this poor performance by many trial lawyers, appellate counsel must closely scrutinize SART testimony. In so doing, viable claims of ineffective assistance of counsel will 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, overruled 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. (*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;"] *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. [Citations.]"].)

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; but see *People v. Stitely* (2005) 35 Cal.4th 514, 546 [suggesting that Proposition 8 may have abrogated this rule].)

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.].)

In short, it is trial counsel's duty to ensure that the testimony of a SART nurse is confined to a proper purpose. If proper objections were not made below, a claim of ineffective assistance of counsel should be advanced.

VI.

PROPERLY APPLIED, THE FRESH COMPLAINT RULE ALLOWS FOR THE ADMISSION OF A VERY LIMITED CLASS OF EVIDENCE.

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.) 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.]" (*Brown, supra*, 8 Cal.4th 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.)

The lesson to be learned about the fresh complaint rule is that it is of very limited application. It is only the mere fact that a complaint was made that is admissible. Thus, a vigilant trial attorney will carefully object when the prosecutor seeks to elicit an extrajudicial statement which describes the "details" of the alleged offense. If there has been a proper objection below, a strong issue is presented for appeal. The Supreme Court has so indicated: "[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 . . . ." (*Brown, supra*, 8 Cal.4th 746, 763.)

Of course, it is often the case that trial counsel will have failed to make a proper objection. In this circumstance, it will be necessary to advance a claim of ineffective assistance of counsel.

VII.

ALTHOUGH THE PROSECUTION CAN PRESENT EXPERT TESTIMONY TO DISABUSE THE JURORS OF MYTHS WHICH THEY MAY BELIEVE, SUCH TESTIMONY MAY NOT BE USED AS SUBSTANTIVE EVIDENCE OF GUILT.

In 1984, the California Supreme Court discussed the then fairly recent concept of rape trauma syndrome. (*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.)

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.)

Consistent with the foregoing principles, 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*.)

As a preliminary observation about *Bledsoe* and *McAlpin*, it is critical to note that they rest on the assumption that jurors <u>actually</u> believe certain falsehoods (i.e. that all rape victims promptly call the police and that all child molesters are gay or alcoholic or ragged old men). (*McAlpin, supra*, 53 Cal.3d at pp. 1302-1303; *Bledsoe, supra*, 36 Cal.3d at p. 247.) However, there is a serious question as to whether this assumption is correct. While the Supreme Court purported to rely on "studies" which supported its assumption, one would think that the voir dire of jurors would be a far more objective method of determining if

jurors hold stereotypical and false ideas.

Indeed, at least one Court of Appeal decision implicitly suggests that the *Bledsoe* and *McAlpin* assumption should be reexamined. In *People v. Robbie* (2001) 92 Cal.App.4th 1075, the prosecutor called an expert witness to testify about the characteristics of people who commit rapes. In attempting to support the judgment, the Attorney General contended that the evidence was admissible to "disabuse the jury of misconceptions about rapists." (*Id*., at p. 1085.) In response, the Court of Appeal noted:

> "Defense counsel did not challenge the existence of public misconceptions about sex offenders, requiring the admission of expert testimony. Evidence Code section 801, subdivision (a) requires that expert testimony be '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' The presupposition that the public shares the mistaken view articulated by the Attorney General is certainly debatable. Because no objection on this ground was made, however, the issue was never joined at the trial level." (*Id*., at p. 1086, fn. 1, emphasis added.)

It has been over 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 may be time to challenge the validity of the *Bledsoe* - *McAlpin* assumption.

In addition, it is worth noting that three states have precluded the use of child sexual abuse accommodation syndrome evidence. (*Newkirk v. Commonwealth* (1996) ___ Ky. ___ [937 S.W.2d 690]; *State v. Bolin* (1996) ___ Tenn. ___ [922 S.W.2d 870]; *Commonwealth v. Dunkle* (1992) 529 Pa. 168 [602 A.2d 830]; see also *Franklin v. Henry, supra*, 122 F.3d

1270, 1273 [favorably citing *Dunkle*.].)[5]/ Thus, California should be encouraged to join these progressive jurisdictions.

Assuming that California does not abrogate the present rule, appellate counsel must carefully review the record to ensure that expert testimony was carefully limited to its proper purpose. If the prosecutor used the evidence as substantive evidence of guilt and there was no objection below, a claim of ineffective assistance of counsel should be brought.

Similarly, trial counsel has a duty to request the standard limiting instructions concerning the use of expert testimony regarding the various "syndromes." (CALCRIM 1192 and 1193.) If there was no request for the instruction, a claim of ineffective assistance of counsel may lie. (*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]; see also *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 [trial court must instruct sua sponte on limited purpose for which syndrome evidence is admitted.].)

Finally, appellate counsel must be alert to any attempt by the government to expand the use of expert testimony. A First District case put a halt to one attempted expansion.

In *People v. Robbie, supra*, 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

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[5] The author acknowledges the efforts of attorney George Schraer who found these cases.

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." (*Robbie, supra*, 92 Cal.App.4th at p. 1087.)

As *Robbie* demonstrates, expert testimony must be closely scrutinized. Unless the evidence was carefully limited to the parameters specified in *Bledsoe* and *McAlpin*, a meritorious issue is available for appeal. (*People v. McFarland* (2001) 78 Cal.App.4th 489, 493-497 [judgment reversed where a government psychiatrist testified to his opinion that the defendant's act of touching a child was motivated by a sexual intent]; but see *People v. Smith* (2005) 35 Cal.4th 334, 357-358 [psychiatric testimony re: motivation of sadistic pedophiles was not inadmissible profile evidence].)

Finally, there may be some sex cases where the prosecution seeks to introduce expert testimony that the complainant suffers from "intimate partner battering" syndrome. Insofar as the Legislature has specifically authorized the use of this type of evidence (Evidence Code section 1107), there is little that the defense can do to challenge its admissibility. Indeed, the Supreme Court has gone so far as to hold that the evidence is admissible even when the

charged act is the *only* evidence that the complainant has been victimized. (*People v. Brown* (2004) 33 Cal.4th 892, 904-908.)

VIII.

THE DEFENSE IS PERMITTED TO PRESENT EXPERT AND LAY OPINION TESTIMONY THAT THE DEFENDANT DOES NOT HAVE THE CHARACTER OF A SEXUAL ASSAILANT.

In a sex case, the nature of the charge provides the prosecution with a head start in obtaining a conviction. In order to counter this reality, it is incumbent upon the defense to marshal as much helpful evidence as is possible. To this end, the California Supreme Court has held that the defense is allowed to introduce expert and lay opinion evidence that the defendant is not a sexual assailant.

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 *People v. 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.)[6]/

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.

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."].)

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[6] As was discussed above (pp. 19-20, *supra*), specific instances of the defendant's conduct are admissible as rebuttal evidence. (*People v. Callahan, supra*, 74 Cal.App.4th 356, 378-379.)

IX.

IN A CHILD MOLEST CASE, THE DEFENSE IS ALLOWED TO PRESENT EVIDENCE THAT THE COMPLAINANT HAD PREEXISTING KNOWLEDGE ABOUT SEXUAL MATTERS.

In child molestation cases, the prosecutor will typically argue that the complainant must have been sexually assaulted since he or she was able to describe sex acts which would otherwise be unknown to a child. In order to counter this argument, defense counsel should marshal evidence regarding the child's preexisting knowledge of sexual matters. This evidence can take several forms.

In some cases, the complainant will have been previously molested by someone other than the defendant. If so, proof of the prior molestation is admissible "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." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.) This type of evidence is so pivotal that its exclusion violates a defendant's federal due process right to a fair trial. (*LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, 668-674; see also *Fowler v. Sacramento County Sheriff's Department*, *supra*, 421 F.3d 1027, 1039 [evidence of complainant's prior molestation was admissible to show why she may have overreacted to benign touching by defendant].)

In a particular case, the prosecutor might note that the complainant has used sexual terms which are usually unknown to children. If this argument is mounted, the defense is permitted to adduce evidence concerning the sexual language to which the complainant has

been exposed. (*People v. Burton* (1961) 55 Cal.2d 328, 345; see also *People v. Santos* (1990) 222 Cal.App.3d 723, 739 [reversal ordered in a child molest case where the "[d]efendant presented testimony that M. had watched x-rated movies, thus suggesting that she had the knowledge necessary to make up the story."].)

Aside from direct evidence concerning the complainant's knowledge of sexual matters, the defendant may also seek to adduce circumstantial evidence about information which might have been imparted in the complainant's home. For example, it is proper to inquire whether a parent has any unusual fears regarding sex.

> "If the mother is abnormally oriented toward sexual conduct, and has an abnormal fear of and reaction to sexual relations, she may, quite unconsciously, build up, in her own mind, a quite innocent act or caress into a grievous wrong. Young children are especially suggestible. The inquiries put by such a mother to her daughter may, themselves, implant into the child's mind ideas and details which existed only in the fears and fantasies of the adult. Once implanted, they become quite real in the mind of the child witness and are impervious to cross-examination." (*People v. Scholl* (1964) 225 Cal.App.2d 558, 563.)

There are a large variety of sources from which a child might obtain information about sexual matters. A resourceful defense attorney should be able to find and produce such evidence in an appropriate case.

X.

DEFENSE COUNSEL SHOULD BE EVER VIGILANT IN PROTECTING THE CONFRONTATION CLAUSE AGAINST THE CONSTANT EROSION WHICH IS OCCURRING IN CHILD MOLEST CASES.

Over the last twenty five years, the issue of child molestation has become a highly

emotional subject of public discussion. As a result, politicians and prosecutors have rushed forward to "protect the children" by enacting several reforms in the law. While these reforms may have been promulgated with the best of intentions, the effect has been to severely erode the Confrontation Clause. Although the reforms have been approved by the courts, defense counsel should nonetheless seek enforcement of the Confrontation Clause to the fullest extent possible.

For present purposes, counsel should be aware of three possible issues which might arise in a particular case: (1) the use of Evidence Code section 1360; (2) the use of Penal Code section 868.5; and (3) the use of videotaped testimony of a child. Each of these issues presents a substantial concern under the Confrontation Clause.

Evidence Code section 1360 allows for the admission of a hearsay statement made by a child under the age of 12 when the statement describes an act of child abuse. The section allows for admissibility if the child either: (1) testifies at trial; or (2) is unavailable to testify and there is evidence corroborating the hearsay statement. (Section 1360, subd. (a)(3).) In light of recent U.S. Supreme Court authority, section 1360 is of limited utility to the government.

In *Crawford v. Washington* (2004) 541 U.S. 36, the court held that "testimonial statements" made by a witness are inadmissible under the Confrontation Clause unless the witness is unavailable at trial and the defendant had a prior opportunity for cross-examination. (*Id*. at pp. 53-54.) Statements made to a police officer are "testimonial" when

the police are engaging in non-emergency investigation. (*Davis v. Washington* (2006) 547 U.S. ____ [165 L.E.2d 224, 237.] Similarly, the rule extends to investigative questioning conducted by private citizens acting as police agents. (*Medina v. State* (2006) ____ Nev. ____ [143 P.3d 471, 476] [statement made to SART nurse is "testimonial"].) However, the court has left open the possibility that there may be limitations on the degree to which statements "made to someone other than law enforcement personnel" will be deemed "testimonial." (*Davis*, *supra*, 165 L.E.2d 224, 238, fn. 2; see *People v. Cage* (April 9, 2007, S127344) ____ Cal.4th ____ [07 DAR 4597] [California Supreme Court holds that statement to doctor at hospital was not "testimonial"].)

Given the holding in *Crawford*, the People are precluded from introducing hearsay statements made to the police (and arguably SART personnel) unless the child testifies at trial. Thus, section 1360 is plainly unconstitutional to the extent that it allows for the admission of hearsay in the absence of a witness who has not previously been cross-examined. Moreover, even if the witness is presently unavailable and was previously cross-examined, all is not lost for the defense.

Section 1360, subdivision (b) provides that the prosecutor must disclose his intent to rely on a statement "sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement." As construed by one Court of Appeal, the provision requires disclosure prior to the beginning of the trial. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1369-1373.) Thus, untimely disclosure may lead

to exclusion of the statement. (*Ibid*.)

Under California law, a witness is "unavailable" when he is suffering from an "existing physical or mental illness or infirmity." (Evid. Code, sec. 240, subd. (a)(3).) Oftentimes, the prosecution will make a claim that a child will be harmed if he is required to testify. However, such an assertion is insufficient to establish unavailability. Rather, the prosecution must call an expert witness to establish that the witness is truly at risk if he testifies. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 514-518 [mother's testimony concerning her daughter's mental health was legally insufficient to establish unavailability] but see *People v. Alcala* (1992) 4 Cal.4th 742, 780 [witness' own testimony may demonstrate unavailability.].)

Importantly, the prosecutor is not entitled to rely on a bald assertion that a young child is "unavailable" since he is too young to testify. Rather, the witness' incompetence must be established as a matter of fact. (*People v. Roberto V., supra,* 93 Cal.App.4th 1350, 1368-1369 [trial court erred in finding that a four year old child was incompetent without holding a hearing.].)

Finally, even if the child is unavailable and previously testified, section 1360 still requires the prosecutor to establish "that the time, content, and circumstances of the [hearsay] statement provide sufficient indicia of reliability." (Section 1360, subd. (a)(2).) Obviously, the inquiry mandated by this provision will have to be litigated on a case by case basis. However, it is fair to say that many extrajudicial statements made by children bear no

indicia of reliability whatsoever. (See generally *People v. Pantoja* (2004) 122 Cal.App.4th 1, 11-13 [statement made in declaration in support of application for restraining order was insufficiently reliable to be admissible].)

Aside from the existing rules regarding section 1360, there is a foundational due process question which should not be ignored. Notwithstanding the legal fiction that young children can provide credible testimony, any sane adult knows better. Children frequently lie. They do so because there are no consequences from telling a lie and because they do not appreciate the significance of the act of lying. Both science and several celebrated cases reveal this to be true. (See *Maryland v. Craig* (1990) 497 U.S. 836, 868 (dis. opn. of Scalia, J.) [listing studies showing that children are subject to fantasy]; *North Carolina v. Kelly* (1995) 118 N.C.App. 589 [456 S.E.2d 861] [judgment reversed in infamous "Little Rascals" case where 29 children claimed to have been sexually molested at a day care center and corroboration was non-existent]; *New Jersey v. Michaels* (1993) 264 N.J. Super. 579 [625 A.2d 489], affirmed 136 N.J. 299 [742 A.2d 1372] [judgment reversed where 19 children testified to sexual abuse at a day care center and corroboration was non-existent]; see also *United States v. Bighead* (9th Cir. 1997) 128 F.3d 1329, 1337-1338 (dis. opn. of Noonan, J.) [comparing modern child molest cases to the incredible testimony offered at the Salem witch trials]; Ceci and Friedman, The Suggestibility of Children: Scientific Research and Legal Implications (2000) 86 Cornell L.Rev. 33, 84, fn. 233 [a study of 9000 families in child custody disputes revealed that 33% of the allegations of child sexual abuse were

false.].)

Given this reality, a zealous trial attorney should elicit expert testimony establishing that child testimony is in fact less reliable than that of an adult. In this way, a test case might thereby be created to challenge the admissibility of hearsay statements made by children.

Pursuant to Penal Code section 868.5, a complainant in a case involving a major sex crime may be accompanied to the witness stand by a support person. If the support person is also a government witness, the support person must testify before the complainant. (Penal Code section 868.5, subd. (c).) Presumably, the support person's testimony will be subject to exclusion if he does not testify before the complainant.

On its face, the only showing required by section 868.5 is that a support person "is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness." (Section 868.5, subd. (b).) According to one court, the showing in a child molest case need only be "perfunctory." (*People v. Lord* (1994) 30 Cal.App.4th 1718, 1722.) This conclusion is wrong.

As was acknowledged in *People v. Adams* (1993) 19 Cal.App.4th 412, section 868.5 must be carefully analyzed under the Confrontation Clause since the presence of a support person has a significant impact "on jury observation of demeanor." (*Id*., at pp. 437-441.) Thus, before a support person is allowed to accompany the complainant to the witness stand, the government must make a specific showing that the complainant would be traumatized without the presence of a support person. (*Id*., at pp. 443-444.)

Obviously, *Adams* requires a substantial evidentiary showing. Defense counsel should always hold the prosecution to its burden of proof. (But see *People v. Johns* (1997) 56 Cal.App.4th 550, 554; *People v. Lord, supra*, 30 Cal.App.4th 1718, 1721-1722 [questioning validity of *Adams*.].)

Occasionally, the prosecutor will seek to use the videotaped testimony of a child. The U.S. Supreme Court has upheld this procedure so long as there is a showing that the child would be traumatized if he was required to testify in the presence of the defendant. (*Maryland v. Craig, supra*, 497 U.S. 836, 856-857.) However, before the procedure may be used, the prosecutor must make an actual showing that "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. [Citations.]" (*Id*., at p. 856.) Thus, as is the case with the support person statute, defense counsel should rigorously enforce the evidentiary showing required by the law.

Finally, it must be emphasized that the erosion of the Confrontation Clause continues on a daily basis. In at least one jurisdiction, the *Craig* rule has been extended to cover government witnesses "whose abuse is neither the subject of the prosecution nor will be the subject of her testimony." (*Marx v. Texas* (1999) 528 U.S. 1034, 1035 (Scalia, J., dissenting from a denial of certiorari.) Given our historical knowledge that the Bill of Rights is constantly under attack, defense counsel should strongly protest any further diminution in the protection afforded by the Confrontation Clause.

XI.

WHENEVER POSSIBLE, DEFENSE COUNSEL SHOULD CATEGORIZE AN EVIDENTIARY ERROR AS BEING ONE OF FEDERAL CONSTITUTIONAL STATURE.

As is beyond dispute, a claim of federal constitutional error obtains a much more favorable standard for harmless error analysis than does a claim of state error. Moreover, if a federal claims fails on a state appeal, it may be taken to federal court whereas a state error may not. Given these realities, one of the primary duties of defense counsel is to raise a claim of error under the federal Constitution if it is at all possible to do so.

As a preliminary point, it should be noted that trial attorneys often fail to specify that their objections are being made under the federal Constitution. As a result, the appellate court will often find that any objection under the federal Constitution has been waived. (See *People v. Huggins* (2006) 38 Cal.4th 175, 240, fn. 18 [Fifth Amendment claim forfeited since the provision was not mentioned in the trial court]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1254, fn. 6 [admission of extrajudicial statement was reviewed only under the *Watson* standard since a "federal constitutional right of confrontation" objection was not made at trial.]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 778-780 [hearsay objection did not preserve Confrontation Clause claim].)

Notwithstanding the foregoing cases, the California Supreme Court has recently clarified that the mere omission of trial counsel to cite the federal Constitution does not necessarily result in the forfeiture of a federal claim. (*People v. Partida* (2005) 37 Cal.4th 428, 436-439.) Rather, so long as the constitutional claim raised on appeal is not different

from the "analysis" of defense counsel in the trial court, the federal claim is not forfeited because the federal Constitution was not specifically cited. (*Ibid*.) For example, if an Evidence Code section 352 objection was made at trial, a federal due process contention lies on appeal since the federal claim is no "different" from the claim made at trial insofar as the constitutional analysis merely states the "legal consequence" of the trial court's erroneous section 352 ruling. (*Ibid*.)

It is also worth noting that the Supreme Court has indicated that an appellate court always retains "discretion" to entertain a claim which has otherwise been forfeited due to the absence of a proper objection at trial. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) However, this exception to the general rule is "typically" limited to cases involving "an important issue of constitutional law or a substantial right. [Citations.]" (*Ibid*.)

Given the appellate courts' normal inclination to find forfeiture, appellate counsel should err on the side of caution and make a backup claim of ineffective assistance of counsel when it is uncertain whether an adequate federal objection was made at trial. In this way, a federal claim can be preserved when it would otherwise be lost.

As a final procedural point, it should be emphasized that a claim may not be raised in federal court unless it was expressly raised in state court as a federal claim. (*Duncan v. Henry* (1995) 513 U.S. 364, 366.) Thus, defense counsel should be sure to specifically cite to both the federal Constitution and U. S. Supreme Court cases on a state appeal. Absent such citations, a federal court will refuse to entertain the case. (*Id.*, at pp. 364-366 [Supreme

Court holds that federal relief is not available since the defendant relied solely on the *Watson* standard on his California appeal]; see also *Baldwin v. Reese* (2004) 541 U.S. 27 [ineffective assistance of counsel claim could not be raised on federal habeas since neither the federal Constitution nor federal case law were cited in the state appeal].)

In raising a federal claim based on evidentiary error, the constitutional foundation is found in either the Sixth Amendment's Compulsory Process and Confrontation Clauses or the Fourteenth Amendment's Due Process Clause. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Under these provisions, a state court commits federal constitutional error when it excludes highly relevant and necessary defense evidence. (*Ibid.*, see also *Rock v. Arkansas* (1987) 483 U.S. 44, 53-56.) Importantly, a federal claim may be made even if no error was made under state law.

Chambers v. Mississippi (1973) 410 U.S. 284 illustrates this principle. There, the defendant sought to admit a confession made by a third party. Under state law, the confession was inadmissible under the hearsay rule. Notwithstanding this well established state rule, the Supreme Court held that exclusion of the confession constituted a violation of the Due Process Clause.

> "The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers, supra*, 410 U.S. at p. 302.)

Chambers establishes a clear rule. So long as the defendant can demonstrate that he cannot receive a fair trial absent the admission of important evidence, the federal Constitution is implicated. This is so regardless of the exact form which the evidence takes. (*Rock v. Arkansas, supra*, 483 U.S. 44, 56-62 [exclusion of defendant's hypnotically enhanced testimony was violative of her constitutional right to testify]; *Crane v. Kentucky*, 476 U.S. 683, 687-692 [exclusion of evidence regarding the circumstances surrounding the defendant's confession violated his right to confront the witnesses against him.].)

A case handled by SDAP Executive Director Michael Kresser further illustrates the usefulness of the foregoing authorities. In *Franklin v. Henry, supra,* 122 F.3d 1270, the defendant was charged with molesting a friend's daughter. In order to impeach the daughter's testimony, the defendant sought to introduce her prior false claim that her mother had molested her. Although it found that the trial court had erred by excluding the evidence, the Sixth District declared the error to be harmless under Evidence Code section 354. (*People v. Franklin, supra,* 25 Cal.App.4th 328, 336-337.) Importantly, the court failed to address the defense contention that the error rose to the level of a federal constitutional violation. Thankfully, the Ninth Circuit did not ignore the claim. Instead, finding that "[e]xclusion of the evidence deprived Franklin `of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful testing"' [citations]," the court reversed the judgment. (*Franklin, supra*, 122 F.3d at p. 1273.)

As *Franklin* shows, a diligent effort can sometimes yield a dramatic victory. In

Franklin, a claim of evidentiary error was carefully federalized in state court. For reasons unknown, the state court failed to acknowledge the federal nature of the error. Nonetheless, the Ninth Circuit later granted relief. While most of our clients will not be as lucky as Mr. Franklin, appellate counsel should still use the case as an inspirational model.

Although the law is much less certain in this area, it is also possible to argue that the erroneous admission of irrelevant and prejudicial evidence may constitute a federal due process violation. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 68-70 [court considers such an issue]; accord, *People v. Partida*, *supra*, 37 Cal.4th 428, 439.) A case from the Ninth Circuit provides an example of this type of error.[7]/

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the defendant was charged with murdering his mother who had died after her throat was slit. The forensic evidence showed that almost any kind of knife could have inflicted the fatal wound. At trial, the government presented evidence that the defendant: (1) had owned a Gerber knife in the past (but not at the time of the crime); (2) was a knife aficionado; (3) wore a knife in the past; and (4) scratched "Death is his" on his closet door with a knife. After finding that this evidence was completely irrelevant, the Ninth Circuit reversed the defendant's conviction.

> "His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions

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[7] Under the 1996 amendment to the federal habeas statute, relief may be granted only when the state court judgment is contrary to "clearly established Federal law, as determined by the Supreme Court of the United States; . . . ." (28 U.S.C. section 2254(d)(1).) This provision refers "to the holdings" of Supreme Court cases. (*Williams v. Taylor* (2000) 529 U.S. 362, 412.)

> of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district court awarded him." (*McKinney v. Rees, supra,*, 993 F.2d at p. 1386, fn. omitted, emphasis in original.)

As *McKinney* makes clear, a defendant may be deprived of due process when the government seeks to shore up a weak case with a dose of highly prejudicial evidence. Thus, in an appropriate case, *McKinney* can serve as persuasive authority in support of a claim of federal error.

A recent Second District case may also prove helpful. In *People v. Albarran* (2007) 149 Cal.App.4th 214, the trial court allowed the prosecution to use gang evidence. After finding that the evidence had no probative value, the Court of Appeal held that the defendant was deprived of his federal due process right to a fair trial. (*Id*. at pp. 229-232.) If it survives a petition for review, *Albarran* will be a highly useful precedent.

Finally, a clear case of federal constitutional error exists when the defense is denied the opportunity to confront a government witness at trial. Thus, whenever the prosecutor improperly relies on an extrajudicial statement as substantive evidence of guilt, the Sixth Amendment requires application of the federal standard for prejudice. (*Idaho v. Wright* (1990) 497 U.S. 805, 826-827.)

XII.

REGARDLESS OF THE APPLICABLE HARMLESS ERROR TEST, THERE ARE A NUMBER OF FACTORS WHICH MAY BE USED TO SHOW PREJUDICE IN A PARTICULAR CASE.

After handling appeals for a number of years, a defense attorney will become familiar with the appellate courts' mantra that the errors were harmless because the evidence was "overwhelming." While the evidence is truly overwhelming in some cases, the reality is that many jury trial cases involve shaky government witnesses, weak circumstantial evidence or some other evidentiary deficiency. In these cases, it is imperative that defense counsel focus on the objective factors found in the record which prove that the case against the defendant was not overwhelming. Although the following examples are not intended to be exhaustive, they are indicative of some of the factors which will enable a defendant to obtain a reversal.

At the outset, it must be emphasized that the primary goal of defense counsel is to dissect the evidentiary weaknesses in the government's case. Thus, if a government witness was granted immunity or was impeached in a substantial way, this point should be strongly discussed. Similarly, if there were inconsistencies in the government's case, this reality should be amply argued. Indeed, any and all weaknesses in the government's case must be carefully and precisely laid out for the reader.

By the same token, appellate counsel should also discuss the strength of the defense evidence. If no such evidence was presented, counsel should set forth the contents of defense counsel's closing argument. In so doing, counsel can hopefully show that the defense presented a relatively credible theory to the jury. If this goal is achieved, it will, of course, make it very difficult for the appellate court to legitimately conclude that the government's evidence was "overwhelming."

As a final preliminary point, it is important to note that some errors are better than others. For example, the California Supreme Court has repeatedly held that the improper admission of uncharged sex offenses is so prejudicial as to require reversal. (*People v. Alcala, supra,* 36 Cal.3d 604, 635-636; *People v. Thomas* (1978) 20 Cal.3d 457, 470; *People v. Kelley* (1967) 66 Cal.2d 232, 245.) Thus, appellate counsel should strive to find those case authorities which depict a particular error as being one which necessarily involves a high degree of prejudice. (See *People v. Robbie, supra*, 92 Cal.App.4th 1075, 1088; [admission of profile evidence was reversible error "[g]iven the highly prejudicial nature of the expert's testimony . . . ."].)

Turning to the case specific factors which may serve to show prejudice, the most obvious indication of a close case is lengthy jury deliberations. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations "deemed protracted."].) While the Supreme Court has indicated that lengthy deliberations are not significant in a complex case (*People v. Cooper* (1991) 53 Cal.3d 771, 837), such deliberations in a short trial can only mean that the jurors found some deficiency in the government's case. Thus, when the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana* (1993)508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury]; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on an unrelated point in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [reversal

ordered where the length of the jury deliberations exceeded the length of the evidentiary phase of the trial.].)

Another indication of a close case involving the jury's behavior is where there has previously been a hung jury. Obviously, this fact demonstrates that the government's case is less than overwhelming. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188.) Moreover, if a defendant is convicted on erroneously admitted evidence which was not presented to the hung jury, the inference is virtually compelled that the evidentiary error is prejudicial. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.)

Aside from hanging, a jury may show that the government's case is weak when it acquits the defendant on one or more counts. In such a circumstance, an error relating to the count of conviction should be deemed prejudicial. (*People v. Epps* (1981) 122 Cal.App.3d 691, 698; *People v. Washington* (1958) 163 Cal.App.2d 833, 846.)

Even if the jury eventually convicts the defendant, its requests for additional instructions or the readback of testimony may establish that the case was a close one. (*People v. Filson, supra*, 22 Cal.App.4th 1841, 1852 [request for additional instructions]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]"]); *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for readback of critical testimony.].) Moreover, if the jury hears an erroneous instruction or erroneously admitted testimony for a second time, it is manifest that the degree of prejudice to the defendant was only

heightened. (*People v. Williams* (1976) 16 Cal.3d 663, 669 [reversal ordered where the jury requested a rereading of an erroneously admitted statement and then quickly returned a guilty verdict]; see also *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [rereading of an erroneous instruction warrants reversal]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 249-252 [erroneous response to a deliberating jury's question requires reversal.].)

Regardless of the behavior of the jury, reversible error is likely to be found when the trial court has effectively precluded the defendant from presenting his case. This is so since errors "`at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment.' [Citation.]" (*People v. Spearman* (1979) 25 Cal.3d 107, 119.) Thus, when the trial court excludes evidence bearing on the defendant's theory of the case, reversal is appropriate. (*People v. Filson, supra*, 22 Cal.App.4th 1841, 1852.)

In sex cases, the erroneous exclusion of impeachment evidence should usually lead to a reversal. If the complainant is the sole government witness, reversal should be virtually automatic. (*People v. Adams, supra*, 198 Cal.App.3d 10, 19 ["where, as here, the resolution of appellant's guilt or innocence turned on his credibility vis-a-vis that of the victim, it is reasonably probable that the verdict would have been in appellant's favor had the excluded evidence been admitted. [Citation.]."]; *People v. Randle, supra*, 130 Cal.App.3d 286, 293

[the “exclusion of the evidence bearing on the credibility of a prosecution witness where only the witness and defendant are percipient witnesses has been held to be prejudicial error. [Citations.]”.]; accord, *Fowler v. Sacramento County Sheriff’s Department*, *supra*, 421 F.3d 1027, 1042.)

If an error impacts in a strongly negative way on the defendant's theory of the case, reversal should also be the result. For example, where the defendant presented a diminished capacity defense in a murder case, the inadmissible "statements which intimated that appellant was fabricating his defense were most prejudicial." (*People v. Rucker* (1980) 26 Cal.3d 368, 391; see also *People v. Wagner* (1975) 13 Cal.3d 612, 621 [erroneous impeachment of defendant required reversal since "the resolution of defendant's guilt or innocence turned on his credibility . . ."]; *People v. Vargas* (1973) 9 Cal.3d 470, 481 *[Griffin* error is prejudicial if it touches a "`live nerve'" in the defense.].)

In contending that an error was prejudicial, defense counsel can often find a great deal of ammunition in the prosecutor's closing argument. If the prosecutor placed a great deal of reliance on an erroneous instruction or an erroneously admitted piece of evidence, the appellate court will have a difficult time in honestly finding that the error was harmless. (*People v. Cruz* (1964) 61 Cal.2d 861, 868 ["[t]here is no reason why we should treat this evidence as any less `crucial' than the prosecutor - and so presumably the jury - treated it"]; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341 [reversal ordered where the prosecutor "exploited" erroneously admitted evidence during his closing argument]; accord,

People v. Robbie, supra, 92 Cal.App.4th 1075, 1088.)

As a final technique for showing prejudice, defense counsel should attempt to demonstrate in an appropriate case that a number of errors require reversal due to the cumulative prejudice which they caused. As our Supreme Court has said, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal may be obtained when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. [Citation.]" (*Id.*, at p. 845; see also *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 302-303; *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

After reviewing the foregoing survey of the case law, defense counsel should employ it as a starting point, not an end. Each case is somewhat unique. While counsel should be familiar with the law, it is more important to closely study the record to see exactly how a particular error affected the dynamics of a trial. By being sensitive to the effect of an error in a particular case, defense counsel can often prepare a persuasive claim of prejudicial error.

CONCLUSION

Long ago, the California Supreme Court acknowledged the truth concerning a charge of sexual assault:

> "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, supra*, 55 Cal.2d 328, 352.)

Regrettably, nothing has changed in the many decades since the quoted words were penned. Nonetheless, it is the duty of defense counsel to rigorously press for the enforcement of the rules of evidence. Without such an effort, a defendant in a sex case has no chance at all.