COMMON EVIDENTIARY ISSUES

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I. CONFRONTATION

A. TESTIMONIAL

1. *Crawford v. Washington* (2004) 541 U.S. 36

The Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54.) Note, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 . . . . " (*Id.* at p. 59, fn. 9; cf. *People v. Cowan* (2010) 50 Cal.4th 401, 463 [hearsay after witness had testified not a confrontation violation when the witness was subject to recall].)

"[T]he principal evil at which the Confrontation Clause was directed was . . . its use of *ex parte* examinations as evidence against the accused. It was these practices that . . . English law's assertion of a right to confrontation meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this in mind. [¶] . . . [¶] This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. . . . [¶] The text of the Confrontation Clause . . . applies to witnesses' against the accused—in other words, those who 'bear *testimony*.' [Citation.] '*Testimony*,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears *testimony* in a sense that a person who makes a casual remark to an acquaintance does not. [Citation.] An accuser who makes a formal statement to government officers bears *testimony* in a sense that a person who makes a casual

remark to an acquaintance does not." (*Id.* at pp. 50-51, emphasis added.)

Affidavits or statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Id.* at p. 52.)

"Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive." (*Id.* at p. 52.) The court used "the term 'interrogation' in its colloquial, rather than any technical sense. Cf. *Rhode Island v. Innis,* 446 U.S. 21, 300-301 [parallel cites. omitted] (1980). . . . [The witness's] recorded statements, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Id.* at p. 53, fn. 4.)

"The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street* [(1985)] 471 U.S. 409, 414 . . . . " (*Id.* at p. 59, fn. 9.)

2 *Davis v. Washington* (2006) 547 U.S. 813

The Confrontation Clause does not apply to statements that are not testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 823 ["the Confrontation Clause applies only to testimonial hearsay"]; see *People v. Loy* (2011) 52 Cal.4th 46, 66-67 [statement to a friend not testimonial]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 156-157 [statements of codefendant's lies were not admitted for the truth of the matters asserted but to show consciousness of guilt].)

In *Bruton v. United States* (1968) 391 U.S. 123 the Supreme Court had held the admission of statements of a non-testifying co-defendant can violate the right to confrontation. Courts recently have narrowed that rule and have been holding statements to civilians pose no confrontation problem because they are not testimonial. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 137 & fn. 14; *People v. Arceo* (2011) 195 Cal.App.4th 556,

574-575.) The prosecution can avoid *Bruton* problems by having the police interview codefendants together and the statements of one can be the adoptive admission of the other. (*People v. Jennings* (2010) 50 Cal.4th 616, 664.)

B. THE EMERGENCY EXCEPTION

1. *Davis v. Washington* (2006) 547 U.S. 813

The Court held statement to 911 operator describing a current emergency is not testimonial. (*Id.* at pp. 826-827.) The Court recognized that 911 operators are not law enforcement officers, but concluded they are police agents. (*Id.* at p. 832, fn. 2.) On the other hand, when police officers arrived at the crime scene in order to find out from the victim what had happened, the victim's statements were testimonial because they relayed historical events and not information concerning a current emergency. (*Id.* at pp. 829-832.)

A test: "Without attempting to produce an exhaustive classification of all conceivable statements--or even all conceivable statements in response to police interrogation--as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, emphasis added; *Michigan v. Bryant* (2011) 562 U.S. __ [131 S.Ct. 1143, 1154]; *People v. Cage* (2007) 40 Cal.4th 955, 982.)

2. *Michigan v. Bryant* (2011) 562 U.S. [131 S.Ct. 1143]

The Court repeated the test announced in *Davis*. (*Id.* at p. 1154.) In determining the "primary purpose" of the interrogation, the Court specified the test is objective; the parties' subjective intent is irrelevant. (*Id.* at p. 1156.) The Court said "we objectively evaluate the circumstances in which the encounter occurs, and the statements, actions of the parties." (*Id.* at p. 1156). "The existence of an ongoing emergency must be objectively assessed from the

perspective of the parties to the interrogation at the time, not with the benefit of hindsight." (*Id.* at p. 1157, fn. 8; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 811-816.)

C. LAB RESULTS AND EXPERT TESTIMONY

1. *Melendez-Diaz v. Massachusetts* (2009) 556 U.S. [129 S.Ct. 2527]

The prosecution introduced a certificate of a drug analysis, which was a sworn statement of a chemical analysis performed by a state laboratory upon police request. Business and public records "are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." (*Id.* at p. 2539.) Nonetheless, the Court held "the analysts' affidavits were testimonial statements, and the analysts were witnesses' for purposes of the Sixth Amendment." (*Id*., at p. 2532.) Therefore, "[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (*Ibid*.; see also *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 2716-2717]; *People v. Geier* (2007) 41 Cal.4th 555, 605-607.) Permitting the defendant to subpoena and question the declarant does not solve a confrontation clause violation. (*Id.* at pp. 2538-2540.)

The purpose of the confrontation clause is to avoid trial by affidavit. (*Id.* at p. 2532.) "There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' " described in *Crawford*. (*Id.* at p. 2532, citing *Crawford*, 541 U.S. at pp. 51-52.) "The fact in question is that the substance found . . . was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial. The 'certificates' are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination" (*Id.* at p. 2532.) "[N]ot only were the affidavits ' "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," ' but under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence

of the composition, quality, and the net weight' of the analyzed substance." (*Id.* at p. 2532.)

2. *Williams v. Illinois* (2012) 132 S.Ct. 221.

Cellmark, a private laboratory, analyzed DNA samples. An expert witness reviewed the analysis and opined the defendant's DNA matched that found at the crime scene. The prevailing plurality of four justices found the lab's DNA analysis was not admitted for the truth of the matter asserted. (*Id.* at pp. 2228, 2235-2242] (plur opn. of Alito, J.) Justice Thomas and the four dissenting justices disagreed and said the lab's statements were being admitted for the truth of the matter asserted. "[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. 'To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.' D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence §4.10.1, p. 196 (2d ed. 2011) . . . 'If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.' *Ibid*." (*Id.* at p. 2257] (conc. opn. of Thomas, J.).) "[W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion [it is admitted for the truth of the matter asserted], because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the outof-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such 'basis evidence' comes in not for its truth, but only to help the factfinder evaluate an expert's opinion 'very weak,' 'factually implausible,' 'nonsense,' and 'sheer fiction.' D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence §4.10.1, pp. 196–197 (2d ed. 2011); id., §4.11.6, at 24 (Supp. 2012). 'One can sympathize,' notes that

treatise, 'with a court's desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of a drug, but to pretend that it is not being introduced for the truth of its contents strains credibility.' *Id*., §4.10.1, at 198 (2d ed. 2011); see also, *e.g., People v. Goldstein*, 6 N. Y. 3d 119, 128, 843 N. E. 2d 727, 732–733 (2005) ('The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful')." (*Id.* at pp. 2268-2269 (dis. opn. of Kagan, J.).)

Nonetheless the plurality and Justice Thomas determined the evidence was not testimonial. (*Id.* at pp. 2228, 2238 (plur. opn.); *id.* at pp. 2259-2261 (conc. opn. of Thomas, J.).) Justice Thomas rejected the "primary purpose test." (*Id.* at pp. 2261-2263 (conc. opn. of Thomas, J.).) Instead, he would rely on "indicia of solemnity." (*Id.* at pp. 2259-2260 (conc. opn. of Thomas, J.).) "The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. See Report of Laboratory Examination, Lodging of Petitioner. The report is signed by two 'reviewers,' but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. See ibid. And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." (*Id.* at p. 2260 (conc. opn. of Thomas, J.).) "Cellmark's report, in substance, certifies nothing." (*Id.* at pp. 2260-2261 (conc. opn. of Thomas, J.).)

3. *People v. Lopez* (2012) 55 Cal.4th 569, *People v. Dungo* (2012) 55 Cal.4th 608

"[T]he prosecution's use at trial of testimonial out-of-court statements ordinarily violates the defendant's right to confront the maker of the statements unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Although the high court has not agreed on a definition of testimonial, . . . a statement is testimonial when two critical components are present. [¶] First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity. [Citations.] The degree of formality required, however, remains a subject of dispute in the

United States Supreme Court. [Citations.]

"Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be. For instance, in this year's *Williams* decision, Justice Alito's plurality opinion said that the Cellmark laboratory's report at issue was not testimonial because it had not been prepared 'for the primary purpose of *accusing a targeted individual'* (*Williams*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2243] (plur. opn. of Alito, J.), italics added). Justice Thomas's concurring opinion criticized that standard, describing it as lacking 'any grounding in constitutional text, in history, or in logic.' (*Id.* at p. ___ [132 S.Ct. at p. 2262] (conc. opn. of Thomas, J.).) Instead, for Justice Thomas, the pertinent inquiry is whether the statement was 'primarily intend[ed] to establish some fact with the understanding that [the] statement may be used in a criminal prosecution.' (*Id.* at p. ___ [132 S.Ct. at p. 2261] (conc. opn. of Thomas, J.).) And under the *Williams* dissent, the pertinent inquiry is whether the report was prepared for the 'primary purpose of establishing "past events potentially relevant to later criminal prosecution" — in other words, for the purpose of providing evidence.' (*Id.* at p. ___ [132 S.Ct. at p. 2273] (dis. opn. of Kagan, J.) [joined by Justices Scalia, Ginsburg, and Sotomayor].)" (*People v. Lopez* (2012) 55 Cal.4th 569, 581-582; *id.* at p. 582-585 [GC/MS printout of drug or alcohol test with a cover sheet including identifying information about the defendant not testimonial].)

A majority of the court agreed with Justice Werdegar's concurring opinion that evidence establishing a chain of custody is not testimonial. (*Lopez, supra,* 55 Cal.4th at pp. 585-587 (conc. opn. of Werdegar, J.).) A majority of the court also agreed with Justice Corrigan's concurring opinion that entries, here establishing the chain of custody, were business records for the primary purpose of the "administration of an entity's affairs" and thus not testimonial. (*Id.* at pp. 587-589 (conc. opn. of Corrigan, J.).) Justice Liu provided an excellent dissent describing how the state supreme court misapplied the United States Supreme Court decisions. (See *id.* at pp. 590-607 (dis. opn. of Liu, J.).)

The observations from an autopsy report prepared by another were not testimonial because it lacked the requisite formality or solemnity and the autopsy report court be used for purposes other than criminal prosecutions. (*People v. Dungo* (2012) 55 Cal.4th 608; see also *id.* at pp. 621-627 (conc. opn. of Werdegar, J.) which had the concurrence of the majority of the court). The majority of the court also agreed with Justice Chen's concurring opinion that the test is as follows: "[W]e must determine whether there was a confrontation clause violation under Justice Thomas's opinion *and* whether there was a confrontation clause violation under the plurality's opinion. If there was no violation under both opinions, then the result (finding no confrontation clause violation) would command the support of a majority from the high court's *Williams* case. Such a test satisfies the requirements of both the plurality opinion and Justice Thomas's concurrence. [¶] Justice Thomas would find no violation if the out-of-court statements lack the necessary formality and solemnity to be testimonial. (*Williams*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2255] (conc. opn. of Thomas J.).) As the majority in this case explains, the statements here are not sufficiently formal to meet this test. (Maj. opn., *ante*, at pp. 12-13.)" (*Dungo, supra,* 55 Cal.4th at p. 629 (conc. opn. of Chen, J.).) Thus, the autopsy report here was not testimonial because no suspect had been identified yet. (*Ibid.*) Justices Corrigan and Liu dissented.

The majority also agreed with her opinion that the test results were not admitted for the truth of the matter asserted but instead to provide a basis for the expert's opinion. (*Lopez*, *supra*, 55 Cal.4th at p. 579; *id.* at pp. 589-590 (conc. opn. of Corrigan, J.); see also *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1418 [hearsay evidence admitted for the expert's basis was not substantive evidence of guilt]; *People v. Hill* (2011) 191 Cal.App.4th 1104 [to support an expert opinion; but see *id.* at pp. 1129-1131 [criticism]; see *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427 [evidence admitted to support a gang expert's opinion was not testimonial]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 744-745 [videotape of victim disoriented and showing his home]; *id.* at pp. 746-747 [basis of expert's opinion]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57 [basis of an expert's opinion];

People v. Thomas (2005) 130 Cal.App.4th 1202, 1208-1210 [same]; but see *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 187-188, 198-199 [gang opinion based on hearsay violated Confrontation Clause]; but see *People v. Goldstein* (N.Y. 2005) 6 N.Y.3d 119, 128 ["The distinction between a statement offered for the truth and one offered to shed light on an expert's opinion is not meaningful."].) To be sure, under current California law, the jury is neither expected nor required to disregard hearsay basis evidence for its truth in evaluating expert opinion testimony. (Evid. Code, §§ 801, 802.) CALCRIM No. 332, the current standard-form jury instruction on expert opinion testimony, instructs the jury that it "must decide whether information on which the expert relied was true and accurate," and it may "disregard any opinion" that it finds "unbelievable, unreasonable, or unsupported by the evidence." (See Pen. Code, § 1127b [sua sponte instructions required on expert testimony].) As is often said, "any expert's opinion is only as good as truthfulness of the information on which it is based." (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427.)

Lopez and *Dungo* followed. (*People v. Edwards* (2013) 57 Cal.4th 658, 704-707 [read autopsy report and conclusions]; *People v. Valdez* (2013) Sept 27 b239983 d2C [expert's testimony about the history of a gang]; *People v. Mercado* (2013) 216 Cal.App.4th 67, 89-90 [expert's testimony on cause of death based on coroner's report]; *People v. Barba* (2013) 215 Cal.App.4th 712, 740-742 [DNA test, though not accepting all of state supreme court cases were consistent with *Williams*]; *People v. Steppe* (2013) 213 Cal.App.4th 1116, 1119-1127 [DNA expert's reliance on other's DNA tests]; *People v. Holmes* (2012) 212 Cal.App.4th 431, 436-438 [DNA expert witness's reliance on notes (of sources of samples), DNA profiles, tables of results, typed summary sheets, and lab reports were not testimonial]; *People v. Huynh* (2012) 212 Cal.App.4th 285, 315-321 [expert relying on photographs].)

D. FORFEITURE BY WRONGDOING AND DYING DECLARATIONS

In *People v. Giles* (2007) 40 Cal.4th 833, the defendant killed his girlfriend. The prosecution admitted evidence of his prior domestic violence with the same victim. Some of the evidence included her statements concerning the domestic violence. The state supreme

court held he forfeited the right to confront her about the prior domestic violence because he killed her. The United States Supreme Court vacated the decision. Forfeiture by wrongdoing applies only if "the defendant engaged in conduct *designed* to prevent the witness from testifying." (*Giles v. California* (2008) 554 U.S. 353, 359-360.)

The United States Supreme Court did state a dying declaration does not violate the Confrontation Clause when the declarant is on the brink of death and aware he or she was dying. (*Giles, supra,* 554 U.S. at pp. 358-359; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 289-290.)

II. GANG EVIDENCE

A "violation of section 186.22(a) is established when a [1] defendant actively participates in a criminal street gang [2] with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and [3] willfully promotes, furthers, or assists in any felonious criminal conduct by gang members." (*People v. Albillar* (2010) 51 Cal.4th 47, 54.)

The elements to the gang enhancement are: (1) the defendant committed or attempted to commit a crime for the benefit of, at the direction of, or in association with a criminal street gang; and (2) the defendant intended to assist, further, or promote criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320; *People v. Loeun* (1997) 17 Cal.4th 1, 11; *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

A criminal street gang: "(1) the group must be an ongoing association of three or more persons sharing a common name or common identifying sign or symbol; (2) one of the group's primary activities must be the commission of one of the specified predicate offenses; and (3) the group's members must engage in or have engaged in a pattern of criminal gang activity.' " (*Loeun, supra,* 17 Cal.4th at p. 8.)

Active participation can be based expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Williams* (1997) 16 Cal.4th 153; *People v. Champion* (1995) 9

Cal.4th 879, 919-925; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414 [testimony about what it means to be a rat]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506-507.) The expert may rely on officer contacts, tattoos, participation in the crime to be active in a gang. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [tattoos, hair style, said (at one time)was a member, had a moniker, crime committed with other members]; *People v. Manriquez* (1999) 72 Cal.App.4th 1486; see also [defendant seen with gang members seven times and says he "kicked back" with them].)

That the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang can be proved by expert testimony. (*People v. Albillar* (2010) 51 Cal.4th 47, 63-64; *People v. Ward* (2005) 36 Cal.4th 186, 209-211 [gang expert could testify that defendant came to the crime scene (to commit premeditated murder) in order to further a gang]; *People v. Gardeley* (1996) 14 Cal.4th 605, 619-620; *People v. Williams* (2009) 170 Cal.App.4th 587, 620-621; *id.* at p. 625 [defendant possessed drugs for the gang because gang received money from drug sales]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484; *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1180-1181; *People v. Gomez* (1991) 235 Cal.App.3d 957, 965; *In re Leland D.* (1990) 223 Cal.App.3d 322, 330-331 [material based the opinion on must be reliable]; *Briceno v. Scibner* (9th Cir. 555 F.3d 1069, 1078, disapproved on other grounds in *People v. Albillar* (2010) 51 Cal.4th 47, 65-66 [asking a gang expert if the crime was committed for the benefit of the gang did not violate due process].) The court erred in excluding a gang expert for the defense who would say that not every time a person rides with a gang member is it gang related. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179.)

An expert cannot testify directly about the defendant's specific intent (but can answer hypothetical questions about it). (Pen. Code, § 29; *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1049; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196-1199; see *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658, limited in *People v. Gonzalez* (2006) 38 Cal.4th 932,

946, fn. 3 [can ask a hypothetical question on the defendant's intent]; but see *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193-1194 [based on gang evidence and listening to wiretapped conversations].)

However, an expert can testify about gang practices and motives which is probative to the defendant's intent. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 947 [gang practices]; *People v. Ward* (2005) 36 Cal.4th 186, 210 [gang practices]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1125-1126 [though based on hearsay from unreliable sources]; *People v. Vasquez* (2009) 178 Cal.App.4th 347, 353-354 [murder, even for personal reasons, enhances the reputation of the gang]; *People v. Williams* (2009) 170 Cal.App.4th 587, 625 [possessed drugs for the gang because money from sales goes to the gang]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 111 [possessed gun when attempt to flee because gang expert said they try to keep guns within the gang]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1502-1511-1513 [possessed gun in car after being shot at]; but see *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [opinion that a shooting was to increase the reputation within the gang was too speculative].) Expert testimony that any crime committed by a gang member benefits the gang by instilling fear does not violate due process. (*People v. Hunt* (2011) 196 Cal.App.4th 811, 817-818.)

"Sufficient proof of the gang's primary activities might consist of . . . expert testimony, as occurred in *Gardeley, supra*, 14 Cal.4th 605. . . . The gang expert based his opinion on conversations he had with fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley, supra,* at p. 620.)" (*Sengpadychith, supra,* 26 Cal.4th at p. 324, quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; accord *People v. Margejo* (2008) 162 Cal.App.4th 102, 106-108; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 [expert relied on personal experience investigating gang crimes]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484; but see *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612 [opinion

insufficient when no evidence of the basis].)

Predicate crimes must be proved by substantive evidence, not expert testimony or inadmissible hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624 [documents or percipient witnesses]; *In re I.M.* (2005) 125 Cal.App.4th 1195, 1207-1208 [the charged crime and the officer personally knew of another gang member who was accused of committing another crime]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1462-1463 [can be documents and the gang expert saying they are gang members]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384-1385; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003; *In re Leland D.* (1990) 223 Cal.App.3d 251, 259-260.)

An expert can testify about the existence of a gang and gang membership. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619-620.) Different gangs can join together but need to show how the defendant benefitted each gang. (*People v. Valdez* 6(1997) 58 Cal.App.4th 494, 507-508 [through expert opinion].) An expert can testify whether the defendant is a member of a gang. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Valdez* (1997) 58 Cal.4th 494, 506-507; *People v. Gomez* (1991) 235 Cal.App.3d 957, 965.)

An expert can testify about the meaning of tattoos. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 53; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1045.) An expert can testify about gang culture, habits, sociology, and psychology. (*People v. Vang* (2011) 52 Cal.4th 1038; *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507; *People v. Olguin* (1994) 61 Cal.App.4th 1335, 1370.) An expert can testify about the characteristic ages, ethnic background, appearances, language, vehicles, weapons, and tactics of a particular gang. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1203.)

An expert can testify about how people join and quit gangs. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 502-503.) An expert can testify about the meaning of a gang oath. (*People v. Roberts* (1992) 2 Cal.4th 271, 298 [prison gang].) An expert can testify about levels of gang involvement. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507.) An expert can testify about how members advance in the gang. (*People v. Dominguez* (1981) 121

Cal.App.3d 481, 494, fn. 13 [NF prison gang].) An expert can testify about a gang's structure, rules, and practices. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 53; *People v. Roberts* (1992) 2 Cal.4th 271, 298.) An expert can testify about gang terminology. (*People v. Champion* (1995) 9 Cal.4th 879, 924-925; *People v. Hawthorne* (1992) 4 Cal.4th 43, 53; *People v. Fields* (1998) 61 Cal.App.4th 1063, 1071 [pager codes]; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1045.)

The gang expert can testify about gang rivalries and alliances. (*People v. Loeun* (1997) 17 Cal.4th 1, 6-7; *People v. Valdez* (1997) 58 Cal.App.4th 494; *People v. Gomez* (1991) 235 Cal.App.3d 957, 965.) An expert can testify about the importance of territory and respect. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) An exert can testify about witness intimidation. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944-949.)

Gang membership is so inflammatory that it is not admissible if only nominally relevant. (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Memory* (2010) 182 Cal.App.4th 835, 858-862 [error admit evidence defendant part of bike gang without evidence the group was a criminal street gang]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 223; *People v. Perez* (1981) 114 Cal.App.3d 470, 477-478 [inadmissible to show bad character or propensity]; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 78 [membership in an organization does not reasonably lead to an inference as to the conduct of a member in a given occasion]; *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342-1343, overruled on other grounds by *Santamaria v. Horseley* (9th Cir. 1998) 133 F.3d 1242, 1248; *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1244-1246; see *United States v. Hankey* (9th Cir. 200) 203 F.3d 1160, 1170.) "The word 'gang' . . . connotes opprobrious implications . . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.)

"Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-

224.) "Gang evidence is admissible if it is logically relevant to some material fact in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] A properly qualified gang expert may, where appropriate, testify to a wide variety of matters, including gang graffiti. [Citations.] [¶] However, gang evidence is inadmissible if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citation.]' [Citation.] In cases not involving a section 186.22 gang enhancement, it has been recognized that 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, 'trial courts should carefully scrutinize such evidence before admitting it. [Citation.]' [Citation.] . . . . [¶] A trial court's admission of evidence, including gang testimony, is reviewed fro abuse of discretion. [Citations.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.)

Gang membership admissible to show motive if the crime was gang related. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655-656; *People v. Romero* (2008) 44 Cal.4th 386, 412-413; *People v. Kennedy* (2005) 36 Cal.4th 595, 623-624 [motive]; *People v. Champion* (1995) 9 Cal.4th 879, 919-925; cf. *Texas v. Johnson* (1989) 491 U.S. 397, 414; *People v. Carter* (2003) 30 Cal.4th 1166, 1194-1195; *People v. Jones* (2003) 30 Cal.4th 1084, 1115 [show motive to robbery and that murder was premeditated]; *People v. Williams* (1997) 16 Cal.4th 153; *People v. Sandoval* (1992) 4 Cal.4th 155, 175 [rival gang membership showed motive]; *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 736-738 [motive]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168 [gang enhancement evidence also admissible to show motive]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240, listing cases; *People v. Parrish* (2007) 152 Cal.App.4th 263, 275-276 [when defendant introduced statements suggesting duress, the prosecution could admit statements from the same conversation suggesting defendant's motive was to silence a snitch]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 274-278 [the

gang enhancement, motive, and intent]; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369-1371 [motive and intent]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516-1519 [motive and intent]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 [gang activity or membership is admissible when it is "important to the motive . . . even if prejudicial."]; *In re Darrell T.* (1979) 90 Cal.App.3d 325, 328-334; *People v. Manson* (1976) 61 Cal.App.3d 102; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194.) The prosecution is entitled to "introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

Gang membership admissible for other purposes under Evidence Code section 1101. (*People v. Brown* (2003) 31 Cal.4th 518, 547 [to show accuracy of defendant's admissions as opposed to just bragging] p. 551 [admit moniker because some witnesses referred to him under this name]; *People v. Tuilaepa* (1992) 4 Cal.4th 569 [why fled]; *People v. Fausto* (1982) 135 Cal.App.3d 129 [intent].)

Gang evidence admissible in penalty phase to show defendant's control over others to commit crimes. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

Gang membership admissible to show why the witness was afraid to testify, though no evidence of the threats coming from the defendant. (*People v. Abel* (2012) 53 Cal.4th 891, 925; *People v. Loza* (2012) 207 Cal.App.4th 332, 345-346.)

Prior threats to a victim os admissible to show defendant's intent in committing the underlying crime. (*People v. McCray* (1997) 58 Cal.App.4th 159; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1614; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369-1371.)

Gang membership is admissible as impeachment evidence to show bias. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 238-243; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497-1498; *People v. Munoz* (1984) 157 Cal.App.3d 999, 1012-1013;

see also *People v. Mendoza* (2000) 24 Cal.4th 130. 179 [relevant to the victim's fear in testifying]; but see *People v. Lepe* (1997) 57 Cal.App.4th 977 [exclude hearsay evidence of gang membership leading prosecution witness to not testify].)

Multiple gang acts admissible for the enhancement; not considered prejudicial. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 819-820.)

Gang evidence inadmissible when it was not established that the group was a gang. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194.)

It was permissible to admit defendant's moniker of Chucky, who was the homicidal creature in a move, in an attempted murder case. (*People v. Leon* (2010) 181 Cal.App.4th 452, 458-463.) Permissible to admit that defendant shaved "187" in his hair at jail. (*People v. Hartsch* (2010) 49 Cal.4th 472, 505.) Permissible to admit defendant's gang moniker of "Point Blank" in shooting murder jury trial. (*People v. Lee* (2011) 51 Cal.4th 620, 647-648.)

III. EVIDENTIARY ISSUES IN SELF-DEFENSE CASES

A. INTRODUCTION

Because [f]ew rights are more fundamental than that of an accused to present witnesses in his own defense[] (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 312, 93 S.Ct. 1038]), a criminal defendant has . . . a *constitutional right* to present such material and relevant evidence in his favor, as was not otherwise disallowed by statute." (*People v. Mizchele* (1983) 142 Cal.App.3d 686, 691, italics in original.) Except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, sec. 351.) Relevant evidence" is defined as . . . evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, sec. 210.)

Clearly, it is of consequence that a person believed that self-defense was necessary. "A person claiming self-defense is required to 'prove his own frame of mind,' and in so doing is 'entitled to corroborate his testimony that he was in fear for his life by proving the

reasonableness of such fear.' " (*People v. Davis* (1965) 63 Cal.2d 648, 656.) When reviewing the record in an assault case, appellate counsel should obviously make sure that any theories of self-defense that were suggested by the facts of the case were in fact presented. This entails determining what evidence was available that tended to show that the defendant was reasonably in fear, and how trial counsel could have persuaded the court that it was admissible. The following are discussions of some common evidentiary issues in self-defense cases.

B. ANTECEDENT THREATS

Whether a defendant was sufficiently in fear of injury to justify the use of force in self-defense is not measured by an abstract standard of reasonableness but one based on the *defendant's* perception of imminent bodily injury or death. Because his state of mind is a critical issue, he may explain his actions in light of his knowledge concerning the victim. (*Davis, supra,* 63 Cal.2d at p. 656; see *People v. Lee Chuck* (1887) 74 Cal. 30, 34-35.) "Evidence of antecedent threats is admissible when the threats are followed by some 'overt act' that has placed the defendant in immediate danger. [Citations.] . . . [Defendant] was entitled to show how a reasonable person in his position would have evaluated the extent of that danger . . . 'In making that evaluation, the defendant is entitled to consider prior threats, assaults, and other circumstances relevant to interpreting the attacker's behavior.' [Citation]." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069; *People v. Pena* (1984) 151 Cal.App.3d 462, 475.)

Antecedent threats as well as the victim's reputation for violence, prior "assaults, and other circumstances [are] relevant to interpreting the attacker's behavior." (*People v. Aris* 215 Cal.App.3d (1989) 1178, 1189; see *People v. Moore* (1954) 43 Cal.2d 517, 527-529; *Lee Chuck, supra*, 74 Cal. at pp. 34-35; *People v. Brophy* (1954) 122 Cal.App.2d 638, 647-648.) These considerations do not by themselves establish a right of self-defense. (See *People v. Fitch* (1938) 28 Cal.App.2d 31, 45-46.) However, they illuminate and reflect on the reasonableness of defendant's perception of both the imminence of danger and the need to

resist with the degree of force applied. (See *Moore,* at p. 528.) They may also justify the defendant "in acting more quickly and taking harsher measures for his or her own protection in the event of assault, whether actual or threatened, than would a person who had not received such threats." (*People v. Bush* (1978) 84 Cal.App.3d 294, 302-303.)

A previous threat, unaccompanied by any demonstration of an immediate intention and ability to carry it out, will not justify an assault. The threat of harm must be imminent. The defendant is, however, "entitled to corroborate his testimony that he was in [immediate or imminent] fear for his life by proving the reasonableness of such fear" through evidence of "his own frame of mind." (*Davis, supra*, 63 Cal.2d at p. 656.) The jury must evaluate such perceptions in context, i.e., the "same or similar circumstances" as those in which the defendant acted. (See *People v. Kermott* (1939) 33 Cal.App.2d 236, 242-243.) Therefore, if they would induce a well founded belief in the mind of a reasonable person that his adversary was on the eve of executing the threat and that immediate defense against the impending danger was the only means of escape from great bodily injury or death, the law of self-defense justifies use of whatever force is necessary to avert the threatened peril. [Citations].) (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.)

Antecedent threats need not have been made by the victim personally to be admissible on the issue of the reasonableness of the defendant s fear of imminent bodily injury or death. (*Minifie*, *supra,* 13 Cal.4th at pp. 1065-1066.) Antecedent threats made not only by the victim but by his or her associates, are admissible not to show that the victim is a violent person, but that the defendant s fear of imminent death or bodily injury was reasonable under the circumstances. (See *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.)

C. PRIOR ASSAULTIVE CONDUCT

1. The Relevance of Prior Conduct of the Defendant to a Self-Defense Theory

Generally, evidence of other crimes is admissible only if relevant to prove a material fact at issue, separate from criminal propensity. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Evidence of a prior assault by the defendant occurring under similar circumstances

may be admitted to prove some intent or motive other than the need to defend oneself. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 9, 15 [evidence of knife assault on another elderly man and robbery of his home properly admitted to show that stabbing death of elderly man also involving theft just hours before was motivated by need for money]; *People v. Wells* (1949) 33 Cal.2d 330, 341-343 [prisoner's prior assaults on guard who had initiated disciplinary action against him admitted to prove malice in subsequent assault on another guard who also initiated disciplinary action]; *People v. Simon* (1986) 184 Cal.App.3d 125, 129-130 [prior assault on man found in defendant's girlfriend's apartment held admissible to negate self-defense in defendant's trial for killing a man found in his girlfriend's apartment if the jury found the motive in both cases was jealousy].)

2. Prior Conduct of the Victim

"In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, sec. 1103, subd. (a).) In a prosecution for assault where self-defense is raised, therefore, evidence of the victim's violent character shown through past conduct is admissible to show the victim was more likely the aggressor. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447; *People v. Rowland* (1968) 262 Cal.App.2d 790, 797; *People v. Smith* (1967) 249 Cal.App.2d 395, 404-405.) However, without some showing of the defendant's state of mind to support a claim of self-defense, evidence of the victim's past violent conduct is irrelevant and should be excluded. (Evid. Code, sec. 350; *Smith,* at pp. 404-405.) Therefore, appellate counsel should make sure that trial counsel sought admission appropriately either by making an offer of proof or by putting on evidence that the victim was the likely aggressor.

The admissibility of prior assaultive conduct by the victim, of course, can be a double-edged sword. "... [E]vidence of the defendant's character for violence or trait of character

for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." (Evid. Code, sec. 1103, subd. (b).) Thus, if the defendant has a record of prior assaultive conduct of his or her own, it will be admissible to show a propensity for violence if the defense has introduced evidence of prior assaultive acts by the victim. This would of course severely damage a claim of self-defense. This is an issue that appellate counsel should examine carefully in each case to determine whether trial counsel had a valid tactical reason for failing to request admission of the victim s prior assaultive conduct.

D. AGGRESSOR OR VICTIM?

The availability of a theory of self-defense often turns on which party is the aggressor. A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if he or she actually and in good faith tries to stop fighting *and* he or she indicates, by word or by conduct, to his or her opponent, in a way that a reasonable person would understand, that he or she wants to stop fighting and he or she has stopped fighting *and* he or she gives his opponent a chance to stop fighting. If a person meets those requirements, he or she has a right to self-defense if the opponent continues to fight. (*People v. Hernandez* (2003) 111 Cal.App.4th 582, 588.) The right to self-defense is not available to a defendant who instigates a confrontation with the intention of creating the necessity for an assault or if the defendant has encouraged the confrontation. (*People v. Garnier* (1950) 95 Cal.App.2d 489, 496.) If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (*People v. Quach* (2004) 116 Cal.App.4th 294; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75.)

Appellate counsel should read the record carefully to determine whether the defendant was indeed the initial aggressor, and if at any time the roles reversed. If there appears to be a mutual combat situation, it would be prudent to contact trial counsel for his or her investigative reports to see whether a theory of self-defense could have been developed based on the premise that the defendant, even if he or she was the initial aggressor, was at some point entitled to self-defense.

IV. SEX CASES

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

1. Generally.

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 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.)

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.

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

A court has 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.

3. Evidence Code section 1109 Might Also Apply.

Evidence Code section 1109 permits the admission of prior instances of domestic violence, elder abuse, or child abuse in a current case that involves such a case. Sexual abuse of a cohabitant or someone in a dating relationship can be considered domestic

violence. Section 1109 even applies to violence to a family pet. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 890-896.)

Section 1109 is broader in another manner. Section 1108 evidence is limited to proving that other charges sex crimes are true. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916.) Section 1109 evidence is admissible to all charges. (*People v. Dallas* (2008) 165 Cal.App.4th 940, 957-958.) However, section 1109 evidence is limited to incidents that are no more than ten years old unless the court finds admission of the evidence furthers the interests of justice. (Evid. Code, § 1109, subd. (e).)

Courts of appeal have found that section 1109 does not violate due process. Evidence Code section 1109 does not violate due process. (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704.)

B. 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.].)

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.

C. 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.

D. 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 actually 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) 937 S.W.2d 690; *State v. Bolin* (1996) 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*.].)[1] 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];

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

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 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.)

E. APPELLATE COUNSEL SHOULD BE ESPECIALLY ALERT TO THE IMPROPER ADMISSION OF OPINION TESTIMONY BY A SART NURSE.[2]/

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 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,

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

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.

F. 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.

G. 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 former 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.[3]/

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 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

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[3] 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.)

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.)

V. EXCLUSION OF DEFENSE EVIDENCE: CONSTITUTIONAL AND STATUTORY ISSUES

A. ESTABLISHING THAT EXCLUSION OF EVIDENCE VIOLATES A DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHTS

1. Nature of federal rights

The most recent United States Supreme Court pronouncements on federal constitutional rights implicated by exclusion of relevant defense evidence shows somewhat schizophrenic nature of caselaw. In *Montana v. Egelhoff* (1996) 518 U.S. 37, the plurality opinion of Justice Scalia surveys the constitutional scene and pronounces "Thus, the holding of *Chambers* [*v. Mississippi* (1973) 410 U.S. 284] – if one can be discerned from such a fact-intensive case -- is certainly not that a defendant is denied `a fair opportunity to defend against the State's accusations' whenever `critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." (518 U.S. at p. 53.) Scalia's plurality opinion reiterates "we were not setting forth an absolute entitlement to introduce crucial, relevant evidence," and stresses that entitlement yields to "`any valid state justification,'" citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691. (*Ibid*.)

Dissenting opinion of Justice O'Connor stated that "the proposition that due process requires a fair opportunity to present a defense is not new." (*Id*., at p. 62.) She read *Chambers v. Mississippi* as a constitutional "prohibition on enforcement of state evidentiary

rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case." (*Ibid.*)

In *Chambers*, the defendant had been prevented from cross-examining his own witness, who had made an out of court sworn confession to the murder for which Chambers was being prosecuted, which he recanted at trial, due to Mississippi's "voucher" rule. Evidence of the witness's confession of murder to three other witnesses was excluded on hearsay grounds. The U.S. Supreme Court found a due process violation and granted habeas. Court found that due process right to confrontation violated, since petitioner should have been able to cross examine his own witness, whose testimony on direct recanting the sworn confession was adverse. Also, exclusion of evidence of confession to three others violates fundamental right to present witnesses in own defense. Testimony excluded "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the [hearsay] exception for declarations against interest. That testimony also was critical to Chambers' defense." (410 U.S. at p. 302.)

In *Crane v. Kentucky, supra*, 476 U.S. 683 the court reversed a conviction because of exclusion of evidence of the circumstances of his interrogation suggesting it was coerced, on grounds that voluntariness of the confession had been determined by judge. The Court termed it "an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." (*Id.*, at p. 687.)

Crane refers to the somewhat uncertain doctrinal bases of the "meaningful opportunity to present a complete defense," saying it exists, "whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . ." (*Id.*, at p. 690.) Right is defined (by unanimous court) as preventing exclusion of "competent reliable evidence . . . when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecution's case encounter and `survive the crucible of

meaningful adversarial testing.' *United States v. Cronic*, 466 U.S. 648, 656 (1984)." (*Ibid.*)

In *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, the court considered whether exclusion of evidence that the alleged victim of a child molest had made false accusations of molestation against her mother was error of constitutional magnitude. The court stated: "The explicit testimony bore on the credibility of the only percipient witness against Franklin. If believed by the jury, Franklin's testimony would have shown Shayna capable of fantasies about her mother analogous to the charge she made against Franklin. Exclusion of the evidence deprived Franklin `of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful [adversarial] testing.' [Citation.]" (*Id.*, at p. 1273.)

2. Applicable prejudice test for denial of due process right to present complete defense

Applicable test of prejudice on direct appeal appears to be *Chapman v. California* (1967) 386 U.S. 14. (See *Crane v. Kentucky, supra*, 476 U.S. 683, stating that "the erroneous ruling of the trial court is subject to harmless error analysis . . . cf. *Delaware v. Van Arsdall* [(1986) 475 U.S. 673]." (*Id.*, at p. 691.) *Crane* remanded case to state court for determination of state's claim that the error was harmless because the same evidence excluded came in through other witnesses.

3. Practice tips

(a) Clearly federalize your claim.

In *Duncan v. Henry* (1994) 513 U.S. 364, the U.S. Supreme Court vacated a grant of federal habeas because the petitioner had in his state appeal argued only that admission of evidence violated Evidence Code section 352 and caused a miscarriage of justice under the state law prejudice standard. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."

(b) Federalize the claim on appeal even if no assertion of federal due process denial is made in trial court.

Unclear if such specification necessary, assuming general compliance with Evidence Code section 354. Since proper offer of proof would establish that evidence was relevant, admissible, and should not be excluded, there would be little gained in terms of policy of giving chance for trial court to avoid error, to require specification of federal due process grounds.

Additionally, if appellate court either ignores federal constitutional argument (as Sixth District did in *People v. Franklin, supra*, 25 Cal.App.4th 328), or if it denies claim solely on merits, any potential procedural default is cured as far as federal habeas review is concerned.

B. STATE LAW PERMITTING DISCRETIONARY EXCLUSION OF RELEVANT DEFENSE EVIDENCE: EVIDENCE CODE SECTION 352

1. Application of provision by trial judge

"That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons set forth in section 352 for exclusion." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

Prejudicial evidence is evidence "that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittendon* (1994) 9 Cal.4th 83, 134.)

2. Standard of appellate review

People v. Minifie (1996) 13 Cal.4th 1055, 1070: "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion."

3. Limits on trial court discretion

(a) Wholesale exclusion of evidence relevant to the prime theory of the defense.

In *People v. Wright* (1985) 39 Cal.3d 576, the court found an abuse of discretion when

the trial court excluded evidence that homicide victim's urine was positive for morphine, indicating use within 24 hours of death. Defendant's defense was that he was confronted by victim who threatened him and accused him of messing around with his wife, when defendant, though residing in the same trailer park, did not know victim or his wife. The court held evidence of recent heroin use would corroborate defendant's claim of irrational behavior by victim, and impeach credibility of main prosecution witness, victim's wife, who said victim had not recently used. The court stated, "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (*Id.*, at p. 585.)

The court also states that "the purported prejudice to the prosecution cannot be based on mere speculation and conjecture." (*Ibid.*) However, the court in *Wright* went on to uphold exclusion of evidence that victim was engaged in sale of heroin, possessed heroin for sale and was under the influence in an incident two years before his death in which he violently resisted arrest. Evidence of victim's violent resistance to arrest was admitted, all references to heroin excluded.

(b) Exclusion due to negative credibility determination by judge.

In *People v. Cudjo* (1993) 6 Cal.4th 585, defendant offered evidence of a jailhouse inmate that defendant's brother had confessed to the murder defendant was accused of, in situation where other evidence suggested defendant's brother was perpetrator. Trial court excluded evidence because it found informant testimony "unreliable and untrustworthy." Supreme Court ruled that evidence would not have consumed undue time, or confused issues, and that evidence had substantial probative value and was necessary since there was no comparable evidence of brother's guilt.

(c) Exclusion due to gross misbalancing of relevant factors.

In *People v. Minifie, supra*, 13 Cal.4th 1055, the court ruled that exclusion of evidence of prior threats to defendant by third parties associated with victim was an abuse of discretion. In *Minifie*, defendant had killed a member of the Knight family. He was

threatened and attacked in jail, and threats from friends of the Knight family were made to his wife. The victim, a pallbearer for the man defendant had killed, approached defendant, asked if defendant knew who he was, said, "So it was you," and punched defendant, knocking him to the floor. Defendant pulled his gun and fired, striking pallbearer and bystander. After holding that threats from third parties who are associated with victim are relevant to issue of whether defendant reasonably believed that serious bodily injury was about to be inflicted on him, Supreme Court held that judge's exclusion of the evidence was abuse of section 352 discretion.

In *People v. McAlpin* (1991) 53 Cal.3d 1289, the court held that it was an abuse of discretion in a child molestation prosecution to exclude evidence by defendant's friends that they had observed defendant's behavior toward their minor daughters, and that in their opinion he was not given to lewd conduct with children. (*Id.*, at p. 1310, n. 15.) The court noted that the testimony was admissible, it would not consume much time, there would likely not be extensive cross examination since defendant had no prior criminal record, and the evidence went to main issue in case.

4. Specific determinations of prejudice from erroneous exclusion of defense evidence under section 352

In *People v. Minifie, supra*, 13 Cal.4th 1055, 1071 the Superior Court found erroneous exclusion of evidence prejudicial under *Watson*. The excluded evidence concerning threats from third parties associated with the person defendant shot would have strengthened the self-defense considerably by showing that the Knight crowd had already killed a friend of defendant and threatened defendant would be next. The jury argument of the prosecutor "tips the scale in favor of finding prejudice," because prosecutor said Minifie's alleged fear of being killed by the Knight crowd was contrived and unsupported by evidence.

In *People v. Wright, supra*, 39 Cal.3d 576, Supreme Court held that exclusion of evidence that decedent was under the influence of heroin at time of death was harmless under *Watson* standard. Court faults offer of proof for not including any proposed testimony about

the level of morphine found in decedent's urine or significance of that level. Claims inference between heroin influence and aggressive, irrational behavior was weak, and other witnesses contradicted defendant's claim that decedent threatened him.

In *People v. Cudjo, supra*, 6 Cal.4th 585, court finds exclusion of evidence of another's confession to the charged murder is harmless under *Watson*. Court so holds despite admitting that person allegedly confessing was other prime suspect in murder, disclosed actual crime scene details, and was closer in appearance to description from sole eyewitness. Court relies on fact that semen sample from victim included defendant but excluded his brother as possible donor, and that defendant's story that he had traded drugs for sex with victim was contrary to all other testimony about victim's lifestyle and values. Also used trial judge's negative credibility determination and "obvious indicia of unreliability" of inmate witness to determine a more favorable outcome for defendant was not reasonably probable.

In *People v. Franklin* (1994) 25 Cal.App.4th 328, the Sixth District determined that exclusion of evidence from defendant that alleged child molest victim had said that her mother had licked her vagina was error. The court held the error harmless under the miscarriage of justice standard, despite admitting that case was one on one credibility contest. The court said that evidence of prior false accusation was relevant to impeach credibility, but was cumulative of other evidence introduced for that purpose, i.e., evidence that victim once dreamed that her mother and defendant were kissing, had altered her testimony to make it less painful for her mother, and may have had access to the Playboy channel.

But see *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, finding federal constitutional error in exclusion of evidence, and declaring "grave doubt as to the effect of the error." Habeas relief was granted under *O'Neal v. McAninch* (1995) 513 U.S. 432. The Ninth Circuit characterized prosecutor's case as not strong, noting its reliance on Child Sexual Abuse Accommodation Syndrome, the disputed nature of the medical evidence, and noting that the excluded evidence could have persuaded the jury that the alleged victim

fantasized about sex.

C. ISSUES REGARDING THE TRIAL RECORD

1. Offer of proof

a. Statutory basis and purposes of requirements:

Evidence Code section 354 states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears on record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination."

Purposes of rule defined in *People v. Whitt* (1990) 51 Cal.3d 620, 648: "The problem is illustrated by Evidence Code section 354, which has long prohibited state appellate courts from reversing a judgment based on the `erroneous exclusion of evidence' unless there is a `miscarriage of justice,' *and* the `*substance,* purpose, *and* relevance of the excluded evidence was *made known* to the [trial] court by the questions asked, an offer of proof, or by any other means.' (Italics added.) The statute serves two important purposes where, as here, an appellant complains that questions he asked of his own witness at trial were wrongly disallowed on relevance grounds. First, the `offer-of-proof' requirement gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear. [Citations.] Second, even where the *question* is relevant on its face, the *appellate court* must know the `substance' or content of the *answer* in order to assess prejudice. [Citation.] This requirement is met only where the wording or context of the question makes the expected answer clear, or where the proponent of the evidence makes an offer of proof."

(b) When offer of proof is not required.

(i) When question discloses admissibility.

In *People v. McGee* (1947) 31 Cal.2d 229, 242, the defense called a medical expert and posed a hypothetical question regarding the treating physician's gross negligence of a shooting victim as the cause of death. Holding: "Defendant made no formal offer of proof, but such offer was not necessary because the questions themselves, together with colloquies with the trial judge, in the light of previously introduced testimony, clearly disclose their purpose, and since they were directed to defendant's own witness, they indicate that the answers were expected to be favorable to the defendant."

In *People v. Whitt, supra*, court determined that questions "Do you want to live?" and "Where do you desire to live?" were not "facially irrelevant" because "the range of constitutionally pertinent mitigation [in a capital case] is so broad." (51 Cal.3d at p. 647.)

(ii) When judge's rulings make offer futile

In *Beneficial etc. Ins. Co., v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 522, the court held: "Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general."

Montez v. Superior Court (1970) 10 Cal.App.3d 343, 351, notes statutory language that substance, purpose and relevance can be shown "by any other means." *Montez* holds that trial court refusal to allow defendant to call any of the 70 judges who selected grand jury members, unless a prima facie case of discrimination was first proved, obviated need for offer of proof regarding their testimony.

(iii) Evidence sought by questions asked during cross or recross:

Reason for exception: requiring cross examiner to disclose object of questioning would forewarn witness and hamper the cross examiner. (See *People v. Jones* (1911) 160 Cal. 358, 363.)

The recent case *Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93, states that

this exception is "simply a reaffirmation of the constitutional right of cross-examination." *Nienhouse* then notes that information sought on cross-examination from police officer concerned defendant's statements, a topic not covered on direct, and thus not a proper subject area for cross-examination. Consequently, offer of proof was required.

2. Specificity of offer as to substance of evidence.

The offer must indicate with precision the evidence to be presented and the witnesses who are to give it.

In *In re Mark C.* (1992) 7 Cal.App.4th 433, the defense offered expert testimony regarding father's lack of propensity to molest in a dependency action alleging he had molested his daughter. In trial court, father's attorney asserts that basis of expert opinion is results of arousal test involving a penile plethysmograph and 33 other standardized tests. On appeal, father concedes that penile plethysmograph not yet accepted by scientific community, but counters that the expert opinion was also based on 33 other tests. Court of Appeal finds noncompliance with Evidence Code section 354 because, "Neither the trial court nor this court has been given any meaningful information about the nature, content or import of these various standardized tests . . . . Because of the uncertainty in the record concerning the nature of the proffered evidence, we cannot say the juvenile court erred in excluding it." (*Id.*, at p. 445.)

In *People v. Sperl* (1976) 54 Cal.App.3d 640, defendant made an offer of proof in an attempt to have court give him an evidentiary hearing on issue of discriminatory prosecution. Defense counsel gave names of witnesses he wanted to call, but did not specify what their testimony would be. Held, "defendant's offer of proof . . . was totally inadequate . . . . We have no way of knowing what the evidence at the requested hearing would have shown . . ." (*Id.*, at p. 657.)

(a) Showing of purpose and relevance.

(1) General principles of relevance: Evidence must have tendency in reason to prove or disprove any disputed fact that is of consequence to determination of the action. Section

210 specifies that relevant evidence includes evidence relevant to credibility of witness or hearsay declarant.

(2) Deficient showings: In *People v. Schmies* (1996) 44 Cal.App.4th 38, defendant was charged with homicide in the death of citizen killed when struck by a police car pursuing defendant in a high speed chase. At trial, defense made offer to present expert testimony to prove unreasonableness of actions of pursuing police officer. Court of Appeal held that reasonableness of conduct of pursuing officers not in issue in prosecution for gross vehicular manslaughter, and that only disputed issue to which proffered evidence had potential relevance was whether officers' conduct was reasonably foreseeable response to defendant's conduct. As to that issue, the items of evidence which had been properly specified had no relevance.

In *People v. Fauber* (1992) 2 Cal.4th 792, 854, defense offered statements of missing husband allegedly killed by defendant to effect that he was in a bitter custody dispute with wife and that she had a contract out on him. Statements offered to impeach credibility of wife, but hearsay and relevance objections sustained. Supreme Court concedes evidence was relevant to prove that husband voluntarily vanished and was not murdered, and was nonhearsay evidence when so used, but since this ground not specifically raised below, defendant did not preserve issue for review.

In *People v. Pride* (1992) 3 Cal.4th 195, 234-235, defense offered tapes of six and a half hours of police interrogation, after prosecution introduced testimony of detective on a few discreet points. Relevance and purpose asserted in trial court was to prove defendant's "state of mind" at time of statements. On appeal, Supreme Court concedes that where one party has introduced part of a statement, opposing party may introduce any other part to place excerpts in context. However, "defendant made no offer of proof as to how the tapes of his police interviews might correct any misimpressions allegedly created by the testimony and transcripts actually before the jury."