S189733

1/A123957

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-v-

MICHAEL DAVID CORNETT,

Defendant and Appellant.

SUPREME COURT
FILED

JAN 13 2011

Frederick K. Ohlrich Clerk

Deputy

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

Appeal from the Judgment of the Superior
Court of the State of California for the
County of Sonoma No. SCR 504048

THE HON. RENE AUGUSTE CHOUTEAU, JUDGE

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District Appellate Project--
independent case system)

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PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

TO THE HONORABLE TANI CANTIL-SAKAUYE, Chief Justice, and to the honorable associate justices of the California Supreme Court:

COMES NOW MICHAEL DAVID CORNETT, appellant herein, and respectfully petitions this court for review of the decision of the Court of Appeal, First Appellate District, Division Two decided by written opinion filed December 6, 2010. A Petition for Rehearing was not filed. A copy of the partially published opinion is attached hereto.

This Petition for Review is filed pursuant to California Rules of Court, Rule 8.508, because it presents no grounds for review under Rule 8.500 (b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes.

BRIEF STATEMENT OF THE UNDERLYING PROCEEDINGS

On August 29, 2007, appellant MICHAEL DAVID CORNETT was charged by Information with sexual offenses against his two stepdaughters, Jane Doe 1 and Jane Doe 2. Against Jane Doe 1, he was charged with forcible oral copulation by a prior offender (Count 1, Pen Code §269, subd. (a)(4)); with oral copulation of a child under 14 (Count 2, Pen. Code §288a, subd. (c)(1); with oral copulation on a person 10 years of age or younger

(Pen. Code §288.7, subd. (b); and with an additional lewd act on the same date (Count 7, Pen. Code §288, subd. (a).)

With respect to Jane Doe 2, he was charged with three separate lewd acts occurring at different times (Counts 3, 4, 5). With respect to each count it was charged that he had a prior conviction under Penal Code section 288, rendering him punishable as a "habitual sexual offender" (Pen. Code §667.71.) He was convicted on each count and convicted of the enhancement, and also of having committed offenses under the "One Strike Law", involving substantial sexual conduct and offenses against more than one victim (Penal Code section 667.61, subdivisions (b) and (e)(5).) Moreover, appellant's prior conviction was a strike, making him liable to a double prison term (Pen. Code §1170.12) and also a serious felony, making him liable to a five-year enhancement to any prison term imposed (1 CT 33-42 [Information], 2 CT 371 [verdicts].)

On January 27, 2009, appellant was sentenced to a determinate term of 10 years in state prison, plus an indeterminate term of 150 years to life. As we make no contentions on appeal as to sentence, the basis for the sentence may be omitted. On February 4, 2009, appellant filed his timely Notice of Appeal (2 CT 380). On December 6, 2010, the Court of Appeal reversed the conviction on Counts 6 and 7, but this did not affect appellant's prison term as the sentence on that count had imposed concurrently.

BRIEF STATEMENT OF THE FACTUAL AND LEGAL BASES OF THE CLAIM

Appellant was arrested because his stepson observed him performing an act of oral copulation on Jane Doe 1, and he was convicted of this offense based on her testimony, her brother's testimony, and a DNA test that showed he had deposited saliva on her genitals. He was also convicted of additional offenses against Jane Doe 1 and against her sister Jane Doe 2, based on testimony that was often vague and uncertain, and based on the transcript of an interview conducted with Jane Doe 2 as a part of the investigation (at trial, Jane Doe 1 expressly denied any improper touching other than the oral copulation, but Jane Doe 2 claimed her sister had touched appellant's penis).

Pursuant to Evidence Code section 1360, the prosecutor was permitted to play most of the videotaped interview with Jane Doe 2, which was substantially clearer and more incriminating than her testimony at trial. No representative of appellant was present at this "forensic interview."

We made the following contentions below, with respect to this evidence:

I

ADMISSION OF THE VIDEOTAPED INERVIEW WITH JANE DOE 2 DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

Prior to trial, the People moved pursuant to Evidence Code 1360, *People v. Poggi* (1988) 45 Cal.3d 306, and *People v. Brown* (1994) 8 Cal.4th 746, to admit Exhibit 23, the videotape of the interview of Jane Doe 2 by Susan Levi of the Redwood Children's Center (1 CT 164). The court heard the motion in limine, and announced that it would allow the evidence, if not cumulative (2 RT 44). Defense counsel did not object (3 RT 428).

Thereafter, the videotape was authenticated by Ms. Levi, and the tape was allowed in without further objection (3 RT 428) and played for the jury (3 RT 455-456). A transcript of the interview is in the appellate record (Aug. CT 64 –73).

We will argue that after *Crawford v. Washington* (2004) 541 U.S. 36, the evidence was inadmissible.

A. Evidence Code section 1360 provided the sole ground for admissibility of the videotaped interview of Jane Doe 2.

Evidence Code section 1360 allows admission of all statements of a child describing acts of child abuse or neglect, if the court determines they are reliable, and the child either testifies at the proceedings or is unavailable as a witness, but his or her statements are corroborated by other evidence.

The hearsay rule as to such statements has been repealed; accordingly, such evidence is admitted for the truth of the matters stated therein. In contrast, *People v. Brown, supra*, simply allowed evidence of the time and circumstances of the first complaint of sexual abuse in order to assist the jury in its evaluation of the veracity of the complaint. The details of the complaint should ordinarily not be repeated, and the jury must be instructed that the complaint is not to be used as positive evidence that the complained-of molestation took place. (8 Cal.4th at pp. 761-762, 763). *People v. Poggi, supra* deals with spontaneous declarations and it was not contended that Susan Levi's interview of Jane Doe 2 at the Redwood Children's Center was a spontaneous declaration.

Nor was there any attempt to introduce some portion of the statements as a prior inconsistent statement (Evid. Code §1235); indeed Jane Doe 2's testimony was not, as it related to what appellant did to *her*, substantially inconsistent with what she had told Susan Levi. Because defense counsel did not cross-examine Doe 2 on any prior inconsistent statements, and did not claim that her testimony was "recently fabricated" or influenced by bias or other improper motive, there was likewise no ground for admission of the interview as a prior consistent statement, because prior consistent statements may only be admitted to rehabilitate a witness (Evid. Code §791).

Accordingly, the *only* basis for admission of the videotaped interview was Evidence Code section 1360.

B. Admission of the evidence violated the Confrontation Clause.

(1) Constitutional and decisional background

The Sixth Amendment lists trial rights of federal defendants; these include the right "to be confronted with the witnesses against him." California has an identical provision (Calif. Const., art. I, §15). It has long been the case that the while the states may fashion their own rules of evidence, the broad admission of unreliable hearsay in a criminal case denies a criminal defendant due process of law under the Fourteenth Amendment. In *Ohio v. Roberts* (1980) 448 U.S. 56, 57 the Supreme Court held that where new or nontraditional exceptions to the hearsay rule allow admission of evidence against a defendant, the Confrontation Clause is violated unless it can be shown that the evidence obtained has "particularized guarantees of trustworthiness." In *Idaho v. Wright* (1990) 497 U.S. 805, 820, the United States Supreme Court held that new and untraditional exceptions to the hearsay rule violate the confrontation clause unless the evidence is so reliable that "the test of cross-examination would be of marginal utility."

However, in *People v. Eccleston* (2001) 89 Cal.App.4th 436, the Court of Appeal upheld the statute against a challenge based on the

Confrontation Clause of the Sixth Amendment. Because section 1360 requires the trial judge to deny admission of the evidence unless the "time, content and circumstances of the statement provide sufficient indicia of reliability", the statute does not violate the principles stated in *Ohio v. Roberts* and *Idaho v. Wright*. Until 2004, no published opinion disagreed with *Eccleston* on this point.

Then the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. 36. In this opinion, sometimes described as a "bombshell", the High Court held that *Ohio v. Roberts* was wrongly decided, insofar as it allowed the admission of "testimonial" hearsay, of the sort that would have been inadmissible in 1791, when the Bill of Rights was ratified by the States. "Testimonial" hearsay is the functional equivalent of an affidavit, and includes police interrogations of suspects and witnesses. There seems to be little doubt that it also includes structured questioning of child victims by organizations that work with the police to provide statements that may later be used in court, as in this case, where by protocol the Redwood Children's Center conducts interviews of child sexual assault victims, and the police limit their questioning accordingly, so as to reduce the number a times a child must tell her story.

In *People v. Sisavath* (2004) 118 Cal.App.4th 1396, the Court of Appeal held that after *Crawford*, structured interviews of children do not in and of themselves produce admissible evidence. If the child does not

testify, the statements cannot be used, and to that extent, section 1360 is unconstitutional. The People did not seek review, and *Sisavath* may be regarded as settled law on this point.[1]

Sisavath was a case where the child was called as a witness, but like Jane Doe 2 at the preliminary hearing in this case, was unable to answer the questions she was asked; accordingly, she did not qualify as a witness. Here, Jane Doe 2 *did* testify at trial. Obviously her testimony was admissible, but so, the People successfully argued, was her interview by Susan Levi. *Crawford, supra*, does not purport to bar prior statements of a witness who is available for cross-examination at trial. And, under *California v. Green* (1970) 399 U.S. 149, some prior statements of witnesses are admissible in the prosecution's case in chief, at least if admitted as prior inconsistent statements under Evidence Code section 1235.

But what if the sole basis for admission of the statement is Evidence Code section 1360? In the next subsection, we discuss this.

[1] Sisavath did seek review, which was denied on September 15, 2004 (S125799).

(2) Where the child's statements are not deemed to be inconsistent with trial testimony, *California v. Green* does not permit them to be used as evidence in the prosecution's case in chief, and the principles of *Crawford v. Washington* compel exclusion.

The problem in this case is, the testimony of Jane Doe 2 was not truly inconsistent. She did not repudiate what she had said before, and certainly did not remember what she had said before. Standing alone, it is highly doubtful that her testimony would have been believed. She could easily have been coached. In large part, what she said was contradicted by her sister. Although the jury did not learn this, she had been unable, emotionally, to give testimony six months after the alleged crimes, and it seems unlikely that any juror could have had confidence in her ability to remember what happened two years before. The most that could be said is that something like what she described could have happened at some time or some place.

However, what she told Susan Levi on 2007, a "short couple of days" after the event (3 RT 418) suffers from none of these infirmities. She may, even then, have been confused about when things happened, but the events were still fresh in her mind. It was this, and not what she testified to two years later, that was of paramount importance. And the jury was told without equivocation or limitation that this evidence was not only admissible, but could be taken "as evidence that the information in those

earlier statements is true" (2 CT 301, CALCRIM No. 318). These interviews covered most of the counts dealing with Jane Doe 2: She saw appellant's erect penis and touched it (Aug. RT 64). He pulled down his pants on "night two", which is the day her brother came down with the camera (Aug. RT 65). This was the same night she and her sister did "flips on the bed" (Aug. RT 66). She saw "white stuff" come out of appellant's penis, and then appellant told both girls to touch his penis (Aug. CT 67). Previously that evening, he had told both girls to get naked when they bounced on the bed, but had them get dressed again in case someone saw them (Aug. CT 70). And on the previous Saturday, appellant had put his hand in Doe 2's pants, on her bare butt and on the front part (Aug. CT 72, 73).[2]

We suggest that *California v. Green, supra*, cannot be taken as authority for the admission of statements by a child witness whose trial testimony is not truly contradicted by the prior statement and who by reason of age and passage of time cannot meaningfully be examined by the defendant's lawyer. We also suggest that the principles of *Crawford v. Washington* (2004) 541 U.S. 36, 158 L.Ed.2d 117, 124 S.Ct. 1354 require

[2] In the part of the tape played for the jury, Doe 2 did not claim that appellant had kissed or touched her vagina while she was bouncing naked on the bed. However, the District Attorney argued that according to Doe 1, appellant blew on Doe 2' svagina, and whether or not he also orally copulated her, it was a violation of Penal Code section 288 to hold her legs and blow on the vagina, with lewd intent (5 RT 671).

exclusion of prior statements as positive evidence in this case. Here, after appellant's arrest, the allegations regarding Jane Doe 2 came to the attention of the police. Rather than interview Doe 2 themselves, the police, following law-enforcement protocol, transported her to the Redwood Children's Center for an interview by a trained sexual-assault interviewer. It can hardly be denied that the purpose of that interview was to obtain and preserve evidence for later use in court. Accordingly, the evidence was the modern equivalent of the Marian process of obtaining *ex parte* evidence in criminal cases, and was "testimonial" (see *People v. Sisavath, supra*). There was, of course, no possibility of cross-examination of Jane Doe 2 while she was being interviewed, and as it turned out, no possibility of cross-examining her at the preliminary hearing. By its terms, the *Crawford* decision only applied to cases where the hearsay declarant did not testify under oath and subject to cross-examination. However, there is substantial authority for the proposition that where testimony is not truly inconsistent with prior statements, it is error to admit them (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, 1220; *People v. Arias* (1996) 13 Cal.4th 92, 153). Logically, if *Green* does not apply, and due to passage of time or immaturity of the declarant, meaningful cross-examination as to the statements is impossible, that error is a violation of the Confrontation Clause Thus, because the primary purpose of admission of the Levi interview of Jane Doe 2 was to provide credible evidence of what appellant

had done to Doe 2, and not to impeach any inconsistency in her statement, admission of the statement denied appellant his Sixth Amendment right to confront the witnesses against him.

C. Although appellant's trial counsel did not object, objection would have been futile.

As noted, *Crawford* only considered cases where the hearsay declarant did not testify and was not available for cross-examination. Here, Jane Doe 2 *did* testify. Therefore, *Crawford* would not seem to apply, and, under *Eccleston*, *supra*, any objection to Judge Antolini's ruling that the Redwood Children's Center interview would have been futile. Counsel could, by the terms of the statute, have asked the judge to rule that the "time, content, and circumstances of the statement" did not provide sufficient indicia of reliability (see Evid. Code §1360, subd. (a)(2),) but there clearly was no basis for such an argument. Jane Doe 2 was interviewed relatively soon after the charged events by a trained and impartial interviewer. The statements may or may not have been true, but the manner in which they were taken was not unreliable.

No appellate case has held that where a child witness testifies at trial, the defendant's right to confrontation has been violated by the admission of prior statements made to the police or similar interviewers. Accordingly, defense counsel could not have had any chance to exclude the statement of

Jane Doe 2. "The law neither ... requires idle acts", Civ. Code §3532, nor punishes defendants when their counsel do not make futile objections. *People v. Hill*, 17 Cal.4th 800, 820 (1998) [reviewing claims on appeal that would have been denied if made to the trial judge]. A defendant need not object if it would have been futile to do so. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; see *People v. Boyette* (2002) 29 Cal.4th 381, 432.)

II.

IT WAS LEGAL AND CONSTITUTIONAL ERROR TO INSTRUCT THE JURY IN THE LANGUAGE OF CALCRIM NO. 318 THAT THE PRIOR STATEMENT OF JANE DOE 2 WAS AFFIRMATIVE EVIDENCE

A. This contention may be considered on appeal though no objection was made to the jury instruction.

In California, exceptions to jury instructions are preserved, even though no objection was made before. In a case presenting this exact issue, *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1038, the Court of Appeal so held, citing Penal Code section 1259 and *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7).

B. The instruction should not have been given, because the use of prior statements denies the defendant his right to confront the witnesses against him where the admission of the statements is based on a social policy that admits such statements in child molestation cases, regardless of whether there is a contradiction.

The statements were deemed admissible before the trial began, not based on some expectation that Jane Doe 2 would contradict herself, but because they were clearly admissible under Evidence Code section 1360. It follows that *California v. Green*, *supra*, has no application to this case. *Green* was based on the supposition that the defendant benefits when a witness recants his testimony at trial. The jury gets to hear the recantation, and it is only fair, and not a violation of the Confrontation Clause, if the jury can hear and act on the contradictory statement given to the police or to other witnesses. We disagree with the Supreme Court on this point, and refer this Court to the dissenting opinion of Justice Brennan in *Green*, *supra* (339 U.S. 189-203) and cogent and persuasive opinion of Justice Mosk in the underlying case of *People v. Green* (1969) 70 Cal.2d 654. However, we recognize that this Court is in no position to overrule the United States Supreme Court.

However, where there is effectively no contradiction, we do not see that *Green* can apply. Instead, *Crawford* applies, and its principles demand that the statement be excluded, as explained in the previous section.

Accordingly, it was error under the Fourteenth Amendment and the Confrontation Clause to allow the jury to use the videotaped interview with Susan Levi as positive evidence of the crimes that may have been committed.

C. The instruction was prejudicial

If the videotape should have been excluded on constitutional grounds, then it was error to instruct the jury that its contents should be considered as evidence, and the burden is on the People to show beyond a reasonable doubt that the error was harmless (*Chapman v. California* (1967) 386 U.S. 18). They cannot do so in this case, because it is evident that the prior statement, taken by a skilled interviewer shortly after the alleged events, was worthy of far more belief than the testimony, given two years later, by an eight-year-old girl recounting something that allegedly happened when she was six.

III.

IF OBJECTION WAS REQUIRED TO PRESERVE AN ISSUE FOR APPEAL, FAILURE TO OBJECT TO THE VIDEO EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, DEPRIVING APPELLANT OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

If this Court deems that some objections were waived or forfeited by failure to object, then that failure was the result of constitutionally

ineffective assistance of counsel.

Reasonably effective assistance includes the filing of appropriate motions (*In re Neely* (1993) 6 Cal.4th 901, 919; *People v. Farley* (1979) 90 Cal.App.3d 851, 868) and making proper objections (*People v. Borba* (1980) 110 Cal.App.3d 989, 994; *People v. Nation* (1980) 26 Cal.3d 169, 181-182). Finally, counsel must know the law as it relates to the case he is trying (*People v. Zimmerman* (1980) 102 Cal.App.3d 647, 657; *People v. McCary* (1985) 166 Cal.App.3d 1).

Where a defendant has not received "reasonably effective" assistance of counsel in a criminal trial, he has been denied due process of law under the Sixth and Fourteenth Amendments to the United States Constitution (*Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 693, 694, 104 S.Ct 2052]). Ineffective assistance is demonstrated when there has been a failure to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate (*People v. Pope* (1979) 23 Cal.3d 412, 425). Where the issue is raised on appeal, it must be based on the appellate record; "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Cunningham* (2001) 25 Cal. 4th 926, 1003).

Here, the only possible reason for not objecting to the admission of the videotape on Constitutional grounds would have been that any objection

would be futile. Yet, if this Court considers whether it was ineffective assistance of counsel not to raise and preserve for appeal constitutional grounds, then this court may have concluded that objection might not have been futile. Or – and this is of paramount importance where appellant is a life prisoner and may benefit from future changes in the law, that it is the duty of trial counsel to preserve, at all costs, objections based on violations of the Bill of Rights and the Fourteenth Amendment.

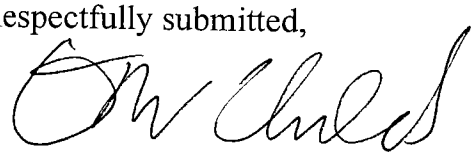
Certainly no reason appears why, at least at the in limine hearing, and then briefly at the time the videotape was introduced, defense counsel could not have objected on confrontation-clause grounds, to preserve the record. Failing to object gave appellant no conceivable advantage – in the highly unlikely event that the trial judge had decided to exclude the interview, defense counsel could still have used it if he felt that some statement made to Ms. Levi was inconsistent with Doe 2's testimony.

CONCLUSION

For the foregoing reasons, appellant was denied due process of law under the federal Constitution, and we ask that review be granted of the federal issues that may subsequently be presented in the federal system.

Dated: January 11, 2011

Respectfully submitted,



OZRO WILLIAM CHILDS
Attorney for appellant

CERTIFICATE OF WORD COUNT

I am counsel for appellant herein, and hereby certify that there are 3864 words in the brief to which this certificate is attached, excluding tables, this certificate, and any attachments authorized by Rule 8.360(b), California Rules of Court.

This certification is based on the word count feature of Office X for Macintosh, used to prepare the final version of this brief.

Dated: January 11, 2011

OZRO WILLIAM CHILDS

Filed 12/6/10

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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

Court of Appeal First Appellate District
FILED
DEC - 6 2010
Diana Herbert, Clerk
by _____ Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DAVID CORNETT,

Defendant and Appellant.

A123957

(Sonoma County
Super. Ct. No. SCR-504048)

Defendant Michael Cornett was charged with molesting his two stepdaughters, 10-year-old Jane Doe 1 and six-year-old Jane Doe 2, with the final instance captured in a photograph taken by defendant's 12-year-old stepson. A jury found defendant guilty on all seven felonies alleged against him, and found all special allegations to be true—including that 11 years earlier he had been convicted of molesting yet another stepdaughter. Defendant was sentenced to 10 years, plus 150 years to life in state prison.

Defendant makes numerous arguments on appeal, asserting myriad errors during trial and at sentencing. The People concede that two of the arguments as to sentencing on count 6 are well taken, and we conclude that an argument as to the conviction on that count has merit as well, requiring a reversal of the conviction on that count.

We shall also reverse the conviction on count 7, alleging commission of a lewd and lascivious act on a child under the age of 14 (because no evidence regarding that offense was presented at the preliminary hearing), modify two rulings made at sentencing, and in all other respects affirm, leaving defendant convicted of six felonies.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the entire section entitled "Evidence at Trial" and section entitled "Discussion" parts A, B, C, E.1 and E.2.

The judgment is affirmed as modified, a modification that does not affect the aggregate sentence imposed by the trial court.

All these issues, save one, are addressed in the unpublished portion of this opinion. The singular exception, the one issue addressed in the published portion of the opinion, is an issue apparently never before addressed in California: was Jane Doe 1, who was 10 years 11 months at the time of the molestation, a "child . . . 10 years of age or younger" within Penal Code section 288.7, subdivision (b),[1] the offense charged in count 6. We answer in the negative, concluding that "a child who is 10 years of age or younger" excludes children who have passed the 10th anniversary of their birth.

EVIDENCE AT TRIAL*

The Incident on January 9, 2007*

Defendant and Angela Cornett, who had been friends since they were young, began dating in May 2003 and married in November the following year. At the time they began dating, Angela had three children from a prior relationship—three-year-old Jane Doe 2, seven-year-old Jane Doe 1, and 10-year-old Dion.[2]

At some point near the end of 2006, Angela and defendant, who had been living in Marin, bought property in Sebastopol. There were multiple houses on the property, all of which needed work before they were habitable. Angela, defendant, and the children were going to live in one house, and Angela's mother and father were each going to live in one of the two smaller houses. By January 2007, most of the work had been completed on the main house, and Angela and her family had moved in. The house for Angela's father was almost ready, with some minor work remaining to be done.

On the evening of January 9, 2007, Angela was sleeping on the couch in the main house. She woke up, noticed it was time for the girls to go to bed, and asked Dion to tell

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

* See footnote, *ante*, page 1.

* See footnote, *ante*, page 1.

[2] During their relationship, Angela and defendant also had a son together.

his sisters it was bedtime. According to Dion's testimony, at the time, Jane Doe 1 was at her grandfather's future house, and Jane Doe 2 in the main house. Dion went to his grandfather's house and looked in the living room window. He did not see anyone, so he tried to open the front door, but it was locked. Noticing that the bedroom light was on, he walked over to the bedroom window. Peering inside, Dion saw Jane Doe 1 lying on her back on the bed. She was wearing nothing but a shirt and had her legs open. Defendant was on top of her, with his hands pushing her legs down, orally copulating her.

Dion ran back to the main house, grabbed a camera, and returned to his grandfather's house. Again looking through the window, he saw defendant in essentially the same position as before, although his head was now up. Dion took a picture through the window, ran back to the main house, told his mother, "Mom, he's molesting Jane Doe 1," and showed her the picture he had taken.

Angela ran down to the grandfather's house, where she found Jane Doe 1 sitting on the coffee table watching television and defendant doing some work on the countertop in the kitchen. She repeatedly demanded to know "[w]hat the hell's going on here?" Defendant responded that he did not know what she was talking about. Dion, who was right behind Angela, said, "You were licking her vagina," which defendant denied. After sending Dion and Jane Doe 1 back to the main house, Angela continued to confront defendant, at one point punching him in the face. Defendant eventually changed his story, claiming that it happened because Jane Doe 1 instigated it, although he was vague about what happened.

Once back at the house, Dion called "Auntie Yaqinah," a close family friend considered to be an aunt by Dion and his sisters. Dion told Yaqinah he saw defendant on top of Jane Doe 1 and they were "doing it." When Yaqinah suggested that perhaps he was mistaken and that he should get some evidence, Dion told her he had already taken a picture. She then told him to call the police, which he did.

Yaqinah also spoke with Jane Doe 1, who sounded "shaky." Jane Doe 1 told her that she was playing in her grandfather's house when defendant came into the room,

pushed her down on the bed, and pulled down her clothes. He started touching her with his hand and then, according to Jane Doe 1, "He did it."

Yaqinah also spoke with Angela who was "really, really upset." Angela told her that defendant had admitted everything.

Santa Rosa Sheriff Deputies Cutting and Salkin arrived within minutes and found defendant and Angela standing in the driveway. As Deputy Cutting began speaking with defendant, he detected an odor of alcohol but observed no outward symptoms of intoxication. When the deputy asked defendant if he knew why he, the deputy, was there, defendant responded that his stepson had called the police. Defendant then volunteered that he had been doing some work at what was going to be his father-in-law's house when Jane Doe 1 came in to have a conversation. During this conversation, she was seated on the bed and he was standing a few feet away. According to the deputy, at no point did defendant ever mention that he horsed around with Jane Doe I, tickled her, or gave her a raspberry, or that he bent down to pick up screws.

That night, Jane Doe 1 was taken to Redwood Children's Center (RCC) for a forensic interview.[3] A genital swab and a blood sample were also taken, and analysis of the swab determined that the sample contained amylase, an enzyme found in saliva. A DNA analysis of the genital swab and an oral swab taken from defendant determined that his DNA matched that found on the genital swab. The likelihood that someone's DNA would match that found in the genital sample was 1 in 3.2 quadrillion African-Americans, 1 in 51 trillion Caucasians, and 1 in 800 trillion Hispanics.

The next day, Detective Joel Pedersen of the Sonoma County Sheriff's Department spoke with Angela. She told him that Jane Doe 2 had told her defendant had

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[3] Susan Levi, who conducted the interview, explained at trial that a forensic interview is an interview of a witness to or victim of a crime that is conducted by someone who is trained with an eye toward obtaining evidence that would be admissible in court. All children and adults interviewed at RCC are involved in an active police investigation.

orally copulated her the previous night. Consequently, Jane Doe 2 was taken to RCC to be interviewed.

Interview of Defendant*

Defendant was taken to the Sonoma County Sheriff's Department, where he was interviewed by Detective Pedersen in the early morning hours of January 10, 2007. Defendant initially told the detective that while he was working on the kitchen that evening, Jane Doe 1 came into the house and went into the bedroom, where she started doing gymnastics on the bed. She called for him to come into the room because she wanted to discuss something that had happened. While she was still jumping on the bed, defendant dropped some screws so he bent down to pick them up. Dion then ran into the room or began banging on the door and saying, " 'I took a picture of you. I took a picture of you.' " When Detective Pedersen asked defendant if he had touched or come into close contact with Jane Doe 1, defendant responded, " 'I mean, I don't even remember—I don't remember even brushing up against her, but it's—it's a very tight space right there.' "

Over the course of the interview, defendant's version of the incident evolved. At one point he claimed he "probably" horsed around with Jane Doe 1 a bit while she was bouncing on the bed and that it was possible he tickled her on his way back up from picking up the screws. At another point, he said he believed he pushed her down on the bed and then tickled her. He later claimed he sometimes tickled the girls and gave them raspberries—"you know, blow on their belly"—but he could not remember if he had given Jane Doe 1 a raspberry that night, and was pretty sure he had not.

Detective Pedersen specifically asked defendant about Jane Doe 1's pants coming down. At that point, defendant denied that her pants were down. When asked about her shirt coming up, defendant first said he did " '[n]ot specifically' " remember that happening, but then later said, " '[Y]ou know, I mean, we're jumping around on the bed and you're wearing loose clothes, it's entirely possible that, um, clothes move around.' "

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* See footnote, *ante*, page 1.

When Detective Pedersen again asked defendant what happened that night, defendant offered yet another version. This time, he claimed Jane Doe 1 was in the bedroom doing flips on the bed. He told her to get off the bed and may have tickled and horsed around with her a bit: " 'I may have even, um—nah. I was thinking I may have even, you know, bounced her back on the bed or something. But I was telling her to get off the bed so I'm pretty sure I didn't do that.' " When asked again about her pants coming down, defendant this time responded, "Um, I mean, I guess if she had scooted back on the bed when I was bending down to pick up the screws. As I said, I don't remember seeing her pants down."

Detective Pedersen also asked what the picture Dion took was going to show. Defendant said he did not know, that he would have to see the photo. When asked how Jane Doe 1's legs got up in the air, defendant hypothesized that they may have come up when he was tickling her, like she scrunched her legs up, contradicting a prior claim that her legs were never in the air. He also said that his arms may have gotten tangled up in her legs either when she scrunched her legs or when he was standing back up.

Detective Petersen asked defendant, " 'When I find your DNA that's been swabbed off of her vagina from your saliva, why would it be there?' " Defendant suggested " 'maybe drool.' " When asked how his drool got on Jane Doe 1's vagina, defendant responded, " 'Unless I did—I don't know—drool a little bit on her stomach and then she put her hand down there and did it. I don't know. I mean, I know that's pretty impossible any other way.' "

Detective Pedersen asked defendant to summarize the incident one more time. Defendant explained that he was working on the house when Jane Doe 1 came in, went into the bedroom, and began bouncing and doing flips on the bed. He went into the room and told her to stop bouncing on the bed. She told him something about her brother, and he said he would look into it. She then rolled back, did a back-flip, and bounced over the edge of the bed. He then tickled her, and when she squirmed, he dropped his screws. He bent down to pick up the screws and tickled her again as he was getting up. He did remember part of her belly being exposed because " 'that's a prime tickling spot.' "

Prior to the interview, Detective Pedersen had run a criminal history on defendant and learned he had previously molested another stepdaughter. During the interview, the detective asked defendant about this prior conviction. Defendant claimed that his stepdaughter at the time, Jessica, came to him and told him that some of her friends were doing "things" with their stepbrothers. According to defendant, he felt that she was probing him to find out what he thought about it, so he told her that what her friends were doing was inappropriate and they should stop. Defendant had also had a conflict with Jessica during her birthday party, that she was arguing with her girlfriends so he told her the party was over. The next day he was contacted by the Marin County Sheriff's Department. He told them that Jessica had grabbed him in the crotch a few times—" 'more or less playing' "—and the next thing he knew he was signing a confession to something he had not done.

Detective Pedersen's interview with defendant was being recorded, and after the detective left the room, defendant could be heard saying, " 'Oh, fuck, I'm so fucking scared. It's all over.' "

Testimony of Jane Doe 1 and Jane Doe 2*

Jane Doe 1, who was 12 years old at the time of trial, testified that on the evening of January 9, 2007, she and Jane Doe 2 were in their grandfather's future house with defendant. Defendant was doing some work, while the girls were jumping on the bed in the bedroom. Defendant came into the bedroom and told the girls to take their clothes off and jump on the bed naked. Jane Doe 1 testified that she was "pretty sure" Jane Doe 2 took all of her clothes off, although she "d[id]n't know."[4] During her interview at RCC, Jane Doe 1 had told the interviewer that Jane Doe 2 had taken off all her clothes. Jane Doe 1 also testified that Jane Doe 2 had jumped on the bed naked at defendant's request, and when she did a handstand, defendant held her legs and blew on her vagina.

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* See footnote, *ante*, page 1.

[4] Jane Doe 1 testified that she was nervous and having a hard time remembering what happened that night.

According to Jane Doe 1, she herself did not take off her clothes, and did not jump on the bed naked.

At some point, Jane Doe 1 took her sister back to the main house to go to bed. She then returned to her grandfather's house to turn off the bedroom light. Defendant was still there, and he followed her into the bedroom. He told her that she could lie down, and when she said she did not want to, he put his hands on her shoulders and forced her down. When he started to take off her pants and underwear, she told him to stop but he did not. He started to touch her, putting his mouth and his hands on her vagina. She then saw a flash at the window. Defendant said he thought he saw a flash, stopped touching her, and left the room.

Jane Doe 1 pulled up her underpants and pants and tried to get out of the house. She did not know how to unlock the door, however, so she sat down and watched television while defendant went into one of the back rooms. She soon heard banging on the door, looked out the window and saw that it was her mother and Dion; figuring out how to open the door, she let them in. Her mother told her to go back to the main house, which she did. She then went into her room and crawled into bed in the dark, feeling scared and upset.

Jane Doe 2, who was eight years old at the time of trial, also testified about what happened the evening of January 9, 2007. As she described it, she and Jane Doe 1 were playing at their grandfather's house. Defendant had told them not to wear any clothes, so both she and her sister were naked. They were playing on the bed, and when she did a handstand, defendant touched her vagina with his tongue. According to Jane Doe 2, Jane Doe 1 also did handstands on the bed, and defendant touched her, too. The two girls then sat down on the bed, and defendant unzipped his pants, pulled down his underwear, and told the girls to touch his penis. Both girls touched it with their hand. Jane Doe 1 then took her back to the main house and put her to bed, although she did not go to sleep until after the police left later that night.

A video recording of a portion of Jane Doe 2's RCC interview was played at trial. In the interview, Jane Doe 2 talked about defendant showing her his penis. As she

described it to the interviewer, "It was standing up straight," "[i]t was kind of a little bit soft," "[b]ut it was really rough." She drew of a picture of defendant's genitals, including two "balls" like "basketball[s]" and then the penis with "little bumps." Jane Doe 2 also described having seen defendant's "boy part" on more than one occasion, one of which was on January 9, 2007, when she and Jane Doe 1 were in their grandfather's house. She described "stuff" coming out of the "boy part." Defendant told both girls to put their finger in the hole at the tip of his "boy part." Jane Doe 2 did as defendant instructed, but she told the interviewer that she was uncertain whether Jane Doe 1 did so. At some point, defendant "squeezed" his penis and "weird, greasy stuff" that was white came out and went onto the "boy part." Defendant then pulled up his pants. At some point that same night, defendant told the girls to take their clothes off. After they jumped around on the bed, he told them to put their clothes back on before anyone saw them.

Jane Doe 2 also described an incident in which defendant touched her "back here and in here." When prodded to describe what that meant, she marked her genitals on a picture of a little girl and wrote that defendant touched her "butt." On more than one occasion, when they were alone in the kitchen, defendant put his hand under her clothes and touched her skin. Although she could not identify how many times this occurred, she specifically identified "Saturday" as one of the times this happened.[5]

Additional Evidence at Trial[*]

Defendant's former stepdaughter Jessica also testified at trial. Jessica, who was 23 years old at the time of trial, was younger than 10 years old when she met defendant, who married her mother and came to live with them. She recounted how defendant would come into her room at night, put his hands inside her clothes, and touch her vagina, chest, and bottom. Jessica pretended to be asleep when it happened and never said anything while defendant was touching her. This happened frequently, three to four times a week in the beginning and then once or twice a week after her little sister was born. It went on

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[5] "Saturday" was presumably January 6, 2007, the date of the molestation alleged in counts 4 and 5.

[*] See footnote, *ante*, page 1.

for "a few years" and stopped when she was in fifth grade because she "[g]ot tired of it" and told her school principal. She never told anyone before that because defendant used to hit her when she was younger, and she was afraid of his anger.

Kristin Allen, an investigator in the Sonoma County District Attorney's Office, also testified. In 1996, when she was a detective with the Marin County Sheriff's Office, she interviewed defendant in connection with allegations by then 12-year-old Jessica that he had sexually molested her. During that interview, defendant told her that Jessica was beginning to go through puberty and had approached him because she was curious about sexuality, claiming that she was planning on becoming sexually active and was, in fact, sexually active with her stepbrothers. Defendant claimed he was concerned for her and wanted to talk to her about it, but Jessica said that the only way she would tell him what she and her stepbrothers were doing was to act it out with him. According to defendant, Jessica also told him she was interested in being sexually involved with him. Defendant explained that it began with a few incidents of fondling, and then evolved to genital-to-genital touching. According to Allen, defendant then signed a written confession.

The prosecutor introduced into evidence the information, guilty plea, and abstract of judgment from the resulting conviction.

The prosecutor also played for the jury four telephone calls between Angela and defendant that occurred while he was incarcerated and awaiting trial. In one call, defendant told Angela, "I've not only destroyed my life, but many lives around me." In another, when Angela remarked that everything they had had been "ripped" away, defendant responded, "Unfortunately, I'm the one who did it. And it eats at me every single day." Later in the same call he admitted to being "ashamed." In a third call, defendant apologized to Angela and remarked that he could not believe he had destroyed their lives. In that same call, he told her that everything he had read about the case against him was "complete lies." Angela responded that while she did not know what the children's statements said, "I know, and you know, what happened."

In the fourth telephone call, defendant was talking about his upcoming preliminary hearing and told Angela that he needed to "get . . . some recantation on . . . statements

that were made," because they were not true. Angela asked if that meant he lied to her on the night of the incident, presumably referring to his admission that something happened between him and Jane Doe 1, albeit supposedly at her instigation. After claiming he did not remember the conversation, he eventually responded, "I'm always honest with you, Sweetheart." He then reiterated his desire to get the children to recant their prior statements, to "get new statements saying that what is in the previous statements is completely wrong, . . . was made up out of . . . fear or coaching."

Angela also testified about a letter defendant sent to his sister, which his sister then forwarded to Angela. In the letter, he again discussed getting the children to change their stories. The letter also mentioned Jessica, his former stepdaughter, again asking his sister to try to contact her and get her to retract her story that he previously molested her.

Dr. Anthony Urquiza, a clinical psychologist, testified as an expert in the area of child sexual abuse accommodation syndrome. Dr. Urquiza testified that it is typical for a child who has been sexually abused to delay disclosing the abuse due to fear, embarrassment, and shame. He explained that abused children are often coerced, both overtly and covertly, to keep quiet about the abuse. When the child does disclose the abuse, it typically happens as a process over time. In other words, the child will often initially disclose one aspect of the abuse and then wait to see if he or she will get in trouble. If not, the child will then add more to the disclosure, and even more later on. Sometimes, a child discloses sexual abuse, and then later retracts or minimizes the allegation due to family pressure, negative consequences, or the other parent's continuing relationship with the perpetrator.

Dr. Urquiza also explained that because children often have a relationship with the abuser, they are reluctant to disclose the abuse because they do not want the person they like to get in trouble. They also fear break up of the family if the abuser is a family member.

PROCEDURAL BACKGROUND

By complaint filed January 11, 2007 and amended on May 16, 2007, the District Attorney of the County of Sonoma charged defendant with the following five felonies:

(1) aggravated sexual assault upon Jane Doe 1, a child under the age of 14 years, on January 9, 2007 (§ 269, subd. (a)(4)); (2) oral copulation upon Jane Doe 1, a child under the age of 14 years and more than 10 years younger than defendant, on January 9, 2007 (§ 288a, subd. (c)(1)); (3) commission of a lewd and lascivious act on Jane Doe 2, a child under the age of 14 years, on January 9, 2007 (§ 288, subd. (a)); (4) commission of a lewd and lascivious act on Jane Doe 2, a child under the age of 14 years, on January 6, 2007 (§ 288, subd. (a)); and (5) commission of a lewd and lascivious act on Jane Doe 2, a child under the age of 14 years, on January 6, 2007 (§ 288, subd. (a)).

The amended complaint also alleged the following enhancements as to all counts: (1) defendant was previously convicted, on April 25, 1996, of committing a lewd act upon a child in violation of section 288, subdivision (a) (§ 667.71); (2) defendant committed offenses against more than one victim (§ 667.61, subd. (b)); (3) on April 25, 1996 defendant was convicted of violating section 288, subdivision (a) (§ 1203.066, subd. (a)(5)); (4) defendant committed the above offenses on more than one victim at the same time and in the same course of conduct (§ 1203.066, subd. (a)(7)); and (5) defendant had substantial sexual conduct with Jane Doe 1 (counts 1, 2) and Jane Doe 2 (counts 3, 4, 5) who were under the age of 14 years (§ 1203.66, subd. (a)(8)). The amended complaint also alleged in aggravation that in April 1996 defendant had been convicted of committing a lewd act upon a child in violation of section 288, subdivision (a), which constituted a prior strike conviction (§ 1170.12) and a prior serious felony conviction (§ 667, subd. (a)(1)).

A preliminary hearing was held on August 15, 2007. At the conclusion of the hearing, the court held defendant to answer all charges alleged against him. Two weeks later, the district attorney filed an information alleging seven counts against defendant. In addition to the five counts previously alleged, the district attorney added two others: (6) oral copulation upon Jane Doe 1, a child who was 10 years of age and younger, by a person 18 years of age and older, on January 9, 2007 (count 6; § 288.7, subd. (b)); and (7) commission of a lewd and lascivious act upon Jane Doe 1, a child under the age of 14 years, on January 9, 2007 (count 7; § 288, subd. (a)).

Trial began on October 27, 2008. Following motions in limine, jury selection, and preliminary instructions, testimony began on November 6, 2008. On November 18, 2008, after calling 16 witnesses, the People rested. Defendant rested without presenting any evidence.

On November 20, 2008, after the court heard closing arguments and instructed the jury, the jury began deliberations. After less than seven hours of deliberations over the course of three days, the jury found defendant guilty on all seven counts and found all allegations to be true.

On January 27, 2009, the court sentenced defendant to state prison for 10 years, plus 150 years to life with the possibility of parole, calculated as follows: count 1: 25 years to life, doubled due to the strike to 50 years to life, plus a consecutive five-year term for the section 667, subdivision (a)(1) enhancement; count 2: 25 years to life, doubled due to the strike to 50 years to life, with a five-year enhancement under section 667, subdivision (a)(1), stayed pursuant to section 654; count 3: consecutive 25 years to life, doubled due to the strike to 50 years to life, plus a consecutive five-year term for the section 667, subdivision (a)(1) enhancement; count 4: consecutive 25 years to life, doubled due to the strike to 50 years to life, with the section 667, subdivision (a)(1) enhancement stricken; count 5: concurrent 25 years to life, doubled due to the strike to 50 years to life, with the section 667, subdivision (a)(1) enhancement stricken; count 6: concurrent 25 years to life , doubled to 50 years to life due to the strike, stayed, with the section 667, subdivision (a)(1) enhancement stayed; and count 7: concurrent 25 years to life, doubled due to the strike to 50 years to life, with the section 667, subdivision (a)(1) enhancement stricken.

This timely appeal followed.

DEFENDANT'S CONTENTIONS

Defendant asserts the following claims: (1) his conviction on count 7—that he committed a lewd act on Jane Doe 1 when she touched his penis on January 9, 2007—must be reversed because the prosecutor failed to present evidence of that incident at the preliminary hearing; (2) his conviction on count 7 must be reversed because it was not

supported by sufficient "credible" evidence; (3) the trial court erred in admitting the videotaped interview of Jane Doe 2 at the RCC and instructing the jury that the interview was affirmative evidence or, alternatively, his counsel's failure to object to admission of the videotape constituted ineffective assistance of counsel; (4) his sentence under the habitual sexual offender law (§ 667.71) must be set aside because the People failed to plead that defendant was a habitual sexual offender and the jury did not make a finding as to his status as a habitual sexual offender as required by section 667.71, subdivision (f); (5) his conviction on count 6—oral copulation on Jane Doe 1, a child 10 years of age or younger—must be reversed because Jane Doe 1 was over the age of 10 years at the time of the crime; and (6) the two five-year sentences imposed for defendant's prior serious felony conviction must be stricken because he was sentenced under an alternative sentencing scheme applicable to habitual offenders or, alternatively, that only one five-year enhancement could be imposed.[6] We address these contentions in turn.

DISCUSSION

A. Defendant's Conviction On Count 7 Must Be Reversed Because There Was No Evidence Supporting The Offense Presented At The Preliminary Hearing And Defendant Could Not Reasonably Have Been Expected To Object To This Defect[*]

As set forth above, the amended complaint charged defendant with two counts involving Jane Doe 1: aggravated sexual assault by oral copulation (count 1) and oral

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[6] Defendant also advances two other claims. Defendant was sentenced on count 6 to 25 years to life under the habitual sexual offender law (§ 667.71), doubled to 50 years to life due to the strike. The court then stayed the sentence pursuant to section 654 since it was the same act charged in count 1. Defendant claims that his sentence on this count must be modified to a 15-years-to-life term, because section 288.7, subdivision (b), the offense named in that count, is not listed in the habitual sexual offender law. He additionally claims that the abstract of judgment erroneously fails to indicate that the sentence on count 6 was stayed pursuant to section 654. The Attorney General concedes that both arguments are well taken, noting that the 15 years-to-life term would be doubled to 30 years to life due to the strike, and we agree. The issues are moot, however, because, as we later explain, appellant's conviction of violation of section 288.7, subdivision (b), must be reversed. (See discussion, *post*, at pp. 26-40.)

[*] See footnote, *ante*, page 1.

copulation on a person under the age of 14 years and more than 10 years younger than defendant (count 2). The remaining three counts (counts 3, 4, and 5) charged defendant with committing a lewd and lascivious act on Jane Doe 2. Following the preliminary hearing, the district attorney filed an information alleging two additional charges involving Jane Doe 1: oral copulation on a child 10 years of age or younger (count 6), and commission of a lewd and lascivious act on a child under the age of 14 years (count 7).

Defendant does not challenge the district attorney's right to allege in the information additional charges not included in the complaint before the magistrate. Defendant correctly notes, however, that the charges may only be added if evidence was presented to the magistrate showing that the offense was committed or that it arose out of the transaction that was the basis for the commitment. (§ 739; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665; *People v. Burnett* (1999) 71 Cal.App.4th 151, 165-166.) Defendant contends his conviction on count 7 violated this rule because there was no evidence supporting the offense presented at the preliminary hearing. We agree.

Count 7 did not specify the act that was the subject of that count. Instead, it alleged that on or about January 9, 2007, "defendant did violate Section 288(a) of the Penal Code, in that the said defendant did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of Jane Doe #1 (DOB 2/15/96), a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child." In closing argument, the prosecutor told the jury that count 7 was "when Jane Doe [1] touched [defendant's] penis," an argument based on Jane Doe 2's trial testimony that when defendant told her and her sister to touch his penis, they both did so.

But in contrast to that trial testimony, there was no evidence before the magistrate that Jane Doe 1 touched defendant's penis.[7] Detective Pederson, who was present at the January 10 RCC interview of Jane Doe 2, testified at the preliminary hearing that Jane Doe 2 told the RCC interviewer defendant had instructed both sisters to take off their clothes.[8] She then described defendant masturbating to the point of ejaculation. According to Jane Doe 2, defendant also told both girls to place their fingers on the tip of his penis. Detective Pederson testified that Jane Doe 2 told the interviewer that she did so, but he did not offer any testimony that Jane Doe 1 did so. And at the preliminary hearing, Jane Doe 1 never testified that she had touched defendant's penis. Defendant's conviction on count 7 thus violated the rule prohibiting prosecution "for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based." (*People v. Burnett, supra,* 71 Cal.App.4th at pp. 165-166.)

This is not, however, the end of our inquiry. The People argue that defendant forfeited his right to assert this claim on appeal by failing to challenge the information or object at trial,[9] in claimed support of which they cite two cases: *People v. Bartlett* (1967) 256 Cal.App.2d 787 (*Bartlett*), and *People v. Harris* (1967) 67 Cal.2d 866, 870 (*Harris*). Neither supports a finding of forfeiture in the setting here.

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[7] The People do not expressly concede that there was no evidence of Jane Doe 1 touching defendant's penis presented at the preliminary hearing. They impliedly do so, however, as they make no attempt to point to any such evidence.

[8] Jane Doe 2 was called as a witness at the preliminary hearing. After testifying that defendant did "something wrong," she became very upset and refused to talk about it any further. The court then excused her from further testimony.

[9] The California Supreme Court has explained, "In this context, the terms 'waiver' and 'forfeiture' have long been used interchangeably. The United States Supreme Court recently observed, however: 'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, fn. 6.) We use the term "forfeiture."

Defendants in *Bartlett* were charged with two counts of burglary and, following a preliminary examination, were held to answer on those two counts. The district attorney then filed an information charging defendants with a third burglary count as well. Defendants moved under section 995 for dismissal of the information, and the two counts on which they were originally held were dismissed for lack of probable cause. They then sought a writ of prohibition to bar further proceedings on the third count, on the grounds that there was no evidence of corpus delicti and no probable cause. The writ was denied, and defendants were tried and convicted on the third count. (*Bartlett, supra,* 256 Cal.App.2d at p. 789.)

As pertinent here, on appeal defendants asserted that their convictions must be reversed because the offense for which they were convicted was not included in the commitment order. (*Bartlett, supra,* 256 Cal.App.2d at pp. 788-789.) The Court of Appeal disagreed that reversal was warranted on that ground.[10] (*Id.* at pp. 791-792.) First, the court noted that section 739 permitted the district attorney to file an information charging defendants with the offenses designated in the commitment order " 'or any offense or offenses shown by the evidence taken before the magistrate to have been committed. . . .' " (*Id.* at p. 790.) It then observed that "section 739 has been construed as authorizing the inclusion of an offense not designated in the commitment order but shown by the preliminary examination to have been committed by defendant if such added offense is related to or connected with the crime or crimes designated in the commitment order." (*Id.* at p. 791.) The court then concluded, however, that the third burglary count was improperly added because it was insufficiently related to or connected with the burglary counts designated in the commitment order. (*Id.* at pp. 791-792.)

Despite this error, the Court of Appeal did not reverse on this ground, stating that "by going to the trial without raising the point [defendants] have waived it." (*Bartlett, supra,* 256 Cal.App.2d at p. 792.) The court explained that section 996 requires

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[10] The court reversed the convictions on grounds not relevant here. (*Bartlett, supra,* 256 Cal.App.2d at pp. 792-795.)

defendant to bring a motion "under section 995 to dismiss an information charging an offense other than the one designated in the commitment order," or be held to have waived such objection. (*Ibid.*) It noted that defendants did move under section 995 to dismiss the information and sought a writ of prohibition, but neither time did they contend that they were improperly committed on the third count. Consequently, "[t]he failure to raise that issue in those proceedings constituted a waiver." (*Ibid.*)

Harris, supra, 67 Cal.2d 866, the second case on which the People rely, is similar. There, defendants Harris and Peart were charged with two counts of first degree robbery. At the preliminary hearing, Peart was represented by counsel while Harris appeared in propria persona. Following a jury trial, defendants were convicted on both counts and sentenced to state prison. (*Id.* at pp. 867-868.) On appeal, the court considered "whether failure to provide counsel at the preliminary hearing require[d] reversal of the ensuing judgment of conviction when the defendant did not move under section 995 of the Penal Code to set aside the information." (*Harris,* at p. 868) and concluded that Harris's failure to present a timely challenge to the information barred him from asserting the issue on appeal (*Ibid.*). The court relied on section 996, which "bars the defense from questioning on appeal any irregularity in the preliminary examination" when it has failed to move to set aside the information under section 995, holding that "to permit a defendant to question the legality of his commitment for the first time on appeal would enable him to secure a reversal of his judgment of conviction even though he was found guilty after an errorless trial." (*Harris,* at p. 870.)

The People argue that defendant forfeited this argument by failing to challenge the addition of count 7 by a section 995 motion or objecting at trial or sentencing, likening defendant to the unsuccessful appellants in *Bartlett* and *Harris*. But here defendant could not reasonably have been expected to raise an objection below—and a section 995 motion would not have been successful. Defendant correctly explains why: "Count 7 alleged that appellant 'did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain part and members thereof of Jane Doe #1.' [Citation.] Testimony before the magistrate showed that appellant had orally copulated

Jane Doe 1 on that date [citation] and touched her vagina [citation]. Either of these acts supported the charge made in Count 7. Accordingly, no motion to dismiss under Penal Code section 995 could have succeeded."

It was only at trial, when the prosecutor argued that count 7 was based on Jane Doe 1's touching of defendant's penis, that count 7 became unsupported by evidence presented at the preliminary hearing. Given that the preliminary hearing occurred on August 15, 2007, and the prosecutor gave her closing argument on November 20, 2008, it would be unreasonable to expect defense counsel to object to the prosecutor's election of a crime shown by the evidence at trial on the ground that it had not been shown at the preliminary hearing 15 months prior. Defendant cannot be held to have forfeited this claim, and his conviction on count 7 must be reversed.[11]

B. The Videotaped Recording Of Jane Doe 2's Interview at RCC Was Properly Admitted*

Defendant's next argument, set forth as three separate arguments in his brief, asserts that admission of the videotape of Jane Doe 2's RCC interview violated his Sixth Amendment right to confront the witnesses against him. Defendant argues that because the videotaped interview was improperly admitted, it was error for the trial court to instruct the jury that the interview constituted affirmative evidence. Finally, defendant argues that his counsel failed to object when the trial court ruled the videotape admissible, but that (1) no objection was required to preserve this issue for appellate review because such objection would have been futile; and (2) if an objection was required, his counsel provided ineffective assistance by failing to make one. We disagree that the trial court erred in admitting the videotaped interview.

Evidence Code section 1360 provides that, "[i]n a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another. . . is not

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[11] We need not address defendant's second contention regarding his conviction on count 7, that the guilty finding was unsupported by substantial evidence.

* See footnote, *ante*, page 1.

made inadmissible by the hearsay rule" provided the statement is not otherwise inadmissible, the court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and the child either testifies at the proceeding or is unavailable but there is corroborating evidence of the abuse.[12] Pursuant to this section, the prosecutor filed motions in limine seeking to introduce prior, out-of-court statements made by Jane Doe 1 and Jane Doe 2.[13] The court granted the motions, permitting introduction of the prior statements "in general" to the extent they were not duplicative of other evidence introduced at trial, but reserving further ruling on the issue. At this point, defendant's counsel did not voice any objection to introduction of the statements.

When the prosecutor was preparing to introduce at trial a videotaped recording of Jane Doe 2's RCC interview, the court inquired of defendant his position on introduction of the videotape. Without stating any basis, defense counsel objected to its admission.

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[12] The actual text of Evidence Code section 1360 is as follows:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

[13] More precisely, motion in limine 6 sought to introduce Jane Doe 2's "prior statements," while motion in limine 7 sought to introduce Jane Doe 1's RCC interview. In addition to Evidence Code section 1360, motion in limine 6 also cited *People v. Poggi* (1988) 45 Cal.3d 306 and *People v. Brown* (1994) 8 Cal.4th 746 as support for the motion.

When the court indicated that it would allow the nonduplicative portions of the interview to be played, defense counsel responded that if the court was going to allow Jane Doe 2's interview to be shown, it should be shown in its entirety. The court then ruled that the prosecutor could show the entire video. After further discussion between the prosecutor and defense counsel, the prosecutor submitted an excerpted version of the videotape, and defense counsel consented to the edits. The excerpted recording was then played for the jury, the 10-page transcript of which is part of the record before us.

Defendant now contends that admission of the videotaped recording of Jane Doe 2's RCC interview violated his Sixth Amendment right to confront the witnesses against him. This contention fails in light of *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*), where, overruling prior cases, the United States Supreme Court held that out-of-court statements that are testimonial in nature cannot constitutionally be admitted against a criminal defendant unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the witness. Significantly for our purposes, in so ruling the court also confirmed that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." (*Id.* at pp. 59-60, fn. 9.) Here, Jane Doe 2 testified at trial and was subject to cross-examination by defense counsel. There was, we conclude, no confrontation clause violation.

People v. Eccleston (2001) 89 Cal.App.4th 436, the one Court of Appeal opinion that addressed a similar issue, also supports this conclusion. There, our colleagues in Division Four considered whether evidence admitted in accordance with Evidence Code section 1360 violates the accused's right to confront the witnesses against him, and held that it does not because the procedure required by Evidence Code section 1360 establishes the particularized guarantees of trustworthiness that satisfy the requirements

of the confrontation clause.[14] (*People v. Eccleston, supra*, 89 Cal.App.4th at pp. 438, 445.)

Defendant concedes that his confrontation clause argument is undermined by "the clear statutory language and the lack of legal support . . . ." He nevertheless urges that "the principles" of *Crawford* compelled exclusion of the interview. This is so, he submits, because he had no opportunity to conduct a meaningful cross-examination of Jane Doe 2 because of the passage of time since the molestation and her immaturity. Further, defendant contends he had no opportunity to cross-examine her at the time of the RCC interview or at the preliminary hearing.

The confrontation clause does not, however, guarantee defendant a "meaningful cross-examination," but merely the *opportunity* for cross-examination. Indeed, the United States Supreme Court has explained that the confrontation clause "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination . . . ." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 21-22; see also *United States v. Owens* (1988) 484 U.S. 554, 555-556 [no confrontation clause violation occurs if a trial court admits into evidence a prior out-of-court identification by a witness who, because of memory problems, cannot explain the basis for it].) Here, defendant had an opportunity to cross-examine Jane Doe

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[14] Defendant does not challenge the court's determination that Jane Doe 2's statements were sufficiently reliable to qualify for admission pursuant to Evidence Code section 1360. Indeed, he concedes that "there clearly was no basis for such an argument" to be made by his counsel at trial. We therefore need not consider whether the videotaped interview satisfied Evidence Code section 1360, confrontation clause issues notwithstanding.

2 at trial—and did. The videotaped recording of Jane Doe 2's RCC interview was properly admitted.[15]

C. Defendant Forfeited Objection to Sentencing Under The Habitual Sexual Offender Statute By Failing To Challenge It Below*

Section 667.71, subdivision (a), defines a "habitual sexual offender" as "a person who has been previously convicted of one or more of" certain specified offenses "and who is convicted in the present proceeding of one of those offenses." A person who meets this statutory definition "[is] punish[able] by imprisonment in the state prison for 25 years to life." (§ 667.71, subd. (b).) Defendant was sentenced under section 667.71, receiving a sentence of 25 years to life, doubled by the strike to 50 years to life, on all counts. He contends that it was improper to so sentence him, however, because section 667.71, subdivision (f) requires that defendant's "status as a habitual sexual offender [be] alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the trier of fact."

Here, as to each of the seven counts alleged against defendant, the information stated: "It is further alleged, pursuant to Penal Code section 667.71, that the defendant, was previously convicted of the crime of lewd act upon child in violation of Penal Code section 288(A) on 25th day of April 1996 in the Superior Court of Marin County." And the verdict form on this allegation read: "We, the jury, further find that pursuant to Penal Code Section 667.71 and Penal Code Section 1203.06(a)(5), that the defendant was previously convicted of the crime of lewd act upon child in violation of Penal Code Section 288(a) on the 25th Day of April 1996 in the Superior Court of Marin County."

Notwithstanding that section 667.71 is entitled " 'Habitual Sexual Offender' Defined; Punishment," and that the verdict form confirmed that the jury found that defendant had been convicted of a predicate act under the section, defendant contends

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[15] Because defendant's confrontation clause argument fails on the merits, we need not address his arguments concerning the jury instruction and his ineffective assistance of counsel claim.

* See footnote, *ante*, page 1.

that this does not satisfy section 667.71, subdivision (f). The People respond that defendant forfeited this argument on appeal by failing to object below. (*People v. Bright* (1996) 12 Cal.4th 652, 671 [where defendant failed to object at trial to the adequacy of notice of the charges against him, objection on appeal was forfeited].) In reply, defendant offers no explanation as to why he should be exempt from the forfeiture rule. And we are aware of none. Indeed, we conclude that this is the paradigmatic setting for application of the forfeiture rule, and thus express no opinion on defendant's claim as to the inadequacy of the information or verdict form.

The California Supreme Court detailed the well-established forfeiture rule in *People v. Saunders, supra,* 5 Cal.4th at pages 589-590, where it explained: " ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." ' [Citation.] ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.]" (Accord, *People v. Vera* (1997) 15 Cal.4th 269, 275-276.)

While, as defendant points out, certain claims are exempted from the forfeiture rule,[16] the claim presented by defendant here is not one for which an exemption exists.

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[16] For example, "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th at p. 276.) Similarly, "By statute, a defendant may challenge on appeal an instruction that affects his or her substantial rights even when no objection has been made in the trial court. [Citations.] In addition, 'when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time' including on appeal,

To the contrary, the instant situation is a perfect example of why the forfeiture rule exists: Had defendant challenged what he claims is the inadequacy of the habitual sexual offender allegation in the information, the district attorney could readily have amended the information if the section 667.71 allegations were in fact deficient. Likewise, had defendant timely objected to the jury verdict form, it could, if need be, have been modified.

Moreover, defendant cannot claim that he lacked adequate notice that he was subject to sentencing under section 667.71. As noted, the information "alleged, pursuant to Penal Code section 667.71, that the defendant, was previously convicted of the crime of lewd act upon child in violation of Penal Code section 288(A) on 25th day of April 1996 in the Superior Court of Marin County." As also noted, section 667.71 is entitled " 'Habitual Sexual Offender' Defined; Punishment." The motion in limine also set forth section 667.71 as a basis for introduction of the 1996 conviction.

The probation department's presentencing report recommended sentencing defendant pursuant to section 667.71 because it provided for "greater punishment" and was "the most punitive and best fits the type of repeat sex offender the defendant is." Indeed, defendant's own sentencing memoranda urged the court to sentence defendant pursuant to section 667.61 "as opposed to the more punitive section 667.71 as chosen by the Probation Officer in writing their recommendation." And at the time of sentencing, the court stated it was "going to sentence [defendant] under 667.71 and designate him a habitual sexual offender." Despite all this, defendant never once voiced an objection. The forfeiture rule applies.

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because the statute is jurisdictional and confers a substantive rather than a procedural right." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 2.) Certain sentencing errors that result in an "unauthorized sentence" can be reviewed by an appellate court despite defendant's failure to object below. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) And a reviewing court may excuse a failure to object below where objection would have been futile (*People v. Welch* (1993) 5 Cal.4th 228, 237-238).

D. Defendant Was Not Properly Charged With and Convicted of Violating Section 288.7 Because Jane Doe 1 Was Not "10 Years of Age or Younger"

As noted, count 6 of the information charged defendant with a violation of section 288.7, subdivision (b), for orally copulating Jane Doe 1 on January 9, 2007. That subdivision provides, "Any person 18 years of age or older who engages in oral copulation or sexual penetration as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life." The jury convicted defendant on that count, but the court stayed the sentence on it pursuant to section 654. Defendant now contends that the conviction must be reversed and the count dismissed because, applying the rules of construction applicable to penal statutes, Jane Doe 1—who was 10 years 11 months at the time of the molestation—cannot be deemed to have been "10 years of age or younger" at the time of the offense.

No California court has yet interpreted the phrase "10 [or some other number] years of age or younger" despite the use of such language in several California statutes. (See, for example, sections 273i ["14 years of age or younger"]; 417.27 ["17 years of age or younger"]; 701.5 ["12 years of age or younger"]; 861.5 ["10 years of age or younger"]; 1127f ["10 years of age or younger"]; 1170.72 ["11 years of age or younger"]; 1347 ["13 years of age or younger"]; 12088.2 ["17 years of age or younger"]; and 12088.5 [18 years of age or younger"].)[17]

While courts in other jurisdictions have construed the same or similar language, they are very divided. Some courts have construed the language to include children who have passed the particular birthday but not yet reached the next birthday. (See, e.g., *State*

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[17] The method for computing attained age under the common law is no longer employed by most states. "[T]he common law rule for calculating a person's age has always been that one reaches a given age at the earliest moment of the day *before* their anniversary of birth" (*In re Harris* (1993) 5 Cal.4th 813, 844), apparently on the theory that " ' "[a] person is in existence on the day of his birth. On the first anniversary he or she has lived one year and one day." ' " (*Ibid.*; accord, *In re Edward* (R.I. 1982) 441 A.2d 543 ["at common law a person reaches his or her next year in age at the first moment of the day prior to the anniversary date of his or her birth"].)

v. Christensen (Utah 2001) 20 P.3d 329, 330 [" '17 years of age or older but not older than 17' " includes a person who is 17 years old until he or she attains 18th birthday]; *State v. Shabazz* (N.J.Super.App.Div. 1993) 622 A.2d 914, 915 [" '17 years of age or younger' includes a juvenile who has attained the age of 17 but has not yet reached his 18th birthday"]; *State v. Joshua* (Ark. 1991) 818 S.W.2d 249, 251, overruled on other grounds in *Kelly v. Kelly* (Ark. 1992) 835 S.W.2d 869 [" 'twelve years of age or younger' " includes children who "have reached and passed their twelfth birthday but have not reached their thirteenth"]; *State v. Carlson* (Neb. 1986) 394 N.W.2d 669, 674 ["fourteen years of age or younger" means children who have "passed their 14th birthday but have not yet reached their 15th]; *State v. Hansen* (Fla.Ct.App. 1981) 404 So.2d 199, 200 ["11 years of age or younger" includes children who have passed their 11h birthday but not yet reached their 12th]; *Phillips v. State* (Tex.Crim.App. 1979) 588 S.W.2d 378, 380 ["14 years of age or younger" includes all children who have not attained their 15th birthday].)

However, courts in other jurisdictions have construed the same or similar language to include only children who have not passed the specified birthday date. (See, e.g., *State v. Collins* (R.I. 1988) 543 A.2d 641, 645, overruled on other grounds in *State v. Rios* (R.I. 1997) 702 A.2d 889 ["thirteen (13) years of age or under" applies to "persons under thirteen years of age and to those who are exactly thirteen years old"]; *State v. Jordan* (R.I. 1987) 528 A.2d 731, 734 ["thirteen (13) years of age or under" includes "only those victims who had reached the day prior to their thirteenth birthday or were under that age"]; *State v. McGaha* (N.C. 1982) 295 S.E.2d 449, 450 ["the age of 12 years or less" excludes a child who has passed his or her 12th birthday]; *Knott v. Rawlings* (Iowa 1959) 96 N.W.2d 900, 901-902 (*Knott*) ["a child of the age of sixteen years, or under" does not include a child who has passed his or her 16th birthday]; *People v. O'Neill* (Sup.Ct. 1945) 53 N.Y.S.2d 945, 947 ["ten years or under" excludes children who have passed their 10th birthday]; *Gibson v. People* (Colo. 1908) 99 P. 333, 334-335 ["sixteen (16) years of age or under" excludes children who have passed beyond the first day of their 16th birthday].)

In some cases courts have been able to resolve the issue on the basis of an illuminating legislative history[18] (see, e.g., *State v. Munoz* (Az. 2010) 228 P.3d 138; *People*[*ex rel. Makin*] *v. Wilkins* (1965) 257 N.Y.S.2d 288), while others have relied upon the practical consequences of competing interpretations, rejecting those that would have absurd results. (See, e.g., *State v. Shabazz, supra,* 622 A.2d 914, 917; *State v. Collins, supra,* 543 A.2d 641.) Unfortunately, neither of these factors provides assistance in this case.

The legislative history of section 288.7, which has never been amended, sheds no light on the issue before us. The only substantive change to the provision during the legislative process was the addition of oral copulation and sexual penetration as proscribed activities. (Compare Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as introduced Jan. 9, 2006 and Sen. Bill No. 1128 (2005-2006 Reg. Sess.) § 9.) Nor are the consequences of the competing constructions instructive. It would be as reasonable to limit the age of the children section 288.7 seeks to protect by confining it to those who have not passed the 10th anniversary of their birth as to those who have not reached the 11th anniversary. (See *State v. Hansen, supra,* 404 So.2d 199, 200.)

Due to the absence of any useful extrinsic information or any absurdity resulting from the application of the competing constructions, we must rely exclusively on the language of the statute, and the only useful guidelines are those provided by the applicable rules of statutory construction.

In California a criminal defendant " 'is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or

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[18] Though the United States Supreme Court considers it appropriate to resolve statutory ambiguity on the basis of a legislative history disclosing the policies that motivated enactment or amendment of the statute (see, e.g., *Moskal v. United States* (1990) 498 U.S. 103, 108), some judges on that court believe the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is inconsistent with the rule of lenity (see, e.g., *United States v. R.L.C.* (1992) 503 U.S. 291, 307 (conc. opn. of Scalia, J.), and Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity* (1994) 29 Harv. C.R. & C.L. L.Rev. 197.)

the construction of language used in a statute . . . .' " (*People v. Gutierrez* (1982) 132 Cal.App.3d 281, 284, quoting *Ex parte Rosenheim* (1890) 83 Cal. 388, 391; *People v. Davis* (1981) 29 Cal.3d 814, 828; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631; *People v. Forbes* (1996) 42 Cal.App.4th 599, 603-604.) Thus, "when language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*In re Tartar* (1959) 52 Cal.2d 250, 256; accord, *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 487-488.) The foregoing principles reflect "the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit . . . ." (*Keeler v. Superior Court,* at p. 631; *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427.) This principle is often referred to as the rule of strict construction but it is also known as the "rule of 'lenity.' " (*People ex rel. Lungren v. Superior Court,* at p. 312)

While, as the Attorney General says, courts should always give words and phrases "a plain and commonsense meaning," common parlance is not always indicative of "commonsense," a highly ambiguous, subjective and somewhat tendentious concept, and as this case shows, a word or phrase may have more than one "commonsense meaning." This is particularly true with respect to the subject of the phrase we must decipher. The concepts of time and its measurements are peculiarly illusive. "The basic difficulty lies in trying to find demarcations in a homogenous indivisibility. Time is without natural units; its so-called divisions are but incidental, independent, repetitious events, such as the swings of a pendulum or rotations of the earth. And he who seeks to fix the ever approaching or receding, never pausing, points in time, essays to shoe a running horse." (Martin, *Inclusion or Exclusion of the Day of Birth in Computing One's Age*, 5 A.L.R.2d 1143, 1144-1145, § 2) Although the Legislature could easily have provided the necessary certainty—as by specifying that a qualifying offense must be committed on a victim who is either "under 10 [or 11] years age"—the ambiguity cannot be eliminated by

resort to inference or implication arising from common sense, popular parlance, or any other extrinsic factor. (See *Keeler v. Superior Court, supra*, 2 Cal.3d at pp. 631-632.)

People v. Gutierrez, supra, 132 Cal.App.3d 281 is instructive on this point. *Gutierrez* involved a statute precluding a grant of probation to a defendant possessing more than one-half ounce of heroin. The term "ounce" could refer to either an avoirdupois ounce or an apothecaries' ounce, and the 14.3 grams of the substance the defendant possessed was less than the number of grams in one-half of an apothecaries' ounce, but more than the number of grams that constitute one-half of an avoirdupois ounce. The question presented was whether, as the statute did not specify, an "ounce" should be measured by the avoirdupois or apothecaries' weight standard. (*Id.* at pp. 283-284.) Even though the average person would understand the word "ounce" to refer only to an avoirdupois ounce, and few would even be aware another type of ounce existed, the court rejected the idea that the meaning of the word "ounce" in a penal statute could be made certain by its common usage. In adopting the uncommon use of an apothecaries' ounce as the weight standard, the court relied upon " 'a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no way implies that language in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved . . . [against the government.]' " (*Id.* at p. 285, quoting *Bell v. United States* (1955) 349 U.S. 81, 83-84.)

The interpretation of section 288.7 urged by the Attorney General is clearly not the only "commonsense" interpretation. As previously pointed out, state courts are almost evenly divided about the proper interpretation of statutes applicable to persons of a designated age "and under." (*State v. Jordan, supra,* 528 A.2d 731, 732.) *Knott, supra,* 96 N.W.2d 900 is illustrative of the line of cases defendant relies upon. The petitioner in that case was charged with committing lascivious acts with " 'a child of the age of sixteen

years, or under.' " (*Id.* at p. 900.) The question presented was whether "one who is sixteen years, six months and three days old [is] 'a child of the age of sixteen years, or under,' " within the meaning of the penal statute. (*Id.* at p. 901.) The Iowa Supreme Court answered the question in the negative, stating as follows: "A child is one year old on the first anniversary of his birth and is sixteen years old on the sixteenth anniversary. Before the sixteenth anniversary he is under the age of sixteen years and after that anniversary he is over the age of sixteen. Sixteen years is an exact and definite period of time. It does not mean or include sixteen years and six months. We should be realistic and not read something into the statute which is not there and which clearly was not intended to be there. *This is a criminal statute and cannot be added to by strained construction.*" [¶] *Of the age of sixteen years' must be construed to mean just what it says, i.e., sixteen years and not sixteen years, six months and three days.*" (*Ibid.*, italics added.)

Like the California court in *People v. Gutierrez, supra,* 132 Cal.App.3d 281, the *Knott* court explicitly refused to be guided by "common parlance." As here, the state emphasized the fact "that when one is asked to state his age he gives only the age at the latest anniversary of his birth and does not add the additional months and days which a completely correct statement would require . . . ." Pointing out that "it is commonly accepted that one is sixteen until his seventeenth birthday anniversary," the state argued that the statute should be seen as reflecting this common understanding. (*Knott, supra,* 96 N.W.2d at p. 901) The court rejected the argument as "unsound," stating as follows: "When the legislature wrote 'sixteen years' into the statute it intended the words to be construed according to their ordinary meaning. It is contended that when the legislature used the words 'a child of the age of sixteen years, or under' it intended such words to mean 'a child under seventeen years of age.' That contention is answered by the fact that it chose the words 'sixteen years, or under' in preference to the words, 'under seventeen years' which it would have used had it intended what the State maintains it intended." (*Ibid.*) We find this reasoning compelling, as have other courts. (See, e.g., *State v. McGaha, supra,* 295 S.E.2d 449: *State v. Jordan, supra,* 528 A.2d 731; *Gibson v. People,*

supra, 99 P. 333; *State v. Maxson* (Ohio 1978) 375 N.E.2d 781; *People v. O'Neill, supra,* 53 N.Y.S.2d 945.)

Conceding that many cases have construed the phrase "__ years of age or younger" to be limited to persons who had not passed the birthday indicated by the statute, the Attorney General contends that the more reasonable cases, which reflect the "modern trend," are those which include persons who have reached and passed the age designated by the statute but have not reached the subsequent birthday. Many of the cases relied upon by the Attorney General are distinguishable.

State v. Shabazz, supra, 622 A.2d 914, involved a statute criminalizing the use or employment of a person " '17 years of age or younger' " to participate in a drug distribution scheme. The court noted that a subsequent provision in the statute barred a mistake of age defense for persons " '18 years of age or older' " and pointed out that this language "would make no sense" if the statute excluded juveniles after their 17th birthday. (*Id.* at p. 917) Other cases reaching the result the Attorney General urges turned on extrinsic evidence of a sort not present in this case. For example, in *People* [*ex rel Makin*] *v. Wilkins, supra,* 257 N.Y.S.2d 288, the 1950 statute before the court was clearly intended to legislatively overrule a 1945 judicial decision construing the phrase "ten years or under" as excluding persons who had passed their 10th birthday. (*Id.* at p. 290.) As the court observed, the 1950 amendment "forcefully indicates that the [1945] judicial decision did not correspond with legislative intent, and that a different interpretation should be had." (*Id.* at p. 291; see also *State ex rel. Morgan v. Trent* (W.Va. 1995) 465 S.E.2d 257.)

Most of the other cases supporting the interpretation urged on us by the Attorney General do not follow or ignore the rule of strict construction applicable in California. For example, in *State v. Christiansen, supra,* 20 P.3d 329, the defendant had argued that the victim, who was between her 17th and 18th birthdays, was "older than 17" and therefore not protected by the statute. The Supreme Court of Utah rejected the cases the defendant relied upon because most of them "relied in part on the rule that criminal

statutes are to be construed strictly against the state and liberally in favor of the defendant" (*id.* at p. 330), a rule which "does not obtain in Utah." (*Ibid.*)

State v. Carlson, supra, 394 N.W.2d 669 and *State v. Joshua, supra,* 818 S.W.2d 249 are simply indifferent to the rule of strict construction. The statute in *Carlson* protected victims "fourteen years of age or younger" and that in *Joshua* victims "twelve (12) years of age or younger." The reasoning of *Carlson*, which was adopted in *Joshua*, is as follows: "If 'less than fourteen years of age' or 'under fourteen years of age' had been used in [the statute], the protection of that statute would terminate when a child reached the 14th birthday. *Because 'less than' or 'under' is absent from [the statute], while 'fourteen years of age or younger' appears in the statute, the compelled logical conclusion is that the statute's protection extends into and throughout the year immediately following a person's 14th birthday.* When the plain and unambiguous language of [the statute] is considered, [citations], to the ordinary person 'fourteen years of age' means that one has passed the 14th birthday but has not reached the 15th birthday. Thus, 'fourteen years of age' is a temporal condition existing on the 14th birthday and continuing until the 15th birthday. Any other construction of 'fourteen years of age' would be a perversion of popular parlance." (*State v. Carlson supra*, at p. 673, italics added; *State v. Joshua,* at p. 251, italics added.) Far from a "compelled logical conclusion," the italicized sentence is no more than an ipse dixit. Moreover, the inference that an otherwise ambiguous provision of a penal statute must have been intended to adopt "popular parlance" makes a mockery of the rule of strict construction, the purpose of which is to ensure that crimes are not " ' " 'built up by courts with the aid of inference, implication, and strained interpretation' [citation] . . . . '[P]enal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.' [Citation.]" ' " (*Gayer v. Whelan* (1943) 59 Cal.App.2d 255, 262-263, quoting *Ex parte McNulty* (1888) 77 Cal. 164, 168 and *Ex parte Twing* (1922) 188 Cal. 261, 265.) Without ever referring to the rule of strict construction, *Carlson* relies instead on the "pertinent" rule " 'that a statute should be construed so that an

ordinary person reading it would get from it the usual, accepted meaning' " (*id.* at pp. 671-672), a rule more frequently applied to civil than to penal statutes.

As Chief Justice Marshall pointed out almost 200 years ago, "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." (*United States v. Wiltberger* (1820) 18 U.S. 76, 95) The strength of this "time-honored interpretive guideline" (*Liparota v. United States* (1985) 471 U.S. 419, 427), at least in this jurisdiction, is worth discussing. Along with those of several other states, the California Legislature nominally abrogated the rule of lenity in 1872 by enacting section 4, which states: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." The rule of strict construction or, as it is also called, the rule of lenity, has, however, survived the statute. The reason a higher degree of certainty is still required of a penal than a civil statute (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 60) is that the rule of strict construction possesses a constitutional dimension. As Professor Packer said, the rule of strict construction and the constitutional vagueness doctrine "have an intimate connection and may most usefully be thought of as contiguous segments of the same spectrum." (Packer, *The Limits of the Criminal Sanction* (1968) 79, 93; see also Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes* (1985) 71 Va. L.Rev. 189, 198-201 (1985).) In effect, the rule of strict construction may be seen "as something of a junior version of the vagueness doctrine." (Packer, *supra, The Limits of the Criminal Sanction*, at p. 95.) The rule of lenity may also be seen as a means of avoiding constitutional issues by making it unnecessary to address potential due process concerns. (Eskridge & Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking* (1992) 45 Vand. L.Rev. 593, 600.)

The rule of lenity also serves the purposes of minimizing the risk of selective or arbitrary enforcement, and maintaining the proper balance between the Legislature, prosecutors and the courts. (*United States v. Kozminski* (1988) 487 U.S. 931, 951-952.) Courts defer to the legislative responsibility to define criminal liability and the

appropriate penalty but require clear directives. As has been said, "[l]enity is an appropriate background principle in the penal context because it maintains the judicial-legislative balance while protecting the rights of individuals. It has survived so long in the common law system precisely because it allays concerns with separation of powers and due process and provides interpretive consistency. When the legislature fails to speak clearly, considerations of lenity avoid the dilemma of how to derive a legitimate interpretation without 'legislating' by choosing *a priori* the stance the court will take. Considerations of lenity therefore create a presumption against criminal liability by assuming that the legislature only intended what was readily apparent." (Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity, supra*, 29 Harv. C.R. & C.L. L.Rev. 197, 206-207, fns. omitted.)

United States v. Bass (1971) 404 US. 336 articulates two other policies that inform the rule of strict construction. The first, the Supreme Court explained, is that " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' " (*Id.* at p. 348) This much quoted statement was originally made by Justice Holmes in *McBoyle v. United States* (1931) 283 U.S. 25, 27. As noted in *United States v. Bass*, Holmes prefaced this statement with the observation that " 'it is not likely that a criminal will carefully consider the text of the law before he murders or steals,' " but the *Bass* court pointed out that in the case of gun acquisition and possession, which was the issue in *United States v. Bass*, it is not unreasonable to imagine a citizen attempting to" '[steer] a careful course between violation of the statute [and lawful conduct]. [Citation.]' " (*United States v. Bass,* at p. 348, fn. 15, quoting *United States v. Hood* (1952) 343 U.S. 148, 151.) *United States v. Bass* thus implicitly acknowledges that, *ordinarily*, persons contemplating the commission of criminal acts do not first consult the appropriate penal statute.[19] It may

[19] Moreover, as the Supreme Court has also pointed out, the provision of actual notice to such persons is a less meaningful aspect of vagueness doctrine than the need for a legislature to establish minimal guidelines to govern law enforcement, because inherently vague statutory

also be noted that the need to provide fair warning would seem unnecessary with respect to crimes, such as the one that here concerns us, that are malum in se rather than malum prohibitum.

The second policy reflected in the rule of lenity that was commented on in *United States v. Bass* is, however, uniformly applicable and has particular relevance to the case at hand. As stated in *Bass* and reiterated in *Liparota v. United States, supra,* 471 U.S. 419 at page 427, and *People ex rel. Lungren v. Superior Court, supra*, 14 Cal.4th 294 at page 313, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' [Citation.]" (*United States v. Bass, supra*, 404 U.S. at p. 348.) Our own Supreme Court's opinion more than a century ago in *Ex parte Rosenheim, supra*, 83 Cal. 388, 391 also recognized that "criminal penalties, because they are serious and opprobrious, merit heightened due process protection for those in jeopardy of being subject to them, including the strict construction of criminal statutes." (*People ex rel. Lungren v. Superior Court, supra*, 14 Cal.4th at p. 313.)

The Attorney General's construction of section 288.7, subdivision (b), exposes all offenders whose victims have passed the 10th anniversary of their birth to a penalty, 15 years to life, *equal to that applicable to a defendant convicted of second degree murder.* Imposition of that penalty in this case would not be the result of an unambiguous *legislative* determination, but the product of a *judicial* interpretation of a phrase which, as the case law effectively demonstrates, is clearly susceptible of two constructions. As Chief Justice Marshall said, the rule of strict construction is based on the "plain principle[] that the power of punishment is vested in the legislative, not in the judicial department." (*United States v. Wiltberger, supra*, 18 U.S. at p. 95.) Our guess, and it is only that, is that the phrase "ten years of age or younger" was probably decided upon by a

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language permits selective law enforcement, which denies due process. (*Smith v. Goguen* (1974) 415 U.S. 566, 572-576.)

drafter who erroneously assumed it was no different from the phrase "younger than 10 years of age." Such a mistake, if that is what it was, provides no basis upon which to expand the application of a serious felony offense to individuals the Legislature did not manifestly intend to include within its scope.

Due to the seriousness of the penalty that would otherwise result, the court in *People v. Gutierrez*, *supra*, 132 Cal.App.3d 281 declined to construe the word "ounce" to mean an avoirdupois ounce rather than an apothecaries' ounce, though most people are almost certainly unaware that there is such a thing as an apothecaries' ounce. The court left it to the Legislature to clarify the meaning of the word "ounce" if it disagreed with the meaning the court assigned. So, too, should we leave it to the Legislature to clarify the age of the children referred to by subdivision (b) of section 288.7. The penalty in this case is far greater than that at issue in *Gutierrez*, and the statute we must construe is much more obviously susceptible of two constructions than the one at issue in *Gutierrez*. Indulging the uncertainty in favor of the state and against the defendant not only conflicts with the rule of lenity but invites rather than discourages statutory ambiguity. If the meaning we attach to the language in question does not reflect the legislative will, the Legislature can easily rectify the problem, as it did in *Gutierrez*, and such an exercise, if it is necessary, may have the salutary effect of reminding legislators of the heightened need for clarity in criminal statutes.

It is true that the rule in favor of strict construction of criminal statutes " ' "is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." ' [Citations.] . . . . [T]he rule does not 'require[] that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of [the legislative body].' " (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146.) However, as we have explained, the rule of strict construction can be applied in this case without overriding common sense, or

requiring magnified emphasis upon a single ambiguous word. Nor do we need to strain or distort language in order to exclude conduct clearly intended to be within its scope, because in this instance the intent of the legislative body is not at all "evident" from the language it used.

Justice Richman contends that defendant's interpretation of section 288.7, subdivision (b), would lead to an "illogical result," because it would apply the provision "to all children from birth through the day of their tenth birthday—but to no other ten year olds[,] [whereas] [c]ommon sense suggests that the statute would apply to all ten-year-old children." (Conc. & dis. opn., at p. 4.) According to Justice Richman, "[t]here is no rationale for the position that the Legislature chose the line of demarcation to be a child on his or her tenth birthday." (*Ibid.*) This odd reasoning assumes that which the argument purports to demonstrate; namely, that for purposes of the statute a person remains "ten years of age or younger" until the 11th anniversary of his or her birth. But that interpretation of "ten years of age" is no more "logical" than one limiting the reference to children who have not passed the 10th anniversary of their birth. Justice Richman's assertion that "[t]here is no rationale for [defendant's] position that the Legislature chose the line of demarcation to be a child on his or her tenth birthday" simply ignores the rationale set forth in *Knott, supra*, 96 N.W.2d 900 and like cases, which is simply that "10 years of age" means just what it says, i.e., 10 years and not 10 years and 11 months. Paraphrasing the opinion in *Knott*, a child is one year old on the first anniversary of his birth and is ten years old on the tenth anniversary. Before the tenth anniversary he or she is under the age of ten years and after that anniversary the child is over that age. Ten years is an exact and definite period of time. It does not mean or include ten years and two or six or eleven months. As the *Knott* court emphasized, we should not read something into a criminal statute which is not there. (*Id.* at p. 901.) Justice Richman may disagree with this reasoning, but it cannot be dismissed as "illogical."

Justice Richman also emphasizes that the Legislature could easily have restricted the application of section 288.7 to children under the age of 10, if that was indeed its

intent, and argues that its failure to do so compels the conclusion it did not intend to do so. (Conc. & dis. opn., at pp. 4-5.) But that argument can just as readily be turned against the interpretation the Attorney General urges us to adopt. While "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision" (*Smith v. Goguen, supra*, 415 U.S. at p. 581), that is not here the case. As earlier indicated, if the Legislature wanted to protect children under the age of 11, as the Attorney General claims, it could easily have said so by using the commonly-accepted phrase "under the age of" eleven. The unusual phrasing the Legislature did employ appears in only 10 sections of the Penal Code (see p. 26, *ante*). The phrases "under the age of ___" and "under ___ years of age," by contrast, appear in hundreds of Penal Code provisions, and repeatedly in section 288 itself. It is hard to know whether this was purposeful, but it is as consistent with an intention to define the children referred to in section 288.7 as limited to those who have not passed the 10th anniversary of their birth, which is the literal meaning of the text, as it is to the interpretation urged by the state.

We do not presume to know precisely what the Legislature intended by the words "ten years of age or younger," nor do we claim that the phrase can have but one meaning, or that the meaning attributed to it by the Attorney General is unreasonable or would have absurd consequences. Putting aside the rule of strict construction, the interpretation of the same or similar language adopted in *State v. Carlson, supra*, 394 N.W.2d 669 and the other cases the Attorney General relies upon seems to us as reasonable as the different interpretation of such language adopted in *Knott, supra*, 96 N.W.2d 900 and the other cases relied upon by defendant. All we say is that (1) because section 288.7 is a penal statute, the inquiry into the ambiguity of the phrase "10 years of age or younger" must be undertaken from the perspective of the rule of strict construction; and (2) viewed from that perspective the language is manifestly ambiguous. Indeed, as one court has said, "one is left to conjecture why on earth the legislature did not plainly say 'under the age of 10' or, alternatively, 'under the age of 11', especially since this very controversy has waxed in other jurisdictions for fifty years. Indeed this very jurisdictional split on the

subject is what finally forces us to face the fact that there must be ambiguity, for if there were none there would likewise be no legal controversy." (*State v. Carroll, supra*, 378 So.2d 4 at p. 7.) The Legislature should take another look at section 288.7 and amend it if the intention was to include as victims children under the age of 11 in subdivision (b).

For the foregoing reasons, we hold that, as it is employed in section 288.7, subdivision (b), the phrase "10 years of age or younger" excludes victims who have passed their 10th birthday.

E. The Trial Court Properly Imposed Two Five-Year Enhancements for Defendant's Prior Serious Felony Conviction*

1. Section 667, subdivision (a)(2) did not preclude the trial court from imposing a five-year enhancement even though defendant was sentenced under the three strikes and habitual sexual offender laws*

Section 667, subdivision (a)(1) provides for a five-year enhancement for any defendant convicted of a serious felony who previously has been convicted of a serious felony. Subdivision (a)(2), however, precludes imposition of such an enhancement "when the punishment imposed under other provisions of law would result in a longer term of imprisonment." Here, the court imposed five-year enhancements on defendant's sentences on counts 1 and 3. Defendant argues that this violated section 667, subdivision (a)(2) because he was sentenced under the habitual sexual offender statute (§ 667.71) and the three strikes law (§ 667), both of which were alternative sentencing schemes that subjected him to longer terms of imprisonment. We disagree.

In *People v. Turner* (1995) 40 Cal.App.4th 733 (*Turner*), overruled on other grounds in *People v. DeLoza* (1998) 18 Cal.4th 585, 600, footnote 10, defendant was sentenced to a total term of 35 years to life, consisting of 25 years to life under the three strikes law and two consecutive five-year enhancements under section 667, subdivision (a)(1). (*Turner,* at pp. 736-737, 740.) On appeal, defendant challenged,

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* See footnote, *ante*, page 1.

* See footnote, *ante*, page 1.

among other things, the imposition of the enhancements. He argued, like defendant here, that because he was sentenced under an alternative sentencing scheme that resulted in a longer term of imprisonment (i.e., the three strikes law), section 667, subdivision (a)(2) precluded imposition of the enhancements. (*Turner,* at p. 740.)

The Court of Appeal rejected the argument. It first noted a conflict in the language of the three strikes law, which sets forth a sentencing scheme that is "in addition to any other enhancement or punishment provisions which may apply" (§ 667, subd. (e)), and the five-year enhancement provision, which does not apply "when the punishment imposed under other provisions of law would result in a longer term of imprisonment" (§ 667, subd. (a)(2)). The court determined that this conflicting language created "an ambiguity in section 667 as to whether a five-year enhancement is applicable to a twenty-five-year-to-life habitual offender sentence." (*Turner, supra,* 40 Cal.App.4th at p. 741.) Turning to the legislative history to resolve this ambiguity, the court noted that the Legislature was aware of the conflict and intended the enhancement provisions of section 667, subdivision (a) to apply, and thus the court concluded that the five-year enhancements were properly imposed. (*Id.* at pp. 741-742.)

Likewise here. Defendant was sentenced under the third strikes law (§ 667, subd. (b)-(i)), in addition to the habitual sexual offender statute (§ 667.71). Under *Turner, supra,* 40 Cal.App.4th 733, it was proper to also impose the five-year enhancements. (Accord, *People v. Acosta* (2002) 29 Cal.4th 105, 128-134 [prior conviction can be used both as a strike under the three strikes law and to impose a five-year enhancement under section 667, subdivision (a)]; *People v. Dotson* (1997) 16 Cal.4th 547, 554-556 [five-year enhancements should be imposed in addition to indeterminate term under the three strikes law].)

Arguing to the contrary, defendant relies on *People v. Lobaugh* (1987) 188 Cal.App.3d 780 (*Lobaugh*) and *People v. Skeirik* (1991) 229 Cal.App.3d 444 (*Skeirik*). Neither case is availing. Defendant Lobaugh was sentenced to three years for robbery, two years consecutive for a firearm enhancement, five years consecutive for a prior serious felony conviction, and one year consecutive for a prior prison term, for an

aggregate sentence of 11years. (*Lobaugh,* at p. 783.) On appeal, he challenged the imposition of the five-year enhancement, arguing that it violated section 667, subdivision (a)(2), because without the five-year enhancement, his prison term totaled six years, which constituted a longer term of imprisonment under an alternative sentencing scheme. The court rejected this claim, explaining: "In deciding whether section 667 applies, the court should not, as defendant argues, make an internal comparison of the component sentences. Rather, the court should determine whether the total term to be imposed, including the section 667 enhancement, is longer than that resulting from other provisions of law. If not, section 667 is inapplicable." (*Lobaugh,* at p. 784.)

Skeirik is equally unhelpful. There, defendant was convicted of two counts of assault with a deadly weapon and one count of possession of a firearm by an ex-felon. The jury also found true, among other things, that defendant was a habitual offender within the meaning of section 667.7 (habitual offenders who inflict great bodily injury) and had two prior serious felony convictions within the meaning of section 667, subdivision (a). The court sentenced him pursuant to section 667.7 to two consecutive life terms, plus a concurrent term of 18 years four months. The determinate portion of his sentence included two five-year terms for the prior serious felony conviction enhancements. (*Skeirik, supra*, 229 Cal.App.3d at p. 449.)

As pertinent here, on appeal defendant challenged the imposition of the two five-year enhancements. The Court of Appeal agreed, explaining: "Section 667, subdivision (a), provides a five-year enhancement for each of the serious felony convictions found to be true in this case. Subdivision (b) of that section sets forth a limitation on the application of the enhancement. Subdivision (b) provides in part that '[t]his section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment.' As previously noted in [*Lobaugh, supra,*] 188 Cal.App.3d 780, 784, section 667.7, subdivision (b), requires the court to determine whether the aggregate term to be imposed, including a section 667 enhancement, is longer than that resulting from other provisions of law. If it is then the 667 enhancement is applicable. Here, the life sentence provided for in section 667.7

constitutes an 'other provision of law' which results in a longer term of imprisonment and will accordingly prevail over the section 667 enhancements." (*Skeirik, supra,* 229 Cal.App.3d at p. 468, fn. omitted.)

According to defendant, *Lobaugh* and *Skeirik* dictate that the trial court here should have compared "the sentence it would have imposed, including the five-year enhancement, to the punishment imposed under an alternate scheme such as a habitual-offender statute. A life sentence is obviously longer than a determinate sentence . . . and in this case, obviously 25 years to life, doubled to 50 years to life, is longer than any determinate sentence the court could have imposed, with all enhancements." Defendant's analysis is flawed for one significant reason—neither *Lobaugh* nor *Skeirik* involved sentencing under the three strikes law. *Turner, supra,* 40 Cal.App.4th 733, confirmed that when sentencing under the three strikes law, section 667, subdivision (a)(1) still applies, despite the limiting language of subdivision (a)(2).

2. The court properly imposed two five-year serious felony enhancements even though defendant had only one prior serious felony conviction*

Failing the above argument, defendant contends that even if the court could impose a five-year enhancement under section 667, subdivision (a), it could impose only one such enhancement—not two as it did—because defendant had only one prior serious felony conviction. In defendant's words, "[t]he enhancement does not attach to each offense separately, but to the defendant, and the five-year enhancement is to be added to the total sentence otherwise imposed by the court." *People v. Byrd* (2001) 89 Cal.App.4th 1373 (*Byrd*) held otherwise.

Defendant Byrd was convicted of 12 counts of robbery, one count of mayhem, one count of attempted premediated murder, and one count of possession of a firearm by a convicted felon, with numerous enhancements, including three prior serious felony convictions. (*Byrd, supra,* 89 Cal.App.4th at p. 1375.) In sentencing him, the court added three five-year terms to each indeterminate sentence on the first 10 counts.

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* See footnote, *ante*, page 1.

Defendant challenged this on appeal, arguing "that his prior serious felony convictions are status enhancements that may be used only once where consecutive sentences are imposed." (*Id.* at pp. 1379-1380.) The Court of Appeal disagreed, concluding that it was proper to use defendant's prior serious felony convictions to enhance each indeterminate sentence. (*Id.* at p. 1380.) While defendant "question[s] whether *Byrd* was correctly decided," we see no reason to disagree with the result.

People v. Misa (2006) 140 Cal.App.4th 837 (*Misa*) is also instructive. There, defendant was convicted of one count of torture and two counts of assault. (*Id.* at p. 840.) The court imposed an indeterminate life sentence on the torture count, plus a term of 18 years for the assault and enhancements. The determinate term included two serious felony prior enhancements, one on the torture count and one on the assault count. (*Id.* at p. 841.) As pertinent here, defendant argued that the court erred in imposing the prior conviction enhancement twice. (*Id.* at p. 845.) The Court of Appeal rejected the argument. While first noting that *People v. Tassell* (1984) 36 Cal.3d 77, 90 (*Tassell*) (overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401) held that a section 667, subdivision (a) enhancement may be used to enhance a determinate sentence only once, regardless of the number of determinate terms that make up the total sentence, the court also noted that *People v. Williams* (2004) 34 Cal.4th 397, 402, held *Tassell* to be inapplicable to indeterminate sentences where the defendant is subject to the three strikes law. (*Misa, supra,* 140 Cal.App.4th at pp. 844-845.) Defendant Misa was, like defendant Williams, subject to the three strikes law. *Misa* thus concluded that the two five-year enhancements were properly imposed.

Again, defendant argues that *Misa* was wrongly decided because defendant there was a second-strike defendant, unlike the defendant in *People v. Williams*. Consequently, he submits, the "punitive purposes, cited in [*Williams,*] to justify multiple use of enhancements in three-strike cases" do not necessarily apply. As defendant would have it, "[t]here is no public interest whatever in unduly lengthening the sentence of a person who has committed only a single prior serious or violent felony, and who then is

convicted of a subsequent felony." The *Misa* court rejected this argument (*Misa, supra*, 140 Cal.App.4th at p. 846). So do we.

DISPOSITION

Defendant's convictions on counts 6 and 7 are reversed. In all other regards, the judgment of conviction is affirmed. Our rulings do not affect the aggregate sentence imposed by the trial court. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

Kline, P.J.

I concur:

Lambden, J.

A123957, *People v. Cornett*

People v. Cornett A123957
Concurring and dissenting opinion of Richman, J.

I concur in all portions of the majority opinion except part E.

Penal Code section[1] 288.7, subdivision (b) provides that "Any person 18 years of age or older who engages in oral copulation or sexual penetration . . . with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." Based on that the jury convicted defendant on count 6, but the court stayed the sentence on it pursuant to section 654.

In part E, the majority concludes that the conviction must be reversed and the count dismissed because Jane Doe 1—who was 10 years, 11 months at the time of the molestation—was not "10 years of age or younger" within the ambit of the statute. The majority thus rejects the People's interpretation that "a child who is 10 years of age or younger" includes a child up to and including the day before the child's eleventh birthday. I agree with the People's interpretation, and thus respectfully dissent from part E of the majority opinion.

The rules governing statutory construction are well established. We recently summarized them in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, where we explained that in construing a statute, our objective is to determine the intent of the lawmakers using a three-step process. We look first to the words of the statute themselves, giving them a " ' " 'a plain and commonsense meaning' " ' " unless they are defined otherwise. If the statutory language is clear and unambiguous, then our analysis is complete. If the language does not resolve the question, we then attempt to glean the lawmakers' intent from extrinsic aids such as the legislative history. Failing that, the third step requires us to " 'apply "reason, practicality, and commonsense to the language at hand" ' " and to " 'consider the consequences that will flow from a particular interpretation.' " (*Brown v. Valverde, supra,* 183 Cal.App.4th at pp. 1546-1547; accord,

[1] All further statutory references are to the California Penal Code unless otherwise indicated.

MacIsaac v. Waste Management Collection & Recycling, Inc. (2005) 134 Cal.App.4th 1076, 1082-1084.)

Both defendant and the People represent that no California court has yet interpreted the phrase "__ years of age or younger." And our research has found no published opinion on the issue, despite the number of statutes that use such language. (See, for example, sections 273i ["14 years of age or younger']; 417.27 ["17 years of age or younger"]; 701.5 ["12 years of age or younger"]; 861.5 ["10 years of age or younger"]; 1127f [same]; 1170.72 ["11 years of age or younger"]; 1347 ["13 years of age or younger"]; and 12088.5 ["18 years of age or younger"].)

Other jurisdictions have construed this identical language, however, and held in accord with the People's position, construing the language to include children who have passed the particular birthday but not yet reached the next birthday. The following cases are illustrative: *State v. Shabazz* (N.J.Super.App.Div. 1993) 622 A.2d 914, 915 [" '17 years of age or younger' includes a juvenile who has attained the age of 17 but has not yet reached his 18th birthday"]; *State v. Joshua* (Ark. 1991) 818 S.W.2d 249, 251 ["twelve years of age or younger" includes children who have reached and passed their twelfth birthday but have not reached their thirteenth]; *State v. Carlson* (Neb. 1986) 394 N.W.2d 669, 674 ["fourteen years of age or younger" means children who have passed their fourteenth birthday but have not yet reached their fifteenth]; *State v. Hansen* (Fla.Ct.App. 1981) 404 So.2d 199, 200 ["11 years of age or younger" includes children who have passed their eleventh birthday but not yet reached their twelfth]; *Phillips v. State* (Tex.Crim.App. 1979) 588 S.W.2d 378, 380 ["14 years of age or younger" includes all children who have not attained their fifteenth birthday]; and *Canada v. State* (Tex.Crim.App. 1979) 589 S.W.2d 452, 454 ["less than fifteen years of age" and "fourteen years of age or under" are identical in meaning]. Also see *People ex rel. Makin v. Wilkins* (N.Y.App.Div. 1965) 22 A.D.2d 497, 502 [child is "10 years or under" until the child reached his or her eleventh birthday]; and *State v. Christensen* (Utah 2001) 20 P.3d 329, 330 ["17 years of age or older but not older than 17" includes a person who is seventeen years old until he or she attains eighteenth birthday].)

As the majority notes, other jurisdictions have construed similar—but, in no case, identical—language to reach the result the majority reaches, to include only children who have not passed the specified birthday date. (See, e.g., *State v. Collins* (R.I. 1988) 543 A.2d 641, 645 ["thirteen (13) years of age or under" applies to "persons under thirteen years of age and to those who are exactly thirteen years old"]; *State v. Jordan* (R.I. 1987) 528 A.2d 731, 734 ["thirteen years of age or under" includes "only those victims who had reached the day prior to their thirteenth birthday or were under that age"]; *State v. McGaha* (N.C. 1982) 295 S.E.2d 449, 450 ["the age of 12 years or less" excludes a child who has passed his or her twelfth birthday]; *Knott v. Rawlings* (Iowa 1959) 96 N.W.2d 900, 901-903 ["a child of the age of sixteen years, or under" does not include a child who has passed his or her sixteenth birthday]; *People v. O'Neill* (Sup.Ct. 1945) 53 N.Y.S.2d 945, 947 ["ten years or under" excludes children who have passed their tenth birthday]; *Gibson v. People* (Colo. 1908) 99 P. 333, 334-335 ["sixteen (16) years of age or under" excludes children who have passed beyond the first day of their sixteenth birthday].)

At one point the majority distills the People's position this way: "Conceding that many cases have construed the phrase '__ years of age or younger' to be limited to persons who had not passed the birthday indicated by the statute, the Attorney General contends that the more reasonable cases, which reflect the 'modern trend,' are those which include persons who have reached and passed the age designated by the statute but have not reached the subsequent birthday."[2] (Maj. opn. at p. 32.) I conclude that the People's interpretation is more reasonable, for several reasons.

First, the People's interpretation is consistent with the manner in which people commonly state their age. In statutory construction terms, it is the " ' " 'commonsense

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[2] The majority's description is an accurate paraphrase of the People's concession, as their brief does state that . . . "appellant has identified a number of cases from other jurisdictions that have construed the phrase '__ years of age or younger' to include only persons who had not passed the anniversary of their birth, ..." (Italics added.) In light of the actual wording of the statutes in those cases—none of which uses that language—perhaps the People have conceded too much.

meaning.' " " " (*Brown v. Valverde, supra,* 183 Cal.App.4th at p.1546.) As the Utah Supreme Court well put it in *State v. Christensen, supra,* 20 P.3d at p. 330: "It is significant that it is almost a universal practice in our society to state our age (except possibly for infants) by the number of full years we have lived, without adding or recognizing that we have also lived some additional months beyond those full years. We do not ordinarily recognize increase in our age until we have lived another full year." Or, in the words of *State v. Carlson, supra,* 394 N.W.2d at p. 674: "[T]o the ordinary person 'fourteen years of age' means that one has passed the 14th birthday but has not reached the 15th birthday. Thus, 'fourteen years of age' is a temporal condition existing on the 14th birthday and continuing until the 15th birthday. Any other construction of 'fourteen years of age' would be a perversion of popular parlance." *State v. Shabazz, supra,* 622 A.2d at p. 916, put it this way: "In common parlance, a juvenile becomes 17 years of age upon reaching his 17th birthday, and remains 17 years of age until he reaches his 18th birthday. The simple and overriding fact is that most people state their ages in yearly intervals. Although such expressions are perhaps linguistically flawed, we doubt that the Legislature intended to depart from the common, everyday meaning of the words used and engage in a metaphysical analysis of the aging process. Instead, we believe that the Legislature, in drafting the statute, intended to 'talk the way regular folks do.' "

To put it in personal terms, my majority colleagues and I are our respective "__ years of age" until we reach our next birthdays. I believe this is how "regular folks" talk. How "ordinary people" state their age. "Common parlance."

Second, the majority's conclusion as to the interpretation of section 288.7, subdivision (b) leads to an illogical result, one I cannot believe is what the Legislature intended. Under their interpretation, section 288.7, subdivision (b) would apply to all children from birth through the day of their tenth birthday—but to no other ten year olds. Common sense suggests that the statute would apply to all ten-year-old children. There is no rationale for the position that the Legislature chose the line of demarcation to be a child on his or her tenth birthday.

Third, had the Legislature intended to protect only those children under the age of 10—which is essentially what the majority concludes—it could have easily said so. As we recently confirmed, "The Legislature knows how to speak the language. . . ." (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 322, quoting *People v. Palomar* (1985) 171 Cal.3d 131, 134.) Thus, it has been observed that the Legislature "knows how to draft time limits" (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51), "knows how to construct an exclusive definition" (*Alan Van Vliet Enterprises v. State Bd. of Equalization* (1977) 65 Cal.App.3d 964, 970), and "knows how to draft a provision to require consideration of the defendant's age or other personal characteristic . . . ." (*People v. Trevino* (2001) 26 Cal.4th 237, 241.) If the Legislature meant section 288.7 to apply only to children under 10 (and the day of their 10th birthday), it could easily have done so, as it has done in many other places. Numerous statutes illustrate the point, including the following: section 261.5, subdivision (b) [unlawful intercourse with minor, defined as "person under the age of 18 years"]; section 26 ["children under the age of 14"]; section 307 ["under the age of 21 years"]; Family Code section 6500 [minor "under 18 years of age"]; and Evidence Code section 1360 ["under the age of 12"].

This leads me finally to the principle at the heart of the majority's conclusion, the "rule of lenity," which the majority discusses in an exhaustive—and typically scholarly—way, reaching all the way back to Chief Justice Marshall. There is nothing about any of that discussion with which I can disagree, only as to how the rule of lenity applies—more accurately, does not apply—here.

As the majority necessarily acknowledges, " 'the rule of construction " 'not an inexorable command to overrule common sense and evident statutory purpose.' " ' " (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146.) Indeed, the rule only applies when "two reasonable interpretations of the same provision stand in relative equipoise . . . ." (*People v. Avery* (2002) 27 Cal.4th 49, 58.) In my view, the majority's interpretation does not so stand. Stated otherwise, since the majority's "interpretation is not equally

reasonable, the rule of lenity is inapplicable." (*People v. Oates* (2004) 32 Cal.4th 1048, 1068.)

Indeed, a case quoted extensively in the majority opinion provides a compelling reason why the rule of lenity does not apply here. That case is *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312-313, which confirms that the United States Supreme Court's "explanation" for the rule of lenity is to " 'ensure[] that criminal statues will provide fair warning.' " (Maj. opn. at pp. 35-36.) I have absolutely no doubt that when defendant committed the heinous crime on Jane Doe I, he knew that she was "10 years of age." What else could he have thought? She had not reached her eleventh birthday.

Richman, J.

Trial Court:	Sonoma County Superior Court
Trial Judge:	Hon. Rene A. Chouteau
Attorneys for Appellant:	Orzo William Childs By appointment, First District Appellate Project, independent case system
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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1622 Fourth Street, Santa Rosa, California 95404.

On the date set forth below, I served the attached APPELLANT'S PETITION FOR REVIEW in said cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in a box designated for collection of mail, following ordinary business practices, at my business address. I am familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service and that this correspondence will be deposited with the United States Postal Service on the date set forth below in the ordinary course of business.

Said envelopes are addressed as follows

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Copy sent to or on behalf of Appellant pursuant to his instructions

O W CHILDS

I, Sharon Ricks, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed at Santa Rosa, California this 12th day of January 2011.

SHARON RICKS