Overview of Presentation

- Purposes of Statute of Limitation (SOL), and when they are not appropriate
- Evolution of Utah SOL related to Sex Abuse
- Analyzing SOL cases
- What constitutes a "report"
- What constitutes "law enforcement agency"
- Tolling of SOL
- Need to still investigate cases for 404(b) and 404(c) purposes
Why have SOL?

- Neither U.S. nor Utah Constitutions provide defendant any right to have a prosecution initiated within any certain time.
- The creation and enactment of statute of limitations are entirely a matter within the purview of the Legislature.
- In Classical Athens, a five-year statute of limitations was established for all cases except homicide. Demosthenes wrote that statutes of limitations were adopted to control "sycophants" [professional accusers]. (Allen, Danielle S, THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS, 154 (2003)).

Purpose of SOL

"The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof .... These statutes are declared to be 'among the most beneficial to be found in our books.' 'They rest upon sound policy, and tend to the peace and welfare of society'; ... The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.


Three main purposes of SOL

- To ensure lawsuits can be dealt with in a timely manner.
- To prevent the facts surrounding the lawsuit from becoming stale, unclear, or discernable.
- To prevent people from filing long drawn-out lawsuits on stale claims merely for harassment purposes.
Example of Reason for Not Limiting Claims

1933 Utah Code:

• Section 103-9-1. No Limitations in Certain Crimes.
  There shall be no limitation of time within which a prosecution for murder, the embezzlement of public moneys or the falsification of public records must be commenced. Prosecution for murder may be commenced at any time after the death of the person killed; and for the embezzlement of public moneys or the falsification of public records, at any time after the discovery of the crime.

• Section 105-9-2. Four Years in All Other Felonies.
  For any felony other than murder, the embezzlement of public moneys or the falsification of public records, an indictment must be found or a complaint or information filed within four years after its commission.

Purposes for Not Limiting Claims

• "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

• "No democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least." Judith N. Shklar, THE FACES OF INJUSTICE 35 (1990).
Evolution of Utah Sex Crimes SOL

Which Statue of Limitations Applies?

- The Type of Crime and the Date of Crime determines which SoL applies:
  - Crime Against Adults?
  - Crime against Children?
Which Statue of Limitations Applies?

- Crimes against adults:
  - Rape. 76-5-402
  - Object Rape. 76-5-402.2
  - Sodomy. 76-5-403
  - Aggravated sexual assault. 76-5-405
  - Forceful sexual abuse. 76-5-404
  - Incest. 76-7-102

Which Statue of Limitations Applies?

- Crimes against adults (Above the Line):
  - Dates to Remember!
    - 2005
    - 2008

Which Statue of Limitations Applies?

- Crimes against adults (Below the Line):
  - Dates to Remember!
    - Incest
      - 1983
      - 2009
    - Forceful Sexual Abuse
      - 2005
### Which Statue of Limitations Applies?

- **Crimes against adults / Children**
  - Dates to Remember!
    - 2003

  "However, the prosecution must commence (i.e. filing of an information) within one (1) year of the defendant being identified by DNA evidence."

### SOL For Adult Sex Crimes - Summary

<table>
<thead>
<tr>
<th>Crime</th>
<th>SOL Date</th>
<th>Note</th>
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<tbody>
<tr>
<td>Rape - Object rape - Forcible sodomy - Aggravated sexual assault</td>
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<td>8 years from offense</td>
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<td>If report w/in 4 yrs. of offense</td>
<td>No SOL</td>
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<td>Forcible Sexual Abuse</td>
<td>05/02/2005</td>
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</tr>
</tbody>
</table>

### Which Statue of Limitations Applies?

- **Crimes against children:**
  - Unlawful Sexual Activity with a minor, 76-5-401
  - Sexual abuse of a minor, 76-5-401.1
  - Unlawful Sexual conduct with a 16- or 17-year old, 76-5-401.2
  - Unlawful adolescent sexual activity, 76-5-401.3
  - Rape of a child, 76-5-402.1
  - Object rape of a child, 76-5-402.3
  - Sodomy on a child, 76-5-403.1
  - Sexual abuse of a child, 76-5-404.1
  - Aggravated sexual abuse of a child, 76-5-404.1
Which Statue of Limitations Applies?

• Crimes against children (Above the Line):
  • Dates to Remember!
    • 1998
      • Unlawful/Sexual Activity with a minor: 76-5-401
      • Sexual abuse of a minor: 76-5-401.1
      • Unlawful/Sexual contact with a 16 or 17-year-old: 76-5-401.2
    • 2017
      • Unlawful/abusive sexual activity: 76-5-401.3

Which Statue of Limitations Applies?

• Crimes against children (Below the Line):
  • Dates to Remember!
    • 1983

Which Statue of Limitations Applies?

• Crimes against children (Below the Line):
  • Rape of a child: 76-5-402.1
  • Object rape of a child: 76-5-402.3
  • Sodomy on a child: 76-5-403.1
  • Sexual abuse of a child: 76-5-404.1
  • Aggravated sexual abuse of a child: 76-5-404.
Which Statue of Limitations Applies?

- Crimes against children (Below the Line):
  - Dates to Remember:
    - 1983
    - 1984
    - 1991
    - 1996
    - 2003
    - 2008
Which Statue of Limitations Applies?

- Crimes against children (other):
  - Child Prostitution, 76-10-1306
  - Human Trafficking, 76-5-310
- Dates to Remember!
  - 2013

SOL For Child Sex Crimes - Summary

Rape of a child - Object rape of a child - Sodomy upon a child - Sexual abuse of a child

What if a report was made?

- Felony 1 Child Sex Crimes + Sexual Abuse of a child (F2)
- Report made:
  - On or after May 5, 2008
    - Charge it!
  - On or before May 9, 1983
    - Can NOT Charge it!
    - UNLESS the Bell Tolls!
  - On or between May 10, 1983 & May 4, 2008
    - Call the District Attorney
Analyzing SOL Cases

Burden of Proof - Waivers

- "When an issue concerning the statute of limitations is raised, the judge shall determine by a preponderance of the evidence whether the prosecution is barred by the limitations in this part."
  - UCA § 76-1-306.
- The "trial court has the discretion to consider evidence concerning running of a statute of limitations in pre-trial proceedings. If the evidence is sufficiently clear, the issue may be resolved in a manner of law at that juncture, avoiding perhaps further proceedings. If however, 'it cannot be said that as a matter of law the statutory period has run, the issue is a question of fact for the trier of fact.'" State v. Pierce, 782 P.2d 194, 196 (Utah Ct. App. 1989) (quoting People v. Padfield, 136 Cal. App.3d 218, 185 Cal. Rptr. 903 (1982)).
- Statutes of limitations are not jurisdictional and can be waived by the defendant in a knowing and voluntary guilty plea. See James v. Galetka, 965 P.2d 567, 573 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999). "If a criminal defendant decides that the advantages of pleading to a statutorily barred lesser crime outweigh the protections the statute affords, that defendant can voluntarily and knowingly waive the right to assert a statute of limitations defense."
State v. Lavoto, 776 P.2d 912 (Utah 1989)

- Before 1983, the Utah Criminal Code did not specifically proscribe any sexual acts against children. The (adult) rape and sodomy crimes were covered by the four-year catchall statute of limitations. See UCA § 76-1-302(1)(a) (1978).
- Thus the SOL ran out on January 1, 1984 and December 31, 1986.
- State in Lavoto argued that the Legislature now increased the SOL for child sex crimes.
- Court held that the 4 year SOL applied in this case because "the eight-year statute of limitations established in § 76-1-307(c) to apply only to the newly designated offenses [which started May 10, 1983] and not to the standard, generic crimes of rape and sodomy which provided a basis for prosecution prior to 1983 in cases in which the victims were children. A contrary conclusion would raise constitutional questions, which the Legislature no doubt sought to avoid." 776 P.2d at 914.

Fact Pattern #2

You receive a report that a child was sexually abused from August 1983 to April 1984.

Can you charge it?
What can you charge aggravated SAC?

Is aggravated an option?

- The Utah Legislature did not define the crime of "aggravated sexual abuse of a child" until February 16, 1984. See UCA § 76-1-404.1(3) (1984), HB 48, 1984 Utah Laws ch. 18, §10 (effective February 16, 1984).
- So there was no crime from August 1983 through February 15, 1984.
- The Legislature did not alter or amend section 76-1-303(c) to include aggravated sexual abuse of a child when they created the enhanced crime.
- Thus, the February 16, 1984 through April 1984 "aggravated" conduct is beyond the four year SOL.
State v. Lusk, 2001 UT 102, 37 P.3d 110

• "Because statutes of limitation are procedural in nature, a legislative amendment enlarging a limitations period may be applied retroactively to crimes committed before the amendment where the limitations defense has not accrued to the defendant before the amendment becomes effective." 2001 UT 102 at ¶28 (citations omitted).

• "[W]hen the legislature enacted the statute defining the crime of aggravated sexual abuse of a child in 1984, the legislature did not specify that any other limitations period applied to the crime. By not specifying that a particular statute of limitations applied to aggravated sexual abuse of a child, the legislature tacitly mandated that the four-year catchall statute of limitations applied to the crime." 2001 UT 102 at ¶23.

• "[O]nce the statute of limitations has run on a crime committed, precluding prosecution of the crime, it is forever barred and a defendant's vested right to rely on that limitations defense cannot be eliminated by subsequent legislative action." 2001 UT 102 at ¶30.

What about just SAC?

• Sexual Abuse of Child was created May 10, 1983 along with a statute of limitations allowed prosecution of the crime within one year after the report of the offense to law enforcement, so long as the prosecution was commenced within eight years after the alleged commission of the offense.

• In 1991, the legislature amended section 76-1-303(c), replacing the eight-year statute of limitations with a limitations period permitting prosecution of sexual abuse of a child anytime "within four years after the report of the offense to a law enforcement agency." UCA § 76-1-303(3) (1991), HB 32, 1991 Utah Laws, ch. 175, §2 (Effective April 29, 1991).

• So if not reported, the August 1983 through April 1984 still viable!

State v. Lusk - continued

• "In sum, we reiterate what we said in Del Monte Corp. v. Moore: 'The general and well-established principle of law is that statutes prescribing limitations relate to remedies; and that the legislature has power to increase the time in which an action may be brought. In that conneet that if the statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension. But if the cause of action is still alive, the new enactment can extend the time in which it may be brought.' 580 P.2d 224, 225 (Utah 1978) (footnotes omitted). We believe that this language from Del Monte regarding civil actions similarly applies to criminal prosecutions." Lusk, 2001 UT 102 at ¶29.
State v. Green, 2005 UT 9, 108 P.3d 710

- February 1985: 12 years old L.K. “betrothed” herself to her stepfather, Thomas Green.
- November 1985: now 13 years old, L.K. “spiritually married” Green during a vacation in Mexico.
- January 1986: L.K., still 13 years old, conceived a child—date of offense for rape of child.
- May 1986: L.K. turned 14 years old
- September 1986: child was born
- May or September 1986: in order to avoid charges of child molestation, Green legally married 14 year old L.K. pursuant to Utah law.

State v. Green - continued

- April 2000: Information filed
- The special eight-year limitation period for rape of child (1983 amendments) would have expired January 1990.
- However, in 1991 the eight-year limitation period was changed to anytime within four years after the report of the offense to a law enforcement agency. UCA § 76-3-3 (1991), HB 32, 1991 Utah Laws, ch. 175, §2 (Effective April 29, 1991).
- This amendment removed the date of the offense as the landmark for calculating the rape of a child limitations period and replaced it with a date of report reference point. In this case, the amendment has the effect of rendering the child’s conception date irrelevant to the statute of limitations analysis. 2005 UT 9 at ¶18.
- Green asserted two shields to retroactivity:
  - “[N]o part of these revised statutes is retroactive, unless expressly so declared.” UUCS § 68-3-3 (1986).
  - Citing State v. Lavoto, 776 P.2d 912, 913 (Utah 1989), he claimed the 1991 amendment did not expressly make its provisions applicable to the crime of rape of a child.
State v. Green - continued

- In January 1986 (date of offense), the statute of limitations for rape of child, was “within one year after the report of the offense to law enforcement officials, so long as no more than eight years has elapsed since the commission of the offense.” UCA § 76-1-303(c).
- In 1991 (5 years from offense), the legislature amended section 76-1-303(c), replacing the eight-year statute of limitations with a limitations period permitting prosecution of sexual abuse of a child anytime “within four years after the report of the offense to a law enforcement agency.” UCA § 76-1-303(3) (1991), HB 32, 1991 Utah Laws, ch. 175, §2 (Effective April 29, 1991).
- “In enacting the 1991 amendment, the legislature conformed to the grant of authority we sanctioned in Lavoto by expanding the statute of limitations for a crime specifically listed in the prior statute, rape of a child. The revised statute of limitations for this offense, therefore, has retroactive application.” 2005 UT 9 at ¶22 (citations omitted).

What is a “report”?

Three-part test:
1. A discrete and identifiable oral or written communications,
2. That is intended to notify a law enforcement agency that a crime has been committed, and
3. That actually communicates information bearing on the elements of a crime as would place the law enforcement agency on actual notice that a crime has been committed.
What is a “report”?  
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- Vague contacts to Sheriff's office reporting Mr. Green's marriage to Linda?
- Information about an illegal polygamist marriage?
- Underage marriage or "child rape"?
- Child's birth certificate by the Bureau of Vital Statistics?
- DCFS contacts?

What is a “report”?  
(State v. Chrisman, 2011 UT App 189, ¶15)

- Victim's half-sister told a police officer that Defendant had engaged in sexual relations with the victim?
What is a “report”?
(State v. Toombs, 2016 UT App 188, ¶23)

• Neighbor’s suspicion that known prior child molester was abusing new child in home after hearing of child being bathed by suspect, but was denied by family members?
• NO!
• Because:
  • One cannot ascertain where the touching occurred
  • What happened, or
  • How it happened.

What is a “Law Enforcement Agency”?
(State v. Green 2005 UT 9, 108 P.3d 710)

A ‘law enforcement officer’ is defined as:
(1) an employee of a law enforcement agency
(2) whose primary and principal duties consist of:
  a) the prevention and detection of crime and
  b) the enforcement of criminal statutes or ordinances of this state or any of its political subdivisions.
What is a “Law Enforcement Agency”?  
(State v. Green 2005 UT 9, 108 P.3d 710)

A ‘peace officer’ is defined as:
(1) Any employee of a police or law enforcement agency
(2) Whose duties consist primarily of the prevention and detection
of criminal statutes or ordinances of this state or any of its
political subdivisions."

What is a “Law Enforcement Agency”?  
(State v. Green, 2005 UT 9, 108 P.3d 710)

• DCFS?  
• NO!  
• Because:  
  • [Although] DCFS shares investigatory functions with law
    enforcement. These shared functions are ancillary to its
    primary purpose of providing child welfare services. ¶50.

What is a “Law Enforcement Agency”?  
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Tolling of Statute of Limitations
Tolling of the SOL

- As a general rule, the SOL in a criminal case begins to run when the offense is committed and is tolled by the filing of an indictment or criminal information. See UCA § 76-1-302(4).
- However, “[t]he period of limitation does not run against any defendant during any period of time in which the defendant is out of the state following the commission of an offense.” UCA § 76-1-304(1).

State v. Canton, 2013 UT 44, 308 P.3d 517

- The Utah Supreme Court “interpret[s] ‘out of the state’ to focus on the question of a person’s physical presence within the state’s territorial boundaries. Thus, we reject Canton’s abstract construct of legal presence…” State v. Canton, 2013 UT 44, ¶12, 308 P.3d 517.
- Defendant originally charged by federal government for enticement of 15 year old girl. The defendant arrested in Utah but then released and returned to New Mexico. Defendant returned to Utah for various court appearances in federal court. After several years, the case was dismissed without prejudice.
- State thereafter filed charges, asserting SOL tolled because defendant was physically “out of the state.” Defendant claimed he was subject to the State’s “legal authority—in the sense of cooperating with federal officials investigating criminal charges in Utah and appearing at federal court proceedings there.” Court said this was not correct interpretation of the statute.

The Statute has run so I am sooooo… done. Right?
Reasons to Investigate after Statute has run

• 404(B) and (C)
• Sexually Violent Persons

404(b)

• Can’t use it to show Character
• BUT
  • Motive
  • Opportunity
  • Intent
  • Preparation
  • Plan
  • Knowledge
  • Identity
  • Absence of mistake
  • Accident
  • Etc.

404(c)

• Can use it to show Character
• BUT
  • Only in Child Molestation Cases
404(c)

- Can use it to show Character
- BUT
  - Only in Child Molestation Cases

So What Should I investigate?
(403 Factors)

- Remoteness of the other act(s)
  - Relevant intervening events

So What Should I investigate?
(403 Factors)

- Remoteness of the other act(s)
- Similarity or Dissimilarity of the other act(s)
So What Should I investigate?
(403 Factors)
• Remoteness of the other act(s)
• Similarity or Dissimilarity of the other act(s)
• Strength of the evidence that points at Defendant

• Frequency of the other acts

• Other 403 factor(s), if any
So What else Does that Mean?

• Agency shall retain a copy of the recording (CJC) for 18 years following the date of the last recording unless the prosecuting attorney requests in writing that the recording be retained for an additional period of time.

So What else Does that Mean?

Evidence gathered in a sexual assault may NOT be disposed of before trial unless:

• 50 years have passed from the date of evidence collection for sexual assault kits related to an uncharged or unresolved crime
• 20 years have passed from the date of evidence collection for restricted kits.
• The prosecution has filed a motion with the court to destroy the evidence AND an attempt has been made to notify the victim.