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ISSUES TO DEVELOP AT TRIAL

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Happy New Year, and welcome to this month's newsletter. Below, we bring to your attention challenges you can make when the prosecution presents the "wrong" witness to introduce evidence, typically scientific or technological. We focus below on challenges to DNA, breathalyzer, and cell site location information. However, be on the lookout for other circumstances not covered here. The broad questions you should ask yourself are: (1) did this witness personally observe the event or generate the data? and (2) does this witness have the necessary expertise to opine as they do?

DNA: If the People seek to introduce DNA testing results that inculcate your client, object on federal and state Confrontation Clause grounds **if the witness did not witness, perform, or supervise the generation of the DNA profile, or if the witness did not alternatively independently analyze the raw data.** The testifying analyst must not simply be "functioning as a conduit for the conclusions of others." See People v. John, 27 N.Y.3d 294 (2016). If the prosecution fails to produce the right witness, or wrongly maintains that the testifying analyst satisfies confrontation, you will have preserved an excellent issue for appeal.

Breathalyzer: If the People in a DWI case seek to introduce breathalyzer testing procedures and results against your client, object on Confrontation Clause grounds **if the witness neither personally participated in nor observed your client's test.** In People v. Flores, the Appellate Term, Second Department reversed, where the testifying witness merely received documents from the tester (who had died before trial) indicating that the proper protocols were followed, but was not himself present when the test was administered. There was no "testimony as to firsthand observations of the 12-step procedure actually carried out and whether the device had produced error tones." 2018 WL 68022257 (Dec. 20, 2018). On the other hand, the Court of Appeals found no confrontation error in People v. Hao Lin, 28 N.Y.3d 701 (2017), where the testifying officer directly observed the defendant's breath test and testified at trial based on his own observations and conclusions, and the written checklist was not admitted into evidence.

Object for lack of foundation if the prosecution seeks to introduce the test results printout for its truth, in the absence of testimony by the proper witness as to the test preparation procedure that preceded it. "Otherwise," as Flores reasoned, "the mere fact that it was produced would validate the procedure itself."

Cell Site Location Information: If the prosecutor offers evidence from a non-expert witness about how cell towers operate, including possible ranges of cell phone towers, object that the witness isn't qualified to provide such testimony. "[T]estimony on how cell phone towers operate must be offered by an expert witness" because an analysis of the possible ranges of cell phone towers and how they operate is "beyond a juror's day-to-day experience and knowledge." People v. Ortiz, 2019 WL 191430 (1st Dep't Jan. 15, 2019) (citing United States v. Natal, 849 F.3d 530, 536 and n.5 (2d Cir. 2017)). The Court reversed in Ortiz because the People offered the testimony of a subpoena compliance agent with T-mobile to testify that, on the day of the attack, the defendant's phone was within two miles of a cell phone tower located near the victim's apartment. The First Department stated that such testimony would require an engineering background.

