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ISSUES TO DEVELOP AT TRIAL

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This summer issue focuses on a "hot" topic: law enforcement personnel providing "expert" testimony to de-code conversations and slang terminology. In recent years, prosecutors have increasingly presented law enforcement personnel as expert witnesses, testifying on topics ranging from the structure of organized crime families to the meaning of slang terms in drug-related prosecutions. Such testimony runs the obvious risk of bolstering the prosecution's case and usurping the jury's role, as the Court of Appeals recognized in *People v. Inoa*, 25 N.Y.3d 466 (2015).

Under *Inoa*, to be permissible, the testimony must be based off of the expert's general subject matter expertise. That is, it must be detached from the particulars of the case investigation and from specific case facts. Nor should the expert opine on factual matters that do not require any specific subject matter expertise at all. Finally, such testimony may raise concerns under the Sixth Amendment's Confrontation Clause. This newsletter summarizes the court's decision in *Inoa* and reviews objections to consider if a law enforcement witness provides expert testimony at trial.

Bottom line: Object if the purported expert appears to be using case-specific information to interpret conversations and terms, rather than his/her general expertise about specific jargon. Ask for an offer of proof ahead of time as well - you might be able to preempt prejudicial and improper testimony.

Background:

In *People v. Inoa*, the defendant was enlisted by his longtime friend, who was incarcerated at the time, to kill a rival drug dealer. To this end, defendant's co-conspirator engaged in numerous telephone conversations about the killing while in custody, some of which were recorded. At trial, the prosecution put on recordings of 77 phone calls involving defendant's accomplice. The prosecution enlisted Rolando Rivera, an NYPD detective, as an expert in decoding phone conversations to help translate coded slang.

Rivera's testimony, however, went much further than translating jargon. He also offered his assistance with "interpreting portions of the phone conversation transcripts which. . .were not encoded." 25 N.Y.3d at 471. In fact, the majority of his testimony was based off of his experience investigating the defendants. He frequently opined on the cumulative meaning of the conversations, utilizing his specific knowledge of the investigations rather than any broader knowledge of the fixed meaning of code words. *Id.* The Court of Appeals found that Rivera had inappropriately summarized and opined as to facts that the jury should have been left to interpret, citing his attempts to interpret the meanings of whole conversations and reliance on firsthand

investigatory knowledge. *Id.* at 474. The Court of Appeals ruled that the trial court had abused its discretion in admitting the testimony.

The Court ultimately declined to vacate Inoa's conviction, ruling that the errors were harmless. However, it noted that in many cases such errors might not be harmless, and that the case "should not encourage any expectation that the harmless error doctrine will reliably insulate the practice of using government agents as sort of summation witnesses." *Id.* at 477.

Grounds for Objection:

Inoa and its progeny, in combination with *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) and *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003), two Second Circuit cases on which *Inoa* relies, suggest the following circumstances in which defense counsel should object to expert law enforcement testimony:

The expert interprets the general meaning of a conversation, rather than individually interpreting code words within a conversation. *Inoa*, 25 N.Y.3d at 474.

- The expert in *Inoa* had participated in prior investigations of the incarcerated co-defendant, and used this background knowledge to "essentially harmonize[] the recorded conversations with the prosecution's overall theory of how the murder plot was carried out." 25 N.Y.3d at 471.

- The expert in *People v. Melendez*, a 2016 case relying on *Inoa*, used his case-specific knowledge to testify about the relationships among individuals overheard in recorded phone calls, rather than simply decoding words. 138 A.D.3d 758, 759 (2d Dep't 2016).

- The expert in *Dukagjini* testified as to the meaning of words or phrases "that were patently not in drug code" such as "what's left over there in that can." 326 F.3d at 55. This testimony did not purport to decode the fixed meaning of a term, but instead resembled a summation by the prosecution based on deductive reasoning and firsthand case knowledge.

The expert interprets ambiguous terms based on knowledge gained through their involvement in the case, rather than their general expertise about crime slang. 25 N.Y.3d at 474.

- The expert in *Inoa* translated numerous phrases "based upon the investigative reconstruction in which he had taken part" rather than on knowledge of the significance of the phrases themselves. 25 N.Y.3d at 474.

- Similarly, the expert in *Dukagjini* testified as to the meaning of the phrase "the six or whatever" based on his experience as a DEA agent assigned to the case, rather than from knowledge of the term's general use in the drug trade. 326 F.3d at 55.

- In *Melendez*, the court erred by admitting testimony regarding "'case-specific' terms that [the expert] had discovered in the course of the investigation." 138 A.D.3d at 759.

Such expert testimony is more likely to be upheld if the expert was not involved with the case investigation or prosecution. *See, e.g.*, *People v. Williams*, 146 A.D.3d 410 (1st Dep't 2017) (upholding admission of expert testimony on slang, observing that the witness "notably had no connection with the investigation of the case").

The expert opines on topics that require no subject matter expertise at all.

- In the example above, interpreting general phrases like "what's left over there in that can" is also problematic because doing so requires no specialized content knowledge. However, it will serve to "provide an alternative, purportedly better informed, gloss on the facts of the case," interfering with the jury's role. *Inoa*, 25 N.Y.3d at 475.

- Defenders should aim to limit any expert testimony that could have been made by a lay witness. In a different but instructive context, the First Department cited *Inoa* to uphold a trial court's rejection of a proposed expert on police procedures when "the proposed testimony consisted of matters that were speculative, that were within the knowledge of the typical juror, or that were, or could have been, explored through fact witnesses." *People v. Cabrera*, 133 A.D.3d 495, 495-96 (1st Dep't 2015).

- On the other hand, if the testimony is limited in scope and does not bring in case-specific knowledge, it will likely be admissible if it decodes "street language beyond the knowledge of the typical juror." *See People v. Murray*, 146 A.D.3d 649, 650 (1st Dep't 2017).

The expert's testimony serves to introduce otherwise inadmissible hearsay, violating the Confrontation Clause.

- In both *Dukagjini* and *Mejia*, the purported expert relied on out-of-court statements by individuals who were not subject to cross-examination, violating the defendants' rights under the Confrontation Clause. This was not a developed issue in *Inoa*, but it could be relevant in future cases.[1]

[1] The *Inoa* court speculated that the Confrontation Clause issue was not raised because the inadmissible statements were either not testimonial or were subject to cross-examination. *Inoa*, 25 N.Y.3d at 473.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- If you are litigating a 30.30 issue, state in your initial motion that you are entitled to a pre-trial hearing under People v. Allard and CPL § 210.45(5)(c). Do a reply even if you don't think the prosecution has rebutted your showing with conclusive proof.

- If you've unsuccessfully challenged any prospective juror for cause, then, barring a strategic reason for not doing so, **exhaust your peremptories**, or the denied cause challenge will not be preserved for appeal;

- Also on the subject of jury selection, if you are litigating a *Batson* challenge against the prosecution, remember the "third step" — challenge the prosecution's race or gender neutral reasons as pretextual by showing (1) that similarly situated jurors of a different race or gender were not challenged. Use the information you've culled about prospective jurors from that round or prior rounds; or (2) that the challenged juror would be expected to favor law enforcement (e.g. was a crime victim, has law enforcement ties, gave prosecution-friendly answers).

See past issues at http://appellate-litigation.org/issues-to-develop-at-trial