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ISSUES TO DEVELOP AT TRIAL

June 2016 - Vol. I, Issue 3

This month's issue discusses the Court of Appeals' April 28, 2016 decision in People v. Sean John, holding that where evidence about DNA testing and comparison results is testimonial, the People are required to present them through a witness who has "prepared, witnessed, or supervised the generation of the . . . numerical DNA profile."

Bottom line:

- **Object on 6th Amendment Confrontation grounds (citing Crawford v. Washington and John) if the witness the People call to testify to a DNA profile generated after your client became a suspect, did not themselves conduct, witness, or supervise the testing of the sample, whether the sample is the defendant's or from the evidence itself.**

The issue: When crime scene evidence is sent to the OCME for DNA testing, numerous analysts may participate in the testing procedures to generate a DNA profile. That testing may occur before or after the defendant becomes a suspect; as discussed below, the timing is relevant to whether evidence about the DNA testing implicates the Confrontation Clause. After the defendant's arrest, law enforcement will generally obtain a buccal swab from him and conduct DNA testing on that (again, often involving multiple analysts), to generate his DNA profile. An analyst then compares the two profiles to determine whether they match.

Relevant Caselaw: John was concerned with who must testify at trial when the "primary purpose" of the DNA evidence is to link an identified suspect to a crime or prove the guilt of a particular defendant at trial, and thus is testimonial hearsay subject to Crawford and the defendant's 6th Amendment right of confrontation.

In John, a witness reported seeing the defendant threaten the complainant with a gun. The defendant was arrested, and the gun, recovered from a basement, was sent to the OCME for DNA testing with a note that the perpetrator had handled it. Upon defendant's indictment, the police collected buccal swabs from him and the OCME lab generated his DNA profile. Since the testing on the gun was plainly done with the primary – indeed, sole — purpose of proving that the defendant possessed the gun and committed the crime for which he was charged, the lab reports were testimonial hearsay to which Crawford and the right of confrontation applied.

At the defendant's trial for weapon possession, the prosecution sought to introduce the OCME files containing the DNA lab reports and test results on the gun swab and the defendant's exemplar as certified business records through an OCME analyst who had neither conducted nor witnessed nor supervised any part of the DNA testing. She had reviewed the laboratory reports, she testified, to "make sure everything looked okay and everything was signed off on by the

necessary people." She testified to the four stages necessary to generate a DNA profile, and, in particular, to the final stage — when the analyst, using a sophisticated software program, produces the DNA "peaks" in graphical form, which are then analyzed and converted to a numerical DNA profile that is used for comparison. Through the witness, the People introduced a box-score-like table that contained the profiles in numerical form, and the witness testified that the numbers were a match.

Focusing on that last stage (characterized by the Court as "the calling of the alleles"), the Court (a majority composed of DiFiore, Rivera, Stein, and Fahey), held that the defendant's confrontation rights were violated by the People's failure to produce the "critical analysts who engaged in an independent and qualitative analysis of the data during the DNA typing tests." The Court rejected the "science fiction"that DNA evidence is "merely machine-generated" or an "automated exercise" requiring no skill set or judgment"and specifically held that in using the software programs in the last stage, the analysts engage in "skilled interpretation of the data from the electrophoresis instrument," "particularly as to the peaks in the graphs, to construct the DNA profile." The witness who testified at trial merely "parrott[ed] the recorded findings that were derived from the critical witnesses' subjective analyses" and exported the generated DNA profiles into a box score chart. That she reviewed the reports and agreed with the results was "nothing more than surrogate testimony to prove a required fact — that defendant's DNA was found on the loaded gun for which he stood charged." Although the prosecution is not required to call every analyst in the chain of testing, the Court stated that, where the laboratory report is testimonial in nature, as was the generation of the DNA profile in John's pending criminal action, "at least one analyst with the requisite personal knowledge must testify."

How to preserve the record: If the prosecution seeks to introduce DNA evidence against your client, and the testing was done after your client became a suspect (thus satisfying the primary purpose test, as the testing was conducted to incriminate him) either (1) make a motion in limine, citing the 6th Amendment, Crawford, and John, to exclude the evidence, absent testimony from a witness who had some direct participation – through performance, witnessing, or direct supervision — in the generation of the profile and the calling of the alleles; that the witness may have exported the generated data into a box score and reviewed it afterwards is not sufficient under John; or (2) object when the witness testifies if it becomes clear that he or she does not have the requisite personal knowledge.

Going forward:

- It is likely that with such specific direction from the Court of Appeals, the People will attempt to comply with John by presenting a witness having some purported degree of involvement in generating the results. Ask to voir dire any witness who did not personally perform the crucial last stage to establish whether their degree of involvement protects your client's confrontation rights. Reviewing the results is not enough; argue that if the witness did not actually run the test, he or she must have either witnessed, supervised, or personally analyzed the raw data generated by the software ("called the alleles") themselves in order to be able to testify about the DNA profile.

- Be attentive to other tasks that may have been performed in the course of constructing the DNA profile from the electrophoresis instrument. For example, the Court mentioned the "editing" process, during which certain peaks are filtered out as not meeting accepted thresholds to qualify as an actual peak. If the testifying witness was not personally involved in this editing process, or did not freshly analyze the raw data related to it, object on 6th Amendment grounds.

- Cold hits: If the incriminating evidence was tested years before your client was identified through a cold hit, the DNA testing will likely not meet the primary purpose test unless the evidence is re-tested after your client's arrest. However, if comparison is made to your client's already-present DNA in CODIS, consider arguing that your client's DNA was entered into CODIS for the primary purpose of incriminating him in some other (albeit then-unknown) crime and thus that evidence about those DNA results is testimonial hearsay. In other words, the DNA results in CODIS are themselves accusatory, and so a witness with personal involvement in creating that profile must testify as to how it was obtained. Of course, if your client's DNA is re-tested in connection with the criminal action, then the presentation of that evidence must comply with Crawford under a straight application of John. Also consider other foundational challenges to evidence about the presence of your client's DNA profile in CODIS — under what circumstances was his DNA collected? How was it entered into the system? Was the chain of custody established?

- Mixtures: John did not involve "the more complex interpretation of DNA profiles from mixtures or in high sensitivity DNA analysis," but the majority, in fn. 7, indicated the need for the proper experts to testify to the final stage of the DNA typing in such circumstances. If you have a mixture case, where different profiles may have been generated, be attentive to whether the People are presenting witnesses who played the requisite part in the generation of each profile.

- Defense experts: It is essential to seek the counsel of an expert in cases involving DNA. Even if the expert concludes that the testing was done correctly and that the results are accurate, the expert can you help you frame questions for making a John challenge, as well as questions for cross-examination.

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 evidence emerges at trial that favorably impacts a previously-litigated suppression issue, move to reopen the suppression hearing. If you're denied, the trial evidence will be available to on appeal to supplement an argument for suppression. (Trial evidence ordinarily is not available when arguing a suppression issue on appeal.) If you succeed, you'll have a chance to relitigate the issue and make expanded arguments for suppression.

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