Defense Tactics for DNA Litigation

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Recent articles in *Profiles in DNA* (1,2) have focused on prosecution tactics for the presentation of DNA evidence at trial. This article discusses defense tactics—in particular, 1) the decision whether to retest DNA evidence and 2) the problems that arise when a defense expert is present during testing by the prosecution expert.

RETESTING DNA EVIDENCE

In his informative book on DNA evidence, *And the Blood Cried Out: A Prosecutor's Spellbinding Account of the Power of DNA,* former prosecutor Harlan Levy raises an interesting point. Near the end of the book, Levy comments:

> Often criminal defense lawyers are just as hesitant, if not more hesitant, to push for DNA testing. Hardened by long exposure to career criminals, many defense lawyers start off believing that their clients are guilty, regardless of their clients' protestations that they were not within miles of the scene of the crime on the day in question. As a consequence, many criminal defense attorneys are wary of ordering a test in each individual case that may force them to face that their client has been lying to them—and that could potentially be admitted at trial to prove their client's guilt. This presents the criminal defense attorney with a difficult choice: Forgo DNA testing, and risk the conviction of an innocent person, or request such testing and possibly aid the conviction of the lawyer's own client (3).

This "choice" does not seem all that difficult. If a client insists he/she is innocent and there is a test that would help establish that innocence, the defense attorney has little choice. Of course, a competent attorney would only request such testing after the case had been thoroughly investigated and the consequences of an unfavorable test result explained to the client. A similar issue arose in the polygraph stipulation cases. In People v. Reeder (4), a California court of appeal held that a defense counsel "who, in advance of the examination, stipulates that a defendant will submit to a polygraph examination and the results will be admissible at trial, demonstrates incompetence" (5). This decision was subsequently vacated, and the defendant's Sixth Amendment incompetency claim rejected (6). Later cases also reject such claims. For example, in one case the court held that, when counsel agrees to an examination after the defendant insists on his innocence, there is no ineffective assistance of counsel (7). In this situation, the defense counsel has no choice.

Indeed, failure to seek DNA testing would constitute ineffective assistance of counsel (8). A 1996 Department of Justice report discusses the exoneration of 28 convicts through the use of DNA technology—some of whom had been sentenced to death. In one of these cases, the public defender who took over the appeal alleged ineffective assistance of counsel because the "trial counsel never requested DNA testing".

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Requesting an independent test by a defense expert is a risk only if the prosecution is able to use the test results at trial. This is a rather murky legal area. Usually, prosecution pretrial discovery extends only to experts that the defense intends to call as witnesses (9). Moreover, in the case of a nontestifying defense expert, some jurisdictions recognize the applicability of the work-product or attorney-client privilege in this context (10), thereby precluding prosecution use of a defense expert. Some courts have also recognized a Sixth Amendment right to effective assistance of counsel argument (10). But these cases are not universally accepted. Moreover, there is nothing to prevent the prosecutor from asking the government expert if there was sufficient DNA remaining for a defense retest (11) and perhaps asking whether some DNA was in fact offered or turned over to the defense.

The only case that seems to preclude these questions is State v. Cloutier (11), in which the Maine Supreme Court indicated that a prosecutor is precluded from eliciting testimony that the prosecution chemist had given blood samples to the defense. That Court had previously rejected the common law missing-witness inference and feared creating a "missing-test-result" inference (12). Most courts have not adopted such a rigid rule against the missing-witness inference, and Cloutier seems an aberrational case.

In any event, such evidence would seem proper in rebuttal if the defense challenges the prosecution's expert evidence. An analogous situation arose with the no-comment rule when an accused exercises the Fifth Amendment right to remain silent. In Griffin v. California (13), the United States Supreme Court held that the Fifth Amendment prohibits the use of an accused's failure to testify as evidence of guilt. However, the Court limited Griffin in United States v. Robinson (14), in which the defendant was convicted of mail fraud. The prosecution introduced a number of out-of court statements made by Robinson, who did not testify. In closing argument, Robinson's counsel tried to minimize the prior statements by suggesting that his client had not been given the opportunity to explain his actions. In response, the prosecutor told the jury: "He could have taken the stand and explained it to you. The United States of America has given him, throughout, the opportunity to explain"(15). The Court in Robinson distinguished Griffin:

> Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, Griffin holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege (16).

It is one thing to use the Fifth Amendment as a shield; it is quite another thing to use it as a sword.

PRESENCE OF A DEFENSE EXPERT AT DNA TESTING

Perhaps a more interesting defense tactic concerns a request to have a defense expert present during the prosecution testing (17). This tactic may backfire, however. What is the expert's role here? If the defense expert is present and does not object to the testing procedures, the prosecution can use the defense expert's silence as an imprimatur or sanction for the test results whether the defense expert testifies or not. If the defense expert criticizes the testing at trial, the prosecution can ask on cross-examination why the expert did not object at the time of the testing? Here, the prosecutor could argue that, had the defense expert been interested in valid test results, the expert would have raised such concerns during the test. This is similar to the problem that defense attorneys face when they represent a client at a lineup, i.e., whether defense counsel waives any objection by not asserting it at the lineup (18).

REFERENCES

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4. 129 Cal. Rptr. 646 (App. 1976).
5. 129 Cal. Rptr. 648 (App. 1976).
6. People v. Reeder, 135 Cal. Rptr. 421 (App. 1976).
7. People v. Berry, 173 Cal. Rptr. 137, 143 (App.), cert. denied, 454 U.S. 966 (1981). Accord State v. Sloan, 545 A. 2d 230, 233-34 (N.J. App. Div. 1988). See generally Annotation, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Hypnosis and Truth Tests, 9 A.L.R. 4th 354 (1981).
8. Connors, E. *et al.* (1996) *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial.* 67.
9. Giannelli, P.C. and Imwinkelried, E.J. (1993) *Scientific Evidence* (2nd. ed) § 3-8 (discussing prosecution discovery).
10. Giannelli, P.C. and Imwinkelried, E.J. (1993) *Scientific Evidence* (2nd. ed) § 5-10 (discussing attorney-client privilege as applied to experts).
11. 628 A. 2d 1047, 1049 (Me. 1993).
12. This inference was mentioned by the United States Supreme Court in an 1889 case, Graves v. United States, 150 U.S. 118, 121 (1893). ("If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates a presumption [inference] that the testimony, if produced, would be unfavorable."). See State v. Brewer, 505 A.2d 774,777 (Me. 1985) ("To allow the missing-witness inference in a criminal case is particularly inappropriate since it distorts the allocation of the burden of proving the defendant's guilt.").
13. 380 U.S. 609, 614 (1965).
14. 485 U.S. 25 (1988).
15. 485 U.S. 28 (1988).
16. 485 U.S. 32 (1988).
17. See generally Prince v. San Diego County Superior Court, 8 Cal. App. 4th 1176, 10 Ca. Rptr. 2d 855 (1992).
18. LaFave, W.R. and Israel, J.H. (1984) *Criminal Procedure* § 7.3(c), at 576.