

Challenging DNA Evidence on Appeal

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A. Introduction.

In November 2012, Silicon Valley millionaire Ravi Kumra was found dead in his gated Monte Sereno estate. He had been bound and gagged by a group of thieves who had been aided by the prostitutes whom Kumra had hired.

A group of individuals were eventually charged with conspiring to commit the brutal attack. Most of these individuals were affiliated with Oakland's most notorious home invasion gangs.

One of the alleged members of this group, Lukis Anderson, stood out from the others. As was true with the other individuals ultimately charged with the killing, police found Anderson's DNA at the crime scene. In particular, his DNA was located under one of Kumra's fingernails.

As far as police could tell, however, Anderson was not a gang member, and he did not appear to know any of the other individuals involved in the crime. Police found only one conceivable link between Anderson and the others: he had previously spent time in the same jail dorm with a member of one of the gangs tied to the Kumra killing. That particular individual, however, was not involved in the attack.

Nothing in Anderson's background made it apparent that he had the disposition to be involved in such a brutal murder. His criminal record effectively portrayed him to be little more than a homeless alcoholic who, beyond one prior conviction for residential burglary,

had a rapsheet littered with minor nonviolent offenses.

Despite how illogical it seemed for Anderson to conspire with the other defendants, he was nonetheless charged with murder. There was one problem, however. On the night of the attack, Anderson had been hit by a truck, suffering a brain injury that led to his hospitalization at Santa Clara Valley Medical Center. Medical records indicated that at the time the murder was believed to have taken place, Anderson was, in fact, at the hospital. How then did Anderson's DNA end up on Kumra's body?

Due to some good investigation done by Anderson's attorney, it came to light that the paramedics who had driven Anderson to the hospital had later responded to Kumra's Monte Sereno estate. Unfortunately, Anderson's DNA came with them, presumably as the result of flawed adherence to evidence collection protocol. The charges against Anderson were eventually dismissed.

While the litigation at issue in the Anderson case was done at the trial court level, it underscores an important point. DNA evidence is not as infallible as *CSI* or prosecutors make it out to be. Problems can occur with both the collection and testing of the evidence. Additionally – and, perhaps, most importantly for appellate advocates – the admission of DNA evidence, or the expert testimony regarding it, may suffer from legal errors that can be challenged on appeal. Just because your client's DNA is located on the victim's body does not necessarily mean that all is lost.

In this article, I want to stress four main points:

First, it is imperative for any criminal defense attorney to have basic knowledge of the

science behind DNA evidence and to be aware of its limitations. Only with such knowledge can a diligent advocate determine whether there are any potential appellate issues relating to this evidence. My colleague Paul Couenhoven has summarized the science behind DNA in the “The Scientific Basis of DNA,” and in this article, I will try to direct you to additional resources.

Second, I want to outline the basic legal requirements for the admission of DNA evidence and expert testimony regarding it. Through this discussion, I hope to provide appellate counsel with some ideas for potential issues that should be researched in appropriate cases.

Third, I hope to provide a basic framework for dealing with the existence of DNA evidence in arguing claims of prejudice. I doubt I have been the only appellate advocate stuck in a situation where I have a great non-DNA evidentiary error that I hope to raise on appeal. The problem: regardless of the error, my client's DNA is still located on the victim's body or murder weapon. Despite this (admittedly unhelpful) fact, I want to encourage counsel to continue to raise the issue. In this article, I will attempt to provide counsel with ideas as to how to minimize the impact of bad DNA evidence.

And finally, it may go without saying, but sometimes there may be issues with DNA evidence that simply cannot be raised on appeal. The issue was never litigated below. The proper investigation was never done. Certain critical information was never provided to trial counsel. Whatever the reason, I will conclude this article by trying to provide advice on pursuing habeas investigations and raising motions for DNA testing in appropriate cases.

B. Resources Regarding the Science Behind DNA Evidence.

Paul has written up a very nice article, “The Scientific Basis of DNA,” that provides an excellent overview of the basic science surrounding DNA testing. In addition to this resource, we have attached several additional articles that may aid in your understanding.

A: Collection of Articles Regarding the Anderson Case.

These articles focus on the investigation done regarding the Anderson case referenced above. They may not provide much help in understanding the science of DNA evidence, but they are interesting reads.

B: *Seattle Post-Intelligencer* Chart re: DNA Evidence.

This chart was provided to me by Linda Starr of the Northern California Innocence Project. It does not go into much depth, but it is clear and easy to follow.

C: Kline et. al., *If DNA, Then Guilty*, *The Champion* (January/February 2015), pp. 22-28.

This is a very dense article focusing on problems with DNA evidence as discovered in one case by several Texas trial attorneys.

The “Bible” on this topic is “DNA for the Defense Bar,” published by the National Institute for Justice and located online at: www.ncjrs.gov/pdffiles1/nij/237975.pdf. At approximately 200 pages, it is too long to attach here, but it is an invaluable resource on this area.

Other helpful resources have been published by the National Academy of Sciences, which has printed periodic updates, many of which have been cited by courts considering

forensic evidence on appeal. (See, e.g., *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 318-319.) These publications include: National Academy of Sciences, National Research Council, *DNA Technology in Forensic Science* (1992); National Academy of Sciences, National Research Council, *The Evaluation of Forensic DNA Evidence* (1996); and National Academy of Sciences, National Research Council, Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (2009).

These resources are available online at books.nap.edu/openbook. Search for “forensic” in the search box, and the first three documents that come up will be these publications.

C. Potential Appellate Issues Relating to DNA Evidence.

It can be challenging to spot potential appellate issues relating to DNA evidence or the expert testimony regarding it. Nonetheless, there are several different types of errors that appellate counsel should investigate. Because this evidence often serves as the prosecution’s lynchpin, careful review is imperative. Even if trial counsel did not properly preserve these issues for appeal, they may serve as grounds for claims of ineffective assistance of counsel.

1. Search and Seizure Issues.

There are two different types of DNA samples that can arguably require suppression under the Fourth Amendment. The first requires little discussion. In appropriate cases, counsel should examine whether there are any grounds to argue that the object on which the DNA is located was illegally seized. If, for example, DNA was located on a murder weapon,

and the weapon itself was illegally obtained, then the DNA found on it would also constitute a “fruit of the poisonous tree.” Under this scenario, the general Fourth Amendment case law applies.

The second relevant type of DNA evidence – the DNA sample obtained from the defendant – is subject to several unique Fourth Amendment challenges and warrants more discussion. This article will focus on three specific scenarios in which such evidence is obtained.

The first is through an “abandoned property” theory of retention. The classic example is a defendant coming in for an interview with law enforcement and drinking a cup of water; the defendant leaves the cup there, and the police then use it as a source of his DNA. Most courts considering the issue have found that a defendant has no reasonable expectation of privacy, and therefore his or her Fourth Amendment rights are not implicated. (See, e.g., *Commonwealth v. Bly* (Mass. 2007) 862 N.E.2d 341; *State v. Athan* (Wash. 2007) 158 P.3d 27; *State v. Wickline* (Neb. 1989) 440 N.W.2d 249, overruled on other grounds by *State v. Sanders* (Neb. 1990) 455 N.W.2d 108.) Arguably, however, given the advances in DNA technology, a DNA sample can reveal much more private information about an individual than these courts may have believed (see Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy* (2006) 100 Nw.U.L.Rev. 857), including an individual’s health, sexual orientation, predisposition to certain diseases, and even a propensity to commit violence, and a challenge emphasizing these factors may therefore provide new ammunition to what, at this point, has been an issue gaining little traction.

Quite commonly, a DNA sample is obtained via a buccal swab. If this occurs in a specific case, counsel should first determine whether the sample was consensually provided by the defendant. In *State v. Lee* (La. 2008) 976 So.2d 109, the Supreme Court of Louisiana ruled that a defendant did not freely and voluntarily consent to providing a DNA sample when law enforcement officers visited the defendant's home and advised him that they had a court order compelling him to provide a DNA sample. (*Id.* at p. 124.) In so doing, the court ruled that mere acquiescence to law enforcement did not meet the requirements of the Fourth Amendment. (*Ibid.*, citing *Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549.)

Given the facts at issue in *Lee*, the court's conclusion is hardly surprising, but, as in many cases analyzing the retention of DNA evidence under an "abandoned property" or "consensual retention" theory, the court then analyzed whether the evidence would have been inevitably discovered. In essence, the prosecution will argue that even if the DNA sample was not properly obtained under one of the aforementioned theories, it would have been eventually located through another lawful mechanism.¹ The principles that will likely underlie such an argument also come into play via the third (and most general) method that this article will analyze: whether the state can automatically obtain DNA samples from individuals under either the Fourth Amendment or the California Constitution.

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A non-inevitable discovery case that, nonetheless, deals with a variety of justifications for upholding the retention of a defendant's DNA sample can be found at *People v. Gonzalez* (2013) 2013 WL 1849140. The case is unpublished, which is probably a good thing since most of its analysis is flawed. Still, it provides a nice overview of the range of Fourth Amendment issues that can come into play.

In order to understand the present state of the law on this issue, it is best to start with the United States Supreme Court's decision in *Maryland v. King* (2013) __ U.S. __ [133 S.Ct. 1958]. There, the court held that the portion of Maryland's DNA Act that authorized DNA collection from individuals arrested and charged with violent crimes and burglaries does not violate the Fourth Amendment. (*King, supra*, 133 S.Ct. at p. 1980.) Under the Maryland act, there is a delay in processing the DNA sample and placing the offender profile in a database until after arraignment, at which time a judicial officer ensures that there is probable cause to detain the defendant pending trial on a qualifying offense. (*Id.* at p. 1967.) For those not tried or convicted, the DNA sample is automatically destroyed and the profile removed from all databases. (*Ibid.*) For other defendants, the DNA test results will be uploaded to CODIS to be compared with DNA collected from unsolved crimes. (*Id.* at pp. 1966-1968, 1983-1985 [dis opn. of Scalia, J.]²)

The *King* court acknowledged that DNA collection constitutes a search within the meaning of the Fourth Amendment, but found that the warrantless and suspicionless DNA search at issue in that case was reasonable. (*King, supra*, 133 S.Ct. at pp. 1968-1969, 1980, citations omitted.) In reaching this conclusion, the court found that the state's legitimate interest in determining whether defendants awaiting trial committed unsolved crimes

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Much of the discussion of the case law on this issue is taken from briefing provided by Kathryn Seligman in *People v. Buza* (Dec. 3, 2014) A125542, rev. granted Feb. 18, 2015 (S223698). That case is presently on review in the California Supreme Court and will be discussed more below.

outweighed the defendants' limited privacy interests while in custody. (*Id.* at p. 1980.) Moreover, the court observed that the determination of the defendants' past criminality and dangerousness is material to assuring the safety of others while these defendants are held in jail or released on bail. (*Id.* at pp. 1972-1975.)³

Considering that the privacy interests of arrestees are generally deemed to be even higher than those of convicted felons, whose activities must be closely monitored to assure they do not reoffend (*Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1196, 1197-1198), the *King* decision would appear to be unhelpful for criminal defendants, even in states where testing is not done until after the defendant is convicted. Nonetheless, California's current DNA collection practice differs from Maryland's in several critical respects and is presently being challenged before the California Supreme Court in *People v. Buza* (rev. granted Feb. 18, 2015, S223698). These differences can be summarized as follows: (1) in Maryland, DNA is only collected from defendants involved in one of 24 specified crimes, while in California, DNA is collected following arrest for *any* felony offense; (2) in Maryland, the collection occurs only after a defendant is charged with a crime, while in California, the collection occurs "immediately following arrest;" (3) in Maryland, a DNA

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As noted in the *Buza* briefing, the Supreme Court did not address a potential second search that the lower *Buza* court identified as the "true focus" of its analysis and that has been recognized by federal circuit courts as implicating significant privacy interests – that is, when the DNA sample is actually analyzed and not merely collected. (See, e.g., *United States v. Mitchell* (3rd Cir. 2011) 652 F.3d 387, 406-407; *United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 85.)

profile is only created after a judicial officer finds probable cause for the arrest, while in California, the profile is created immediately upon collection; and (4) in Maryland, if an individual is not convicted, the DNA profile is automatically expunged from all databases, while in California, defendants must navigate a complicated process for expungement. (Compare Md. Code Ann. Pub. Saf., §§ 2-504 with Pen. Code, § 296.1.)

In *Buza*, the California Supreme Court will be considering the propriety of the regime under both the Fourth Amendment *and* the California Constitution; unlike with many courts considering these issues, the *Buza* case did not stem from the denial of a suppression motion, which is governed only by the Fourth Amendment, but from the defendant's conviction for refusing to provide a DNA specimen. (Pen. Code, § 298.1, subd. (a).) The lower appellate court found that California's DNA Act violated our state constitution, and therefore did not reach the issue on Fourth Amendment grounds.

Currently then, counsel should investigate whether there are grounds to challenge the mandatory DNA collection in their case, whether the sample was obtained due to a defendant's prior arrest or whether it occurred during the booking process in the case at issue. Given the differences between Maryland's and California's DNA acts, there are likely still grounds to raise a Fourth Amendment claim.⁴ The now-unpublished opinion by the First

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In a separate case, *People v. Lowe* (S215727, rev. granted March 19, 2014), the California Supreme Court is only considering a Fourth Amendment challenge to California's DNA Act. Further, in *People v. Robinson* (2010) 47 Cal.4th 1104, the Court previously found that exclusion of a blood sample was not required when the testing procedure violated California state law, but did not violate federal law. (*Id.* at pp. 1119-1129.) The *Robinson* court,

District Court of Appeal in *Buza* is definitely worth a look, as it contains extensive discussion of the issues at play. Appellate counsel should be very aware, however, that suppression of evidence **cannot** be a remedy for a violation of the California Constitution when the Fourth Amendment is not violated. (*In re Lance W.* (1985) 37 Cal.3d 873, 879.)

In sum, in appropriate cases, counsel should be on the lookout to determine whether there are grounds to argue that the DNA evidence required suppression. If the issue was not properly litigated below, counsel should conduct their own independent investigation as to the merits of a petition for writ of habeas corpus alleging ineffective assistance of counsel.

2. Chain of Custody.

Reversible error can occur when the prosecution fails to prove an adequate chain of custody as to a DNA reference sample. *People v. Jimenez* (2008) 165 Cal.App.4th 75 provides an example of this. There, the defendant was convicted of second-degree robbery. (*Id.* at p. 77.) On appeal, he argued that a DNA reference sample obtained as a result of a prior criminal offense suffered from an improper chain of custody; the record was unclear as to who possessed the sample at numerous points in time and was also silent as to whether proper protocol was followed in several respects. (*Id.* at p. 81.) The appellate court agreed with the defendant's argument, deeming that the error violated his due process rights and required reversal. (*Id.* at p. 82; see also *Dobson v. Industrial Accident Commission* (1952)

however, most notably addressed an issue somewhat outside the scope of this article: whether an arrest warrant that identified the person to be arrested by his unique DNA only met constitutional and statutory requirements so as to extend the applicable statute of limitations. (*Id.* at pp. 1130-1143.)

114 Cal.App.2d 782, 784.)

Unsurprisingly, however, most courts have found an adequate chain of custody when the issue is raised on appeal. Examples of this occurred in *People v. Hall* (2010) 187 Cal.App.4th 282 and *People v. Ford* (2015) 2015 Cal.App.LEXIS 295 where the potential holes in the chain of custody were not so significant as to the effect the evidence's admissibility. In an unpublished portion of the *Ford* opinion, in particular, the court distinguished the facts from those in *Jimenez* in that there was no rational claim that the chain of custody procedures employed there could have resulted in any possibility of tampering.⁵ (Slip Opn. at pp. 10-11.) Indeed, both the California and United States Supreme Courts have opined that a trial court has broad discretion in determining the adequacy of the chain of custody and that minor gaps are therefore permissible. (See *People v. Catlin* (2001) 26 Cal.4th 81, 134 ["While a perfect chain of custody is desirable, gaps will not result in the exclusion of evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering."]; *Melendez-Diaz, supra*, 557 U.S. at p. 311, fn. 1 [any inadequacies as to the chain of custody go to the weight of the evidence, and not necessarily to the evidence's admissibility].)

Hence, in context, *Jimenez* does serve as an outlier. Still, it indicates that if there are so many problems with the chain of custody, the evidence is arguably inadmissible. Such

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In reviewing the thorough briefing in *Ford*, however, which was provided by appellant's attorney Danalynn Pritz, the court's analysis is woefully inadequate on this point as there were numerous potential holes that were not never mentioned by the court.

problems extend beyond the mere weight of the evidence; as in that case, it can implicate a defendant's due process rights and warrant reversal. Nonetheless, if this issue is raised, then counsel should heed the warning implied by the *Ford* court and provide a detailed explanation as to how the chain of custody could have reasonably resulted in tampering.

3. Issues Relating to DNA Testing.

If DNA evidence is not subject to challenges either under the Fourth Amendment or due to an improper chain of custody, there still may be issues worth raising on appeal that relate to the testing of the DNA evidence. Specifically, counsel should investigate whether the testing procedure employed by the lab and the statistical calculation employed by the analyst constitute new scientific techniques and meet the standards for general scientific acceptance under *People v. Kelly* (1976) 17 Cal.3d 24, *People v. Leahy* (1994) 8 Cal.4th 587, and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. Additionally, regardless of whether the technique employed is new or not, counsel should examine whether the proper protocol was followed in a particular case.

As explained more in Paul's article, there are several different techniques that are commonly employed by most labs as part in analyzing DNA evidence. As is true of all new scientific techniques, "the proponent of [the] evidence...must establish that (1) the reliability of the new technique has gained general acceptance in the relevant scientific community, (2) the expert testifying to that effect is qualified to give an opinion on the subject, and (3) the correct scientific procedures were used." (*People v. Doolin* (2009) 45 Cal.4th 390, 445 [these three factors will herein be referred to as the *Kelly-Frye* rule].)

At this point, courts have ruled that most of the commonly-employed methods for DNA analysis have obtained general acceptance in the scientific community, and therefore meet the requirements for the first factor of the *Kelly-Frye* rule. (See, e.g., *People v. Jones* (2013) [PCR analysis of DQ-Alpha gene and dot-intensity analysis]; *People v. Venegas* (1998) 18 Cal.4th 47 [RFLP methodology done by FBI]; *People v. Barney* (1992) 8 Cal.App.4th 798 [Cellmark RFLP methodology]; *People v. Morganti* (1996) 43 Cal.App.4th 643 [PCR methodology]; *People v. Wright* (1998) 62 Cal.App.4th 31 [PCR methodology]; *United States v. Hicks* (9th Cir. 1996) 103 F.3d 837 [PCR methodology], overruled on other grounds by *United States v. W.R. Grace* (9th Cir. 2008) 526 F.3d 499; *United States v. Chischilly* (9th Cir. 1994) 30 F.3d 1144 [RFLP methodology].) While these cases may seem to indicate that there is little wiggle room left to argue that a particular type of DNA analysis has not gained scientific acceptance under the *Kelly-Frye* rule, I urge counsel to note that the methodology currently employed is still constantly changing and that *Jones* was decided in 2013 and dealt with a new variation of PCR analysis. Hence, counsel should not assume that the analysis employed in every single case will necessarily meet this standard.

Similarly, in most cases, an expert will opine as to the statistical probability that a particular piece of DNA evidence will be found in the general population. The methodology employed in making this determination is also subject to *Kelly-Frye* analysis. (*Venegas, supra*, 18 Cal.4th at p. 82.) Most commonly, this is done through the “modified” or “unmodified” product rules. In *Venegas, supra*, 18 Cal.4th 47, the California Supreme Court found that the “modified” method had gained general scientific acceptance, and in *People*

v. Soto (1999) 21 Cal.4th 512, it reached the same conclusion as to the unmodified product rule. (But see *People v. Collins* (1968) 68 Cal.2d 619 [providing that certain mechanisms of calculating statistical probability – in that instance, in a non-DNA case – may be inadmissible on non-*Kelly-Frye* grounds].)

More recently, the California Supreme Court considered the application of the product rule to “cold-hit” DNA cases. (*People v. Nelson* (2008) 43 Cal.4th 1242.) On first glance, it would not seem to make much difference whether the product rule is being applied in this context, or any other. The hallmark of a “cold-hit” case, however, is that the DNA evidence at issue is matched by combing through existing databases of DNA profiles. Accordingly, in a “cold-hit” case, the number derived by the product rule “no longer accurately represents the *random match probability*” since a DNA database was already searched in locating the match. (*Id.* at p. 1266, citation omitted.) Nonetheless, the number is still relevant in a “cold-hit” case because it does provide the *rarity* of the DNA profile. (*Id.* at p. 1267.)

Appellate counsel should be especially diligent in examining the third prong of the *Kelly-Frye* rule – that is, whether the proper procedures were followed in a specific case. If the proper procedures were not followed, then the results of the new methodology are inadmissible. (*Venegas, supra*, 18 Cal.4th at p. 81.) This differs from the general rule, which, outside the consideration of new methodology under *Kelly-Frye*, generally provides that the failure to adhere to proper protocol only affects the evidence’s weight and not its admissibility. (*People v. Stevey* (2012) 209 Cal.App.4th 1400, 1414, 1417-1419 [the fact that Y-STR DNA testing cannot positively identify an individual does not mean the test is

unreliable or that the results are not probative; such issues go to the evidence's weight and not its admissibility]; *People v. Henderson* (2003) 107 Cal.App.4th 769, 799 [echoing a similar sentiment in reviewing complications as to analyzing multiple source DNA].)

The difference in these standards can perhaps be best evidenced by the decision in *Venegas, supra*, 18 Cal.4th 47, where, as noted above, the California Supreme Court considered the application of the "modified" product rule; the court found that the FBI had not adhered to proper protocol and remanded the case since there was insufficient evidence to support the conviction absent the DNA evidence. (*Id.* at pp. 94-95; see also *People v. Pizarro* (2003) 110 Cal.App.4th 530 [finding, as to several issues, that reversal was required under the third prong of the *Kelly-Frye* rule].) Hence, if counsel is presented with problems going to improper compliance with procedural protocol, then he or she should investigate whether the methodology employed is arguably new and therefore will provide counsel with a better standard under which to argue the issue. Admittedly, if there was no *Kelly-Frye* challenge presented below, then the issue will likely be impossible to raise on direct appeal due to an incomplete record on the matter; nonetheless, this train of thought may serve as an appropriate premise for a habeas investigation.

Of course, in most DNA cases, counsel will not be presented with new DNA methodology under *Kelly-Frye*, and therefore many potential problems with DNA evidence – whether they go to adherence to proper protocol or other issues – will affect only the evidence's weight and not its admissibility. For example, in several cases, California courts have found that DNA evidence is admissible even if the expert testifies only that the

defendant's DNA sample is "consistent" with the evidence, and therefore is not supported by statistics indicating the probability that the DNA profile could be located in a random sampling of the population; the lack of supporting statistics only goes to the evidence's weight. (*People v. Her* (2013) 216 Cal.App.4th 977; *People v. Cua* (2011) 191 Cal.App.4th 582; *Rodriguez v. State* (Nev. 2012) 273 P.3d 845, 851 [no accompanying statistics required for DNA evidence to be deemed admissible]; see also *People v. Wilson* (2006) 38 Cal.4th 1237, 1245-1250 [further considering the proper scope of relevant DNA expert testimony].) In a similar vein, appellate courts grant trial courts broad discretion in making evidentiary rulings relating to DNA evidence and, accordingly, are hesitant to reverse those rulings. (See *Ford, supra*, 2015 Cal.App.LEXIS 295 [Slip Opin. at pp. 18-21 (unpublished portion of opinion where court rejected defense's claims that evidence relating to the propriety of the testing procedures was improperly excluded)].)

All is not lost, however, and appellate counsel should be reminded of two facts. First, in some instances – as in the *Jimenez* case discussed in the "Chain of Custody" section above – the unreliability of particular evidence will be so grave that the problems will go to the evidence's weight and not its admissibility. It is appellate counsel's job to convince the court of this. Second, problems affecting only the evidence's weight and not its admissibility can be useful factors to point out in arguing claims of prejudice. This topic will be discussed more below but, in essence, if counsel has a strong non-DNA evidentiary error, all the potential problems with the DNA evidence should be pointed out in claiming that the existence of a DNA match does not render the error harmless.

4. Potential Confrontation Clause Errors.

Beyond potential issues relating to the DNA evidence itself or the testing procedures employed, appellate counsel should also examine the testimony of the DNA expert to ensure that there are no additional issues. I urge counsel to refer back to an article written by my colleague Jonathan Grossman in 2011 in which he ably examined potential issues relating to expert witness testimony more generally. (Grossman, *Admissibility of Expert Opinion Testimony* (2011), available from SDAP.)

This portion of the article, however, will mainly focus on potential Confrontation Clause issues that may arise in DNA cases. As many attorneys are keenly aware, the past decade has featured extensive litigation over these types of issues. The guiding analysis is far from well-settled, and hence, such claims may be arguable in a number of cases where the issue is properly litigated below.

As a general matter, “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine.” (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) “To be considered testimonial, the out-of-court statement (1) must have been made with some degree of formality or solemnity and (2) must have a primary purpose that pertains in some fashion to a criminal prosecution.” (*People v. Barba* (2013) 215 Cal.App.4th 712, 720-721, citation omitted.) The Confrontation Clause does not apply, however, when an out-of-court

statement is not offered for its truth. (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)⁶

In a typical DNA case, there may be several areas for potential Confrontation Clause challenges, though most commonly they arise in the context of the admission of, or testimony about, a DNA lab analyst's report. The three most recent Confrontation Clause cases decided by the United States Supreme Court each deal with expert witnesses and represent the court's current division in considering whether statements are admitted for their truth, and whether statements are testimonial. In *Melendez-Diaz, supra*, 557 U.S. 306, the court considered whether a chemical analyst's affidavit was admitted as a substitute for live testimony to prove whether the defendant possessed cocaine, an element of the offense with which he was charged. Five members of the court agreed that the affidavit was testimonial since it had a clear "evidentiary purpose" for later use at a potential trial. (*Id.* at pp. 310-311.) In *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705], the court considered a variation of the situation presented in *Melendez-Diaz*; there, the prosecution had a lab analyst testify regarding a certified blood-alcohol report prepared by a different analyst. (*Id.* at pp. 2709, 2718-2719.) A five-member majority of the court found that the "stand-in" analyst did not cure the Confrontation Clause problem since he was testifying regarding an element of the offense – the defendant's level of alcohol – and was not familiar with the testing procedures employed in that case. (*Id.* at pp. 2715-2716.)

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For a more detailed description of confrontation clause cases, please also see Sacher et. al., *Common Evidentiary Issues* at pp. 1-9, an article from the 2013 FDAP/SDAP Appellate Workshop that is available from SDAP.

The court's decision in *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221] did not provide the clarification that the court may have intended and instead significantly muddied the waters. The scope of this decision was perhaps best summarized by the Second District Court of Appeal in *Barba, supra*, 215 Cal.App.4th 712, 727-728:

Williams arose from the kidnap, rape, and robbery of a Chicago woman in February 2000. Vaginal swabs were taken as part of a sexual assault examination and the Illinois State Police sent those swabs to a Cellmark lab for DNA analysis. Cellmark tested the swabs and produced a DNA profile of the semen donor. Defendant Williams had not been identified as the perpetrator and was not considered a suspect in that crime when the Cellmark DNA profile was created. Williams was arrested in August 2000 on unrelated charges. A sample of his blood was taken at that time, from which the state police lab created a DNA profile. Sometime later, state police crime lab analyst Sandra Lambatos conducted a computer search of DNA profiles in the state police database to see if any matched the DNA profile that Cellmark had produced from the rape victim's vaginal swabs. Lambatos determined that the Cellmark profile from the vaginal swabs matched the state crime lab's DNA profile of Williams produced from his August 2000 blood sample. Williams then took part in a lineup where the rape victim identified him as her attacker. At trial, Lambatos testified about her conclusions based on the Cellmark DNA report, but the report itself was not in evidence.

Williams was found guilty at a bench trial and the Illinois Court of Appeals and Supreme Court each affirmed that judgment. At issue in those appeals was whether Lambatos's testimony concerning the match between the state police lab and Cellmark DNA profiles violated Williams's Sixth Amendment confrontation rights.

The United States Supreme Court affirmed the judgment, yet remained as fractured as it had in *Bullcoming*. In a plurality opinion written by Justice Alito, the court set forth two independent grounds why Lambatos's expert testimony did not violate the [c]onfrontation [c]lause. In the first of these, Justice Alito said that the testimony was not admitted for its truth. Instead, the prosecution expert's references to the underlying DNA reports had the limited purpose of explaining the basis of Lambatos's independent expert conclusion that Williams's DNA from the state police lab profile matched the profile that Cellmark produced from the victim's vaginal swabs. (*Williams, supra*, 567

U.S. at p. ____ [132 S.Ct. at p. 2228] (plur. opn. of Alito, J.) Because this was a bench trial, it was far more likely that the trial judge was able to evaluate this evidence for this limited purpose. (*Id.* at pp. ____–____ [132 S.Ct. at pp. 2236–2237] (plur. opn. of Alito, J.)

The plurality's alternative ground rested on the conclusion that the Cellmark DNA report was not testimonial for purposes of Confrontation Clause analysis. The *Williams* plurality reasoned that the confrontation clause had not been violated because the Cellmark report was prepared for the primary purpose of finding a dangerous rapist who was still at large, not for the primary purpose of targeting an accused individual. (*Williams, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2243] (plur. opn. of Alito, J.)

Justice Thomas wrote a separate concurring opinion, concluding that even though Lambatos's testimony about the Cellmark DNA report went to the truth of that report, the report was not testimonial because it “lack[ed] the solemnity of an affidavit or deposition.” (*Williams, supra*, 567 U.S. at p. ____ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.)) Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, dissented. According to the dissent, testimony about the Cellmark DNA by Lambatos (who was not affiliated with Cellmark) violated Williams's right to confront the Cellmark analyst who prepared the report because the expert's statements went to the truth of that report. (*Id.* at p. ____ [132 S.Ct. at p. 2276] (dis. opn. of Kagan, J.))

Unsurprisingly, California courts have struggled to reconcile the scope of the *Williams* decision. The California Supreme Court provided little assistance with its opinions in *People v. Lopez* (2012) 55 Cal.4th 569 and *People v. Dungo* (2012) 55 Cal.4th 608. In *Lopez*, the court considered whether admitting a nontestifying lab analyst's report on blood-alcohol level and allowing a different criminalist to testify about it was proper under the Sixth Amendment. (*Lopez, supra*, 55 Cal.4th at p. 576.) In essence, a majority of the court found that the evidence at issue was not sufficiently formalized such that its admission violated the defendant's rights under the Confrontation Clause. (*Id.* at p. 585.) In *Dungo*, the court addressed the admissibility of evidence based on an autopsy report prepared by a

non-testifying pathologist. (*Dungo, supra*, 55 Cal.4th at p. 612.) A majority of the court found no Confrontation Clause problem since the report at issue only described objective facts regarding the state of the victim’s body; therefore, the court found that the statements were not testimonial as they were “less formal than statements setting forth a pathologist’s expert conclusions.” (*Id.* at pp. 619-620.) In *Dungo*, the only conclusions offered as to the cause of death were provided by the testifying expert, who could be properly cross-examined. (*Ibid.*) As ammunition for your own cases, I strongly urge you to read the dissents filed in both *Lopez* and *Dungo*, which ably undercut the majority’s conclusions in light of United States Supreme Court precedent.

It should be noted that the aforementioned discussion is intentionally brief, as a thorough discussion of the reasoning employed in all of these cases would be well outside the scope of this article. Nonetheless, following these opinions, at least three California courts have considered Confrontation Clause issues in the context of DNA analysis, with each court reaching conclusions adverse to defendants by, in very simplistic terms, at least partially relying on the *Dungo* court’s distinction between observations and conclusions. (See, e.g., *Barba, supra*, 215 Cal.App.4th 712, 742-743; *People v. Steppe* (2013) 213 Cal.App.4th 1116, 1126-1127; *People v. Holmes* (2012) 212 Cal.App.4th 431, 437-438.) The *Dungo* and *Lopez* courts’ reasoning, however, was premised on untenable readings of *Williams*, which are explained in detail in Justice Liu’s and Justice Corrigan’s dissents in those cases. If counsel raises a Confrontation Clause challenge as to DNA evidence, the flaws in these readings should be emphasized. It may not matter with the lower appellate

court, which is bound by our high court's precedent, however, but this methodology – when combined with a search for positive out-of-state cases – may serve as the best basis to properly preserve the issue for higher courts to address the issue.

D. Minimizing the Impact of DNA Evidence in Arguing Prejudice.

Many panel attorneys (and appellate courts) operate under the false assumption that if DNA evidence links a defendant to a crime, then any other error that goes to the defendant's involvement must necessarily be harmless. Indeed, some courts have ruled that DNA evidence alone – with no further corroboration – can be legally sufficient to support a conviction. (See, e.g., *People v. Soto* (1994) 48 Cal.App.4th 924; *State v. Toomes* (Tenn.Crim.App. 2005) 191 S.W.3d 122; *Roberson v. State* (Tex.App. 2000) 16 S.W.3d 156.)

While DNA evidence linking your client to a crime is unhelpful in trying to prove that a particular error is prejudicial, counsel should not necessarily forego raising an issue on this basis. DNA evidence is not infallible, and not all such evidence is created equally. Counsel cannot simply ignore DNA evidence, of course, in arguing that an error was prejudicial, but there are several different ways that it can be minimized.

In researching this article, I found very little California case law that proved useful, at least in terms of establishing a helpful framework in arguing these types of prejudice claims. I extended my search to other jurisdictions, however, and did find some cases out of Missouri that should provide appellate counsel with ammunition in downplaying the significance of DNA evidence.

State v. Abdemalik (Mo. App. 2008) 273 S.W.3d 61, in particular, is illustrative of these cases. There, the Western District of the Court of Appeals of Missouri considered whether DNA evidence was sufficient to support a defendant's conviction for capital murder. (*Id.* at p. 63.) The court affirmed the conviction based solely on the DNA evidence. (*Id.* at p. 66.)

Despite the (admittedly unhelpful) result in that case, the court's thorough analysis can provide a useful context for discussing DNA evidence in prejudice claims. Specifically, the *Abdelmalik* court considered three factors in examining the sufficiency of the DNA evidence: (1) the probability that the DNA could match someone else; (2) the location where the DNA was found; and (3) the amount of DNA left at the crime scene. (*Abdelmalik, supra*, 273 S.W.3d at pp. 63-66.) As the court's analysis makes clear, there was one main undercurrent that it was considering by examining these factors: whether there was any possible way, via casual contact with the victim or any other mechanism, that the DNA could have been left if the defendant had not been involved in the crime. (*Ibid.*) The type of analysis employed by the *Abdelmalik* court leaves appellate counsel with much more to argue than a blanket statement that the DNA evidence alone is insufficient to support the conviction. While I have not found any California cases explicitly analyzing the legal sufficiency of the evidence in this context, the approach employed by *Abdelmalik* is not controversial; indeed, it is backed by common sense.

Turning to the "*Abdelmalik* factors," it should go without saying that the greater the chance that the DNA could be someone else's, the less probative it is. (*Abdelmalik, supra*,

273 S.W.3d at pp. 64-66.) In California, as in many states, a DNA expert should not simply testify that the defendant's DNA matches the sample taken from the evidence at the crime scene; instead, he or she should go further and provide the likelihood that the evidence could be someone else's, typically within the context of the perpetrator's ethnic population. (See *People v. Axell* (1991) 235 Cal.App.3d 836, 866-867 [statistical probability that the evidence could match another person's DNA is "integral" in the analysis].) As expressed by the California Supreme Court, "[a] determination that the DNA profile of an evidentiary sample matches the profile of a suspect establishes that the two profiles are consistent, but the determination would be of little significance if the evidentiary profile also matched that of many or most other human beings. The evidentiary weight of the match with the suspect is therefore inversely dependent upon the statistical probability of a similar match with the profile of a person drawn at random from the relevant population." (*Venegas, supra*, 18 Cal.4th at p. 82.)

In *Abdelmalik* itself, the DNA located under the fingernails of the victim returned a genetic profile that occurs only once in one quintillion individuals; given these odds – and when combined with the location of the DNA and the amount of DNA found – this was sufficient to support the conviction. (*Abdelmalik, supra*, 273 S.W.3d at pp. 64-66.) The *Abdelmalik* court distinguished the facts there from those in *State v. Luna* (Mo. App. 1990) 800 S.W.2d 16, 18-20, where the blood type located on a murder victim could be found in seven of every 1,000 people; thus, the probative value of the evidence in *Luna* (which was the main link tying the defendant to a homicide and was deemed insufficient to sustain the

trial court's verdict) was much lower than that in *Abdelmalik*. Moreover, if the DNA expert opines that the DNA evidence is only "consistent with" the defendant's DNA profile, the lack of supporting statistics should be utilized by appellate counsel in arguing the low probative value of such evidence.

For the most part, however, testing will reveal a low likelihood that the DNA found could be from another person, though, in my experience, this is probably less true when the DNA located is a mixture of multiple people. Other courts have also ruled that DNA alone is sufficient to prove identity when the odds it could match someone else were one in 500 million (*People v. Rush* (N.Y.Sup. 1995) 630 N.Y.S.2d 631, 634), one in at least five billion (*Toomes, supra*, 191 S.W.3d at p. 131), and one in 1.3 billion black people (*United States v. Wright* (9th Cir. 2000) 215 F.3d 1020, 1025). (See also *McDaniel v. Brown* (2010) 558 U.S. 120, 124, 132 [DNA evidence with random match probability of one in three million was "powerful[ly] inculpatory evidence"].)

Of the three "*Abdelmalik* factors," the location of the DNA is probably the most significant. In *People v. Kelley* (N.Y.App.Div. 2007) 847 N.Y.S.2d 813, the court's analysis rested primarily on this factor. There, a large amount of DNA was found on the holster of a handgun used as part of a robbery and left at the crime scene; because the handgun was seen in the perpetrator's hand, the court found that the DNA evidence was sufficient to tie the defendant to the crime. (*Id.* at p. 814.) Similarly, in *State v. Freeman* (Mo. 2008) 269 S.W.3d 422, the defendant's DNA was located on a piece of toilet paper next to the murder victim's body inside her apartment. (*Id.* at p. 425.) The Missouri Supreme Court found this

sufficient to uphold a murder conviction, as the victim had been seen going inside her apartment the previous night with a man who matched the defendant's general description. (*Ibid.*) According to witnesses, the victim and defendant had been talking the previous night at a bar. (*Ibid.*) The court concluded that the toilet paper, when taken with the other pieces of evidence, indicated that the defendant was the man who entered the victim's apartment the night before the victim's body was found; his DNA could not have been located on the toilet paper – which matched that found in the victim's bathroom – under any other rational explanation of events. (*Ibid.*) Interestingly, however, the lower appellate court came to the opposite conclusion, deeming that the DNA's presence on the toilet paper did not automatically link him to the murder. (*State v. Freeman* (Mo. App. 2008) 2008 WL 142299, 7-16.)⁷

While I have cited numerous cases in an attempt to provide a helpful framework in which to analyze prejudice claims, many of the holdings in those cases are not helpful to the defense. But, counsel should take heed in *People v. Arevalo* (2014) 2014 Cal. App. LEXIS

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The *Freeman* case is not the only example of a state's high court finding reason to disagree with a lower appellate court's ruling to reverse a serious conviction in such circumstances. In *Griggs v. State* (Tex. App. 2005) 2005 Tex. App. LEXIS 2848, the lower appellate court reversed the denial of a motion for mistrial based upon the prosecutor's elicitation of extraneous allegations by witnesses regarding the defendant; even with the defendant's DNA found on a glove allegedly worn by the assailant as well as the defendant's supposed jailhouse confession, the court ruled that the admission of the extraneous allegations was still prejudicial. The Court of Criminal Appeals of Texas reversed the ruling, finding that trial counsel had not met the procedural requirements for bringing the motion. (*Griggs v. State* (2007) 213 S.W.3d 923.)

332, where, in a previously-published decision, Division Three of the Fourth District Court of Appeal found that the defendant's DNA found on a rock apparently used during a commercial burglary was insufficient to connect him to the offense. The undercurrent of this case was that the prosecution had not proved that the DNA found on the rock necessarily had resulted from the defendant's involvement in the burglary and therefore, relying on two fingerprint cases *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 and *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, the court found there was insufficient evidence to support the conviction.

In sum, I think the main lesson to take from *Abdelmalik* and the other cases cited above is that counsel should closely review the record to determine whether there is any other rational explanation as to how the DNA ended up where it did. If the amount of DNA found in a particular location is not high, which is something that most DNA experts will admit, then counsel should emphasize that the placement of the DNA could have resulted from casual contact. Finally, if you can attack the reliability of the DNA evidence through collection or testing protocol, then this too may serve as another valuable source of ammunition.⁸ Admittedly, the existence of DNA is a tough hurdle to conquer, but there are mechanisms to do so.

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In a recent case that I handled, I raised three errors that all went to the trial court's exclusion of evidence that could have bolstered the defense's theory that the DNA evidence could have been inappropriately transferred through faulty evidence collection. In that instance, my claim of prejudice focused predominantly on emphasizing the ways that the transfer could have occurred, and, to a lesser extent, on the "*Abdelmalik* factors."

E. Habeas Investigations and Motions for DNA Testing.

From the “Central Park Five” to the “West Memphis Three,” the stories of individuals later exonerated due to DNA evidence are legion.⁹ Indeed, the advent of DNA testing has led to the creation of a national network of Innocence Projects. In an appropriate case, counsel may seek to contact the Northern California Innocence Project for further assistance.

As is always true, before proceeding with a habeas investigation, panel attorneys should contact their SDAP buddies. Since starting at SDAP, I have conducted three habeas investigations relating to DNA evidence in my own cases. The circumstances that gave rise to these investigations are varied. In one, my client was convicted of possession of methamphetamine for sale, and the DNA evidence served as the critical link in the prosecution’s case. A jury had previously hung on the charge before DNA testing was done on the glove in which the drugs were located. These facts on their own may not have required a habeas investigation, but two additional facts did: (1) after the defendant was convicted, the Santa Clara County Crime Lab admitted that there may have been errors in the initial DNA testing, and (2) my client was sentenced to 25 years-to-life under the old Three Strikes Law. The appellate court afforded me funds to retain my own expert to test the DNA samples.

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As a fan of true crime documentaries, I would be remiss in failing to point out two excellent documentaries on these cases: the Ken Burns’ documentary *The Central Park Five* on the former case and the *Paradise Lost* trilogy on the latter case.

In neither of my other cases did I need to retain my own expert. One case involved the necessity of examining whether additional evidence existed to support a DNA transfer theory (as in the Anderson case described at the beginning of this article) in regards to a particularly brutal (and seemingly random) attempted murder. In another case, new DNA evidence was identified on the homicide victim's body during the pendency of the appeal, and so I investigated the significance – if any – of this evidence. These cases are merely provided as examples as to when a habeas investigation may be warranted but, of course, such scenarios are not an exhaustive list. In a particular case, further investigation may be necessary if counsel believes an issue was not properly litigated or preserved. If a DNA expert is required, contact SDAP, and we can refer you to some that we have used in the past.

Another important caveat is that under Penal Code section 1405, there is a statutory mechanism for criminal defendants to bring post-conviction motions for DNA testing. While this statute was prompted by the nationwide influx of exonerations due to DNA evidence, the burden placed on the defendant to succeed on these motions is surprisingly low. Despite good published case law on the statute (*Jointer v. Superior Court* (2013) 217 Cal.App.4th 759, *Richardson v. Superior Court* (2008) 43 Cal.4th 1040), it is exceedingly rare that such motions are brought. I therefore encourage counsel to investigate the possibility of raising them in appropriate cases. Of course, talk to your SDAP buddy before doing so, but the upside of bringing these motions can be huge. If the motion is granted, and the resulting test is positive, appellate counsel will have much greater ammunition in a petition for writ of

habeas corpus.

Before discussing the case law on Penal Code section 1405, some of the procedural requirements should be briefly addressed. Initially, an indigent criminal defendant must request appointment of counsel for purposes of pursuing such a motion. “The request shall include the person’s statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person’s statement as to whether he or she previously has had counsel appointed under this section.” (Pen. Code, § 1405, subd. (b)(1).) If you are presently representing the defendant on appeal and are willing to litigate the motion, then a declaration providing this information would also be useful so that you personally are the individual appointed to represent the defendant.

Once counsel is appointed, there is no requirement that a motion ever be filed. Investigation into the merits may reveal that a motion would be frivolous. Pursuant to Penal Code section 1405, subdivision (c)(1), the motion must be verified by the defendant and “shall do all of the following:”

- (A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
- (B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
- (C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known.

(E) State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

While there are several procedural requirements outlined in the statute, the court does have discretion in two significant respects: (1) in determining whether to set a hearing on the matter, and (2) in determining whether the defendant is entitled to be present at the hearing. (Pen. Code, § 1405, subd. (e).) Pursuant to subdivision (f) of the motion, the motion must be granted if the court finds:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

As mentioned above, courts have interpreted the burden in succeeding on such motions to be much lower than the statutory language otherwise suggests. The holding in *Jointer v. Superior Court* (2013) 217 Cal.App.4th 759 is illustrative. There, the defendant was sentenced to an indeterminate term of 34 years to life as a result of 1997 grocery store robbery. (*Id.* at p. 761.) The contested issue at trial was the identity of the perpetrator. (*Id.* at p. 766.) The culprit had been holding a water bottle at the time he robbed the cashier, and the defendant was linked to the crime by a fingerprint match from the bottle. (*Ibid.*) Additionally, one eyewitness conclusively identified the defendant as being the culprit, and two others “tentatively” identified him. (*Id.* at p.767.) This evidence was enough to secure the conviction.

The defendant in *Jointer* filed a motion for DNA testing in 2012, arguing that the water bottle should be subject to DNA testing. (*Jointer, supra*, 217 Cal.App.4th at p. 763.) The motion was denied since the trial court did not believe that the testing requested would result in a reasonable probability of a better judgment for the defendant, as required under Penal Code section 1405. (*Id.* at pp. 763-764.) The Court of Appeal reversed, emphasizing that the standard in granting such motions is low and that the DNA testing itself was more

cost-efficient for the state than excessive litigation as to the motion's merits. (*Id.* at pp. 768-769.) In so doing, the appellate court assumed that the results of the DNA testing would necessarily be helpful for the defendant and, given the "weak" identifications and the prosecution's failure to prove when the defendant's fingerprints were placed on the bottle, found that the trial court erred in denying the motion. (*Ibid.*, citations omitted)

The *Jointer* court distinguished the facts in its case from those in *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, the only other published decision regarding Penal Code section 1405. In *Richardson*, the court outlined many of the governing principles that were ultimately applied by the *Jointer* court. Of particular note was the *Richardson* court's conclusion that "reasonable probability" in the context of Penal Code section 1405 was synonymous with the meaning applied to the same term in *Strickland v. Washington* (1984) 466 U.S. 668 and *People v. Watson* (1956) 46 Cal.2d 818. (*Richardson, supra*, 43 Cal.4th at pp. 1050-1051.) The *Richardson* court cautioned trial courts about imposing too great a burden:

In making this assessment, however, it is important for the trial court to bear in mind that the question before it is whether the defendant is entitled to develop potentially exculpatory evidence and not whether he or she is entitled to some form of ultimate relief such as the granting of a petition for habeas corpus based on that evidence. As the Ninth Circuit observed in an analogous decision, "Obtaining post-conviction access to evidence is not habeas relief." [Citation.] Therefore, the trial court does not, and should not, decide whether, assuming a DNA test result favorable to the defendant, that evidence in and of itself would ultimately require some form of relief from the conviction.

(*Id.* at p. 1051.)

Given the factual background of the *Richardson* case, it is little surprise, however, that the court found that this standard had not been met. There, the defendant was convicted of murdering a young girl during the course of various other crimes. (*Richardson, supra*, 43 Cal.4th at p. 1044.) The defendant sought to test DNA from hair samples located near the girl's body, which was found in the bathtub in her residence. (*Id.* at pp. 1051-1052.) Experts at the previous trial had testified that the samples were consistent with the defendant's hair, though they disagreed as to which of the hairs could be linked to him. (*Ibid.*) Regardless, the evidence of guilt was overwhelming, including the defendant's statements that he had inside knowledge regarding the murder, his flight from the scene, and his various statements to the police, which at one point, culminated in an admission. (*Id.* at p. 1053.) Given these facts, our state's high court found no reasonable probability of a better result, even assuming that the test results would have been beneficial for the defendant.

Taken together, *Jointer* and *Richardson* underscore a few important points, most significantly that, in analyzing the merits of a motion, the trial court must assume the results would be helpful to the defendant. In *Jointer*, eyewitness testimony and a fingerprint match from the evidence intended to be tested could not overpower potentially beneficial DNA evidence. In contrast, the defendant's corroborated admissions and flight in *Richardson* were sufficient to indicate his guilt, regardless of the DNA evidence.

In light of this case law, I do want to encourage appellate counsel to look into the merits of such a motion in appropriate cases. The burden is not particularly high, and the results – if helpful – could make a huge impact on the client's case.

F. Conclusion.

The advent of DNA testing has had numerous implications on the criminal justice system. The seemingly infallible nature of this evidence can, at times, help our clients; as in some cases, it can conclusively prove that a particular defendant is innocent. In many more cases, however, the converse is true: the DNA evidence found at the crime scene is viewed as definitively establishing our client's guilt.

DNA evidence is not perfect, and its existence does not mean that a defendant's rights are to be forgotten. Appellate counsel may find potential sources of error in Fourth Amendment claims, chain of custody issues, the testing methodology employed by the lab, the veracity of the expert's opinion, or a violation under *Crawford*. Additionally, even when unhelpful DNA evidence does link a client to a crime, there are several ways for counsel to minimize this evidence in establishing prejudice claims, whether this be from piggy-backing off the aforementioned types of errors or by arguing that the DNA evidence did not necessarily stem from the defendant's participation in the crime. And finally, if all else fails, appellate counsel should investigate possible habeas claims or the merits of a bringing a post-conviction motion for DNA testing.

Most importantly, appellate counsel should remember that all DNA evidence is not created equally. While a presumption of DNA evidence's infallibility definitely still exists, some hard work and creativity can help to minimize this presumption and assure our clients of the zealous representation to which they are entitled.