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Memorandum

To: Office
From: Chris Gauger
Date: March 23, 2010
Re: Chain of Custody & Preliminary Hearings

The prosecution will be retesting some or all of Debbie Madden's cases either before trial or after dismissals on a re-filing. Our next step is to argue that the chain of custody has been broken: we look at 1) general chain of custody law; and, 2) applying it to several scenarios in preliminary hearings. For trial a further M att Rosen will be writing: 1) a motion in limine to exclude the evidence due to the break in the chain; 2) a motion in limine opposing DA request to exclude evidence of Maddengate; 3) a pinpoint jury instruction advising jury what to do with this chain evidence. Below is advice on preliminary hearings and chain of custody.

1. General law of chain of custody: “reasonable certainty” — a preponderance — that the evidence has not been altered.

The chain of custody is established when the party offering a particular item in evidence shows that it is reasonably certain the evidence has not been altered.¹ The “reasonable certainty” standard is, essentially, the equivalent of proof by a preponderance of the evidence.²

¹ *People v. Catlin* (2001) 26 Cal.4th 81, 134; *People v. Lucas* (1995) 12 Cal.4th 415, 444.

² *People v. Herrera* (2000) 83 Cal.App.4th 46, 61.

The state Supreme Court in the 1995 *Lucas* case noted that chain of custody is not merely a technicality: “The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. ... Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.”³

Moreover, the defense has a right to present evidence that would impeach the chain of custody, and the trial court has broad discretion to determine the admissibility of evidence.⁴ Over a chain-of-custody objection, the state Supreme Court has held in the 2001 *Catlin* case that the party offering the evidence has the burden of proof of showing “to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration.”⁵ The Court went on to underline that the requirement of “reasonable certainty” is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received.⁶

This is a foundational issue: an improper chain of custody precludes testimony or evidence on the issue involved. Look to the Court of Appeals *Jimenez* case (2008)⁷ for a recent example resulting in reversal. There, when the testimony of prosecution witnesses failed to resolve key foundational issues about the chain of custody of defendant’s DNA reference sample, the trial court abuse its discretion in overruling chain-of-custody objections to that sample and to the criminalist's comparison of the sample with DNA from crime scene.⁸

Though, if the possibility that someone has tampered with the evidence is supported by only bare speculation, then “it is proper to admit the evidence and let what doubt

³ *People v. Lucas* (1995) 12 Cal.4th 415, 444.

⁴ *People v. Williams* (1997) 16 Cal.4th 153, 196.

⁵ *People v. Catlin* (2001) 26 Cal.4th 81, 134.

⁶ *Ibid.*

⁷ *People v. Jimenez* (2008) 165 Cal.App.4th 75.

⁸ *Id.* at 81.

remain go to its weight”;⁹ Here, we have an admission (by Madden) that real tampering occurred, a random sample showing large (7/25) percentage of error (by Woodward), and the ASCALD report showing that the Lab's chain of custody procedures are sorely lacking.

2. Chain of custody at preliminary hearing.

Because a preliminary hearing involves only probable cause the prosecution may argue that chain of custody is not important; but chain of custody is an evidentiary rule that goes to the admissibility of the evidence (is it authentic) unless it is just speculation then it still goes to weight. Here we must argue in all Madden cases it is a question of admissibility as she tested the objects. Below we deal with different scenarios that might occur at preliminary hearing: a) new expert testifies; b) police officer testimony under Pen. Code, sec. 872; c) official record exception; d) police-officer “expert.”

A) New expert testifies.

First, make sure you cross the new chemist. Perhaps the scientist will one admit to the key principle of chain of custody. Also they will have to admit that they were not the first to examine the bag(based on marking opening), nor that they know the old SF lab’s procedure, nor that those procedure were at an acceptable standard (show them the ASCALD report: is their Lab certified?) , nor if the what ever sloppy chain procedure were followed. An expert can rely on hearsay so you might even get them to admit that they know that Madden tested it, that she has a misdemeanor DV conviction, that she used drug and tampered with some evidence; and that the SF lab is closed.

Perhaps we can get an expert who will explain the importance of chain of custody and what that means to an ultimate retest? Any how introduces the discover from the DA and ask te court to take judicial notice (Evid. Code, sec. 452) of any newspaper article that you need to complete the record.

⁹ *People v. Williams* (1989) 48 Cal.3d 1112, 1134 (unexplained anomalies in prosecution handling of latent fingerprint Card went to weight of evidence after prosecution had made prima facie showing that Card had not been tampered with); *In re Ruth H.* (1972) 26 Cal.App.3d 77.83 (inference that pills placed in envelope by high school security agent were same as those picked up within short time by deputy sheriff was sufficient to deny chain-of-custody objection).

B) Pen. Code § 872 (Prop 115 — police hearsay)

Argue that the magistrate should not accept the 115 hearsay under *Hosek*'s¹⁰ reliability prong.

Of course, in a given case the magistrate (or the superior court on a section 995 motion or an appellate court in a writ proceeding) *might conclude that an officer's testimony does not provide a sufficient indication of reliability to permit introduction of the extrajudicial statement*. For example, the court might reject such testimony if, under cross-examination, an investigating officer says the expert expressed doubts about a test result. Another example might be an officer revealing that he had not asked the expert whether the test results appeared valid and unexceptional. In these circumstances, the court may decline to admit the test results as unreliable without personal testimony from the criminalist.”¹¹

How about another example right here, where there has been tampering and use by the original chemist. The chain of custody is fatally tainted and though usually chain is merely a weight issue, it is key here to 115/ PC 872 trustworthiness.

C. Official records also have trustworthiness prong.

An attack on chain of custody aims to show that the evidence was tampered with in some way.¹² “Chain-of-custody issues are present whenever physical evidence capable of submission to the jury is introduced at trial.”¹³

D. Police “expert” testifies.

Theoretically a magistrate can find an officer an expert in identifying substances (always object when they say “I picked up the “cocaine” as “not an expert, it only ‘appeared to be cocaine’”, until and unless the court holds they are one). Revert to the chain fo custody arguments above which should serve in good stead here, unless the officer is the arresting officer and makes clear that his opinion is based on the initial incident and not the review of the item in court (after possible tampering).

¹⁰ *Hosek v. Superior Court* (1992) 10 Cal.App.4th 605.

¹¹ *Id.* at 653.

¹² *People v. Riser* (1956) 47 Cal.2d 566, 581 disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 649.

¹³ *People v. Baldine* (2001) 94 Cal.App.4th 773, 779.

Beware the *West* and *Westley* cases below, on whether a qualified officer can testify to the nature of a substance; you can see how we tried to distinguish them in the sample argument below.

While a qualified expert may provide sufficient evidence that a suspected narcotic is actually a particular substance, the expert here — though undoubtedly experienced in the investigation of drug offenses — does not usually have enough experience to provide sufficient evidence that what Defendant sold a specific drug. Point out whether the officer: 1) has ever qualified as an expert in identification of cocaine base; 2) reveal sufficient expertise in drug recognition; 3) or admitted that he could not always distinguish it from its fake substitute; and 4) could only say he “believed” it was base cocaine.

To prove the crime of sales of a narcotic, the state must prove by competent evidence that the accused sold a controlled substance, knowing of its presence and character as a controlled substance, and that the substance was actually a specific narcotic.¹⁴ It is the prosecution’s burden to bring forth competent evidence of every element, including that the substance was a narcotic.¹⁵

Most commonly, the nature of an illegal narcotic substance is established through results of chemical testing of the substance. Federal and state courts have implicitly recognized that to reliably determine the nature of a substance, a chemical test is needed.

In *Cook v. U.S.*,¹⁶ for example, the 9th Circuit found that evidence of large amounts of white powder, along with behavior consistent with drug sales, was insufficient evidence of narcotics trafficking: “We note judicially that whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance.”

Likewise, the Court of Appeal in *People v. McChristian* recognized the probability of error, on the part of narcotic enforcement officers, in relying upon mere observation to decide that a package contained narcotics. Thus, it held that there was insufficient evidence of heroin possession where there was no chemical test results, but only the officers’ opinion based upon the appearance of the heroin-type balloons. This evidence, said the court, was speculative and conjectural, and was not competent evidence that the

¹⁴ Health & Safety Code, section 11352; CALCRIM 2300.

¹⁵ *People v. McChristian* (1966) 245 Cal. App. 2d 891, 896.

¹⁶ *Cook v. U.S.* (9th Cir. 1966) 362 F.2d 548.

balloons contained heroin.¹⁷

On the other hand, some courts have found the identity of the substance was sufficiently established through circumstantial evidence,¹⁸ including through expert opinion testimony of an officer qualified to identify the substance based on an inspection of its appearance and texture. These 1990 Court of Appeal cases, *People v. Wesley* and *People v. West*, involved narcotics received and used through official sources in reverse sting operations.¹⁹ In both cases, the officer's expert opinion was the substance "was" cocaine; not that he "believed" it to be cocaine, as here.²⁰ Moreover, in those cases the police department itself had provided the cocaine for a reverse sting — the source itself lending believability to the expert's opinion.

Here, we have a street transaction involving a substance the origin of which is a complete unknown, there was no chemical test result produced, and Officer's belief was not sufficient to prove that what Defendant sold to the officers was actually crack cocaine.

B. There was insufficient evidence that what Defendant sold was actually crack cocaine, because Officer does not have adequate expertise in identifying it by sight, and his mere belief does not provide definitive proof of its nature.

Here, Inspector Officer "believed" that the substance Defendant sold was base cocaine, but he could not be totally certain. While absolute certainty, of course, is not required in the context of a preliminary hearing, sufficient expertise to make his belief reliable is necessary, and was lacking here.

(1) Officer was not sufficiently qualified to identify the substance Defendant sold.

A person is qualified to testify as an expert if it is shown before testimony the person has the specialized knowledge, skill, experience, training or education to qualify

¹⁷ *McChristian, supra*, at p. 897.

¹⁸ See *People v. Sonleitner* (1986) 183 Cal.App.3d 364; *People v. Palaschak* (1995) 9 Cal.4th 1236.

¹⁹ *People v. Wesley* (1990) 224 Cal.App.3d 1130; *People v. West* (1990) 224 Cal.App.3d 1337.

²⁰ See *Wesley, supra*, at p. 1146; *West, supra*, at p. 1347.

him as an expert on the subject to which his testimony relates.²¹ Determining whether a person qualifies as an expert in a particular field in a specific case depends upon the facts of the case and the witness' peculiar qualifications.²² “The competency of an expert is relative to the topic and the fields of knowledge about which a person is asked to make a statement and, in considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.” Thus, an expert cannot be qualified to testify about a particular set of facts because he has experience in a generalized area; rather his qualifications must fit the specific facts of the case.

Here, Officer had never been qualified as an expert to identify cocaine base. As Officer said, usually the substance is tested by a lab to establish its narcotic nature, and he had never been asked to identify it in court. Though Officer’s qualifications included much experience in narcotics investigations and arrests, his testimony revealed little expertise in actually identifying a substance as cocaine base rather than its fake counterpart or some other substance. There was no evidence of any training in recognition of it, and no evidence as to why he should be considered an expert in distinguishing between the real thing and a substitute substance that might look and feel very similar.

In fact, Officer admitted that he does not know the chemical makeup of cocaine and cannot always tell the difference between actual cocaine base and the fake substitute known as “bunk.”

Participation in thousands of buy-bust operations and other narcotics investigations may well qualify Officer as an expert in other areas, but it does not — without more — make him an expert in identifying a suspected narcotic as the real thing. This, presumably, is why he had never before been asked to identify a suspected substance as actual narcotics in court. The magistrate erred in allowing Officer to testify as an expert in the particular subject of cocaine base recognition, and this court should set aside the information, as it is based upon inadmissible and thus incompetent evidence.

(2) Officer’s belief that what Defendant sold was base cocaine is insufficient.

An expert’s “belief” is not sufficient proof of the nature of a narcotic substance. The need for a definitive expert opinion was recognized in *Wesley and West*.²³ There, the defendant claimed there was insufficient proof of the nature of the substance where the

²¹ Evid. Code section 720.

²² *People v King* (1968) 266 Cal.App.2d 437, 445.

²³ *Wesley, supra*, 224 Cal.App.3d 1130; *West, supra*, 224 Cal.App.3d 1337.

only evidence was a qualified expert's opinion that the substance in question was actually cocaine. The Court of Appeal disagreed, holding that the expert's opinion was enough for the preliminary hearing, but only because of the definitive quality of that opinion. Specifically, in Wesley, the expert's testimony "was not that the substance 'resembled cocaine,' or 'looked like' cocaine or 'more likely than not' was cocaine or 'appeared' to be cocaine, but that *it was cocaine*."²⁴

Moreover, those cases involved the same officer (Qualls from Pasadena) who got the cocaine from his sergeant (Kirkpatrick). As already noted, they were both reverse sting cases, that is, the drugs are obtained from the police and sold by undercover officers to the defendants. The official source of the drugs made the expert's opinion that it was cocaine circumstantially more reliable than here, where we have "street" drugs the source of which is entirely unknown.

end.

Chris Gauger

²⁴ *Id.* at p. 1146 (emphasis added).