

Commentary on: Thompson WC, Taroni F, Aitken CGG. How the Probability of a False Positive Affects the Value of DNA Evidence. J Forensic Sci 2003 Jan.;48(1):47–54.

Sir:

I read with alarm the discussion by Thompson et al., of the significance of DNA evidence in forensic casework. I was struck by the authors' description of a 1995 case in the jurisdiction in which I practice law. The authors state: "In 1995, Cellmark Diagnostics admitted that a similar sample-switch error had caused it to report, incorrectly, that a rape defendant's DNA profile matched DNA found in vaginal aspirate from a rape victim."

As a prosecutor who specializes in the use of DNA evidence and who actively consulted with the trial prosecutor in the case the authors describe, I feel compelled to correct errors by the authors and provide important additional information.

The evidence at issue was not a vaginal aspirate but a white cloth recovered from the victim's residence, used by the assailant to wipe himself following his knife-point sexual attack. More importantly, testing on the towel conducted by Cellmark Diagnostics involved no sample switch as alleged by the authors.

Cellmark's analysis of reference samples from the victim and defendant revealed that the victim matched a portion of the white cloth. Cellmark provided a report that mistakenly reported that the defendant—rather than the victim—matched the evidence sample. All parties were provided the raw testing data, which reflected the correct, victim-evidence match.

The authors continue: "After the error came to light during the defendant's trial, Cellmark issued a revised report that stated that the vaginal sample [sic] matched the victim's own DNA profile and that the defendant was excluded as a potential donor." Again, the facts are different.

The defendant objected to the admissibility of the results provided by Cellmark on general acceptance grounds and was granted a pretrial, or *in limine*, hearing on that issue. During that hearing, prior to even the selection of a jury, the report-writing error was discovered during testimony. The error was promptly reported to the court and counsel. The hearing was rendered moot inasmuch as the true result was not probative for purposes of trial.

Contrary to the authors' assertions, no sample switch ever occurred. Narratives of this case written and heard elsewhere have repeatedly mischaracterized these facts.

In addition, other events demand description. First, the evidence at trial included DNA testing of another portion of the white cloth, which contained sperm. The profile obtained from that sperm evidence matched the defendant and is found in only approximately 1 in 8,600 Caucasians.

The trial jury was also informed that the day after the assault, the defendant pawned numerous items of property stolen from the victim. The defendant was convicted and sentenced to life in prison.

Finally, as a result of a proactive review of older cases by the San Diego County Office of the District Attorney, advanced DNA testing will be offered for the defendant to resolve any question of guilt. The defendant, through a letter addressed by him to my office, has already indicated his willingness to participate in retesting—retesting that could have been undertaken by defendant's counsel and expert many years earlier.

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