

# Inferences, Arguments, and Second Generation Forensic Evidence

ERIN MURPHY\*

## INTRODUCTION

A woman, lost in an unfamiliar neighborhood, stops a man on the street and asks him for directions.<sup>1</sup> He jots them down on a note, but when she follows the directions to the destination, he reappears by surprise and then rapes and robs her. Police apprehend a suspect, and obtain from him a writing sample that replicates the writing on the note. Later, in the course of preparing for trial, the defense attorney asks the court to order the crime scene note turned over for independent examination by a handwriting analyst. When the defense expert concludes that the defendant is the probable author, the defense decides not to present the expert's testimony, but nevertheless attacks the reliability of the government expert's analysis at trial.

At this point, consider a range of scenarios that the government could undertake. It could:

- Elicit only evidence from its own expert that the defendant authored the note, and nothing further;
- Elicit evidence from its expert that nothing in the testing process disturbed the note, and so it remained available to the defense to conduct its own independent tests;
- Elicit evidence as above, adding that the defense did actually request and receive the note for the purpose of independent examination;
- Elicit evidence as above, only also call attention to the fact that the defendant's expert was not called at trial;
- Elicit evidence as above, only also request an express inference that the failure to call the witness suggests that the

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\* Assistant Professor, University of California, Berkeley School of Law. Thanks are due to the outstanding research assistance of Beth Kostrezwa and Lisa Cisneros, both of whose efforts were indispensable to this project.

1. The following hypothetical is loosely based on the facts of *State v. Mingo*, 392 A.2d 590, 591-92 (N.J. 1978).