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ISSUES TO DEVELOP AT TRIAL

March 2024

This issue focuses on two recent Court of Appeals cases and identifies open questions ripe for further litigation.

People v. Jordan, 40 N.Y.3d 396 (Nov. 20, 2023)

Those who have tried cases involving DNA are probably all too familiar with the rote and jargon-filled testimony the prosecution's cherry-picked analyst gives to establish that he or she conducted an "independent review" of the DNA analysis process, that being necessary under *People v. John*, 27 N.Y.3d 294 (2016), to satisfy the dictates of the Confrontation Clause. Perhaps you objected to the testimony arguing that this witness was just a conduit for the conclusions of others because he or she didn't prepare any reports themselves or participate in any of the actual testing. Likely you were shut down, the Court persuaded by the analyst's seemingly impressive testimony about the scope and depth of their review.

In *People v. Jordan*, the Court revisited the thorny issue of what testimony from an OCME analyst will satisfy the demands of the Confrontation Clause. The Court, citing its prior cases, reiterated that the critical stage the testifying witness must have been involved in is "the editing stage at which 'the generated DNA profile' is created by the analyst exercising independent judgment."

In *Jordan*, the witness was the technical reviewer for the DNA profile extracted from the swab of a cellphone recovered from the crime scene. He testified that he "review[ed] the data and reports" and conducted his "independent interpretation" of the testing data contained in the paper file he received. He was also the reporting analyst for the post-arrest confirmatory swab but he did not "run" the raw data, he "received" the raw data and went through it and then drew his own interpretations based on that data.

The Court of Appeals held that this testimony was "insufficient" because the Court could not discern the witness's level of involvement "in the generation of the DNA profiles at the critical final stge of testing." The Court framed the ultimate inquiry as whether the testifying analyst "participated in the critical portion of the testing process or reviewed the data in meaningful way that enabled independent verification of the accuracy of the DNA profile." The Court tasked the People with "mak[ing] a clear record of the stages of the DNA testing in which the testifying analyst was involved, or what manner of independent analysis the testifying analyst performed" to ensure his or her involvement at the "necessary stage."

Analysis

By referencing the editing stage and emphasizing the exercise of judgment when the profile is generated, the Court made clear that it is not enough for the analyst to mouth the word "independent." We believe, under *Jordan*, that to satisfy Confrontation, the analyst must engage with the data **at the stage when it comes off the capillary electrophoresis machine and is processed by software such as GeneMapper or GeneMarker**. That is the critical final stage of testing when the analyst exercises judgment, because it is the point at which the analyst can concur with the software filters and edits and make their own edits.

An analyst has only made a Confrontation Clause compliant independent review if they have reviewed the raw data in digital form, i.e., on a computer. It is that data that can be correctly termed the raw data, not the printed electropherogram or "Allele Report" in the written report you may be familiar with and which is produced after the edits have been made. Review of data in the OCME printed report is thus insufficient. Analysts often mistakenly refer to these print-outs as the raw data providing the basis for their independent review, but they are not. As counsel for *Jordan* explained in the oral argument in that case, an independent review of the raw data would be accomplished by the analyst going to a computer terminal and reviewing the saved unedited raw data using the software.

Using Jordan going forward

Although *Jordan*, unhelpfully, did not identify by name the capillary electrophoresis stage as the critical stage, its analysis inevitably leads to that conclusion, and leaves open opportunities for you to press the issue.

Caveat: *Keep in mind that Jordan puts the burden on the prosecution to create a sufficient record from which a court can confirm that the analyst exercised independent judgment at the critical stage. While we suggest lines of cross and argument below to support your Confrontation challenge, this approach would likely be most effective where the analyst has testified at length about his or her comprehensive review but, per the above analysis, still misses the mark. If, in your estimation, the analyst, as in Jordan, has provided only conclusory and vague testimony about what they did, consider whether a better strategy would be to simply object on Confrontation grounds that the analyst's testimony does not satisfy Jordan. Asking one too many questions may invite the analyst to create a better record.*

You should consult an expert to establish whether there is a challenge to the DNA conclusions reached, but for laying a foundation for your *post-Jordan* Confrontation Clause challenge, we suggest the following:

- Review the reports you receive to establish whether the testifying analyst participated in the capillary electrophoresis stage. If you confirm that the analyst did not participate in that stage, elicit on cross. If the analyst has stated, as they are likely to do, that they

independently reviewed the "raw data" and reached "independent conclusions" about the validity and accuracy of the DNA profiles extracted, establish on cross what they mean by the raw data. The printed electropherogram? Something else? If it's anything other than the unedited data coming off the electrophoresis machine, you will have set up an objection that they did not conduct an independent review of the raw data.

- Establish what they did. Were they the analyst in the first instance who interpreted the data as it came off the machine? If not, did they go back to the computer terminal and review the original data before any edits were made?

- Try to independently confirm through your review of the DNA reports that the testifying analyst did not make any edits. Once confirmed, elicit on cross.

Once you've established that the analyst did not review the data per *Jordan*, object that the analyst was not the right witness to call and their testimony violated Confrontation. Argue that the witness did not either participate in or supervise the final step that generates the DNA profile as by analyzing the data in the first instance at the capillary electrophoresis stage, or conduct an independent analysis as by going back and reviewing the unedited data themselves. Only by doing those things can the court be assured of the accuracy of the results. Object that the printed material – the electropherogram/Allele Report/edit table – is not the raw data because the data reflected there has already been edited by the software and by the analysts who reviewed the data in the first instance. Object to both (1) the admission of the OCME report on the grounds that the witness is not qualified to lay the foundation for its admission and (2) any testimony from the analyst about conclusions in the report, because they are the conclusions of others.

People v. Gonzalo Aguilar, 2024 WL 674254 (Feb. 20, 2024)

Mr. Aguilar challenged the court's refusal to recharge justification in response to a jury note requesting "[a]ll definitions discussed: Murder II, Manslaughter I, Depraved Murder II, etc." After the court's recharge on the charged counts, defense counsel asked the court to charge "the definition of justification." The court refused saying the jury hadn't asked for that. The Court of Appeals found the response meaningful because the form of the note, including the "etc." indicated a request for the elements of the crimes, nothing more.

Concurring, Chief Judge Wilson agreed that the note did not require the court to recharge the jury on justification. But Chief Judge Wilson left open whether justification needed to be recharged because absence of justification is an element of the counts to which it applies – the People must disprove justification beyond a reasonable doubt. Although the parties had argued this theory on appeal, Chief Judge Wilson found the argument unpreserved because it was not specifically raised in the trial court and thus not before the Court for review.

Mr. Aguilar also challenged on appeal the court's interested witness charge, which charged, per the CJI, that the defendant, who had testified in his own defense, was an interested witness whose interest was a factor for the jury to consider in evaluating his credibility. The Court of Appeals found the claim unpreserved, rejecting the defense's argument that the claim satisfied

the "futility" exception to preservation even under the Court's exceedingly narrow view of the exception.

Using Aguilar Going Forward

With respect to the justification recharge, although the Chief Judge's stingy view of preservation is disappointing to your appellate colleagues, his observation invites further litigation.

Should your client have a justification defense and should the jury ask for readback of the offense, or crimes, or "elements," – however it is phrased – argue that the recharge must include justification because, for the counts to which justification applies, it is an element which the People must disprove beyond a reasonable doubt. Cite due process and CPL § 310.30.

With respect to the "interested witness" charge, object that the charge violates due process under the state and federal constitutions because it undermines the presumption of innocence and right to a fair trial. See our April 2019 ITD and September 2020 Update (available on the issues-to-develop page on our website) for further support in framing your challenge).

** *BRUEN* UPDATE **

It is hard to keep up with all the post-*Bruen* decisions flying out of the courts, but one that we want to bring to your attention is *United States v. Homer*, 2024 WL 417103 (E.D.N.Y. Feb. 5, 2024), where the Eastern District granted suppression finding, post- *Bruen*, that the police did not have probable cause to arrest Mr. Homer after seeing him place a handgun in his pants pocket. With the invalidation of the "proper cause" licensing requirement, the court said, the police could not reasonably assume that Mr. Homer, as the possessor a gun, was unlicensed. As the court stated, "it cannot be the case that a dramatic expansion of the scope of conduct that is permissible under the Constitution has no effect on the scope of an individual's freedom from unreasonable intrusions by law enforcement." The court noted that the police had the tools to determine whether Mr. Homer was committing a crime, such as conducting a *Terry* stop and then running a gun license check, but they did not do so.

Consider how *Homer* might assist your suppression litigation.