GUIDE TO NEW YORK EVIDENCE

ARTICLE 7

OPINION EVIDENCE

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(1) A person qualified as an expert by knowledge, skill, experience, training, or education, may testify to an opinion or information concerning scientific, technical, medical, or other specialized knowledge when:

(a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and

(b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter.

(2) Where the subject matter of the testimony is not based on the personal training or experience of the witness but rather is based on scientifically developed procedures, tests, or experiments, it must also be (or have been) established that: (a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment; (b) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result.

(3) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

(4) An expert need not assert a conclusion with certainty, so long as the expert demonstrates a degree

of confidence in the conclusion sufficient to satisfy accepted standards of reliability in the expert's field.

(5) (a) Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form. The expert may base an opinion on facts in the record or known to the witness, and the expert may state an opinion and reasons without first specifying the data upon which it is based; however, an expert who relies on facts within personal knowledge that are not contained in the record is required to testify to those facts prior to rendering the opinion.

(b) An expert also may rely on out-of-court material if:

(i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and

(ii) it is a link in the chain of data and accordingly not exclusively relied upon for the expert's opinion.

(c) In a criminal case, while an expert may rely upon hearsay statements in formulating an opinion, the constitutional right of confrontation precludes the expert from testifying on direct examination to a statement made by a person who was not available for cross-examination.

(d) Defense of lack of criminal responsibility (CPL 60.55)

(i) When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he [or she] must be permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his [or her] opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist or licensed psychologist must be permitted to make any explanation reasonably serving to clarify his [or her] diagnosis and opinion, and may be cross-examined as to any matter bearing on his [or her] competency or credibility or the validity of his [or her] diagnosis or opinion.

(ii) Any statement made by the defendant to a psychiatrist or licensed psychologist during his [or her] examination of the defendant shall be inadmissible in evidence on any issue other than that of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The statement shall, however, be admissible upon the issue of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, whether or not it would otherwise be deemed a privileged communication.

(e) Sex Offender Civil Case. In a sex offender civil management case under article 10 of the Mental Hygiene Law, an expert may testify to hearsay

offered to explain the basis of the expert's opinion when the proponent demonstrates through evidence that the hearsay is reliable and that its probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.

Note

Subdivision (1) reflects the basic New York rule that it is for the jury to determine the facts and that they "may be aided, but not displaced," by expert testimony "where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence" (*People v Inoa*, 25 NY3d 466, 472 [2015]; *People v Cronin*, 60 NY2d 430, 432-433 [1983] ["For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable' "]; *cf. People v Clyde*, 18 NY3d 145, 154 [2011] [in responding to the defendant's argument that "physicians were improperly allowed to testify as to their conclusions" regarding injuries, the Court held that "admissibility turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon. The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment. It was therefore error to overrule (the defendant's) objections and permit this expert testimony" (citing *Cronin*)]).

What distinguishes New York from other jurisdictions is its emphasis on opinion evidence being "necessary" to properly describe the subject matter. (*See Ferguson v Hubbell*, 97 NY 507, 514 [1884] [the rules admitting opinions of experts should not be unnecessarily extended]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871].) That "necessity" requirement in recent times appears subsumed by the requirement that the subject matter be beyond the knowledge or understanding of a typical juror or will dispel misconceptions a juror may hold and thereby help a juror to understand the evidence or determine a fact in issue. (*People v Rivers*, 18 NY3d 222, 228 [2011] [" 'The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror' "]; *People v LeGrand*, 8 NY3d 449, 455-456 [2007] ["A court's exercise of discretion depends largely on whether jurors, after the court considers their 'day-to-day experience, their common observation and their knowledge,' would benefit from the specialized knowledge of an expert witness"]; *People v Keindl*, 68 NY2d 410, 422 [1986] ["Opinion testimony of an expert witness is admissible where the

conclusions to be drawn 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence' "]; *People v Lee*, 96 NY2d 157, 162 [2001] ["Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror"].) In the end, it is for the trial court "to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness." (*People v Cronin*, 60 NY2d at 433; *People v Keindl*, 68 NY2d at 422; *People v Lee*, 96 NY2d at 162.)

As also specified in subdivision (1), the proffered expert witness must be qualified to provide expert testimony, that is, the witness "should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." (*Matott v Ward*, 48 NY2d 455, 459 [1979]; *see Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941].) The proponent of the witness is entitled to a reasonable opportunity to demonstrate that the person is qualified to testify as an expert (s*ee Werner v Sun Oil Co.*, 65 NY2d 839, 840 [1985]) and the opposing party is entitled to a reasonable opportunity to demonstrate otherwise. The trial court decides in the exercise of its discretion whether the witness is qualified to testify as an expert. (*Price v New York City Hous. Auth.*, 92 NY2d 553, 558 [1998]; Guide to NY Evid rule 1.09 [1].) As stated in *Meiselman*: "The prevailing rule is that the question of the qualification of a witness to testify as an expert is for determination, in his [or her] reasonable discretion, by the trial court, which discretion, when exercised, is not open to review unless in deciding the question the trial court has made a serious mistake or committed an error of law or has abused his [or her] discretion." (285 NY at 398-399.)

Subdivision (2) sets forth New York's continued adherence to the rule of *Frye v United States* (293 F 1013 [DC Cir 1923]; *People v Wesley*, 83 NY2d 417 [1994]). "Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted." (*People v Brooks*, 31 NY3d 939, 941 [2018].)

The *Frye* rule does not apply where experts base their testimony on personal training or experience of the expert. (*People v Oddone*, 22 NY3d 369, 375 [2013].) In *Oddone*, the Court permitted a doctor to testify that the deceased's neck had been compressed for "something in the range of 2, 3, 4 minutes." The defendant claimed that the doctor "was advancing a scientific principle that had not gained general acceptance in its field, in violation of the rule of *Frye* . . . . The flaw in defendant's reasoning is that [the doctor] did not claim to rely on any established scientific principle. He made clear that his testimony was based on his personal 'experience'—meaning what he had observed, heard and read about particular cases. Such evidence is not barred by *Frye*" (*Oddone*, 22 NY3d at 375-376).

The *Oddone* Court added a caveat:

> "We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a 'scientific principle' is . . . We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words 'in my experience.' To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*" (*Oddone*, 22 NY3d at 376).

The Court of Appeals has stressed that a *Frye* inquiry, whether required or not, is "separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). The foundation is lacking if the trial court determines that " 'there is simply too great an analytical gap between the data and the opinion proffered.' " (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014], quoting *General Electric Co. v Joiner*, 522 US 136, 146 [1997].) The question boils down to whether the expert's opinion sufficiently relates to existing data or, to the contrary, "is connected to existing data only by the *ipse dixit* [unproven word] of the expert." (*Joiner*, 522 US at 146; *see Brooks*, 31 NY3d at 941.)

Examples of accepted expert testimony include testimony that explains the following: the terminology used in the illegal drug trade (*People v Garcia*, 83 NY2d 817 [1994]); the inconsistency of the quantity of drugs recovered and packaging with personal use (*People v Hicks*, 2 NY3d 750 [2004]); the significance of the absence of the buy money in an undercover "buy and bust" when the reason for its absence is not inferable from the circumstances (*People v Brown*, 97 NY2d 500 [2002]; *cf. People v Gonzalez*, 99 NY2d 76 [2002]; *People v Smith*, 2 NY3d 8 [2004]); the impact on the ability to act with the requisite intent when a defendant had consumed up to a case of beer, smoked several marijuana cigarettes, and ingested 5 to 10 Valium (*People v Cronin*, 60 NY2d 430, 432 [1983]); the "range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents" (*People v Keindl*, 68 NY2d 410, 422 [1986]); the "sexually abused child syndrome" (*Matter of Nicole V.*, 71 NY2d 112 [1987]); whether a fire was intentionally set (*People v Rivers*, 18 NY3d 222 [2011]); an estimated time of a victim's death (*People v Miller*, 91 NY2d 372 [1998]); GPS evidence (*Matter of Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410-411 [1st Dept 2015]); and the mechanism of an injury or physiological process by which an injury occurs (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982, 983-984 [2016]).

Notwithstanding that expert evidence on a particular subject has been accepted, the Court of Appeals has explained that "our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations. Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question" (*People v Williams*, 35 NY3d 24, 43 [2020]).

Subdivision (3) is derived from Court of Appeals cases that indicate that, once the criteria for admissibility are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the "ultimate" issue in the case. (*People v Hicks*, 2 NY3d 750, 751 [2004] ["Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case"]; *People v Cronin*, 60 NY2d at 433 [trial court erred in precluding an opinion on the grounds that it "went to the ultimate question and would usurp the jury's function"]; *Dufel v Green*, 84 NY2d 795, 797 [1995] [It was not error for plaintiff's doctors to testify to "two of the statutory components of the 'serious injury' threshold as defined by Insurance Law § 5102 (d)"]; *see People v Jones*, 73 NY2d 427, 430-431 [1989] ["Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw 'conclusions from the facts' . . . It is a kind of authorized encroachment in that respect"]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Rivers*, 18 NY3d at 228.)

Subdivision (4) is taken from *Matter of Anthony M.* (63 NY2d 270, 280-281 [1984] ["Though sometimes perceptible to lay witnesses . . . the progression from injury to death, often unseen and not readily comprehended, will generally be a subject for expert medical opinion. To establish a causal connection, conclusions which are only 'contingent, speculative, or merely possible' . . . will not suffice, but neither is absolute certainty and the exclusion of every other possibility required"]). A reasonable degree of certainty within the subject field of the testimony should suffice (*Matott v Ward*, 48 NY2d 455, 459-460 [1979] ["Granted that 'a reasonable degree of medical certainty' is one expression of such a standard . . . it is not, however, the only way in which a level of certainty that meets the rule may be stated. . . . (A)ny formulation from which it can be said that the witness' 'whole opinion' reflects an acceptable level of certainty (will suffice)," and the weight of the testimony is then to be assessed by the trier of fact]; *People v Brown*, 67 NY2d 555, 560 [1986]).

Subdivision (5) derives primarily from a series of Court of Appeals cases.

- **Subdivision (5) (a):** The first sentence is taken verbatim from CPLR 4515. The second sentence is a combination of decisional law (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959] ["opinion evidence must be based on facts in the record or personally known to the witness"]; *Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984] [same]), and the portion of CPLR 4515 that reads "the witness may state his opinion and reasons without first specifying the data upon which it is based." The Court of Appeals has qualified that latter portion of CPLR 4515 in two ways.

  The first qualification is as set forth in the rule's exception for an expert who relies on facts within personal knowledge. (*People v Jones*, 73 NY2d 427, 430 [1989] [an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion]; *Mandel v Geloso*, 206 AD2d 699, 700 [3d Dept 1994].)

  Second, while the expert may state an opinion without first specifying the data that would support that opinion, the expert's testimony or the record must supply the data. (*Jones* at 431 ["In failing to supply an evidentiary predicate for their own chemist expert's ultimate conclusion (that a particular drug was a controlled substance), the People presented an insufficient case"].) That the opposing party under CPLR 4515 may of course cross-examine the expert does not shift the burden to that party to fill in the missing data. (*Id.*; *see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4515; Barker & Alexander, Evidence in New York State and Federal Courts § 716 [2d ed].)

- **Subdivision (5) (b) (i)** is derived from a series of Court of Appeals cases: *People v Sugden* (35 NY2d 453, 460-461 [1974] ["The psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion. . . . He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial"]); *People v Stone* (35 NY2d 69, 73 [1974] ["(T)he Trial Judge was very careful to satisfy himself that an independent, legally competent basis existed for the (expert) opinion in the doctor's interviews with the defendant and in the medical records in evidence"]); *Hambsch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] ["In order to qualify for the (*Sugden*) 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material . . . Plaintiff presented no such evidence in the instant case and therefore the physician's opinion was inadmissible"]); *People*

v Jones (73 NY2d 427, 430 [1989] ["(A)n expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion . . . Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded"]).

- Subdivision (5) (b) (ii) is derived from a series of cases, principally *Ciocca v Park* (21 AD3d 671 [3d Dept 2005], *affd* 5 NY3d 835 [2005]). The Appellate Division in *Ciocca* held that an "MRI was properly excluded because [the expert] exclusively relied upon the radiologist's report, 'not merely [as] a link in the chain of data,' but rather as the entire foundation for his opinion" (*Ciocca* at 672-673 [citations omitted]). The Court of Appeals affirmed holding: "Plaintiff did not lay an adequate foundation for the testimony of his experts" (*Ciocca*, 5 NY3d at 836; *see also Borden v Brady*, 92 AD2d 983, 984 [3d Dept 1983] [error was committed where a neurologist's report "constituted an expression of opinion on the crucial issue of the permanency of plaintiff's injuries and formed the principal basis for the expert witness' opinion on the same issue, not merely a link in the chain of data upon which that witness relied"]; *O'Shea v Sarro*, 106 AD2d 435, 437 [2d Dept 1984] [expert witnesses "may not rely primarily upon the opinions by physicians who were not called as witnesses at trial" (citing *Borden*)]; *Sigue v Chemical Bank*, 284 AD2d 246, 247 [1st Dept 2001] [error where an arthrogram report "formed the principal basis for the neurologist's opinion . . . 'not merely a link in the chain of data upon which that witness relied' " **(**citing *Borden*)]; *Tornatore v Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] [out-of-court material may be relied upon "provided that it does not constitute the sole or principal basis for the expert's opinion" (internal quotation marks omitted, citing *Borden*)]).

- **Subdivision (5) (c):** *People v Goldstein* (6 NY3d 119, 129 [2005] ["the statements made to (the expert) by her interviewees were testimonial. . . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making 'a casual remark to an acquaintance'; all of them should reasonably have expected their statements 'to be used prosecutorially' or to 'be available for use at a later trial.' . . . Responses to questions asked in interviews that were part of the prosecution's trial preparation are 'formal' in much the same sense as 'depositions' and other materials that the Supreme Court identified as testimonial"]). *Goldstein* also viewed the statements in question as hearsay because they were effectively being offered for their truth; if they were not being offered for their truth, the Confrontation Clause would not normally be

implicated. In *Matter of State of New York v Floyd Y.* (22 NY3d 95, 107 [2013]), however, the Court of Appeals in a civil case under New York's sex offender civil management statute (Mental Hygiene Law art 10) held that "basis hearsay [hearsay offered to explain the basis of an expert's opinion] does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions." That holding seemingly creates a criminal-civil dichotomy on whether the statements are hearsay. Thus far, *Floyd Y.*'s holding has not been applied in any reported decision other than cases under article 10 of the Mental Hygiene Law.

- **Subdivision (5) (d)** is taken verbatim from CPL 60.55. That section includes a requirement that the court give the jury the following limiting instruction: "Upon receiving the statement [of the defendant] in evidence, the court must instruct the jury that the statement is to be considered only on the issue of such affirmative defense and may not be considered by it in its determination of whether the defendant committed the act constituting the crime charged" (CPL 60.55 [2]).

- **Subdivision (5) (e):** *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). Using the terminology "hearsay basis evidence" to refer to hearsay offered to explain the basis of an expert's opinion, the Court held (at 109): "Due process requires any hearsay basis evidence to meet minimum requirements of reliability and relevance before it can be admitted at [a Mental Hygiene Law] article 10 proceeding. In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the 'probative value in helping the jury evaluate the [expert's] opinion substantially outweighs [its] prejudicial effect.' "

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[1] In June 2022, this rule was amended: (1) to combine former subparagraphs (i) and (ii) of subdivision (5) (b) into subparagraph (i) of that subdivision; (2) to add subdivision (5) (b) (ii) and a corresponding Note; (3) to add a paragraph in the Note to subdivision (1) on the court determining whether a proffered witness is an expert; and (4) to add a paragraph in the Note to subdivision (2) to include the admonition set forth in *People v Williams* (35 NY3d 24, 43 [2020]).

7.03 Opinion of Lay Witness

(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness's personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness's testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference.

(2) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.

Note

Subdivision (1). The law recognizes that in their daily lives individuals communicate in part by the expression of statements that constitute an opinion or inference; e.g., "it was snowing," rather than "white flakes were falling from the sky." Beyond those self-evident examples of warranted opinions and inferences, the law has developed parameters within which a lay witness may testify to an opinion, as opposed to a statement of facts upon which the trier of fact will draw a conclusion.

The first requirement for admissibility of a lay witness's opinion or inference, as set forth in paragraph (a), is for the testimony to be rationally based on the witness's personal perception. In other words, it would be reasonable for the witness, on the basis of the perceived facts, to form the opinion or inference. (*See People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995] [where the witness was a nurse who was familiar with calamine lotion, a lay opinion as to the identity of the substance covering marks and bruises was permissible]; *People v Smith*, 194 AD2d

874, 876 [3d Dept 1993] [where the witness was familiar by experience with the odor of blood, he properly rendered a lay opinion about smelling the odor of blood]; *Tulin v Bostic*, 152 AD2d 887, 888] [3d Dept 1989] ["While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert"].)

A close corollary to the first requirement, as set forth in paragraph (b), is that the testimony be within the ambit of common experience or that of a particular witness. Matters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness's experience with the question presented; matters within the ambit of common experience, such as, color, weight, taste, or observed demeanor of another person, may not. (*See* Jerome Prince, Richardson on Evidence §§ 363, 364 [10th ed 1973]; *People v Eastwood*, 14 NY 562, 566 [1856] ["A child six years old may answer whether a man (whom it has seen) was drunk or sober; . . . the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue"]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 - 282 [1871] ["On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks"]; *People v Leonard*, 8 NY2d 60, 61 - 62 [1960] [Lay testimony that a beverage referred to as "rye and ginger ale was ordered, served and paid for was sufficient at least to present a jury question as to whether an alcoholic beverage was served," given that what constituted an alcoholic beverage was a "matter of common knowledge"]; *Senecal v Drollette*, 304 NY 446, 448 [1952] [a 12-year-old boy who "often rode in automobiles and watched their speedometers" was competent to testify to the speed of a car that hit his companion]; *People v Olsen*, 22 NY2d 230 [1968] [speed]; *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 - 494 [2006] ["The trial court also properly permitted plaintiff to testify regarding an estimate of his running speed. Plaintiff established a sufficient foundation demonstrating the basis of his knowledge . . . . In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles"]; *People v Christopher*, 161 AD2d 896, 897 [1990] ["In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify"].)

Next, as exemplified by the foregoing cases, the opinion or inference must assist the trier of fact in understanding the testimony or determining an issue of fact. (*See People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017] [Three witnesses who were not eyewitnesses but were familiar with the defendant could properly "give

lay opinion testimony . . . that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony 'served to aid the jury in making an independent assessment regarding whether the man in the (videos) was indeed the defendant' "].)

Last, what distinguishes New York from other jurisdictions is, as set forth in paragraph (c), its requirement that the opinion or inference of a lay (or expert) witness must be "necessary" to properly describe the subject matter. (*Teerpenning v Corn Exch. Ins. Co.,* 43 NY 279, 281 [1871] ["As a rule, witnesses must state facts, and not draw conclusions, or give opinions. . . . The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had"]; *Collins v New York Cent. & Hudson Riv. R.R. Co.*, 109 NY 243, 249 [1888] ["We know of no other way in which the witness could have stated his observation" than by the expression of his opinion "as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature"]; *People v Gatewood*, 91 NY2d 905 [1998] [testimony of the defendant's wife concerning the alleged effects of the drug Prozac upon the defendant was permissible], citing *People v Cronin*, 60 NY2d 430, 433 [1983].)

Examples of acceptable opinions or inferences of a lay witness, subject to relevance and in some instances a proper foundation as to the qualification of the witness to offer the opinion, include matters of "color, weight, size, quantity, light and darkness, and inferences of identity as to race, language, persons, visibility, [and] sounds" (Jerome Prince, Richardson on Evidence § 364 [a] at 329 [10th ed 1973]); "taste, smell, and touch" (*id*. subd [b]); the "state of emotion exhibited by a person; e.g., whether he appeared to be angry or jesting" (*id.* subd [c]); the "apparent physical condition of a person, which is open to ordinary observation" (*id.* subd [d]); the "[i]dentity and likeness" of a person (*id.* subd [e] at 330); the "identification of a person by his voice" (*id.* subd [f]); intoxication (*id.* subd [h] at 332); ownership of property (*id.* subd [i] at 333); the speed of a vehicle (id. subd [j]); the estimated age of a person (*id.* subd [k] at 334); one's "own intent or belief" (*id.* subd [l]); the "rational or irrational nature of a person's conduct" (but not whether the person was of "sound of unsound mind") (*id.* subd [m]); the "value of property or services" (*id.* subd [n] at 335); and the "genuineness of the handwriting of another" (*id.* subd [o] at 337).

Subdivision (2). Subdivision (2) is derived from Court of Appeals cases that indicate that, once the criteria for admission are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the "ultimate" issue in the case. (*See People v Eastwood*, 14 NY at 566 [testimony that a person was drunk]; *Senecal v Drollette*, 304 NY at 448 [testimony about the speed of a car]; *cf. People v Hicks*, 2 NY3d 750, 751 [2004] ["Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case"]; *People v Cronin*, 60 NY2d

at 433 [trial court erred in precluding an opinion of an expert on the grounds that it "went to the ultimate question and would usurp the jury's function"]; *People v Jones*, 73 NY2d 427, 430 - 431 [1989] ["Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw 'conclusions from the facts.' It is a kind of authorized encroachment in that respect" (citation omitted)]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Rivers*, 18 NY3d 222, 228 [2011]).

7.06 Abused Person Syndrome

(1) (a) The "abused person syndrome" has historically been referred to as the "battered women's syndrome." The syndrome, however, is not limited to a "battered" woman or indeed to "women"; rather the syndrome refers to a constellation of medical and psychological symptoms of a person of any gender who, at the hands of a "member of the complainant's family or household" has suffered physical, sexual, or emotional abuse or has been coerced to do something contrary to their right not to do so.

(b) The term "member of the complainant's family or household" is defined in the Criminal Procedure Law and Family Court Act to include:

(i) persons related by consanguinity or affinity;

(ii) persons legally married to one another;

(iii) persons formerly married to one another regardless of whether they still reside in the same household;

(iv) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and

(v) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

(2) The admissibility of expert testimony about an identifiable syndrome reaction depends on meeting the criteria of Guide to New York Evidence rule 7.01 and

on the reason given that the evidence would be relevant and helpful to a jury to understand an issue in the proceeding.

(3) The expert may not testify that the complainant should be believed or that the conduct at issue in the case constituted abuse; the expert may describe the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of an abused person that might be beyond the ken of the average juror.

(4) The syndrome is not per se a defense to a criminal charge. Evidence of the syndrome may, however, be admissible in support of a defense. In a prosecution for assault or homicide, for example, evidence of the syndrome may be admissible when relevant and probative of an issue presented by the defense of justification.

(5) The reasons evidence of the syndrome may be admissible include, but are not necessarily limited to:

> **(a) when relevant, to place before the finder of fact a reason for a complainant's: (i) delayed reaction to abuse; or (ii) inability to leave the marital home; or (iii) recantation of allegations of abuse; or (iv) failure to testify at defendant's domestic violence trial;**
>
> **(b) when, in a child sexual abuse and neglect proceeding, the mother asserts she was the victim of the "domestic violence syndrome," in order to place before the finder of fact a reason why she could not be said to have "allowed" the sexual abuse of her child by the person who abused her.**

Note

Introduction

Expert testimony relating to what the decisional law has historically referred to as the "battered women's syndrome" has been held admissible as set forth in this Guide to New York Evidence rule. The "battered women's syndrome" terminology, however, has been found wanting because the syndrome is gender neutral, not limited to abused women, and the syndrome may involve sexual and emotional abuse that is not reflected in the term "battering." Decisional law has moved towards referring to expert evidence of the syndrome under the umbrella of "domestic violence" evidence, which is gender neutral and encompasses abuse that is other than just physical. (*People v Shoshi*, 177 AD3d 779, 781 [2d Dept 2019] [the trial court properly permitted "an expert in the field of domestic violence to testify on the subject of domestic violence generally. The expert's testimony was relevant to explain the behavior patterns of victims of domestic violence that might appear unusual or that jurors might not be expected to understand"]; *People v Levasseur*, 133 AD3d 411, 412 [1st Dept 2015] ["The court also correctly admitted expert testimony describing typical features of the cycle of domestic violence"]; *People v Walters*, 127 AD3d 889, 889 [2d Dept 2015] ["the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror"].)

This Guide to New York Evidence rule relates to the testimony of an expert with respect to an "abused person syndrome" whether under the historical terminology of "battered women's syndrome" or under the present-day "domestic violence" terminology. There are other types of evidence that may be admitted in a "domestic violence" case that are not the subject of this rule. (*See* Guide to NY Evid rule 4.28, Evidence of Crimes and Wrongs (*Molineux*); *People v Frankline*, 27 NY3d 1113, 1115, 1117 [2016] ["Previous acts of intimate partner violence may be nonpropensity evidence 'probative of (a defendant's) motive and intent to assault (the) victim' and which 'provide(s) necessary background information on the nature of the (defendant and victim's) relationship' (*People v Dorm*, 12 NY3d 16, 19 [2009])"].)

The Court of Appeals has not expressly addressed the admissibility of expert testimony on a syndrome related to domestic violence although the nature of the syndrome and reasons for admissibility are analogous to the "rape trauma syndrome" and the "child abuse syndrome" that the Court of Appeals has recognized. Other courts have accordingly held admissible expert testimony of the syndrome under the circumstances set forth in this rule.

The Rule

Subdivision (1) (a) is derived in part from a portion of the definition of "battered-woman syndrome" set forth in Black's Law Dictionary (11th ed 2019) ("A constellation of medical and psychological symptoms of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or partner"); and in part from Psychological and Scientific Evidence in Criminal Trials § 7:3 (defining a "battered woman" in part as " 'a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights' " [citation omitted]). (*See People v Ellis*, 170 Misc 2d 945, 950 [Sup Ct, NY County 1996] ["The battered woman syndrome is described as 'a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged length of time' "]; s*ee generally* R. Keith Perkins, Domestic Torts: Civil Lawsuits Arising From Criminal Conduct Within Family Relationships §§ 2:18 ["Battered woman syndrome"], 2:21 ["Battered husbands"]; 1 NY Law of Domestic Violence § 2:98 [3d ed].)

Subdivision (1) (b) attempts to provide guidance on the type of relationship that may involve an "abused person," as may be testified to by an expert in a particular case. The stated definition recites verbatim the definition of "members of the same family or household" as it appears in both CPL 530.11 (1) (a) to (e) and Family Court Act § 812 (1) (a) to (e). With respect to subdivision (1) (b) (v) of this rule, CPL 530.11 (1) (e) and Family Court Act § 812 (1) (e) add:

> "Factors the court may consider in determining whether a relationship is an 'intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an 'intimate relationship'."

There is, however, no uniform definition in decisional or statutory law. Other statutory definitions may be found in: Real Property Law § 227-d (1) (for the purposes of the law addressing discrimination based on "domestic violence victim status," defining the term "domestic violence victim"); Social Services Law § 459-a (1) (for purposes of the "Domestic Violence Prevention Act," defining "victim of domestic violence"); and Executive Law § 292 (34) (for purposes of the "Human Rights Law," defining the term "victim of domestic violence" to have the same meaning as defined in the Social Services Law). (*See also* CPL 440.47 [2] [c]

[allowing an application for resentencing where the defendant was a "victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household" as defined in CPL 530.11 (1)].)

Subdivision (2) recognizes that the syndrome has been held to meet the criteria for expert opinion testimony (*see* Guide to NY Evid rule 7.01 [1]) and is thus admissible when the proffered reason for the expert testimony is relevant and helpful to the finder of fact to understand a litigated issue. (*People v Byrd*, 51 AD3d 267, 274 [1st Dept 2008] [holding that it was not necessary for the trial court to hold a *Frye* hearing before admitting the expert testimony because: "Battered person syndrome is not novel or experimental. The courts of this state have accepted it since 1985"]; *People v Johnson*, 22 AD3d 600, 601 [2d Dept 2005] [expert testimony about "battered women's syndrome" was properly admitted "to aid the jury in understanding the unusual behavior of one of the female victims after the attack"]; *Matter of Pratt v Wood*, 210 AD2d 741, 743 [3d Dept 1994] ["it has come to be recognized that expert testimony in the field of domestic violence is admissible since the psychological and behavioral characteristics typically shared by victims of abuse in a familial setting are not generally known by the average person"].)

Subdivision (3) states a rule commonly governing the admissibility of syndrome evidence and is derived principally from the following decisions: *People v Walters* (127 AD3d at 889 [in approving the receipt of evidence of the syndrome, the Appellate Division noted: "The court did not allow the expert to offer an opinion as to whether the conduct at issue constituted domestic violence or whether the complainant exhibited symptoms of battered women's syndrome. Instead, the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror"]); *People v Anglin* (178 AD3d 839, 840 [2d Dept 2019] [the expert "did not testify as to the particular facts of the case or offer an opinion as to whether the conduct at issue constituted domestic violence"]); *People v Whitson* (166 AD3d 663, 664 [2d Dept 2018] [noting with approval that the trial court "did not allow the expert to testify regarding the particular facts of the case or offer an opinion as to whether the conduct at issue constituted domestic violence. Instead, the expert described the general behavior patterns of domestic violence perpetrators and victims in order to explain behaviors of a battered woman that might be beyond the ken of the average juror"]); and *People v Thompson* (119 AD3d 966, 966-967 [2d Dept 2014] ["The court did not allow the expert to offer an opinion as to whether the conduct at issue constituted domestic violence, or to testify regarding any prior bad acts by the defendant"]).

Subdivision (4) sets forth decisional law holdings that "battered women's syndrome is not itself a defense" to a criminal charge. (*People v Wilcox*, 14 AD3d 941, 943 [3d Dept 2005]; *see People v Bryant*, 278 AD2d 7, 7 [1st Dept 2000] ["battered women's syndrome" evidence was properly excluded where "there was overwhelming evidence that defendant personally inflicted vicious abuse and severe injuries upon the deceased, her four-year-old child, entirely of her own volition and ill-will toward the child, and that the purported abuser, defendant's husband, was not even present during some of this abuse"]; *People v Neathway*, 43 Misc 3d 1235[A], 2014 NY Slip Op 50936[U], *7 [Sup Ct, NY County 2014] ["battered women's syndrome" evidence was properly excluded where the defendant was charged with "grand larceny," "falsifying business records" and "offering a false instrument for filing," noting that: "All three crimes, like the vast majority of other crimes in the Penal Law, require that the State prove the Defendant acted with a particular mental state. Mental culpability under the Penal Law, however, is obviously distinguishable from the motivation an offender may have to commit a crime"].)

As subdivision (4) further states, however, evidence of the syndrome may be admissible in support of a defense, such as a defense of justification. In a defense of justification, for example: "To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by [the person injured or killed], and a 'reasonable person' in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that too." (CJI2d[NY] Defenses—Justification: Use of Deadly Physical Force in Defense of a Person [last rev Jan. 2018].) Thus, coupled with the defendant's testimony, expert testimony of what constitutes an "abused person syndrome" may be relevant and probative.

Some trial courts in a justification defense case have even permitted an expert to testify that the defendant was in fact a battered person, but those decisions were not reviewed by an appellate court. (*People v Seeley*, 186 Misc 2d 715, 723 [Sup Ct, Kings County 2000]; *People v Torres*, 128 Misc 2d 129, 135 [Sup Ct, Bronx County 1985]; *People v Colberg*, 182 Misc 2d 798, 802 [Sullivan County Ct 1999]; *compare People v De Sarno*, 121 AD2d 651, 654-655 [2d Dept 1986] [in a case involving a defense of justification and proffered expert testimony on a defendant's personality disorder as it bore on his state of mind, the trial court properly allowed an expert to testify about the "impact such a personality disorder has upon a person's perception, state of mind and behavior" and properly precluded the expert from opining that the defendant believed the decedent was going to kill the defendant because "the explanation of the defendant's alleged 'personality disorder with explosive and paranoid features' would have furnished a sufficient basis to aid the jury in forming an accurate conclusion as to the defendant's

subjective belief and the reasonableness of the belief"]; *People v Hamel*, 96 AD2d 644, 645 [3d Dept 1983] [in a case involving a defense of justification and proffered expert psychiatric testimony regarding "past psychological trauma involving instances when (the defendant) had been sexually assaulted and threatened," the trial court did not err in precluding the expert testimony, given that the "defendant testified fully about her thoughts and actions on the evening of the shooting and her unfortunate personal history. In light of this testimony, the jury could properly fulfill its function of making the required judgment based upon objective standards. Injection of psychiatric testimony into the normal case where justification is claimed would effectively usurp the jury's role in determining what is reasonable"].)

Subdivision (5) sets forth some examples of where evidence of the syndrome has thus far been accepted; it is not designed to place limitations on the application of the syndrome in other appropriate circumstances.

Subdivision (5) (a) is derived from the following: *People v Roblee* (83 AD3d 1126, 1128 [3d Dept 2011] [the expert testimony was properly allowed "to explain the victim's delay in seeking aid or attention immediately following the attack, to the extent that it was otherwise unexplained"]); *Matter of Pratt v Wood* (210 AD2d 741, 743 [3d Dept 1994] [in a child custody case, evidence of the syndrome should have been admitted to explain the failure of the child's mother "to tell anyone about the abuse or to seek help (since that) is a characteristic typically shared by victims of domestic violence"]); *Matter of V.C. v H.C.* (257 AD2d 27, 35 [1st Dept 1999] [Family Court should have admitted evidence of the syndrome which, "according to petitioner's offer of proof, would have helped explain her delayed reaction to the abuse inflicted upon her, her inability to leave the marital home on her own, and the impact of her deafness on her ability to function under hostile circumstances"]); *Matter of Erin R. v Ronald R.* (36 Misc 3d 1213[A], 2012 NY Slip Op 51263[U], *3 [Fam Ct, Kings County 2012] ["Testimony from an 'expert on battered women's syndrome who can explain a victim's delayed reaction to the abuse inflicted, her inability to leave the marital home on her own, and her ability to function under hostile circumstances' will be relevant and material evidence admissible at fact-finding as well as disposition"]); *People v Byrd* (51 AD3d at 269 [a complainant's grand jury testimony was admissible after the trial court determined at a hearing that "the complainant was unavailable to testify at trial because of battered person syndrome"]); and *People v Ellis* (170 Misc 2d at 955 ["It is now accepted that 'it is not common knowledge that one reason for a recantation may be the existence of battered woman's syndrome' "]).

Subdivision (5) (b) is derived from *Matter of Glenn G.* (154 Misc 2d 677 [Fam Ct, Kings County 1992], *affd sub nom. Matter of Josephine G.*, 218 AD2d 656 [2d Dept 1995]).

7.08 Child Sexual Abuse Syndrome

(1) Child Sexual Abuse Syndrome (CSAS), like Rape Trauma Syndrome, is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after sexual abuse or attempt thereof.

(2) The admissibility of expert testimony about an identifiable CSAS reaction depends on meeting the criteria of Guide to New York Evidence rule 7.01 and on the reason given that the evidence would be relevant and helpful to a jury to understand an issue in the proceeding.

(a) In general, in the exercise of a trial court's discretion, expert testimony may be admissible to explain the behavior of a complainant that might appear unusual or that jurors may not be expected to understand.

(b) In particular, in the exercise of a trial court's discretion, expert testimony may, for example, be admissible to dispel juror misconceptions regarding the ordinary responses of a victim; to explain a child's delay in reporting sexual abuse or a child's recantation; to explain why a child's behavior was not inconsistent with having been molested; why some children want to live with the person who abused them; why a child might appear "emotionally flat" following sexual assault; and why a child might run away from home.

(3) An expert may not testify that the child should be believed, or that the conduct at issue in the case constituted abuse; the expert may describe the relevant

general behavior patterns of an abused child that might be beyond the ken of the average juror.

Note

Subdivision (1), as well as the remainder of this rule, is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]) that allowed for expert testimony on the analogous Rape Trauma Syndrome, as well as the Court of Appeals cases that specifically address the Child Sexual Abuse Syndrome (CSAS), also known as the Child Sexual Abuse Accommodation Syndrome (CSAAS). (*People v Carroll*, 95 NY2d 375, 387 [2000]; *People v Spicola*, 16 NY3d 441, 460-466 [2011]; *People v Williams*, 20 NY3d 579, 584 [2013]; *People v Nicholson*, 26 NY3d 813, 827-829 [2016].)

Although the admission of CSAS evidence has recently been challenged, it continues to be admissible under New York law. (*People v Austen*, 197 AD3d 861, 862 [4th Dept 2021] ["We reject defendant's contention that CSAAS is no longer generally accepted in the relevant scientific community. Although a small number of other state courts do not allow expert testimony on CSAAS (*see e.g. State of New Jersey v J.L.G.*, 234 NJ 265, 289, 303, 190 A3d 442, 456, 464 [2018]), the record here provides no basis for us to reach a similar conclusion (*see Spicola*, 16 NY3d at 466)"].)

Subdivision (2). Expert testimony concerning CSAS is admissible in "the sound discretion of the trial court" (*Nicholson* at 828) and parallels the reasons for admissibility of expert testimony concerning Rape Trauma Syndrome. (Guide to NY Evid rule 7.05.) As *Carroll* declared: "We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand (*see, People v Taylor,* 75 NY2d 277)." (*Carroll* at 387; *see Spicola* at 465 ["we have 'long held' evidence of psychological syndromes affecting certain crime victims to be admissible for the purpose of explaining behavior that might be puzzling to a jury (*see Carroll*, 95 NY2d at 387)"].)

In *People v Keindl* (68 NY2d 410, 422 [1986]), as *Carroll* explained, "expert testimony was permitted to 'rebut defendant's attempt to impair the credibility of [sexually abused children] by evidence that they had not promptly complained' of the sexual abuse (*People v Taylor, supra,* 75 NY2d, at 288)." (*Carroll* at 387.) Similarly, in *Carroll*, the expert referred to CSAS "only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse." (*Id.*)

Spicola confirmed the admissibility of CSAS evidence and provided further illustrations of when it may be admissible, noting that "the majority of states 'permit expert testimony to explain delayed reporting, recantation, and inconsistency,' as well as 'to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear "emotionally flat" following sexual assault, why a child might run away from home, and for other purposes' (*see* 1 Myers on Evidence § 6.24, at 416-422 [collecting cases . . .])." (*Spicola* at 465; *Nicholson* at 828 ["The expert educates the jury on a scientifically-recognized 'pattern of secrecy, helplessness, entrapment (and) accommodation' experienced by the child victim. This includes assisting the jury to understand 'why a child may wait a long time before reporting the alleged abuse,' fail to report at all, and deny or recant claims of sexual assault" (citations omitted)].)

In explaining the "accommodation syndrome," the expert may give "testimony concerning abusers' behavior" that is relevant to explain the syndrome. (*Williams* at 584 ["That testimony assisted in explaining victims' subsequent behavior that the factfinder might not understand, such as why victims may accommodate abusers and why they wait before disclosing the abuse"].)

Subdivision (3) is at the core of the admissibility of syndrome evidence when it states that: "An expert may not testify that the child should be believed, or that the conduct at issue in the case constituted abuse; the expert may describe the relevant general behavior patterns of an abused child that might be beyond the ken of the average juror." (*See Carroll* at 387 [the expert testimony "did not attempt to impermissibly prove that the charged crimes occurred"]; *Spicola* at 465 [the expert "confirmed that the presence or absence of any particular behavior was not substantive evidence that sexual abuse had, or had not, occurred. He made it clear that he knew nothing about the facts of the case before taking the witness stand; that he was not venturing an opinion as to whether sexual abuse took place in this case; that it was up to the jury to decide whether the boy was being truthful"]; *People v Williams*, 20 NY3d 579, 584 [2013] ["the expert's testimony exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case. Such testimony went beyond explaining victim behavior that might be beyond the ken of a jury, and had the prejudicial effect of implying that the expert found the testimony of this particular complainant to be credible—even though the witness began his testimony claiming no knowledge of the case before the court"]; *People v Duell*, 124 AD3d 1225, 1229 [4th Dept 2015] [the "expert never opined that defendant committed the crimes; that the victim was, in fact, sexually abused; or that the victim's behavior was consistent with such abuse"].)

While it is not permissible to permit the expert testimony solely to bolster the complainant's credibility, particularly by testimony that the expert credits the complainant (*Williams* at 584), CSAS is admissible to counter an inference from the complainant's behavior that the complainant "is not credible." (*Nicholson* at 828.) For example, in *Nicholson*, the complainant did not disclose the sexual assaults until 10 years after the first assault. The CSAS expert testimony was therefore "appropriate to assist the jury in assessing [the complainant's] credibility by 'explaining victims' subsequent behavior that the factfinder might not understand, such as why victims may accommodate abusers and why they wait before disclosing the abuse.' " (*Nicholson* at 828; s*ee Spicola* at 465 [the expert had not met the complainant and the CSAS testimony was not to be construed as an opinion on the complainant's credibility as to whether the abuse took place]; *Williams* at 584.)

7.10 Rape Trauma Syndrome[1]

(1) Rape trauma syndrome is a therapeutic concept encompassing identifiable behavioral, somatic, and psychological reactions a person may experience after a rape or attempted rape.

(2) The admissibility of expert testimony about an identifiable rape trauma syndrome reaction depends on meeting the criteria of Guide to New York Evidence rule 7.01 and on the reason the evidence is offered. It is admissible to dispel juror misconceptions regarding the ordinary responses of a victim of rape or attempted rape. Thus, for example:

(a) rape trauma syndrome evidence that a rape victim who knows her assailant is more fearful of disclosing the assailant's name to the police and is in fact less likely to report the rape at all is admissible to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her.

(b) rape trauma syndrome evidence that half of all women who have been forcibly raped are controlled and subdued following the attack is admissible to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack.

(c) rape trauma syndrome evidence is admissible to assist the jury in understanding why the victim told her boyfriend about the rape the day after it occurred but refrained from telling her mother and the police until two weeks later as consistent with patterns of response exhibited by rape victims.

(3) Evidence of rape trauma syndrome is not admissible when it bears solely on proving that a rape

occurred or when its purpose is solely to bolster the credibility of the complainant's testimony.

Note

This rule is derived from the seminal Court of Appeals decision in *People v Taylor* (75 NY2d 277 [1990]).

Subdivision (1) provides a description of the syndrome drawn from *Taylor. Taylor* noted that the syndrome was a "therapeutic" concept, described as " 'the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation' (Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am J Psychiatry 981, 982 [1974])" (*Taylor* at 285).

Subdivision (2) (a) and subdivision (2) (b) are drawn from the following part of the *Taylor* opinion:

> "[E]vidence of rape trauma syndrome can assist jurors in reaching a verdict by dispelling common misperceptions about rape . . . . [T]he reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice. . . .
>
> "[I]n *Taylor* [the complaining witness] had initially told the police that she could not identify her assailant. Approximately two hours after she first told her mother that she had been raped and sodomized, she told her mother that she knew the defendant had done it. The complainant had known the defendant for years and had seen him the night before the assault. . . . [E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury and testimony explaining this behavior assists the jury in determining what effect to give to the complainant's initial failure to identify the defendant. This evidence provides a possible explanation for the complainant's behavior that is consistent with her claim that she was raped. As such, it is relevant.
>
> "Rape trauma syndrome evidence was also introduced in *Taylor* in response to evidence that revealed the complainant had not seemed upset following the attack. We note again in this context that the reaction of a rape victim in the hours following her attack is not something within the common understanding of the average lay juror. Indeed, the defense would clearly want the jury to infer that because the victim was not upset following the attack, she must not

> have been raped. This inference runs contrary to the studies . . . which suggest that half of all women who have been forcibly raped are controlled and subdued following the attack. Thus, we conclude that evidence of this type is relevant to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack" (*Taylor* at 292-293 [citations omitted]).

Subdivision (2) (c) recites the holding in *People v Maymi* (198 AD2d 153 [1st Dept 1993]).

Subdivision (3) is a dictate of *Taylor*'s companion case, *People v Banks* (75 NY2d at 293 ["evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred"]; *People v Bennett*, 79 NY2d 464, 473 [1992] ["expert opinion is inadmissible when introduced merely to prove that a sexual assault took place or bolster a witness' credibility" (citation omitted)]; *Maymi*, 198 AD2d at 153 [in finding that the rape trauma syndrome evidence specified in subdivision (3) was admissible for an appropriate purpose, the Court rejected the idea that the evidence was admitted "for purposes of bolstering the victim's testimony"]; *see People v Spicola*, 16 NY3d 441, 466 [2011] [in explaining that the expert on Child Sexual Abuse Accommodation Syndrome did not impermissibly bolster the child's credibility, the Court stated that "the expert's testimony certainly supported the boy's credibility by supplying explanations other than fabrication for his post-molestation behavior. It was offered, after all, for purposes of just such rehabilitation. But . . . the expert did not express an opinion on the boy's credibility"]; *People v Kukon*, 275 AD2d 478, 478-479 [3d Dept 2000] [in rejecting a claim that the expert on "child sexual abuse syndrome" "impermissibly bolstered" the credibility of the complainant, the Court stated that the "expert, who testified that she had not met or examined the victim in this case, did not impermissibly suggest that the victim had been sexually abused or that she exhibited signs similar to individuals who have been abused"]).

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[1] In December 2021, this rule was revised to add to subdivision (2) the phrase "on meeting the criteria of Guide to New York Evidence rule 7.01." The rule was also renumbered from 7.05 to 7.10.

7.13 Expert Testimony in a Drug Case[1]

(1) A witness who is qualified pursuant to Guide to New York Evidence rule 7.01 as an expert in illegal drug trafficking may, in the discretion of a trial court, testify in the circumstances set forth in this section; in situations where the illegal substance is not available for analysis, however, drug users who can demonstrate a knowledge of the illegal drug are competent to testify to its identity.

(2) In a prosecution involving the possession or sale of a controlled substance where specialized terminology is used during the criminal transaction, a qualified expert may testify to the meaning of the terminology.

(3) In a prosecution involving the possession or sale of a controlled substance where the People are required to prove the type or the weight of the controlled substance, a qualified expert may testify to its type or weight, including weight based upon an acceptable statistical sampling method.

(4) In a prosecution for possession of a controlled substance with intent to sell, where the defense is that the drugs that were recovered from the defendant were for personal use, a qualified expert may testify that the packaging of the drugs recovered from defendant was inconsistent with personal use and consistent with the packaging that the expert had encountered in previous drug sale arrests.

(5) In a prosecution for the sale of a controlled substance to an undercover officer in a street-level drug transaction involving multiple individuals, a qualified expert may testify about the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police when the "buy" money and drugs were not recovered, provided: (a) the

expert does not render an opinion that defendant sold drugs to the undercover officer or even that defendant's specific actions or behavior were consistent with participation in a street drug sale, and (b) the trial court instructs the jury that they are free to reject the testimony and that the expert's testimony must in no manner be taken as proof that the defendant was engaged in the sale of narcotics.

Note

Subdivision (1) recognizes the need to qualify a witness before permitting the witness to testify as provided in the ensuing subdivisions (Guide to NY Evid rule 7.01, Opinion of Expert Witness; *see People v Christopher*, 161 AD2d 896, 897 [3d Dept 1990] ["In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the (illegal substance) are competent to testify (to its identity). It is for the jury to determine the weight to be given the testimony"]). In *Christopher*, the witness "testified that he had both injected and snorted heroin in the past, that he had taken other substances by injection and that the feeling produced by the substance in question was similar to that of heroin and was different from that of other substances. Thus, he was competent to render an opinion regarding the identity of the substance" (*id*. at 898; *accord People v Fulton*, 28 AD3d 1180, 1181 [4th Dept 2006]).

Subdivision (2) reflects a holding of *People v Brown* (97 NY2d 500, 505 [2002] ["Although the average juror may be familiar with the reality that drugs are sold on neighborhood streets, it cannot be said that the average juror is aware of the specialized terminology used in the course of narcotics street sales"]; *accord People v Smith*, 2 NY3d 8, 12 [2004]; *see People v Garcia*, 83 NY2d 817, 819 [1994] ["there is no merit to the preserved claim that the detective's expert testimony implied defendant's involvement in extensive drug trafficking, especially since the trial court limited the testimony to the definitions of the terms 'hawker', 'hand-to-hand' and 'money man' "]).

People v Anderson (149 AD3d 1407, 1413 [3d Dept 2017]) acknowledged that it is "well established that the meaning of the specialized jargon used in drug transactions is not within the knowledge of a typical juror and is therefore an appropriate subject for expert testimony." *Anderson* further noted that the trial court had provided appropriate limiting instructions to the jury, including that "the

ultimate determination as to the meaning of the language was to be made by the jury" (*id.*).

Subdivision (3) addresses the admissibility of an expert's testimony as to the nature and/or the weight of a controlled substance.

An expert's opinion that a substance contains a "controlled substance" is admissible when based upon a chemical analysis and not on a comparison of the substance to a "known" standard "when the accuracy of the known standard is not established" (*People v Burnett*, 245 AD2d 460, 460 [2d Dept 1997]). If the expert's opinion is "based on the results of certain tests in which the substance was compared with a 'known' standard, the People must establish the accuracy of the standard as a reliable norm" for the expert's opinion to be admissible (*People v Ramis*, 213 AD3d 951, 952 [2d Dept 2023]). If the expert's opinion "is not based solely upon comparative tests using known standards but also on a series of other tests not involving known standards, a comparison test may then be relied upon by the expert" (*Burnett* at 460).

An expert's opinion as to weight, and in particular the use of an acceptable "statistical sampling method" to determine weight, is derived from *People v Hill* (85 NY2d 256, 261 [1995]). In *Hill,* an expert used a "statistical sampling method" to "estimate and conclude" the weight of the controlled substance (*id.* at 259). The Court held that the expert's testimony was admissible and " 'it was for the jury to decide whether the expert had adequately analyzed and weighed the contents and whether his opinion was entitled to be credited' " (*id.* at 261 [citation omitted]; *see People v Nelson*, 156 AD3d 1112, 1116 [3d Dept 2017] ["The forensic scientist who testified used an acceptable statistical sampling method to establish the aggregate weight of the heroin"]; *People v Caba*, 23 AD3d 291, 292-293 [1st Dept 2005] ["The court properly received the testimony of the People's chemist concerning the total weight of the drugs. The chemist was fully qualified, and she adequately explained the statistical sampling method of evaluating the weight of the heroin and the tests she conducted"]).

Subdivision (4) is derived from *People v Hicks* (2 NY3d 750 [2004]). In that case, the Court concluded that the "trial court did not abuse its discretion in allowing the arresting officer [who qualified as a narcotics expert] to testify that the packaging of the drugs recovered from defendant was inconsistent with personal use and consistent with the packaging that the officer had encountered in previous drug sale arrests. . . . [T]he defense was that defendant possessed the 14 glassine envelopes of heroin for his personal use. Based on day-to-day experience, common

observation and knowledge, the average juror may not be aware of the quantity and packaging of heroin carried by someone who sells drugs, as opposed to someone who merely uses them. Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case." (*Hicks* at 751 [citations omitted].)

Subdivision (5) is derived from *People v Brown* (97 NY2d 500 [2002]) and *People v Smith* (2 NY3d 8 [2004]). In *Brown*, an undercover officer testified that he had purchased drugs from the defendant and that during the transaction he, as well as the defendant, interacted with several individuals. The defense "suggested that because no drugs or marked money were found on defendant, her arrest was a 'mistake.' " (*Brown* at 503.) The trial court permitted a narcotics expert, who did not participate in the transaction, to testify to "the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police." (*Brown* at 504-505.) On appellate review, *Brown* held that the trial court acted within the scope of its discretion in permitting the expert testimony. (*See People v Jamison*, 8 AD3d 189, 190 [1st Dept 2004] ["The court properly exercised its discretion in allowing a detective to testify as an expert to the roles typically played by various participants in a drug transaction. This was specialized information not ordinarily within the knowledge of the average juror, and it was helpful to the jury in understanding how defendant and the other alleged participants in the transaction acted together"].)

Smith emphasized that, while the expert may be relevant and helpful in a street sale involving multiple individuals, it is error to allow an expert to testify "as to the money handling aspects of street-level, multi-member narcotics operations" in a one-on-one sale allegedly between an undercover officer and the defendant. (*Smith* at 9.)

The expert who testified in *Brown* did not participate in the transaction and was "properly precluded" from "opining that defendant sold drugs to the undercover officer or even that defendant's specific actions or behavior were consistent with participation in a street drug sale." (*Brown* at 506.) In *People v Richardson* (17 AD3d 196, 197 [1st Dept 2005]), however, the Court held that there was "sufficient factual basis to conclude that defendant was not operating alone" in the alleged drug sale and the trial court "properly exercised its discretion when it permitted the undercover officer to give limited testimony regarding street-level drug operations, since this evidence was relevant to an issue raised by defendant concerning the failure of the police to recover the buy money."

Brown especially directed that "[b]ased on our concern that expert testimony be admitted only for a permissible purpose, we hold that this type of testimony must be paired with appropriate limiting instructions. If and when the trial court allows such testimony, it should inform the jury that it is free to reject it and that the testimony being admitted should in no manner be taken as proof that the defendant was engaged in the sale of narcotics. These crucial instructions should be reemphasized in the concluding charge to the jury" (*Brown* at 506).

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[1] In December, 2023, subdivision two was amended to add the reference to the "type" of controlled substance.

7.15 Expert Testimony on Confessions

(1) Expert testimony regarding the reliability of a confession may be admitted, limited, or denied in the discretion of the trial court.

(2) In the exercise of its discretion, the trial court should consider (a) whether the proposed expert testimony is based on principles that are generally accepted within the relevant scientific community; (b) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict; (c) whether the proffered testimony is relevant to the defendant and interrogation before the court; and (d) the extent to which the People's case relies on the confession.

(3) Expert testimony regarding the reliability of a confession generally falls within the following parameters: (a) testimony that purports to identify those "dispositional factors" of an individual that make it more likely that he or she may be coerced into giving a false confession (e.g. individuals who are highly compliant or intellectually impaired, suffer from a diagnosable psychiatric disorder, or are for some other reason psychologically or mentally fragile) or (b) testimony that purports to identify conditions or characteristics of an interrogation ("situational factors") that might induce someone to confess falsely to a crime.

(4) An expert who testifies may not render an opinion as to the truth or falsity of the confession.

(5) To the extent the proffered testimony involves novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant

scientific community, the trial court should conduct a *Frye* hearing to determine the issue. (Guide to NY Evid rule 7.01 [2].)

Note

This rule is derived from Court of Appeals decisions. (*People v Bedessie*, 19 NY3d 147 [2012]; *People v Powell*, 37 NY3d 476 [2021].)

In the words of *Bedessie*:

> "False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system. And there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions." (*Bedessie* at 161; *see also Powell* at 491 ["There is a difference between the classically, inherently coercive interrogation that produces an involuntary confession—an issue that the jury is well-equipped to understand . . . and the phenomenon of false confessions involving the interplay of situational and dispositional factors that produce a coercive compliant false confession from an innocent suspect, an occurrence that the jury may find counterintuitive"].)

The rules applicable to the admissibility of an expert on the reliability of a confession parallel the rules applicable to an expert on the reliability of identification evidence. (*See Bedessie* at 156 [analogizing to the law on the reliability of expert identification testimony set forth in *People v Lee* (96 NY2d 157 [2001])]; Guide to NY Evid rule 7.17.)

Subdivision (1) states the rule of *Bedessie* and *Powell* that " 'admissibility and limits of expert testimony' " on the reliability of a confession " 'lie primarily in the sound discretion of the trial court.' " (*Bedessie* at 156, quoting *Lee* at 162; *Powell* at 489 [the "admissibility and scope of expert testimony are subject to the discretion of the trial court"]; *cf. People v Santiago*, 17 NY3d 661, 668 [2011] [a "trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification"].)

A trial court's exercise of discretion in denying or limiting an expert's testimony on the reliability of a confession is subject to appellate review for an abuse of discretion. (*Powell* at 489 ["The admissibility and scope of expert testimony are subject to the discretion of the trial court . . . (thereby) limiting our scope of review to whether the determination to exclude the proffered expert testimony was an abuse of that discretion as a matter of law"]; *Bedessie* at 161 [the

trial court did not "abuse his discretion" when "he excluded the proposed testimony" by an expert on the reliability of confessions]; *cf. People v McCullough*, 27 NY3d 1158, 1161 [2016] [summing up the criterion for appellate review of the exercise of discretion in denying or limiting expert identification evidence by stating: "Courts reviewing (the exercise of discretion) simply examine whether the trial court abused its discretion in applying the standard balancing test of prejudice versus probative value (*People v Powell*, 27 NY3d 523, 531 [2016])" (internal quotation marks omitted)]; *see* Guide to NY Evid rule 4.07.)

Subdivision (2) recites factors a trial court should consider in determining whether to admit expert testimony on the reliability of a confession which are reflected primarily in the opinions of *Bedessie* and *Powell.*

Bedessie summed up the "broad principles" for determining admissibility; namely, a trial court's discretion should be guided by "whether the proffered expert testimony would aid a lay jury in reaching a verdict; courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province; [d]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of the evidence at issue, it cannot be said that psychological studies bearing on reliability are within the ken of the typical juror; and since the expert testimony may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community." (*Bedessie* at 156-157 [internal quotation marks and citation omitted].) In addition, "the expert's proffer must be relevant to the defendant and interrogation before the court." (*Id.* at 161.)

Powell added that "the scientific principles involve more complexity than the general conclusion that false confessions do occur, and the expert is supposed to articulate those principles so a jury can apply the information to the actual evidence in the case—not merely speculate in the absence of that evidence. We therefore hold that there is no abuse of discretion when the trial court disallows expert psychological testimony as to false confessions when it is not relevant to the circumstances of the custodial interrogation in the case at hand." (*Powell* at 495.)

Neither *Bedessie* nor *Powell* quoted the criterion included for consideration in determining whether to allow expert identification testimony, namely, whether "there is little or no corroborating evidence connecting the defendant to the crime." (*People v LeGrand*, 8 NY3d 449, 452 [2007].)

Bedessie, however, discussed the nature of the non-confession evidence, which appeared to rest solely on the identification by the complainant, noting that "certainly this is not a case where there was corroboration by verifiable evidence supplied in a defendant's confession itself and previously unknown to the police"

and, regardless of the evidence of corroboration, the expert's "proffer had nothing to say that was relevant to the circumstances of this case." (*Bedessie* at 157.) Thus, the trial judge did not abuse his discretion when he excluded the proposed testimony, "even assuming that the confession was not corroborated." (*Id.* at 161.)

Powell observed that the defendant was identified via a lineup as the perpetrator of a robbery, and that video surveillance evidence supported the identification but did not conclusively show the perpetrator's face. As in *Bedessie*, *Powell*'s holding that the court did not abuse its discretion in denying the motion for an expert on the reliability of confessions rested on a determination that the proffered expert testimony was "not relevant to the circumstances of the custodial interrogation in the case at hand." (*Powell* at 495.)

The Appellate Division cases following *Bedessie* have weighed the "extent to which the People's case relied on the confession" in determining whether the trial court abused its discretion in denying a motion for expert testimony on the reliability of confessions. (*People v Evans*, 141 AD3d 120, 126 [1st Dept 2016] [*Bedessie* "asks us to examine whether the proffered expert testimony is warranted based on the nature of the interrogation, the applicability of the science of false confessions to the defendant and the extent to which the People's case relied on the confession. All three factors must be considered and weighed to determine the admissibility of the expert testimony on false confessions"]; *People v Jeremiah*, 147 AD3d 1199, 1205 [3d Dept 2017]; *see People v Roman*, 125 AD3d 515, 516 [1st Dept 2015] ["this is not a case that turns on the accuracy of defendant's confession"].)

Evans, for example, accepted that "the relevant inquiry here is whether the confession was corroborated by overwhelming evidence, thereby undermining the usefulness of expert testimony on the issue of false confessions." On the facts of the case, however, the Court held that "the confession was a central component of the People's case, and thus does not undermine the usefulness of expert testimony on the issue of false confessions." (*Evans* at 126.)

Jeremiah, on the other hand, found that "the People's case was not premised exclusively or primarily upon defendant's statement" and ruled that "the required showing of relevancy was not made." (*Jeremiah* at 1204-1205.)

Subdivision (3) sets forth a summary of the scope of expert testimony that is drawn from *Bedessie*, which began by declaring: "That the phenomenon of false confessions is genuine has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom" (*Bedessie* at 156), and then identified the expert testimony normally proffered on the issue of a false confession as follows:

> "Research in the area of false confessions purports to show that certain types of defendants are more likely to be coerced into

> giving a false confession—e.g., individuals who are highly compliant or intellectually impaired or suffer from a diagnosable psychiatric disorder, or who are for some other reason psychologically or mentally fragile . . . .
>
> "Research also purports to identify certain conditions or characteristics of an interrogation which might induce someone to confess falsely to a crime." (*Bedessie* at 159-160; *see also Powell* at 485 [noting that, at a *Frye* hearing, the defense expert "set forth the three types of false confessions: voluntary (not coerced—could be offered to protect another or attain notoriety), coerced compliant (where the suspect's will is overborne) and internalized (through deceptive interrogation techniques, the suspect comes to believe he or she is guilty). (The expert) also set forth the paradigm of a series of dispositional and situational factors that have been recognized as contributing to the risk of false confessions"]; *Evans*, 141 AD3d at 124-125 [finding that the expert's testimony was relevant with respect to the dispositional factors which the expert concluded the defendant exhibited]; *People v Days*, 131 AD3d 972, 979, 981 [2d Dept 2015] ["it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, 'within the ken of the typical juror,' " and "the defendant made a thorough proffer that he was 'more likely to be coerced into giving a false confession' than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him . . . Further, there was little evidence to corroborate the defendant's confession in this case, and his conviction turned almost entirely on his videotaped confession"].)

Subdivision (4) recites the rule set forth in both *Bedessie* (at 161 [the expert may not testify as to whether a particular defendant's confession was or was not reliable]) and *Powell* (at 491 ["the proffered testimony would not have been admissible for the purpose of establishing that a false confession occurred"]).

Subdivision (5) recognizes the standard procedure for determining the admissibility of novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community. (*See Bedessie* at 156-157 ["since the expert testimony may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community" (internal quotation marks omitted)].)

Powell (at 495 n 15) explained that "even where there is general acceptance for a particular phenomenon . . . that does not mean that all evidence related to that field will be admissible. The court still has a gatekeeping function to perform in determining whether specific research areas relating to that field are generally accepted."

On scientific evidence generally, the Court of Appeals has noted that a trial court "need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. 'Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure.' " (*LeGrand*, 8 NY3d at 458; *but see People v Williams*, 35 NY3d 24, 43 [2020] ["our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations"].)

7.17 Expert Testimony on Identification

(1) Expert testimony regarding the reliability of identification evidence may be admitted, limited, or denied in the discretion of the trial court.

(2) In the exercise of its discretion, the trial court should consider the following factors: (a) whether the eyewitness identification is a central element of the proof; (b) whether there is little or no corroborating evidence connecting the defendant to the crime; (c) whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case; (d) whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community; and (e) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the witness is a qualified expert and the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict.

(3) (a) The principles upon which expert identification testimony has been recognized by the Court of Appeals as generally accepted within the relevant scientific community include:

confidence-accuracy correlation **(a lack of correlation between the confidence the eyewitness expresses in the identification and the accuracy of the eyewitness's identification);**

confidence malleability **(an eyewitness's confidence in an identification can be influenced by factors that are unrelated to identification accuracy); and**

postevent information **(eyewitness testimony about an event often reflects not only what the**

eyewitness actually saw but information the witness obtained later on).

(b) The principles upon which expert identification testimony has been recognized by other New York courts as generally accepted within the relevant scientific community include:

event stress **(a stressful event can impair the ability of a person to recognize an unfamiliar face accurately);**

exposure time **or** ***event duration*** **(the amount of time available for viewing a perpetrator affects the witness's ability to identify the perpetrator accurately); and**

unconscious transference **(a witness may identify an individual familiar to them from other situations or contexts);**

weapon focus **(a victim's focus on the weapon used in an assault can affect ability to observe and remember the attacker).**

(4) To the extent the proffered testimony involves novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community, the trial court should conduct a *Frye* hearing to determine the issue. (Guide to NY Evid rule 7.01 [2].)

Note

This rule is derived from a series of Court of Appeals decisions. (*People v Berry*, 27 NY3d 10 [2016]; *People v McCullough*, 27 NY3d 1158 [2016]; *People v Muhammad*, 17 NY3d 532 [2011]; *People v Santiago*, 17 NY3d 661 [2011]; *People v Abney* [and *Allen*], 13 NY3d 251 [2009]; *People v LeGrand*, 8 NY3d 449 [2007]; *People v Young*, 7 NY3d 40 [2006]; *People v Lee*, 96 NY2d 157 [2001]; *see also People v Mooney*, 76 NY2d 827, 833 [1990] [dissenting opinion].) *LeGrand* is the leading case on the exposition of the standards to be

observed and *Abney* summarizes and contrasts the Court's previous decisions, as does *Santiago.*

A guiding theme of the Court of Appeals decisions is that "[b]ecause mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, 'courts are encouraged . . . in appropriate cases' to grant defendants' motions to admit expert testimony on this subject." (*Santiago*, 17 NY3d at 669.)

Subdivision (1). The Court of Appeals decisions are uniform in holding that the admissibility of expert identification testimony is in the discretion of the trial judge. (*E.g. Santiago*, 17 NY3d at 668 [a "trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification"]; *LeGrand*, 8 NY3d at 456 ["it is clear that expert testimony regarding the factors that affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of a court's discretion]; *Lee*, 96 NY2d at 162 ["the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court"].)

A trial court's exercise of discretion in denying or limiting an expert's testimony on the reliability of an identification is subject to appellate review for an abuse of discretion. (*E.g. LeGrand*, 8 NY3d at 456 ["there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications"]; *People v Young*, 7 NY3d at 44.)

And *Berry* (27 NY3d at 19) noted that " 'where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for [the] trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror' (*People v LeGrand*, 8 NY3d 449, 452 [2007])." *McCullough* (27 NY3d at 1161) summed up the criterion for appellate review by stating: "Courts reviewing [the exercise of discretion] simply examine whether the trial court abused its discretion in applying the 'standard balancing test of prejudice versus probative value' (*People v Powell*, 27 NY3d 523, 531, [2016])." (*See* Guide to NY Evid rule 4.07.)

In *People v Drake* (7 NY3d 28 [2006]), the trial court "ruled that the expert [on the reliability of eyewitness identifications] would be permitted to testify as to certain psychological factors that may influence the accuracy of an eyewitness identification, but held that '[t]o prevent any possibility that the expert testimony will infringe upon the jury's fact-finding function, the witness will not

be permitted to give opinion testimony regarding the credibility or reliability of any witness. In addition, the expert may not opine as to whether any of the specific psychological factors outlined [in the trial court's opinion] actually influenced the identifications. In short, the testimony of the expert is limited to setting forth the relevant psychological factors and interpreting the research data that demonstrate an effect on memory and perception.' " (*Id.* at 31-32.) The Court of Appeals, however, held: "Since defendant raised no objection to these limitations, the propriety of the [trial] court's ruling in this regard is not before us." (*Id.* at 32.) The Court has not since expressly resolved the questions presented by those limitations. (*Compare People v Bedessie*, 19 NY3d 147 [2012] [an expert who testifies to factors that may result in a false confession may not testify as to whether a particular defendant's confession was or was not reliable]; *People v Carroll*, 95 NY2d 375, 387 [2000] [the expert's testimony, explaining "child sexual abuse accommodation syndrome," "did not attempt to impermissibly prove that the charged crimes occurred"]; *People v Banks*, 75 NY2d 277, 293 [1990] ["evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred"].)

Subdivision (2). The Court of Appeals decisions are uniform on the factors for a trial court to consider in determining the admissibility of expert identification testimony. There is, however, one caveat.

Until the decision in *McCullough* (27 NY3d 1158) the Court, beginning with *LeGrand*, had divided consideration of the factors into a "two-stage inquiry," the first stage deciding whether the eyewitness identification is a central element of the proof and whether little or no corroborating evidence connects the defendant to the crime, and the second stage considering the remaining factors. In *McCullough* (27 NY3d at 1161), however, the Court held that "[t]o the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification would aid a lay jury in reaching a verdict" (quotation marks omitted).

Nonetheless, to date, key determining factors with respect to whether the testimony of an identification expert is warranted **have been as specified in subdivision (2): (a)** whether the eyewitness identification is a central element of the proof, and **(b)** whether little or no corroborating evidence connects the defendant to the crime.

In the words of the Court of Appeals: "In the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting defendant." (*LeGrand*, 8 NY3d at 459.)

For example, in *Lee* (96 NY2d 157), the complainant's car was stolen at gunpoint; both the complainant and defendant were in close proximity to each other and exchanged words; and, two months after the theft, the defendant was arrested driving the stolen car. Given that corroborative evidence, the trial court did not abuse its discretion in denying expert identification testimony. In *Young* (7 NY3d at 45-46), in a robbery committed by a male, identified by a witness as the defendant, the stolen property was found in the possession of two of defendant's female acquaintances "and one of them pointed to defendant as the person from whom she got the property"; thus, "the corroboration was strong enough for the trial court reasonably to conclude that the expert's testimony would be of minor importance." In *Allen* (13 NY3d at 269), the corroborating evidence of the eyewitness was the identification of the defendant by an individual who knew the defendant and recognized him during the course of the robbery.

By contrast, where the key proof of guilt rests upon an identification (or identifications that are questionable) and there is "little or no corroborating evidence" (*People v LeGrand*, 8 NY3d at 452), upon a defendant's application, expert identification testimony about one or more of the scientific principles relevant to the case has been required.

For example, in *LeGrand* (8 NY3d at 457), the case turned solely on the accuracy of the "eyewitness identifications" and, "unlike *Lee* and *Young*, there was no corroborating evidence connecting defendant to the commission of the crime charged"; thus, the defendant's application for expert identification testimony should have been granted. In *Abney* (13 NY3d at 268), there was no corroborating evidence of the identification, and the trial judge therefore "abused his discretion when he did not allow [the expert] to testify on the subject of witness confidence. As for the remaining relevant proposed areas of expert testimony—the effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification—the trial judge should have conducted a *Frye* hearing before making a decision on admissibility."

Uniquely, eyewitness identification with little or no corroboration may not warrant expert identification testimony where the complainant and the defendant are known to each other. (*People v Muhammad*, 17 NY3d at 546 [the victim knew the defendant for over a decade; so that "prior relationship took any issue regarding human memory formation and recollection out of the case, rendering the victim's ability to perceive his attacker as the only aspect on which expert testimony was even potentially relevant. . . . (A)n average juror would have been capable of assessing whether a person in the victim's situation had an adequate opportunity to observe someone he had known for so long. Moreover, the defense never directly challenged the victim's ability to observe or recall who shot him, but instead sought to characterize his testimony implicating defendant as a lie, thereby further removing the scope of the proposed expert testimony from the issues presented to the jury"]; c*f. People v Zohri*, 82 AD3d 493, 494 [1st Dept 2011] [the trial court did not abuse its discretion in excluding expert testimony on

eyewitness identification where, in addition to some corroboration, "(b)etween the crime and defendant's apprehension, the victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely"].)

A trial court that denies pretrial an application for an expert identification witness may need to reconsider, upon a defense request, once the trial has produced evidence that may not have been known or appreciated before trial. (*Santiago*, 17 NY3d at 673 [the trial court "abused its discretion when, after the defense had rested, the court denied defendant's renewed request to call an expert witness on eyewitness identification"]; *People v Austin*, 46 AD3d 195, 198-199 [1st Dept 2007] [based on the pretrial proffer for an expert, the trial court did not abuse its discretion in denying the application, and, while the expert may have been warranted after evidence had been received, the defense did not renew its motion].) *Austin* noted that "[p]erhaps the better practice would [be] to reserve decision or deny the motion with leave to renew during presentation of the People's case, at which time both the defense and the court would have been in a better position to consider the relevance of any expert testimony proffered on the effect of various factors on the reliability of eyewitness identification."

With respect to factor **(c)** (i.e., "whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case"). *Santiago* (17 NY3d at 672-673) provides an example of testimony on identification factors found irrelevant upon the pretrial defense application and then relevant in part after the defense rested and renewed its application. Thus, on the pretrial application, the Court noted that: "weapon focus, the effects of lineup instructions, wording of questions, and unconscious transference" were irrelevant, given that the "victim was not aware that her assailant had a weapon, and the record contains no evidence of improper lineup instructions, suggestive wording, or the presence of defendant's image in photographs the victim saw prior to identifying him in the photographic array she viewed." In the ruling on the defense's second application, the trial court "should have given specific consideration to the proposed testimony concerning unconscious transference. That testimony would have been relevant, given that [at the trial, an eyewitness (not the victim)] saw a photograph of [the defendant], and [another eyewitness (not the victim)] saw a sketch of the perpetrator based on the victim's description, and familiarity with these images may have influenced these eyewitnesses' identifications." (*Id.* at 673.)

With respect to factor **(d)** ("whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community"), see subdivision (3) of this rule and the Note thereto.

With respect to factor **(e)** ("whether the proffered testimony meets the general requirements for the admission of expert testimony [Guide to NY Evid rule 7.01 (1)]), in particular, whether the witness is a qualified expert and the

testimony is beyond the ken of the jury and would aid the jury in reaching a verdict"), the Court of Appeals has noted that "it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror." (*Lee*, 96 NY2d at 162; *but see People v Fratello*, 92 NY2d 565, 572 [1998] ["It was well within the trial court's sound discretion to reject expert testimony on a matter (night visibility) that is a subject of common experience of lay triers of fact"].)

In the end, the trial court's exercise of discretion may depend on "whether the 'specialized knowledge' of the expert can give jurors more perspective than they get from 'their day-to-day experience, their common observation and their knowledge' . . . . In other words, could the expert tell the jury something significant that jurors would not ordinarily be expected to know already?" (*Young*, 7 NY3d at 45.)

Subdivision (3) lists the scientific principles related to an expert identification witness that the Court of Appeals and other courts have found generally accepted by the relevant scientific community.

Thus, in *LeGrand* (8 NY3d at 458), the Court of Appeals held that as to the first three factors listed in subdivision (3)—"correlation between confidence and accuracy of identification, the effect of postevent information on accuracy of identification and confidence malleability—the defense expert's testimony contained sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Accordingly, defendant met his burden under *Frye.*" (*See Abney*, 13 NY3d at 268 [followed *LeGrand* with respect to "witness confidence"]; *Santiago*, 17 NY3d at 672 [held it was error to exclude expert testimony "showing that eyewitness confidence is a poor predictor of identification accuracy and on studies regarding confidence malleability" and the effects of "postevent information on eyewitness memory"].)

With respect to cross-racial identification, in *People v Boone* (30 NY3d 521, 535-536 [2017]) the Court of Appeals held that "a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification." (*See* CJI2d[NY] Identification.)

In coming to that conclusion, the *Boone* Court explained that "[t]he cross-race effect is 'generally accepted' by experts in the fields of cognitive and social psychology, a point that the People do not dispute. Indeed, in a survey of psychologists with expertise in eyewitness identification, 90% of the experts

believed that empirical evidence of the cross-race effect was sufficiently reliable to be presented in court. The phenomenon has been described as '[o]ne of the best documented examples of face recognition errors' " (30 NY3d at 528-529 [citations to supporting studies omitted]).

With respect to expert testimony on cross-racial identification, the *Boone* Court made the point that the required jury instruction does not preclude expert testimony "explaining the studies to the jury . . ., because 'it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror,' with the decision to admit subject to the trial court's discretion." (*Id.* at 531 [citation omitted].) While, therefore, mandating the instruction, the Court left to the discretion of the trial court whether the criteria for expert testimony had been satisfied. In *People v Santiago* (17 NY3d at 672), the Court held: "Given that the People did not dispute that the victim is a non-Hispanic Caucasian, the proposed testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant, and is beyond the ken of the average juror." In *Abney* (13 NY3d at 268), the Court held that the trial court should have held a *Frye* hearing, inter alia, on the effect of cross-racial identification. On remand, the trial court conducted the *Frye* hearing and held the expert testimony inadmissible because "[w]hile [the expert] opined that the own-race bias phenomenon extended to persons of Asian/Indian descent, she acknowledged that she was unable to point to any specific scientific studies to support such a conclusion." (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U], *50 [Sup Ct, NY County 2011]; *see also People v Banks*, 16 Misc 3d 929, 942 [Westchester County Ct 2007] [because the expert at a pretrial hearing "did not mention any studies demonstrating . . . a bias between Hispanics (the identification witness) and African Americans" (the defendant), the court excluded the testimony].)

With respect to other courts:

On remand from *Santiago* (17 NY3d 661), the prosecutor conceded that the proffered testimony related to identification factors was generally accepted by the relevant scientific community and the trial court accepted that concession and considered which identification factors were relevant to the case. (*People v Santiago*, 35 Misc 3d 1239[A], 2012 NY Slip Op 51043[U] [Sup Ct, NY County 2012].) The factors held relevant (in addition to those accepted by the Court of Appeals) included: "*unconscious transference*" (a witness may identify an individual familiar to them from other situations or contexts); "*high event stress*" (introduction of evidence that high stress negatively impacts the accuracy of eyewitness identification and recall of crime details); "*exposure time*" (because "the victim viewed her attacker's partially obscured face for no more than 25 seconds, the subject of exposure time is certainly relevant" [2012 NY Slip Op 51043[U], *8]); and "*weapon focus*" (but only if the complainant testified to having seen the "boxcutter while viewing the perpetrator's face" [*Id*. at *9]). With respect to "exposure time," see CJI2d(NY), Identification ("the accuracy of a

witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person" followed by a listing of related factors). Testimony related to the conduct of a lineup was also found relevant; however, in 2017, New York amended its identification laws to account for some of the issues related to fairness in lineup procedure. (*See* Executive Law § 837 [21]; Identification Procedures: Photo Arrays and Line-ups Municipal Police Training Council Model Policy and Identification Procedures Protocol and Forms Promulgated by the Division of Criminal Justice Services Pursuant to Executive Law 837 [21] [June 2017].)

On remand from *Abney* (13 NY3d 251), the trial court held, after conducting a *Frye* hearing, that (in addition to the identification factors accepted by the Court of Appeals) expert identification testimony would be admissible with respect to the following factors: "*event stress*" (i.e., "a stressful event impairs the ability of a person to recognize an unfamiliar face accurately" and "the complainant was placed in a highly stressful situation as she was allegedly robbed in the subway at knife point by a complete stranger"); "*weapon focus*" (given the use of a knife during the robbery); and "*event duration*," also known as "exposure duration" (refers to " 'the phenomenon that [the] longer a person is exposed to a face the more likely that person will make a correct identification at a later time' [and conversely] an identification is likely to be less accurate if the perpetrator is viewed only for a brief period of time. In this case, as the charged crime took only seconds to complete this Court finds that the phenomenon of event duration is relevant to the identification of the defendant.") (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U] [Sup Ct, NY County 2011] [citations omitted]; *see also e.g. People v Norstrand*, 35 Misc 3d 367, 372-373 [Sup Ct, Monroe County 2011] [allowing expert testimony on a number of factors including: "identification of a stranger"; "exposure duration"; "event stress"; "recovered memories ([eyewitness] recalled more details regarding the event two days later following a dream)"]; *People v Banks*, 16 Misc 3d 929, 930 [Westchester County Ct 2007] [exposure time; weapons focus]; *People v Drake*, 188 Misc 2d 210, 213 [Sup Ct, NY County 2001] [admitting expert identification testimony on the "stress of the event" (emphasis omitted)]; *but see People v Banks*, 74 AD3d 1214, 1215 [2d Dept 2010] [the trial court "providently exercised its discretion in precluding, after a *Frye* hearing . . . , expert testimony on the effects of stress"]; *compare People v Berry*, 27 NY3d at 20-21 [there was no abuse of discretion in precluding expert testimony on "event stress" on the ground that it was "not relevant"].)

Ultimately, in the words of the Court of Appeals: "We have acknowledged that even when expert testimony is required, the trial court is 'obliged to exercise its discretion with regard to the relevance and scope of such expert testimony' and that 'not all categories of such testimony are applicable or relevant in every case' (*LeGrand*, 8 NY3d at 459)." (*Berry*, 27 NY3d at 20.)

Subdivision (4) recognizes the standard procedure for determining the admissibility of novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community. (*Lee*, 96 NY2d at 162 [where expert testimony may "involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community"].)

The caveat here is that although the Court of Appeals has recognized the rule set forth in subdivision (4), the Court has also noted that a trial court "need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. 'Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure.' " (*LeGrand*, 8 NY3d at 458; *but see People v Williams*, 35 NY3d 24, 43 [2020] ["our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations"].)

7.19 Scientific Evidence

(1) Subject to the requirements identified in Guide to New York Evidence rule 4.01 (Relevant Evidence); rule 4.07 (Exclusion of Relevant Evidence); rule 7.01 (Opinion of Expert Witness), as limited by rule 8.02 (Admissibility Limited by Confrontation Clause); and subject to the establishment by foundation evidence of the authenticity of the materials and propriety of the procedure used, the following scientific evidence has been held admissible:

(a) Ballistics evidence used to show that a firearm is operable or that a bullet was fired from a particular firearm.

(b) Blood type evidence used to identify the type of blood a particular individual carries and to determine whether the blood of one person matches that of another.

(c) Fingerprint and palmprint evidence.

(d) The results of a medical or diagnostic procedure or test as provided in CPLR 4532-a.

(e) Photometric testimony, limited to measurements of footprints.

(f) Radar speedometer results.

(2) Scientific evidence that has been held admissible by the Court of Appeals but whose reliability has subsequently been questioned includes:

(a) Bite mark evidence as a means of identification.

(b) Comparative hair analysis evidence.

(3) Purported scientific evidence that has been held not admissible includes:

(a) The results of a polygraph examination.

(b) The results of voice spectrographic evidence.

(4) Notwithstanding that evidence of a particular subject has been accepted in a scientific community, the evolving views and opinions in a scientific community may occasionally require a *Frye* hearing with respect to previously accepted scientific evidence. Scientific evidence that has been previously accepted within the relevant scientific community but has since come into question includes: hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis. At the same time, evolving views and opinions in the scientific community about a particular subject may justify the admission of such evidence notwithstanding that it has not been previously accepted.

Note

The admissibility of DNA evidence will be the subject of a separate rule.

Subdivision (1) (a) is derived from Court of Appeals decisions. (*See People v Knight*, 72 NY2d 481, 485 [1988] [there are a "variety of scientific methods routinely accepted in our courts for their general reliability, including . . . ballistic evidence"]; *People v Romeo*, 12 NY3d 51, 53 [2009] ["Ballistics evidence . . . indicated that a gun belonging to defendant was the murder weapon"]; *People v Vataj*, 69 NY2d 985, 987 [1987] ["A ballistics test matched a spent bullet recovered from the scene of the crime with a bullet from defendant's gun"]; *People v Soper*, 243 NY 320, 325 [1926] ["The bullets found in the body of the deceased were fired from a revolver of the same calibre as the revolver which was found . . . (T)wo experts produced by the prosecution testified, in effect, that they found and measured certain marks on the bullets and that these marks corresponded exactly with so-called 'grooves' and 'lands' in the barrel of the revolver and that these bullets were fired from that particular revolver"].) In 2020, the Court of Appeals noted that the reliability of "comparative bullet lead analysis" (i.e. the comparing by chemical analysis of a bullet at a crime scene with a bullet found in possession of the defendant), while previously accepted by other courts, was presently questionable. (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (1) (b) is derived from *People v Mountain* (66 NY2d 197, 202-203 [1985]), which held: "The scientific validity and reliability of tests used to identify the type of blood a particular individual carries and to determine whether the blood of one person matches that of another are well recognized in both the medical and legal communities . . . [T]he relative rarity of the assailant's type of blood relegates arguments as to remoteness to the realm of weight rather than admissibility." (*But see People v Rogers*, 8 AD3d 888, 891-892 [3d Dept 2004] [in a rape prosecution, a report of the victim's blood alcohol content was improperly admitted because "the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial (and admission) of the blood test results without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's Confrontation Clause"].)

Subdivision (1) (c) is derived from a long line of Court of Appeals decisions recognizing the admissibility of such evidence, as well as statutory law recognition via the required taking of fingerprints and palmprints of those arrested for a crime. (CPL 160.10; *see People v Gates*, 24 NY2d 666, 669 [1969] ["there can be no doubting the almost conclusive force of the fingerprint evidence"]; *but see People v Rawlins*, 10 NY3d 136, 157 [2008] ["fingerprint reports at issue were clearly testimonial because . . . a police detective (prepared the) reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant's identity" and were thus inadmissible given that the detective was not a witness subject to cross-examination].)

Subdivision (1) (d) incorporates CPLR 4532-a ("Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests") as set forth in Guide to New York Evidence rule 9.09.

Subdivision (1) (e) is derived from *People v Bay* (67 NY2d 787, 789 [1986]), which held that the "receipt of the expert photometric testimony, limited to measurements of the footprints, was not an abuse of discretion."

Subdivision (1) (f) is derived from *People v Magri* (3 NY2d 562, 566 [1958] ["the time has come when we may recognize the general reliability of the radar speedmeter (also known as a radar speedometer) as a device for measuring the speed of a moving vehicle, and that it will no longer be necessary to require expert testimony in each case as to the nature, function or scientific principles underlying it"]). (*People v Knight*, 72 NY2d 481, 486 [1988] ["insofar as the underlying scientific principles of moving and stationary radar are the same, evidence derived from either should be admissible without the need for expert testimony"].)

Subdivision (2) (a) on the admissibility of bite mark evidence is derived from *People v Middleton* (54 NY2d 42, 45 [1981]) where the Court held: "The

reliability of bite mark evidence as a means of identification is sufficiently established in the scientific community to make such evidence admissible in a criminal case." (*See People v Smith*, 63 NY2d 41, 64 [1984] ["no error was committed in permitting the photo-to-photo comparison" of a known bite mark of the defendant on human skin with a bite mark on the skin of the deceased].) In 2020, however, notwithstanding *Middleton* and *Smith*, the Court of Appeals noted that there had been "[r]ecent questioning of previously accepted techniques related to . . . bite mark matching." (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (2) (b) is derived from *People v Allweiss* (48 NY2d 40, 49-50 [1979] [comparative hair analysis was properly admitted where "(t)he People's expert testified that he had microscopically compared the hair samples taken from the defendant's head with the hair found at the scene of the crime. He stated that the test, like fingerprint analysis, involved comparing a number of characteristics, generally 15 to 20. He conceded that the results would not be as conclusive as fingerprinting, but stated that if a sufficient number of similarities could be found, it could be determined with a reasonable degree of certainty that a hair had come from a certain individual. He said that he was able to do that in this case"]). In 2020, however, notwithstanding *Allweiss*, the Court of Appeals noted that there had been "[r]ecent questioning of previously accepted techniques related to hair comparisons." (*People v Williams*, 35 NY3d 24, 43 [2020].)

Subdivision (3) (a) is derived from well-established precedent, most recently *People v Shedrick* (66 NY2d 1015, 1018 [1985]), which stated that it was not "reversible error for the court to exclude results of a polygraph examination offered by defendant to indicate his own belief in his innocence. The reliability of the polygraph has not been demonstrated with sufficient certainty to be admissible in this State. (*People v Tarsia,* 50 NY2d 1, 7; *People v Leone,* 25 NY2d 511, 517.)" (*People v Forte*, 279 NY 204 [1938].)

Subdivision (3) (b) is derived *People v Jeter* (80 NY2d 818, 820-821 [1992]), which stated: "We do not agree that the court could properly have determined that voice spectrography is generally accepted as reliable based on the case law and existing literature on the subject. In this instance, there is marked conflict in the judicial and legal authorities as to the reliability of the procedure. New York courts are split on the issue of admissibility. Moreover, while several jurisdictions have held that voice spectrography evidence is sufficiently reliable to be admissible, others have reached just the opposite conclusion. The legal scholarship on the admissibility of voice spectrography is likewise conflicting. We conclude that the trial court lacked a proper basis to admit the voice spectrographic evidence without a preliminary inquiry into reliability" (citations omitted). (*But see People v Tyson*, 209 AD2d 354, 355 [1st Dept 1994] ["It was an abuse of discretion to deny defendant's request for a reasonable expenditure to test whether a voice on a tape offered in evidence, in which defendant allegedly admitted the crime, was in fact defendant's . . . A preliminary hearing must then be held to determine the

scientific reliability of the test should the expert conclude that the voice on the tape was not defendant's"].)

Subdivision (4) is derived from *People v Williams* (35 NY3d 24, 43 [2020]), which stated:

> "[O]ur *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations.
>
> "Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question."

7.21 DNA Evidence

(1) <u>Definitions.</u>

(a) DNA is:

(i) the biological substance known as autosomal DNA which is present in the nucleus of human cells and comprises the human genome, exclusive of the similar substance on the sex chromosomes;

(ii) the biological substance known as mitochondrial DNA ("mtDNA") which is present in the mitochondria in a human cell and contains the genetic contributions of an individual's mother; and

(iii) the biological substance known as Y-STR DNA which is present on a male's Y chromosome and contains the genetic contributions of that male's father.

(b) DNA evidence is evidence about the recovery and analysis of DNA, including an expert appraisal of the likelihood that DNA obtained from a person or place came from a particular individual.

(c) DNA evidence is "deconvoluted" when the profile of at least one contributor to a DNA mixture can be isolated from the profile(s) of the remaining contributor(s).

(d) Simple DNA is:

(i) autosomal DNA apparently from one individual and

(ii) autosomal DNA apparently from one individual whose contribution to a mixture of individuals' DNA was deconvoluted.

(e) Complex DNA is a mixture of individuals' autosomal DNA, or a portion of such a mixture, which cannot be deconvoluted.

(f) A likelihood ratio is a mathematical statement of the probability that a DNA sample contains DNA from one or more known individuals rather than solely from one or more other individuals.

(g) Electrophoresis is the stage of DNA analysis at which a machine measures distinguishing markers in a DNA sample at key locations of the genome.

(2) <u>Admissibility; in general.</u>

(a) Subject to the foundational requirements of paragraph (b), expert testimony about the analysis of DNA evidence is admissible when the theories and procedures of analysis are generally accepted as reliable by the relevant scientific community.

(b) The admission of DNA evidence is subject to the foundational requirements identified in Guide to New York Evidence rules 4.01 (Relevant Evidence) and 7.01 (Opinion of Expert Witness [rev June 2022]) and article 8 (Hearsay). In addition, a foundation for the admissibility of DNA evidence should include testimony that the appropriate steps were taken in analyzing the evidence. The required foundation should not include a determination by the court whether the evidence is accurate; that determination remains with the jury.

(3) <u>The admissibility of types of DNA evidence</u>

(a) At present, widely used theories and procedures for analyzing autosomal DNA in simple DNA samples, mtDNA, and Y-STR DNA have been found reliable by general consensus of the relevant

scientific community. Some but not all proposed theories and procedures for analyzing complex DNA have been found reliable by general consensus of the relevant scientific community. Evidence of analysis performed through the accepted theories and procedures is admissible, subject to subdivision two and absent a showing that the theories and procedures are no longer generally accepted as reliable by consensus of the relevant scientific community.

(b) When a party offers simple DNA evidence as proof that the DNA did or did not come from a particular individual, the evidence need not include the expression of a likelihood ratio unless the court in its discretion rules otherwise.

(c) An expert testifying about a sample containing complex DNA may not state that a particular individual contributed to the sample. An expert may testify to a likelihood ratio and should inform the finder of fact about the significance of the likelihood ratio or of other statistics derived from DNA analysis.

(4) <u>Application of principles of hearsay and confrontation.</u>

(a) The rules applicable to hearsay apply to DNA evidence in civil and criminal cases. See Guide to New York Evidence article 8 and in particular rule 8.02 (Admissibility [of Hearsay] Limited by Confrontation Clause [*Crawford*] [rev June 2022]).

(b) In a criminal case, constitutional restrictions on the introduction of testimonial hearsay:

(i) do not apply to evidence about laboratory DNA work through the electrophoresis stage, absent circumstances indicating that this

preliminary work was skewed to implicate a particular individual;

(ii) do apply to evidence about laboratory DNA analysis that follows electrophoresis, including analysis of the electrophoresis data, if the primary purpose of the analysis was to assess whether DNA came from a particular person of interest to law enforcement. Evidence about analysis that follows electrophoresis therefore must be presented by one or more expert witnesses who personally performed, witnessed, or supervised the analysis, or who can independently opine whether the analysis is correct.

Note

Subdivision (1)

Subdivision (1) (a) (i) addresses autosomal DNA. Autosomal DNA, a string of biological substances contributed equally by each individual's father and mother, comprises most of the human genome. Autosomal DNA is located in the nucleus of most human cells but does not include the similar substances on the sex chromosomes in the nucleus. It is unique for every individual (except for identical twins). Autosomal DNA can therefore identify, for example, which human left physical evidence at a crime scene or is the parent of a child. (*See People v Wesley*, 83 NY2d 417, 421 [1994]; *People v Wakefield*, 38 NY3d 367 [2022] [description of the theories and procedures of DNA analysis]; *People v Williams*, 35 NY3d 24 [2020] [same]; Roth, *Chapter 13: Admissibility of DNA Evidence in Court*, Silent Witness: Forensic DNA Analysis in Criminal Investigations and Humanitarian Disasters at 295-297 [Oxford Univ Press 2020].) Identification evidence based on a single individual's autosomal DNA has long been accepted as scientifically sound. (*Wesley* at 424-425; Roth at 295.)

Subdivision (1) (a) (ii) and (iii) addresses two less familiar types of DNA. Mitochondrial DNA ("mtDNA") is present in a cell's mitochondria, structures outside the cell's nucleus. The genome in mitochondria differs from that in the cell's nucleus, but its components are examined with the same procedures employed for autosomal DNA. MtDNA almost always comes only from a person's mother. Absent a mutation, a mother's mtDNA will be passed on from generation to generation to her male and female descendants. (*See People v Klinger*, 185 Misc 2d 574 [Nassau County Ct 2000]; Roth at 298; Court, *Mitochondrial DNA in forensic use*, 5 Emerging Topics Life Scis [Issue 3] 415 [Portland Press 2021];

Budowle et al., *Forensics and Mitochondrial DNA: Applications, Debates, and Foundations*, 4 Ann Rev Genomics & Hum Genetics 119, 121-122 [2003].) The descendants of a woman with a particular mtDNA genome can be recognized—but mtDNA cannot distinguish the woman's descendants from one another. Nonetheless, when an autosomal DNA sample is too small for analysis or is degraded, mtDNA can provide information that may exonerate individuals of interest or substantially narrow the universe of possible DNA contributors.

Like autosomal DNA evidence, evidence about mtDNA has been held scientifically sound. (*See People v Ko*, 304 AD2d 451, 452 [1st Dept 2003] ["The court correctly determined that mitochondrial DNA analysis has been found reliable by the relevant scientific community, and that issues regarding contamination go to the weight to be given such evidence"], *judgment vacated on other grounds* 542 US 901 [2004], *on remand judgment affd* 15 AD3d 173 [1st Dept 2005]; *Klinger*, 185 Misc 2d 574.)

The third form of DNA is Y-STR DNA. Y-STR DNA is in a cell's nucleus, on the Y chromosome. It is pertinent only to the identification of males, as only they have a Y chromosome. Y-STR DNA profiles are subject to mutations, but otherwise are passed down over generations from father to son. (*See People v Wright*, 115 AD3d 1257, 1259-1260 [4th Dept 2014, Fahey & Carni, JJ., dissenting], *revd* 25 NY3d 769 [2015]; Kayser, *Forensic use of Y-chromosome DNA: a general overview*, 136 Hum Genetics 621 [2017].) Y-STR DNA analysis cannot distinguish one male in a paternal line from another. It simply allows a conclusion about whether an individual of interest is included in that paternal line and, if so, an estimate of the odds that a random person would be included. But like mtDNA it can exonerate the innocent or substantially narrow the universe of possible DNA contributors.

Y-STR DNA has apparently not been subjected to a *Frye* hearing in New York. The admission of Y-STR DNA evidence by the New York trial courts, however, has been noted without negative comment by the appellate courts. (*See e.g. People v Wright*, 25 NY3d 769 [2015]; *People v Longo*, 212 AD3d 471 [1st Dept 2023].) The theories and procedures underlying Y-STR DNA analysis are, through the electrophoresis stage, the same as those that apply to autosomal DNA and mtDNA analysis. Beyond that, the acceptability of Y-STR DNA evidence is assumed in the state regulations on forensic DNA methodology (9 NYCRR 6192.3 [e]) and such evidence has been admitted in trials in many states (*see* LaRue, *The Science of Change: Familial Searches And Y-STR DNA*, 17 Ohio State J Crim L 241, 256-259 [2019] [collecting cases]).

Subdivision (1) (b) recognizes that DNA evidence includes evidence about the recovery of DNA samples. Contamination or degradation of a DNA sample may affect the probative value of DNA evidence. And "touch" DNA from an innocent person can be passed on to another individual and then left where it may incriminate that innocent person. The circumstances of the recovery of DNA may be relevant

to an assessment of those and similar possibilities. (*See* Roth at 303; *and see* Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, 18 J Assn Crime Scene Reconstr 1, 3-4 [2012].)

Subdivision (1) (c) defines "deconvoluted" as utilized in the analysis of simple and complex DNA, as specified in subdivision (1) (d) and (e). (*See e.g.* Butler et al., *DNA Mixture Interpretation: A NIST Scientific Foundation Review*, National Institute of Standards & Tech Internal Rep 8351-DRAFT at x [June 2021], available at https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8351-draft.pdf.)

Subdivision (1) (d) defines "simple" DNA. The first type is autosomal DNA that apparently came from one individual. Analysis of a substantial quantity of such DNA to determine whether it matches a DNA profile from a separate sample is now routine. (Roth at 295; *DNA Mixture Interpretation* at 12; Jobling & Gill, *Encoded Evidence: DNA in Forensic Analysis*, 5 Nature Revs Genetics 739, 739 [2004].) The second type of simple DNA comes from a mixture of individuals' autosomal DNA that can be fully or partially "deconvoluted" or "resolved"—that is, from which the DNA of at least one contributor can be isolated. One individual's DNA may be present in a much larger or smaller amount than that of other contributors. That difference can make it possible to create a DNA profile of the larger or smaller contributor. (*See People v Griffin*, 122 AD3d 1068 [3d Dept 2014] [major contributor provided 90% of the DNA].) In addition, the identity of one or more contributors may be known. A known donor's DNA profile can simplify analysis of the mixture, helping to expose the DNA profile of another contributor (*see People v Powell*, 165 AD3d 842 [2d Dept 2018] [the likelihood that two suspected donors contributed to a three-person mixture]). In sex crime cases, scientists have for years been able to recognize which DNA comes from sperm cells and can create a profile from those cells alone. (*See People v Rawlins*, 10 NY3d 136, 158-159 [2008]; Williamson et al., *Enhanced DNA mixture deconvolution of sexual offense samples using the DEPArray system*, 34 Forensic Sci Intl: Genetics 265 [2018]; Gill et al., *DNA Profiling in Forensic Science*, Encyclopedia of Life Sciences [2001], available at https://doi.org/10.1038/npg.els.0001001.)

Subdivision (1) (e) addresses complex DNA, that is, DNA mixtures that cannot be deconvoluted. In the past, experts who analyzed a complex mixture could opine only that an individual of interest could be excluded as a contributor, that he could not be excluded, or that testing results were inconclusive. (*See e.g. People v Wright*, 25 NY3d 769, 771, 775-777 [2015] [the defendant could not be excluded as a contributor to a mixture]; *People v Watley*, 245 AD2d 323 [2d Dept 1997] [same].) Experts have now developed "probabilistic genotyping" software that permits the creation of the more informative likelihood ratios. (*See People v Williams*, 35 NY3d 24, 47-49 [2020]; *People v Foster-Bey*, 35 NY3d 959 [2020].)

Subdivision (1) (f) explains a likelihood ratio; for example, in analyzing a two-person mixture, an analyst might hypothesize that a known individual and an unknown random individual were the contributors and calculate the probability

(likelihood ratio) that the known individual was a contributor as 100,000 times greater than the probability that the contributors instead were two unknown random individuals. (*DNA Mixture Interpretation* at 37.) Decisional law cites testimony about likelihood ratios with apparent approval of their use. (*See e.g. Wakefield*, 38 NY3d at 371-380.)

It is important that the probative value of a likelihood ratio be understood. When a two-person mixture cannot be deconvoluted, an analyst deals with a stew of about four or more DNA markers from each of about two dozen locations on the genome. Analysis of mixtures from more contributors is still more complicated. There is no way to determine which markers combine to create the profiles of the individual contributors. Thus, in the example above the expert cannot say that the odds are 100,000 to one that the known individual's DNA is in a mixture. Nor can the expert say that only one individual in 100,000 could have been a contributor. The expert is expressing how much more likely it is that the known individual and one other are contributors than two random individuals on the street. The expert will have no idea whether an individual with a higher likelihood ratio might be living next door to the known individual. (*See DNA Mixture Interpretation* at 37-38, 90-91.)

Subdivision (1) (g) introduces the concept of electrophoresis. At identified locations on the genome, an individual's DNA markers will differ in length from those of most other people. The electrophoresis machine measures the length of the DNA markers at those locations. For a simple DNA sample this data can reveal the individual's profile. For a complex sample, an expert can graph all the markers and use the data to create a likelihood ratio for a known person of interest. The electrophoresis stage marks a significant border for Confrontation Clause purposes. (*See* subd 4, *infra*.)

Subdivision (2)

Subdivision (2) (a) addresses the admissibility of DNA evidence created through scientific theories and procedures that are challenged by a party. If that party makes a prima facie showing in support of the challenge, the proponent of the evidence must demonstrate that the theories and procedures underlying the DNA analysis are generally accepted in the scientific community. (*See Wesley*, 83 NY2d at 422-423 [applying *Frye v United States* (293 F 1013 [DC Cir 1923]) to DNA evidence]; *People v Williams*, 35 NY3d 24, 37-38 [2020]; Guide to NY Evid rule 7.01 (2), Opinion of Expert Witness [rev June 2022]; *see also* Report of the President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* [2016] [PCAST report].)

Subdivision (2) (b) is a reminder that a proper foundation for DNA evidence must be provided and specifies that the foundation must include proof that approved procedures were utilized and explained (*Wesley* at 425). In addition, a

ruling on admissibility does not turn on any assessment by the court of whether the proffered evidence is correct (*id.*).

Subdivision (3)

Subdivision (3) (a) addresses the status of DNA procedures under the *Frye* rule. DNA testimony purporting to show the identity of an individual who left a simple DNA sample has been found admissible under *Frye.* (*Wesley*, 83 NY2d at 420.) However, some methods for interpreting complex DNA evidence with probabilistic genotyping software are not authoritatively endorsed at this time. (*See People v Foster-Bey*, 35 NY3d 959, 961 [2020] ["(I)t was an abuse of discretion as a matter of law to admit . . . (forensic statistical tool) evidence without first holding a *Frye* hearing given defendant's showing that there was uncertainty regarding whether such proof was generally accepted in the relevant scientific community at the time of the subject motion"]; *see People v Williams*, 35 NY3d 24 [2020] [same].) *Williams*, however, made it clear that, among the unsettled questions is whether software adequately analyzes complex samples containing very small quantities of DNA—"low copy number" or "LCN" DNA (*see Williams* at 30, 39-40; *DNA Mixture Interpretation* at 31).

Today's *Frye* challenges to mixture analysis software include attacks on the use of "continuous" probabilistic software in place of "semi-continuous" probabilistic software like that discussed in *Williams*. (*See DNA Mixture Interpretation* at 31.) The PCAST report stated that, as of 2016, probabilistic genotyping software in general was a "promising" method for mixture analysis (PCAST report at 82, 148). The report added that, according to published reports, two brands of continuous software, TrueAllele and STRmix, are reliable for two- and three-person mixtures under certain conditions (PCAST report at 80, 82). New York appellate courts have since gone farther. In particular, *People v Wakefield* (38 NY3d 367 [2022]) found that TrueAllele software passed the *Frye* test even for LCN mixture samples. (*See also People v Bullard-Daniel*, 203 AD3d 1630 [4th Dept 2022] [STRmix result was admissible]; *People v Wilson*, 192 AD3d 1379 [3d Dept 2021] [TrueAllele result was admissible].)

Subdivision (3) (b) recognizes that expert witnesses frequently testify about the likelihood that a particular individual is the source of a simple DNA sample and it notes that such testimony need not come in the form of a likelihood ratio. Witnesses have, for example, testified without controversy that the odds that someone other than the defendant provided a DNA sample were "1 in greater than 1 trillion people" (*People v John*, 27 NY3d 294, 298 [2016]). In an earlier case the chances of another profile matching the defendant's profile were said to be 500 million to one (*People v Rush*, 242 AD2d 108 [2d Dept 1998]). And in *People v Dearmas* (48 AD3d 1226 [4th Dept 2008]), an expert opined that the odds that someone other than the defendant left the DNA sample were one in 12.2 trillion.

Subdivision 3 (c) recognizes that practice is different for testimony about complex DNA samples. In the past experts could offer only vague testimony about the possibility that a particular individual contributed to a DNA mixture. As noted, DNA experts now use software to create the more helpful likelihood ratios. It appears that no court has required that reports about mixture contributions be delivered in the form of a likelihood ratio, but the employment of likelihood ratios seems now to be universal.

Jurors, and indeed counsel, may find testimony about likelihood ratios difficult to understand and subdivision 3 (c) also addresses that circumstance. The court should ensure that the parties correctly state the significance of a likelihood ratio. To date, appellate disapproval of trial comments has centered on prosecutors' overstatements about the meaning of ratios. (*See e.g. People v Wright*, 25 NY3d 769, 778-782 [2015]; *People v Powell*, 165 AD3d 842 [2d Dept 2018].) The principle would seem to apply to expert testimony as well.

Subdivision (4)

Subdivision (4) (a) is a reminder that New York's hearsay rules apply to DNA evidence, and subdivision (4) (b) details those principles as applied in a criminal proceeding.

Subdivision (4) (b) addresses the application of the Sixth Amendment right of confrontation to DNA evidence in criminal cases in light of *Crawford v Washington* (541 US 36 [2004]). That case and its progeny determine when evidence of DNA laboratory reports is admissible. (*See generally* Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*] [rev June 2022].)

Crawford held that the right to confrontation dictates that "testimonial hearsay" proffered by the prosecution, no matter how reliable, is inadmissible even if the declarant is unavailable if "the defendant had [no] prior opportunity for cross-examination," so long as the witness's unavailability is not due to actions of the defendant. (*Id.* at 53-60, 62.) If a DNA laboratory report is testimonial hearsay under that rule, it is inadmissible unless introduced through the testimony of the declarant or another witness with first-hand knowledge of the laboratory analysis.

Subdivision (4) (b) sets forth the current answer to when a laboratory report of DNA evidence is testimonial and is derived principally from *People v John* (27 NY3d 294 [2016]).

John held that the introduction of "DNA reports into evidence, asserting that defendant's DNA profile was found on the gun that was the subject of the charged possessory weapon offense, without producing a single witness who conducted, witnessed or supervised the laboratory's generation of the DNA profile

from the gun or defendant's exemplar" violated the defendant's right to confrontation. (*Id.* at 297.)

John explained that "we have deemed the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial. . . . We have considered two factors of particular importance in deciding whether a statement is testimonial—first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing. Furthermore, the purpose of making or generating the statement, and the declarant's motive for doing so, also inform these two interrelated touchstones." (*Id.* at 307 [internal quotation marks and citations omitted].)

The "primary purpose" in *John* "of the laboratory examination on the gun swabs [to identify the defendant as the possessor of the gun] could not have been lost on the . . . analysts, as the laboratory reports contain the police request for examination of the gun swabs on the basis that the 'perp' handled the gun and repeatedly identify the samples as 'gun swabs.' " (*John* at 308.) Thus, to the extent that the primary purpose of the DNA reports in *John* was to accuse the defendant of the crime, they constituted testimonial hearsay and were inadmissible absent the requisite witness (subd [4] [b] [ii]).

John noted, however, that even if the primary purpose of a DNA laboratory report were to create evidence against a known individual, portions of the report describing what took place before the "raw data" from electrophoresis was forwarded for expert analysis were not testimonial hearsay (subd [4] [b] [i]). Those preliminary steps are so routine that they are not considered accusatory, even if the suspect is known. (*Id.* at 313 [in the *John* case "any hypothetical missteps of the analysts in the multiple stages preliminary to the DNA typing at the electrophoresis stage would result in either no DNA profile or an incomplete DNA profile, or one readily inconsistent with a single source 16 loci profile"].)

Following *John's* "primary purpose" rationale, if the primary purpose of a DNA report is not to accuse a person of an offense, the DNA report would not be testimonial. Thus, for example, in *People v Meekins* (10 NY3d 136 [2008]), decided before *John*, a rape kit DNA sample was analyzed before any individual was a suspect. A report of the result, including a profile later found to match defendant's, was not testimonial, as the testing was not conducted to provide a result accusing a known individual. (*See Meekins* at 158-161; *see generally People v Pealer*, 20 NY3d 447 [2013] [primary purpose of calibration and maintenance of breathalyzer machine was not to incriminate any particular individual or prove an element of a crime]; *People v Brown*, 13 NY3d 332 [2009] [expert witness drew her conclusions from raw DNA data developed before the defendant was a suspect].)

Parenthetically, it should be noted that in *Williams v Illinois* (567 US 50 [2012]), which was decided by a plurality of four judges, the remaining five justices refused to subscribe to the "primary purpose" test.