1.13. Court Reconsideration of an Evidence Ruling

(1) Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial.

(2) Except as provided in subdivisions three and four, in order to promote the efficient and orderly adjudication of cases in courts of coordinate jurisdiction, a judge should not ordinarily reconsider, disturb, or overrule an order of another judge of coordinate jurisdiction in the same proceeding.

(3) When it becomes necessary in the course of a trial to substitute a judge for the judge who was presiding over the trial, the substitute judge may revisit de novo an evidentiary ruling of the former presiding judge and issue a different ruling absent a showing of undue prejudice to a party. A mid-trial reversal in a criminal proceeding of an evidentiary ruling that impedes the defense strategy, for example, may result in undue prejudice to the defendant.

(4) On a retrial, a court may reconsider evidentiary rulings made in a prior trial.

Note

Subdivision (1) recites a rule set forth in *People v Cummings* (31 NY3d 204, 208 [2018]; *see People v Gonzalez*, 8 AD3d 210, 210-211 [1st Dept 2004] ["The court's midtrial offer of a more favorable *Sandoval* ruling did not cause any prejudice to defendant"]).

Subdivision (2) is an outgrowth of the "law of the case" doctrine, "a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion but does not restrict its authority" (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks and citation omitted]). Its purpose is "to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*id.* at 504). Thus, the Court "recognized as much in *Matter of Dondi v Jones* (40 NY2d 8, 15 [1976]), when it cautioned that 'a court should not ordinarily reconsider, disturb or overrule an

order in the same action of another court of co-ordinate jurisdiction' " (*Evans*, 94 NY2d at 504). There are, however, exceptions as set forth in subdivisions (3) and (4).

Subdivision (3) recites a rule also drawn from the holding in *Cummings*:

> "Where, as here, the evidentiary ruling [with respect to an 'excited utterance'] was reversed [by the substitute judge] before the jury was empaneled, absent a showing of prejudice resulting from, for example, a mid-trial reversal of an evidentiary ruling that impedes the defense strategy, we cannot say that an abuse of discretion occurred" (31 NY3d at 209).

Thus, *Cummings* treats a substitute judge's authority to revisit an evidentiary ruling as being the same as the judge who originally made the ruling. As stated by the Court:

> "The decision to admit hearsay as an excited utterance is an evidentiary decision, 'left to the sound judgment of the trial court,' and thus may be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling" (*Cummings*, 31 NY3d at 208 [citations omitted]).

Subdivision (4) is drawn from various decisional law rulings (*see Cummings*, 31 NY3d at 208 ["On retrial, evidentiary rulings may be reconsidered"]; *Evans*, 94 NY2d at 500-501 [a *Sandoval* ruling may be revisited by the successor judge presiding over the retrial]; *People v Nieves*, 67 NY2d 125, 136-137 [1986] [noting an "excited utterance" decision at the first trial may be revisited at a retrial]; *People v Malizia*, 62 NY2d 755, 758 [1984] ["Evidentiary rulings made at one trial, however, are normally not binding in a subsequent trial"]).

Not all rulings on the admission of evidence at a trial are, however, necessarily evidentiary within the meaning of this rule. In addition to noting that on retrial "evidentiary rulings may be reconsidered," *Cummings* added that "orders determining the result of a suppression hearing generally cannot" (*Cummings*, 31 NY3d at 208; *see Nieves*, 67 NY2d at 137 n 5 ["In contrast (to evidentiary rulings), the findings made pursuant to a hearing on an article 710 motion are ordinarily binding at any retrials of the same case, and where an appellate court concludes that the record of the hearing reveals that evidence must be suppressed, the People are not entitled to a new hearing to try to sustain a theory which they could have, but failed to raise at the first trial"]). By statutory law, however, as *Nieves* noted, the defense may be permitted to reopen a

suppression hearing on a showing of newly discovered evidence (CPL 710.40 [4]).

In *Evans* (94 NY2d at 504 [citations omitted]), the Court of Appeals cited with approval Appellate Division decisions holding that the following types of rulings may not be reconsidered on retrial: "*People v Leon*, 264 AD2d 784 [1999] [barring reconsideration of request for a *Mapp* hearing]; *People v Rodriguez*, 244 AD2d 364 [1997] [barring reconsideration of motion to dismiss indictment]; *People v Guin*, 243 AD2d 649 [1997] [barring reinspection of Grand Jury minutes]; *People v Broome*, 151 AD2d 995 [1989] [barring *Wade* hearing redetermination])."