THE COURT OF APPEALS' ROLE IN THE DEVELOPMENT OF NEW YORK'S RULES OF EVIDENCE

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I. INTRODUCTION

New York's law of evidence continues to be composed of hundreds of common law rules and numerous statutory enactments, a scheme that was initially adopted in 1777 in New York's first constitution.[1] The former were created and constantly refashioned by the judiciary "to protect the integrity of the of the truth-finding process"[2] and "to meet the demands of modern litigation."[3] The latter, primarily found in article 45 of the Civil Practice and Law Rules (CPLR), applicable in both civil and criminal proceedings, and article 60 of the Criminal Procedure Law (CPL), applicable in criminal proceedings, are the result of recognition of the slow pace of judicial reform and that the legislature is responsive to the need for a specific rule to govern a recognized problem and ameliorate the unintended adverse consequences of a judicial decision.[4] This scheme is unlike the law of evidence in the federal courts and in forty-five other state courts where the rules of evidence are statutorily codified in a systematic, comprehensive, and authoritative single statement of the rules of evidence.[5] An observation made almost sixty years ago is still valid: "The product of piecemeal and haphazard judicial and legislative activity, the New York law of evidence is a patchwork of complicated

[1] New York's first constitution provided "such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the colony at the breaking out of the Revolution in 1775, constituted the law of the State, subject to alteration by the Legislature." N.Y. CONST. of Apr. 20, 1777, *quoted in* WILLIAM ALLEN BUTLER, THE REVISION AND THE REVISERS 4–5 (New York, Banks & Bros. 1889). This dual system as applied to the law of evidence was reflected in the long-running debate in the 1800s involving efforts to enact a statute setting forth the rules of evidence, which were unsuccessful. *See* Edith L. Fisch, *Study of the Feasibility of Formulating a Code of Evidence for the State of New York*, *in* REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK FOR THE JUDICIAL YEAR JULY 1, 1965 THROUGH JUNE 30, 1966, at 182, 190–92 (1967).

[2] People v. Conyers, 420 N.E.2d 933, 936 (N.Y. 1981).

[3] Fleury v. Edwards, 200 N.E.2d 550, 554 (N.Y. 1964) (Fuld, J., concurring).

[4] *See* Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 687–94, 697–703 (1992).

[5] *See* 21 CHARLES ALAN WRIGHT & ARTHUR A. MILLER, FED. PRAC. & PROC. EVID. § 5009 (Kenneth W. Graham, Jr. ed., 2d ed. 2024). The federal codification is the Federal Rules of Evidence, and the state codifications follow in large part the Federal Rules of Evidence, with differences attributable to specific state interests. *Id.*

and confusing rules, riddled with exceptions and extremely difficult to apply."[6]

Overseeing New York's scheme is the Court of Appeals, long viewed both in New York and nationally as a leader in the development of evidence rules.[7] These rules are then implemented by the appellate division departments with further review of those decisions by the court.[8] This is a workable common law regime.

Of note, the Court of Appeals has gone its own way. As a commentator has observed:

> The New York approach to evidence in its broadest sense is significantly more restrictive than the federal approach with respect to expert witness testimony, spousal privilege, character evidence, the statements for medical treatment exception, defining unavailability for hearsay purposes, admitting prior sex crimes in sexual abuse trials as substantive evidence of guilt, the residual exception to hearsay, and . . . prior inconsistent statements.[9]

What can one now expect from the Wilson Court[10] going forward? How will New York's evidentiary scheme fare? Will the appellate division departments be given sufficient guidance? Will they appropriately implement Court of Appeals decisions? No crystal ball here. But one can start to see some direction the court is headed by looking at recent evidence decisions issued by the court and the appellate division departments in the beginning of Chief Judge Rowan Wilson's tenure. This Article will explore some of those decisions with that thought in mind. The decisions will be discussed under traditional evidence categories.

[6] Fisch, *supra* note 1, at 182.

[7] *See* Steven Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals' Radical Re-evaluation of Hearsay*, 21 CARDOZO L. REV. 211, 252 (1999) ("The New York Court of Appeals has long been a leader in advancing the law through common law development. The court has refined and modernized the law of evidence . . . .").

[8] *See id.* at 230–33.

[9] Steven V. DeBraccio, *That's (Not) What She Said: The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials,* 78 ALB. L. REV. 269, 276–78 (2015).

[10] Rowan D. Wilson is the Chief Judge of the Court of Appeals. *Honorable Rowan D. Wilson*, CT. OF APPEALS, STATE OF N.Y., https://www.nycourts.gov/ctapps/jwilson.htm [https://perma.cc/57A5-8QWQ]. The New York State Senate confirmed his nomination by Governor Kathy Hochul to be Chief Judge on April 18, 2023. *Id.*

II. JUDICIAL CONTROL OF THE TRIAL

A. Control of the Courtroom

New York trial judges are vested with inherent powers which permit them to do all things reasonably necessary for the fair administration of justice.[11] This judicial power has been recognized in New York from the earliest times.[12] Central to this power is the power to oversee and supervise the conduct of civil and criminal trials.[13] As part of this charge, the Court of Appeals has expressly recognized that trial judges have the authority "to control conduct and decorum in the courtroom" by directing actions to implement that control.[14]

Two Wilson Court decisions addressed the exercise of this authority. They both held that this authority is of a discretionary nature, and permits *sui generis* type directives.[15]

At issue in *People v. Dunton* was whether the trial judge's removal of the defendant from the courtroom during the announcement of the verdict and the polling of the jury was a proper exercise of discretion because, given the defendant's history of violent outbursts both in and out of the courthouse during trial, the judge had reason to believe the defendant posed an imminent risk of harm.[16] The defendant had been charged in a seven-count indictment, the top count being attempted murder.[17] The first five counts were announced as guilty, and at that point, the transcript of the trial reads: "The defendant laugh[ed]."[18] When the sixth count also came back guilty, the transcript reflected the following:

> "THE DEFENDANT: You thought that was gonna break me? I thought about sentencing. I don't care about sentencing. You think you all broke me? Y'all didn't break me.
>
> THE COURT: Please control your client.

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11 Feldsberg v. Nitschke, 404 N.E.2d 1293, 1296 (N.Y. 1980); Gabrelian v. Gabrelian, 489 N.Y.S.2d 914, 918 (App. Div. 2d Dep't 1985).

12 *See* Yates v. Lansing, 9 Johns. 395, 398–99 (N.Y. 1811).

13 *See* Bernstein v. Bodean, 426 N.E.2d 741, 745 (N.Y. 1981) ("[T]he trial judge [has] . . . responsibility to supervise and to oversee the conduct of the trial."); Campbell v. Rogers & Wells, 631 N.Y.S.2d 6, 9 (App. Div. 2d Dep't 1995) ("[A] trial court has broad authority to control the courtroom . . . .").

14 People v. Nelson, 53 N.E.3d 691, 696, 698 (N.Y. 2016).

15 *See* People v. Dunton, 241 N.E.3d 1239, 1240, 1244 (N.Y. 2024); People v. Ramirez, 234 N.E.3d 1043, 1046, 1048–49 (N.Y. 2024).

16 *See Dunton*, 241 N.E.3d at 1243–45.

17 *See id.* at 1246.

18 *Id.* at 1250 (Aarons, J., dissenting).

> THE DEFENDANT: I'm good. You all didn't break me. Give me the whole 50 years. I don't give a f*** about nothing. It's over. It is what it is. All 12 of y'all can sit there and say you all did the right thing. That's what I want y'all to know. Live with that. Live with that.
>
> THE COURT: Officers, take charge.
>
> THE DEFENDANT: Live with that. It is what it is. I ain't gonna walk out of here. What y'all done ain't gonna break me. You ain't gonna see me cry. I'm walking out the same way I came in, immaculate. Suck my d***."[19]

Defendant was then removed from the courtroom, and at the direction of the trial judge the jury foreperson announced the jury's finding of guilty on the seventh count.[20] When the jury was then discharged, the trial judge stated for the record:

> "THE COURT: . . . Mr. Dunton began to act out. He became quite verbally abusive, began screaming out profanity. It became upsetting. I saw the jurors were becoming upset. I allowed it to go on for a few seconds. I tolerated it for a while. Eventually, I did ask the court officers to take charge and have him removed from the courtroom. In hindsight, it appears the right decision to have him handcuffed in the courtroom."[21]

The court ruled 6-1, in an opinion written by Judge Jenny Rivera, that the trial judge's removal of the defendant from the courtroom was a provident exercise of discretion.[22] It had no difficulty in concluding that the trial judge, based on concerns for the safety of the jury and all those present in the courtroom that were present before the defendant's outburst, and the tension now present when the jury reached its verdict, was warranted in removing the defendant from the courtroom.[23] In this regard, the defendant's right to be present during the reading of the verdict and the polling of the jury was not violated.[24]

The substantial issue for the majority and the dissenter was whether the removal was violative of the defendant's right to be present because he was not given prior to his removal any warning that he would be removed from the courtroom based on disorderly or

[19] *Id.* at 1250–51.
[20] *Id.* at 1251.
[21] *Id.* at 1243 (majority opinion).
[22] *See id.* at 1240. Appellate Division Justices Tracey Bannister and Sharon Aarons were designated to participate on the appeal pursuant to article VI, section 2 of the New York Constitution, replacing Judges Michael Garcia and Caitlin Halligan. *Id.* at 1248 n.*, 1257 n.*.
[23] *See id.* at 1245–46.
[24] *Id.* at 1240.

disruptive conduct.[25] The majority recognized that ordinarily a defendant may be removed from the courtroom due to disruptive behavior only if the defendant was warned that engaging in disruptive conduct would result in his removal from the courtroom, a warning that is constitutionally[26] and statutorily[27] required. However, the majority concluded that a judge "may dispense with the constitutional and statutory warnings when it is impracticable to give them."[28] Here, the majority recognized that under the circumstances, "[a]ny delay in defendant's removal would have permitted further disruption of the proceedings and risked physical danger to the public, jurors, judge, court officers and staff and the lawyers."[29] Quoting the trial judge, "things get ugly very fast in a [quite small] courtroom."[30] The circumstances justified the trial judge's reasonable on-the-spot decision that the judge needed to remove the defendant swiftly to ensure the safety of everyone in the courtroom.[31] In short, the giving of a warning before removal was impractical and thus the trial judge's removal of the defendant from the courtroom without any advance warning was proper.[32]

Justice Aarons's dissent expressed strong disagreement with the majority's conclusion. In her view, the majority adopted a watered-down impracticability standard that would weaken the constitutional and statutory right of a defendant to be present at all stages of the trial.[33] Any claim of impracticability must be based on violent behavior in the courtroom, which was absent here.[34]

At issue in *People v. Ramirez*,[35] a prosecution for aggravated vehicular homicide and related charges, was whether the trial judge properly denied the defendant's motion for a mistrial made during the prosecution's opening statement, after defense counsel observed the decedent's surviving spouse crying in the courtroom.[36] While there can be no doubt that a trial judge's inherent power to control decorum in the courtroom extends to controlling the conduct of

[25] *See id.* at 1246–48.
[26] *Id.* at 1246; *see* Illinois v. Allen, 397 U.S. 337, 343 (1970) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[27] N.Y. C.P.L. 260.20 (McKinney 2025).
[28] *Dunton*, 241 N.E.3d at 1245 (citing People v. Palermo, 298 N.E.2d 61, 63 (N.Y. 1973)).
[29] *Dunton*, 241 N.E.3d at 1246.
[30] *Id.*
[31] *See id.* at 1246–47.
[32] *See id.* at 1246–47.
[33] *See id.* at 1256–57 (Aarons, J., dissenting) (citing People v. Parker, 440 N.E.2d 1313, 1315–16 (N.Y. 1982); People v. Epps, 334 N.E.2d 566, 570 (N.Y. 1975)).
[34] *See Dunton*, 241 N.E.3d at 1255–57 (citing Illinois v. Allen, 397 U.S. 337, 343 (1970)).
[35] People v. Ramirez, 234 N.E.3d 1043 (N.Y. 2024).
[36] *Id.* at 1046–47.

spectators,[37] there is a lack of clarity as to when spectator conduct can be the subject of judicial control.[38] An important issue in *Ramirez* was what, if anything, a trial judge can do when a spectator shows emotion in the courtroom.[39]

The court in *Ramirez* unanimously ruled in an opinion authored by Judge Anthony Cannataro that "there is no requirement that a trial judge keep courtroom spectators from displaying any emotion whatsoever absent prejudice to a party."[40] Here, there was no showing of prejudice as, according to the trial judge, the crying was "inconspicuous" and there was no indication that the jury heard the crying.[41] Of note, the court suggested, as an alternative to granting a mistrial if there were some showing of prejudice, that the trial judge give a curative instruction and have the party who may be perceived as benefitting from the showing of emotion speak to the spectator to ensure that the behavior is not repeated.[42] Surprisingly, perhaps, the court did not suggest that the trial judge talk either jointly or separately with the jurors.[43]

Both decisions show the court is taking a pragmatic approach to a trial judge's exercise of discretion in making courtroom decisions. That approach takes into account the practicalities of the situation and any significant prejudice to a defendant's constitutional right. There is nothing that suggests the court will adopt a different approach going forward.

B. Examination of Witnesses

Although the parties have the basic responsibility to present evidence,[44] the Court of Appeals has stated that "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process."[45] May a trial judge take an active role by the judge calling a witness? In *People v. Arnold*, the Court of Appeals held there

[37] *See* People v. Nelson, 53 N.E.3d 691, 696 (N.Y. 2016).
[38] *Id.* at 701–02 (Garcia, J., concurring) (first citing United States v. Farmer, 583 F.3d 131, 149 (2d Cir. 2009); and then quoting Carey v. Musladin, 549 U.S. 70, 76 (2006)).
[39] *Ramirez*, 234 N.E.3d at 1049.
[40] *Id.*
[41] *Id.* (citing People v. Batticks, 159 N.E.3d 758 (N.Y. 2020)). The decision does not state the seating arrangements in the courtroom, nor the sightlines the jury would have vis-à-vis spectator seating. *See Ramirez*, 234 N.E.3d 1043.
[42] *See Ramirez*, 234 N.E.3d at 1049.
[43] *See id.*
[44] *See* People v. Arnold, 772 N.E.2d 1140, 1145 (N.Y. 2002).
[45] People v. Jamison, 393 N.E.2d 467, 473 (N.Y. 1979).

is no bar to a trial judge calling a witness.[46] However, whether or not to call witness is a matter of judicial discretion, rather than a duty, and the discretion should be exercised, the court stressed, in those "unusual circumstances" in which it is necessary in order to get at the truth of the matter in issue.[47]

The court did not elaborate on the issue of what constitutes unusual circumstances. Instead, the court clearly recognized it could not enumerate, and would not, what those circumstances would be, and left it for the lower courts to make that determination with the court then able to review those determinations.[48] While *Arnold* is not a Wilson Court decision, it does show an approach *Dunton* and *Ramirez* strongly suggest it would follow in future cases—set sufficiently detailed guidelines based on policy and let the appellate division departments fill in the gaps, with the court being able to correct any outlier decisions.

A good example of this approach is the trial court's calling of a witness in *Jehrica K. v. Erin J.*[49] In this proceeding pursuant to Family Court Act article 6 to modify a prior order of custody and visitation, the father alleged that, among other things, the mother's youngest child—a newborn baby—had passed away due to an unsafe sleeping position and that she was under investigation by Child Protective Services.[50] At a hearing, the Family Court judge called as her own witness the Department of Social Services counselor who investigated the circumstances attending the child's death and directly examined the witness regarding those circumstances.[51] On appeal from the Family Court judge's decision awarding primary physical custody to the father and the concomitant reduction in the mother's parenting time, the mother argued the trial judge acted improperly, exceeding her judicial role in calling the witness.[52] While the Third Department initially noted the argument was unpreserved for appellate review, it nonetheless found no reversible error was present because all parties had reviewed the report prepared by Child Protective Services regarding the child's death and were given the opportunity to cross-examine the witness.[53]

[46] *See Arnold*, 772 N.E.2d at 1145.
[47] *Id.*; GUIDE TO N.Y. EVID. r. 1.11 (Court's Power to Call or Examine Witness).
[48] *See Arnold*, 772 N.E.2d at 1145.
[49] *See* Jehrica K. v. Erin J., 203 N.Y.S.3d 441 (App. Div. 3d Dep't 2024).
[50] *Id.* at 443–44.
[51] *See id.* at 446.
[52] *Id.* at 444, 446.
[53] *Id.* at 446.

The Third Department's decision did not stop with that conclusion. Rather, the court had some harsh words regarding the Family Court judge's conduct.[54] It criticized the judge for not explaining why the calling of the counselor was necessary and for not inviting consent from the parties regarding her decision.[55] The court even suggested that "unusual" circumstances were not present that would have permitted the calling of the witness.[56]

The Third Department followed *Arnold*'s teaching.[57] The takeaway from its decision is clear: judicial calling of witnesses is something that should occur only in the rarest of situations, if ever. *Arnold* was fleshed out by the court in the thoughtful opinion authored by Justice Michael Lynch.

C. Presentation of Evidence

The inherent authority of a trial judge to supervise and oversee the conduct of a trial includes, as set forth by the Court of Appeals, the authority to exercise reasonable control over the mode and order of presenting evidence and examining witnesses.[58] This authority in turn extends to the trial judge deciding all questions regarding the admissibility of evidence upon objections raised by a party under a rule of evidence.[59] Does this authority empower a trial judge to exclude evidence that is not barred by a rule of evidence? New York's common law, as developed by the court, has long recognized that a trial judge has broad discretionary authority that sweeps across almost all of the rules of evidence recognized in New York, thereby providing a mechanism for excluding evidence that otherwise would be admissible under another rule.[60]

In *People v. Fisher*,[61] the Third Department applied an aspect of this common law rule to uphold the exclusion of cumulative evidence.[62] The defendant was charged with the crime of assault in

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54 *See id.*
55 *See id.*
56 *Id.*
57 *Id.* (quoting People v. Arnold, 772 N.E.2d 1140, 1145 (N.Y. 2002)).
58 *See* Feldsberg v. Nitschke, 404 N.E.2d 1293, 1297 (N.Y. 1980) ("[T]he order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court."); *see also* People v. Parks, 359 N.E.2d 358, 368 (N.Y. 1976) ("The order of the presentation of witnesses is generally left to the parties themselves, subject to the general supervisory discretion of the court.").
59 *See* GUIDE TO N.Y. EVID. r. 1.09(1) (Court Determination of Preliminary Questions).
60 *See* GUIDE TO N.Y. EVID. r. 4.06 (Exclusion of Relevant Evidence).
61 People v. Fisher, 201 N.Y.S.3d 539 (App. Div. 3d Dep't 2023).
62 *See id.* at 543.

the second degree.[63] At trial, an otolaryngologist testified that he treated the victim, and that he had several facial fractures, the likely result of several impacts to his face.[64] The defendant claimed error not in the admission of this testimony, but in admission of the testimony of a second otolaryngologist.[65] The trial court limited the testimony of the second otolaryngologist, noting that it would be impermissibly cumulative of the testimony of the first otolaryngologist as to the issue of cause of the victims' facial fractures.[66] However, the trial court otherwise allowed the second otolaryngologist's testimony.[67]

The Third Department held that no error was present.[68] In a thoughtful opinion authored by Justice Molly Reynolds-Fitzgerald, the court initially noted that a trial court can exclude cumulative evidence, even the cumulative testimony of an expert, as here, to prevent unfair prejudice to the adverse party that would be created by which it called "bolstering."[69] Here, there was no impermissible bolstering because the thrust of his testimony was the surgery that was performed on the victim's orbital floor due to victim's facial anatomy shifting to the sinus.[70] Any overlapping of his testimony was minor and was not prejudicial.[71]

Fisher is a notable decision as it clearly indicates that evidence can be excluded as cumulative by reason of the creation of unfair prejudice, as well as the traditional basis of unduly prolonging the trial.[72] It follows Court of Appeals directives.[73]

D. Sua Sponte *Objection*

The traditional role of the parties at a trial is to make objections to offered evidence in order to preclude its admission.[74] Does this preclude a trial judge from *sua sponte* ruling that offered evidence is

[63] *Id.* at 541.
[64] *Id.* at 542.
[65] *See id.* at 544.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *See id.*
[70] *Id.* at 542, 544.
[71] *See id.* at 544.
[72] *See id.*
[73] *See* People v. McDowell, 172 N.E.2d 279, 280 (N.Y. 1961) ("The discretion of the trial court . . . does not encompass a refusal to admit any such evidence [bias], but rather permits it to limit the quantity thereof.").
[74] 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 1.4 (2d ed. 2011).

inadmissible, that a question in form or substance is not proper, or that a response to a question is not proper and is struck? The Court of Appeals has not directly addressed this issue other than referencing the trial judge's discretion to control the trial.[75]

In *People v. Nellis*,[76] the Third Department addressed this issue and in a comprehensive opinion written by Justice Andrew Ceresia, an experienced criminal trial judge, made clear that a trial judge has an obligation to make sure that certain fundamental rules of evidence are followed, even if one of the parties' attorneys does not make an objection.[77]

The defendant was charged with the crimes of murder and criminal possession of a weapon arising from the death of his girlfriend on September 25, 2018.[78] She had left her job at a convenience store heading to her residence, but she never made it home.[79] Her body was found on October 2, 2018.[80] Prior to trial, the trial judge ruled on the People's combined *Sandoval*[81] and *Molineux*[82] motion that the People could introduce evidence of one bad act on their case-in-chief and could cross-examine the defendant in connection with three of his prior convictions.[83] During their direct case, however, the People elicited testimony from three different witnesses that the defendant had admitted to them on September 25, 2018, or within days afterward, that he had shot someone off a motorcycle.[84] Furthermore, while cross-examining the defendant, the prosecutor inquired into this motorcycle incident as well as another shooting incident that occurred a decade earlier.[85] While the trial judge had permitted cross-examination as to this crime, the prosecutor asked, "[I]s this how you handle your confrontations, you grab a gun and just fire away?"[86] Defense counsel made no objection to the prosecutor's presentation of this evidence.[87]

On appeal from the judgment of conviction on the crimes charged, the court initially commented that the prosecutor was clearly seeking

75 *See McDowell*, 172 N.E.2d at 280.
76 People v. Nellis, 191 N.Y.S.3d 196 (App. Div. 3d Dep't 2023).
77 *Id.* at 202–03.
78 *Id.* at 198.
79 *Id.*
80 *Id.*
81 *See generally* People v. Sandoval, 314 N.E.2d 413 (N.Y. 1974).
82 *See generally* People v. Molineux, 61 N.E. 286 (N.Y. 1901).
83 *Nellis*, 191 N.Y.S.3d at 201.
84 *Id.*
85 *Id.*
86 *Id.*
87 *See id.* at 203.

to create the impression that defendant had a propensity for acting violently when angry which led to his shooting of the victim, and that the prosecutor's actions were contrary to New York's firmly and fundamentally established character evidence rule that barred such evidence and questioning.[88] Reversible error was readily found.[89]

Of greater significance is that the court also was critical of the trial judge, stating that "County Court made no effort to intervene or otherwise attempt to minimize or alleviate the prejudice being caused to defendant."[90] In this regard, the court stated the trial judge must have been aware that the evidence introduced by the prosecutor on the People's direct case and upon cross-examination of the defendant fell outside the scope of the pre-trial ruling, and even bluntly "should have been aware of the inappropriate propensity use of the evidence being undertaken by the prosecutor."[91]

In the court's view, the trial judge should have interjected herself into the trial once it became apparent of the violation of New York's venerable character evidence rule.[92] Corrective actions were required, such as the striking of the testimony and/or giving of proper cautionary instructions, and perhaps even granting a mistrial.[93] The court then added that when it appears that clearly inadmissible evidence is being offered, and no objection is raised, there might be a strategic reason as to why the adverse party's attorney did not object, which may counsel against the trial judge raising an objection.[94] In such a situation, perhaps the trial judge should have the attorneys approach the bench and inquire as to the failure to object. Here, however, there was no need to do so as the improper objective of the prosecutor was plainly obvious and there was no legitimate strategy reason not to object.[95]

Nellis is an excellent example that the New York courts in the Wilson Court era are continuing to fashion workable rules to confront what the courts see as problematic trial occurrences, or in the case of *Nellis*, non-occurrences. The lodestar, most importantly, continues to be the assurance that trials are conducted fairly.

[88] *See id.* at 202.
[89] *Nellis*, 191 N.Y.S.3d at 203.
[90] *Id.* at 202.
[91] *Id.*
[92] *See id.*
[93] *See id.*
[94] *Id.*
[95] *Id.*

II. EVIDENTIARY SHORTCUTS

A. Presumptions

Workers' Compensation Law (WCL) section 10(1) provides that an injury to a worker is only compensable under the WCL if it arose out of and in the course of a worker's employment.[96] WCL section 21(1) sets forth a rebuttable presumption, which provides that when an injury arises in the course of a worker's employment, the injury is presumed to arise out of that worker's employment, and therefore is compensable absent substantial evidence to the contrary.[97] In *Timperio v. Bronx-Lebanon Hospital*,[98] the Court of Appeals addressed the issue of the evidentiary showing that must be made to rebut the presumption.[99]

In *Timperio*, the claimant was shot at the hospital where he was working.[100] A former employee of the hospital entered the hospital wearing a doctor's white medical coat under which he had a loaded AR-15 rifle.[101] He proceeded to the area where the claimant was working, and opened fire, killing a doctor and wounding five members of the medical staff, including the claimant.[102] The shooter and claimant were strangers prior to the shooting as they had never worked at the hospital at the same time, and had no other prior contact.[103]

The hospital notified the Worker's Compensation Board (WCB) of the claimant's injuries and requested an administrative decision from the WCB to establish a claim under the WCL.[104] In a proceeding before a Worker's Compensation Law Judge (WCLJ), the claimant argued that no worker's compensation claim should be made because the shooting was not work-related.[105] The WCLJ determined the claimant's injuries were compensable under the WCL, and the claimant appealed to the WCB, which affirmed the decision.[106] The Third Department reversed, and held the presumption was rebutted

[96] N.Y. WORKERS' COMP. LAW § 10(1) (McKinney 2025).
[97] *Id.* § 21(1).
[98] Timperio v. Bronx-Lebanon Hosp., 245 N.E.3d 1103 (N.Y. 2024).
[99] *Id.* at 1104.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1104.
[104] *Id.*
[105] *Id.*
[106] *Id.*

due to the lack of any evidence establishing any employment-related animus.[107]

The Court of Appeals reversed.[108] In an opinion for a unanimous court authored by Judge Caitlin Halligan, it was initially noted that as it was undisputed that the shooting occurred in the regular course of the claimant's employment, the presumption was triggered.[109] Thus, there was no need for the employer to make an affirmative factual showing that the shooting arose "'out of' the employment."[110] The court then held that as it was also undisputed that there was no evidence in the record "of the motivation for the assault or any indication of a prior relationship between" the claimant and the shooter, the presumption was not rebutted.[111] Thus, the WCB determination was reinstated.[112]

In so holding, the court clearly was ruling that to rebut the presumption when an intentional assault is involved, there must be proof that the assault was motivated by purely personal animosity. The court's interpretation of the statutory presumption was based on its view that its ruling was consistent with the purpose of the WCL, which is to "'protect [] work[ers] and their dependents from want in case of injury' on the job."[113]

B. Judicial Notice of Law

CPLR 4511(b) governs the taking of judicial notice of four types of laws: (1) private acts and resolutions of the United States Congress; (2) private acts and resolutions of the New York State Legislature; (3) ordinances and regulations of officers, agencies or governmental subdivisions of the State of New York or of the United States; and (4) the laws of foreign countries or their political subdivisions.[114] Where judicial notice of one of these sets of laws is requested by a party, and the party gives sufficient information to the court to comply with the request, the court must take judicial notice of the requested law.[115]

107 Timperio v. Bronx-Lebanon Hosp., 163 N.Y.S.3d 302, 308 (App. Div. 3d Dep't 2022) (first quoting McMillan v. Dodsworth, 679 N.Y.S.2d 722, 722 (App. Div. 3d Dep't 1998); then citing Wadsworth v. K-Mart Corp., 898 N.Y.S.2d 338, 338 (App. Div. 3d Dep't 2010); and then citing Mintiks v. Metro. Opera Ass'n, 550 N.Y.S.2d 143, 145 (App. Div. 3d Dep't 1990)).

108 *Timperio*, 245 N.E.3d at 1106.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* (alteration in original) (quoting Johannesen v. N.Y.C. Dep't of Hous. Pres. & Dev., 638 N.E.2d 981, 983 (N.Y. 1994)).

114 N.Y. C.P.L.R. 4511(b) (McKinney 2025).

115 *Id.*

In *Eccles v. Shamrock Capital Advisors, LLC*,[116] the Court of Appeals addressed the "sufficiency" requirement set forth in CPLR 4511(b).[117]

Eccles arose out of a merger between FanDuel Ltd. (FanDuel), a Scottish company, and the United States assets of nonparty Paddy Power Betfair plc, a British company.[118] The plaintiffs, a group of over 100 common shareholders and founding members of FanDuel, commenced an action alleging a breach of fiduciary duty under New York law which centered around the valuation of merger consideration by the defendant directors and their legal duties to certain shareholders.[119] Upon a choice-of-law analysis, the court held Scots law, the law of the defendant corporation's place of incorporation, applied.[120]

The court then turned to the contents of the Scots law.[121] It noted that CPLR 4511(b) gives courts "substantial flexibility" not only in determining whether to take judicial notice, but also in "ascertaining its content."[122] The court emphasized the construction of foreign law "as a legal issue, rather than a factual one," which is appropriate for summary resolution.[123] Accordingly, the court indicated that a trial judge "should consider the merits of expert affidavits and other submitted materials" from all of the parties and make a decision as to their sufficiency in determining the contents of the foreign law in issue.[124] Of note, the court added that the trial judge may choose to conduct a hearing on the issue.[125] However the trial judge proceeds, the court cautioned that the judge "should always endeavor to provide detailed findings as to what the law of the foreign jurisdiction is and how it applies to the case at hand in order to facilitate appellate review."[126]

Lastly, the court held that from the "voluminous materials" submitted to the trial judge, including expert affidavits, relevant statutes, and numerous decisions, all of which were written in English and derived from English common law principles, sufficient

[116] Eccles v. Shamrock Cap. Advisors, LLC, 245 N.E.3d 1110 (N.Y. 2024).
[117] *Id.* at 1125.
[118] *Id.* at 1115–16.
[119] *Id.* at 1118.
[120] *Id.* at 1123–24.
[121] *Id.* at 1124.
[122] *Id.*
[123] *Id.* at 1124–25 (quoting Sea Trade Mar. Corp. v. Coutsodontis, 978 N.Y.S.2d 115, 117 (App. Div. 1st Dep't 2013)).
[124] *Eccles*, 245 N.E.3d at 1125.
[125] *Id.*
[126] *Id.*

information was present to take notice of the applicable Scots law.[127] Applying this law, the court concluded plaintiff had adequately pleaded, under New York's liberal pleading standard, a cognizable breach of fiduciary duty claim under Scots law.[128]

Judge Madeline Singas' opinion for a unanimous court shows the Wilson Court is willing and capable of filling the gaps in evidentiary statutes. Most significantly, it will do so in a manner providing clear guidance to the bench and bar.

C. Judicial Notice of Facts

CPLR 4532-b creates "a rebuttable presumption that a digital mapping presentation," such as MapQuest or "Google Maps, is a fair and accurate depiction of images, locations, distances, travel times and similar information in the presentation."[129] If the presumption is not rebutted, the court, upon request of a party, must take judicial notice of the facts presented, admitting into evidence the presentation.[130] The basis of this combined presumption/judicial notice of facts standard is the inherent reliability of the digital mapping process.[131]

Governor Andrew Cuomo's gubernatorial approval message noted the need for this evidentiary statute:

> Current evidentiary practice in New York requires a party seeking to introduce an image, map, location, distance, calculation, or other information gleaned from Google Maps or similar computer application to first, establish a foundation for the use of such information; next, establish the validity of the computer application; and finally, establish a chain of custody for the evidence.[132]

The new statute streamlined the admission process without any sacrifice of reliability. It accomplished something that the Court of Appeals could not realistically achieve under the common law.[133]

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[127] *Id.*

[128] *Id.* at 1128. Of note, this determination of the sufficiency of the plaintiff's pleading was made upon a complaint that alleged a breach of New York's fiduciary law owed by directors. *Id.* at 1127.

[129] Vincent C. Alexander, *Practice Commentaries*, *in* N.Y. C.P.L.R. 4532-b (McKinney 2025).

[130] *Id.*

[131] *See* Michael J. Hutter, *Streamlining the Authentication Process: Two New CPLR Amendments*, N.Y.L.J., Feb. 7, 2019, at 3, col. 3.

[132] Governor's Approval Mem. #19, Bill Jacket, N.Y. S.B. 9601, 2018 Leg., ch. 516 at 5.

[133] *See* Hutter, *supra* note 131, at 3, col. 3.

The usefulness of CPLR 4532-b in litigation was demonstrated in *Ryabaya v. City of New York.*[134] The plaintiff alleged that in March 2016 she tripped and fell on a broken and cracked curb located at 1375 Rockaway Parkway in Brooklyn.[135] She further alleged that the defendant City had received prior written notice of the defect through a Big Apple Map from 2004.[136] The City moved for summary judgment, demonstrating that it had not received prior written notice of the alleged defective condition.[137] In support, the City submitted a Google Maps image from August 2013, which showed that any defects indicated on the Big Apple Map from 2004 had been remedied by August 2013.[138] Supreme court granted the City's motion, taking judicial notice that the alleged defect has been remedied, at least as of August 2013, and the plaintiff had no proof other than the Big Apple Map to show the City had been provided with written notice of the defect.[139]

The Second Department affirmed.[140] It held that supreme court properly relied upon CPLR 4532-b in concluding that the plaintiff had not established that the City had received prior written notice of the defect alleged to exist in 2016.[141] In so holding, the Second Department emphasized that the Google Maps image, admitted under CPLR 4532-b, established that the defect alleged to have been present in 2004 had in fact been remedied by August 2013.[142]

Ryabaya applies faithfully CPLR section 4532-b and shows the usefulness of mapping services presentations, whether they consist of an image, map, location, distance, or other information being admitted under CPLR 4532-b. Expressed differently, *Ryabaya* illustrates quite well that the present scheme of evidence law being the product of common law development and statutory enactments can work well to achieve efficiencies in the litigation process without the sacrifice of reliability.

D. Spoliation of Evidence

Under New York's common law spoliation doctrine, as most recently recognized by the Court of Appeals in *Pegasus Aviation I,*

134 Ryabaya v. City of New York, 198 N.Y.S.3d 728, 730 (App. Div. 2d Dep't 2023).
135 *Id.* at 729.
136 *Id.*
137 *Id.*
138 *Id.* at 730.
139 *Id.* at 729.
140 *Id.*
141 *See id.* at 729–30.
142 *Id.* at 730.

Inc. v. Varig Logistica, S.A.,[143] a party may be sanctioned for the loss, destruction, or alteration of relevant evidence when the spoliation was done with a "culpable mental state."[144] A "culpable mental state" includes acting intentionally, negligently, or with gross negligence.[145] When the spoliation of evidence has been established, a trial judge possesses broad discretion to determine the nature of the sanction to be imposed.[146] While the Court of Appeals has not addressed a spoliation issue since *Pegasus*, the Appellate Divisions have been active in doing so, and in the process have developed a substantial spoliation jurisprudence building upon the *Pegasus* decision.[147] Two are worth noting, having been decided in the Wilson Court era.

In *Fata v. Heshel's Riverdale, LLC*, the plaintiff alleged that he was injured when he tripped on a metal drain plate in a parking garage in the defendant's building.[148] Shortly afterwards he called the building superintendent, who came to the scene.[149] On that same day, the superintendent viewed the video of the accident from the garage surveillance system, but because he took no action to preserve the video, it was automatically erased three days later.[150] The plaintiff then moved for spoliation sanctions, including the striking of the defendant's answer, or, alternatively, an adverse inference charge.[151] Supreme court as a sanction struck the answer, and the First Department affirmed.[152] The court found that as the superintendent was aware of the plaintiff's accident, he was on notice that the video might be needed for future litigation, and his failure to preserve the video constituted the intentional spoliation of evidence.[153] This

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143 Pegasus Aviation I, Inc. v. Varig Logistica S.A., 46 N.E.3d 601 (N.Y. 2015).

144 *See id.* at 602 (quoting Voom HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 330 (App. Div. 1st Dep't 2012)).

145 *See Pegasus Aviation I*, 46 N.E.3d at 602 (intentional); *see also* Bruno v. Peak Resorts, Inc., 138 N.Y.S.3d 744, 747 (App. Div. 3d Dep't 2021) (negligence); Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, 100 N.Y.S.3d 218, 219 (App. Div. 1st Dep't 2019) (gross negligence); *Voom HD Holdings LLC*, 939 N.Y.S.2d at 331 (intentional; bad faith).

146 *Pegasus*, 46 N.E.3d at 605.

147 *See* Fata v. Heskel's Riverdale, LLC, 203 N.Y.S.3d 550, 551 (App. Div. 1st Dep't 2024); Buffalo Biodiesel, Inc. v. Blue Ridge Fina., LLC, 213 N.Y.S.3d 608 (App. Div. 4th Dep't 2024).

148 *Fata*, 203 N.Y.S.3d at 551.

149 *Id.*

150 *Id.* at 551–52.

151 *See id.* at 552 (citing Voom HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 331 (App. Div. 1st Dep't 2012)). The adverse inference charge given to the jury would allow the jury to infer that the video would be unfavorable to the defendant's position because the defendant destroyed it. *See* 1A COMMITTEE ON PATTERN JURY INSTRUCTIONS, ASSOCIATION OF SUPREME COURT JUSTICES, N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 1:77 (2024).

152 *Fata*, 203 N.Y.S.3d at 551.

153 *Id.* at 552 (citing Ellis v. JPMorgan Chase Bank, 139 N.Y.S.3d 190, 191 (App. Div. 1st Dep't 2021)).

culpable state of mind, together with the defendant's intentional destruction of the drain plate, warranted the striking of the answer rather than imposing the lesser sanction of an adverse inference charge.[154]

In *Buffalo Biodiesel, Inc. v. Blue Ridge Financial, LLC*, the plaintiff alleged causes of action arising from allegations that the defendant sent an email to a financial services company in which the defendant falsely characterized an ongoing legal dispute between the parties.[155] The defendant served discovery demands, in which it sought, among other things, copies of all communications between the plaintiff and the financial services company.[156] In response, the plaintiff advised that it no longer had any such documents as they had been routinely deleted during the pendency of the action.[157] Supreme court, on the plaintiff's motion for sanctions, struck the complaint.[158] The Fourth Department affirmed.[159] The court held that the "plaintiff's failure to suspend [its] routine deletion of its emails during the course of litigation constituted the grossly negligent spoliation of evidence."[160] In so holding, the court was critical of the plaintiff's failure to issue a litigation hold that would have prevented the deletion.[161] In these circumstances, the court held the striking of the complaint was warranted.[162]

The takeaways from *Fata* and *Buffalo Biodiesel* are clear. Once a party becomes aware that it might become involved in litigation, or is in litigation, the party is obligated to take steps to ensure that any evidence that may pertain to such litigation be preserved.[163] The issuance of a litigation hold directive to employees of the party is essentially mandated.[164] Furthermore, while an adverse inference charge is ordinarily the sanction meted out upon a finding of spoliation, the striking of the party's pleading is a sanction that is

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154 *Fata*, 203 N.Y.S.3d at 552.
155 Buffalo Biodiesel, Inc. v. Blue Bridge Fin., LLC, 213 N.Y.S.3d 608, 609 (App. Div. 4th Dep't 2024).
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.* at 610 (citing Voom HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 330 (App. Div. 1st Dep't 2012)).
161 *See Buffalo Biodiesel*, 213 N.Y.S.3d at 609.
162 *Id.* (citing Sage Realty Corp. v. Proskauer Rose LLP, 713 N.Y.S.2d 155, 160 (App. Div. 1st Dep't 2000)).
163 *See* Fata v. Heskel's Riverdale, LLC, 203 N.Y.S.3d 550, 552 (App. Div. 1st Dep't 2024); *Buffalo Biodiesel*, 213 N.Y.S.3d at 610.
164 *See, e.g.*, *Voom HD Holdings LLC*, 939 N.Y.S.2d at 328 (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

available under *Pegasus*.[165] The specter of a pleading being struck means that the preservation of evidence is a matter that must be recognized.

Fata and *Buffalo Biodiesel* appear fully consistent with *Pegasus*. As the Court of Appeals has not revisited its common law spoliation rule, now may be an appropriate time for the court to do so.

III. RELEVANCE

A. Molineux

New York's common law *Molineux* rule provides that evidence of a person's prior uncharged crimes or bad acts is not admissible for the purpose of proving that the person acted in conformity therewith or had the propensity to do so on the relevant occasion.[166] In the words of the Court of Appeals: "This court has declared that '[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime . . . . The endeavor has been often made, but always it has failed.'"[167] The rule is applicable in both civil and criminal actions.[168]

The Court of Appeals has, however, set forth exceptions to this rule. Evidence of prior uncharged crimes or bad acts may be admissible "if it helps to establish some element of the crime [or cause of action] under consideration or is relevant because of some recognized exception to the general rule."[169] In *Molineux,* the court set out several such exceptions: motive, intent, absence of mistake, common scheme or plan, or identity of the defendant.[170] The Wilson Court addressed the *Molineux* rule and its exceptions in two recent decisions, *People v. Telfair*[171] and *People v. Weinstein*.[172] They are both important contributions to the *Molineux* jurisprudence.

In *Telfair*, the defendant was stopped in June 2017 for making an illegal U-turn and driving without headlights; he had a marijuana cigarette in the truck he was operating and was arrested.[173] A search

[165] *See* Pegasus Aviation I, Inc. v. Varig Logistica S.A., 46 N.E.3d 601, 603–04 (N.Y. 2015).
[166] *See* People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901). *See generally* GUIDE TO N.Y. EVID. r. 4.07.1(1), (2) (Limited Admissibility of Relevant Evidence).
[167] People v. Mullin, 362 N.E.2d 571, 574 (N.Y. 1977) (alterations in original) (quoting People v. Zackowitz, 172 N.E. 466, 468 (1930)).
[168] *See In re* Brandon, 433 N.E.2d 501, 503 (N.Y. 1982).
[169] People v. Alvino, 519 N.E.2d 808, 812 (N.Y. 1987).
[170] *See Molineux*, 61 N.E. at 294.
[171] People v. Telfair, 231 N.E.3d 385 (N.Y. 2023).
[172] People v. Weinstein, 248 N.E.3d 691 (N.Y. 2024).
[173] *Telfair*, 231 N.E.3d at 387.

of the truck produced a .45 caliber gun in the center console and three handguns in the truck's flatbed, and he was charged with various weapons crimes.[174] His defense was someone else had packed his truck for him and he was not aware that the person had included his firearms. Each firearm was legally purchased and registered in his name in Florida.[175]

The prosecutor offered evidence on the People's case-in-chief of two prior gun-related incidents to establish that the defendant had knowledge of firearms in his truck.[176] In 2006, a flight attendant on a plane the defendant was flying on found a .22 caliber pistol in a pillow he was resting on.[177] The defendant told the police during an investigation that he had borrowed his girlfriend's gym bag and upon taking it on the plane, he discovered the pistol.[178] Not knowing what to do with the pistol, he placed it inside the pillow.[179] The defendant was not arrested as the police accepted his explanation.[180] As to the next incident, the defendant was arrested in 2007 in New York for speeding and a loaded .45 caliber handgun was found under the passenger's seat.[181] The defendant claimed it belonged to his girlfriend, and that she was the primary driver of the vehicle.[182] The defendant and the girlfriend both pleaded guilty to unlawful possession of a firearm as a misdemeanor.[183] The trial judge admitted the evidence of both incidents as relevant to show the defendant knew his weapons were in his truck in June 2017, thereby satisfying a *Molineux* exception.[184]

The Court of Appeals reversed, with the plurality concluding the evidence should not have been admitted.[185] The court recognized that the defendant's knowledge was in issue and that the *Molineux* exception was potentially a basis to admit the evidence of the two prior incidents.[186] However, upon analysis, the evidence was not

[174] *Id.*
[175] *Id.* at 387.
[176] *Id.* at 388.
[177] People v. Telfair, 231 N.E.3d 385, 388 (N.Y. 2023).
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 389.
[185] *Id.* at 393. Judge Halligan wrote the opinion for the court with Chief Judge Wilson and Judge Shirley Troutman concurring. Judge Jenny Rivera concurred in result in a separate opinion and Judges Garcia, Anthony Cannataro, and Madeline Singas dissented in an opinion written by Judge Cannataro.
[186] *Id.* at 390.

relevant to the knowledge issue.[187] Emphasizing the differences between the two incidents and the present charge, the majority held "[t]he 2006 and 2007 incidents were neither very similar nor close in time to the 2017 incident. Just the opposite: they involved different guns, different sets of circumstances, different excuses, and occurred more than 10 years earlier."[188] The court concluded: "[T]hat Telfair unknowingly possessed other guns in two completely different circumstances about 10 years prior could not have put him on notice that there might have been guns in his truck this time."[189] In sum, the court was clearly expressing the view that the first issue to be addressed when a *Molineux* exception is invoked is whether the prior uncharged crime or bad act is relevant to that exception.

Weinstein was the high-profile case against Harvey Weinstein, the famous and highly successful movie and television producer.[190] He was accused of sexually assaulting three women. Each testified that they resisted and repeatedly said "no" to his sexual advances, but that he overpowered them.[191] Weinstein claimed that each of his three accusers consented.[192] In addition, three other women testified, over objection, that Weinstein had committed similar crimes against them.[193] In essence, the prosecutor argued, and the trial judge agreed, that their testimony was relevant to show that Weinstein knew or should have known that the three women he was charged with sexually assaulting had not consented.[194]

The Court of Appeals held 4-3 that the trial judge erred in admitting the testimony of the three other women under *Molineux* and that their testimony rendered the trial unfair.[195] The basis for this conclusion was that the testimony was not relevant under any of the recognized *Molineux* exceptions.[196] In this regard, the majority pointed out that the prosecution failed to identify any issue other than mere propensity.[197] To the extent the prosecution proffered the

[187] *See id.*
[188] *Id.* at 391.
[189] *Id.*
[190] People v. Weinstein, 248 N.E.3d 691, 698 (N.Y. 2024).
[191] *Id.* at 699–700, 707.
[192] *Id.* at 718 (Singas, J., dissenting).
[193] *Id.* at 699–700 (majority opinion).
[194] *Id.* at 701 (testimony admitted "on the question of whether the defendant intended to engage in the sexual acts, and whether each of the complaining witnesses consented").
[195] *Id.* at 712. The majority opinion was written by Judge Rivera, with Chief Judge Wilson and designated Appellate Division Justices Betsy Barros and Christine Clark concurring. Judge Singas dissented in an opinion in which Judges Garcia and Cannataro concurred, and Judge Cannataro dissented in a separate opinion in which Judges Garcia and Singas concurred.
[196] *See id.*
[197] *Id.*

testimony on the issue of consent, as the trial judge found, the majority noted that the complainants' respective testimonies were not equivocal on the issue of consent as no reasonable person would understand their behavior—saying "no" to a sexual encounter and attempting to physically resist Weinstein before succumbing to his brute physical force—as communicating anything other than that they did not consent.[198] The testimony was therefore unnecessary, and thus not relevant to the claimed non-propensity issue of consent, and served only to establish Weinstein's propensity to commit the crimes charged.[199]

The dissenting judges opined that in sexual assault cases, prior sexual assault evidence should be admissible to establish a propensity inference.[200] In their view, as the *Molineux* rule was created by the court, it can and should modify it.[201] They specifically noted that *Molineux* is especially inadequate in sexual assault cases in which the victim and the defendant are acquainted, and the defendant has greater professional or economic status than the victim.[202]

The majority directly responded to the dissenters, stating: "Under our system of justice, the accused has a right to be held to account only for the crime charged and, thus, allegations of prior bad acts may not be admitted against them for the sole purpose of establishing their propensity for criminality."[203] In short, the majority was unwilling to create special rules for specific or certain cases. To the extent such rules are to be created, that is a task for the legislature to do.[204]

The takeaways from *Telfair* and *Weinstein* are clear. The Court of Appeals has said that a *Molineux* analysis involves two broad issues to be resolved: (1) Is the proffered evidence relevant to a non-propensity *Molineux* category? And if it is relevant to an issue other than propensity, (2) does its probative value exceed the potential for

[198] *Id.* at 707.
[199] *Id.* at 712.
[200] *Id.* at 717 (Singas, J., dissenting); *id.* at 729 (Cannataro, J., dissenting).
[201] *See id.* at 717 (Singas, J., dissenting).
[202] Of note, the Federal Rules of Evidence were amended in 1994 to add Rule 413 to allow evidence of a defendant's prior sexual misconduct without the requirement of satisfying a *Molineux*-type exception if such misconduct was relevant, and several states have enacted similar rules. *See* 4 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 20:10 (7th ed. 2000 & Supp. 2008).
[203] *Weinstein*, 248 N.E.3d at 697.
[204] *See id.* at 704. The State Senate introduced and passed such a bill in May 2024, but it was not passed by the Assembly. *See* S.B. 9276, 2023–2024 Leg., Reg. Sess. (N.Y. 2024).

prejudice resulting to the defendant?[205] But actually, a *Molineux* analysis involves several discrete and separate issues in addition to whether the defendant committed the uncharged crime or bad act:[206] (1) Does the uncharged crime involve an uncharged crime or bad act for purposes of *Molineux*? (2) Is the uncharged crime or bad act intrinsic to the crime charged, *i.e.*, part of the crime charged, or extrinsic to it, *i.e.*, not part of or not directly related to the crime charged? (3) If the uncharged crime or bad act is an extrinsic act, *Molineux* is implicated; for the uncharged crime or bad act to be admissible, is a *Molineux* exception identifiable? (4) Once an exception is identified, is the exception logically connected to the crime? (5) If the uncharged crime or bad act is so connected, is the uncharged crime or bad act relevant to the relied upon exception, *i.e.*, how probative is the evidence of the exception? And (6) does the probative value as determined exceed the potential prejudice to the defendant if admitted?[207] Both *Telfair* and *Weinstein* show that the relevance inquiry is the critical issue to be decided, and that the trial judge should require a strong probative showing.[208]

B. Constitutional Right to Present Evidence

The Court of Appeals has created robust precedent in regard to a criminal defendant's right to present a defense.[209] This right encompasses a right to offer the testimony of witnesses.[210] Thus, the Court of Appeals has recognized that, depending on the circumstances presented, a defendant's constitutional rights may allow the admission of relevant evidence on behalf of a defendant that

[205] People v. Telfair, 231 N.E.3d 385, 390 (N.Y. 2023) (quoting People v. Ely, 60 N.Y.2d 520, 529 (N.Y. 1986)); *Weinstein*, 248 N.E.3d at 706 (quoting People v. Alvino, 519 N.E.2d 808, 812 (N.Y. 1987)).
[206] Michael J. Hutter, *Determining 'Molineux' Issues in Civil and Criminal Actions*, N.Y.L.J., Oct. 3, 2024, at 3, col. 3.
[207] *Id.*
[208] Relevant evidence is any evidence having any tendency to prove a fact in issue—a low threshold for admissibility. GUIDE TO N.Y. EVID. r. 4.01(1) (Relevant Evidence). Relevance as applied in a *Molineux* analysis apparently uses a stricter standard for relevance. *See* GUIDE TO N.Y. EVID. r. 4.38(1) (*Molineux*: Evidence of Crimes and Wrongs). Thus, in *Telfair*, the Court rejected an argument that the two prior incidents were relevant as it was highly unlikely that some person on three separate occasions placed a gun where the defendant would be without his knowledge. *Telfair*, 231 N.E.3d at 391. Such likelihood would ordinarily lead to a relevance finding, as argued by Judge Cannataro in dissent. *Id.* at 395–96 (Cannataro, J., dissenting).
[209] *See* People v. Deverow, 190 N.E.3d 1161, 1167 (N.Y. 2022). *See generally* GUIDE TO N.Y. EVID. r. 4.26.1 (Defendant's Right to Present a Defense) (collecting cases).
[210] *See* People v. Foy, 299 N.E.2d 664, 667 (N.Y. 1973).

would ordinarily be precluded by the rules of evidence.[211] However, the court has cautioned that this right does not give a defendant carte blanche to circumvent the rules of evidence.[212]

The Wilson Court has applied this precedent in three decisions, *People v. Cerda*,[213] *People v. Sidbury*,[214] and *People v. Dixon*.[215] They are all instructive decisions, and continue the Court's protective approach to a defendant's right to present a defense and call witnesses.[216]

In *Cerda*, the defendant was charged with two counts of first-degree sexual abuse arising from his alleged molestation of a minor, the daughter of a relative of his.[217] The People's medical evidence attributed the complainant's injuries to the defendant and its expert testified that her injures were consistent with the criminal conduct of which the defendant was accused.[218] The defendant's entire defense was premised upon demonstrating the claimant's allegations against him were untrue in that the injuries testified to were caused by the complainant's own actions or a third party.[219] Forensic evidence containing findings that offered such plausible alternative explanations was proffered.[220]

On the defendant's motion *in limine*, the trial court ruled the proffered evidence was inadmissible under CPL 60.42, New York's Rape Shield Act.[221] In so ruling, the trial judge rejected the defendant's argument that the court should admit the evidence under subdivision five of the act, which permits evidence of a victim's sexual conduct when it is determined "to be relevant and admissible in the interests of justice."[222] In its view, the theories advanced by defense counsel "were 'very speculative'" and the forensic findings risked "confusing the jurors."[223]

On the defendant's appeal from his conviction of one of the charges related to digital penetration of the complainant's vagina, the Court

[211] People v. Carroll, 740 N.E.2d 1084, 1089 (N.Y. 2000) ("A court's discretion in evidentiary rulings is circumscribed by the . . . defendant's constitutional right to present a defense.").
[212] People v. Jin Cheng Lin, 47 N.E.3d 718, 736 (N.Y. 2016) (quoting People v. Hayes, 950 N.E.2d 118, 123 (N.Y. 2011)).
[213] People v. Cerda, 223 N.E.3d 308, 313 (N.Y. 2023).
[214] People v. Sidbury, 248 N.E.3d 735, 751 (N.Y. 2024).
[215] People v. Dixon, 42 N.Y.3d 609, 617 n.2 (N.Y. 2024).
[216] *See* GUIDE TO N.Y. EVID. r. 4.26.1 (Defendant's Right to Present a Defense).
[217] *Cerda*, 223 N.E.3d at 310.
[218] *Id.* at 311–12.
[219] *See id.* at 312.
[220] *Id.* at 310.
[221] *Id.* at 311; *see* N.Y. C.P.L. 60.42 (McKinney 2025).
[222] *Cerda*, 223 N.E.3d at 313; C.P.L. 60.42(5).
[223] *Cerda*, 223 N.E.3d at 311.

of Appeals reversed in a 5-2 decision authored by Justice Michael Lynch.[224] The majority noted that CPL 60.42(5) provides that evidence of a victim's sexual conduct may be admitted in evidence in a sex abuse prosecution when "it is determined by the [trial] court after an offer of proof by the accused . . . to be relevant and admissible in the interest of justice."[225] While this provision gives the trial judge discretion whether to admit evidence, the majority held the discretion can be abused as a matter of law if it "deprived defendant of a meaningful opportunity to present a complete defense."[226] Here, that occurred, as the proffered evidence directly responded to the prosecutor's argument that the defendant alone had caused the complainant's injuries because it showed plausible alternative explanations for the injuries and was hardly speculative.[227]

The dissenters, Judge Michael Garcia and Judge Cannataro, in an opinion written by Judge Cannataro, expressed the view that the proffered evidence was properly excluded because it was not conclusive on the issue that the complainant had engaged in sexual activity with another person or herself.[228] The majority responded by noting that the constitutional right to present evidence does not rest upon whether the evidence is decisive or not. Rather, "[r]elevance is for the court to determine, decisiveness for the jury."[229]

In *Sidbury*, the defendant was convicted of arson in the second degree.[230] On appeal, he argued, among other issues, that his constitutional right to present a defense and call witnesses was violated by the trial judge's ruling that precluded his psychiatric evidence under CPL 250.10.[231] This provision is applicable when a defendant seeks to offer psychiatric evidence in support of the defendant's defense that he lacked criminal responsibility by reason of mental disease or defect, as the defendant had raised.[232] Under the statute, such evidence is "not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence."[233] However,

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[224] *See id.* at 316. Justice Lynch, an Associate Justice of the Third Department, had been designated to sit on the Court of Appeals for the appeal.
[225] *Id.* at 313–14 (alterations in original); *see* C.P.L. 60.42(5).
[226] *Id.* at 316 (quoting People v. Deverow, 190 N.E.3d 1161, 1169 (N.Y. 2022)).
[227] *See Cerda*, 223 N.E.3d at 316.
[228] *Id.* at 318–19 (Cannataro, J., dissenting).
[229] *Id.* at 315.
[230] People v. Sidbury, 248 N.E.3d 735, 737 (N.Y. 2024).
[231] *Id.* at 737–38; *see* N.Y. C.P.L. 250.10(2) (McKinney 2025).
[232] *Sidbury*, 248 N.E.3d at 739; *see* C.P.L. 250.10(1).
[233] C.P.L. 250.10(2).

under the statute, the trial judge has discretion to permit service of a late notice "[i]n the interest of justice and for good cause shown."[234]

As the defendant had not filed a CPL 250.10 notice on a timely basis, he made an application to the trial judge to allow a late notice.[235] The trial judge rejected the application on the ground that there was no indication that the insanity defense would have any chance of success.[236] The First Department affirmed, concluding that the notice was "grossly untimely" and lacked any showing that the proffered psychiatric evidence would be relevant.[237] It also found fault in defense counsel's failure to serve the notice sooner.[238]

The Court of Appeals reversed.[239] Chief Judge Wilson, writing for the majority, concluded the trial judge's ruling was an abuse of discretion as a matter of law as it "impinged [the defendant's] constitutional right to present a defense and call witnesses."[240] In so concluding, the majority readily recognized that the ruling effectively prevented the defendant from raising his insanity defense.[241] This effect was not acceptable as the People never asserted that the late notice would prejudice their case and the trial court did not consider alternatives that might cure any prejudice.[242] In these circumstances, it was intolerable that the defendant should be prevented from developing his defense through the introduction of psychiatric evidence.[243]

The dissenters, Judges Garcia, Cannataro, and Singas, in an opinion written by Judge Singas, initially rejected the majority's view that a trial judge must weigh a defendant's constitutional right to a defense against prejudice to the People from late notice.[244] In the dissenters' view, Supreme Court precedent did not require such balancing.[245] The dissenters also expressed the view that the failure of defense counsel to provide a reasonable excuse for the untimely filing strongly militated against allowing late service of a CPL 250.10 notice.[246]

[234] *Id.*
[235] *Sidbury*, 248 N.E.3d at 739.
[236] *Id.* at 740.
[237] *Id.* at 741.
[238] *Id.*
[239] *Id.* at 756.
[240] *Id.* at 743.
[241] *See id.* at 746–47.
[242] *Id.* at 744–45.
[243] *See id.* at 745 (citing People v. Hartman, 883 N.Y.S.2d 361, 364 (App. Div. 3d Dep't 2009).
[244] *Sidbury*, 248 N.E.3d at 747–48 (Singas, J., dissenting in part).
[245] *Id.* at 747, 753.
[246] *Id.* at 754–55 (citing People v. Silburn, 98 N.E.3d 696, 708 (N.Y. 2018)).

Responding to the dissenters, the majority brought out that the Court of Appeals and the United States Supreme Court have always "emphasize[d] the predominance of the right to a fair trial over purely procedural requirements, especially where no prejudice would result from waiver of a deadline."[247] As to the dissenters' suggestion that the defendant's failure to proffer a reasonable excuse for the late filing precluded relief, the majority indicated that a defendant's delay would be a factor in declining to grant a late application only if that delay was intentional or designed to obtain a tactical advantage.[248]

In *Dixon*, the defendant in his sexual abuse prosecution raised a novel defense regarding denial of the constitutional right to present a defense.[249] He argued that the People's monitoring of the telephone calls that he made to his trial witnesses while incarcerated had a chilling effect on his trial preparation that threatened his right to present a defense.[250] Judge Shirley Troutman, writing for a unanimous court, noted the opportunity for an attorney to communicate confidentially with potential witnesses is essential to the presentation of a defense, a conclusion that is equally applicable to an incarcerated defendant exercising the right of self-representation, such as the defendant in *Dixon*.[251] Furthermore, a self-represented incarcerated defendant who uses a jail telephone for trial preparation "may not fully appreciate that their conversations may be divulged to the prosecution, which risks placing them at an unfair disadvantage."[252] In short, the court was clearly aware that in these circumstances, a defendant's right to present a defense could be undermined.[253] However, upon a further analysis of the facts, "any chilling effect here was negligible" and not a constitutional violation.[254]

Cerda, *Sidbury*, and *Dixon* confirm that the Court of Appeals' robust precedent to present a complete defense continues, and has in fact been strengthened; there is no sign the precedent will be weakened. While it is difficult to predict when an evidence rule must give way to satisfy a defendant's right to present a defense, the Court of Appeals' decisions certainly encourage defense counsel to explore how evidence rendered inadmissible due to an evidence rule may be

[247] *Sidbury*, 248 N.E.3d at 745.
[248] *Id.* at 746.
[249] *See* People v. Dixon, 42 N.Y.3d 609, 612, 616 (N.Y. 2024).
[250] *Id.* at 618.
[251] *Id.* at 627, 630.
[252] *Id.* at 630.
[253] *See id.* at 629–30.
[254] *Id.* at 631.

essential to the defendant's right to present a complete defense and thus admissible.

IV. WITNESSES

A. Lay Opinion

It is becoming increasingly common for courts to admit surveillance photographs and video recordings in criminal cases in which it is claimed the defendant's image is depicted therein.[255] Correspondingly, lay opinion testimony involving a non-eyewitness testifying that the person depicted in the photograph or videotape is the defendant is frequently proffered as well.[256] The admissibility of such testimony has been questioned as it involves the province of the jury.[257] The Court of Appeals has, however, permitted such testimony, at least in the situation where the defendant had changed his appearance since the underlying incident.[258] In this situation, the court concluded that the testimony is not only helpful, but necessary.[259]

In *People v. Mosley*,[260] the court revisited the issue, but in a different context, namely, where there was no change in the defendant's appearance to justify the lay non-witness identification testimony.[261] The trial judge had allowed a police detective to identify the defendant in a surveillance video depicting the shooting for which the defendant was arrested and subsequently charged with gun possession crimes.[262] Prior to testifying, during his *voir dire*, the detective stated that he was familiar with the defendant.[263] He had met the defendant seven months after the incident while investigating an unrelated crime.[264] However, the detective testified that he had never had any "street interactions" with the defendant.[265] The trial judge concluded that the detective could identify the

[255] George Bach, *Moderating the Use of Lay Opinion Identification Testimony Related to Surveillance Video*, 47 FLA. STATE U. L. REV. 445, 446 (2020).
[256] *See id.* at 446–47.
[257] *See, e.g.*, United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993) (though "sometimes permissible," the testimony runs "the risk of invading the province of the jury").
[258] *See* People v. Russell, 594 N.E.2d 922, 923 (N.Y. 1992); People v. Sanchez, 991 N.E.2d 698, 703–04 (N.Y. 2013).
[259] *Russell*, 594 N.E.2d at 923.
[260] People v. Mosley, 239 N.E.3d 928 (N.Y. 2024).
[261] *Id.* at 929–30.
[262] *Id.*
[263] *Id.*
[264] *Id.* at 930.
[265] *Id.* at 929–30.

defendant as the person in the surveillance video based on his "extensive basis of knowledge."[266]

The Court of Appeals, in an instructive opinion written by Judge Halligan, held the detective's testimony was erroneously admitted, and reversed the defendant's conviction.[267] The court ruled that a person not an eyewitness to a crime may offer opinion testimony to a jury as to the defendant's identity as an individual depicted in a photo or video, so long as there is proof that "the witness is sufficiently familiar with the defendant that their testimony would be reliable, and there is reason to believe the jury might require such assistance in making its independent assessment."[268] In order to establish that such criteria have been met, the court "should inquire as to the basis of the witness's familiarity outside the presence of the jury in a separate hearing or *voir dire*."[269] In so ruling, the court built upon its decisions in *People v. Russell* and *People v. Sanchez*.[270]

The first inquiry involves the trial judge's assessment of the witness's level of familiarity with the defendant.[271] The factors to be considered are "the witness's general level of familiarity with the defendant's appearance"; "whether the witness's familiarity spanned an extended period of time and variety of circumstances"; "whether the witness was familiar with the defendant's appearance at the time the surveillance footage was taken"; "the witness's familiarity with the defendant's customary manner of dress or clothing on the day of the surveillance footage"; and "whether the witness [testified about] a specific trait the defendant has" and "whether [the witness identif[ied] that trait in the surveillance footage."[272] The determination should be made upon a hearing, a so-called *Mosley* hearing.[273] If the trial judge determines that the witness does not have sufficient familiarity with the defendant, the testimony will be deemed to have no probative value, and "that is the end of the inquiry."[274]

Where sufficient familiarity is present, the inquiry then becomes whether the jury needs the witness's assistance in making the

[266] *Id.* at 930.
[267] *Id.* at 929, 935–37.
[268] *Id.* at 929.
[269] *Id.* at 934–35.
[270] *See id.* at 933 (citing People v. Russell, 594 N.E.2d 922 (N.Y. 1992); People v. Sanchez, 991 N.E.2d 698 (N.Y. 2013)).
[271] *Mosley*, 239 N.E.3d at 935.
[272] *Id.* at 933–34. For further discussion, see Barry Kamins, *Lay Witness Identification Testimony: The New "Mosley" Hearing*, N.Y.L.J., June 3, 2024, at 3, col. 3.
[273] *See Mosley*, 239 N.E.3d at 934–35; *see also* Kamins, *supra* note 272, at 3.
[274] *Mosley*, 239 N.E.3d at 933.

determination of whether the person depicted is the defendant.[275] The factors involved in making this determination are "whether the defendant's appearance changed between the time of the surveillance footage and the trial or whether the defendant disguised himself in the surveillance footage," as well as the quality of the surveillance footage and the extent to which the subject is clearly captured in the frame.[276]

The two *Mosley* inquiries as detailed by the court are clearly intended to safeguard against several issues. First, they seek to ensure that the witness is sufficiently familiar with the defendant so that the identification testimony is derived from a reliable and substantive source of knowledge.[277] Second, they weigh the probative value of the testimony against the possible prejudice of making the jury aware of the defendant's prior interactions with law enforcement officials, even when the facts surrounding those interactions are omitted or otherwise sanitized.[278] Finally, they ensure that the testimony that will be elicited will actually be needed by the jury in that it will aid in their evaluation of the evidence, as opposed to invading their province as the ultimate finders of fact.[279]

Of note, on the facts in the case, the court determined that the detective-witness was not sufficiently familiar with the defendant to render his identification helpful to the jury.[280] Further, as the shooter in the video did not wear a disguise, there was no indication that the defendant's appearance changed; so, if the defendant were depicted and identifiable in the video, "there was no reason to think that the jury would not be equally well positioned to identify the defendant based on his appearance in the courtroom."[281]

Lastly, the court advised that when an identification is made by a person who was not an eyewitness, the best practice would be for the trial judge to instruct the jury "both at the time of the testimony and during the final charge . . . that lay non-eyewitness identification testimony is mere opinion testimony that they may choose to accept or reject," and "that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters."[282]

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[275] *Id.* at 934.
[276] *Id.*
[277] *See id.* at 935.
[278] *See id.* at 932.
[279] *See id.* at 933.
[280] *Id.* at 935.
[281] *Id.* at 936.
[282] *Id.* at 935.

The *Mosley* inquiries are sound ones, and were then applied by the court in a manner helpful to the bench and bar. An evidentiary roadmap for the admission of lay opinion testimony by a non-eyewitness of whether a defendant is the person depicted in surveillance photographs or video recordings has been provided by the court.

B. Eyewitness Identification

In New York, it is well established that the complaining witness or an eyewitness to a crime may make an in-court identification of the defendant charged with the crime based on the witness's present recollection at the time of the trial, consistent with constitutional and statutory procedures.[283] Whether said witness can testify to prior identifications of the defendant is governed by a comprehensive statutory scheme.[284] In *People v. Perdue*,[285] the Court of Appeals addressed an issue not covered by present law, namely, when, if ever, a witness may identify the defendant as the perpetrator of the crime without having been subject to any pretrial identification procedure.[286]

The defendant was charged with one count of assault in the second degree and two counts of criminal possession of a weapon arising from a residential neighborhood shooting.[287] An eyewitness to the shooting called 911 to report the shooting and described the shooter as to skin color, weight, and clothing, and subsequently when police arrived, she told the police that she could identify the shooter if necessary.[288] Afterwards, no pretrial identification procedures were conducted.[289]

At the trial, the eyewitness testified. She stated the shooter was a dark-skinned Black man, approximately six feet tall, with a mustache and a goatee, and was wearing gray jeans, white sneakers, and a white cap.[290] The People asked whether the witness "would . . . recognize" the individual if she saw him again and the witness answered, "Of course," and then pointed to the defendant.[291] Defense

[283] N.Y. C.P.L. 60.25(1) (McKinney 2025). *See generally* WILLIAM C. DONNINO, NEW YORK COURT OF APPEALS ON CRIMINAL LAW, ch. 25, pts. I, II (3d ed. 2024).
[284] *See* BARKER & ALEXANDER, *supra* note 74, § 8.12.
[285] People v. Perdue, 232 N.E.3d 738 (N.Y. 2023).
[286] *See id.* at 740.
[287] *Id.* at 738, 740.
[288] *Id.*
[289] *Id.*
[290] *Id.* at 740–41.
[291] *Id.* at 741 (alteration in original).

counsel objected to the testimony, arguing the absence of any pretrial identification by the witness of the defendant and the inherent suggestiveness of the identification—defendant sat at the defense table, next to only one other person, defense counsel—required exclusion of the testimony.[292] In making this argument, defense counsel stressed that the witness had testified that she had never seen the shooter before the night in question.[293]

The Court of Appeals addressed the issue as raised by defense counsel in a thoughtful opinion written by Judge Singas for the majority.[294] The majority initially addressed the issue in the context of the heightened risk of eyewitness misidentification.[295] It held that the defendant "should be afforded a meaningful opportunity to request additional procedures that would (1) demonstrate the reliability of a subsequent in-court identification . . . or (2) reduce the suggestiveness of the in-court identification procedure itself."[296] In this connection, the majority noted "the ability of the defendant to meaningfully request such protective measures is dependent on the defendant's awareness that the witness may make a first-time, in-court identification."[297] Thus, "when the People may ask a witness to make a first-time, in-court identification, they must ensure that the defendant is aware of this possibility as early as practicable."[298] Defense counsel would then be in the position to choose a strategy in response.[299] However, the court further observed that a defendant may not want to seek any protective measures that would bolster or draw further juror attention to the identification.[300]

The majority next stressed that the admission of a first-time, in-court identification is vested in discretion of the trial judge, who "must balance the probative value of the identification against the dangers of misidentification and other prejudice to the defendant."[301] To ameliorate the risk of misidentification the judge must consider:

> whether there are independent assurances of the identification's reliability that outweigh this risk. Such considerations may include: the witness's familiarity with the

[292] *Id.*
[293] *See id.*
[294] *Id.* at 739.
[295] *Id.* at 741–42.
[296] *Id.* at 742 (citing United States v. Brown, 699 F.2d 585, 593–94 (2d Cir. 1983); United States v. Archibald, 734 F.2d 938, 941–42 (2d Cir. 1984)).
[297] *See Perdue*, 232 N.E.3d at 743.
[298] *Id.*
[299] *See id.*
[300] *Id.* at 743.
[301] *Id.* at 740, 743.

> defendant, the quality of the witness's opportunity to observe the defendant before the incident in question . . . , the witness's ability to provide . . . descriptive details regarding the defendant . . . , the time between the crime and the testimony, and whether there is other, reliable trial evidence corroborating the identification.[302]

Applying these rulings to the facts before it, the majority held that the trial judge did not abuse his discretion as a matter of law in overruling defense counsel's objection to the testimony of the eyewitness.[303] In so ruling, the majority found the testimony to be reliable based on her testimony that was given only five months after the shooting, her trial testimony which was consistent with her 911 call, and her previous description of the shooter which established her ability to observe the shooting and view the shooter.[304]

Judge Rivera, in a spirited dissent, opined that the majority's decision was giving insufficient protection against the scourge of wrongful convictions based on erroneous eyewitness testimony.[305] She advocated a rule that would require the People to conduct a pre-trial procedure to ensure a defendant's right to a fair trial when: "1) identification is at issue; 2) the witness is a stranger to the defendant; and 3) the witness's memory of the crime is the only basis for the identification."[306]

Upon analysis of the majority's approach, and its application to the facts before it, a good case can be made for the proposition that the majority has crafted a workable scheme to counteract the heightened risk of misidentification in the context of a first-time, in-court identification witness, the majority's intended goal.[307] Judge Rivera's call for automatic hearings seems impractical and may be a waste of judicial time.

C. Sandoval *Impeachment*

In *People v. Sandoval*, the Court of Appeals created a right for the defendant in a criminal case to move for the trial judge to "make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral

302 *Id.* (citations omitted).
303 *Id.* at 744.
304 *See id.*
305 *Id.* at 745 (Rivera, J., dissenting).
306 *Id.*
307 *See id*. at 744–45 (majority opinion).

acts for the purpose of impeaching a defendant's credibility."[308] In implementing *Sandoval*, the court sanctioned the cross-examination of a defendant about acts of misconduct which revealed "a willingness or disposition on the part of the [defendant] voluntarily to place the advancement of [the defendant's] self-interest ahead of principle or the interests of society," thereby suggesting a "readiness to do so again on the witness stand."[309] Since use of this impeachment method has the potential for unfair prejudice to the defendant, or may confuse or mislead the jury, the nature and extent of cross-examination are subject to the sound discretion of the trial judge.[310]

In *Weinstein*, the court revisited that branch of *Sandoval* permitting cross-examination of a defendant about acts of misconduct.[311] On the People's *Sandoval* motion, the trial judge allowed cross-examination of Weinstein about his sex offenses against the three *Molineux* witnesses and one against another woman who had provided corroborating testimony of one of the *Molineux* witnesses.[312] Additionally, the trial judge allowed cross-examination about whether he used a friend's Social Security number to obtain a passport; told people to lie to his wife; told an intelligence firm to manipulate or lie to people; scheduled a business meeting in 2012 with a woman under false pretenses; and engaged in a variety of business-related misconduct that ranged from encouraging executives to lie on his behalf to threats and acts of violence against people who worked for him, including abandoning a colleague by the side of the road in a foreign country.[313] The trial judge also allowed the People to ask about incidents of bullying, including when at a hotel restaurant Weinstein screamed and cursed at the staff, demanding to be served a meal late at night.[314] In sum, the trial judge allowed the People to cross-examine Weinstein about twenty-eight acts that spanned nearly thirty years.[315]

The majority held the trial judge's ruling admitting acts of misconduct other than those involving prior sexual misconduct and

[308] People v. Sandoval, 314 N.E.2d 413, 416 (N.Y. 1974). Of note, CPL 245.20(3) requires the People to disclose, no later than fifteen days before trial, "all misconduct and criminal acts of the defendant" that "the prosecution intends to use at trial for purposes of . . . impeaching the credibility of the defendant." N.Y. C.P.L. 245.10(1)(b), .20(3) (McKinney 2025).
[309] *Sandoval*, 314 N.E.2d at 417–18.
[310] *See id.* at 418.
[311] People v. Weinstein, 248 N.E.3d 691, 713–14 (N.Y. 2024). The *Molineux* issue presented in *Weinstein* is discussed *supra* in text accompanying notes 190–204.
[312] *Weinstein*, 248 N.E.3d at 698–99, 713.
[313] *Id.* at 698–99.
[314] People v. Weinstein, 170 N.Y.S.3d 33, 62 (App. Div. 1st Dep't 2022).
[315] *Id.*

prior acts of dishonesty or cheating was an abuse of discretion as a matter of law.[316] It emphasized the issue for a trial judge is whether the proffered evidence of misconduct shows a lack of in-court veracity.[317] If the evidence does, and it is not unduly prejudicial, the evidence may be admitted for the limited purpose of attacking the defendant's credibility.[318]

As to the acts of misconduct admitted involving sexual misconduct and honesty or cheating, the majority characterized them as nothing more than acts of bullying and fits of anger and spite.[319] While the acts were "appalling, shameful [and] repulsive" as well as "loathsome," they were not at all helpful in determining Weinstein's credibility as a witness.[320] In the majority's view, the evidence was "nothing more than bad behavior that destroys a defendant's character but sheds no light on their credibility as related to the criminal charges lodged against them."[321] As observed by a commentator, the court said "in effect, that there is too big a gap between boorish, childish and uncivil behavior and an inference that the person who commits it will be inclined to commit perjury on a witness stand."[322]

The majority's ruling has clearly refocused the *Sandoval* inquiry to its roots—whether the acts of misconduct show an "untruthful bent."[323] Contrary to the dissenters' view that the trial judge's ruling was a proper exercise of discretion, the majority's ruling is commendable as it assures the jury's resolution of a defendant's credibility as a witness will not be obscured by non-credibility matters, matters that may make the defendant to look like a *bad person* in the eyes of the jury.

[316] *See Weinstein*, 248 N.E.3d at 714. The acts of misconduct permitted to be examined upon were clearly probative of the defendant's credibility, and as the Appellate Division affirmed the trial judge's ruling as a proper exercise of discretion, the Appellate Division's ruling did not warrant review by the Court of Appeals. *See id.* at 714 & n.11; People v. Williams, 905 N.E.2d 605, 605 (N.Y. 2009) (quoting People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y. 1990)).

[317] *Weinstein*, 248 N.E.3d at 714 (quoting People v. Sandoval, 314 N.E.2d 413, 418 (N.Y. 1974)).

[318] *Weinstein*, 248 N.E.3d at 714 (quoting *Sandoval*, 314 N.E.2d at 415 n.1).

[319] *See Weinstein*, 248 N.E.3d at 714.

[320] *Id.* at 713–14.

[321] *Id.* at 716.

[322] BARKER & ALEXANDER, *supra* note 74, § 6:59.

[323] *See* People v. Smith, 57 N.E.3d 53, 59 (N.Y. 2016) (quoting People v. Walker, 633 N.E.2d 472, 476 (N.Y. 1994)).

V. HEARSAY

A. Employee Admissions

Historically, the Court of Appeals has recognized new exceptions to the hearsay rule to accommodate the demands of modern litigation unless there was some strong public policy precluding such an exception or a clear act of preemption by the legislature.[324] This approach was invoked in *Loschiavo v. Port Authority of New York and New Jersey*.[325] Under the then-existing law, a statement of an employee was admissible only upon a showing that the employer had given authority to the employee to speak on behalf of the employer about the subject matter of the statement, an exception created by the Court of Appeals.[326] In *Loschiavo*, the exception was sought to be broadened to include statements made by employees, while employed, concerning their scope of employment, even though there was no authority to make such statements (the almost universally recognized rule in the United States).[327] However, the Court of Appeals balked. It "decline[d] plaintiff's invitation to change [the] well-settled, albeit widely criticized rule of evidence."[328] The court gave no explanation for doing so other than an opaque reference to the Code of Evidence before the legislature, which included the creation of the sought after exception.[329] As the court had created the speaking agent rule under its common law power, its reluctance to expand it under its power is in many respects inexplicable.

With the Court of Appeals' reluctance to reject the widely criticized common law rule, the legislature enacted CPLR 4549.[330] The legislature took note of the substantial criticism and shortcomings of current law and saw no principled reason to stay the course.[331] This statutory enactment provides:

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[324] Fleury v. Edwards, 200 N.E.2d 550, 554 (N.Y. 1964) (Fuld, J., concurring); *see* People v. Brown, 610 N.E.2d 369, 372–73 (N.Y. 1993); Brown v. Ristich, 325 N.E.2d 533, 538 (N.Y. 1975); *see also supra* notes 1–3 and accompanying text.

[325] *See* Loschiavo v. Port Auth. of N.Y. & N.J., 448 N.E.2d 1351, 1352 (N.Y. 1993).

[326] *See* Loschiavo v. Port Auth. of N.Y. & N.J., 446 N.Y.S.2d 358, 361–62 (App. Div. 2d Dep't 1982) (Lazer, J., dissenting) (discussing origin of the exception).

[327] *Loschiavo*, 448 N.E.2d at 1352–53 (Fuchsberg, J., dissenting); Michael J. Hutter, *'Speaking Agent' Hearsay Exception: Time to Clarify, If Not Abandon*, N.Y.L.J., June 6, 2013, at 3, col. 1.

[328] *Loschiavo*, 448 N.E.2d at 1352.

[329] *See id.*

[330] *See* N.Y. C.P.L.R. 4549 (McKinney 2025). It was enacted by L. 2021, ch. 883, effective December 31, 2022.

[331] Michael J. Hutter, *New CPLR 4549: Admissibility of Agent/Employee Statements Against the Principal/Agent*, N.Y.L.J., Feb. 16, 2022, at 3, col. 1; Senate Introducer's Mem. in Support, Bill Jacket, N.Y. S.B. 7093, 2021 Leg., ch. 833, at 7–8.

> A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.[332]

As can be discerned, CPLR 4549's first part codifies the "speaking agent" employee exception to the hearsay rule, while the second part enacts an "employee" exception, accomplishing what the Court of Appeals refused to do in *Loschiavo*.[333]

The Court of Appeals will now be called upon to interpret CPLR 4549 and flesh out its specified elements for the employee exception, namely, when an employee's statement concerns "a matter within the scope of that [employment or agency] relationship" and the statement was made "during the existence of that relationship."[334] Of note, interpretation has started in the lower courts.

In *BL Doe 5 v. Fleming*,[335] the Fourth Department was asked to determine whether a statement by a school official, a music teacher, made to a student about a fellow music teacher's sexual abuse of that student, was admissible against the school district employer.[336] The majority held it was, noting that the statement showing awareness of sexual abuse of a student by a fellow teacher concerned a matter within the existence of the teacher's employment relationship, and the fact that it was made off school grounds to a non-school district employee and after school hours did not preclude the statement's admissibility.[337] Presiding Justice Gerald Whalen dissented, contending the statement was not made during the employment relationship as it was made for the purpose of inducing the plaintiff to engage in sexual relations.[338]

The majority's application of the exception and its construction is consistent with the legislative intent in creating the exception.[339] In this construction, the court follows the approach long taken by the Court of Appeals in interpreting legislative evidentiary rules.[340]

332 C.P.L.R. 4549.
333 *See id.*; *Loschiavo*, 448 N.E.2d at 1352.
334 *See* C.P.L.R. 4549.
335 BL Doe 5 v. Fleming, 215 N.Y.S.3d 628 (App. Div. 4th Dep't 2024).
336 *See id.* at 632.
337 *Id.* at 633.
338 *See id.* at 634–35 (Whalen, P.J., dissenting) (first quoting Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534, 537 (2d Cir. 1992); and then citing *In re* Air Crash Disaster, 86 F.3d 498, 536 (6th Cir. 1996)).
339 *See* Hutter, *supra* note 331, at 3, col. 1.
340 *See, e.g.*, Johnson v. Lutz, 170 N.E. 517, 518 (N.Y. 1930).

Viewed in this light, CPLR 4549 shows the legislature will step in and create rules of evidence that the Court of Appeals for some reason is unwilling to recognize, much less discuss the reasons for not recognizing them.

B. Confrontation Clause

The Sixth Amendment's Confrontation Clause guarantees the accused the right "to be confronted with the witnesses against him" in a criminal prosecution.[341] The clause not only assures the accused the right to confront face-to-face a witness testifying against the accused in court, but also limits the admissibility of statements made out of court against the accused.[342] As to the latter, the United States Supreme Court held in *Crawford v. Washington*[343] that a witness's out-of-court statement would be barred by the Clause if it were "testimonial," unless the witness testifies at the trial or if the witness is unavailable for trial and the accused had a prior opportunity to cross-examine the witness.[344] Under *Crawford*, the fact that the statement was admissible under a required hearsay exception was considered irrelevant.[345]

In the twenty-five years since *Crawford* was decided, the Court of Appeals has sought to define the boundaries of *Crawford* and especially the definition of "testimonial," a difficult task because of the lack of guidance from the Supreme Court and the opaqueness of its decisions.[346] Recent decisions from the court show this struggle continues in the Wilson Court.

The case to start with is *People v. Ortega*.[347] At issue was the admissibility of autopsy reports, ordinarily admissible under New York's business records hearsay exception, in the defendant's murder prosecution for the two children the defendant allegedly stabbed to death.[348] They had been prepared by the New York City Office of Chief Medical Examiner (OCME), and were introduced into evidence through an OCME pathologist who did not perform the autopsies or create the reports; the pathologist who performed the autopsy and

[341] U.S. CONST. amend VI.
[342] *See* White v. Illinois, 502 U.S. 346, 352–53 (1992); Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting California v. Green, 399 U.S. 149, 175 (1970)).
[343] Crawford v. Washington, 541 U.S. 36 (2004).
[344] *See id.* at 68.
[345] *See id.*
[346] *See* BARKER & ALEXANDER, *supra* note 74, § 8:6.
[347] People v. Ortega, 227 N.E.3d 302 (N.Y. 2023).
[348] *Id.* at 304.

created the report did not testify.[349] The reports stated the location and size of the wounds, and repeatedly mentioned that the children had been killed and that they were killed by the defendant.[350]

The Court of Appeals held in a unanimous opinion authored by Judge Singas that the admission of the reports was in violation of the Confrontation Clause, as they were testimonial in nature.[351] In so holding, the court noted that in *People v. Freycinet*,[352] it had ruled that the factual portion of an autopsy report prepared by OCME was not a testimonial statement.[353] The court rejected *Freycinet*, holding the decision and its application was inconsistent with recent United States Supreme Court decisions decided subsequent to *Freycinet*.[354] The court held the autopsy reports were testimonial because they were "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" and were created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial."[355]

The *Ortega* takeaway is clear. Forensic reports will be deemed "testimonial," and thus within *Crawford*, when they are created for an evidentiary purpose in aid of a police investigation.[356] Additionally, forensic reports that are testimonial include reports analyzing evidence that not only contains direct accusations of guilt, but also reports that do not link evidence to a particular person at the time the report was prepared.[357] In short, almost all forensic-type reports prepared in connection with a criminal case will be testimonial.[358]

Of further significance, the court noted that the Confrontation Clause does not entirely preclude the use of information contained in testimonial autopsy reports.[359] In this regard, the court held "an expert medical examiner may offer conclusions as to the cause and manner of death, and surrounding circumstances, where that testifying expert performed, supervised or observed the autopsy or

[349] *Id.*
[350] *Id.* at 309.
[351] *Id.* at 304.
[352] People v. Freycinet, 892 N.E.2d 843 (N.Y. 2008).
[353] *Ortega*, 227 N.E.3d at 305–06 (citing *Freycinet*, 892 N.E.2d at 844).
[354] *Ortega*, 227 N.E.3d at 308.
[355] *Id.* at 308–09 (alterations in original) (quoting Crawford v. Washington, 541 U.S. 36, 51–52 (2004)).
[356] *See Ortega*, 227 N.E.3d at 308–09 (quoting *Crawford*, 541 U.S. at 51).
[357] *See Ortega*, 227 N.E.3d at 305, 308.
[358] *See id.*
[359] *Ortega*, 227 N.E.3d at 310.

used their own independent analysis of the primary data" in the autopsy file.[360] The primary data relied upon may include materials in the autopsy file, such as photographs and video recordings.[361]

The second Confrontation Clause case is *People v. Franklin*.[362] The defendant was charged with the criminal possession of a gun found in the basement of the home he shared with two other people.[363] At trial, the People introduced a Criminal Justice Agency (CJA) report created upon the defendant's arrest.[364] A CJA report is routinely prepared for all arrestees in New York City to give the arraignment judge information pertaining to the arrestee's suitability for pretrial release.[365] Pedigree information is collected, including the defendant's address, as pertinent to establishing community ties.[366] The defendant's CJA report was admitted to prove where the defendant lived—in the basement at the given address—and his dominion and control over a gun in that basement, an element of the crime charged.[367] The defendant objected, arguing the report was testimonial and thus barred under *Crawford*.[368]

The Court of Appeals, in an opinion written by Judge Halligan, rejected the defendant's argument, holding the report was not testimonial.[369] In so holding, the court stated that "in ascertaining whether out-of-court statements are testimonial, courts should inquire, as the U.S. Supreme Court has instructed, 'whether in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony."'"[370] This approach was an express repudiation of its prior

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360 *Id.*

361 *Id.* at 310–11. As discussed *infra* in text accompanying notes 387–92, this statement approving reliance upon primary data has been, apparently, restricted by a United States Supreme Court decision regarding CJA reports subsequent to *Ortega*.

362 People v. Franklin, 242 N.E.3d 652 (N.Y. 2024), *cert. denied*, Franklin v. New York, 145 S. Ct. 831 (2025).

363 *Id.* at 653–54.

364 *Id.*

365 *Id.* at 653.

366 *Id.* at 654.

367 *See id.*

368 *See id.*

369 *Id.* at 653. The dissenting judges, Appellate Division Justices Sharon Aarons and Tracey Bannister, who were designated to hear the appeal, expressed the view that the report should be viewed as testimonial. *Id.* at 660, 664, 667 (Aarons, J., dissenting) (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)).

370 *Franklin*, 242 N.E.3d at 656 (alteration in original) (first quoting Ohio v. Clark, 576 U.S. 237, 245 (2015); and then quoting Michigan v. Bryant, 562 U.S. 344, 358 (2011)).

precedent utilizing an "essential element" approach to determining whether an out-of-court statement was testimonial.[371]

In applying the "primary purpose" standard to the CJA report, the court held its purpose "was not to create an out-of-court substitute for trial testimony, and that it is not therefore testimonial. The primary purpose of a CJA interview and resulting report is administrative, not something tailored 'to establish or prove past events potentially relevant to later criminal prosecution.'"[372] "Its objective is to give the arraignment judge information pertaining to a defendant's suitability for pretrial release[,] . . . not to elicit incriminating statements."[373]

Franklin, read together with *Ortega*, shows the Court of Appeals will follow faithfully United States Supreme Court precedent. In doing so, the court has shown it will not hesitate to reject its prior precedent on a *Crawford* issue.

C. Foundation Proof for Testifying Forensic Analyst's Opinion

In *People v. Jordan*,[374] the Court of Appeals was asked to address what foundation proof the People must admit to allow a testifying forensic analyst to opine as to the result of a forensic test the analyst did not personally perform, when it is asserted that the analyst conducted an independent analysis on the raw data and was not merely functioning as a conduit for the conclusions expressed in a forensic report concerning the test.[375] The concern is that the analyst would be testifying to the contents of an out-of-court statement, which would be inadmissible if it were testimonial in nature.[376] The court had previously held such testimony was an impermissible end-run around *Crawford* in *People v. John*.[377]

In *Jordan*, the defendant was charged with robbery in the second degree.[378] At trial, an OCME analyst testified that the defendant's DNA profile matched the DNA profile developed from a crime scene swab.[379] As a foundation for the opinion, three documents were

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[371] *Id.* at 655–56. The court repudiated the "essential element" standard that the court had addressed in *People v. Pacer*, 847 N.E.2d 1149, 1152 (N.Y. 2006).
[372] *Franklin*, 242 N.E.3d at 658 (quoting *Clark*, 576 U.S. at 244).
[373] *Franklin*, 242 N.E.3d at 658 (citing People v. Yu, 90 N.Y.S.3d 32, 33 (App. Div. 1st Dep't 2018)).
[374] People v. Jordan, 223 N.E.3d 773 (N.Y. 2023).
[375] *See id.* at 775–76.
[376] *Id.* (quoting Bullcoming v. New Mexico, 564 U.S. 647, 657 (2011)).
[377] People v. John, 52 N.E.3d 1114, 1120 (N.Y. 2016).
[378] *Jordan*, 223 N.E.3d at 775.
[379] *Id.*

admitted into evidence: a forensic biology file containing all paperwork developed by OCME, including a DNA profile generated from the DNA swab from the crime scene; a similar forensic biology file that contained a DNA profile generated from the confirmatory swab taken from the defendant; and a demonstrative chart used to explain the matches to the jury.[380] The People claimed, over the defendant's objection, that the analyst had performed an independent analysis of the profiles, and thus his opinions were admissible as he was merely a hearsay conduit for the conclusions of others.[381]

A unanimous Court of Appeals, in an opinion by Judge Garcia, held the admission of the analyst's testimony and the underlying exhibits was error as their admission violated the defendant's Confrontation Clause rights.[382] Error was present because the evidence showed only a conclusory description of the involvement of the analyst in the DNA analytical process, which was insufficient to support the introduction of the testimony and the exhibits.[383] The court noted that the analyst's testimony, that for one DNA profile he had received the reports and reviewed them and for the other profile he had received the raw data and went through it, was too vague to establish that he had used his independent analysis on the raw data.[384] In sum, the foundation evidence testified to was insufficient to establish he was not merely functioning as a conduit for the conclusions of others.[385]

Of note, Judge Garcia concluded his opinion with a word of caution:

> We note that our holding today is made absent clear guidance from the U.S. Supreme Court. The Supreme Court may revisit the issues . . . in a manner that affects today's holding. Technology may also develop in a way that affects confrontation rights and our holding is limited to the process for forensic DNA analysis as currently conducted.[386]

This observation was proven to be prescient by the United States Supreme Court's decision in *Smith v. Arizona*,[387] decided seven months after *Jordan*.

In *Smith*, the Supreme Court held that notes and reports relied upon by a testifying expert, which the expert did not prepare, to

[380] *Id.*
[381] *Id.*
[382] *Id.* at 778–79.
[383] *Id.* (quoting People v. John, 52 N.E.3d at 1128).
[384] *Jordan*, 223 N.E.3d at 778.
[385] *Id.* (quoting *John*, 52 N.E.3d at 1128).
[386] *Jordan*, 223 N.E.3d at 778–79 (citations omitted).
[387] *See* Smith v. Arizona, 602 U.S. 779, 783 (2024).

support the expert's opinion are not being admitted for a non-truth purpose, but for their truth, and thus constitute hearsay.[388] The Confrontation Clause will bar their admission if the notes and reports are testimonial.[389] The Supreme Court then remanded the case to the Arizona Supreme Court to determine if the relied upon notes and reports were testimonial.[390]

Needless to say, the "raw data" relied upon by the forensic expert or analyst is testimonial, a defendant must be given an opportunity to challenge the creator of the raw data, and if no opportunity is given, the testimony will be precluded.[391] *Smith* is a wake-up call regarding the presentation of forensic testimony.[392] The Court of Appeals will be called upon again to clarify what is and what is not permissible for a foundation for forensic opinion evidence.

VI. EXPERT TESTIMONY

A. Eyewitness Identification

In *People v. Vaughn*,[393] the Court of Appeals once again addressed an issue involving the admissibility of expert eyewitness testimony.[394] As a backdrop for this decision, it is important to note that the court has consistently over the past two decades expressed concern about mistaken eyewitness identifications, stating they "are 'the single greatest cause of wrongful conviction in this country,' 'responsible for more . . . wrongful convictions than all other causes combined.'"[395] Acting on this factual foundation, and in the absence of any specific legislation directed at this issue, the court held that judges have the discretion in "appropriate cases" to permit eyewitness expert testimony to "educate a jury concerning the

[388] *See id.* at 794–800.
[389] *Id.* at 800.
[390] *Id.* at 803.
[391] *See id.*; *Jordan*, 223 N.E.3d at 778.
[392] *See* BARKER & ALEXANDER, *supra* note 74, § 8.6.
[393] People v. Vaughn, 258 N.E.3d 1159 (N.Y. 2024).
[394] *See id.* at 1161.
[395] People v. Boone, 91 N.E.3d 1194, 1197 (N.Y. 2017) (first quoting State v. Delgado, 902 A.2d 888, 895 (N.J. 2006); and then quoting Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero, & C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 605 (1998)); *see also* People v. Marshall, 45 N.E.3d 954, 959 (N.Y. 2015) ("Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system."); People v. Santiago, 958 N.E.2d 874, 880 (N.Y. 2011).

circumstances in which an eyewitness is more likely to make such mistakes."[396]

The court in *People v. LeGrand*[397] then set forth a standard to guide trial judges in determining the admissibility of expert eyewitness testimony:

> [W]here the 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 a 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.[398]

A decade later, the court in *People v. McCullough*[399] clarified this standard, rejecting an interpretation that *LeGrand* "require[d] courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence."[400] According to the court:

> [*LeGrand*] 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. Courts reviewing such a determination simply examine whether the trial court abused its discretion in applying the standard balancing test of prejudice versus probative value.[401]

Turning now to *Vaughn*, the primary contested issue at the defendant's trial on the charge of robbery in the first degree was the identity of the robber.[402] The People's case relied upon two identifications of eyewitnesses who saw the perpetrator's face for less than two minutes under stressful conditions in which a gun was pointed at them.[403] On an oral mid-trial application, defense counsel informed the trial judge he intended to present expert testimony on the factors that affect the reliability of eyewitness identification and

396 *Santiago*, 958 N.E.2d at 880 (quoting People v. Drake, 850 N.E.2d 630, 631 (N.Y. 2016)).
397 People v. LeGrand, 867 N.E.2d 374 (N.Y. 2007).
398 *Id.* at 375–76.
399 People v. McCullough, 58 N.E.3d 386 (N.Y. 2016).
400 *Id.* at 388.
401 *Id.* (internal quotation marks omitted) (first quoting People v. Lee, 750 N.E.2d 63, 66 (N.Y. 2001); and then quoting People v. Powell, 55 N.E.3d 435, 439 (N.Y. 2016)).
402 *See* People v. Vaughn, 258 N.E.3d 1159, 1162 (N.Y. 2024).
403 *Id.* at 1161–62.

on "cross-race effect."[404] The trial judge permitted the testimony on cross-race effect, but otherwise denied the application.[405] The judge's denial was based on her determination that the factors the expert would rely upon were within the ken of an average juror, and thus the jury did not need any help from the expert, and that he had discretion to admit or exclude the testimony because of the existence of corroborating evidence.[406] The Second Department upheld the ruling as a proper exercise of the trial judge's discretion, noting specifically that "the People presented sufficient corroborating evidence connecting the defendant to the crime to obviate the need for the additional inquiry required by [*LeGrand*]."[407]

The Court of Appeals, in a 6-1 decision authored by Judge Troutman, held that while the trial judge, and the Appellate Division in affirming the conviction, referenced an incorrect framework, the trial judge's ruling was nonetheless not an abuse of discretion.[408] Initially, the majority made clear, indeed crystal clear, its rejection of a two-stage inquiry for the determination of expert eyewitness testimony, stating:

> Courts must not decide whether evidence is admissible based solely on the existence or strength of corroborating evidence. Nor should courts require adequate corroborating evidence as a prerequisite to weighing other considerations pertinent to admissibility. Rather, courts should be guided by whether the proffered expert testimony would aid a lay jury in reaching a verdict.[409]

The majority then held that on the record before the court, the trial judge did not abuse her discretion in limiting the defendant's application as to the eyewitness expert, stating "[t]he record establishes that the court reached its determination by weighing the probative value of the testimony against, among other things, the prospect of unduly delaying trial."[410] In so ruling, the majority commented that defendant on appeal focused on three factors that he perceived as supporting admissibility of his expert testimony—the effect of stress, weapon focus, and the correlation between confidence

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[404] *Id.* at 1162.
[405] *See id.* at 1163.
[406] *Id.* at 1162–63.
[407] People v. Vaughn, 191 N.Y.S.3d 162, 164 (App. Div. 2d Dep't 2023) (citing People v. LeGrand, 867 N.E.2d 374, 375–76 (N.Y. 2007)).
[408] *Vaughn*, 258 N.E.3d at 1167.
[409] *Id.* at 1165 (internal quotation marks and citations omitted).
[410] *Id.* (citation omitted).

and accuracy.[411] As to these factors, the majority faulted the defendant for not fully exploring them before the trial judge, and that in the absence of a full record on those factors, "we cannot say that there was an abuse of discretion in the court's balancing of the proffered testimony's probative value against the prospect of causing undue prejudice, confusing the issues, misleading the jury, or unduly delaying the proceedings."[412]

Judge Troutman's opinion for the court should dispel any ambiguities in its decisions—to the extent there are now ambiguities, a doubtful proposition—as to when eyewitness expert testimony is admissible.[413] In this regard, there is no need for legislative action on the issue.

VII. PRIVILEGE

A. Attorney-Client

New York's attorney-client privilege, as codified in CPLR 4503(a), protects against disclosure of a "confidential communication made between the attorney or his or her employee and the client in the course of professional employment."[414] To qualify for privileged status, the confidential communication must be made for the purpose of obtaining or providing legal advice or service.[415] Notably, the Court of Appeals in developing the contours of the privilege has long recognized that the confidential communications between attorney and client are not limited to legal advice concerning litigation, present or imminent, but cover the client's providing of information to the attorney so that the attorney can understand the client's non-litigation problems and render legal advice regarding these problems.[416] In determining whether the privilege attaches to a confidential communication, the critical inquiry is whether the conversation was made in order to obtain or render legal services to the client.[417]

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411 *Id.* at 1166.
412 *Id.* at 1167. Judge Rivera, the sole dissenter, was of the opinion that the trial judge's ruling was an abuse of discretion. *See id.* (Rivera, J., dissenting).
413 GUIDE TO N.Y. EVID. r. 7.17(2) (Expert Testimony on Reliability of Identifications) (setting forth the factors for a trial judge to consider in determining the admissibility of eyewitness expert testimony).
414 N.Y. C.P.L.R. 4503(a)(1) (McKinney 2025).
415 Bacon v. Frisbie, 80 N.Y. 394, 398–400 (1880).
416 Spectrum Sys. Int'l. Corp. v. Chem. Bank, 581 N.E.2d 1055, 1061 (N.Y. 1991).
417 App. Advocs. v. N.Y.S. Dep't of Corr. & Cmty. Supervision, 228 N.E.3d 588, 592 (2023).

In *Appellate Advocates v. New York State Department of Corrections and Community Supervision*, the Court of Appeals, in an opinion by Judge Rivera for a unanimous court, addressed the issue of legal advice versus non-legal advice in the context of a confidential communication between a government agency and the agency's counsel.[418] Her opinion for the court shows a strong commitment to the applicability of the privilege in that the communications, regardless of the form or manner of the communication, and even when proactively made as a response to a specific request, will fall within the privilege provided the communication involves legal advice or services. While the opinion is rendered in the context of a governmental communication, the decision is clear as to its universal application to all attorney-client communications.[419]

In *Appellate Advocates*, the respondent state agency withheld eleven documents prepared by counsel for the Board of Parole for the purpose of training and advising commissioners on how to comply with their legal duties and obligations that were sought by the petitioner pursuant to a Freedom of Information Law (FOIL) request.[420] Specifically, the documents sought "contain[ed] counsel's advice regarding compliance with legal requirements concerning parole interviews and parole determinations"; "summarize[d] recent court decisions and advise[d] on how to apply statutes, regulations, and case law"; and "include[d] guidance on drafting parole decisions that accord with the law."[421] Respondent argued that it properly refused to disclose the documents as they were exempt from disclosure.[422]

The court held that as "the documents reflect[ed] counsel's legal analysis of statutory, regulatory and decisional law, and provide[d] guidance for the [Board of Parole] commissioners on how to exercise their discretionary authority," they therefore fell "squarely within" the attorney-client privilege.[423]

In reaching the conclusion, the court took note that the attorney-client privilege is premised on full disclosure to an attorney by the client, and that such disclosure enables the attorney to act more

418 *Id.* at 591.
419 *See id.* at 592.
420 *Id.* at 591.
421 *Id.* at 592.
422 *Id.* (citing N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney 2025)). This provision allows an agency to withhold documents that are protected by the attorney-client privilege.
423 *App. Advocs.*, 228 N.E.3d at 592 (citing Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 706 (N.Y. 1989)).

effectively and expeditiously;[424] and "[t]his policy is important in the public setting, where society at large benefits immensely from the free and candid communication between government lawyers and government actors."[425] In sum, "[t]he public is well served when counsel advises government clients on how to lawfully fulfill their public duties."[426]

Additionally, the court addressed the issue present when the communication may also have involved some non-legal policy advice, such as financial or political considerations.[427] It held that these considerations, albeit present, will not defeat the application of the privilege when an objective view of the communication overall showed the predominant purpose of the communication was the rendition of legal advice.[428]

In upholding the privilege as applied to the withheld documents, the court rejected three arguments made by the petitioner. First, the court rejected the argument that even if legal advice is involved, the communication must respond to an "existing real world factual situation" to be protected by the privilege.[429] The reason for rejection was obvious to the court: "Counsel often provides legal advice to assist the client in deciding how best to order their affairs in compliance with legal mandates, including what action, if any, to take in order to avoid litigation."[430] Second, the court rejected the argument that the privilege can only be invoked where the attorney's advice is triggered by the client's direct request for advice or disclosure of confidential information.[431] The court was unpersuaded by the argument as "[e]ncouraging proactive compliance with the law has patent benefits."[432] Third, and perhaps most significantly, the court rejected the petitioner's argument that "public policy in favor of transparency" required the privilege to give way, but stated forcefully, as noted above, that the privilege will not give way when it is promoting candid discussions between government attorneys and government officials.[433]

Suffice it to say, *Appellate Advocates* shows a strong commitment to upholding the attorney-client privilege and ensures that its

[424] *See App. Advocs.*, 228 N.E.3d at 594.
[425] *Id.*
[426] *Id.*
[427] *See id.* at 592.
[428] *Id.* at 593 (quoting *Rossi*, 540 N.E.2d at 706).
[429] *App. Advocs.*, 228 N.E.3d at 592–93 (internal quotation marks omitted).
[430] *Id.* at 593.
[431] *Id.*
[432] *Id.*
[433] *Id.* at 594.

underlying goals are achieved. This is a commendable commitment by the Wilson Court that bodes well for the privilege when future efforts are made to preclude its application.

VIII. CONCLUSION

Using as a foundation the Court of Appeals' major evidentiary decisions and certain statutory enactments in recent years, the case can be made that New York's scheme for the creation of evidence rules is working well, and that there appear to be no significant obstacles to a continuation thereof in the future. This Article and its analysis fully support this conclusion.

While this may suggest that there is no need to codify New York's rules of evidence in a statutory format like the Federal Rules of Evidence, a codification is desirable as it can result in "an accessible, easy-to-use guide for judges and lawyers [that] will save research time, promote uniformity in applying the law, avoid erroneous rulings and improve the quality of legal proceedings."[434] The lack of codification is a serious drawback to the present scheme.[435] Legislative intransigence on the enactment of a Code of Evidence, however, precludes that beneficial development.[436]

However, it is worthwhile to note that the emerging prominence of the Guide to New York Evidence is accomplishing the goals of codification within the present scheme. The Guide, which is readily available to all, can be accessed at the New York State Unified Court System website.[437] As this author has previously observed:

> The *Guide* consists of a compilation of New York's existing rules of evidence, both common law and statutory, written in Code Style—a rule in statutory format, followed by a Note which sets forth the source, meaning, and nuances of the Rule. To the extent practicable, the language of each Rule adheres to controlling decisional law, especially from the Court of Appeals, and current statutory language. While the *Guide*'s articles parallel the organization of the Federal Rules of Evidence in large part, it does not utilize the language of a Federal Evidence Rule except when that language has been adopted in New York decisional law.[438]

[434] JANET DIFIORE, *THE STATE OF OUR JUDICIARY 2017*, at 12 (2017).
[435] Salken, *supra* note 4, at 664–72.
[436] *Id.* at 661–62.
[437] *Guide to New York Evidence*, N.Y. STATE UNIFIED CT. SYS. (May 26, 2025), https://www.nycourts.gov/judges/evidence/ [https://perma.cc/WNX8-4A5J].
[438] Michael J. Hutter, *Evidence,* 70 SYRACUSE L. REV. 357, 358 (2020).

All that is missing is the Court of Appeals' citation to the Guide when present rules of evidence are in issue before the court. There is no principled reason why the court cannot follow the Massachusetts Supreme Judicial Court's endorsement of the Massachusetts Guide to Evidence, a work similar in nature and scope to the Guide to New York Evidence.[439] As the Supreme Judicial Court stated in reference to a draft of a codification that became the Guide to Massachusetts Evidence: "The Proposed Rules have substantial value as a comparative standard in the continued and historic role of the courts in developing principles of law relating to evidence. Parties are invited to cite the Proposed Rules, wherever appropriate, in briefs and memoranda submitted."[440]

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[439] *Massachusetts Guide to Evidence*, COMMONWEALTH OF MASS. (2025), https://www.mass.gov/guides/massachusetts-guide-to-evidence [https://perma.cc/VD7M-KPVU].

[440] Advisory Committee to Study the Rules of Evidence, *Announcement Concerning the Proposed Massachusetts Rules of Evidence* (Dec. 30, 1982), *in* 20 MASSACHUSETTS PRACTICE SERIES, EVIDENCE app. D (William G. Young, John R. Pollets & Christopher Poreda eds., 2025).