GUIDE TO NEW YORK EVIDENCE

ARTICLE 4: RELEVANCE AND ITS LIMITS

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4.01. Relevant Evidence

(1) Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence.

(2) All relevant evidence is admissible except as otherwise provided or required by the Constitution of the United States or the Constitution, statutes, or common law of New York State.

Note

Subdivision (1). Subdivision (1) defines the term "relevant evidence." It is derived from *People v Davis* (43 NY2d 17, 27 [1977]). As observed by the Court of Appeals, under this definition the evidence must tend to prove a fact that is material in the litigation. (*People v Stevens*, 76 NY2d 833, 835 [1990] [Evidence "should not be admitted unless relevant to a material fact to be proved at trial"]; *People v Scarola*, 71 NY2d 769, 777 [1988] ["Evidence is relevant if it has any tendency in reason to prove the existence of any material fact"]; *People v Yazum*, 13 NY2d 302, 304 [1963] ["all that is necessary is that the evidence have relevance, that it tend to convince that the fact sought to be established is so. That it is equivocal or that it is consistent with suppositions other than guilt does not render it inadmissible"].)

Subdivision (2). Subdivision (2) is derived from *Ando v Woodberry* (8 NY2d 165, 167 [1960] ["(I)t is well to recall the principle, basic to our law of evidence, that '(a)ll facts having rational probative value are admissible' unless there is sound reason to exclude them, unless, that is, 'some specific rule forbids' (1 Wigmore, Evidence [3d ed., 1940], p. 293). It is this general principle which gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules"]). The Court of Appeals has repeatedly referred to this "principle." (*E.g. Scarola*, 71 NY2d at 777 ["In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule"]; *People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Lewis*, 69 NY2d 321, 325 [1987].)

4.02 Direct and Circumstantial Evidence Defined

(1) Direct evidence is evidence of a fact based on a witness's personal knowledge of that fact acquired by means of the witness's senses. Direct evidence may prove guilt of a charged offense or liability for a civil wrong if, standing alone, that evidence satisfies a jury that guilt of the offense has been proved beyond a reasonable doubt or that liability for a civil wrong has been proven by a preponderance of the evidence or other applicable burden of proof.

(2) Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or nonexistence of another fact. Circumstantial evidence may prove guilt of a charged offense or liability for a civil wrong, if that evidence, while not directly establishing guilt of the offense or liability for a civil wrong, gives rise to an inference of guilt beyond a reasonable doubt or of liability for the civil wrong by a preponderance of the evidence or other applicable burden of proof.

(3) The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact.

(4) In a criminal proceeding, a defendant's confession of guilt constitutes direct evidence. A defendant's admission, not amounting to a confession because it does not directly acknowledge guilt but includes inculpatory statements from which a jury may infer guilt, is circumstantial evidence.

Note

Subdivisions (1) and (2) are derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70 (General Instruction—Circumstantial Evidence). Those definitions summarize the law of New York, beginning with *People v Bretagna* (298 NY 323, 325-326 [1949]):

> "Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred" (*id.* [internal quotation marks omitted]; *see People v Hardy*, 26 NY3d 245, 251 [2015] ["This Court has described circumstantial evidence as evidence that never proves directly the fact in question. (*People v Bretagna*, 298 NY 323, 325 [1949]). By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)" (internal quotation marks and citations omitted)]; *Schneider v Kings Hwy. Hosp. Ctr*., 67 NY2d 743, 744 [1986] ["To establish a prima facie case of negligence based wholly on circumstantial evidence, '(i)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.' The law does not require that plaintiff's proof 'positively exclude every other possible cause' of the accident but defendant's negligence. Rather, her proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (citations omitted)]; *Markel v Spencer*, 5 AD2d 400 [4th Dept 1958], *affd without op* 5 NY2d 958 [1959]).

In *Hardy*, the defendant was charged with larceny of a purse. A surveillance video inside a club showed the defendant positioning himself between the complainant and her purse; putting the purse underneath him; and, when the complainant left, "rifling through its contents" and walking away with the purse in hand (26 NY3d at 248). The surveillance video therefore was direct evidence, proving the actus reus, that is, the "taking" element, of larceny. That the "defendant offered the jury an alternative explanation of his behavior, one that was inconsistent with [the element of] larcenous intent, does not change the character of the evidence from direct to circumstantial" (*id*. at 251). As *Hardy* explained, "a particular piece of evidence is not required to be wholly dispositive of guilt in order to constitute direct evidence, so long as it proves directly a disputed fact without requiring an inference to be made. In other words, even if a particular item of evidence does not

conclusively require a guilty verdict, so long as the evidence proves directly a fact in question [in *Hardy*, the actus reus], the evidence is direct evidence of guilt" (*id.* at 248, 250-251; *e.g. People v Daddona*, 81 NY2d 990, 992 [1993] ["The criminal possession counts charged were amply supported by direct evidence: there was eyewitness testimony that defendant directed the stolen vehicles in and out of the driveway, thereby establishing, with direct evidence, that he was in constructive possession of the stolen vehicles, or that he was acting in concert with those in physical possession of the stolen vehicles"]; *People v Roldan*, 88 NY2d 826, 827 [1996] ["This case involves direct evidence . . . . Eyewitness testimony, if believed by the jury, established that defendant engaged in acts which directly proved that at the very least he acted as a lookout while the crime was being committed"]).

Perhaps the most important reason for distinguishing between direct and circumstantial evidence is that "a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence. By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*Hardy* at 249 [citations omitted]; *see People v Silva*, 69 NY2d 858, 859 [1987] [The complainant "was unable to make an identification of defendant and there was no direct evidence linking him to the robbery. Thus, . . . the case against defendant on the robbery counts was wholly circumstantial. It was, therefore, error for the court to refuse to give a circumstantial evidence charge"]).

Each subdivision refers to the burden of proof in a civil case by the terminology "preponderance of the evidence or other applicable burden of proof." The other applicable burdens of proof utilized in varying civil cases include "clear and convincing evidence" and "substantial evidence" (*see e.g.* Guide to NY Evid rule 3.01 [3] [c] and the note thereto).

Subdivision (3) is also derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70, which reflect the views expressed in *People* v *Benzinger* (36 NY2d 29, 32 [1974] [The reason for the rule on how to evaluate circumstantial evidence "is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require careful reasoning by the trier of facts"]) and *People v Cleague* (22 NY2d 363, 367 [1968] [The rule on how to evaluate circumstantial evidence does not stem "from any distrust of circumstantial evidence or any vaunted favoring of direct evidence. The myth of innate superiority of direct testimonial evidence was exploded long ago. Indeed, circumstantial evidence is generally stronger, at least when it depends, as it often does, upon undisputed evidentiary facts about which human observers are less likely to err as a matter of accuracy or to distort as a matter of motivation, emotional shock, or external suggestion. On the other hand, direct evidence almost always, even in the instance of bystanders, is subject to one or more of these psychological infirmities. Hence, the occasional superior reliability of the evidentiary circumstances" (citation omitted)]).

Subdivision (4) is derived from *People v Bretagna* (298 NY 323, 326 [1949] ["a confession of guilt by a defendant in a criminal cause . . . is not circumstantial evidence" but an admission "not amounting to a confession because not directly acknowledging guilt, but including inculpatory acts from which a jury may or may not infer guilt, is circumstantial, not direct evidence"]) and *People v Hardy* (26 NY3d 245, 249-250 [2015]):

> "[The defendant's] statement to the prosecution witness that he did not have the purse but could get it was not direct evidence of his guilt. A defendant's statement is direct evidence only if it constitutes a relevant admission of guilt. . . .
>
> "By contrast, where the defendant makes an admission that merely includ[es] inculpatory acts from which a jury may or may not infer guilt, the statement is circumstantial and not direct evidence. . . .
>
> "Here, defendant's statement—that he did not have the purse but could get it—was not a direct admission of his guilt of larceny. Rather, defendant's statement was also consistent with an inference that although he did not steal the purse, he knew where the purse was located and thought he could obtain it. Inasmuch as his statement merely included inculpatory facts from which the jury may or may not have inferred guilt, his statement was circumstantial rather than direct evidence" (internal quotation marks and citations omitted).

4.03 Completing and Explaining Writing, Recording, Conversation or Transaction[1]

When part of a writing, conversation, recorded statement or testimony, or evidence of part of a transaction is admitted, any other part of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted when necessary to complete, explain, or clarify the previously admitted part. The timing of the admission of such additional parts is subject to the court's discretion.

Note

This rule is derived from long-standing Court of Appeals precedent which recognizes that when evidence has been admitted, an adverse party may offer evidence necessary to complete, explain, or clarify the evidence that has been introduced. (*See e.g. Rouse v Whited*, 25 NY 170, 174-175 [1862] [" 'Where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible' " (citing *Prince v Samo*, 7 Adol & Ellis 627 [1838]; 1 Phillips' Evidence 416 [4th Am ed, from 10th Eng ed])]; *Grattan v Metropolitan Life Ins. Co.*, 92 NY 274, 284 [1883] ["The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence"]; *Nay v Curley*, 113 NY 575, 578-579 [1889] ["(W)here a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed"].) The rule is founded upon "the plainest principles of equity." (*Rouse*, 25 NY at 177 ["All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of equity require, that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it"].)

The rule as stated reflects the limits on "completeness" imposed by the Court of Appeals, namely, "(*a*) No utterance irrelevant to the issue is receivable; (*b*) no more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable; (*c*) the remainder thus received merely

aids in the construction of the utterance as a whole, and is not in itself testimony." (*People v Schlessel*, 196 NY 476, 481 [1909], citing 3 Wigmore on Evidence § 2113.)

Under the rule, when part of a party's own statement is admitted against that party as an admission against the party's interest, the party may offer into evidence any part of the statement which is exculpatory. (*See e.g. People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Gallo*, 12 NY2d 12, 15-16 [1962]; *Grattan*, 92 NY at 284-286; *cf. People v Hubrecht*, 2 AD3d 289, 289-290 [1st Dept 2003] [Where the defendant made three statements, two of which were exculpatory and the People introduced the one statement that was inculpatory, the exculpatory statements were "not admissible under the rule of completeness because the three statements were made to different persons in different settings and could not be viewed as a single continuous narrative or process of interrogation" (citation omitted)].)

Similarly, when a witness has been impeached by a statement the witness previously made, other parts of the statement may be admitted to clarify or explain the statement. (*See e.g. People v Ochoa*, 14 NY3d 180, 187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 496-498 [1973]; *see also People v Ramos*, 70 NY2d 639, 640-641 [1987] [Court emphasized that parts of the statement used for impeachment purposes that concerned unrelated matters were not admissible].)

This rule of "completeness" does not in any way modify Guide to New York Evidence rule 8.05 (Admission by Adopted Statement) as it relates to a defendant's silence.

The rule also addresses a timing issue; that is, when the completion evidence may be admitted. The rule commits the timing determination to the discretion of the court. (*See e.g. People v Torre*, 42 NY2d 1036, 1037 [1977] [where part is admitted during cross-examination, other parts may be admitted on redirect]; *Gallo*, 12 NY2d at 15-16 [where part of a written statement was read into the record on the People's rebuttal, other parts which were exculpatory may be admitted at that time].)

While other jurisdictions' codification of the completeness rule permits the use of other writings or recordings for explanatory and clarification purposes of the admitted writing or recording (*see e.g.* Fed Rules Evid rule 106), the Court of Appeals has not addressed the use of other writings or recordings.

New York has expressly incorporated the rule of completeness in CPLR 3117 (b) ("If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read"), and in CPLR 4517 (b) ("If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read

any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read").

In *Hemphill v New York* (595 US —, —, 142 S Ct 681, 692 [2022]), the Court barred the introduction in evidence of "unconfronted testimonial hearsay" under the "opening the door to evidence" principle (*see* Guide to NY Evid rule 4.08). In doing so, the Court opined that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court" (595 US at —, 142 S Ct at 693 [internal quotation marks and citations omitted]).

To date (May 2023), it does not appear that the Court of Appeals has precluded application of the completeness rule because the completed portion constituted hearsay; however, as noted above, *Schlessel* specified that one of the limitations on the completeness rule is that the completed portion is introduced as an aid in the construction of the utterance, "and is not in itself testimony." (*Schlessel*, 196 NY at 481.) In *Thrower v Smith* (62 AD2d 907, 912 [2d Dept 1978], *affd* 46 NY2d 835 [1978]), the Appellate Division noted that a "whole statement" in a document had to be admitted "in order to allow the party to explain the admission [in the portion introduced] by its context"; and in that situation, it was "not admissible for the truth of its contents." Statements admitted "for purposes other than establishing the truth of the matter asserted" do not constitute testimonial evidence (*Crawford v Washington*, 541 US 36, 59 n 9 [2004] [last sentence]; *People v Garcia*, 25 NY3d 77, 86 [2015]; *People v Reynoso*, 2 NY3d 820, 821 [2004]).

Unless barred, however, as the Advisory Committee on the Federal Rules of Evidence has explained, the completeness rule may also result in some statements being admitted for their truth:

> "[If the completing statement] is admitted to provide context for the initially proffered statement . . . , the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder

weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact" (Committee Note, Proposed Fed Rules Evid rule 106 [Oct. 19, 2022], available at https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf [proposed amendment would allow evidence of completeness to be admitted over a hearsay objection]).

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[1] In January 2022, the Note was amended to include the paragraph describing the *Hemphill* decision, and in May 2023, further comment on the issue raised in *Hemphill* was added.

4.05. Conditional Relevance (Evidence Offered "Subject to Connection")

When the admissibility of offered evidence depends on the introduction of further evidence to fulfill the requirements of admissibility, the court may admit the offered evidence after, or subject to, receipt of that further evidence. Upon failure of a party to fulfill the requirements of further evidence, the offered evidence must be struck and the jury instructed to disregard it, or, if undue prejudice has resulted, the court may grant a mistrial.

Note

This rule governs the situation where the relevance of offered evidence depends upon the existence of an additional fact(s). It is derived from Court of Appeals precedent that in such a situation the court may admit the evidence "subject to connection"—later proof of that additional fact(s)—or require before admitting the evidence proof of that additional fact(s). (*See e.g. People v Caban*, 5 NY3d 143, 151 [2005]; *Cover v Cohen*, 61 NY2d 261, 269 n 2 [1984].) The order of proof is within the discretion of the court. (*See e.g. Caban*, 5 NY3d at 151.) However, the Court has cautioned that where the evidence is highly prejudicial in content, the "better practice would be for relevance to be established prior to admission, out of the presence of the jury." (*Cover*, 61 NY2d at 269 n 2.) The second sentence sets forth judicial options when the promised connection does not occur. (*See People v Stone,* 29 NY3d 166, 171 [2017]; *United States Vinegar Co. v Schlegel,* 143 NY 537, 544 [1894].)

4.06. Exclusion of Relevant Evidence

A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would:

(1) create undue prejudice to a party;

(2) confuse the issues and mislead the jury;

(3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or

(4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.

Note

The Court of Appeals has held that relevant evidence is admissible as set forth in rule 1.05. The Court of Appeals, however, has also made clear that relevant evidence may be excluded by the trial court in the exercise of its discretion upon a consideration of pragmatic factors. (*See generally People v Davis*, 43 NY2d 17, 27 [1977].) These factors are set forth in subdivisions (1) – (4).

Relevant evidence may be excluded when, for example, it:

- causes undue prejudice (*see Mazella v Beals*, 27 NY3d 694, 710 [2016] [in a medical malpractice action, "any possible relevance of the consent order's contents (concerning defendant's negligent treatment of other patients) was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards"]; *People v Hudy*, 73 NY2d 40, 68 [1988]; *Davis*, 43 NY2d at 27);

- confuses the issues and misleads the jury (*see People v Santarelli*, 49 NY2d 242, 250 [1980] [in insanity cases where a mass of evidence of prior criminal conduct is offered, "the danger is particularly great that the jury will become confused by the mass of evidence presented and will decide to convict the defendant not because they find he was legally sane at the time of the act, but rather because they are convinced that he

is a person of general criminal bent"]; *Radosh v Shipstad*, 20 NY2d 504, 508 [1967]; *People v Nitzberg*, 287 NY 183, 189 [1941]);

- creates unreasonable delay or is unnecessarily cumulative (*see People v Petty*, 7 NY3d 277, 286-287 [2006] [court properly exercised its discretion in excluding a witness' testimony as to threats the victim made against the defendant as four defense witnesses, including the defendant, had already testified that victim made numerous threats against defendant]; *Hudy*, 73 NY2d at 67 ["Where the facts underlying a witness's reason to fabricate are admitted by the witness, extrinsic proof of those facts may properly be excluded, in the court's discretion, on the ground that it would be cumulative"]; *Davis*, 43 NY2d at 27 [court properly excluded the testimony as its "probative value . . . could be outweighed by dangers that the main issue would be obscured, by prolongation of trial"]; *People v Harris*, 209 NY 70, 82 [1913] [court excluded evidence "tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned"]); or

- unfairly surprises the opposing party (*Davis*, 43 NY2d at 27; *Nitzberg*, 287 NY at 189).

The Court of Appeals has stressed that these concerns and their presence in a given case do not mandate exclusion of offered evidence; rather, these concerns must be balanced against the probative value of the evidence (*see People v Brewer*, 28 NY3d 272, 277 [2016]; *Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990]).

While the Court of Appeals has consistently enumerated the factors that may lead to a discretionary exclusion of relevant and otherwise admissible evidence, the Court has described the standard in differing ways. The majority, and most recent, of the Court's decisions state that relevant evidence may be excluded if its probative value is "outweighed" by one of the enumerated factors. (*People v Brewer*, 28 NY3d 271, 277 [2016]; *Mazella*, 27 NY3d at 709; *People v Smith*, 27 NY3d 652, 668 [2016]; *People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *Hudy*, 73 NY2d at 68; *Davis*, 43 NY2d at 27.) Other decisions have stated that the probative value must be "substantially outweighed" by one of the enumerated concerns. (*E.g. People v Caban*, 14 NY3d 369, 374 [2010]; *People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Santarelli*, 49 NY2d 241, 255 [1980].) No decision discusses the difference between "outweighed" and "substantially outweighed." An analysis of the decisions suggests that the same result would have been reached regardless of the formulation utilized. A fair assumption, therefore, is that the differing formulations do not affect the required balance between probative value

and prejudice. The rule utilizes the formulation found in the majority of the Court's opinions.

The Court of Appeals has cautioned that exclusion under the rule may not be required when a cautionary instruction to the jury can obviate the potential for prejudice. (*See People v Mountain*, 66 NY2d 197, 203 [1985].) Decisional law, however, recognizes that in some situations a limiting instruction may not be sufficient to protect a party adequately from the jury's misuse of the evidence, and that in such situations the court may take other action, such as precluding or redacting the evidence or directing a severance. (*Bruton v United States*, 391 US 123, 135 [1968] ["(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"]; *People v Johnson*, 27 NY3d 60, 70 [2016] ["curative instructions could not avoid the substantial risk" that the jury would misuse the evidence]; *People v Cedeno*, 27 NY3d 110, 120 [2016] [redaction as made was not effective to preclude misuse of the evidence by the jury]; *Cover v Cohen*, 61 NY2d 261, 270 [1984] [evidence should be excluded where there is "substantial risk that such evidence may be over-emphasized by the jury"].)

4.07. Limited Admissibility of Relevant Evidence[1]

(1) Evidence may be admitted for one purpose but not for another, or as to one party but not as to another.

(2) In a trial by jury, where evidence is admitted pursuant to subdivision one, the court shall provide the jury an instruction on the limited applicability of the evidence.

(3) When a limiting instruction will not adequately protect a party, the court may exclude the evidence or take other appropriate action.

Note

Subdivisions (1) and (2). This rule is derived from Court of Appeals precedent holding that evidence is admissible as to any party or for any relevant purpose even though it may be inadmissible as to another party or for another purpose. In such circumstances, jury instructions as to the limited purpose for which the evidence may be considered are appropriate. (*Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990] [admission of evidence for a limited purpose with an appropriate instruction to the jury in the court's final instructions]; *People v Williams*, 50 NY2d 996, 998 [1980] [evidence was admitted for a limited purpose and in this case the trial court should have, "when (the) evidence (came) in and again in its charge at the end of the case, caution(ed) the jury concerning the limited purpose for which it is being admitted"]; *People v Marshall*, 306 NY 223, 227 [1954] [evidence admissible as to one defendant but not a codefendant]; *cf. People v Warren*, 20 NY3d 393 [2013] [in a simultaneous trial of codefendants, with defendant #1 being tried by jury and defendant #2 by the judge, the trial judge erred in not granting the motion of defendant #1 that the jury be excused when defendant #2 testified in his own behalf].) The aim of the limited admissibility rule "is, insofar as possible, to assure that evidence admitted for a limited purpose will not be improperly applied beyond that purpose by the jury." (Proposed NY Code of Evidence § 105, Comment [1991].)

In *People v Patterson* (48 AD2d 933, 933 [2d Dept 1975]), the Court reversed a judgment on the law because the trial court "failed to give any instructions as to the limited nature of the rebuttal testimony when it was offered and, during the charge, the jury was not clearly instructed that the admission [of the defendant introduced on rebuttal for impeachment purposes only] could not be considered as evidence of guilt." Even in the absence of a timely defense objection, the Appellate Division in *People v Campbell* (59 AD2d 912, 912 [2d Dept 1977])

reversed the judgment in the interests of justice when the trial court failed to charge the jury that a statement (albeit taken in violation of the defendant's constitutional rights) was admitted in rebuttal solely for impeachment purposes.

While the Appellate Division may not exercise its "interests of justice" jurisdiction in every instance that a court in a joint trial of defendants fails to provide a jury instruction on the scope of critical evidence that is not applicable to all defendants, *Campbell* suggests that the better practice is for the court to do so, with or without a request. (*See Brandon v Caterpillar Tractor Corp.*, 125 AD2d 625, 627 [2d Dept 1986] [the trial court "erred in failing to instruct the jury" of the limited purpose for which specific documents were received in evidence].)

Statutes may require a limiting instruction on the receipt of evidence. For example, CPL 60.35 (2) dictates that where a party is authorized to impeach its own witness with a prior contradictory statement, the prior statement "may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury."

The timing of the instruction may be critical to curing any prejudice to the party against whom the evidence is not admissible. (*Marshall*, 306 NY at 226, 228 [" 'Reserving the instructions (as to evidence that was stricken) until after the evidence had sunk in and then asking the jury to excise it from consideration as to appellant was not psychologically the equivalent of the proper instruction at the proper time' "].)

Subdivision (3) is illustrated perhaps best by *Bruton v United States* (391 US 123, 137 [1968]), which held that, in a joint trial of defendants, a limiting instruction that the jury may not consider one defendant's confession against the codefendant was insufficient to protect the codefendant's right of confrontation.

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[1] In December 2022, the rule was renumbered and amended to expand subdivision (2) and add a new subdivision (3); and the Note was substantially expanded.

4.07.1. Character Evidence[1]

(1) Admissibility. Evidence of a person's character is not admissible to prove that the person acted in conformity therewith on a particular occasion except:

(a) In a civil or criminal proceeding, evidence of a person's character is admissible where that character is an essential element of a crime, charge, claim, or defense.

(b) In a criminal proceeding, a defendant may offer evidence of character that is relevant to prove the defendant acted in conformity therewith on a particular occasion, and, if the evidence is admitted, the People may rebut that evidence.

(c) In a criminal proceeding where the defendant interposes a defense of justification based on the defense of self or another:

(i) evidence of the victim's reputation for violence and prior specific acts of violence by the victim against the defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant's belief of the necessity of defending himself or herself or another person from impending harm;

(ii) evidence of the victim's prior threats against the defendant, whether known to the defendant or not, is admissible to prove that the victim was the initial aggressor;

(iii) evidence of the victim's reputation for violence is not admissible to prove that the victim was the "initial aggressor"; and

(iv) evidence of the defendant's reputation for violence is not admissible to prove that the defendant was the "initial aggressor."

(d) In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness as provided in Guide to New York Evidence article six.

(2) Method of Proof. When evidence of a person's character is admissible, proof thereof may only be by testimony as to that person's reputation for the relevant character as set forth in Guide to New York Evidence rule 8.39 (1), except:

(a) If evidence of character is admissible under subdivision (1) (a) of this rule, the relevant character may be proved by testimony as to that person's reputation for the relevant character as set forth in rule 8.39 (1) and by proof of relevant specific acts.

(b) If a defendant in a criminal proceeding, through the testimony of a witness called by the defendant, offers evidence of the defendant's good character, the People may independently prove any previous conviction of the defendant for an offense that would tend to negate any character trait or quality attributed to the defendant in that witness' testimony.

(3) Cross-Examination. If a witness offers reputation evidence as to a person's character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which the defendant is charged, that is inconsistent with that reputation.

Note

Subdivision (1). The general rule stated in subdivision (1) is derived from Court of Appeals precedent that has long recognized that in civil and criminal proceedings the character or a character trait of a person may not be proved to raise an inference that the person acted in conformity therewith on the occasion in issue (*see e.g. People v Zackowitz*, 254 NY 192, 197 [1930]; *Noonan v Luther*, 206 NY 105, 108 [1912]; *McKane v Howard*, 202 NY 181, 186-187 [1911]). 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' " (*People v Mullin*, 41 NY2d 475, 479 [1977]). This exclusionary rule is "one, not of logic, but of policy" (*Zackowitz*, 254 NY at 198).

Evidence of a rape victim's prior sexual conduct to prove conduct, e.g., consent, is governed by CPL 60.42; and evidence of a victim's sexual conduct in prosecutions for any offense is governed by CPL 60.43.

The remaining paragraphs of subdivision (1) set forth the exceptions to the rule's bar to character evidence.

Subdivision (1) (a). Paragraph (a) of subdivision (1) sets forth the common-law rule that where the character or a trait of character of a person is, as a matter of substantive law, an essential element of a crime, charge, claim, or defense, that character or trait of character may be proved (*see e.g. People v Mann*, 31 NY2d 253 [1972]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898]; *Cleghorn v New York Cent. & Hudson Riv. R.R. Co.*, 56 NY 44, 46-47 [1874]).

Subdivision (1) (b). Paragraph (b) of subdivision (1) is derived from Court of Appeals precedent which gives a defendant in a criminal proceeding the option to introduce reputation evidence as to defendant's own good character for the purpose of raising an inference that defendant would not be likely to commit the crime charged (*see e.g. People v Aharonowicz*, 71 NY2d 678, 681 [1988] ["The principle has long been that in a criminal prosecution, the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular offense charged"]; *People v Van Gaasbeck*, 189 NY 408, 413-414 [1907]). When the defendant opts to introduce evidence of good character, "such testimony must relate to the traits involved in the charge against him" (*People v Miller*, 35 NY2d 65, 68 [1974]).

Additionally, the rule as stated recognizes that when the defendant puts his or her character in issue, the People may, in rebuttal, challenge the "good" character or character trait elicited by defendant (*see e.g. People v Richardson*, 222 NY 103, 107 [1917]; *People v Hinksman*, 192 NY 421, 430-431 [1908]).

Subdivision (1) (c). Paragraph (c) of subdivision (1) is derived from Court of Appeals decisions holding that when the defendant interposes a justification defense of self-defense, evidence of the victim's *reputation* for being a violent person and evidence of the victim's prior violent acts against others, when known to the defendant, are admissible to show the defendant's state of mind as to the necessity of defending himself or herself (*People v Rodawald*, 177 NY 408, 423 [1904]); and further, that evidence of the victim's past violent *acts* against others, when known to the defendant, is admissible as to the reasonableness of defendant's conduct, provided the evidence is reasonably related to the crime charged (*see e.g. People v Miller*, 39 NY2d 543, 551-552 [1976]; *Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Guerra*, 2023 NY Slip Op 01352, 2023 WL 2529524 [2023]).

On the question of who was the "initial aggressor," *People v Petty* (7 NY3d 277 [2006]) permits evidence of the victim's threats against the defendant, whether the defendant was aware of the threats or not. That evidence permits an inference of the victim's "intent" to "act upon [the uttered threats]" and that he or she did so as the initial aggressor (*id.* at 285).

The "general reputation" of the victim as "quarrelsome, vindictive or violent," however, is "not received to show" that the victim "was the aggressor" nor is similar evidence of the reputation of the defendant admissible to show the defendant was the aggressor (*People v Rodawald*, 177 NY 408, 423 [1904]; Prince, Richardson on Evidence § 4-409 at 172 [Farrell 11th ed]; *cf. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543 [1976]; *but see Williams v Lord*, 996 F2d 1481, 1484 [2d Cir 1993, concurring op]).

Subdivision (1) (d) notes that when character evidence is admitted for impeachment purposes, it may be admissible under the rules set forth in this Guide's article six.

Subdivision (2). This subdivision is derived from the well-established rule in New York that when a person's character or character trait is admissible it must be proved by reputation testimony as set forth in Guide to New York Evidence rule 8.39 (1). Reputation testimony is the only form of proof permitted, and that reputation evidence must relate to the trait or traits involved in the charge against

the defendant (*see e.g. People v Miller*, 35 NY2d 65, 68 [1974]; *People v Kuss*, 32 NY2d 436, 443 [1973]; *People v Van Gaasbeck*, 189 NY 408, 413-415 [1907]).

The witness may testify, upon an adequate foundation, that "I have heard the reputation for the relevant character or character trait is good," or to the fact that since the witness has never heard anything contrary to the relevant character or character trait, defendant's reputation must be "good" (*Van Gaasbeck*, 189 NY at 420; *see also People v Bouton*, 50 NY2d 130, 140 [1980] ["And, the fact that the offer consisted solely of 'negative evidence'—i.e., the absence of adverse comment on the pertinent aspects of defendant's character—could not in itself be the basis for an exclusionary ruling"]).

The opinions of those who know defendant personally and have firsthand knowledge of defendant's character as well as proof of defendant's commission of specific acts that may implicate the trait are inadmissible (*Van Gaasbeck*, 189 NY at 415-416). The basis for this limitation as stated by the Court of Appeals in *Van Gaasbeck* is that "its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation" (*id.* at 418).

Additionally, the rule as stated in subdivision (2) recognizes that, when the defendant puts his or her character in issue pursuant to subdivision (1) (b), the People may now, in rebuttal, challenge the "good" character or character trait elicited by defendant. As derived from the common law, the People may introduce reputation evidence that defendant's reputation for the relevant character or character trait placed in issue is "bad." (*See e.g. Richardson*, 222 NY at 107; *Hinksman*, 192 NY at 430-431.)

The remaining paragraphs set forth specific proof rules applicable in limited situations.

Subdivision (2) (a). Paragraph (a) of subdivision (2) is derived from Court of Appeals precedent that, where a person's character is an element of a crime, charge, claim, or defense, the character may be proved by relevant specific acts (*see e.g. Mann*, 31 NY2d at 259; *Park*, 155 NY at 219; *Cleghorn*, 56 NY at 46-47). Although the case law is limited, courts have also permitted the character to be proved by reputation. (*See e.g. Wuensch v Morning Journal Assn.*, 4 App Div 110, 115-116 [1st Dept 1896].) However, the Court of Appeals has held to the contrary in an action where the defendant was alleged to have been negligent in hiring or

retaining an incompetent employee. (*See Park*, 155 NY at 218-219 ["We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community"].)

It should also be noted that CPL 60.40 (3) states the rule that where a prior criminal conviction is an element of the charged crime, the prior conviction necessary to the proof of the charged crime may be independently proved unless the defendant has availed himself or herself of the procedural protections set forth in CPL 200.60 or CPL 200.63. (*See* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 60.40 at subd three.)

Subdivision (2) (b). Paragraph (b) of subdivision (2) restates CPL 60.40 (2), which provides an additional avenue of proof to rebut the reputation evidence admitted when the defendant puts his or her character in issue pursuant to subdivision (1) (b). (*See* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 60.40 at subd two.)

Subdivision (3). This subdivision is derived from Court of Appeals precedent which holds that the witness providing reputation testimony may be asked on cross-examination whether the witness has heard about particular events that are derogatory to the reputation testified to by the witness (*People v Kuss*, 32 NY2d 436, 443 [1973] ["(I)t is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him"]). Specifically, the witness may only be asked whether the witness heard of the event and not whether the witness has personal knowledge of such an event. (*People v Kennedy*, 47 NY2d 196, 206 [1979] ["Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts"].) In *Kuss*, the Court emphasized that there are certain limitations, namely, "[t]he inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions" (*Kuss*, 32 NY2d at 443).

And, if the witness is solely a character witness, he or she may not be questioned about the crimes or underlying conduct of the crimes of which the defendant is accused (*People v Lopez*, 67 AD2d 624, 624 [1st Dept 1979] ["The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character evidence was offered"]; *People v Lowery*, 214 AD2d 684, 685 [2d Dept 1995], *mod on other grounds* 88 NY2d 172 [1996] ["We agree with the defendant that the prosecutor's cross-examination of a defense character witness exceeded the bounds of propriety insofar as the prosecutor utilized hypothetical questions which assumed the defendant's guilt of the crimes for which he was on trial"]; *People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989] ["The court erred in permitting the People to cross-examine defendant's character witnesses concerning whether their opinions of defendant's reputation would change if they knew that defendant had committed the crimes at issue"]).

[1] In December 2022, subparagraphs (iii) and (iv) of subdivision (1) (c) were added.

4.07.2. Habit Evidence

Habit of a person or routine practice of an organization is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct however frequent yet likely to vary from time to time depending on the circumstances). Evidence of a person's habit or an organization's routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.

Note

This rule sets forth New York's habit and routine practice rule as established by Court of Appeals decisions.

The definition of habit of a person and regular practice of an organization contained in the first sentence is derived from *Halloran v Virginia Chems.* (41 NY2d 386, 389, 392 [1977] [mechanic's practice of heating cans of Freon before transferring the gas to automobile air conditioning systems constituted admissible habit evidence as proof showed it was "a deliberate and repetitive practice" by a person "in complete control of the circumstances" as opposed to "conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances"]); *Ferrer v Harris* (55 NY2d 285, 294 [1982] [evidence that mother had told her daughter not to cross the street without looking for cars was not admissible as habit evidence because the plaintiff made no showing of "a persistent habit or regular usage by one in control of the circumstances in which it is employed"]); and *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007] [dentist's pre-extraction injection procedure which would not vary from patient to patient constituted admissible habit evidence as the record established it was a " 'deliberate and repetitive practice'—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional 'in complete control of the circumstances' "]).

The rule's second sentence, as derived from several Court of Appeals decisions, provides that evidence of a person's habit or an organization's routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. (*E.g. Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508-509 [2015] [billing company's regular office practices and procedures in handling no-fault claims to prove claims had been mailed]; *Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 392; *Beakes v DaCunha*, 126 NY 293, 298 [1891] [habit of being home on a specific day of the month to transact a specified

business]; *Matter of Kellum*, 52 NY 517, 519-520 [1873] [attorney's routine practice regarding execution of wills to prove proper execution of will].) As stated by the Court in *Halloran*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (41 NY2d at 391).

Of note, the Court of Appeals initially appeared disinclined to accept habit evidence in negligence cases. (*See Eppendorf v Brooklyn City & Newton R.R. Co.*, 69 NY 195, 197 [1877] [evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident]; *Zucker v Whitridge*, 205 NY 50, 58-66 [1912] [proof that the deceased had usually looked both ways before crossing railroad tracks was not admissible to establish his care on the particular occasion].) *Halloran*, however, found that a "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad" (41 NY2d at 392; *see also Ferrer v Harris*, 55 NY2d 285, 294 [1982] [acknowledging that *Halloran* "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases]).

Rather, as explained in *Halloran*, "[W]here the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks" (*Halloran*, 41 NY2d at 392 [citations omitted]; *accord Rivera v Anilesh*, 8 NY3d 627 [2007]).

Thus, in *Halloran*, a personal injury products liability action brought by a mechanic who sustained an injury in the use of the product, the Court authorized habit evidence of the plaintiff mechanic's habit in the use of that product which permitted an inference that he was negligent in its use. In *Rivera*, a patient sued her dentist in a malpractice action, and the Court allowed the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice (8 NY3d at 635).

Before proof of habit or routine practice is admitted, the party offering the proof must "show on *voir dire* . . . that [the party] expects to prove a sufficient number of instances of the conduct in question" (*Halloran*, 41 NY2d at 392). In *Halloran*, for example, "[i]f defendant's witness was prepared to testify to seeing Halloran using an immersion coil [in servicing automobile air conditioner units] on only one occasion, exclusion was proper. If, on the other hand, plaintiff was seen a sufficient number of times, and it is preferable that defendant be able to fix, at least generally, the times and places of such occurrences, a finding of habit or regular usage would be warranted and the evidence admissible for the jury's consideration"

(*id.* at 392-393). And, while at one point decision law was unclear whether habit evidence was admissible only when there were no eyewitnesses to the conduct in issue (*see e.g. Zucker*, 205 NY at 58), recent decisions permit habit evidence regardless of whether eyewitnesses are available (*Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 390-391).

4.08 "Opening the Door" to Evidence[1]

(1) A party may "open the door" to the introduction by an opposing party of evidence that would otherwise be inadmissible when in argument, cross-examination of a witness, or other presentation of evidence the party has given an incomplete and misleading impression on an issue. In a criminal case, however, unconfronted testimonial hearsay is not admissible in response to a party's argument, cross-examination of a witness, or other presentation of evidence that is misleading.

(2) A trial court must exercise its discretion to decide whether a party has "opened the door" to otherwise inadmissible evidence. In so doing, the trial court should consider whether, and to what extent, the evidence or argument claimed to "open the door" is incomplete and misleading and what, if any, otherwise inadmissible evidence is reasonably necessary to explain, clarify, or otherwise correct an incomplete and misleading impression.

(3) To assure the proper exercise of the court's discretion and avoid the introduction of otherwise inadmissible evidence, the recommended practice is for a party to apply to the trial court for a ruling on whether the door has been opened before proceeding forward, and the court should so advise the parties before taking evidence.

Note

Subdivisions (1) and (2) recite the long-settled "opening the door to evidence" principle in New York, as primarily explained in *People v Melendez* (55 NY2d 445 [1982]); *People v Rojas* (97 NY2d 32, 34 [2001]); *People v Massie* (2 NY3d 179 [2004]); and *People v Reid* (19 NY3d 382 [2012]), as limited by *Hemphill v New York* (595 US —, —, 142 S Ct 681, 694 [2022]), which bars the introduction in evidence of "unconfronted testimonial hearsay" under the "opening the door to evidence" principle.

Melendez dealt with the issue of whether the defense had "opened the door"

to permit the prosecutor to explore an aspect of the investigation that would not otherwise have been admissible. The Court began by noting that, when an "opposing party 'opens the door' on cross-examination to matters not touched upon during the direct examination, a party has the right on redirect to explain, clarify and fully elicit [the] question only partially examined on cross-examination." (*Melendez* at 451 [internal quotation marks and citation omitted].)

Argument to the jury or other presentation of evidence also may "open the door" to the admission of otherwise inadmissible evidence. (*Rojas* at 34 ["defendant opened the door" based "on the combination of his opening statement and cross-examination of a prosecution witness"]; *Massie* at 184 [noting that a door may be opened by "evidence or argument"].)

The "opening the door to evidence" principle, however, "does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. . . . [T]he court should only allow so much additional evidence to be introduced on redirect as is necessary to meet what has been brought out in the meantime upon the cross-examination. . . . The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply." (*Melendez* at 452 [internal quotation marks, citations, and emphasis omitted].)

On the facts of *Melendez*, the Court ruled that "although defense counsel may have partially 'opened the door' by asking whether [one of the People's witnesses] was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged." (*Id.* at 453.)

Massie recognized *Melendez* as the leading case on the subject, while noting that the application of the "opening the door to evidence" principle was not limited to cross-examination questions. *Massie* therefore set forth the guiding rule included in subdivision (2) for dealing with any "opening the door to evidence" issue in any circumstance. (*Massie* at 184 ["a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression"]; *see e.g.* Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

Reid pointed out that the "opening the door to evidence" principle exists to "avoid . . . unfairness and to preserve the truth-seeking goals of our courts." (*Reid* at 388.) Notwithstanding that goal, *Hemphill* held that the "opening the door to evidence" principle must not permit the introduction of evidence in violation of the

Sixth Amendment's Confrontation Clause. In *Hemphill*, the defense to a murder indictment rested upon a claimed third party's culpability; in accord with New York's then "opening the door to evidence" principle, the trial court allowed the introduction of the third party's guilty plea when the third party was unavailable to testify. The parties did not dispute that the third party's guilty plea was "testimonial" hearsay, and the Supreme Court then held its admission to be in violation of the Confrontation Clause. Thus, even if it may be argued that "unconfronted testimonial hearsay" would respond to a party's misleading impression on an issue, it is not admissible: "[The Confrontation Clause] admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive." (595 US —, —, 142 S Ct 681, 693 [2022].)

The Supreme Court, however, made a point of stating that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court." (595 US —, —, 142 S Ct 681, 693 [2022] [internal quotation marks and citations omitted]; *see* Guide to NY Evid rule 4.03.)

Other examples of situations where a party "open[s] the door" to otherwise inadmissible evidence include:

- "apparent inconsistencies or contradictions in a witness' statements or acts brought out on cross-examination to discredit his testimony [which] may be reconciled on redirect by relating to the jury the relevant surrounding circumstances." (*Melendez* at 451.)

- "where cross-examination raises the inference that the witness' testimony was the product of a recent fabrication, a party on redirect can refute this allegation either by introducing consistent statements made by the witness at a time when there was no motive to lie or by having the witness explain why the information was not disclosed earlier." (*Id.*)

- "where only a part of a statement has been brought out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying the statement." (*Id.* at 451-452; *see* Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

- Defense counsel's question to a police officer witness for the People

about whether there ever came a time when defendant "denied his involvement in this" opened the door to redirect examination about the defendant's exact words, namely, " 'that he was there, but he didn't rob the old lady.' " (*People v Goodson*, 57 NY2d 828, 829-830 [1982].)

- "evidence of a prior conviction [for robbery] that had been precluded by a pretrial [*Sandoval*] ruling . . . was nonetheless properly used by the prosecution on cross-examination to impeach" the testimony of defendant's witness, a psychologist, who asserted that defendant had been nonviolent throughout his life. (*People v Fardan*, 82 NY2d 638, 641 [1993].)

- "Defendant's claim that he had never seen or known [the codefendant] before his arrest on November 4, 1992 . . . opened the door to evidence . . . regarding [his] subsequent arrest with [the codefendant] on November 16, 1992 relevant for 'contradiction and response' with respect to the November 4, 1992 existence of their relationship and not simply to impeach his general credibility." (*People v Blakeney*, 88 NY2d 1011, 1012 [1996].)

- The "[d]efendant opened the door to cross-examination regarding his motivation for prior guilty pleas and was subject to impeachment by the People's use of the otherwise precluded evidence . . . where . . . defendant's testimony was meant to elicit an incorrect jury inference that he had pleaded guilty and served prison terms in prior cases, but that he would not plead guilty in this case because he was in fact innocent." (*People v Cooper*, 92 NY2d 968, 969 [1998] [citations omitted].)

- When the People's witnesses testified that the defendant "never denied" committing the crime, the trial court should have permitted the defense to introduce a taped telephone conversation between the defendant and the complainant prior to the defendant's arrest, in which the defendant denied the allegations. (*People v Carroll*, 95 NY2d 375, 386 [2000].)

Subdivision (3) follows logically on the need for the trial court to make a ruling on whether the door has been opened before otherwise inadmissible evidence that may warrant a mistrial is admitted. (*See People v Rojas*, 97 NY2d 32, 40 [2001] [the "better practice" would have been for the People to ask for a "conference" to have the court decide whether the door had been opened to a question the prosecutor asked a witness]; *see also* Guide to NY Evid rule 1.07, Court Control Over Presentation of Evidence; rule 1.09, Court Determination of Preliminary Questions.)

[1] In January 2022, subdivision (1) of this rule was amended to accord with the holding of *Hemphill v New York* (595 US —, —, 142 S Ct 681, 694 [2022]), precluding the introduction of "unconfronted testimonial hearsay" under the "opening the door to evidence" principle. And in December 2022, subdivision (1) was further amended to note that *Hemphill* applied only in criminal proceedings.

4.12 Contracts in small print (CPLR 4544).

The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared.

As used in the immediately preceding sentence, the term "consumer transaction" means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes.

No provision of any contract or agreement waiving the provisions of this section shall be effective.

The provisions of this section shall not apply to agreements or contracts entered into prior to the effective date of this section.

Note

This rule restates verbatim CPLR 4544. The statute's purpose is to require that a contract or agreement be legible when the contract or agreement involves (1) a consumer transaction (as defined in the second sentence) or (2) a lease for space to be occupied for "residential purposes." The statute accomplishes that purpose by precluding the introduction in evidence at a trial, hearing, or proceeding on behalf of the party who "printed or prepared" a contract or agreement (or caused same to be printed or prepared) that fails to meet the statute's legibility requirements.

The statute's prohibition on its provisions being waived further protects the person who stands to be victimized by the illegible writing (*Matter of Filippazzo v Garden State Brickface Co.*, 120 AD2d 663, 665 [2d Dept 1986] ["Although this statute speaks in terms of the admissibility in evidence of such a contract, the underlying purpose of this 'consumer' legislation is to prevent

draftsmen of small, illegibly printed clauses from enforcing them . . . . The few cases construing this statute interpret it as rendering a contract's provisions 'unenforceable' if printed in 'small print' "]; *see Street v Davis*, 143 Misc 2d 983, 985 [Civ Ct, NY County 1989] ["The public policy rationale behind CPLR 4544 was to protect residential tenants and consumers who are at risk when entering into contracts drawn up by others and presented to them on a take-or-leave basis. Since they cannot truly negotiate these contracts as an equal, they should at least be able to read them!"]).

The definition of "consumer transaction" does not on its face or by implication include a "contract for the construction and sale of a one-family dwelling." (*Drelich v Kenlyn Homes*, 86 AD2d 648, 649-650 [2d Dept 1982] ["The statute reflects the legislative intent to regulate transactions for such property and services which are primarily personal in nature in order to protect the unwary consumer from the sharp practices of various dubious business enterprises which deal in such services and goods which are attractive to consumers . . . (and) the statute is also made applicable to leases for residential property, which, as chattels real, constitute personal property"].)

In a "conflict of laws" case, the statute, although phrased in terms of a rule of evidence, "should be regarded as a substantive, formal, contractual requirement rather than a procedural rule of the forum" and where a "choice-of-law provision" provides for the application of the law of another state, "the substantive laws of that state must be applied and the substantive laws of New York, including for these purposes CPLR 4544, have no application." (*Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 287 [2d Dept 2010].) Nor may CPLR 4544 "be employed to nullify a contractual limitation enforceable under Federal maritime law." (*Lerner v Karageorgis Lines*, 66 NY2d 479, 485 [1985].)

The statute's last sentence precludes retroactive effect before the effective date of July 1, 1976. That provision is undoubtedly based on the principle that the drafters of a requisite contract or agreement should not be held to its remedial requirements that they were unaware of at the time of the drafting. There is a difference of opinion, however, over whether an agreement entered into after the effective date of the statute, incorporating by reference provisions of an agreement entered into prior to the effective date of the statute that did not meet the statute's legibility requirements, is subject to the statute's remedial dictates. *Street v Davis* (143 Misc 2d at 986-987) found that an agreement made after the effective date of this statute was subject to its remedial terms, given that there was an opportunity to remedy the illegible portions of the incorporated agreement. (*Contra Jossel v Filicori*, 145 Misc 2d 779, 782 [Sup Ct, NY County 1989]; *King Enters. v O'Connell*, 172 Misc 2d 925, 927 [Civ Ct, NY County 1997]; *see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4544 at 797 [2007 ed] [*Street v Davis* "hits closer to home because upon renewal, a new contract has been 'entered into' "].)

4.15 Liability Insurance

Evidence that a person was or was not insured against liability:

(1) is not admissible to prove that the person acted negligently or otherwise wrongfully, or that the person should be held strictly liable, or to establish damages;

(2) is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that caused the accident, or bias or prejudice of a witness.

Note

This rule is derived from well settled New York law governing the admissibility of evidence as to whether a person is or is not insured against liability.

As set forth in **subdivision (1)**, such evidence is inadmissible when offered on the issue of whether an insured acted negligently or otherwise wrongfully, or should be held strictly liable, or to establish damages. (*See e.g. Salm v Moses*, 13 NY3d 816, 817 [2009] ["(e)vidence that a defendant carries liability insurance is generally inadmissible"]; *Leotta v Plessinger*, 8 NY2d 449, 461 [1960] ["(o)rdinarily whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible"]; *Simpson v Foundation Co*., 201 NY 479, 490-491 [1911] [it was improper for plaintiff's counsel to ask questions suggesting to the jury that the defendant was insured in order to induce the jury to give a larger verdict]; *see also Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965] ["we cannot condone the obvious reference to the lack of defendants' insurance coverage contained in defense counsel's summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors' minds"].)

As stated by the Court of Appeals in *Salm*, excluding evidence of insurance coverage on the issue of liability is premised on two reasons:

> "First, 'it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict.' Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that,

> consequently, jurors are now more likely to be aware of the possibility of insurance coverage, we have continued to recognize the potential for prejudice." (*Salm*, 13 NY3d at 817-818 [citations omitted].)

"A passing reference to insurance, however, does not necessarily warrant reversal" (*Gbadehan v Williams*, 207 AD3d 418, 419 [1st Dept 2022] ["Two of the insurance references at issue were elicited by defense counsel, from his own client, and counsel lodged no objection to the reference elicited by plaintiff's counsel. The record indicates no intention on plaintiff's part to prompt such information"]).

If the reference goes beyond "mere mention of insurance, then a mistrial may be warranted" (*Campbell v St. Barnabas Hosp.*, 195 AD3d 405, 408 [1st Dept 2021]; *but see Grogan v Nizam*, 66 AD3d 734, 736-737 [2d Dept 2009] [a mistrial was warranted here even though "there was only the one mention of insurance by the plaintiffs' expert (because) it cannot be said that this one instance did not have an influence on the jury. The (trial record) revealed, not only that the jury was aware of the defendants' insurance coverage, but also that the defendants' insurance coverage was the subject of its deliberations. Although the trial court gave a curative instruction, in light of the circumstances, the instruction was insufficient to cure prejudice to the defendants"]).

The reference to insurance coverage should be apparent (*Boehm v Rosario*, 154 AD3d 1298, 1298 [4th Dept 2017] ["Contrary to plaintiff's contention, defense counsel's . . . statements that defendant should not be held 'responsible' for certain medical expenses were in response to plaintiff's testimony and the arguments of plaintiff's counsel. Defense counsel never stated or implied that defendant lacked insurance coverage for the accident or would have to pay out of pocket"]).

Subdivision (2) recognizes that New York law does not exclude evidence of insurance coverage or lack of insurance when the evidence is offered for a purpose other than to establish liability or fault, such as to establish ownership or control over the premises where the accident occurred or the instrumentality that caused the accident (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]), or to show bias or interest on the part of a witness, such as an expert witness retained by the defendant's insurance company. (*Salm*, 13 NY3d at 818.) The enumeration of potential admissible purposes is illustrative and not exclusive. When such evidence is admissible, however, the Court of Appeals has specifically cautioned that the trial court may exclude the evidence if it determines the risk of confusion or prejudice outweighs its probative value (*Salm*, 13 NY3d at 818; *see Maiorani v Adesa Corp.*, 83 AD3d 669, 671 [2d Dept 2011] [in an action for damages for injuries sustained by contact with the defendant's electrical fence, an insurance agreement's language between the defendant and a nonparty fence manufacturer that the " 'provider agrees to assume full liability for injuries caused by the system *during closed hours*' (emphasis added) is admissible, as it relates to a material issue at trial that the defendant had a duty to turn the fence's electric current off during

business hours and had actual notice of the potential harm of leaving the electric current on during business hours"]).

4.16. Offers to Compromise (CPLR 4547)

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.

Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this rule shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations.

Furthermore, the exclusion established by this rule shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

Note

This rule is verbatim from CPLR 4547. It governs the admissibility of evidence of compromise and settlement and offers to compromise or settle when offered to prove liability or lack thereof or the amount of damages.

CPLR 4547 was enacted in 1998 (L 1998, ch 317, §1). It tracks in large part the language of the original version of Federal Rules of Evidence rule 408 as the legislative intent was to make New York law consistent with that rule as it then existed (Senate Introducer's Mem in Support, Bill Jacket, L 1998, ch 317 at 4). In 2006, however, Federal Rules of Evidence rule 408 was amended to address issues that had split the federal courts regarding its applicability in criminal trials. The amended rule provides for the admissibility in criminal cases of statements made by a party in discussions regarding the compromise of a civil claim by a government agency acting in its regulatory, investigative, or enforcement capacity. However, Federal Rules of Evidence rule 408 makes evidence of a compromise or offers to

compromise civil litigation inadmissible in criminal actions involving the same facts.

The Court of Appeals has not addressed the issue of the applicability of CPLR 4547 in criminal actions. In *People v Newman* (107 AD3d 827 [1st Dept 2013]), the issue was raised but not resolved. In *Newman*, defendant was convicted of grand larceny in the first degree based on his embezzlement of money from the complainants. He argued that the trial court erred in admitting evidence of the written statement and the payments he made to the complainants as such evidence was barred by CPLR 4547. "Assuming, without deciding, that CPLR 4547 applies to criminal trials," the Court concluded that the statute did not apply because defendant had admitted the embezzlements (*id.* at 828). In *People v Forbes-Haas* (32 Misc 3d 685 [Onondaga County Ct 2011]), a grand larceny in the third degree prosecution based on defendant's alleged wrongful taking and withholding funds from an escrow account at a bank, the trial court allowed the prosecution to introduce into evidence statements made by the defendant during a settlement conference with employees of the bank, and the settlement agreement between the defendant and the bank. The court held that CPLR 4547 was inapplicable in a criminal action because "the public interest in prosecuting crime outweighs achieving a settlement of civil claims" (*id*. at 688).

4.17. Payment by Joint Tortfeasor [CPLR 4533-b]

(1) In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury.

(2) The fact, but not the amount, of a settlement may, however, form a proper basis for impeachment of a testifying witness.

Note

Subdivision (1) restates verbatim CPLR 4533-b, except for the omission of the last sentence of that statute which reads: "The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury."

CPLR 4533-b was designed to abrogate decisional law to the extent it was contrary. (*See Livant v Livant*, 18 AD2d 383 [1963], *lv dismissed* 13 NY2d 894 [1963].)

While subdivision (1) prohibits the introduction of evidence of a settlement with a tortfeasor when offered by a defendant in mitigation of damages, the statute does not prohibit, and decisional law allows, as set forth in subdivision (2), the use of such evidence when relevant to impeach a tortfeasor. (*See Maldonado v Cotter*, 256 AD2d 1073, 1075 [4th Dept 1998] [defendants properly cross-examined "the recovery room nurse concerning the fact but not the amount of plaintiff's settlement with the Hospital, pursuant to which that nurse also was released from liability. 'It has long been recognized that a prior settlement might well have an impact upon the credibility of a witness called to testify on behalf of a former adverse party' (*Hill v Arnold*, 226 AD2d 232, 233)"]; *compare Stevens v Atwal*, 30 AD3d 993, 994 [4th Dept 2006] [while recognizing that a prior settlement may be admissible to impeach a witness, held that on the facts of the case, "the settlements had no bearing on plaintiff's credibility"].)

4.18. Payment of Medical and Other Expenses

Evidence of offering, promising, or making payment for medical, hospital, or other expenses, such as lost wages, resulting from an injury is not admissible as proof of liability for the injury, but is admissible to prove some other fact relevant to a material issue, such as agency, or ownership or control of an object or premises, or bias or prejudice of a witness.

Note

This rule is derived from established, albeit sparse, New York law governing the admissibility of evidence of a party's post-injury offer to pay the injured party's medical, hospital or other expenses, such as lost wages.

The first portion of the rule that precludes admissibility of the specified post-injury conduct is derived from *Grogan v Dooley* (211 NY 30 [1914, Cardozo, J.]). In *Grogan*, a personal injury action, the trial court permitted plaintiff to prove the defendant offered to pay his wages and medical expenses while he was disabled, viewing the offer as an admission of liability. The Court of Appeals rejected the ruling, holding the evidence had "no such significance." (*Id.* at 31.) Rather, the defendant's offer "should be treated as a humane recognition of an existing necessity" (*id.* at 32); and "[t]he law would be doing wrong to [persons making such offers] and scant service to [recipients of the offers] if it throttled the impulses of benevolence by distorting humane conduct into a confession of wrongdoing." (*Id.*)

While the rule excludes payment and offers of payment of medical and similar expenses, it does not encompass evidence of statements, e.g., opinions or admissions of fault or liability, when made in connection with the payment or offer. Such statements may, however, be inadmissible under Guide to New York Evidence rule 4.05 (Completing and Explaining Writing, Recording, Conversation or Transaction) when made in the context of settling or compromising a matter in dispute.

No New York case has addressed offers to pay property damage.

New York, however, in the second portion of the rule permits admissibility of the specified post-injury conduct when admissible for a purpose other than establishing liability. (*See e.g. Flieg v Levy*, 148 App Div 781, 783 [2d Dept 1912] [ownership of horse alleged to have struck or kicked plaintiff].) The non-liability purposes enumerated are suggested by *Flieg* and by comparable rules that statements or conduct of a party may not be admissible to establish liability for

reasons of policy, but may be admissible for non-liability purposes where such purposes are relevant.

4.19. Subsequent Remedial Measures

Evidence of measures taken after an event, that, if taken before the event, would have made injury or damage less likely to result:

(1) in civil proceedings, is not admissible when offered to prove negligence or culpable conduct in connection with the event or to prove negligent or culpable conduct with respect to a product alleged to be defective.

(2) in civil and criminal proceedings, is admissible to prove some other fact relevant to a material issue, such as ownership or control of an object or premises, feasibility of precautionary measures, or in a products liability proceeding to prove a manufacturing defect by a change in design.

Note

This rule governs the admissibility in civil proceedings of evidence of repairs or other measures, such as a modification, change, or precaution, taken by a party after an event, such as an accident, which if taken before the event would have made injury or damage less likely to result.

The exclusionary aspect of the rule does not necessarily apply in a criminal proceeding. As explained in *People v Thomas* (70 NY2d 823, 825 [1987]), where the defendant was prosecuted for a homicide arising out of the operation of a motor vehicle:

> "defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle . . . should have been permitted. . . . Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design. Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a 'defect' in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply." (Citations omitted.)

The rule is derived from well settled New York law. (*See e.g. Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Getty v Town of Hamlin*, 127 NY 636, 638 [1891]; *Corcoran v Village of Peekskill*, 108 NY 151, 155 [1888].) The Court of Appeals in *Caprara* stated the rationale for this exclusionary rule:

> "Now reaching the broader and more basic question of the role of postaccident change in this case, we start by reiterating the long accepted proposition that, in a negligence suit, proof of a defendant's postaccident repair or improvement ordinarily is not admissible. The reason for applying this rule of evidence to that kind of case is clear. Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value." (52 NY2d at 122.)

In strict product liability cases, Court of Appeals decisions make the exclusionary rule applicable in actions based on design defects or failure to warn, but inapplicable in actions based on a manufacturing defect. (*See Haran v Union Carbide Corp.*, 68 NY2d 710, 711-712 [1986] [in a failure to warn action, evidence of a subsequent change in warnings is inadmissible]; *Cover v Cohen*, 61 NY2d 261, 274-275 [1984] [in a *design defect* action, evidence of a subsequent change in design is inadmissible]; *Caprara*, 52 NY2d at 123-126 [in a *manufacturing defect* action, evidence of a subsequent design change is admissible as it tended to show a defect and that it was the cause of the accident].) The rationale for the distinction was explained by Justice Simons in *Rainbow v Elia Bldg. Co.* (79 AD2d 287, 292-293 [4th Dept 1981], *affd on op below* 56 NY2d 550 [1982]):

> "Perhaps it is sufficient to note that in *Caprara* the court limited its decision to strict product liability cases involving manufacturing flaws, holding that the exclusionary rule did not apply to them because due care is not a defense in such cases. Clearly distinguishable under present New York law is a strict products liability claim of design defect, based as it is on a balancing of risk and utility factors, and involving considerations of reasonable care." (Citation omitted.)

Finally, Court of Appeals decisions hold that the exclusionary rule is inapplicable where the evidence of subsequent remedial measures is offered for a non-liability purpose relevant in the action. (*See e.g. Scudero v Campbell*, 288 NY 328 [1942] [ownership]; *Caprara*, 52 NY2d at 122 [in dictum, noting impeachment of a witness would be a permissible purpose]; *Cover*, 61 NY2d at 270; *see also Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [2011] ["The records of defendant's post-fire repairs and remedial measures do not fall within any of the recognized exceptions . . . . Contrary to plaintiffs' contentions, 'general credibility

impeachment' is not an exception. Control is not at issue here since defendant concedes that it owns the premises"].)

4.20 *Bruton*: A Defendant's Statement Implicating Codefendant

(1) In a joint trial of codefendants accused of committing a crime, a statement of a nontestifying defendant implicating a codefendant in the commission of the crime is, as to the codefendant, hearsay, and, except as provided in subdivision two, under the Sixth Amendment's Confrontation Clause and New York common law, it is error to introduce the hearsay statement of a nontestifying defendant that inculpates a codefendant in the crime even if the jury is given a limiting instruction to disregard the inculpatory, hearsay statement of the defendant, and even if the codefendant's own statement is admitted and recites essentially the same facts the nontestifying defendant recites.

(2) In a joint trial of defendants, a statement of a defendant implicating a codefendant is admissible when the statement(s) meet the requirements of the exception for hearsay statements of a coconspirator (Guide to NY Evid rule 8.09).

(3) The remedies for an anticipated introduction of a nontestifying defendant's statement against a codefendant include: (a) the prosecution may forego use of the defendant's statement; (b) separate trials; (c) a single trial, with a jury for each defendant, albeit multiple juries are the exception, not the rule, and are to be used sparingly; and (d) redaction of references to the codefendant may be made in the defendant's statement pursuant to subdivision four.

(4) In a joint trial, a statement of a defendant that does not implicate a codefendant is admissible against the defendant, with an appropriate limiting instruction that the statement is admitted only against the defendant; accordingly, in a joint trial a statement of a nontestifying defendant that implicates a codefendant is admissible if the portions implicating

the codefendant are effectively redacted without prejudice to the defendant or codefendant. The defendant is prejudiced when portions of the statement that are exculpatory or would otherwise support the defense are redacted. The codefendant is prejudiced when the redaction allows for the identification of the codefendant in the defendant's incriminating statement. The burden of effective redaction rests heavily upon the prosecution.

(5) A motion to sever defendants for trial or at a joint trial, an objection to the introduction of a defendant's statement inculpating a codefendant preserves an appellate challenge as a matter of law to the correctness of a decision denying severance or admitting the codefendant's statement whether in redacted form or not.

Note

Subdivision (1) summarizes the holding of *Bruton v United States* (391 US 123, 137 [1968]), and includes the holding of *Cruz v New York* (481 US 186, 190 [1987]) that the nontestifying codefendant's statement is inadmissible even though the defendant who was implicated in the codefendant's statement also made a statement that "recited essentially the same facts" as those of the nontestifying codefendant. If, however, the defendant who is implicated in the codefendant's statement fully "adopted" the codefendant's statement as his or her own, then both statements are admissible with proper instructions. (*People v Woodward*, 50 NY2d 922, 923 [1980] [the defendant adopted the codefendant's statement when, after the police read the codefendant's statement to him, he said "Yes, that is what happened"].) The *Woodward* jury was "advised that [the codefendant's] statement was only 'binding' upon him, and therefore, would not have used it with respect to defendant unless they found that he had in fact adopted it as his own." (*Id.*) "Even at a separate trial, [*Woodward* noted], the [codefendant's] statement would have been admissible since the jury could find that [the defendant] had adopted it as his own." (*Id.*; *see* Guide to NY Evid [GNYE] rule 8.05, Admission by Adopted Statement [rev June 2022].)

As stated in the rule's definition, *Bruton* applies to a statement of a "nontestifying" defendant implicating a codefendant in the commission of the

crime. *Bruton*'s exclusionary rule is not violated when the defendant who made a statement inculpating a codefendant testifies at the joint trial. (*People v Anthony*, 24 NY2d 696, 702-703 [1969] ["*Bruton* was directed at extrajudicial statements not subject to cross-examination by the defendant who is implicated by them and the evil sought to be obviated by *Bruton* is not present where the codefendant who made the statement takes the stand and thereby provides the defendant with the *opportunity* to exercise his Sixth Amendment right to confrontation"]; *People v Griffin*, 48 NY2d 998, 1000 [1980] [any objection to the denial of a motion to sever "was obviated when the codefendant testified"]; *see Nelson v O'Neil*, 402 US 622, 629-630 [1971] ["where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments"].) An opportunity to cross-examine the codefendant at a pretrial suppression hearing or preliminary hearing does not suffice to warrant the introduction at a joint trial of the codefendant's statement inculpating a defendant. (*People v Rosario*, 51 NY2d 889, 890 [1980] [suppression hearing]; *People v Berzups*, 49 NY2d 417, 426 [1980] [preliminary hearing].)

Subdivision (2), allowing for the introduction of coconspirator statements in a joint trial of codefendants, embodies the holdings of *United States v Nixon* (418 US 683, 701 [1974] ["Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy"]); *Dutton v Evans* (400 US 74 [1970]); and *People v Rastelli* (37 NY2d 240, 242-245 [1975]) (*see* GNYE rule 8.09, Coconspirator Statement).

Subdivision (3) is derived from *People v Ricardo B.* (73 NY2d 228, 234-235 [1989]), which explained:

> "Customarily, when a court is presented with a *Bruton* problem because of inculpatory out-of-court statements by one or both codefendants, it has the option of (1) deleting references to the codefendant in the statement, (2) seeking the consent of the People to a joint trial without the evidence or (3) ordering separate trials . . .
>
> "It should be clear, however, that multiple juries are the exception, not the rule . . . Multiple juries are to be used sparingly and then only

> after a full consideration of the impact the procedure will have on the defendants' due process rights and after thorough precautions have been taken to protect those rights."

(*See Krivoi v Chappius*, 573 F Supp 3d 816, 829 n 7 [ED NY 2021] ["It remains nothing less than astonishing that after undergoing the extensive precaution of holding trial before two juries, the State elicited, and the trial court permitted over defense objection, . . . testimony in seeming violation of Petitioner's Confrontation Clause rights"], *affd* 2022 WL 17481816, 2022 US App LEXIS 33634 [2d Cir, Dec. 7, 2022, 21-2934-pr]; *cf. People v Warren*, 20 NY3d 393 [2013] [in a simultaneous trial of codefendants, one before a jury and the other before the court, the court erred when it denied the application of the defendant being tried before a jury to have the testimony of the defendant being tried by the court to be given outside the presence of the jury].)

Subdivision (4) allows for the admission of a nontestifying defendant's statement that implicates a codefendant in the crime if the statement can be redacted "without prejudice to declarant or nondeclarant" (*People v Boone*, 22 NY2d 476, 486 [1968]). And "the burden of 'effectively redacting is one which rests heavily upon the prosecution' (*People v Boone*, 22 NY2d 476, 486)" (*People v Smalls*, 55 NY2d 407, 416 [1982]).

The series of Court of Appeals cases detailing flawed redactions begins with *People v La Belle* (18 NY2d 405, 410 [1966]), decided more than a year before *Bruton*. In *La Belle*, the Court determined that a redaction of the declarant's statement was flawed because the remaining portions of the statement "not only eliminated prejudicial reference to [the codefendant] but also eliminated those portions of the statement tending to exculpate [the declarant]" (*id.*). Subsequently, in *People v Mahboubian* (74 NY2d 174 [1989]), the Court added that the redacted words need not be " 'exculpatory' [of the declarant] in the strictest sense," to warrant a finding that the declarant was prejudiced by a redaction that harmed the declarant's defense. (*Mahboubian* at 188 [the redacted words "supported" the declarant's defense "and if believed, it explained much of the evidence against him"].)

While redaction of a codefendant's statement may appear sufficient on the face of the statement, events at trial, including a "slip-of-the-tongue" reference to the defendant as the person referred to in the codefendant statement, can nullify the purpose of redaction (*People v Lopez*, 68 NY2d 683, 685 [1986]). In *People v Burrelle* (21 NY2d 265, 269 [1967]), a case also decided before *Bruton*, the Court found that

"whatever protection from prejudice" the redaction (substituting "X" for an implicated defendant) provided, it "was vitiated by the testimony of an assistant district attorney and two police officers who, in testifying as to the taking of these statements, recounted how 'Fats', 'Slim' and 'Shorty' [the nicknames of the defendants that appeared to match their build] were implicated in the crime by the various declarants [and] the persons referred to initially as 'X' were now unmistakably identifiable to the jury."

Similarly, in *People v Jackson* (22 NY2d 446, 449-450 [1968]) an "attempted redaction [substituting a letter of the alphabet for each codefendant implicated in the statement] proved a monumental failure. There were frequent and blatant lapses not only during the taking of the testimony but in the court's own instructions [in apparently marshalling the evidence]. In point of fact, one of the witnesses, on cross-examination by [one defendant's] counsel, identified 'X' as the defendant Jackson. Thus, the name of each defendant and the letter assigned to him were so interchanged as to make it perfectly plain to the jurors [who the letters stood for]." (*Accord People v Baker*, 23 NY2d 307, 318 [1968] [redaction (by substitution of letter "X") was flawed in that it "was a simple matter for the jury" to determine who the "X" was]; *People v Wheeler*, 62 NY2d 867, 869 [1984] [redaction of the defendant's name and the substitution of "(deletion)" was insufficient: "Given that the two brothers (the defendants) were being tried for the crime together, we believe the confession could only be read by the jury as inculpating defendant"].)

The Supreme Court first addressed the question of redaction in 1987 in *Richardson v Marsh* (481 US 200 [1987]). There the defendant's "confession was redacted to omit all reference to [the codefendant]—indeed, to omit all indication that *anyone* other than [a codefendant who was not on trial] and [the declarant] participated in the crime." (*Richardson* at 203.) The Court held that irrespective of whether the codefendant was "linked to the confession by evidence properly admitted against him at trial," the "Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at 202, 211.)

Richardson left unanswered the question of the validity of a redaction that replaced the name of the codefendant "with a symbol or neutral pronoun" (*Richardson* at 211 n 5). Years later, *Gray v Maryland* (523 US 185 [1998]) addressed that question. In *Gray*, the defendant's confession was redacted "by substituting for the [codefendant's] name in the confession a blank space or the

word ‘deleted’ ” (*Gray* at 188). The Court believed “that, considered as a class, redactions that replace a proper name with an obvious blank, the word ‘delete,’ a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*’s unredacted confessions as to warrant the same legal results” (*Gray* at 195). In *Gray*’s words: “the redacted confession with the blank prominent on its face . . . ‘*facially* incriminat[es]’ the codefendant” (*id*. at 196, quoting *Richardson* at 209).

In 2016, in *People v Cedeno* (27 NY3d 110, 119-121 [2016]), the Court of Appeals considered *Richardson* and *Gray*:

> “This Court’s decision in *People v Wheeler* (62 NY2d 867 [1984]) . . . anticipated both *Gray* and *Richardson*. In *Wheeler*, we recognized—as did the Supreme Court in *Richardson*—that, if a codefendant’s ‘confession . . . can be effectively redacted so that the jury would not interpret its admissions as incriminating the nonconfessing defendant, it may be utilized at the joint trial’ (*Wheeler*, 62 NY2d at 869). Further, as in *Gray*, we held that merely replacing a defendant’s name with the word ‘deletion’ is not an effective redaction that would render admissible a codefendant’s statement implicating a defendant (*see id.* at 869).”

On its facts, the written statement in *Cedeno* which “simply replaced with a large blank space” the “identifying description of defendant” was “not effectively redacted . . . Rather, the statement, with large, blank [spaces] prominent on its face, . . . *facially* incriminat[ed] a codefendant because it involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” (*Cedeno* at 120 [internal quotation marks and citations omitted].)

In 2023, a divided Supreme Court, in *Samia v United States* (599 US 635 [2023]), expanded the type of redactions that were permissible. In that case, the defendant’s confession which implicated Samia was redacted to substitute “other person” for Samia’s name. The majority believed that, with a limiting instruction, the substitution of “other person” sufficiently sanitized the confession’s inculpation of Samia, unlike, they opined, the substitution of a “blank” space or the word “deleted” that was disapproved in *Gray*. To the dissenters, “that distinction makes nonsense of the *Bruton* rule. *Bruton*’s application has always turned on a confession's inculpatory impact.” (*Samia*, 599 US at 663 [Kagan, J., dissenting].) *Samia* allows confessions that “replace a defendant’s name with another placeholder . . . no matter how obvious the reference to the defendant.” (*Id.* at 659 [Kagan, J., dissenting].)

New York's law of evidence, before *Bruton*, beginning with *La Belle*, was concerned with an effective redaction that did not prejudice the declarant or the person inculpated in the crime. (*Cf.* John M. Leventhal, *Is Bruton on Life Support in the Aftermath of Crawford v. Washington?*, 43 Am J of Crim L 1, 17 [Fall 2015] ["non-testimonial statements are no longer subject to Confrontation Clause scrutiny, and post-*Crawford* decisions have not applied *Bruton* to non-testimonial statements," leaving the admissibility of an out-of-court declaration (e.g. to a civilian in a social setting) to a state's rules of evidence].)

It thus remains to be determined whether New York's law of evidence, via the Confrontation Clause in the State's constitution (NY Const, art I, § 6) or in Civil Rights Law § 12, will continue on that path and not allow the substitution of a placeholder, such as "other person" that plainly points the finger at the defendant sitting at the defense table with the declarant of the confession. (*See* Barry Kamins, *Is 'Bruton v. United States' on Life Support in the Aftermath of 'Samia'?*, NYLJ, July 31, 2023 ["Clearly, the New York Court of Appeals has taken a different view of what constitutes a confession that 'directly implicates' a defendant. As a result, it could be argued that New York might reject the analysis found in Samia. In the past, the Court of Appeals has interpreted the state Constitution to afford more protection to individual rights than that given by the federal Constitution"]; *e.g. People v Griminger*, 71 NY2d 635, 639 [1988] ["We are not persuaded . . . that the (Supreme Court's turnabout in the criteria for evaluating hearsay information from an undisclosed informant in the determination of probable cause for a search warrant) provides a sufficient measure of protection"].)

Until the Court of Appeals decides the future direction of New York's law, this rule reflects the law of New York, as decided by the Court of Appeals before the Supreme Court's decision in *Samia*.

Subdivision (5) sets forth the rule of preservation with respect to an alleged violation of *Bruton* and its progeny. In a judgment rendered before the *Bruton* decision (May 20, 1968), a *Bruton* error could not be ignored because of the failure to object. (*People v Baker*, 23 NY2d 307, 317 [1968] [the *Bruton* error cannot be ignored "since in this pre-*Bruton* case their admission under limiting instructions was proper"].)

Since the date of the decision of *Bruton*, a motion to sever defendants for trial, or an objection to the introduction at a joint trial of a codefendant's statement inculpating a defendant preserves, as a matter of law, an appellate challenge to the correctness of a decision denying a severance or admitting the codefendant's statement. (*People v Boone*,

22 NY2d 476, 485 [1968] [“Boone’s motion for a severance saved the question for review”]; *People v Johnson*, 27 NY3d 60, 67 [2016] [a *Bruton* issue was presented as a question of law given that “defense counsel,” as reported in the Appellate Division opinion (123 AD3d 573, 576 [1st Dept 2014]), made a “timely application for preclusion of the codefendant’s grand jury testimony, deletion of all references to defendant, or a severance”]; *People v Smalls*, 55 NY2d 407 [1982] ["where the defendant moved for a severance on the precise basis that he would be prejudiced by the admission of a codefendant's confession, and the motion is denied because prejudice to defendant can, in the court's view, be avoided by redaction, and counsel, though participating in the redaction process, continues to object to the entire procedure, we cannot say that the defect has been waived"]; *cf. People v Fernandez*, 72 NY2d 827 [1988] [a claimed *Bruton* error was not preserved as a matter of law for appellate review, citing the statute (CPL 470.05 [2]) that requires a “protest”].)

On appellate review, a *Bruton* error is subject to determination of whether the error was harmless beyond a reasonable doubt (*Harrington v California*, 395 US 250 [1969]; *Brown v United States*, 411 US 223 [1973]; *People v Faust*, 73 NY2d 828, 829 [1988]).

4.21. Chemical Tests Evidence (Alcohol or Drugs in Blood) (VTL 1195 & CPL 60.75)

(1) Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of [the Vehicle and Traffic Law], the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of [the Vehicle and Traffic Law].

(2) In any prosecution where two or more offenses against the same defendant are properly joined in one indictment or charged in two accusatory instruments properly consolidated for trial purposes and where one such offense charges a violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law [Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs], chemical test evidence properly admissible as evidence of intoxication under subdivision one of section eleven hundred ninety-five of such law [Chemical Test Evidence] shall also, if relevant, be received in evidence with regard to the remaining charges in the indictments.

(3) This rule does not preclude the admission in any proceeding of evidence of the amount of alcohol or drugs in a person's blood, if legally obtained and relevant, notwithstanding the absence of any charge under the Vehicle and Traffic Law.

Note

Subdivision (1) restates Vehicle and Traffic Law § 1195 (1) except that the words "the Vehicle and Traffic Law" in brackets are substituted for "of this article." By its terms, it applies to any "action or proceeding," civil or criminal (*People v Ladd*, 89 NY2d 893, 896 [1996]).

Subdivision (2) restates Criminal Procedure Law § 60.75, except for the bracketed material. It applies to a criminal action, but as *Ladd* explains does not preempt application of the rule in subdivision (1):

> "CPL 60.75 provides that when Vehicle and Traffic Law charges and Penal Law charges are tried together the evidence obtained pursuant to section 1194 of the Vehicle and Traffic Law is admissible as to both charges. The statute was enacted to remove any doubts arising from our holding in *People v Moselle* (57 NY2d 97 [1982]), that when charges from the two chapters were joined the test results were not admissible with respect to the Penal Law charges. Section 60.75 does not limit the use of blood test results to prosecutions under the Vehicle and Traffic Law or to prosecutions linking Vehicle and Traffic Law and Penal Law offenses. Indeed, section 1195 (1) of the Vehicle and Traffic Law provides that blood test results are admissible at the trial of 'any action or proceeding' arising out of a factual basis for a driving while intoxicated arrest. The evidence, if legally obtained and relevant, should be admissible in Penal Law prosecutions, notwithstanding the absence of any charge under the Vehicle and Traffic Law" (*Ladd*, 89 NY2d at 896).

Subdivision (3) is derived from the rule on "relevant evidence" (Guide to NY Evid rule 4.01 [2]) and *Ladd* (89 NY2d at 896).

4.22 Complainant's Sexual Conduct or Dress (CPL 60.42; 60.43; 60.48)[1]

(1) Admissibility of Evidence of Victim's Sexual Conduct in Sex Offense Cases [CPL 60.42]

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty or in section 230.34 [sex trafficking] of the Penal Law, unless such evidence:

(a) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or

(b) proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the Penal Law within three years prior to the sex offense which is the subject of the prosecution; or

(c) rebuts evidence introduced by the People of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or

(d) rebuts evidence introduced by the People which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

(e) is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

(2) Admissibility of Evidence of Victim's Sexual Conduct in Non-Sex Offense Cases [CPL 60.43]

Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

(3) Admissibility of Evidence of Victim's Manner of Dress in Sex Offense Cases [CPL 60.48]

Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any offense, or an attempt to commit an offense, defined in article one hundred thirty of the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

Note

Subdivision (1) restates verbatim CPL 60.42 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases").

CPL 60.42, known as the "rape shield law," was enacted in 1975 (L 1975, ch 230, § 1) to address the "concerns that testimony about the sexual past of the victims of sex crimes often serves solely to harass the victim and confuse the jurors . . . At the same time, by providing exceptions to the general evidentiary prohibition

of section 60.42, our Legislature acknowledged that there are instances where evidence of a complainant's sexual history might be relevant and admissible. The exceptions also recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution's witnesses." (*People v Williams*, 81 NY2d 303, 312 [1993]; *see Michigan v Lucas*, 500 US 145, 146 [1991]; *see also People v Scott*, 16 NY3d 589, 594 [2011] [evidence of a complainant's sexual conduct "must be precluded if it does not tend to establish a defense to the crime because it will only harass the victim and possibly confuse the jurors"]; *People v Halbert*, 80 NY2d 865 [1992] [example of a court appropriately balancing the prohibition and the defense]; *People v Halter*, 19 NY3d 1046 [2012] [same].)

Subdivision (5) of CPL 60.42 (Guide to NY Evid rule 4.22 [1] [e]) provides an exception to the rape shield law when the evidence is "relevant and admissible in the interests of justice," thereby allowing the introduction of relevant evidence that may be required pursuant to a defendant's constitutional right to present a defense (*People v Cerda*, — NY3d —, 2023 NY Slip Op 05305 [2023]). In *Cerda*, the defendant was prosecuted for sexual abuse of a minor, and the Court held that, in accord with a defendant's constitutional right to present a defense, the trial court should have, pursuant to subdivision (5) of CPL 60.42, permitted the defendant to introduce "forensic evidence confirming the presence of the complainant's saliva in the vicinity of her internal injuries, [which when] juxtaposed against the expert testimony that such injuries were consistent with digital penetration, speaks to an alternative, innocent explanation for the cause of the identified injuries and bears on the issue of guilt or innocence" (— NY3d at —, 2023 NY Slip Op 05305, *3).

Subdivision (2) restates verbatim CPL 60.43 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in non-sex offense cases"). It was enacted in 1990 (L 1990, ch 832, § 1) and shares the same concerns as CPL 60.42.

Subdivision (3) restates verbatim CPL 60.48 ("Rules of evidence; admissibility of evidence of victim's manner of dress in sex offense cases"). It was enacted in 1994 (L 1994, ch 482, § 1) and also shares the same purpose as the other subdivisions.

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[1] In December, 2023, subdivision (1) was amended to reflect an amendment of the statute that added: "or in section 230.34" of the Penal Law.

4.23 Connecting Physical Evidence to Defendant

Physical evidence is admissible when the evidence is sufficiently connected with the defendant to be relevant to an issue in the case. Physical evidence is sufficiently connected to a defendant when the connection is not so tenuous as to be improbable.

Note

This rule is derived from *People v Mirenda* (23 NY2d 439, 453 [1969] ["The admissibility of (the physical) evidence was dependent solely on whether they were sufficiently connected with the defendants to be relevant to an issue in the case. The test for admissibility of this type of object is an evaluation of how close is the connection between the object and the defendant. If it is not so tenuous as to be improbable, it is admissible as is any other evidence which is relevant to an issue in the prosecution"]).

In *Mirenda*, after shooting the victim, the defendant and another fled along a path where a pair of sunglasses was subsequently found. A witness testified that the glasses "resembled" a pair of sunglasses he had previously offered the defendant but he did not recall whether the defendant had taken them; another witness testified that the glasses were "similar" to the glasses he saw one of the fleeing perpetrators wearing. The Court of Appeals after stating the rule on admissibility of physical evidence remarked: "Though the glasses were of a common variety the possibility that they were dropped in the roadway by someone other than the defendants was not so great as to make their introduction irrelevant. . . . The process of drawing a concrete conclusion from differing inferences requires adding together a number of circumstances, each of which by itself might be common to many pairs of glasses but which, when viewed together, make it more than probable that they could only co-exist in one pair of glasses. In this case there were enough surrounding circumstances to permit the jury to infer that these glasses were actually the glasses which [were] offered Mirenda." (*Mirenda* at 453-454).

Other examples of physical evidence connected to a defendant are:

- The trial court properly permitted the police officers to testify that when they first sought to question the defendant "he had in his possession a black skirt, torn and stained, and when he saw them he discarded the skirt and ran from them." (*People v Jones*, 69 NY2d 853, 855 [1987].) The skirt was "relevant to the issue of identification because the victim had testified that her attacker was carrying something black at the time of the incident and the evidence of defendant's possession of a similar object at another closely related time helped to link him to the crime." (*Id.*)

- During a robbery, a defendant "thrust his arm, with its hand enclosed in a brown paper bag, towards [the victim]" who testified that it "looked like there was a gun in it." (*People v Pena*, 50 NY2d 400, 406 [1980].) The codefendant took the victim's coat. Subsequently, the codefendant was found wearing the coat and carrying a brown paper bag that contained a knife. There was "no direct evidence" that the defendants had exchanged possession of the bag, and the victim could not say "for certain whether the bag . . . was the very same one" he observed in the defendant's hand, but it was sufficient for admission of the bag (and the knife) given that the "bag found on [codefendant] . . . 'looked like' the one" the victim saw the defendant holding. (*Id.* at 408-409.)

- "It was reported that the robber had possessed a 'nickel-plated 45—an Army type 45'. This type of pistol was discovered in a briefcase under the seat of . . . [an] automobile borrowed by defendant and in which he was observed leaving the scene of the crime. The briefcase was identified as similar to the one carried by the robber. Defendant was identified as the robber. This then was sufficient evidence to establish defendant's possession of the pistol. And the evidence that the pistol was similar to the one used during the robbery was admissible." (*People v Logan*, 25 NY2d 184, 194 [1969].)

- Hours after the defendant's arrest for robbery in which a gun was used, a police officer returned to the site of the crime and found a gun. That gun was properly admitted in evidence on the complainant's testimony identifying the gun "as one like that placed against his chest by the defendant's accomplice." (*People v Randolph*, 40 AD2d 806, 806 [1st Dept 1972], *cited with approval in Pena*, 50 NY2d at 409.)

4.24. Consciousness of Guilt

(1) Evidence of post-crime conduct that may in the context of a particular case evince a defendant's consciousness of guilt of the offense with which the defendant is charged is admissible. A consciousness of guilt may, for example, be evinced by a false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence or flight.

(2) A defendant may introduce evidence of an innocent explanation for the conduct in order to rebut the inference of "consciousness of guilt."

(3) A jury should be advised of the limited probative value of "consciousness of guilt" evidence and must be so advised upon request of the defendant.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that have authorized the admission of relevant "consciousness of guilt" evidence. (*E.g. People v Bennett*, 79 NY2d 464, 469-470 [1992] ["Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself.' . . . (C)onduct that has been recognized as revealing a guilty mind includes false statements or alibis; coercion or harassment of witnesses; and abandonment or concealment of evidence" (citations omitted)]; *People v Leyra*, 1 NY2d 199, 208 [1956] ["The assertion of false explanations or alibis as well as the destruction or concealment of evidence comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, admissible and relevant on the question of a defendant's guilt"].)

Although "consciousness of guilt" evidence may meet the relevancy test for admissibility in a particular case, New York courts have struggled with the weight a jury should be permitted to attribute to such evidence, and its value in determining the validity of a judgment of conviction. (*See Leyra*, 1 NY2d at 208-209 ["(I)t is difficult to determine from the decisions the precise weight or value to be assigned to (consciousness of guilt evidence) . . . . (T)he courts have consistently acknowledged the weakness of this type of evidence . . . where it is not supported by other proof of a truly substantial character"]; *Bennett*, 79 NY2d at 470 ["Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even

innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning" (citations omitted)].)

"Consciousness of guilt" evidence therefore has been described as being of "slight value" (*People v Reddy*, 261 NY 479, 486 [1933]) and of "limited probative value," with its probative weight "highly dependent upon the facts of each particular case." (*People v Cintron*, 95 NY2d 329, 332-333 [2000]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt ["(T)he weight and importance you (the jury) give to th(e) evidence (offered to show consciousness of guilt) depends on the facts of the case. Sometimes such evidence is only of slight value and, standing alone, it may never be the basis for a finding of guilt"].)

"Consciousness of guilt" evidence may provide the necessary corroboration of accomplice testimony. (*People v Ruberto*, 10 NY2d 428, 430 [1962].)

Examples of decisions relating to <u>false statements</u> as "consciousness of guilt" evidence are:

- The defendant's false statement about finding the deceased's credit card in a park after he had already used the card evinced a consciousness of guilt "of some crime" (*People v Levine*, 65 NY2d 845, 847 [1985]).

- Defendant's statements "disclosing a pattern of inconsistent, and sometimes false, exculpatory stories" raised an inference of defendant's consciousness of guilt (*People v Johnson*, 61 NY2d 932, 934 [1984]).

- The jury was "entitled to find consciousness of guilt if they disbelieved defendant's explanation for his conduct" (*Cintron*, 95 NY2d at 332).

Before a jury may be charged to consider a consciousness of guilt emanating from a purportedly false alibi or explanation, there must be evidence independent of that offered to prove the defendant's guilt, that the alibi or explanation is false. (*O'Donnell v State of New York*, 26 AD3d 59, 64 [2d Dept 2005]; *People v Sheirod*, 124 AD2d 14, 18 [4th Dept 1987]; *People v Lawson*, 112 AD2d 457, 460 [3d Dept 1985]; *People v Abdul-Malik*, 61 AD2d 657, 661[1st Dept 1978].)

Examples of decisions relating to conduct as "consciousness of guilt" evidence are:

- A defendant's attempt to flee from the police during a high-speed chase and his continued flight on foot after crashing his car allowed for a "reasonable inference that defendant knew that the vehicle was stolen and that he did not have the owner's consent to operate it." (*People v Cintron*, 95 NY2d 329, 333 [2000]; s*ee People v Yazum*, 13 NY2d 302, 304 [1963] [evidence of flight is admissible as "consciousness of guilt"

even though a defendant has reason to be in flight from the charged crime and some other crime].)

- "[T]estimony regarding defendant's attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt" (*People v MacDonald*, 89 NY2d 908, 910 [1996]).

- "Evidence that defendant may have damaged the victim's electronic devices to prevent her from preserving a record of defendant's conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation" (*People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020]).

Examples of evidence that did not warrant an inference of consciousness of guilt are:

- The defendant's assertion, on being questioned by police, of his right to counsel, did not infer a consciousness of guilt. (*People v Al-Kanani*, 26 NY2d 473, 478 [1970].)

- It was error to introduce evidence of an attempted murder of an eyewitness to the crime as consciousness of guilt when the evidence did not connect the person who made the attempt to the defendant. (*People v McKnight*, 52 NY2d 760 [1980], *revg for reasons stated in dissent below* 71 AD2d 801, 802-804 [4th Dept 1979].)

- In an arson prosecution, the defendant's false statements "regarding efforts to assist others are not inconsistent with his innocence. An innocent person in defendant's position may have uttered such statements not because of knowledge of his own guilt but because of a misguided desire to gain praise and possibly save his job." (*People v Marin*, 65 NY2d 741, 746 [1985].)

- Defendant's attempt to obtain the complainant's motor vehicle records by false representations did not constitute "consciousness of guilt" evidence in his prosecution for rape of the complainant. (*People v Bennett*, 79 NY2d 464, 470 [1992].)

- Admitting evidence of a "smile" as circumstantial evidence of consciousness of guilt is error. (*People v Harris*, 98 NY2d 452, 492 [2002].)

- The defendant's resisting arrest six months after the alleged commission of an assault and after violating an order of protection was not admissible as evidence of consciousness of guilt in the assault trial. "The

defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident" and the probative value "was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies" (*People v Ramirez*, 180 AD3d 811, 813 [2d Dept 2020]).

Subdivision (2). New York law is well settled that a trial court not only must exercise care in determining whether proffered evidence constitutes relevant evidence of a "consciousness of guilt," but also must permit the defense an opportunity to present evidence of an innocent explanation. (*People v Gilmore*, 66 NY2d 863, 867 [1985] [The court erred in preventing the defendant from testifying about what he had learned in his conversation with his mother-in-law that may have motivated his flight other than a consciousness of guilt].)

Subdivision (3). New York law is equally well settled that a court should and must, upon request of the defendant, charge the jury on the limited probative value of "consciousness of guilt" evidence. (*E.g. People v Limage*, 45 NY2d 845 [1978], *affg on mem below* 57 AD2d 906 [2d Dept 1977] [in this case, on request of the defendant, the trial court was required to instruct the jury as to the limited probative value of flight]; *People v Yazum*, 13 NY2d 302, 304 [1963] ["This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged"]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt.)

4.26. Culpability of a Third Party

(1) Evidence of the culpability of a person other than the defendant for the offense for which the defendant is charged is admissible when the probative value of the proffered evidence outweighs any countervailing risks of delay, prejudice, and confusion and is not so remote and speculative that it does not sufficiently connect the third party to the offense.

(2) A defense application to present third-party culpability evidence should be made, in the court's discretion, in writing or orally, at the earliest reasonable opportunity and must include an offer of proof in support of the application and, in particular, explain what evidence the defense would introduce to implicate a third party's culpability for the offense. The People must then have an opportunity to be heard. The court may then conduct any hearing that may be necessary to assess the arguments and, with or without the hearing, render a decision that includes a clear directive as to what evidence, if any, the court will and will not allow.

Note

Subdivision (1) is derived from a series of Court of Appeals cases, the seminal case being *People v Primo* (96 NY2d 351 [2001]).

Primo held that the admissibility of evidence of third-party culpability should be addressed under the "general balancing analysis" of whether the proponent has demonstrated that the proffered evidence has a probative value that outweighs the "countervailing risks of delay, prejudice and confusion." (*Primo* at 356-357.) "Courts thus have been careful to exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion (*see, Greenfield v People*, [85 NY 75, 89 (1881)] [excluding evidence of '(r)emote acts, disconnected and outside of the crime itself' to prove that someone else is the guilty party] . . .). The admission of evidence of third-party culpability may not rest on mere suspicion or surmise." (*Primo* at 357.)

That the application of the *Primo* standard may exclude a proffered defense "does not infringe upon a defendant's constitutional right to present a complete defense as set forth in the Sixth and Fourteenth Amendments." (*People v Powell*,

27 NY3d 523, 526 [2016].)

The proffered evidence of third-party culpability in *Primo* was a ballistics report that linked a third person to the gun used to shoot the complainant coupled with proof that the third party was at the scene of the shooting. On those facts, *Primo* determined that the "probative value" of the evidence of the culpability of a third party proffered in that case "plainly outweighs the dangers of delay, prejudice and confusion." (*Primo* at 357.)

Powell (27 NY3d at 531) reinforced *Primo*, holding that "courts should 'exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion' or where the evidence is so remote and speculative that it does not sufficiently connect the third party to the crime" (citation omitted).

Given that the proffered evidence of third-party culpability in *Powell* was based on a speculative assertion that "others could have had access to [the deceased's] home or might have had reason to kill her—the trial court did not abuse its discretion by precluding the proffered evidence (*see People v Gamble*, 18 NY3d 386, 398-399 [2012] [speculative assertions that other unidentified individuals had a motive to harm a victim are insufficient to support admission of third-party culpability evidence])." (*Powell* at 531-532; *see People v King*, 27 NY3d 147, 158 [2016] [the court properly rejected a defense proffer of a witness to testify to hearsay statements by two unidentified individuals, not including the defendant, that they had a motive to harm the victim]; *cf. Gamble* at 399 ["That the People introduced evidence establishing defendant's motive for the shootings does not . . . open the door to generalized, speculative evidence of possible motives by unidentifiable persons" (internal quotation marks omitted)].)

Powell made it clear, however, that a third-party culpability claim "does not necessarily require a specific accusation that an identified individual committed the crime. For example, a proffer of an unknown DNA profile may be sufficient." (*Powell* at 532.)

People v DiPippo (27 NY3d 127, 136 [2016]) followed *Primo*, adding that the absence of "proof directly linking the third party to the *crime scene*" was not necessarily fatal to the introduction of third-party culpability evidence.

On its facts, *DiPippo* found that notwithstanding the absence of proof linking the third party to the "crime scene," the evidence of a culpable third party was sufficient in that it included a declaration against penal interest by the third party that implicated him in the crime, as well as a showing that the third party had committed other crimes with a unique modus operandi that paralleled the crime charged.

With respect to the "modus operandi" evidence, *DiPippo* explained that

"[w]hile unlikely to be sufficient standing alone," it "is relevant to, and can support, a third-party culpability proffer where the crimes reflect a 'modus operandi' connecting the third party to the charged crimes." (*Id.* at 138; *cf. People v Schulz*, 4 NY3d 521, 528 [2005] [the defendant offered "no evidence which shows a modus operandi"; but only evidence that an identified third party committed the same type of crime in the area of the charged crime and around the time of its occurrence].)

In permitting evidence of third-party culpability, the trial court retains discretion to determine what evidence would be appropriate. (*See Primo* at 357 [the court will "make its determination (of an application to admit third-party culpability) followed by clear directives as to what it will and will not allow"]; *People v Boyd*, 31 NY3d 953, 955 [2018] [where the defense was permitted to pursue a third-party culpability defense, the court did not abuse its discretion by refusing to admit in evidence facts concerning the arrest of the third party (who had inculpated himself and later recanted)]; *People v Hemphill*, 35 NY3d 1035, 1036 [2020] [where the defense presented a third-party culpability defense, "the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pleaded guilty to possessing a firearm other than the murder weapon"].)

Subdivision (2) is derived from *Primo* (at 357):

> "In practice, the balancing [of whether the probative value outweighs the countervailing risks] is best performed by requiring the defense, at the earliest reasonable opportunity, to make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow."

4.27 Defendant's Testimony Re: Intent, Knowledge, or Motive

When the intent, knowledge, or motive of a defendant in performing a particular act or making a particular declaration is an element of an offense or reflects on a material issue, the defendant may testify as to his or her intent, knowledge, or motive.

Note

This well-settled rule is derived from a long line of cases.

Kerrains v People (60 NY 221, 228-229 [1875]), for example, allowed a defendant to testify to his motive for procuring the purported murder weapon in order to disprove that he had an intent to use it to kill the deceased. In *Kerrains*' words:

> "[W]hen the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness. The motive for procuring the ax was a fact material upon the principal fact in the case, and it was clearly competent for the prisoner to testify in respect to it" (internal quotation marks omitted; *accord People v Levan*, 295 NY 26, 34 [1945] ["Testimony by the defendant as to what his intent was would not have been conclusive but it was competent"]; *People v McCullough*, 278 AD2d 915, 917 [4th Dept 2000] [" 'where an actor's state of mind is a material issue, the actor is allowed to testify concerning such issue' (*People v Rivera*, 101 AD2d 981, 982, *affd* 65 NY2d 661). Defendant was convicted of intentional murder as an accomplice, and thus the jury had to find that he acted 'with the mental culpability required for the commission' of that offense (Penal Law § 20.00 . . .)"]; *People v McBee*, 143 AD2d 773, 774-775 [2d Dept 1988] [in a prosecution for possession of cocaine with intent to sell, "the defendant should have been permitted to testify fully regarding his mental state with respect to the disposal of the (cocaine)"]; *People v Cohen*, 266 App Div 23, 27 [3d Dept 1943] [in a prosecution for receiving stolen property, the defendant should have been permitted to state that he believed he was paying full value for the articles purchased because "(h)is belief upon that subject was relevant as bearing upon guilty knowledge. Appellant's testimony as to his intent and

belief was competent"]; *People v Pierce*, 218 App Div 254, 257 [3d Dept 1926] ["Nothing is better settled . . . where the intent is a necessary ingredient of the crime than that a defendant may testify directly as to his intent"]).

4.30. Evidence of Dangerous Drugs Destroyed Pursuant to Court Order (CPL 60.70)

(1) The destruction of dangerous drugs, pursuant to the provisions of CPL article 715, shall not preclude the admission on trial or in a proceeding in connection therewith of testimony or evidence where such testimony or evidence would otherwise have been admissible if such drugs had not been destroyed.

(2) Notwithstanding subdivision one, the failure to follow CPL article 715 does not preclude admission of testimony as to the nature and amount of the drugs seized if the prosecution has sufficiently explained the destruction, the drugs were not destroyed in bad faith, and the defendant is not prejudiced.

Note

Subdivision (1) restates verbatim CPL 60.70, except where the statutory language refers to "article seven hundred fifteen hereof," this rule inserts the appropriate reference, namely, "CPL article 715."

Subdivision (2) assumes that the normal prerequisites to the admissibility of drugs, such as chain of custody, can be met but that at some point the drugs themselves have been destroyed. In that instance, *People v Reed* (44 NY2d 799 [1978]) allows for testimony about the drugs if the criteria stated in the rule are fulfilled:

> "[T]he destruction of the contraband by the police custodian was due to a clerical error which led him to reasonably believe that the case had been dismissed. The prosecution has thus sufficiently explained the destruction, and there is no indication and, indeed, no claim of bad faith. Additionally significant is the absence of any prejudice to the defendant as a result of the destruction of the substance prior to trial. . . . [T]he drugs were available to defendant for independent analysis or measurement for nearly two years, and were not destroyed until just prior to trial. At no time during this long period that the police had the substance did defendant seek to have the drugs examined; instead, he simply requested a copy of the police laboratory report. In light of these facts, the decision to allow testimony as to the nature and amount of the material seized did not constitute error" (*Reed* at 800-801).

4.32. Evidence of Plea and Ancillary Statements

(1) When a plea of guilty is withdrawn or vacated, evidence of that plea and any statement made in the course of entering that plea:

(a) is not admissible in a criminal proceeding against the person who entered the plea;

(b) is admissible in a civil proceeding against the person who entered the plea, provided that the vacatur was not based upon a violation of due process.

(2) A defendant's statement made on advice of counsel to a prosecutor for the purpose of obtaining a beneficial disposition of the defendant's case is, in the absence of the agreed upon disposition, admissible against the defendant in a subsequent trial, provided the trial is not the consequence of the prosecutor's improper breach of the agreement and provided the parties did not otherwise expressly agree.

Note

Subdivision (1). Subdivision (1) (a) is derived from *People v Spitaleri* (9 NY2d 168 [1961]). In *Spitaleri*, the Court of Appeals held a withdrawn guilty plea is "out of the case forever and for all purposes." (*Id.* at 173.) Thus, once a guilty plea is withdrawn, neither the fact of the plea nor the contents of the plea may be subsequently used at a trial by the prosecuting authority as evidence in chief or to impeach a defendant who testifies. (*People v Moore*, 66 NY2d 1028, 1030 [1985].) As acknowledged by the Court of Appeals, the *Spitaleri* rule is not constitutionally or statutorily compelled and rests upon the principle that "it would be unfair to allow a defendant to withdraw a plea of guilty and then permit its use against him [or her] at trial." (*People v Evans*, 58 NY2d 14, 22 [1982].)

Subdivision (1) (b), as derived from *Cohens v Hess* (92 NY2d 511 [1998]), recognizes that the *Spitaleri* rule does not apply in civil proceedings. Thus, when the vacatur of a defendant's plea is not based upon any violation of due process in the taking of the guilty plea, it is admissible in a civil proceeding. (*Cohens v Hess*, 92 NY2d at 515.)

For the purposes of this rule, a plea of guilty includes an *Alford* plea; that is, a plea entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Id.* at 472, 475.) The Supreme Court held such a plea is not constitutionally proscribed, and "may generally be used for the same purposes as any other conviction." (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*See Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000].)

Subdivision (2). Subdivision (2) is derived from *People v Evans* (58 NY2d 14 [1982]) and *People v Curdgel* (83 NY2d 862 [1994]). In both cases, the defendant, in pursuit of a favorable plea agreement and upon the advice and in the presence of counsel, voluntarily furnished the prosecutor with an incriminating statement. In *Evans* the defendant agreed to testify in two trials against an accomplice, and in *Curdgel* the defendant agreed to testify in the grand jury against his accomplices. Before testifying in the grand jury, Curdgel signed a waiver of immunity.

Although for different reasons, each defendant ultimately went to trial—Evans, because his conviction upon his plea was reversed for unrelated reasons; and Curdgel, because he breached the plea agreement by publicly contradicting his testimony. At Evans's trial, the People were permitted to use against him his statements to the prosecutor and his testimony at the accomplice's trials; at Curdgel's trial, the People were permitted to use his grand jury testimony against him.

The plea agreements in *Evans* and *Curdgel* did not include a condition that the statements or testimony would not be admissible at a subsequent trial of the defendant. (*See Curdgel*, 83 NY2d at 864-865 ["As in (Curdgel's) case, the *Evans* defendant . . . set no conditions on the subsequent use of his testimony"].)

In *Evans*, the Court noted that because the defendant entered into an agreement for the exchange of statements or testimony for a beneficial plea that did not include a condition limiting the use of the statements or testimony "when it would have been a simple task to include such a limiting condition as part of that plea, [the defendant] assumed the risk that the challenged evidence might be used against him if he succeeded on his appeal." (*Evans*, 58 NY2d at 23.) In *Curdgel*, the Court noted that "the People bargained for use of defendant's testimony in the prosecution of his accomplices." (*Curdgel*, 83 NY2d at 865.) After the defendant's breach of that agreement, the People were permitted to use the defendant's grand jury testimony at his trial, given in exchange for a beneficial plea offer, "as this was a counseled, foreseeable use of his testimony." (*Id.*)

The statement or testimony in *Evans* and *Curdgel* was bargained for by the People in return for a beneficial plea offer; therefore, when, through no fault of the People, a guilty plea did not result, the People were not precluded from using what they had bargained for against each defendant as this was a "foreseeable" consequence of the plea agreement. (*See People v Melo*, 160 AD2d 600, 600–601 [1st Dept 1990] ["The defendant could have sought as a condition for the negotiations an agreement from the prosecutor not to use his statements against him, but he did not. Absent such agreement with the District Attorney, prepleading admissions made in the presence of the defendant's attorney are admissible" (citation omitted)]; *but cf. People v Thompson*, 108 AD3d 732 [2d Dept 2013].)

4.33 Exception or Proviso

(1) A statute or administrative rule may provide for the exclusion of liability for an offense. If the People are required to plead the inapplicability of the exclusion and at trial disprove it beyond a reasonable doubt, the exclusion is deemed an "exception." If the People are not required to plead the inapplicability of the exclusion or at trial disprove it unless raised by the defendant, the exclusion is deemed a "proviso."

(2) When an exclusion to liability for an offense *is not specified* in the definition of the offense, absent the expressed intent of the enacting body to the contrary, the exclusion is a "proviso," and the People are not required to plead the inapplicability of the exclusion; when, however, the exclusion is raised at trial, the People must disprove it beyond a reasonable doubt.

(3) (a) When an exclusion to liability for an offense *is specified* in the definition of the offense, absent the expressed intent of the enacting body to the contrary as detailed in paragraph (b), the exclusion is an "exception," and the People are required to plead the inapplicability of the "exclusion," and at trial the People must disprove it beyond a reasonable doubt.

(b) When the intent of an enacting body is not expressly stated, their intent is assumed to be what would constitute a "common sense and reasonable pleading" of the exclusion.

(i) In determining whether "common sense and reasonable pleading" may excuse the People from pleading the inapplicability of an exclusion stated in the definition of an offense and disproving it at trial unless raised by the defendant, a court may consider, for example:

(1) whether the exclusion, by its own terms, or by incorporation of a separate statute, includes myriad factual scenarios that would require the People to go to intolerable lengths to negate.

(2) whether the exclusion is uniquely within the defendant's knowledge.

Note

Subdivision (1). A Penal Law statute may designate a "defense" or "affirmative defense" to a defined offense. The People bear the burden of disproving a "defense" beyond a reasonable doubt. The defendant bears the burden of establishing an affirmative defense by a preponderance of the evidence. (Penal Law § 25.00.)

In addition to a "defense" or "affirmative defense," there may be provisions in or outside the definition of an offense that "exclude" liability for the offense in stated circumstances. No statute, however, defines the evidentiary burden of the People or of the defendant with respect to the "exclusion."

When decisional law requires the People to plead the inapplicability of the exclusion and at trial disprove an exclusion beyond a reasonable doubt, the exclusionary clause is deemed an "exception"; when decisional law does not require the People to plead the inapplicability of the exclusion or disprove it at trial unless the defendant raises it, the exclusionary clause is deemed a "proviso" (*People v Devinny*, 227 NY 397, 401 [1919] ["The general rule is that in dealing with a statutory crime exceptions must be negatived by the prosecution and provisos utilized as a matter of defense. Attempts to apply this general rule and distinguish between exceptions and provisos have resulted in many technicalities and in much (subtlety)"]; *People v Davis*, 13 NY3d 17, 31 [2009] ["Although the murky contours of 'exceptions' and 'provisos' have long been the subject of debate . . . , we continue to utilize those ancient labels"]; *People v Santana*, 7 NY3d 234, 237 [2006] ["We therefore conclude that the . . . clause operates as a proviso that the accused may raise in defense of the charge rather than an exception that must be pleaded by the People in the accusatory instrument. . . . If an accused timely raises the issue, the People must, of course, establish beyond a reasonable doubt that the . . . proviso does not apply"]).

"[T]he distinction between a proviso and an exception will be wholly disregarded, if necessary to give effect to the manifest intention of the Legislature" (*Davis* at 31, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 211, Comment at 369). Thus, that the exclusion is "introduced by 'except' is not

determinative" (*Davis* at 31, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 211, Comment at 370).

On occasion, decisional law may use the term "exception" generically to include the terms of art of "exception" and "proviso" (*e.g. People v Kohut*, 30 NY2d 183, 187 [1972] ["If the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute, the exception generally is a matter for the defendant to raise in defense, either under the general issue or by affirmative defense"]).

Unlike New York law, federal decisional law has a fairly settled rule "that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it" (*McKelvey v United States*, 260 US 353, 357 [1922]; *Dixon v United States*, 548 US 1, 13 [2006]).

In New York, to determine the effect of an "exclusion," courts look to the legislative intent, which, unless expressly stated, assumes the application of "common sense and reasonable pleading" (*Devinny* at 401 ["The two classes of provisions—exceptions and provisos—frequently come closely together and the rule of differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading"]; *Santana*, 7 NY3d at 237 ["As a matter of 'common sense and reasonable pleading' (*People v Devinny*, 227 NY 397, 401 [1919]), we do not believe that the Legislature intended to require the People to negate" the exception in issue]; *Davis* at 31).

Factors that may be considered to determine legislative intent include: (1) is the exclusion set forth inside the definition of the penal offense or outside that definition in another statute; or (2) if the exclusion is defined inside the definition of the penal offense, does it reference a statute outside the definition of the offense; (3) does the exclusion require the People to go to "intolerable lengths" to plead and negate the exclusion; and (4) does the exclusion recite facts "uniquely within a defendant's knowledge" (*Davis* at 31-32).

Subdivision (2) recites the rule as summarized in *People v Kohut* (30 NY2d 183, 187 [1972]), namely, when the exclusionary language "is found outside the statute [that defines an offense], the [exclusion] generally is a matter for the defendant to raise in defense, either under the general issue or by affirmative defense." Following that rule, *Kohut* held that the indictment was not defective for "failure to allege facts tolling the Statute of Limitations," which are found outside the statute defining the offense (*Kohut* at 195).

A classic example is found in the prohibitions on possession of a firearm in Penal Law article 265. The exemptions from liability for those possessory crimes

are in a separate section (Penal Law § 265.20). Thus, the People are not obligated to plead the inapplicability of a statutory exemption from liability, such as ownership of a license, nor are the People obligated to disprove an exemption unless the defendant places it in issue. (*See People v Washington*, 209 AD2d 162, 163 [1st Dept 1994], *affd* 86 NY2d 853 [1995].)

Even though the exclusionary language may be recited in the definition of the offense, it may yet be held to be outside the statute defining the offense when the exclusionary language incorporates the application of a statute that is outside the statute defining the offense (*Santana*, 7 NY3d 234). In *Santana*, the defendant was charged with "criminal contempt in the second degree" (Penal Law § 215.50 [3]). The definition of the offense required intentional disobedience or resistance of a court order "except in cases involving or growing out of labor disputes as defined by [Judiciary Law § 753-a (2)]." That "exclusionary language" in the Penal Law definition of criminal contempt, the Court stated, "does not provide a complete definition of the class of cases that the Legislature intended to remove from the ambit of criminal contempt because the statute refers to a definition of 'labor disputes' set forth *outside* the Penal Law" (*Santana* at 237 [emphasis added]). Also, the Court noted, the Judiciary Law provision "delineates the multiple circumstances that constitute 'labor disputes' and the various parties who can engage in such disagreements" (*id*.). Thus, as a matter of " 'common sense and reasonable pleading' . . . , we do not believe that the Legislature intended to require the People to negate each of the alternatives specified in Judiciary Law § 753-a" (*Santana* at 237; s*ee Davis* at 31 ["In *Santana*, we applied the general rule that qualifying language found outside the text of a relevant Penal Law provision is in the nature of a 'proviso' . . . but our ultimate conclusion was premised on the belief that the Legislature could not reasonably have intended the People to negate the existence of each of the myriad labor disputes delineated in Judiciary Law § 753-a"]).

Subdivision (3) (a) sets forth the general rule that applies when the exclusionary language is wholly contained in the definition of the statute; namely, absent intent of the enacting body to the contrary, the People are required to plead the inapplicability of the exclusionary language and at trial must disprove its application beyond a reasonable doubt. That rule is also derived from *Kohut* (30 NY2d at 187 ["If the defining statute contains an exception, the indictment must allege that the crime is not within the exception"]).

An example of that rule is illustrated in the definition of "criminal possession of a weapon" set forth in Penal Law § 265.03 (3)—formerly Penal Law § 265.02 (4)—which states that a person is guilty of the crime when that person "possesses any loaded firearm. Such possession shall not . . . constitute a violation of this subdivision if such possession takes place in such person's home or place of business." (*People v Rodriguez*, 68 NY2d 674 [1986], *revg for reasons stated in dissenting op at* 113 AD2d 337, 343-348.) *Rodriguez* held that the People were required to plead and prove at trial that the possession of the loaded firearm was not in the defendant's home or place of business. (*See Santana*, 7 NY3d at 237

["Legislative intent to create an exception has generally been found when the language of exclusion is contained entirely within a Penal Law provision. For example, the 'home or place of business' exception found in Penal Law (former) § 265.02 (4) . . . does not require reference to another statute to determine its applicability"].)

Subdivision (3) (b) sets forth what may be viewed as an exception to the general rule stated in subdivision (3) (a), that is, instances when legislative intent, seen through the prism of "common sense and reasonable pleading," does not require exclusionary language stated in the definition of an offense to be pled or disproved at trial absent the defendant placing the exception in issue. See the discussion of *Santana* in subdivision (2) and in particular the comment in *Davis* that, in addition to the exception in *Santana* being "found outside the text" of the definition of the statute, the Court of Appeals "conclusion was premised on the belief that the Legislature could not reasonably have intended the People to negate the existence" of myriad items included in the exception (*Davis* at 31).

In *Davis*, the defendant was convicted of a misdemeanor based upon his violation of a New York City Department of Parks and Recreation rule which prohibited individuals in city parks after their "posted closing times" (*Davis* at 20-21). The rule contained "qualifying language stating that a person may disregard a park sign 'upon order by a Police Officer or designated Department employee' " (*id.*). In response to the defendant's argument that the People were required to plead that the exception did not apply (and therefore ultimately to disprove its application at trial), the Court said:

> "The main goal of the interpretative rules governing exceptions and provisos is to discover the intention of the enacting body. . . .
>
> "Here, we conclude that, as a matter of common sense and reasonable pleading (*see Devinny*, 227 NY at 401; *accord Santana*, 7 NY3d at 237), the City's Parks Department did not intend that the People plead and prove that no police officer or Parks Department employee had authorized defendant to ignore a posted closing time. *Such information is uniquely within a defendant's knowledge*, and *to require the People to plead and negate the existence of the relevant permission would require them to go to 'intolerable lengths'* . . . . These efforts would serve '[n]o useful purpose of narrowing issues or giving notice,' but would merely give rise to 'technicalitie[s that] could be used belatedly to stifle an otherwise viable prosecution' (*cf. People v Kohut*, 30 NY2d 183, 191 [1972]). As such, we hold that the Parks Department intended the police officer/department employee qualifying language to operate as a 'proviso' that must be pleaded and proved by the defendant" (*Davis* at 31-32 [emphasis added]; *see Devinny* at 401 ["In the case at bar if it should be held that an indictment must negative all of the cases

> referred to in the statute as not being unlawful, it would be drawn out to intolerable lengths"]).

Finally, it should be noted that on rare occasion the legislature will state expressly its intention on what is required of a statutory exception. (*E.g.* Public Health Law § 3396 [1] ["In any civil, criminal or administrative action or proceeding brought for the enforcement of any provision of (article 33, Controlled Substances), it shall not be necessary to negate or disprove any exception, excuse, proviso or exemption contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the person claiming its benefit"].)

4.34. Gang Membership and Activity

(1) Evidence of gang activity and a defendant's membership in a gang is inadmissible if it cannot logically be connected to some specific material issue in the case and tends only to demonstrate the defendant's propensity to commit the crime charged. The requisite connection can exist and evidence of the defendant's gang membership can be admitted when the defendant's gang membership: (a) provides a motive for the crime charged; or (b) is inextricably interwoven with a charged crime; or (c) is necessary to explain the relationships of the individuals involved or otherwise necessary to provide background information relevant to the commission of the crime or its participants; *and* (d) the probative value of the evidence outweighs its prejudicial effect.

(2) When evidence of gang membership reveals, directly or indirectly, the commission of crimes, wrongs, or other bad acts, a limiting instruction on the reason for and use of the evidence is warranted.

Note

Subdivision (1). Evidence of gang activity and a defendant's membership in a gang normally will reveal, directly or indirectly, the commission of crimes or bad acts and thus analytically whether to admit the evidence or not falls under the umbrella of *People v Molineux* (168 NY 264 [1901]; *People v Bailey*, 32 NY3d 70, 83 [2018]). In short, that means that evidence of gang activity and a defendant's gang membership will not be admissible "if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged," and the probative value of the evidence does not outweigh its prejudicial effect (*People v Kims*, 24 NY3d 422, 438 [2014]; *see Bailey*, 32 NY3d at 83; *People v Boxill*, 111 AD2d 399, 401 [2d Dept 1985], *affd for reasons stated in mem of App Div* 67 NY2d 678 [1986] ["in the absence of a connection between gang membership and the crime or crimes for which a defendant is being tried, the prosecutor's questions as to gang membership are improper"]; Guide to NY Evid rule 4.28, Evidence of Crimes and Wrongs [*Molineux*]).

So analyzed, the Court of Appeals has held that evidence of a defendant's membership in a gang can be admitted to show motive for the commission of the

crime (*People v Moore*, 42 NY2d 421, 428, 433 [1977] ["evidence of the defendant's relationship with the (Black Liberation Army) and their stated hostility to the police was properly admitted at trial to show the motive for the crime" of attempted murder of two police officers even though "it reflected on the defendant's character"]). Further, the Court has held that evidence of a defendant's membership in a gang can be admissible "to provide necessary background, or when it is inextricably interwoven with the charged crimes, or to explain the relationships of the individuals involved" (*People v Bailey*, 32 NY3d at 83).

In *Bailey*, the defendant and two inmates were charged with assault of another inmate and there was evidence that during the assault one of the perpetrators—not the defendant—in response to the complainant's request for a "fair fight" (one-on-one) said, "ain't nothing fair, only Blood rules" (*id.* at 73). After the attack, when the defendant said he could not get a fair fight, the same codefendant yelled out "power Blood rules" (*id*.). The Court of Appeals held that "the testimony elicited by the People about the Bloods was probative of defendant's motive and intent to join the assault on complainant, and provided necessary background information on the nature of the relationship between the codefendants . . . . The testimony was intended to explain why defendant and one of the codefendants were quick to join in the fight, as well as the gang-related meaning of the words complainant alleged that the codefendant used during and after the attack. In fact, very little of the investigator's testimony focused on sensational details about the Bloods. The testimony described how members are identified and briefly discussed how carrying out an act of violence on behalf of a member might allow another member to rise in the gang's hierarchy" (*id.* at 83).

Examples of other decisions admitting evidence of gang activity and a defendant's membership in a gang include:

- *People v Benjamin*, 203 AD3d 617, 617 (1st Dept 2022) (In a prosecution for manslaughter, the admitted evidence, "which included expert testimony regarding the history of a specific conflict between two gangs, a photo in which defendant made a gang sign accompanied by two known members of the gang, and a photo in which two members of the gang made the same sign in defendant's presence[,] was probative of motive since it provided an explanation as to why defendant would . . . shoot the victim. Although defendant's confession also discussed his motive, his explanation made no sense except in the context of a gang rivalry" [internal quotation marks and citations omitted]).

- *People v Hilts*, 187 AD3d 1408, 1414 (3d Dept 2020) (In a prosecution for the sale of a firearm, an FBI confidential informant [CI] arranged to purchase a firearm from the defendant. The CI had worked for the Bloods as an "enforcer" in guarding a store where the Bloods conducted firearms transactions and it was in the store's parking lot that the sale was arranged.

The Court held that the "CI's testimony about his former gang membership, the affiliation between his gang and the Bloods and his position of trust as an enforcer explained the FBI's interest in his services as a CI. His testimony about the [store's] owner's gang affiliation provided background information that explained the FBI's surveillance of the store and the CI's presence there. As for defendant himself, evidence of his gang membership and status within the gang hierarchy helped the jury to understand why the CI felt comfortable approaching him about the gun sale and how defendant was able to arrange the sale while removing himself from physical involvement").

- *People v Argueta*, 194 AD3d 857, 858 (2d Dept 2021) (In a prosecution for attempted murder, the "testimony regarding the defendant's membership in a gang and prior encounters with the victim was properly admitted to establish motive and intent, and to explain the defendant's connection to his accomplices and their relationship with the victim, and the prejudicial effect of that testimony did not outweigh its probative value" [citations omitted]).

- *People v McCommons*, 143 AD3d 1150, 1154 (3d Dept 2016) (In a prosecution for murder and other crimes, the trial court "did not err in permitting the People to establish that defendant was a gang member." The evidence "provided background information that assisted the jury in understanding the audiotaped conversation [that contained incriminating admissions], as well as defendant's trusting relationships with, among others, certain gang members to whom he made admissions and a gang member who loaned him the gun used in committing the crimes. Notably, the court again mitigated any undue prejudice by providing limiting instructions" [citations omitted]).

By contrast, in *People v Kims* (24 NY3d at 439), the Court of Appeals held that "the references to gang activity were not relevant to any material issue. The People's theory centered on possession and on intent to sell [drugs]. It is clear that the testimony about defendant's alleged gang affiliation would not have provided any relevant background information about how the drugs came to be located in his apartment. Similarly, there was no need to explain the defendant's relationship to the witnesses by referencing gang affiliation; the testimony clearly indicated their status as buyers as well as their respective relationships to the defendant. Finally, gang affiliation was not interwoven with the charges because there was no evidence that defendant was working with fellow members of his gang to distribute drugs."

Bailey, *Benjamin*, *Hilts*, *McCommons*, and other cases illustrate varying methods by which a gang affiliation or gang activity may be proved, namely, reference to a gang during commission of the crime (*Bailey*); photographs evincing the defendant's affiliation with a gang (*Benjamin*); a confidential

informer whose membership in a gang facilitated his purchase of a firearm from the defendant (*Hilts*); admissions (*McCommons*); identification of the defendant at trial as the shooter "by a fellow gang member" (*People v Evans*, 132 AD3d 1398, 1398 [4th Dept 2015]); clothing identified with a particular gang (*Matter of Donovan B.*, 278 AD2d 95, 95-96 [1st Dept 2000] ["(A)ppellant, who was wearing blue clothing associated with the 'Crips' gang, was engaged in a punching and kicking fight with an individual wearing red, associated with the 'Bloods' gang"]); gang insignia (*see Matter of Doyle v Prack*, 115 AD3d 1110, 1111 [3d Dept 2014] [contrary to prison rules, petitioner possessed gang-related material, namely, a "black wristband with a white '1%er' insignia"]).

Subdivision (2). As noted, evidence of gang membership may involve the revelation directly or indirectly of the commission of crimes or bad acts, and a court must therefore by its instructions to a jury guard against the jury utilizing the evidence to prove a defendant's criminal propensity (*Bailey*, 32 NY3d at 83).

In *Bailey*, for example, after finding the gang activity evidence admissible, the Court of Appeals concluded: "Regardless, because the court's instructions addressed any possible prejudice to defendant, we cannot say the court's ruling was error" (*Bailey*, 32 NY3d at 83-84). The trial court instruction recited in *Bailey* at 76-77 adapted the jury instruction set forth in CJI2d(NY), General Applicability, *Molineux*. (*See Benjamin*, 203 AD3d at 617 ["The probative value of defendant's gang affiliation outweighed any prejudice, which was minimized by the court's limiting instructions"]; *People v Johnson*, 106 AD3d 1272, 1274 [3d Dept 2013] [the trial court "properly balanced the probative value of (defendant's gang membership) evidence against its prejudicial effect and gave appropriate limiting instructions"].)

4.35.1 Identification; Composite Sketch

(1) A composite sketch of a person alleged to have committed an offense is hearsay and is thus inadmissible to prove guilt.

(2) A composite sketch may be admitted for a purpose other than to prove the guilt of a defendant; for example, a composite sketch may be admitted:

(a) as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication;

(b) to show inconsistencies between an in-court identification and a witness's prior description as recorded in the sketch; or

(c) to show at a suppression hearing that there was, or was not, a basis for a finding of reasonable suspicion or probable cause.

Note

This rule is derived from three Court of Appeals cases: *People v Maldonado* (97 NY2d 522 [2002]); *People v Griffin* (29 NY2d 91 [1971]); and *People v Coffey* (11 NY2d 142 [1962]).

Subdivision (1) sets forth the general rule excluding evidence of a composite sketch as evidence of guilt. As summarized by *Maldonado* (at 528-529):

> "This Court has long considered composite sketches to be hearsay (*see People v Coffey*, 11 NY2d 142, 145 [1962] . . .), and thus generally inadmissible against defendants to prove guilt (*see e.g. Coffey* at 145 . . .). . . . A composite sketch 'may not be admitted simply to counteract evidence . . . which casts doubt on the reliability of [a] complainant's identification' . . . . When offered for that purpose, a composite sketch impermissibly bolsters the identifying witness's testimony and is therefore inadmissible."

Subdivision (2) sets forth examples of purposes, other than proof of guilt, for which a composite sketch may be admissible.

Subdivision (2) (a) is derived from *Maldonado* and *Coffey*. In the words of *Maldonado*:

> "[A] composite sketch may be admissible as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication (*see Coffey*, 11 NY2d at 145-146). In those circumstances, a sketch may be employed to confirm the identification with 'proof of declarations of the same tenor before the motive to falsify existed.' " (*Maldonado* at 528-529; *see People v Peterson*, 25 AD2d 437 [2d Dept 1966]; Guide to NY Evid rule 6.20, Impeachment by Recent Fabrication; rule 8.31, Prior Consistent Statement [rev June 2022].)

Subdivision (2) (b), pursuant to *Griffin*, allows for the introduction of "a composite sketch on cross-examination to show inconsistencies between a courtroom identification and the prior description as recorded in the sketch." (*Griffin* at 93; *accord Maldonado* at 529 n 7; *see* Guide to NY Evid rule 6.15, Impeachment by Prior Inconsistent Statement.)

Subdivision (2) (c) is derived from *Griffin*'s declaration that aside from proof of guilt, there are "other uses of a composite sketch" that "are not proscribed . . . . For example, such a sketch might prove invaluable in a suppression hearing where the issue is probable cause for arrest or reasonable suspicion for a 'stop.' In such instances the reasonable basis, including the sketch, for the police action is critical." (*People v Griffin* at 93; *accord Maldonado* at 529 n 7; *see People v Rodriguez*, 49 AD3d 433, 434 [1st Dept 2008] ["There is no indication that the sketch was created on the basis of anything other than information supplied by the victim, or any reason to believe the process of creating a sketch impaired the fairness of the subsequent lineup"].)

4.35. Identification of a Defendant

Part I. Definition of blind or blinded procedure [CPL 60.25 (1) (C)]

For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproduction under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness.

Part II. Identification by means of previous recognition, in addition to present identification [CPL 60.30]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the People to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question, and (c) on a subsequent occasion he or she observed the defendant, or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the Constitution of this State or of the United States, and then also recognized him or her (the defendant) or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same

person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she (the witness) observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence-in-chief.

Part III. Identification by means of previous recognition, in absence of present identification [CPL 60.25]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under

the Constitution of this State or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(2) Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such

testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence-in-chief.

Note

Part I is a verbatim reproduction of CPL 60.25 (1) (c), which applies to that section and by a cross-reference to CPL 60.30. At the end of the definition of "blind or blinded procedure," the statute continues as follows:

"The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter." (CPL 60.25 [1] [c].)

Part II is a verbatim reproduction of CPL 60.30.

Part III is a verbatim reproduction of CPL 60.25.

Consistent with the constitutional and statutory procedures, a witness may testify to (1) an in-court identification of a defendant that is relevant to the offense charged and that is based on present recollection at the time of the in-court identification and (2) his or her recognition of the defendant made at a relevant time prior to testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant.

If a witness cannot on the basis of present recollection make an in-court identification, consistent with the constitutional and statutory procedures, the witness may testify to his or her identification of the defendant that is relevant to the offense charged and that was made at a relevant time before testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant; provided, there is independent proof that the person viewed personally or by a pictorial, photographic, electronic, filmed or video recorded reproduction was the defendant.

4.36. Effect of Intoxication upon Liability [Penal Law §§ 15.25, 15.05 (3)]

In any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged except if the culpable mental state of the offense is "recklessly." In that instance, a person who creates a substantial and unjustifiable risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Note

The rule incorporates Penal Law § 15.25 (Effect of intoxication upon liability) and the exception set forth in Penal Law § 15.05 (3) (Culpability; definitions of culpable mental states).

Penal Law § 15.25 states the general rule that "[i]ntoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." Normally, the "element" that intoxication may negate is the actor's culpable mental state (*see People v Newton*, 8 NY3d 460 [2007]).

The exception for the culpable mental state of "recklessly" is set forth in Penal Law § 15.05 (3) (*see People v Register*, 60 NY2d 270, 280 [1983], *overruled on other grounds People v Feingold*, 7 NY3d 288 [2006]).

The Court of Appeals has not decided whether intoxication may negate the element of "depraved indifference to human life," declared a culpable mental state by *Feingold* and included in the definition of crimes that also require a defendant to act recklessly (*compare People v Wimes*, 49 AD3d 1286, 1287 [4th Dept 2008] [finding that intoxication could have negated the element of "depraved indifference" to human life], *and People v Coon*, 34 AD3d 869, 870 [3d Dept 2006] [finding that intoxication by crack cocaine negated "depraved indifference" to human life], *with People v Wells*, 53 AD3d 181, 193 [1st Dept 2008] [in dicta, the Court opined that intoxication was not a defense because in its view "culpability (for depraved indifference murder) is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication"]; *see also People v Lessey*, 40 Misc 3d 530 [Sup Ct, NY County 2013]).

Whether the evidence is sufficient to warrant an instruction to the finder of fact to consider the effect of intoxication on a defendant's mental state depends on

such factors as: "the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether the defendant consumed them on an empty stomach, whether the drinks were high in alcoholic content, and the specific impact of the alcohol upon the defendant's behavior or mental state. *People v. Gaines*, 83 N.Y.2d 925, 615 N.Y.S.2d 309, 638 N.E.2d 954 (1994) (the defendant's testimony that he had a couple of drinks and may have lost control, and the testimony of witnesses that the defendant was 'high' and had glassy eyes and alcohol on his breath was insufficient to warrant a charge on intoxication); *People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 (1990) (since there was no evidence as to when the defendant ingested the narcotics, the quantity ingested or the effect they had on him, a charge on intoxication was not warranted)" (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 15.25).

Given the requisite showing, a defendant is entitled to the jury instruction: "[I]n determining whether the defendant had the (*specify, e.g. intent and/or knowledge*), necessary to commit a crime you may consider whether the defendant's mind was affected by intoxicants to such a degree that he/she was incapable of forming the (*specify, e.g. intent and/or knowledge*) necessary for the commission of that crime" (CJI2d[NY] General Applicability, Defenses, Intoxication).

4.37 Mental Disease or Defect Evidence to Negate Intent

Evidence that the defendant suffers from a mental disease or defect is admissible to negate a culpable mental state of intent, notwithstanding that the defendant does not interpose the affirmative defense of mental disease or defect.

Note

A defendant may interpose the affirmative defense of mental disease or defect to negate guilt of a criminal offense. (Penal Law § 40.15.) Upon doing so, however, the defendant bears the burden of proving that affirmative defense by a preponderance of the evidence. (Penal Law § 25.00.)

On the other hand, the People bear the burden of proof beyond a reasonable doubt of the elements of an offense. Thus, when the defendant's "intent" is an element of an offense, the People bear the burden of proof beyond a reasonable doubt of that intent. In turn, evidence of the defendant's mental disease or defect is admissible to negate that intent regardless of whether the affirmative defense of insanity is also in issue. (*People v Segal*, 54 NY2d 58, 66 [1981] ["Although proof of a mental defect other than insanity may not have acquired the status of a statutory defense, and will not constitute a 'complete' defense in the sense that it would relieve the defendant of responsibility for all his (or her) acts (see, e.g., Penal Law, § 30.05) it may in a particular case negate a specific intent necessary to establish guilt"]; *People v Moran*, 249 NY 179, 180 [1928] ["Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible (per the defense of insanity), may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill"]; *People v Matthews*, 148 AD2d 272, 278 [4th Dept 1989] ["It is well established that proof of a mental defect or deficiency short of insanity, although not having acquired the status of a statutory defense, may still negate a finding of specific intent essential to sustain a conviction"].)

The affirmative defense of mental disease or defect "is not the same as a *mens rea*-type defense. . . . (*see generally*, Penal Law § 25.00 [2]; Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 40.15, at 203). An insanity affirmative defense is defined by the precise wording of Penal Law § 40.15, which contemplates that as a result of mental disease or defect, the defendant lacks substantial capacity to know or appreciate either the nature and consequences of such conduct or that such conduct was wrong. A *mens rea*-type defense, by contrast, serves to negate a specific intent necessary to establish guilt." (*People v Almonor*, 93 NY2d 571, 580 [1999].)

When the affirmative defense is, however, raised along with the *mens rea*-type defense, a court must carefully instruct the jury to avoid "confusion and erroneous application of rules [by a jury] with respect to the People's burden of proving the element of intent and defendant's burden of proving the affirmative defense of insanity." (*People v Kohl*, 72 NY2d 191, 199 [1988].)

To date, the decisional law of New York has only passed on the admission of evidence of mental disease or defect to negate intent. Admission of evidence of mental disease or defect may, however, be also admissible to prove that the defendant did not have one of the other culpable mental states that is an element of a charged offense. (*See* Model Penal Code § 4.02 [1] ["Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense"]; *People v Colavecchio*, 11 AD2d 161, 165 [4th Dept 1960] [quoting the Model Penal Code in holding that evidence of mental disease was admissible to negate larcenous intent].)

4.38. *Molineux*: Evidence of Crimes and Wrongs

(1) Evidence of crimes, wrongs, or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in a wrongful act or acts. This evidence may be admissible when it is more probative than prejudicial to prove, for example:

> **motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or conduct that is inextricably interwoven with the charged acts; or to provide necessary background information or explanation; or to complete the narrative of the subject event or matter.**

(2) In a criminal proceeding, where the defendant interposes a defense, the People on rebuttal may prove the defendant's commission of other crimes or wrongs when such crimes or wrongs are relevant and probative to disprove the defense.

Note

Subdivision (1). This rule sets forth what is generally known as the *Molineux* rule, after the seminal case of *People v Molineux* (168 NY 264 [1901]).

The first sentence sets forth the general rule, applicable in both civil and criminal proceedings, that when evidence of other crimes, wrongs or acts committed by a person is offered for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, the evidence is inadmissible. (*Molineux*, 168 NY at 291-293; *People v Morris*, 21 NY3d 588, 594 [2013] ["(E)vidence of uncharged crimes is inadmissible where its purpose is only to show a defendant's bad character or propensity towards crime"]; *People v Bradley*, 20 NY3d 128, 135 [2012] ["Without some better developed theory of relevance," evidence of a stabbing incident more than 10 years before defendant fatally stabbed her estranged boyfriend was "resonant solely for what (it) seemed to disclose about defendant's violent propensity and the manner of its expression"]; *Matter of Brandon*, 55 NY2d 206, 210-211 [1982] ["A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to

prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion"]; *People v Vargas*, 88 NY2d 856 [1996] [Where only the credibility of the complainant and the credibility of the defendant were at issue on whether there was a forcible or consensual sex act, evidence of the defendant having engaged in sexual misconduct with others was impermissible evidence of propensity, not probative evidence of intent].)

As explained in *People v Frumusa* (29 NY3d 364, 369 [2017]):

> "The *Molineux* rule ' "is based on policy and not on logic." ' 'It may be logical to conclude from a defendant's prior crimes that he is inclined to act criminally, but such evidence "is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past" ' " (citations omitted).

The second sentence sets forth exceptions to the exclusionary rule recognized by the Court of Appeals. The exceptions relate to circumstances where the evidence of other crimes, wrongs, or acts is offered for a non-conformity purpose that is relevant in the proceeding. These exceptions are available in both civil and criminal proceedings. (*See Matter of Brandon*, 55 NY2d at 210-211; *Mazella v Beals*, 27 NY3d 694, 709-710 [2016].)

In *Molineux*, the Court listed examples of uncharged crimes that may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant (168 NY at 293). This enumeration is "merely illustrative" (*People v Vails*, 43 NY2d 364, 368 [1977]) and not intended to be "exhaustive" of the possible range of relevancy (*People v Santarelli*, 49 NY2d 241, 248 [1980]). The Court has continued to add to this enumeration. (*See People v Stanard*, 32 NY2d 143, 146 [1973] ["background evidence"]; *People v Cook*, 42 NY2d 204, 208 [1977] [" 'to complete the narrative' "]; *People v Vails*, 43 NY2d 364, 368 [1977].)

Even when evidence of other crimes, wrongs, or acts is admissible for such a non-conformity purpose, the court must weigh the evidence's probative value against its prejudicial impact before admitting the evidence and may exclude the evidence in its discretion. (*See* Guide to NY Evid rule 4.07; *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 360 [1981].)

In *People v Robinson* (68 NY2d 541, 544-545 [1986]), the Court of Appeals held the People must show by clear and convincing evidence that the defendant committed the other crimes in order to admit evidence under the identity exception.

In its discretion, a trial court may conduct an inquiry or hearing, outside the presence of the jury, to determine admissibility, and in particular whether there is sufficient evidence of the *Molineux* exception. A defendant in a criminal

prosecution is entitled to pretrial discovery of any misconduct and criminal acts of the defendant which the prosecution intends to use at trial as "substantive proof" of any material issue in the case. (CPL 245.20[3].)

Preliminary evidence of a *Molineux* exception may be admitted pursuant to rule 4.05 of the Guide to New York Evidence (Conditional Relevance [Evidence Offered "Subject to Connection"]). (*See People v Small*, 12 NY3d 732, 733 [2009] [mid-trial grant of the People's application to introduce *Molineux* evidence to rebut the defendant's defense was proper]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981] [prior to trial or the testimony of the *Molineux* witness "the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness"].) Nothing precludes a court from itself requiring a party to advise the court, orally or in writing, of a prospective trial application to admit *Molineux* evidence and conducting any necessary and appropriate proceeding to determine the matter.

It should be noted that in certain instances, a prior criminal conviction or conduct may be required proof of a criminal charge.

In instances where a prior criminal conviction must be proved, statutory law may permit a defendant to admit the prior criminal conviction outside the presence of the jury in order to preclude the People from offering proof of that conviction at trial (CPL 200.60, 200.63). The principles of *Molineux* set forth in this rule may, however, yet permit the People to prove the conviction (*People v Anderson*, 114 AD3d 1083, 1086 [3d Dept 2014]).

In a conspiracy case, an overt act must be alleged and proved to have been committed in furtherance of the conspiracy (Penal Law § 105.20). That overt act may constitute an uncharged crime. And, the Court of Appeals has held that an "indictment for conspiracy need not allege every overt act . . . If the indictment provides sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it, then evidence may be offered at trial of related [non-enumerated] overt acts" (*People v Ribowsky*, 77 NY2d 284, 292-293 [1991] [citations omitted]), even if those overt acts include uncharged crimes (*People v Portis*, 129 AD3d 1300, 1302 [3d Dept 2015]; *People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006]; *People v Morales*, 309 AD2d 1065 [3d Dept 2003]; *People v McKnight*, 281 AD2d 293 [1st Dept 2001]). While such overt acts are not subject to exclusion pursuant to the *Molineux* rule, their admissibility, as with all forms of evidence, may be subject to rule 1.07 of the Guide to New York Evidence (Exclusion of Relevant Evidence). It may therefore be advisable and the better practice (as it is for *Molineux* evidence) for a court to require that it be informed before the commencement of trial of any unenumerated overt acts the People intend to prove.

Subdivision (2). The rule in this subdivision is derived from several Court of Appeals decisions which permit evidence of a defendant's commission of other crimes or wrongs to rebut a defense raised by the defendant. (*See e.g. People v Israel*, 26 NY3d 236, 242-243 [2015] [rebuttal of extreme emotional distress disturbance]; *People v Santarelli*, 49 NY2d 241, 248 [1980] [rebuttal of insanity defense]; *People v Calvano*, 30 NY2d 199 [1972] [rebuttal of entrapment defense].)

Notably, in *People v Valentin* (29 NY3d 150 [2017]) where the defendant did not present evidence of an agency defense, but rather interposed the defense based on the People's evidence, the People were entitled to prove the defendant's prior conviction for a drug sale on the issue of his intent to sell.

4.39. Motive to Commit an Offense

(1) Motive to commit an offense refers to the reason or reasons a person chooses to commit or attempt to commit a criminal act.

(2) (a) Evidence of motive (or lack thereof) is admissible for the finder of fact's consideration in determining whether the defendant is guilty of a charged offense, regardless of whether the definition of the offense charged requires proof of motive.

(b) Evidence of motive, by itself, is not sufficient to prove guilt.

(c) Even though no motive for an offense has been proved, the finder of fact may nonetheless enter a verdict of guilty upon finding that the evidence presented establishes the defendant's guilt beyond a reasonable doubt.

(3) Evidence of motive must be: relevant (that is, the motive attributed to the accused must have had a logical connection with the crime charged), have probative value that does not outweigh its prejudice, and be in a form that is otherwise admissible.

(4) In a charge involving domestic violence, a defendant's prior wrongdoing relating to the complainant may be admitted when probative of the defendant's motive.

Note

Subdivision (1) states a definition of "motive" derived from CJI2d(NY) Motive (When Not an Element) ("the reason why a person chooses to engage in criminal conduct"); Law.com, Legal Dictionary, motive (https://dictionary.law.com/Default.aspx?typed=motive&type=1) ("the probable reason a person committed a crime"); and Lexico, US Dictionary, motive (https://www.lexico.com/en/definition/motive) ("A reason for doing something").

(*See People v Fitzgerald*, 156 NY 253, 258 [1898] ["Motive is an inducement, or that which leads or tempts the mind to indulge the criminal act"].)

Subdivision (2) (a) is derived primarily from *People v Sangamino* (258 NY 85, 88 [1932]):

> "While it is true 'that motive is not an essential ingredient of the crimes [charged],' and that either crime may be committed without a motive, nevertheless, the question of motive or lack of motive is always a question for the serious consideration of a jury, in determining the guilt or innocence of the defendant. It is the duty of a trial judge to instruct the jury to the effect that in its deliberations upon the question of the defendant's guilt or innocence it may consider the question of the defendant's motive or lack of motive to commit the crime charged." (*See and compare People v Moore*, 42 NY2d 421, 428 [1977] [in a circumstantial evidence case "motive often becomes not only material but controlling"], *with People v Luciano*, 46 NY2d 767, 769 [1978] ["in some circumstances absence of motive evidence may tend to establish that defendant did not commit the act charged or that he lacked the requisite intent"], *and People v Guadagnino*, 233 NY 344, 348-349 [1922] ["the fact that the district attorney can suggest no reason why the defendant should kill (the deceased) bears materially upon the weight of the evidence claimed to show a premeditated and deliberated design to take life"].)

Subdivision 2 (b) is derived from *People v Giordano* (213 NY 575, 584 [1915] ["Motive can never, of itself, prove guilt, though it may, when other circumstances point to the conclusion of guilt, strengthen such circumstantial proof of guilt and thus aid to establish the commission of the crime or the identity of the criminal"]).

Subdivision 2 (c) is derived from *People v Seppi* (221 NY 62, 70 [1917] ["Where testimony is presented on a trial which satisfies a jury that the defendant has committed a crime, it is sufficient for conviction although no motive therefor has been shown"]) and *People v Feigenbaum* (148 NY 636, 639 [1896] ["The question of motive is comparatively unimportant where the other evidence points unmistakably to the guilt of a defendant"]).

Subdivision (3) is derived from a series of Court of Appeals cases, beginning with *People v Namer* (309 NY 458 [1956]), which held that evidence that the defendant was a parole violator was not admissible as evidence of motive to possess a pistol. In making that ruling, the Court explained that:

> "To be valid evidence of the commission of a crime, the motive attributed to the accused must have had a logical connection with the crime charged. . . .
>
> "In order to be admissible, evidence of motive must possess a relation to the criminal act according to known rules and principles of human conduct. If it has not such relation, or if it points in one direction as well as in the other, it cannot be considered a legitimate part of the proof." (*Id.* at 462-63 [quotation marks and citations omitted].)

Examples of evidence of motive that was admissible include: *People v Gamble* (18 NY3d 386, 398 [2012] [the trial court "correctly determined" that "testimony that defendant had previously threatened to kill (the deceased) was relevant in establishing a motive for the murders and the identity of the perpetrator in this circumstantial evidence case"]); *People v Till* (87 NY2d 835, 837 [1995] ["(t)he evidence of the uncharged robbery established a motive for defendant's attempt to kill or assault the off-duty police officer to avoid capture and punishment"]); and *People v Mees* (47 NY2d 997, 998 [1979] [in a manslaughter prosecution, the trial court properly admitted "evidence that a charge for assaulting the victim was pending against defendant Mees at the time of the homicide . . . to establish motive . . . to avoid punishment for the prior crime . . . and the court instructed the jury that it was not to consider the prior charge as indicative of guilt or innocence of that crime"]).

In particular circumstances, the Court of Appeals has found that the defendant's association with a group supplied evidence of motive. (*People v Bailey*, 32 NY3d 70 [2018]; *People v Moore*, 42 NY2d 421 [1977].) In *Bailey*, the Court noted that "the testimony elicited by the People about the Bloods was probative of defendant's motive and intent to join the assault on complainant, and provided necessary background information on the nature of the relationship between the codefendants, thus placing the charged conduct in context." (32 NY2d at 83.) In *Moore*, the defendant was charged with the attempted murder of two police officers and the "evidence of the defendant's relationship with the [Black Liberation Army] and their stated hostility to the police was properly admitted at trial to show the motive for the crime." (42 NY2d at 433.)

Examples of evidence of motive that was not admissible include: *People v Ely* (68 NY2d 520, 522 [1986]) and *People v Montanez* (41 NY2d 53, 58 [1976]).

In *Ely*, taped conversations between the defendant and her husband "which tended to establish that defendant's motive for procuring the murder of her former husband was to prevent his having overnight visitation with the child" were admissible, but there was "other highly prejudicial material" on the tapes that should have been redacted. (68 NY2d at 528, 531.) As the Court explained, "when, as here, tapes which are admitted to prove motive contain evidence of crimes other

than that for which defendant is on trial, unrelated to motive or the relevance of which to motive is outweighed by its prejudicial effect, which is not itself otherwise admissible and not explanatory of the acts done or words used in the admissible part of the tapes, such material should be redacted before submission of the tapes to the jury." (68 NY2d at 522.)

In *Montanez*, the defendant was charged with reckless manslaughter. While evidence of an argument between the deceased and the defendant about drugs was admissible, additional testimony that the deceased previously had "smuggled large quantities of drugs into the country," thereby placing the defendant "squarely in the midst of a large scale and apparently international drug traffic," is the "classic example of a case where the prejudice to the defendant outweighed the probative value of the evidence." (41 NY2d at 58.)

An example of proffered evidence of motive that was not in a form that permitted its introduction in evidence is *People v Steiner* (30 NY2d 762, 763 [1972]). There, in a prosecution of a husband for the death of his wife, "diary entries in the decedent's handwriting and indicating the husband's involvement with an employee in an extramarital affair" were inadmissible hearsay. (*Id.*)

Subdivision (4) is derived from *People v Dorm* (12 NY3d 16, 19 [2009] [the trial court did not abuse its discretion when it allowed in evidence, with appropriate limiting instruction, the defendant's prior conduct relating to the complainant that was "probative of his motive and intent to assault his victim; it provided necessary background information on the nature of the relationship and placed the charged conduct in context"]; *accord People v Frankline*, 27 NY3d 1113 [2016]; *see People v Vega*, 3 AD3d 239, 249 [1st Dept 2004] [approving "evidence that defendant had a history of inflicting physical injury to the decedent" to show "a motive to kill the decedent"]; *see also* Guide to NY Evid rules 7.06, Abused Person Syndrome; 4.21, Evidence of Crimes and Wrongs [*Molineux*]).

4.40. Possession of Condoms; Receipt into Evidence (CPL 60.47)

Evidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing, or other proceeding in a prosecution for section 230.00 [prostitution] of the Penal Law for the purpose of establishing probable cause for an arrest or proving any person's commission or attempted commission of such offense.

Note

This rule states verbatim (with the addition of the name of the offense in brackets) CPL 60.47.

The statute represents a policy determination that banning the use of condoms in prosecutions of prostitution will "obviate the public health risks attendant to the failure of a person engaged in prostitution to carry or use condoms out of fear that they would be seized and used as evidence" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.47).

4.42. Possession of Opioid Antagonists; receipt into evidence [CPL 60.49; CPLR 4519-a]

(1) For the purposes of this section, opioid antagonist is defined as a drug approved by the Food and Drug Administration that, when administered, negates or neutralizes in whole or in part the pharmacological effects of an opioid in the body and shall be limited to naloxone and other medications approved by the department of health for such purpose.

(2) (a) Evidence that a person was in possession of an opioid antagonist may not be admitted at any trial, hearing or other proceeding in a prosecution for any offense under sections 220.03, 220.06, 220.09, 220.16, 220.18, or 220.21 of the Penal Law for the purpose of establishing probable cause for an arrest or proving any person's commission of such offense.

(b) Possession of an opioid antagonist may not be received in evidence in any trial, hearing or proceeding pursuant to subdivision one of section two hundred thirty-one and paragraph three of subdivision b of section two hundred thirty-three of the real property law[,] or subdivision five of section seven hundred eleven and subdivision one of section seven hundred fifteen of the real property actions and proceedings law as evidence that the building or premises are being used for illegal trade, manufacture, or other illegal business.

Note

This rule recites verbatim the provisions of CPL 60.49 and CPLR 4519-a that were added to the respective consolidated laws by L 2021, ch 431.

Subdivision (1) sets forth verbatim the definition of "opioid antagonist" that applies to both the CPL and the CPLR provisions. (CPL 60.49 [2]; CPLR 4519-a [2].)

Subdivision (2) (a) sets forth verbatim the provision in CPL 60.49 (1).

The statute prohibits the admission of evidence of opioid antagonists in prosecutions for all controlled substance *possession* offenses, but does not apply to prosecutions for the sale, manufacture or trafficking of a controlled substance. The statute's evidentiary bar applies to "probable cause for an arrest" determinations and evidence to prove a person's commission of a possession crime, but does not address whether that evidence may be used to justify a law enforcement intrusion based on less than probable cause (for example, one based on "reasonable suspicion") under the framework governing police encounters outlined by *People v De Bour* (40 NY2d 210 [1976]) and its progeny.

Subdivision (2) (b) sets forth verbatim the provision in CPLR 4519-a (1). The statutes referred to in that paragraph are: Real Property Law § 231 (1) (lease, when void; liability of landlord where premises are occupied for unlawful purpose); Real Property Law § 233 (b) (3) (eviction from manufactured home parks); Real Property Actions and Proceedings Law § 711 (5) (grounds for proceeding to recover possession of real property where landlord-tenant relationship exists); and Real Property Actions and Proceedings Law § 715 (1) (grounds and procedure to recover possession of real property where use or occupancy is illegal).

The Legislative Memorandum in support of the legislation explained that

> "[o]pioid antagonists, such as naloxone, have been in existence since the 1960s and have helped in preventing numerous heroin and opiate overdose-related deaths in emergency situations. Recent legislation and actions by law enforcement and chemical dependence prevention and treatment providers have increased the availability of naloxone to those with addiction to heroin and opiates and to those who care for individuals with substance use issues, including family members and medical professionals. At hearings and roundtable discussions held by the Assembly, chemical dependence prevention and treatment providers, physicians, drug policy experts, and law enforcement all cited the importance of the availability of opioid antagonists in preventing overdose-related deaths. Although medical treatment is required after an opioid antagonist is administered, its use and possession should not be discouraged amongst those who need it most. By prohibiting the possession of opioid antagonists as evidence in court of possession

of controlled substances, this bill would help to encourage people to obtain and possess opioid antagonists and continue to save lives." (Sponsor's Mem in Support of 2021 NY Assembly Bill A2354, enacted as L 2021, ch 431.)

4.44. Proof of Previous Conviction; When Allowed [CPL 60.40 (3)]

Subject to the limitations prescribed in [CPL] section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

Note

This section restates verbatim CPL 60.40 (3), except for the bracketed reference to the CPL. The statute omits the reference to the CPL.

Under CPL 200.60, if a prior conviction is an element of an offense, a defendant may preclude proof of that conviction if, outside the presence of the jury, the defendant admits the prior conviction.

4.46. Statements of Defendants; Corroboration (CPL 60.50)

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

Note

This section reproduces verbatim CPL 60.50.

The statute's purpose is to "avert the danger that a crime may have been confessed when no crime *in any degree* has been committed by anyone" (*People v Chico*, 90 NY2d 585, 590 [1997] [internal quotation marks omitted]). Accordingly, CPL 60.50 "does not mandate submission of independent evidence of every component of the crime charged but merely requires some proof, of whatever weight, that a crime was committed by someone" (*People v McGee*, 20 NY3d 513, 517 [2013] [internal quotation marks omitted]; *see* CJI2d[NY] Corroboration of a Confession).

The additional proof may be "either direct or circumstantial" (*People v Daniels*, 37 NY2d 624, 629 [1975]) and is sufficient when "in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key" (*People v Reade*, 13 NY2d 42, 45 [1963]; *see People v Booden*, 69 NY2d 185 [1987]; *People v Lipsky*, 57 NY2d 560, 571 [1982]).