

8.03. Admissibility of Hearsay in Sex Offender Civil Management Proceedings

In an evidentiary proceeding pursuant to article 10 of the Mental Hygiene Law (the Sex Offender Management and Treatment Act) hearsay evidence offered to demonstrate the basis of an expert witness's opinion ("hearsay basis evidence") is admissible if it satisfies two criteria.

(1) The proponent must demonstrate that the hearsay is reliable.

(a) A declarant's hearsay statements may be determined to be sufficiently reliable and admissible through the testimony of an expert witness when they are supported by guilt adjudications or a respondent's admissions.

(b) Criminal charges for which a respondent was acquitted or criminal allegations for which the respondent was never charged cannot support a reliability determination unless such charges are supported by a respondent's admissions or other extrinsic admissible evidence.

(c) The determination of whether criminal charges that resulted in neither acquittal nor conviction may be the basis for a reliability determination under this rule requires close scrutiny on a case-by-case basis.

(2) The court must determine that the probative value of the evidence in helping the jury evaluate the expert witness's opinion substantially outweighs the prejudicial effect of that evidence.

Note

Mental Hygiene Law article 10, inter alia, provides for a hearing to determine whether there is probable cause to believe a person is a sex offender requiring civil management (Mental Hygiene Law § 10.06 [k]) and upon finding probable cause, the court “shall conduct a jury trial [or if waived, a bench trial] to determine whether the [person] is a detained sex offender who suffers from a mental abnormality.” (Mental Hygiene Law § 10.07 [a].) Upon determining that the person has a “mental abnormality,” the court “shall consider whether the [person] is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision.” (Mental Hygiene Law § 10.07 [f].)

This rule’s two requirements for the admission of hearsay at an article 10 trial is contained in the holding of the Court of Appeals in *Matter of State of New York v Floyd Y.* (22 NY3d 95, 109 [2013]).

“In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the ‘probative value in helping the jury evaluate the [expert’s] opinion substantially outweighs [its] prejudicial effect.’ ” (Accord *Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014]; *Matter of State of New York v Charada T.*, 23 NY3d 355, 361 [2014].)

The Court reached that holding by applying “the Due Process Clauses of the Fifth and Fourteenth Amendments,” as set forth in *Mathews v Eldridge* (424 US 319, 335 [1976]). (*Floyd*, 22 NY3d at 103.)

In most article 10 trials, “basis hearsay questions” primarily concern the extent to which detailed evidence of a respondent’s prior crimes or bad acts can be relayed through expert witnesses, as was true in each of the foregoing Court of Appeals cases. That is so because most article 10 trials do not feature the testimony of crime victims but rather elicit such evidence through expert psychologists who have reviewed records and sometimes conducted interviews. The *Floyd Y.* court ruled on multiple recurring admissibility issues regarding such expert testimony and these rulings now serve as a guide to adjudicating those issues.

Under the *Floyd Y.* rules, first, an expert witness may relay the facts of prior crimes supported by guilt adjudications. (*Floyd Y.*, 22 NY3d at 109.) In *Matter of State of New York v Kevin W.* (234 AD3d 977 [2d Dept 2025]), the Court held that statements from a crime victim to an expert witness were admissible through the expert witness’s testimony under this rule because the respondent had been convicted of a sexual offense against the victim. (See *Matter of State of New York v Vanderpool*, 137 AD3d 1688 [4th Dept 2016] [same].)

Second, an expert witness may relay statements of a hearsay declarant supported by a respondent's admissions. (*Floyd Y.*, 22 NY3d at 109-110; see GNYE rule 8.03 [governing the general admissibility of party admissions as an exception to the hearsay rule].)

Decisional law does not require that every detail of a hearsay declarant's statements need be included as part of an underlying reliability determination. What is required is that the underlying reliability factor supports the hearsay declarant's assertions. (See *Matter of State of New York v James R.C.*, 165 AD3d 1612, 1614-1615 [4th Dept 2018] [allowing records of a guilt finding for a sexual infraction at a prison disciplinary proceeding to be admitted under this rule because they satisfied the two-part test set forth in *Floyd Y.* for the admission of hearsay basis evidence].)

In *Floyd Y.*, the respondent admitted having inappropriate conversations with a minor and the Court held, based on this admission, that facts from the minor's affidavit regarding these conversations were admissible even though it was not clear the respondent's admission contained all of the information in the minor's affidavit. (See *Matter of State of New York v Bass*, 119 AD3d 1356 [4th Dept 2014] [outlining the wide scope of evidence admissible in the case based on guilt findings and admissions]; *Matter of State of New York v Justin D.*, 145 AD3d 735 [2d Dept 2016] [statements of respondent during sex offender treatment were admissible even though normally privileged, citing Mental Hygiene Law § 10.08 (b) and (c)]; but see *Matter of State of New York v Abdul A.*, 123 AD3d 1047, 1048 [2d Dept 2014] [trial court erred in allowing expert to testify that "someone at the Manhattan Psychiatric Center had diagnosed the appellant with pedophilia"].)

Criminal charges for which the defendant was acquitted are ~~not~~ inadmissible. (*Floyd Y.*, 22 NY3d at 110.) "Uncharged accusations" (not supported by extrinsic evidence or admissions) are not admissible. (*Id.*) In *John S.*, for example, the Court found the admission of evidence of an uncharged rape through expert testimony derived solely from a presentence report was error because it was not sufficiently reliable. (*John S.*, 23 NY3d at 346-347; see *Charada T.*, 23 NY3d at 358 ["hearsay testimony about a crime respondent Charada T. was never charged with committing" was error].)

As *Floyd Y.* explained: "Criminal charges that resulted in neither acquittal nor conviction require close scrutiny. Police charged Floyd Y. in connection with the accusation of the 15-year-old daughter of his ex-wife, but those charges were dropped in connection with Floyd Y.'s parole agreement promising to stay away from the girl. The parole agreement provides sufficient reliability to weigh in favor of admission of this hearsay. However, unlike an adjudication of guilt, the parole agreement does not conclusively prove the allegations. Supreme Court should have taken care to ensure that they were substantially more probative than prejudicial. In such a case, the better course would have been to require live confrontation of the declarant to ensure the statement's reliability." (*Floyd Y.* at 110.)

The *John S.* court applied the *Floyd Y.* standard in upholding the trial court’s admission, through expert testimony, of evidence of the respondent’s commission of sexual offenses for which he had pleaded guilty, even though his guilty pleas were vacated a decade later based on mental incompetence, and the charges were never re-prosecuted. The court reasoned that the facts of the rapes were reliably established through extensive documentary evidence, including allegations by five different victims which were reflected in indictments. (*John S.* at 344-346.)

New York evidence rules also define when an expert can rely upon out-of-court material. “An expert . . . may rely on out-of-court material if: (i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and (ii) [the out-of-court material] is a link in the chain of data and accordingly not exclusively relied upon for the expert’s opinion.” (Guide to NY Evid rule 7.01 [5] [b].) Experts in article 10 cases typically rely on a uniform set of standard materials and routinely assert these materials are generally accepted as reliable in assessing sex offenders. The professional reliance issue is rarely contested in such cases.

There is a difference, however, between facts an expert may *rely upon* in reaching a conclusion and facts from a hearsay declarant the expert can *recite* during trial testimony. These two issues are often conflated but *Floyd Y.* addressed this distinction. “Although we have held that hearsay may play a role in an expert’s testimony because the expert may base an opinion on hearsay if it ‘is of a kind accepted in the profession as reliable in forming a professional opinion’ (*People v Goldstein*, 6 NY3d 119, 124 [2005]), we have not decided [until *Floyd Y.*] whether, or under what circumstances, an expert’s underlying basis information may be admissible in a civil proceeding, even though it consists of hearsay statements otherwise subject to exclusion.” (*Floyd Y.*, 22 NY3d at 107 [citation omitted].) *Floyd Y.* held that “basis hearsay does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts’ opinions.” (*Floyd Y.*, 22 NY3d at 107.) Courts have also approved jury instructions reciting that principle. (*See John S.*, 23 NY3d at 346 [trial court adequately instructed the jury of the “limited purpose of out-of-court statements introduced to help evaluate the experts’ opinions” (brackets and citation omitted)].) Thus, the *Floyd Y.* court held both that “basis hearsay” was hearsay and was not offered for its truth, which in any other context would make such evidence *not* hearsay. (*See* Guide to NY Evid rule 8.00 [1] [“Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement”].)

The *Floyd Y.* view that “basis hearsay” is not offered for its truth has been rejected, most prominently by the United States Supreme Court in *Smith v Arizona* (602 US 779 [2024]). There, the Court held that where an expert conveys an out-of-court statement in support of an opinion, and the statement supports the opinion

only if true, the statement *is* offered for its truth and is therefore testimonial under the Confrontation Clause. (*Smith* at 795 [“If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise?”].)

Article 10 proceedings, however, have been held not to be subject to the Confrontation Clause because such proceedings are civil rather than criminal. (*Floyd Y.*, 22 NY3d at 103; *John S.*, 22 NY3d at 342; *see Floyd Y.*, 22 NY3d at 111-112 [Smith, J., concurring] [noting that in *Goldstein* (6 NY3d 119): “(w)e rejected the People’s argument that the statements were not offered to prove the truth of what the interviewees said but only to help the jury in evaluating (the expert’s) opinion; we pointed out that the interviewees’ statements would have been of no use to the People unless the jury accepted them as true” (internal quotation marks and citation omitted)].) Whether *Smith*’s (602 US 779) rejection of the “not offered for its truth” rationale of *Floyd Y.* may undermine the decision’s continued validity remains to be seen. *Floyd Y.* was based on the Due Process Clauses of the Fifth and Fourteenth Amendments. The *Smith* holding concerned the Sixth Amendment’s Confrontation Clause.

Floyd Y. concerned a jury trial. There are, however, five additional kinds of evidentiary hearings conducted without juries which may occur in article 10 proceedings. Respondents also often opt for bench rather than jury trials. Multiple appellate courts have cited *Floyd Y.* in ruling on the admissibility of evidence during hearings without discussing whether the *Floyd Y.* holding is applicable to hearings in the same way as trials. (*See Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348-1349 [4th Dept 2020] [applying *Floyd Y.* and its progeny to an initial dispositional hearing]; *Matter of State of New York v Geoffrey P.*, 196 AD3d 588 [2d Dept 2021] [applying *Floyd Y.* to a hearing resulting in the revocation of the respondent’s placement on supervision and ordering confinement]; *Matter of Charles B. v State of New York*, 192 AD3d 1583 [4th Dept 2021] [applying *Floyd Y.* to evidence at an annual review hearing ordering continued confinement].)

On the other hand, it has been noted that an evaluation of the *Mathews v Eldridge* flexible due process analysis might lead to different rules for hearings than trials. (*See State of New York v Marcello A.*, 48 Misc 3d 635, 640-643 [Sup Ct, Suffolk County 2015] [applying a more permissive basis hearsay standard at a probable cause hearing than a trial]; *see People ex rel. Neville v Toulon*, 43 NY3d 1, 9 [2024] [where the Court continues to apply the due process analysis set forth in *Mathews v Eldridge* to uphold the constitutionality of certain article 10 confinement procedures].)

Appellate courts also have given more deference to the consideration of “basis hearsay” by judges than juries. (*See Matter of Brooks v State of New York*, 120 AD3d 1577, 1578 [4th Dept 2014] [“Supreme Court is presumed to have properly given any hearsay statements limited legal significance in making its

determination”]; *Bass*, 119 AD3d at 1357 [“in this nonjury trial, the court is presumed to be able to distinguish between admissible evidence and inadmissible evidence and to abide by the limited purpose of hearsay evidence when admitted and to render a determination based on the former” (internal quotation marks and brackets omitted)]; *Matter of State of New York v Armstrong*, 119 AD3d 1431, 1432 [4th Dept 2014] [“the court is presumed to have properly given any hearsay statements therein their limited legal significance in making its factual findings”].)

The *Floyd Y.* rule has not been generally applied outside article 10 although analysis of its applicability in other civil contexts has been limited and inconsistent. The most thorough discussion by an appellate court came in a brief decision in a termination of parental rights case. (*Matter of Fredericka S. [Jolanda S.]*, 176 AD3d 1624 [4th Dept 2019].) There the Court held that “*Floyd Y.* applies in a narrow context: the admission of hearsay evidence serving as the basis of an expert’s opinion at civil commitment hearings held pursuant to article 10.” (*Id.* at 1625, citing *Floyd Y.*) The Court concluded that while the “professional reliability exception” to hearsay (i.e. allowing an expert to provide an opinion based on otherwise inadmissible hearsay) applied to non-article 10 cases, *Floyd Y.*’s additional requirements did not. (*Id.*)

In *People v Howard* (134 AD3d 1153 [3d Dept 2015]), the Court combined the “professional reliance” and *Floyd Y.* hearsay repetition rules to conclude that an insurance investigator could repeat statements from interviews about the causes of a fire in an arson case.

In *People v Paul* (137 AD3d 1169 [2d Dept 2016]), the Court held that expert testimony about facts and opinions of the defendant’s therapist concerning the victim’s conduct was properly precluded as falling outside a basis hearsay exception, citing *Goldstein*, *Floyd Y.* and *People v Sugden* (35 NY2d 453, 460-461 [1974]). (See *Matter of J.W.*, 45 Misc 3d 933, 942 [Sup Ct, Monroe County 2014] [applying *Floyd Y.* to preclude evidence in an application by a psychiatric center to involuntarily medicate a patient calling the case a “comparable proceeding” to article 10].)