EVIDENCE

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INTRODUCTION

This annual *Survey* reviews important evidentiary decisions issued in the past year.[1] It focuses primarily on decisions by the New York Court of Appeals, while also including notable decisions by other courts within the state. The first discussion is of a splintered and fascinating Court of Appeals decision analyzing what prosecutors must do to introduce DNA evidence. The Constitution's Confrontation Clause is front and center in that decision, and had an important role in other evidentiary decisions last year. In another important decision, the Court held fast to its narrow view of the common interest doctrine, declining entreaties to expand that exception to the attorney-client privilege waiver rule as other courts have done. In several decisions, the Court explored when and how parties may use prior "bad acts" to impeach witnesses. There were a number of cases where the Court addressed questions regarding exceptions to the hearsay rule. The Court addressed a series of issues pertaining to experts, including when a *Frye* hearing is appropriate, and limitations of eyewitness testimony.

I. HEARSAY

A. Confrontation Clause Implications of DNA Reports Offered as Business Records

The use of DNA evidence continues to raise complex evidentiary questions. The Court of Appeals last year waded into a national conversation about the evidentiary foundations needed to introduce DNA findings. In *People v. John*, a criminal prosecution for a weapons possession offense, the prosecutor "sought to introduce . . . DNA laboratory reports and test results . . . as certified business records."[2] They were introduced into evidence at trial by a laboratory employee who had no personal knowledge of the testing or analysis of the DNA samples in that particular case.[3] Writing for a 4-3 decision, Chief Judge Janet DiFiore held that the Confrontation Clause barred admission of DNA results where the prosecution did not produce a "witness who conducted,

1. The *Survey* year covered in this Article is from May 1, 2015 through June 30, 2016, with exceptions where noted.

2. 27 N.Y.3d 294, 300, 307–08, 52 N.E.3d 1114, 1117, 1123, 33 N.Y.S.3d 88, 91, 97 (2016) (holding that DNA evidence cannot be admitted where expert witness has not "conducted, witnessed or supervised" analyses).

3. *Id.* at 301, 52 N.E.3d at 1118, 33 N.Y.S.3d at 92.

witnessed or supervised" the creation and analysis of the DNA profile.[4] Following *John*, a prosecutor seeking to admit DNA evidence will need to offer at least one witness who personally conducted (or at least supervised) the actual testing of the DNA evidence.[5]

The facts in *John* underscore the significance of the DNA evidence admitted against the defendant. The defendant had been "involved in an altercation . . . outside . . . his apartment building."[6] His neighbor testified that she witnessed him point a gun at another person and called the police.[7] When the police arrived, the defendant was arrested and the police located the gun based on information from the neighbor that she had seen the defendant enter a nearby basement with an object.[8] The police then entered the basement and found the gun.[9] The gun was swabbed for DNA, which a government laboratory then analyzed through a multi-step process described in the Court's opinion.[10] The State obtained a sample of the defendant's DNA.[11] Analysts at the laboratory then conducted tests comparing the two samples.[12] The numbers generated by the DNA testing were interpreted as identical.[13]

At trial, the prosecution sought to introduce the DNA reports and results through a lab employee, Melissa Huyck, "as an expert in forensic biology and DNA analysis."[14] While Huyck had "opened the package[s] containing the [DNA] swabs," she did not conduct, witness, or supervise any of the *testing* of the swabs, which was performed by other analysts employed in the same lab.[15] Huyck examined the DNA profiles and testified that they "were a match."[16] The defendant was convicted of criminal possession of a weapon and menacing.[17] The Appellate Division, Second Department, affirmed.[18]

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4. *Id.* at 297, 52 N.E.3d at 1115, 33 N.Y.S.3d at 89.
5. *Id.* at 315, 52 N.E.3d at 1128, 33 N.Y.S.3d at 102.
6. *Id.* at 297, 52 N.E.3d at 1115, 33 N.Y.S.3d at 89.
7. *John*, 27 N.Y.3d at 297, 52 N.E.3d at 1115, 33 N.Y.S.3d at 89.
8. *Id.*
9. *Id.* at 298, 52 N.E.3d at 116, 33 N.Y.3d at 90.
10. *Id.*
11. *Id.* at 299, 52 N.E.3d at 1116, 33 N.Y.S.3d at 90.
12. *John*, 27 N.Y.3d at 318, 52 N.E.3d at 1130, 33 N.Y.S.3d at 104 (Garcia, J. dissenting).
13. *Id.* at 299, 52 N.E.3d at 1117, 33 N.Y.S.3d at 91 (majority opinion).
14. *Id.* at 299–300, 52 N.E.3d at 1117, 33 N.Y.S.3d at 91.
15. *Id.* at 301, 52 N.E.3d at 1118, 33 N.Y.S.3d at 92.
16. *Id.*
17. *John*, 27 N.Y.3d at 302, 52 N.E.3d at 1119, 33 N.Y.S.3d at 93.
18. People v. John, 120 A.D.3d 511, 512, 990 N.Y.S.2d 597, 598 (2d Dep't 2014).

On appeal, the defendant challenged, as he had at trial, the introduction of the DNA evidence as violating his Sixth Amendment right to confront his accusers (also referred to as the "Confrontation Clause").[19] The Court's analysis began with a line of U.S. Supreme Court decisions culminating in the 2011 *Bullcoming v. New Mexico* decision, which provides that the Confrontation Clause attaches to any statement, whether offered through a self-authenticating business record or otherwise, that is "testimonial in nature."[20] In *Bullcoming*, the Supreme Court found a blood-alcohol laboratory result to be testimonial and held that testimony by a laboratory employee who did not personally perform the testing underlying the results was not sufficient to satisfy the defendant's right to confront his accusers as guaranteed by the Confrontation Clause.[21] Complicating matters, a year later, the Supreme Court issued a splintered decision in *Williams v. Illinois*, in which the plurality opinion found that expert testimony interpreting DNA results without benefit of the testimony of the analysts who performed the tests did not violate the Confrontation Clause on the facts of that case.[22] The plurality reconciled this holding with *Bullcoming* in part by explaining that the *results* themselves were not admitted as they had been in *Bullcoming*.[23] This nuanced rationale was pivotal in *John*, where the results reached in the reports were introduced through a witness with no personal knowledge of the tests that were performed.[24]

In defining "testimonial," the Court of Appeals began with the "primary purpose test"; that is a statement is testimonial if it was "procured with a primary purpose of creating an out-of-court substitute for trial testimony."[25] While avoiding any "iron-clad rule," the Court identified two key factors to be considered in applying this test: first, whether the statement was created "in a manner resembling ex parte examination"; and, second, whether the statement was accusatory in nature.[26] The Court had little difficulty finding both these factors met by

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19. *John*, 27 N.Y.3d at 303, 52 N.E.3d at 1119, 33 N.Y.S.3d at 93 (citing U.S. CONST. amend. VI).

20. *Id.* at 303–04, 52 N.E.3d at 1120, 33 N.Y.S.3d at 94 (citing Bullcoming v. New Mexico, 564 U.S. 647, 657 (2011)).

21. *Bullcoming*, 564 U.S. at 665.

22. 132 S. Ct. 2221, 2235 (2012).

23. *Id.* at 2240.

24. *John*, 27 N.Y.3d at 299–300, 313, 52 N.E.3d at 1117, 1127, 33 N.Y.S.3d at 91, 101.

25. *Id.* at 307, 52 N.E.3d at 1122, 33 N.Y.S.3d at 96 (quoting People v. Pealer, 20 N.Y.3d 447, 453, 985 N.E.2d 903, 906, 962 N.Y.S.2d 592, 595 (2013)).

26. *Id.* at 307, 52 N.E.3d at 1122–23, 33 N.Y.S.3d at 96–97.

the case at bar.[27] Among other reasons, the Court observed that the lab reports themselves described the police request for an examination of the gun handled by the "perp."[28]

The majority also rejected the argued analogy to the *Williams* decision.[29] Unlike in *Williams*, the Court explained, the witness (Huyck) had not performed any independent expert analysis; she was simply reporting data compiled and analyzed by other lab employees.[30] She acted merely as a "surrogate witness" reporting the results of separate tests that were themselves admitted for truth.[31] The Court disputed any suggestion that *Williams* called into question the continuing validity of *Bullcoming* and its predecessor decisions,[32] specifically rejecting "the science fiction that DNA evidence is merely machine-generated," noting that trained analysts must operate sophisticated software programs to perform these analyses.[33] The majority decision did acknowledge concerns about the practical ability of the government to produce such witnesses, and suggested a potential mitigating factor, that the State must put on "at least one" individual responsible for the analysis, but not necessarily each individual who contributed to it.[34]

Judge Garcia, joined by Judges Pigott and Abdus-Salaam, dissented.[35] The dissenters argued that *Williams*, along with prior Court of Appeals precedent, required a narrower view of testimonial evidence, finding that DNA test results that were, in essence, the output of accepted and standardized computer data analyses were not testimonial.[36] The dissenters argued that *Bullcoming* and *Williams* were difficult to reconcile, and that the Court should credit the more recent decision.[37] The dissenters also contended that the majority's rule would impose an impossible burden on state laboratories; there are too many samples and too many analysts to reasonably expect a single analyst to see a sample

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27. *Id.* at 308, 52 N.E.3d at 1123, 33 N.Y.S.3d at 97.

28. *Id.*

29. *John*, 27 N.Y.3d at 311, 52 N.E.3d at 1125, 33 N.Y.S.3d at 99.

30. *Id.* at 310, 52 N.E.3d at 1125, 33 N.Y.S.3d at 99.

31. *Id.*

32. *Id.* at 311, 52 N.E.3d at 1125, 33 N.Y.S.3d at 99.

33. *Id.*

34. *John*, 27 N.Y.3d at 312–13, 52 N.E.3d at 1126–27, 33 N.Y.S.3d at 100–01 (citing Williams v. Illinois, 132 S. Ct. 2221, 2273 n.4 (2012) (Kagan, J., dissenting)).

35. *Id.* at 315, 52 N.E.3d at 1128, 33 N.Y.S.3d at 102 (Garcia, J. dissenting).

36. *Id.* at 327–28, 331, 52 N.E.3d at 1137, 1140, 33 N.Y.S.3d at 111, 114 (citing *Williams*, 132 S. Ct. at 2273 n.4 (Kagan, J. dissenting)).

37. *Id.* at 336, 52 N.E.3d at 1143–44, 33 N.Y.S.3d at 117–18 (first citing *Williams*, 132 S. Ct. at 2242 n.13; and then citing *Williams*, 132 S. Ct. at 2277 (Kagan, J. dissenting)).

through the entire process.[38]

B. Statements by Non-Testifying Co-Defendants

In *People v. Cedeno*, the Court of Appeals re-examined the contours of the permissible use of statements at criminal trials by non-testifying co-defendants.[39] Unquestionably, such statements are hearsay. The Confrontation Clause issue arose in this case where multiple defendants and alleged gang members were tried together on charges ranging from second degree murder, to gang assault, to weapons possession.[40] One of the non-testifying defendants had made an incriminating statement to police, which was partially redacted and admitted into evidence.[41] Defendant Cedeno's attorney objected to such redacted statement as containing information implicating him in the crimes charged.[42] Under such circumstances, he argued that he was deprived of the right to cross-examine the non-testifying witness against him.[43] The statement was received into evidence with the instruction that the jury was to consider it with regard to the non-testifying declarant defendant only.[44] Cedeno was convicted of gang assault and weapons possession.[45]

The Court of Appeals, reversing the Second Department, held that the trial court's limiting instruction was insufficient to overcome the Confrontation Clause violation caused by the admission of the co-defendant's statement into evidence.[46] Such a statement was testimonial in nature, as it implicated defendant Cedeno in criminal activity.[47] Beginning with the Supreme Court's *Bruton v. United States* decision, the Court of Appeals described the line of federal and state cases imposing Confrontation Clause limitations on the use at trial of statements by non-testifying co-defendants.[48] "The critical inquiry," the

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38. *Id.* at 316–17, 334, 52 N.E.3d at 1129, 1142, 33 N.Y.S.3d at 103, 116 (citing *Williams*, 132 S. Ct. at 2228).

39. 27 N.Y.3d 110, 114, 50 N.E.3d 901, 903, 31 N.Y.S.3d 434, 436 (2016) (citing Bruton v. United States, 391 U.S. 123 (1968)).

40. *Id.* at 114–15, 50 N.E.3d at 903–04, 31 N.Y.S.3d at 436–37.

41. *Id.* at 115–16, 50 N.E.3d at 904, 31 N.Y.S.3d at 437.

42. *Id.*

43. *Id.* at 116, 121, 50 N.E.3d at 905, 908, 31 N.Y.S.3d at 438, 441.

44. *Cedeno*, 27 N.Y.3d at 115–16, 50 N.E.3d at 904, 31 N.Y.S.3d at 437.

45. *Id.* at 116, 50 N.E.3d at 905, 31 N.Y.S.3d at 438.

46. *Id.* at 120, 50 N.E.3d at 907, 31 N.Y.S.3d at 440 (citing United States v. Jass, 569 F.3d 47, 61 (2d Cir. 2009)).

47. *Id.* at 120–21, 50 N.E.3d at 908–09, 31 N.Y.S.3d at 441–42.

48. *Id.* at 117, 50 N.E.3d at 905–06, 31 N.Y.S.3d at 438–39 (first citing Richardson v. Marsh, 481 U.S. 200, 207 (1987), *superseded by statute*, FED. R. APP. P. 4(a)(5)(A)(ii) advisory committee's note to 2002 amendment, *as recognized in* Smith v. Montgomery Cty.

Court explained, is "whether [a] neutral allusion [to a confederate] sufficiently conceals the fact of explicit identification [of the defendant] to eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction."[49]

The redacted co-defendant's statement failed the test.[50] The statement "made it obvious that" the non-testifying co-defendant "expressly implicated a specific" gang member, and it required little for the jury to infer that the implicated gang member was a co-defendant.[51] The Court noted that the "*Bruton* rule" required exclusion of extra-judicial co-defendant statements that named or otherwise identified a co-defendant as complicit in the criminal activity.[52] A limiting instruction is not sufficient to overcome the prejudice of allowing such an extra-judicial statement into evidence without affording the defendant the opportunity to cross-examine the co-defendant.[53] The Court held that the admission of such evidence was not harmless error, as the other evidence against defendant Cedeno was not considered to be overwhelming evidence of guilt.[54]

C. Declaration Against Penal Interest

The Court of Appeals in *People v. Soto* held that the exception to the hearsay bar for a declaration against penal interest may be triggered even where the potential consequences of the declaration are not perceived as extremely serious.[55] The defendant in *Soto* had been found drunk in a car that had collided with a parked car.[56] Two weeks later, a woman told the defendant's investigator that she, not Soto, had driven the vehicle into the parked car.[57] She had left the scene, she said, because she was scared of

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Sheriff's Office, No. 3:10-cv-448, 2013 U.S. Dist. LEXIS 70320 (S.D. Ohio 2013); then citing Bruton v. United States, 391 U.S. 123, 135–36 (1968); then citing United States v. Lung Fong Chen, 393 F.3d 139, 148 (2d Cir. 2004); and then citing Gray v. Maryland, 523 U.S. 185, 195 (1998)).

49. *Cedeno*, 27 N.Y.3d at 118, 50 N.E.3d at 906, 31 N.Y.S.3d at 439 (quoting *Jass*, 569 F.3d at 61).

50. *Id.* at 120, 50 N.E.3d at 908, 31 N.Y.S.3d at 441 (citing People v. Wheeler, 62 N.Y.2d 867, 869, 466 N.E.2d 846, 847, 478 N.Y.S.2d 254, 255 (1984)).

51. *Id.*

52. *Id.* (citing *Jass*, 569 F.3d at 60).

53. *Id.* at 117, 50 N.E.3d at 905, 31 N.Y.S.3d at 438 (citing *Bruton*, 391 U.S. at 135–36).

54. *Cedeno*, 27 N.Y.3d at 121, 50 N.E.3d at 908, 31 N.Y.S.3d at 441.

55. 26 N.Y.3d 455, 461, 44 N.E.3d 930, 934, 23 N.Y.S.3d 632, 936 (2015).

56. *Id.* at 458, 44 N.E.3d at 931, 23 N.Y.S.3d at 633.

57. *Id.* at 458, 44 N.E.3d at 932, 23 N.Y.S.3d at 634.

her parents' reaction.[58] The investigator took notes on this conversation.[59] And after initially expressing concern about potential trouble, the woman signed a statement attesting to the same facts.[60]

Prior to trial, the defense counsel unsuccessfully sought immunity for the confessing witness for leaving the scene of an accident.[61] At trial, the witness invoked her Fifth Amendment right against self-incrimination.[62] The defendant then sought to admit the woman's statement to the investigator as a declaration against interest.[63] The trial court held a hearing outside the presence of the jury on the question, ultimately concluding that the statement was not admissible because the declarant lacked the requisite understanding that the statement could subject her to criminal liability.[64]

The jury convicted the defendant, who appealed.[65] A majority of the Appellate Division, First Department reversed, holding that the purported driver's expressions of apprehension about potential trouble at the time of the statement demonstrated that she was aware that the statement was contrary to her penal interest, and should have been admitted into evidence.[66]

In affirming, the Court of Appeals reviewed the general rule that an out-of-court statement will be admissible as a declaration against interest if (1) the declarant is unavailable to testify, (2) the declarant was aware at the time the statement was made that the statement was against her penal interest, (3) the declarant has competent knowledge of the facts underlying the statement, and (4) supporting circumstances independent of the statement serve to corroborate it.[67] The dispute in this case primarily concerned the second element—in particular, whether (what might at least be perceived as) relatively light consequences for leaving the scene of an accident should be sufficient to trigger the exception.[68] The Court expressly rejected any idea that the exception is limited to

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58. *Id.*
59. *Id.* at 459, 44 N.E.3d at 932, 23 N.Y.S.3d at 634.
60. *Soto*, 26 N.Y.3d at 459, 44 N.E.3d at 932, 23 N.Y.S.3d at 634.
61. *Id.*
62. *Id.*
63. *Id.* at 459, 44 N.E.3d at 933, 23 N.Y.S.3d at 635.
64. *Id.*
65. *Soto*, 26 N.Y.3d at 460, 44 N.E.3d at 933, 23 N.Y.S.3d at 635.
66. People v. Soto, 113 A.D.3d 153, 161, 967 N.Y.S.2d 87, 92 (1st Dep't 2013).
67. *Soto*, 26 N.Y.3d at 460–61, 44 N.E.3d at 933–34, 23 N.Y.S.3d at 635–36 (citing People v. Settles, 46 N.Y.2d 154, 167, 385 N.E.2d 612, 619, 412 N.Y.S.2d 874, 882 (1978)).
68. *Id.* at 461, 44 N.E.3d at 934, 23 N.Y.S.3d at 636 (citing Basile v. Huntington Util. Fuel Corp., 60 A.D.2d 616, 617, 400 N.Y.S.2d 150, 151 (2d Dep't 1977)).

serious penal consequences.[69] The Court found the witness's expressions of concern about the consequences, including her worry about her parents' reactions and requesting legal advice, were sufficient to satisfy the element that the declarant be aware that the statement was against penal interest.[70]

The Court also addressed the fourth element, pointing to corroboration from a witness (a co-worker of the defendant) who testified he had seen the defendant in a car with a woman shortly before the car crash.[71] Corroboration is an element that satisfies concerns that the declarant was not fabricating the statement (i.e., for the benefit of the defendant being prosecuted).[72] The standard of review of such corroborating evidence is relatively less stringent when the statement is offered to exculpate a criminal defendant, requiring evidence that "establishes a reasonable possibility that the statement might be true."[73] The Court viewed the co-worker's testimony as "harmoniz[ing]" evidence with the information sought to be introduced through the declarant's statement.[74]

The Court had cause to address this fourth prong again in *People v. DiPippo* (also discussed below).[75] There, too, a defendant sought to introduce an out-of-court statement that implicated someone else in the crime—this time, a brutal rape and murder.[76] The court observed that the statement "was internally consistent and coherent, with no apparent contradictions" and that "[m]ost significantly, almost all of" the claims were corroborated by other evidence.[77]

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69. *Id.*

70. *Id.* at 461–62, 44 N.E.3d at 934, 23 N.Y.S.3d at 636 (citing People v. Fields, 66 N.Y.2d 876, 877, 489 N.E.2d 728, 729, 498 N.Y.S.2d 759, 760 (1985)).

71. *Id.* at 462, 44 N.E.3d at 934–35, 23 N.Y.S.3d at 636–37.

72. *Soto*, 26 N.Y.3d at 462, 44 N.E.3d at 934–35, 23 N.Y.S.3d at 636–37 (first citing People v. Brensic, 70 N.Y.2d 9, 15, 509 N.E.2d 1226, 1228, 517 N.Y.S.2d 120, 122 (1987); and then citing People v. Maerling, 46 N.Y.2d 289, 298, 385 N.E.2d 1245, 1250, 413 N.Y.S.2d 316, 322 (1978)).

73. *Id.* (quoting People v. Settles, 46 N.Y.2d 154, 169–70, 385 N.E.2d 612, 621, 412 N.Y.S.2d 874, 884 (1978)) (citing *Brensic*, 70 N.Y.2d at 15, 509 N.E.2d at 1228, 517 N.Y.S.2d at 122).

74. *Id.* at 462, 44 N.E.3d at 935, 23 N.Y.S.3d at 637 (citing *Settles*, 46 N.Y.2d at 169, 385 N.E.2d at 620, 412 N.Y.S.2d at 884).

75. 27 N.Y.3d 127, 130–31, 50 N.E.3d 888, 889–90, 31 N.Y.S.3d 421, 422–23 (2016); *see infra* Part V.

76. *Id.* at 130–31, 133, 50 N.E.3d at 889–91, 31 N.Y.S.3d at 422–24.

77. *Id.* at 138, 50 N.E.3d at 895, 31 N.Y.S.3d at 428.

D. Admissions for Non-Hearsay Purposes

In *People v. Lin*, the Court of Appeals affirmed a double homicide conviction over objections by the defendant's attorney that the trial court improperly excluded a videotaped interview of the defendant as hearsay.[78] The Court's decision also provides guidance on the bounds of pre-arraignment delay, as it bears on the question of the voluntariness of a defendant's confession made during that time period. The defendant in *Lin* was initially questioned by police as one of several individuals of interest, but not considered suspects.[79] Over a period of two days, the police questioned the defendant in a windowless room at the precinct.[80] He was allowed to return home after the first day of questioning, and was offered food, water, and cigarettes throughout his time at the precinct.[81]

By the mid-morning of the second day, the defendant was considered a suspect and read his *Miranda* rights in English.[82] The defendant was a native Cantonese speaker, who communicated with the detectives in both English and Cantonese.[83] By the end of the second day, the defendant proposed a version of events that included his role in planning a robbery that was carried out by other alleged participants at the victim's apartment.[84] The defendant was then placed under arrest for participating in the robbery.[85] As the police investigated the purported robbery, the defendant remained in custody awaiting arraignment.[86] The detectives uncovered an online diary of one of the victims, implicating the defendant as being in the apartment at the time of murders, allegedly looking for "fishing poles."[87] The detectives confronted the defendant with the "fishing pole" story and he broke down and confessed with details to both homicides.[88]

The defendant was convicted at trial, and on appeal to the Appellate Division, Second Department, contested the voluntariness of his confession, as well as the trial court's refusal to allow into evidence a

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78. 26 N.Y.3d 701, 705, 727, 47 N.E.3d 718, 721, 737, 27 N.Y.S.3d 439, 442, 458 (2016).
79. *Id.* at 706, 47 N.E.3d at 721, 27 N.Y.S.3d at 442.
80. *Id.* at 708, 47 N.E.3d at 723, 27 N.Y.S.3d at 444.
81. *Id.* at 714, 47 N.E.3d at 727, 27 N.Y.S.3d at 448.
82. *Id.* at 715, 47 N.E.3d at 728, 27 N.Y.S.3d at 449.
83. *Lin*, 26 N.Y.3d at 708, 47 N.E.3d at 723, 27 N.Y.S.3d at 444.
84. *Id.* at 711–12, 47 N.E.3d at 725, 27 N.Y.S.3d at 446.
85. *Id.* at 711, 47 N.E.3d at 725, 27 N.Y.S.3d at 446.
86. *Id.* at 711–12, 717, 47 N.E.3d at 725, 729, 27 N.Y.S.3d at 446, 450.
87. *Id.* at 713, 47 N.E.3d at 726, 27 N.Y.S.3d at 447.
88. *Lin*, 26 N.Y.3d at 713–14, 47 N.E.3d at 727, 27 N.Y.S.3d at 448.

videotape of his meeting with the Assistant District Attorney, and certain notes he made to himself during the first day of his questioning.[89] He argued that both statements, though hearsay, should have been admitted as evidence that he was subjected to a coercive environment and his confession was not voluntary.[90] The court modified the judgment of convictions on the second degree murder counts but otherwise confirmed the convictions.[91]

On appeal, reviewing the issue of the voluntariness of the defendant's confession, the Court of Appeals held that the twenty-eight hour delay in arraignment was inordinate and "presumptively unnecessary."[92] However, the Court found that the undue delay did not itself lead to the confession, as the prosecution presented evidence that the defendant was not subjected to deprivation of food, drink, or bathroom breaks, nor was he subjected to "psychological pressure."[93] Rather, the confession was the result of being confronted with evidence of his own guilt, in the form of the "fishing pole" evidence from one of the victim's online diaries.[94]

The Court also addressed and rejected the defendant's arguments that the prosecution had not established the defendant's fluency in English, and therefore, did not establish that the defendant had knowingly waived his *Miranda* rights.[95] Accordingly, the Court held that the prosecution had met its burden of establishing the voluntariness of the defendant's confession.[96]

As part of his defense at trial, the defendant sought to introduce a videotape of his meeting with an assistant district attorney, contending that his disheveled appearance was evidence that the confession was not voluntary.[97] The Court agreed that, in general, evidence of the

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89. People v. Lin, 105 A.D.3d 761, 761–62, 963 N.Y.S.2d 131, 132–33 (2d Dep't 2013).

90. *Id.*

91. *Lin*, 105 A.D.3d at 761, 963 N.Y.S.2d at 132.

92. *Lin*, 26 N.Y.3d at 722, 47 N.E.3d at 733, 27 N.Y.S.3d at 454 (citing People *ex rel.* Maxian v. Brown, 77 N.Y.2d 422, 426, 570 N.E.2d 223, 225, 568 N.Y.S.2d 575, 577 (1991)).

93. *Id.* at 725, 47 N.E.3d at 734–35, 27 N.Y.S.3d at 455–56 (first citing People v. Guilford, 21 N.Y.3d 205, 214, 991 N.E.2d 204, 210, 969 N.Y.S.2d 430, 436 (2013); then citing People v. Holland, 48 N.Y.2d 861, 863, 400 N.E.2d 293, 294, 424 N.Y.S.2d 351, 352 (1979); and then citing People v. Anderson, 42 N.Y.2d 35, 39–40, 364 N.E.2d 1318, 1321, 396 N.Y.S.2d 625, 628 (1977)).

94. *Id.* at 713, 725, 47 N.E.3d at 726, 735, 27 N.Y.S.3d at 447, 456.

95. *Id.* at 726–27, 47 N.E.3d at 736, 27 N.Y.S.3d at 457.

96. *Id.* at 726, 47 N.E.3d at 736, 27 N.Y.S.3d at 457.

97. *Lin*, 26 N.Y.3d at 727, 47 N.E.3d at 736, 27 N.Y.S.3d at 457.

voluntariness of the confession was relevant,[98] but that the videotape was indisputably hearsay.[99] The defendant's request to use the video for evidence of his appearance might in theory have been a proper nonhearsay use, but was fatally undermined by his refusal to instead offer a still photograph from the video.[100] The Court did suggest that the tape may have been admissible as evidence of the defendant's limited English proficiency, but the defense counsel had expressly disavowed this purpose.[101] The Court also rejected as hearsay the defendant's attempt to introduce evidence of doodle-like statements he made during his initial questioning which suggested he was questioning police tactics.[102]

E. Prior Consistent Statements

New York courts have generally barred the introduction of prior consistent statements used to "bolster" testimony, on the theory that a statement repeated multiple times may gain no truth from the repetition but may unduly impress the jury.[103] The courts have allowed such testimony when introduced for something other than the truth, an exception explored in the Court of Appeals decision in *People v. Gross*.[104]

The defendant in *Gross* was convicted of sexual conduct against a child and endangering the welfare of a child.[105] At trial, the victim testified to several instances of sexual abuse, and also testified that she had disclosed the abuse to a number of individuals.[106] Each of these individuals testified to the fact of disclosure, though the trial court barred them from testifying to the specifics of what the victim told them.[107] In addition, a child sex abuse expert testified to her examination of the victim and that the victim disclosed the abuse to the expert.[108] On appeal,

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98. *Id.* at 727, 47 N.E.3d at 737, 27 N.Y.S.3d at 458.

99. *Id.*

100. *Id.* at 728, 47 N.E.3d at 737, 27 N.Y.S.3d at 458.

101. *Id.* (citing People v. Williams, 62 N.Y.2d 285, 289, 465 N.E.2d 327, 329, 476 N.Y.S.2d 788, 790 (1984)).

102. *Lin*, 26 N.Y.3d at 728, 47 N.E.3d at 737, 27 N.Y.S.3d at 458.

103. *See* People v. Caserta, 19 N.Y.2d 18, 21, 25, 224 N.E.2d 82, 83, 86, 277 N.Y.S.2d 647, 649, 652 (1966); People v. Trowbridge, 305 N.Y. 471, 475, 113 N.E.2d 841, 842 (1953).

104. 26 N.Y.3d 689, 694–95, 47 N.E.3d 738, 743, 27 N.Y.S.3d 459, 464 (2016) (citing People v. Ludwig, 24 N.Y.3d 221, 231, 21 N.E.3d 1012, 1018, 997 N.Y.S.2d 351, 357 (2014)).

105. *Id.* at 691, 47 N.E.3d at 740, 27 N.Y.S.3d at 461 (first citing N.Y. PENAL LAW § 130.75(1)(b) (McKinney 2009); and then citing N.Y. PENAL LAW § 260.10(1) (McKinney 2008)).

106. *Id.*

107. *Id.* at 691–92, 47 N.E.3d at 740, 27 N.Y.S.3d at 461.

108. *Id.* at 692, 47 N.E.3d at 740, 27 N.Y.S.3d at 461.

the defendant made several ineffective assistance of counsel arguments, including relevant here that the defense counsel should have objected to the admission of the victim's disclosures as improper bolstering.[109]

As the Court of Appeals explained, it "has repeatedly held that it is generally improper to introduce testimony that the witness had previously made prior consistent statements, when there is no claim of either prompt outcry or recent fabrication."[110] This bar on "bolstering" is based on the view that repetition will create an exaggerated sense of the probative value of particular testimony.[111] However, while prior consistent statements may not be admitted for truth, they may be admitted for other reasons (as, of course, is generally true for statements that would otherwise be hearsay).[112] In particular, prior consistent statements may be admitted to explain the investigative process and complete the narrative of events leading to a defendant's arrest.[113] The Court of Appeals found that in this case, the disclosures were properly offered for the legitimate non-hearsay purpose of filling out the narrative leading to the defendant's arrest.[114]

Judge Rivera's dissent agrees that, on the specific question of admitting prior consistent statements for purposes of filling out the narrative, the majority's analysis follows directly from previous Court of Appeals precedent, particularly *People v. Ludwig*.[115] But Judge Rivera, who also dissented in *Ludwig*, maintained that decision was wrongly decided and that the fact pattern in *Gross* demonstrates the potential for mischief embedded in it.[116] The benefit of filling out the record, in her view, was relatively small and outweighed by the potential prejudice created by repeated testimony that the victim made similar statements over time to different people.[117] She also argues that, even under *Ludwig*,

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109. *Gross*, 26 N.Y.3d at 692, 47 N.E.3d at 741, 27 N.Y.S.3d at 462.

110. *Id.* at 694, 47 N.E.3d at 742–43, 27 N.Y.S.3d at 463–64 (first citing People v. Rosario, 17 N.Y.3d 501, 513, 958 N.E.2d 93, 100, 934 N.Y.S.2d 59, 66 (2011); then citing People v. Fisher, 18 N.Y.3d 964, 966, 967 N.E.2d 676, 678, 944 N.Y.S.2d 453, 455 (2012); and then citing People v. McClean, 69 N.Y.2d 426, 428, 508 N.E.2d 140, 141, 515 N.Y.S.2d 428, 429 (1987)).

111. *Id.* at 694, 47 N.E.3d at 743, 27 N.Y.S.3d at 464 (citing People v. Smith, 22 N.Y.3d 462, 466, 5 N.E.3d 972, 973, 982 N.Y.S.2d 809, 810 (2013)).

112. *Id.* at 694–95, 47 N.E.3d at 743, 27 N.Y.S.3d at 464 (citing People v. Ludwig, 24 N.Y.3d 221, 231, 21 N.E.3d 1012, 1018, 997 N.Y.S.2d 351, 357 (2014)).

113. *Id.* at 695, 47 N.E.3d at 743, 27 N.Y.S.3d at 464.

114. *Gross*, 26 N.Y.3d at 695, 47 N.E.3d at 743, 27 N.Y.S.3d at 464.

115. *Id.* at 697, 47 N.E.3d at 745, 27 N.Y.S.3d at 466 (Rivera, J., dissenting) (citing *Ludwig*, 24 N.Y.3d at 235, 21 N.E.3d at 1021, 997 N.Y.S.2d at 360 (Lippman, J., dissenting)).

116. *Id.*

117. *Id.* at 698, 47 N.E.3d at 745, 27 N.Y.S.3d at 466.

the conviction should be overturned in light of statements by the prosecutor arguing that the repeated disclosure was itself evidence of guilt.[118] (The majority does not quite reach the evidentiary question on this issue, instead holding that it was not ineffective assistance to fail to object to these statements.)[119]

F. Habit Evidence and Prior "Bad Acts"

As a general rule, "habit" evidence, that is, evidence that a person acted in a certain way in different circumstances, will not be admissible to show that he or she acted in that way in the particular instance at issue.[120] New York courts recognize five exceptions to this general rule in which the evidence may be admissible: to prove motive, intent, the absence of a mistake or accident, a common scheme or plan, or identity.[121] These issues arise most commonly and saliently in the questioning of criminal defendants, where the Court of Appeals' now more than a century-old *Molineaux*[122] decision sets out a framework for determining when criminal defendants may be questioned about previous wrongdoing.[123] But the Court of Appeals recently had cause to address the rule in a variety of contexts.

1. Admissibility of a Consent Order in a Medical Malpractice Lawsuit

Mazella v. Beals was a medical malpractice and wrongful death lawsuit in which the defendant doctor was accused of prescribing anti-depressants without properly monitoring the patient, who later committed suicide.[124] At trial, the defendant admitted he departed from the standard of care, but argued he was not liable because of the superseding actions of a different doctor.[125] The plaintiff introduced into evidence, over the

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118. *Id.* at 699, 47 N.E.3d at 746, 27 N.Y.S.3d at 467.

119. *Gross*, 26 N.Y.3d at 696, 47 N.E.3d at 743–44, 27 N.Y.S.3d at 464–65.

120. *In re* Estate of Brandon, 55 N.Y.2d 206, 210–11, 433 N.E.2d 501, 503, 448 N.Y.S.2d 436, 438 (1982) (citing JEROME PRINCE, RICHARDSON ON EVIDENCE §§ 170, 184 (10th ed. 1973)).

121. *Id.* at 211, 433 N.E.2d at 503, 448 N.Y.S.2d at 438 (first citing People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901); and then citing PROPOSED CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 404(b) (1980)); *see also* People v. Cass, 18 N.Y.3d 553, 557, 965 N.E.2d 918, 922, 942 N.Y.S.2d 416, 420 (2012) (citing People v. Cass, 5 Misc. 3d 495, 499, 784 N.Y.S.2d 346, 349 (Sup. Ct. Kings Cty. 2004)).

122. *Molineux*, 168 N.Y. at 272, 61 N.E. at 286.

123. *Id.* at 294, 61 N.E. at 294.

124. 27 N.Y.3d 694, 698, 57 N.E.3d 1083, 1085, 37 N.Y.S.3d 46, 48 (2016).

125. *Id.* at 698, 705–06, 709, 57 N.E.3d at 1085, 1090, 1092–93, 37 N.Y.S.3d at 48, 53, 55–56.

defendant's objection, a Consent Order between the defendant and the Office of Professional Medical Conduct (OPMC), in which the defendant had agreed not to contest charges of negligence for prescribing medication without proper monitoring to twelve patients over several years.[126] The OPMC had in fact charged the defendant with thirteen counts, with the thirteenth and the sole non-conceded charge concerning the decedent in *Mazella*.[127] In other words, the doctor had conceded wrongdoing for the behavior at issue with respect to twelve patients but *not* the decedent.[128]

The defendant argued that the OPMC charges and Consent Order were not probative evidence in the lawsuit, as they contained no concessions about the decedent or the particular facts at issue, and were unduly prejudicial.[129] The trial court allowed the plaintiff to examine the defendant on the charges and for the Consent Order to come in as evidence of "habit and credibility."[130] During cross-examination of the defendant, the plaintiff's counsel "repeatedly confronted [the defendant] with the fact that OPMC had charged him with 'gross negligence' with regard to 13 patients, including [the] decedent, and that [the] defendant signed the Consent Order in satisfaction of the charges, receiving a reprimand and censure as punishment."[131] A jury found the defendant liable and awarded $1.2 million in damages.[132] The defendant appealed on several grounds, including that the Consent Order should not have been admitted and that related questioning should have been prohibited.[133] The Appellate Division, Fourth Department affirmed.[134]

The Court of Appeals reversed, holding that the trial court's admission of the Consent Order and related questioning was an abuse of discretion.[135] The Court pointed to two features of the case that undermined the probative value of the evidence: first, the Consent Order did not include any concession regarding the defendant's care of the decedent; and, second, the defendant did not contest at trial that he had

126. *Id.* at 701–02, 57 N.E.3d at 1087, 37 N.Y.S.3d at 50.
127. *Id.* at 702, 57 N.E.3d at 1088, 37 N.Y.S.3d at 51.
128. *Id.*
129. *Mazella*, 27 N.Y.3d at 702, 57 N.E.3d at 1088, 37 N.Y.S.3d at 51.
130. *Id.*
131. *Id.* at 703, 57 N.E.3d at 1088, 37 N.Y.S.3d at 51.
132. *Id.* at 704, 57 N.E.3d at 1089, 37 N.Y.S.3d at 52.
133. *Id.* at 705, 57 N.E.3d at 1090, 37 N.Y.S.3d at 53.
134. Mazella v. Beals, 122 A.D.3d 1358, 1358, 997 N.Y.S.2d 849, 855 (4th Dep't 2014).
135. *Mazella*, 27 N.Y.3d at 709, 57 N.E.3d at 1093, 37 N.Y.S.3d at 56.

departed from the standard of care.[136] The latter point seems particularly important to the result and makes what otherwise may be a surprising decision more explicable; there was no need to prove the absence of a mistake because the defendant conceded the mistake.[137] The Court then went on to find that any probative value was outweighed by the prejudice, explaining, "The Consent Order was nothing more than evidence of unrelated bad acts, the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the jury to decide the case based on evidence of [the] defendant's character."[138]

The Court also rejected the plaintiff's argument that the Consent Order was properly used as impeachment.[139] There was no inconsistent statement, as the Consent Order contained no statements regarding the treatment of the decedent and, in any event, the defendant did not deny negligence.[140] Nor were the defendant's claims that he did not commit malpractice inconsistent with the findings of negligence in the Consent Order, as negligence does not necessarily constitute malpractice.[141] Finally, the Consent Order was not admissible to impeach credibility, as the risk of prejudice outweighed any limited probative value.[142]

Having found that the Consent Order and related questioning should have been excluded, the Court of Appeals went on to consider whether a new trial was required. It was, the Court found it "difficult to imagine how a jury could simply ignore that [the] defendant negligently treated 12 other patients for years in a similar manner as [the] decedent, namely failing to monitor them."[143] This point would seem to be inarguable, although in the absence of the defendant's decision not to contest negligence, it would seem to point in favor of admitting the evidence.

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136. *Id.* at 710, 57 N.E.3d at 1093–94, 37 N.Y.S.3d at 56–57 (citing Maraziti v. Weber, 185 Misc. 2d 624, 626, 713 N.Y.S.2d 821, 822 (Sup. Ct. Dutchess Cty. 2000)).

137. *Id.* at 709–10, 57 N.E.3d at 1093, 37 N.Y.S.3d at 56 (citing *In re* Estate of Brandon, 55 N.Y.2d 206, 211, 433 N.E.2d 501, 503, 448 N.Y.S.2d 436, 438 (1982)).

138. *Id.* at 710, 57 N.E.3d at 1093–94, 37 N.Y.S.3d at 56–57 (first citing *Maraziti*, 185 Misc. 2d at 626, 713 N.Y.S.2d at 822; then citing People v. Arafet, 13 N.Y.3d 460, 464–65, 920 N.E.2d 919, 921, 892 N.Y.S.2d 812, 814 (2009); and then citing Hosmer v. Distler, 150 A.D.2d 974, 975, 541 N.Y.S.2d 650, 652 (3d Dep't 1989)).

139. *Id.* at 710, 57 N.E.3d at 1094, 37 N.Y.S.3d at 57.

140. *Mazella*, 27 N.Y.3d at 711, 57 N.E.3d at 1094, 37 N.Y.S.3d at 57.

141. *Id.* (citing James v. Wormuth, 21 N.Y.3d 540, 545, 997 N.E.2d 133, 136, 974 N.Y.S.2d 308, 311 (2013)).

142. *Id.*

143. *Id.* at 711, 57 N.E.3d at 1094–95, 37 N.Y.S.3d at 57–58.

2. Admissibility of Prior "Bad Acts" Against Law Enforcement Witnesses in Criminal Prosecution

In a consolidated appeal of three First Department cases,[144] the Court of Appeals in *People v. Smith* addressed the circumstances under which criminal defendants should be allowed to question police officers about the *officer's* previous misbehavior (or alleged misbehavior).[145] In all three cases, the trial court had excluded questioning into allegations of misconduct by an officer or officers involved in the defendant's arrest.[146]

While emphasizing throughout that law enforcement officers should be treated no differently than any other witnesses,[147] the Court of Appeals endorsed a three-part test for questioning into prior alleged bad acts by law enforcement: first, the defendant must show a "good faith basis" for the line of questioning; second, the defendant must identify specific *facts* for questioning; and, finally, the court must engage in the standard analysis of weighing prejudice and probative value.[148] The interaction between the first two prongs is important: the defendant must show a basis for questioning, which will often be a civil lawsuit against the relevant officer, in order to satisfy the first prong, but the defendant cannot simply ask the officer about the lawsuit.[149] Instead, the defense counsel must question the officer about *facts*.[150]

The three cases analyzed by the Court show how different approaches to the issue will achieve different results. In *Smith*, the defense counsel predominately sought to ask questions about the officer's settlement of prior civil lawsuits and the dismissal of criminal charges against the defendants who brought suit.[151] The Court of Appeals

144. People v. Ingram, 125 A.D.3d 558, 5 N.Y.S.3d 376 (1st Dep't 2015); People v. McGhee, 125 A.D.3d 537, 4 N.Y.S.3d 186 (1st Dep't 2015); People v. Smith, 122 A.D.3d 456, 996 N.Y.S.2d 37 (1st Dep't 2014).

145. 27 N.Y.3d 652, 659, 668–69, 57 N.E.3d 53, 57, 63–64, 36 N.Y.S.3d 861, 865, 871–72 (2016).

146. *Id.* at 659, 57 N.E.3d at 57, 36 N.Y.S.3d at 865.

147. *Id.* ("These cases stand for the unremarkable proposition that law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination.").

148. *Id.* at 662, 57 N.E.3d at 59, 36 N.Y.S.3d at 867 (first citing Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); and then citing People v. Harrell, 209 A.D.2d 160, 160, 618 N.Y.S.2d 631, 631–32 (1st Dep't 1994)).

149. *Id.* at 664, 57 N.E.3d at 61, 36 N.Y.S.3d at 869.

150. *Smith*, 27 N.Y.3d at 662, 57 N.E.3d at 59, 36 N.Y.S.3d at 867 (first citing *Van Arsdall*, 475 U.S. at 679; and then citing *Harrell*, 209 A.D.2d at 160, 618 N.Y.S.2d at 631–32).

151. People v. Smith, 122 A.D.3d 456, 456–57, 996 N.Y.S.2d 37, 38 (1st Dep't 2014) (first citing People v. Ducret, 95 A.D.3d 636, 636, 945 N.Y.S.2d 232, 233 (1st Dep't 2012);

described this series of questions as "inappropriate," but acknowledged that the defense counsel also proposed at least one appropriate question—"namely, whether the witness had falsely arrested the plaintiff in one of the lawsuits."[152] The Court nonetheless found the exclusion of this line of questioning harmless error on the basis of overwhelming evidence, in particular, testimony from a different police officer not subject to impeachment.[153]

In contrast, in *People v. Ingram* and *People v. McGhee*, the "defendant's trial counsel clearly indicated that she was interested in getting to the allegations of specific facts underlying the federal lawsuit."[154] The trial courts' decisions to exclude that line of questioning, after the defendant had identified a good-faith basis for it and proclaimed an intention to inquire into the facts, rather than the existence or details of the lawsuits, were held to be an abuse of discretion.[155] The Court reversed in *Ingram*, as the conviction hinged in significant part on the testimony of two officers subject to impeachment,[156] while affirming as harmless error in *McGhee* on the basis of overwhelming evidence from many officers not implicated by the accusations.[157]

3. Admissibility of Prior Conviction of a Sex Crime

The Court addressed a more traditional prior bad acts question in *People v. Denson*.[158] After a non-jury trial, the defendant was convicted of the attempted kidnapping of a ten-year-old neighbor.[159] The defendant had repeatedly asked the victim to join him on "dates" in his apartment,

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and then citing Bigelow-Sanford, Inc. v. Specialized Commercial Floors, Inc., 77 A.D.2d 464, 466–67, 433 N.Y.S.2d 931, 933 (4th Dep't 1980)).

152. *Smith*, 27 N.Y.3d at 664, 57 N.E.3d at 61, 36 N.Y.S.3d at 869.

153. *Id.* at 664–65, 57 N.E.3d at 61, 36 N.Y.S.3d at 869 (first citing People v. Kello, 96 N.Y.2d 740, 744, 746 N.E.2d 166, 168, 723 N.Y.S.2d 111, 113 (2001); and then citing People v. Crimmins, 36 N.Y.2d 230, 240–41, 326 N.E.2d 787, 793, 367 N.Y.S.2d 213, 221 (1975)).

154. *Id.* at 667, 57 N.E.3d at 63, 36 N.Y.S.3d at 871.

155. *Id.* at 668–70, 57 N.E.3d at 63–64, 36 N.Y.S.3d at 871–72.

156. *Id.* at 668, 57 N.E.3d at 63, 36 N.Y.S.3d at 871.

157. *Smith*, 27 N.Y.3d at 670, 57 N.E.3d at 64, 36 N.Y.S.3d at 872.

158. 26 N.Y.3d 179, 183, 42 N.E.3d 676, 679, 21 N.Y.S.3d 179, 182 (2015). The Court also addressed the prior bad acts rule in *People v. Nicholson*, affirming a defendant's conviction for sexual abuse of his daughter over the defendant's objection that the trial court had improperly admitted testimony that the defendant had, on other occasions, physically abused his children. 26 N.Y.3d 813, 818, 829–30, 833, 48 N.E.3d 944, 947–48, 955, 958, 28 N.Y.S.3d 663, 666–67, 674, 677 (2016) (citing N.Y. PENAL LAW § 130.75(1) (McKinney 2009)). The Court of Appeals agreed that this testimony was relevant to explain in part the victim's "delayed disclosure," and that the trial court had engaged in a "careful balancing of the probative value of the testimony against its potential for prejudice." *Id.*

159. *Denson*, 26 N.Y.3d at 183, 42 N.E.3d at 679–80, 21 N.Y.S.3d at 182–83.

had shown up unannounced at her door, and otherwise engaged in what was unquestionably inappropriate behavior by an adult toward a child.[160] The victim's mother contacted police after a particularly harrowing incident where the defendant was pressing the young girl to go with him to get ice cream.[161] The prosecution argued that his conduct was a prelude to a kidnapping, and introduced evidence from the defendant's 1978 sodomy conviction involving his step-daughter, including testimony from the defendant's estranged wife and her niece.[162] The testimony offered similarities in the defendant's use of a particular costume-like outfit when engaged in the offending activity.[163] The evidence was admitted following a pre-trial *Ventimiglia* hearing.[164] The defendant was convicted,[165] and the Appellate Division, First Department affirmed.[166]

Applying *Molineux*, the Court of Appeals explained that the prosecution was first required to identify a permissible purpose for the testimony (that is, a reason other than criminal propensity), and then to establish that the probative value outweighed the risk of undue prejudice.[167] The evidence in this case was introduced to prove intent that the behavior, while disturbing if done by any individual, was a manifestation of criminal intent to kidnap the victim when done by *this* individual.[168] At the *Ventimiglia* hearing to determine the admissibility of the evidence, the prosecution called an expert who testified that the similarities between the two sets of interactions indicated that the defendant was reliving his prior experience and seeking to groom the victim for a sexual relationship.[169] The Court of Appeals agreed with the lower court that this was sufficient to admit the evidence to prove

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160. *Id.* at 183–84, 42 N.E.3d at 680, 21 N.Y.S.3d at 183.

161. *Id.* at 184, 42 N.E.3d at 680, 21 N.Y.S.3d at 183.

162. *Id.* at 184, 42 N.E.3d at 680–81, 21 N.Y.S.3d at 183–84 (citing N.Y. PENAL LAW § 130.50 (McKinney 2009)).

163. *Id.* at 184–85, 42 N.E.3d at 681, 21 N.Y.S.3d at 184.

164. *Denson*, 26 N.Y.3d at 184, 42 N.E.3d at 680–81, 21 N.Y.S.3d at 183–84 (citing People v. Ventimiglia, 52 N.Y.2d 350, 361–62, 420 N.E.2d 59, 63, 438 N.Y.S.2d 261, 265 (1981)).

165. *Id.* at 185, 42 N.E.3d at 681, 21 N.Y.S.3d at 184.

166. People v. Denson, 114 A.D.3d 543, 543, 980 N.Y.S.2d 434, 435 (1st Dep't 2014).

167. *Denson*, 26 N.Y.3d at 185–86, 42 N.E.3d at 681, 21 N.Y.S.3d at 184 (first citing People v. Cass, 18 N.Y.3d 553, 559–60, 965 N.E.2d 918, 923–24, 942 N.Y.S.2d 416, 421–22 (2012); and then citing People v. Alvino, 71 N.Y.2d 233, 242, 519 N.E.2d 808, 812, 525 N.Y.S.2d 7, 11–12 (1987)).

168. *Id.* at 186–87, 42 N.E.3d at 682, 21 N.Y.S.3d at 185 (first citing *Alvino*, 71 N.Y.2d at 242, 519 N.E.2d at 813, 525 N.Y.S.2d at 12; and then citing N.Y. PENAL LAW § 135.00(2)(a) (McKinney 2009)).

169. *Id.* at 186, 42 N.E.3d at 682, 21 N.Y.S.3d at 185.

intent.[170] The Court's analysis is interesting, as it can be read as suggesting that the *weakness* of the State's case justified the admission of the evidence:

> Defendant's actions of attempting to give the victim the keys to his apartment were equivocal, and this was therefore not a case where defendant's intent could be easily inferred from his conduct. Rather, the reason defendant invited the victim to his apartment was important in determining whether he had the requisite intent, i.e., whether he intended to prevent the victim's liberation by secreting or holding her there.[171]

The Court of Appeals then largely deferred to the trial court's analysis of potential prejudice arising from admission of the evidence.[172]

II. ALL THINGS EXPERT

A. Standard for Admission of Expert Testimony

In a memorandum decision in *Sadek v. Wesley*, the Court of Appeals affirmed[173] a nuanced First Department decision[174] analyzing the circumstances under which courts should, and should not, subject proffered expert testimony to a "*Frye* hearing."[175] In so holding, the appellate division reminded that the purpose of the *Frye* hearing is to determine if proffered expert opinions are based on generally accepted principles and data, and are not "newly minted or experimental processes or newly posited psychological theories."[176] In this case, the foundational basis for the proffered medical opinions was neither new nor novel; it was simply challenged by the defendant.[177]

The plaintiff in *Sadek* claimed he was injured in a collision between the vehicle he was driving and a bus operated by the defendant.[178] After the accident, the plaintiff exited his vehicle, became dizzy and shaky, and

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170. *Id.*

171. *Id.* at 186–87, 42 N.E.3d at 682, 21 N.Y.S.3d at 185 (first citing *Alvino*, 71 N.Y.2d at 242, 519 N.E.2d at 813, 525 N.Y.S.2d at 12; and then citing PENAL § 135.00(2)(a)).

172. *Denson*, 26 N.Y.3d at 188, 42 N.E.3d at 683, 21 N.Y.S.3d at 186.

173. 27 N.Y.3d 982, 983, 51 N.E.3d 553, 554, 32 N.Y.S.3d 42, 43 (2016).

174. Sadek v. Wesley, 117 A.D.3d 193, 195–96, 986 N.Y.S.2d 25, 26–27 (1st Dep't 2014).

175. *Id.*

176. *Id.* at 201, 986 N.Y.S.2d at 30 (first citing Marsh v. Smyth, 12 A.D.3d 307, 308, 785 N.Y.S.2d 440, 441 (1st Dep't 2004); and then citing *Marsh*, 12 A.D.3d at 308, 785 N.Y.S.2d at 441 (Saxe, J. concurring)).

177. *Id.* at 200–01, 986 N.Y.S.2d at 30.

178. *Id.* at 196, 986 N.Y.S.2d at 27.

suffered a stroke.[179] Initial hospital reports diagnosed him as having suffered an embolic stroke.[180] The plaintiff served expert disclosure with regard to opinions to be offered by neurological expert, Dr. Yazgi, referencing a report issued by him, causally connecting the motor vehicle collision, the large clot, and the embolic stroke.[181] However, Dr. Yazgi issued a subsequent report, qualifying his earlier opinion, and questioning whether the larger clot seen on the earlier report was possibly "artifact" and "physiologically unlikely," but also opining that "[a]ssuming this clot was present on the first report, trauma could feasibly have dislodged it, or a portion of it, causing an embolic stroke."[182]

On the first day of trial, the defendant moved in limine to preclude each of the plaintiff's seven experts, including Dr. Yazgi, arguing that Dr. Yazgi's second report qualified his causation opinion, which was characterized by him as stating that the "trauma 'could have' caused the" stroke.[183] The trial court granted the defendant's motion to preclude Dr. Yazgi, but provided the plaintiff with a four-day continuance to find another expert.[184] The plaintiff retained a second neurologist, Dr. Oh, and proffered disclosure that he would testify on causation consistently with Dr. Yazgi's initial report.[185] The defendant objected, asserting that the opinion that a trauma could cause an embolic stroke was "a novel theory of causation."[186] The trial court granted the defendant's request for a *Frye* hearing, and ultimately precluded Dr. Oh's testimony, resulting in dismissal of the complaint for failure of proof as to serious injury caused by the accident.[187]

On appeal by the plaintiff, the Appellate Division, First Department reversed the order of the court below, finding the plaintiff had presented sufficient evidence at the *Frye* hearing to establish reliability of the causation opinion.[188] The court also went on at length to explain that in cases where the underlying basis for the expert's opinion is not novel or

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179. *Sadek*, 117 A.D.3d at 196, 986 N.Y.S.2d at 27.

180. *Id.*

181. *Id.*

182. *Id.* at 196–97, 986 N.Y.S.2d at 27 (alteration in original) (quoting Dr. Yazgi's supplemental report).

183. *Id.* at 197, 986 N.Y.S.2d at 27–28.

184. *Sadek*, 117 A.D.3d at 197, 986 N.Y.S.2d at 27–28.

185. *Id.* at 197, 986 N.Y.S.2d at 28.

186. *Id.*

187. *Id.* at 197–99, 986 N.Y.S.2d at 28–29 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

188. *Id.* at 196, 199, 201–03, 986 N.Y.S.2d at 27, 29, 31–32 (citing Marsh v. Smyth, 12 A.D.3d 307, 312, 785 N.Y.S.2d 440, 445 (1st Dep't 2004)).

untested (i.e., radiologic and/or epidemiological data) a *Frye* hearing is not necessary.[189] There was a concurrence of Justice Moskowitz agreeing with the result but advancing her opinion that a *Frye* hearing was necessary.[190] Justice Tom issued a strong dissent, questioning whether the accident was the result of the causative factor in the plaintiff's stroke.[191]

The Court of Appeals' memorandum decision was brief but pointed. Affirming the majority opinion below, the Court noted that a *Frye* hearing was neither necessary nor applicable to the facts of this case.[192] Any alleged deficiencies challenged to an expert's opinion foundation are properly issues for the trier of fact to decide, and are not questions of admissibility to be decided by the trial court.[193]

As a note to practitioners, the majority opinion from the First Department strongly questioned the defense attorneys' tactics in the timing of their serving motions in limine, describing them as "something akin to an ambush," as the seven motions were not served until the day the jury was empaneled.[194] The court cautioned, "Trial courts should take care that the informal procedure of in limine evidentiary applications is not abused so as to unfairly tip the scales."[195]

The Court of Appeals upheld preclusion of the plaintiff's experts in a toxic tort case, *Sean R. v. BMW of North America, LLC.*[196] The claim in that case was that the infant-plaintiff suffered injury in utero, with resultant severe mental and physical disabilities, as a result of his mother's exposure to a gas vapor leak into the interior of the car she regularly drove.[197] The plaintiff served expert disclosure with regard to two experts on causation, to offer opinions that (1) exposure to unleaded gas vapor was capable of causing the birth defects at issue, and (2) the infant-plaintiff's mother suffered sufficient exposure to have exposed the infant-plaintiff to a hazardous amount of gasoline vapors.[198] Such

189. *Sadek*, 117 A.D.3d at 200–01, 986 N.Y.S.2d at 30.

190. *Id.* at 203, 986 N.Y.S.2d at 32 (Moskowitz, J., concurring).

191. *Id.* at 204, 986 N.Y.S.2d at 33 (Tom, J., dissenting).

192. Sadek v. Wesley, 27 N.Y.3d 982, 983, 984 n.1, 51 N.E.3d 553, 554 n.1, 32 N.Y.S.3d 42, 43 n.1 (2016).

193. *Id.* at 984, 51 N.E.3d at 554, 32 N.Y.S.3d at 43.

194. *Sadek*, 117 A.D.3d at 203, 986 N.Y.S.2d at 31–32.

195. *Id.* at 203, 986 N.Y.S.2d at 32.

196. 26 N.Y.3d 801, 805–06, 48 N.E.3d 937, 939, 28 N.Y.S.3d 656, 658 (2016).

197. *Id.* at 806–07, 48 N.E.3d at 939–40, 28 N.Y.S.3d at 658–59.

198. *Id.* at 807, 48 N.E.3d at 940, 28 N.Y.S.3d at 659; *see* Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 448, 857 N.E.2d 1114, 1120–21, 824 N.Y.S.2d 584, 590 (2006) (first citing McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1241 (11th Cir. 2005); and then citing Wright v. Willamette Indus., 91 F.3d 1005, 1106 (8th Cir. 1996)).

opinions were offered to meet the requisite expert testimony in toxic tort causation with regard to "general causation" (that the toxin was capable of causing the injuries complained of) and "specific causation" (that the plaintiff was exposed to sufficient amounts of the toxin to cause the injuries).[199]

The trial court precluded the plaintiff from offering such expert testimony at trial, and the case was stayed.[200] The Appellate Division, First Department unanimously affirmed, but permitted appeal by certified question to the Court of Appeals.[201]

The Court of Appeals addressed the question of whether the plaintiff's experts' methodologies were generally accepted in the scientific community[202] (as noted in a footnote, the Court was not called upon to address whether there was a proper foundation for their opinions).[203] The Court reviewed the scientific support for the experts' proposition that exposure to gasoline vapors has a corresponding relationship to toxicity.[204] One of the experts testified as to studies that showed that there was a relationship between the indicia of reported symptoms (such as nausea and headaches), and exposure to a known quantity of gasoline vapors.[205] The plaintiff's expert then extrapolated for specific causation purposes that because there is a minimum threshold of gasoline vapor beneath which a person would not experience headaches or nausea, and the plaintiff-mother did experience such symptoms; therefore, she must have been exposed to at least that concentration.[206] The Court found that the plaintiff failed to present enough evidence to show that the "symptom-threshold" methodology, unlike "odor threshold methodology," had been generally accepted in the scientific community.[207] Accordingly, the Court held that the experts' testimony

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199. *Id.* at 808, 48 N.E.3d at 941, 28 N.Y.S.3d at 660 (citing *Parker*, 7 N.Y.3d at 448, 857 N.E.2d at 1120–21, 824 N.Y.S.2d at 590).

200. Reeps v. BMW of N. Am., LLC, No. 100725/08, 2012 N.Y. Slip Op. 33030(U), at 23 (Sup. Ct. N.Y. Cty. Dec. 21, 2012), *lv. denied*, 972 N.Y.S.2d 146 (2013).

201. Sean R. v. BMW of N. Am., LLC, 115 A.D.3d 432, 433, 981 N.Y.S.2d 514, 514–15 (1st Dep't 2014) (citing Centennial Restorations Co. v. Wyatt, 248 A.D.2d 193, 197–98, 669 N.Y.S.2d 585, 588 (1st Dep't 1998)).

202. *Sean R.*, 26 N.Y.3d at 809, 48 N.E.3d at 941, 28 N.Y.S.3d at 660 (quoting *Parker*, 7 N.Y.3d at 449, 857 N.E.2d at 1121, 824 N.Y.S.2d at 591).

203. *Id.* at 809 n.1, 48 N.E.3d at 941 n.1, 28 N.Y.S.3d at 660 n.1 (citing *Parker*, 7 N.Y.3d at 447, 857 N.E.2d at 1120, 824 N.Y.S.2d at 589).

204. *Id.* at 809–10, 48 N.E.3d at 941–42, 28 N.Y.S.3d at 660–61.

205. *Id.* at 807, 48 N.E.3d at 940, 28 N.Y.S.3d at 659.

206. *Id.*

207. Sean R., 26 N.Y.3d at 811, 48 N.E.3d at 943, 28 N.Y.S.3d at 662.

was properly precluded.[208]

In its analysis, the Court noted the general acceptance of odor threshold methodology, which establishes the minimum quantity of exposure by correlating to the minimum level at which a substance, such as gasoline, has a detectable odor.[209] The problem with the symptom-threshold methodology was the lack of scientific support for the correlation of symptoms with a specific minimum exposure to a toxin.[210]

In *People v. Nicholson*, the Court of Appeals issued another decision regarding the admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS).[211] The defendant in *Nicholson* was charged with first degree sexual contact with a child.[212] At trial, the prosecution presented expert testimony on CSAAS in part to explain why the victim waited several years before reporting her abuse.[213] The defendant was convicted and appealed to the Appellate Division, Fourth Department, which affirmed his conviction.[214]

On appeal, the defendant did not contest that CSAAS was, in general, an appropriate subject of expert testimony, recognizing clear precedent on the issues.[215] Instead, he argued that voir dire demonstrated that the jurors were sufficiently aware of CSAAS to make the expert testimony unnecessary.[216] This argument was not compelling. The Court of Appeals held that the defendant failed to establish any discernable "juror view point," or understanding of the intricacies of CSAAS, such as to warrant reversal of his conviction based on alleged abuse of discretion by the trial court in permitting such testimony.[217] Rather, the Court found the testimony provided relevant information outside the

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208. *Id.* at 809, 48 N.E.3d at 941, 28 N.Y.S.3d at 660.

209. *Id.* at 810–11, 48 N.E.3d at 942–43, 28 N.Y.S.3d at 661–62 (citing Manuel v. Shell Oil Co., 664 So. 2d 470, 477 (La. Ct. App. 1995)).

210. *Id.* at 811, 48 N.E.3d at 943, 28 N.Y.S.3d at 662.

211. 26 N.Y.3d 813, 820, 824, 48 N.E.3d 944, 949, 951, 28 N.Y.S.3d 663, 668, 670 (2016).

212. People v. Nicholson, 118 A.D.3d 1423, 1423, 988 N.Y.S.2d 765, 766 (4th Dep't 2014) (citing N.Y. PENAL LAW § 130.75(1) (McKinney 2009)).

213. *Id.* at 1423, 988 N.Y.S.2d at 767.

214. *Id.* at 1423, 988 N.Y.S.2d at 766.

215. *Nicholson*, 26 N.Y.3d at 827–28, 48 N.E.3d at 954, 28 N.Y.S.3d at 673 (first citing People v. Williams, 20 N.Y.3d 579, 583–84, 987 N.E.2d 260, 263, 964 N.Y.S.2d 483, 486 (2013); and then citing People v. Spicola, 16 N.Y.3d 441, 465, 947 N.E.2d 620, 635, 922 N.Y.S.2d 846, 861 (2011)).

216. *Id.* at 828, 48 N.E.3d at 954, 28 N.Y.S.3d at 673.

217. *Id.* at 828–29, 48 N.E.3d at 954–55, 28 N.Y.S.3d at 673–74 (citing People v. Taylor, 75 N.Y.2d 277, 288, 552 N.E.2d 131, 135, 551 N.Y.S.2d 883, 887 (1990)).

knowledge of the jurors.[218]

B. Eyewitness Identification Experts

In recent years, the courts have recognized that eyewitness identifications, the quintessential direct evidence, are more questionable than once viewed.[219] This acknowledgement has arisen as a result of research by experts in witness identification, whose testimony has gained general acceptance as relevant and helpful to a jury in appropriate cases.[220] Identification experts have been offered to testify to the limitations of human identification and memory, as well as to specific causes that may exacerbate flaws in the identification process.[221] In a leading 2007 case, *People v. LeGrand*, the Court of Appeals confirmed the value of such witnesses, and held that it could be an abuse of discretion for courts, at least in some circumstances, to preclude these experts from testifying.[222] *LeGrand* suggested a relatively lenient standard for admission of such testimony, unless there was otherwise substantial corroboration of the eyewitness testimony.[223] Decisions last year, however, further refined this standard, circumscribing circumstances in which such expert testimony is appropriate.

This past year, over a vigorous dissent by Judge Rivera, a 4-3 decision by the Court of Appeals in *People v. McCullough* reversed an appellate division decision[224] overturning a murder conviction because of the trial court's exclusion of an identification expert.[225] The defendant

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218. *Id.* at 829, 48 N.E.3d at 955, 28 N.YS.3d at 674.

219. *See, e.g.*, ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 180, 184 (Harvard Univ. Press 2d ed. 1996) (1979). The dissenting opinion in *McCullough* provides an overview of recent academic and judicial treatment of the subject. People v. McCullough, 27 N.Y.3d 1158, 1162, 1165, 1169, 58 N.E.3d 386, 389, 391, 394, 37 N.Y.S.3d 214, 217, 219, 222 (2016) (Rivera, J. dissenting) (citing People v. Santiago, 17 N.Y.3d 661, 669, 958 N.E.2d 874, 880, 934 N.Y.S.2d 746, 752 (2001)).

220. *See* LOFTUS, *supra* note 219, at 155–56, 158, 162–65, 168–69, 192.

221. *Id.* at 192–94.

222. 8 N.Y.3d 449, 457, 459, 867 N.E.2d 374, 379–80, 835 N.Y.S.2d 523, 528–29 (2007); *see also* People v. Lee, 96 N.Y.2d 157, 162–63, 750 N.E.2d 63, 66, 726 N.Y.S.2d 361, 364 (2001) (citing People v. Cronin, 60 N.Y.2d 430, 433, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

223. *See LeGrand*, 8 N.Y.3d at 459, 867 N.E.2d at 380, 835 N.Y.S.2d at 529 ("Although the trend has been of late to more liberally admit such testimony—as recognized in *Lee* and *Young*—the admissibility of such evidence would also depend upon the existence of sufficient corroborating evidence to link defendant to the crime. In the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting defendant.").

224. 126 A.D.3d 1452, 1452–53, 5 N.Y.S.3d 665, 666 (4th Dep't 2016).

225. 27 N.Y.3d 1158, 1161–62, 58 N.E.3d 386, 388, 37 N.Y.S.3d 214, 216 (2016) (first

was accused of shooting and killing a man during a robbery of a barbershop.[226] The prosecution's case was based predominately on the testimony of two men: an eyewitness who was outside the barbershop when the shooting occurred, and an alleged accomplice of the defendant who had pled guilty.[227] The trial court determined that the eyewitness's testimony was sufficiently corroborated by the testimony of the alleged accomplice that there was no need to allow an identification expert.[228] The Court of Appeals agreed, finding this to be an appropriate exercise of discretion.[229] The majority rejected the argument (urged by, among others, the dissenting judges) that *LeGrand* required a two-part test under which the court needed to first evaluate the strength of the corroborating evidence.[230] Instead, *LeGrand* should "be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification 'would aid a lay jury in reaching a verdict.'"[231]

In dissent, Judge Rivera argued that the majority's decision vests too much discretion with the trial court.[232] Her core argument was that "[a] trial court cannot rest its determination to exclude expert testimony on alleged corroborating evidence that is itself unreliable."[233] Here, the corroboration was purportedly provided by another participant in the crime, who had incentive to shade the truth, had offered inconsistent testimony, and faced various other credibility challenges.[234] The trial court had acknowledged these infirmities but stated that, having previously seen the eyewitness testify in a trial against a different defendant, he found him to be credible and the accomplice's testimony to be sufficiently corroborative.[235] The dissent would have applied the "two-

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citing *McCullough*, 126 A.D.3d at 1452–53, 5 N.Y.S.3d at 666; and then citing *LeGrand*, 8 N.Y.3d at 452, 867 N.E.2d at 375–76, 835 N.Y.S.2d at 524–25).

226. *Id.* at 1159, 58 N.E.3d at 386–87, 37 N.Y.S.3d at 214–15 (first citing N.Y. PENAL LAW § 20.00 (McKinney 2009); then citing N.Y. PENAL LAW § 125.25(3) (McKinney 2009); then citing N.Y. PENAL LAW § 160.15(4) (McKinney 2010); and then citing N.Y. PENAL LAW § 110.00 (McKinney 2009)).

227. *Id.* at 1159–60, 58 N.E.3d at 387, 37 N.Y.S.3d at 215.

228. *Id.* at 1160–61, 58 N.E.3d at 388, 37 N.Y.S.3d at 216.

229. *Id.* at 1161, 58 N.E.3d at 388, 37 N.Y.S.3d at 216.

230. *McCullough*, 27 N.Y.3d at 1161, 58 N.E.3d at 388, 37 N.Y.S.3d at 216 (citing People v. Lee, 96 N.Y.2d 157, 162, 750 N.E.2d 63, 66, 726 N.Y.S.2d 361, 364 (2001)).

231. *Id.* (quoting *Lee*, 96 N.Y.2d at 162, 750 N.E.2d at 66, 726 N.Y.S.2d at 364).

232. *See id.* at 1165, 1167, 1170–71, 58 N.E.3d at 391–92, 395, 37 N.Y.S.3d at 219–20, 223 (Rivera, J. dissenting).

233. *Id.* at 1162, 58 N.E.3d at 389, 37 N.Y.S.3d at 217 (citing People v. Santiago, 17 N.Y.3d 661, 673, 958 N.E.3d 874, 883, 934 N.Y.S.2d 746, 755 (2011)).

234. *Id.*

235. *McCullough*, 27 N.Y.3d at 1163, 58 N.E.3d at 390, 37 N.Y.S.3d at 218 (Rivera, J.

stage inquiry" it contended *LeGrand* required: the trial court must first determine (1) "whether the case 'turns on the accuracy of eyewitness identifications'" and (2) if "there is little or no corroborating evidence connecting the defendant to the crime."[236] If it does so, it must permit expert eyewitness testimony.[237] If it does not, it may then engage in the general weighing of prejudice and probative value.[238]

The disagreements that divided the Court in *McCullough* were absent in another Court of Appeals case addressing the use of identification experts, *People v. Berry*.[239] The trial court in *Berry* had allowed an eyewitness-identification expert to testify, but with limitations: the court allowed the expert to testify on several topics, including "weapon focus" (the idea that a witness may be most focused on a weapon when one is present) and "witness confidence" (the idea that a more certain witness is not necessarily a more accurate one), but refused to allow the expert to testify about "event stress" (the effects on accuracy of undergoing significant stress).[240] The trial court found that the event stress testimony was not sufficiently reliable under the *Frye* test.[241] The Court of Appeals affirmed the decision, finding that the trial court "made a reasoned determination concerning the kinds of expert testimony that were relevant."[242]

III. ATTORNEY-CLIENT PRIVILEGE

Usually, an attorney-client communication shared with an outsider will lose its privileged status.[243] An exception to this general rule is the "common interest" doctrine, which limits disclosure of confidential attorney-client communications between parties represented by counsel who share a common legal interest in a pending or reasonably anticipated

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dissenting).

236. *Id.* at 1166, 58 N.E.3d at 392, 37 N.Y.S.3d at 220 (quoting People v. Santiago, 17 N.Y.3d 661, 669, 958 N.E.2d 874, 881, 934 N.Y.S.2d 746, 752 (2001)).

237. *Id.* at 1166, 58 N.E.3d at 391–92, 37 N.Y.S.3d at 219–20 (citing *Santiago*, 17 N.Y.3d at 668–69, 958 N.E.2d at 880, 934 N.Y.S.2d at 752).

238. *Id.* at 1161, 58 N.E.3d at 388, 37 N.Y.S.3d at 216 (majority opinion) (citing People v. Powell, 27 N.Y.3d 523, 531, 53 N.E.3d 435, 439, 35 N.Y.S.3d 675, 679 (2016)).

239. 27 N.Y.3d 10, 15, 49 N.E.3d 703, 706, 29 N.Y.S.3d 234, 237 (2016).

240. *Id.* at 18, 49 N.E.3d at 709, 29 N.Y.S.3d at 240.

241. *Id.* at 19, 49 N.E.3d at 709, 29 N.Y.S.3d at 240 (citing Frye v. United States., 293 F. 1013, 1014 (D.C. Cir. 1923)).

242. *Id.* at 20–21, 49 N.E.3d at 710–11, 29 N.Y.S.3d at 241–42.

243. *See, e.g.*, People v. Harris, 57 N.Y.2d 335, 343, 442 N.E.2d 1205, 1208, 456 N.Y.S.2d 694, 697 (1982); Baumann v. Steingester, 213 N.Y. 328, 333, 107 N.E. 578, 579 (1915); People v. Patrick, 182 N.Y. 131, 175, 74 N.E. 843, 857 (1905).

litigation.[244] In *Ambac Assurance Co. v. Countrywide Home Loans, Inc.*, the Court of Appeals rejected a request to expand this doctrine to apply to any common *legal* interest, confirming that under New York law, a cognizable common-interest exists only in the context of a pending or reasonably anticipated litigation.[245] This will often be an important difference, as *Ambac* makes clear. (Note, though, that other jurisdictions have adopted broader interpretations of the common-interest doctrine.)[246]

In *Ambac*, the plaintiff insurance company had guaranteed payments on mortgage-backed securities sold by the defendant Countrywide.[247] Many of those securities failed during the financial crisis, leaving the plaintiff on the hook.[248] The plaintiff sued Countrywide, arguing the mortgage provider had breached contractual representations, fraudulently misrepresented the quality of the loans, and fraudulently induced the plaintiff to guarantee them.[249] The plaintiff also sued Bank of America, which had acquired Countrywide in 2008, arguing that Bank of America was liable as Countrywide's successor-in-interest.[250]

Through discovery, the plaintiff sought production of communications between the Bank and Countrywide while the two entities discussed their merger, and during which time both entities were represented by counsel, and exchanged information regarding business operations, finances, etcetera.[251] Bank of America withheld several

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244. *See* People v. Osorio, 75 N.Y.2d 80, 85, 549 N.E.2d 1183, 1184, 550 N.Y.S.2d 612, 615 (1989) (first citing United States v. Simpson, 475 F.2d 934, 936 (D.C. Cir. 1973); then citing United States v. Melvin, 650 F.2d 641, 646 (5th Cir. 1981); then citing Finn v. Morgan, 46 A.D.2d 229, 234–36, 362 N.Y.S.2d 292, 299–300 (4th Dep't 1974); then citing United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); and then citing Hunydee v. United States, 355 F.2d 183, 184–85 (9th Cir. 1963)). The "common interest" doctrine is often described as if it is a freestanding privilege analogous to the attorney-client privilege, but it is not. Graco, Inc. v. PMC Glob., No. 08-1304 (FLW), 2011 U.S. Dist. LEXIS 14718, at *14 (D.C.N.J. Feb. 14, 2011). It applies only if there is an existing, underlying privilege (or work product claim), which it *protects* from waiver, but does not extend. *See id.*

245. 27 N.Y.3d 616, 620, 57 N.E.3d 30, 32, 36 N.Y.S.3d 838, 840 (2016).

246. *Id.* at 635, 57 N.E.3d at 42–43, 36 N.Y.S.3d at 850–51 (Rivera, J. dissenting) (first citing United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987); then citing United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); then citing *In re* Teleglobe Communications Corp., 493 F.3d 345, 364 (3d Cir. 2007); then citing *In re* Regents of Univ. of Cal., 101 F.3d 1386, 1390–91 (Fed. Cir. 1996); then citing Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015); then citing Hanover Ins. Co. v. Rapo & Jenpsen Ins. Servs., 449 Mass. 609, 616 (2007); then citing S.F. Pac. Gold Corp. v. United Nuclear Corp., 143 N.M. 215, 222 (Ct. App. 2007); and then citing DEL. R. EVID. 502(b)).

247. *Id.* at 620, 57 N.E.3d at 32, 36 N.Y.S.3d at 840 (majority opinion).

248. *Id.* at 620–21, 57 N.E.3d at 32, 36 N.Y.S.3d at 840.

249. *Id.*

250. *Ambac Assurance Corp.*, 27 N.Y.3d at 621, 57 N.E.3d at 32, 36 N.Y.S.3d at 840.

251. *Id.* at 621, 57 N.E.3d at 33, 36 N.Y.S.3d at 841.

hundred such communications, listing these communications on a privilege log, and asserting they were protected by the common interest privilege based on the companies' shared interest in the merger's "successful completion" and their commitment to confidentiality.[252] The plaintiff contested the withheld production, arguing that though the two companies may have had, in some sense, a shared interest in the merger, this was not an interest related to a pending or reasonably anticipated litigation.[253]

A Special Referee appointed by the supreme court largely adopted the plaintiff's framing, and the supreme court agreed over the defendants' objection.[254] Bank of America appealed, and the appellate division reversed.[255] The Appellate Division, First Department, acknowledged that New York courts had historically taken a narrow view of the common-interest doctrine but found it difficult to square this view with the purposes of the attorney-client privilege and followed several federal court cases rejecting a relation-to-litigation requirement.[256] The appellate division then certified the question to the Court of Appeals.[257]

The Court of Appeals described the history of the common interest doctrine, which it first recognized in 1989.[258] As the Court described, New York courts have continued to apply the doctrine in the years since "but always in the context of pending or reasonably anticipated litigation."[259] It therefore approached the question certified by the appellate division as one of whether it should modify the existing rule.[260] The Court declined to adopt the proposed change, rejecting the defendant's entreaty to follow certain federal courts that have expanded

252. *Id.* at 621, 57 N.E.3d at 32–33, 36 N.Y.S.3d at 840–41.

253. *Id.* at 621–22, 57 N.E.3d at 33, 36 N.Y.S.3d at 841.

254. *Id.* at 622, 57 N.E.3d at 33–34, 36 N.Y.S.3d at 841–42 (citing Ambac Assurance Corp. v. Countrywide Home Loans, Inc., No. 651612/2010, 2013 N.Y. Slip Op. 32568(U), at 7 (Sup. Ct. N.Y. Cty. June 24, 2013); and then citing Ambac Assurance Corp. v. Countrywide Home Loans, Inc., No. 651612/2010, 2013 N.Y. Slip Op. 51673(U), at 2 (Sup. Ct. N.Y. Cty. Oct. 16, 2013)).

255. Ambac Assurance Corp. v. Countrywide Home Loans Inc., 124 A.D.3d 129, 132, 137, 998 N.Y.S.2d 329, 332, 336 (1st Dep't 2014).

256. *Id.* at 130, 133, 135, 998 N.Y.S.2d at 331, 333–34 (citing Dura Glob. Techs., Inc. v. Magna Donnelly Corp., No. 07-CV-10945-DT, 2008 U.S. Dist. LEXIS 41432, at *10 (E.D. Mich. May 27, 2008)).

257. *See Ambac Assurance Corp.*, 27 N.Y.3d at 623, 57 N.E.3d at 34, 36 N.Y.S.3d at 842.

258. *Id.* at 626, 57 N.E.3d at 36, 36 N.Y.S.3d at 844 (citing People v. Osorio, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 1185–86, 550 N.Y.S.2d 612, 614–15 (1989)).

259. *Id.* at 627, 57 N.E.3d at 37, 36 N.Y.S.3d at 845.

260. *Id.* at 628, 57 N.E.3d at 37, 36 N.Y.S.3d at 845.

the doctrine.[261] Instead, it affirmed its commitment to a common-interest doctrine that applies only "[w]hen two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest."[262] A broader rule, the Court believed, would be inconsistent with the state's interest in liberal discovery and would not offer offsetting benefits.[263] As the Countrywide-Bank of America relationship itself showed, parties with common interests, particularly in the transactional context, have a business incentive to share confidential communications without the protection of the common-interest doctrine.[264] The Court also noted that expansion of the doctrine could result in "substantial loss of relevant evidence, as well as the potential for abuse."[265] The Court was attuned to the plaintiff's contention that the withheld communications would have revealed that the defendants structured the merger to conceal fraud and deny their victims recourse.[266] The Court reasoned that New York's policy of liberal disclosure outweighed the argued need for protection under the common interest doctrine.[267]

IV. EVIDENTIARY SHORTCUTS

A. Statutory Presumptions

In *People v. Hogan*, the Court of Appeals addressed the statutory "drug factory" presumption of Penal Law § 220.25.[268] This presumption provides an evidentiary shortcut in the prosecution of drug sale crimes where a defendant is not in actual physical possession of drugs at the time of his arrest.[269] It allows the jury to presume criminal involvement where a defendant is apprehended in "close proximity" to the drugs sufficient to evince his or her participation in an apparent drug sale operation.[270]

The defendant was arrested on possession charges when police executing a search warrant found the defendant running from a kitchen

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261. *Id.* at 628, 631, 57 N.E.3d at 37, 40, 36 N.Y.S.3d at 845, 848.

262. *Ambac Assurance Corp.*, 27 N.Y.3d at 628, 57 N.E.3d at 38, 36 N.Y.S.3d at 846.

263. *Id.* at 629, 57 N.E.3d at 38, 36 N.Y.S.3d at 846.

264. *Id.* at 628–29, 57 N.E.3d at 38, 36 N.Y.S.3d at 846 (quoting Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 68 (2000)).

265. *Id.* at 629, 57 N.E.3d at 38, 36 N.Y.S.3d at 846.

266. *Id.* at 630, 57 N.E.3d at 39, 36 N.Y.S.3d at 847.

267. *Ambac Assurance Corp.*, 27 N.Y.3d at 632, 57 N.E.3d at 40, 36 N.Y.S.3d at 848.

268. 26 N.Y.3d 779, 781, 48 N.E.3d 58, 60, 28 N.Y.S.3d 1, 3 (2016) (citing N.Y. PENAL LAW § 220.25 (McKinney 2008)).

269. *Id.* at 783, 48 N.E.3d at 61, 28 N.Y.S.3d at 4 (citing People v. Kims, 24 N.Y.3d 422, 432, 24 N.E.3d 573, 580, 999 N.Y.S.2d 337, 344 (2014)).

270. *Id.* (citing PENAL § 220.25(2)).

containing cocaine and drug paraphernalia.[271] At trial, police officers testified that they found the cocaine, that the drug paraphernalia was of the type commonly used for the sale and distribution of cocaine, and that the defendant was initially observed within a few feet of the drugs.[272] The defendant's girlfriend, in whose apartment the drugs were found, pled guilty to felony drug charges and testified that she had bought the cocaine.[273] In a non-jury trial, the supreme court found the defendant guilty of criminal possession, on the basis of the drug-factory presumption.[274] The appellate division affirmed, rejecting arguments that the presumption was inapplicable as well as ineffective assistance of counsel claims.[275]

Addressing the drug-factory presumption, the Court of Appeals first rejected the defendant's argument that the presumption did not apply because there was no evidence of intent to package or otherwise prepare drugs for sale.[276] Relying in part on its recent decision in *People v. Kims*, the Court held that the presumption required no showing of intent to unlawfully mix or otherwise prepare the drugs for sale.[277] Having dispensed with the defendant's intent argument, the Court found application of the presumption in this case compelling.[278]

B. Stipulations

In *People v. Gary*, the Court of Appeals affirmed a decision to admit hearsay evidence that was the subject of an admissibility stipulation and to which the opposing party did not timely object.[279] The facts here likely made for an easy decision. The Court of Appeals was unanimous, and both lower courts had reached the same conclusion.[280] But in passing on

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271. *Id.* at 781–82, 48 N.E.3d at 60, 28 N.Y.S.3d at 3.

272. *Id.* at 782, 48 N.E.3d at 60, 28 N.Y.S.3d at 3.

273. *Hogan*, 26 N.Y.3d at 782, 48 N.E.3d at 60, 28 N.Y.S.3d at 3.

274. *Id.* at 782–83, 48 N.E.3d at 61, 28 N.Y.S.3d at 4 (citing PENAL § 220.25(2)).

275. People v. Hogan, 118 A.D.3d 1263, 1263–64, 986 N.Y.S.2d 907, 908 (4th Dep't 2014).

276. *Hogan*, 26 N.Y.3d at 783, 48 N.E.3d at 61, 28 N.Y.S.3d at 4 (citing PENAL § 220.25(2)).

277. *Id.* (first citing PENAL § 220.25(2); and then citing People v. Kims, 24 N.Y.3d 422, 432, 24 N.E.3d 573, 580, 999 N.Y.S.3d 337, 344 (2014)).

278. *Id.* at 783, 48 N.E.3d at 61, 28 N.Y.S.3d at 4 (citing *Kims*, 24 N.Y.3d at 432, 24 N.E.3d at 580, 999 N.Y.S.3d at 344).

279. 26 N.Y.3d 1017, 1018–19, 41 N.E.3d 1142, 1143–44, 20 N.Y.S.3d 327, 328–29 (2016).

280. *Id.* at 1020, 41 N.E.3d at 1145, 20 N.Y.S.3d at 330; People v. Gary, 115 A.D.3d 760, 760, 981 N.Y.S.2d 602, 602 (2d Dep't 2014); People v. Gary, 34 Misc. 3d 523, 530, 935 N.Y.S.2d 260, 265 (Sup. Ct. Nassau Cty. 2011).

its decision, the Court provides some useful guidance on the use of evidentiary stipulations. In *Gary*, the parties had stipulated to the admission of various exhibits.[281] One of the exhibits contained handwritten notes.[282] A witness testified about the exhibit and the notes, and the exhibit was admitted.[283] A day after the exhibit was discussed and admitted, the defendant objected.[284] The supreme court overruled the objection, while stating that the exhibit would have been inadmissible hearsay but for the stipulation.[285]

The Court of Appeals emphasized that there may be instances in which a court can or should in the exercise of its discretion relieve a party from an evidentiary stipulation.[286] Such a stipulation is not "irreversibly binding" but is "presumptively enforceable."[287] The defendant in *Gary* offered no plausible excuse for failing to seek an exemption, and this failure was compounded by the delay in raising the issue after testimony.[288] The lesson, then, is to stipulate carefully and object quickly if problematic, inaccurate and/or inadvertent content is contained within the evidentiary stipulation. The Court noted that the analysis might be different if the admitted evidence was testimonial hearsay.[289]

C. Adverse Inferences for Spoliation

The explosion of electronically-stored information (ESI) over the past two decades has created considerable challenges that most often manifest themselves in discovery.[290] But ESI has significant evidentiary implications as well, and a failure to address the discovery issues may have significant evidentiary consequences. In *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, the Court of Appeals in part endorsed a trial court's implementation of a substantively significant adverse inference instruction as a sanction for spoliation of ESI, reversing the appellate

281. *Gary*, 26 N.Y.3d at 1019, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329.
282. *Id.*
283. *Id.* at 1018–20, 41 N.E.3d at 1143–45, 20 N.Y.S.3d at 328–30.
284. *Id.* at 1019, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329.
285. *Id.* 1018–20, 41 N.E.3d at 1143–45, 20 N.Y.S.3d at 328–30.
286. *Gary*, 26 N.Y.3d at 1019, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329 (citing *In re* N.Y., Lackawanna & W. R.R. Co., 98 N.Y. 447, 453 (1885)).
287. *Id.* at 1019–20, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329.
288. *Id.*
289. *Id.* at 1020, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329 (citing Crawford v. Washington, 541 U.S. 36, 36 (2004)).
290. *See* Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 549, 46 N.E.3d 601, 603, 26 N.Y.S.3d 218, 220 (2015).

division in doing so.[291]

Drawing on the seminal *Zubulake* decision by Southern District of New York Judge Scheindlin,[292] the Court of Appeals began with a useful explanation of the general framework for approaching requests for spoliation sanctions:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.[293]

The underlying dispute in *Pegasus Aviation* was complex and largely irrelevant to the spoliation question. More important was the defendants' document preservation, or lack thereof. The plaintiff first sued in February 2008.[294] In January 2010, the defendant revealed that it had no way of preserving e-mails before 2008 and that, while it had implemented a mechanism to preserve documents beginning in 2008, a series of computer crashes had led to all those documents being destroyed as well.[295]

The supreme court granted the sanction request, finding that the failure to implement a litigation hold was gross negligence as a matter of

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291. *Id.* at 554–55, 46 N.E.3d at 607, 26 N.Y.S.3d at 224 (first citing 1A N.Y. PJI–Civil 1:77 (3d ed. 2017); and then citing Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 255, 926 N.Y.S.2d 53, 58 (1st Dep't 2011)).

292. 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

293. *Pegasus Aviation*, 26 N.Y.3d at 547–48, 46 N.E.3d at 602, 26 N.Y.S.3d at 219 (quoting Voom HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33, 45, 939 N.Y.S.2d 321, 330 (1st Dep't 2012)) (citing *Zubulake*, 220 F.R.D. at 220).

294. *Id.* at 549, 46 N.E.3d at 603–04, 26 N.Y.S.3d at 220–21.

295. *Id.* at 549–50, 46 N.E.3d at 603–04, 26 N.Y.S.3d at 220–21. This somewhat oversimplifies the actual situation. In fact, the plaintiff sought sanctions against two sets of defendants: VarigLog (the company that had destroyed emails) and MP (a company not accused of destroying emails itself but who had a complex ownership relationship with VarigLog). *Id.* The one thing the trial court, appellate division, and Court of Appeals all agreed on was that MP had sufficient control or responsibility over VarigLog to be held responsible for its document retention foibles. *Id.* This too may be an independently important holding.

law, thereby allowing the court to presume that the destroyed ESI was relevant.[296] It granted an adverse inference against the defendant.[297] Though agreeing that the defendant's conduct merited some sanction, a divided appellate division overturned the adverse inference sanction.[298] It disagreed that the litigation hold "was so egregious as to rise to the level of gross negligence."[299] And because the plaintiff had not proved that the destroyed ESI would have supported its claims, an adverse inference sanction was inappropriate.[300] It was particularly bothered by the prospect of granting an adverse inference, which it viewed as "tantamount to granting . . . summary judgment" for the plaintiff.[301]

The Court of Appeals agreed in part with the appellate division.[302] It found the appellate division's analysis of the defendant's mistakes more compelling than that of the trial court, agreeing that the misconduct was merely negligence, not gross negligence.[303] But it faulted the appellate division for failing to engage with the plaintiff's argument as to the relevance of the ESI, stating that the appellate division "all but ignored [the plaintiff's] arguments concerning the relevance of the documents."[304] The Court was also troubled by the appellate division's view that the adverse inference was potentially dispositive.[305] First, the Court pointed to several other cases in which New York courts had granted adverse inferences on a finding of ordinary negligence, implicitly suggesting that whether or not the adverse inference proved dispositive was not a relevant inquiry.[306] Second, it noted that the actual adverse inference charge could be tailored by the trial court, and would not necessarily be done in a way that would resolve the action.[307] The Court

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296. *Pegasus Aviation*, 26 N.Y.3d at 550, 46 N.E.3d at 604, 26 N.Y.S.3d at 221.

297. *Id.*

298. Pegasus Aviation I, Inc. v. Varig Logistica S.A., 118 A.D.3d 428, 428, 987 N.Y.S.2d 350, 351 (1st Dep't 2014).

299. *Id.* at 432, 987 N.Y.S.2d at 354.

300. *Id.* at 435, 987 N.Y.S.2d at 357.

301. *Id.* at 436, 987 N.Y.S.2d at 357.

302. *Pegasus Aviation*, 26 N.Y.3d at 553, 46 N.E.3d at 606, 26 N.Y.S.3d at 223.

303. *Id.*

304. *Id.* at 554, 46 N.E.3d at 607, 26 N.Y.S.3d at 224.

305. *Id.* (quoting *Pegasus Aviation*, 118 A.D.3d at 436, 987 N.Y.S.2d at 357).

306. *Id.* (first citing Strong v. City of New York, 112 A.D.3d 15, 22–24, 973 N.Y.S.2d 152, 156–59 (1st Dep't 2013); then citing Marotta v. Hoy, 55 A.D.3d 1194, 1197, 866 N.Y.S.2d 415, 418 (3d Dep't 2008); and then citing Tomasello v. 64 Franklin, Inc., 45 A.D.3d 1287, 1288, 845 N.Y.S.2d 643, 644 (4th Dep't 2007)).

307. *Pegasus Aviation*, 26 N.Y.3d at 554, 46 N.E.3d at 607, 26 N.Y.S.3d at 224 (first citing 1A N.Y. PJI–Civil 1:77 (3d ed. 2017); and then citing Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 255, 926 N.Y.S.2d 53, 58 (1st Dep't 2011)).

accordingly remanded to the supreme court to determine whether the destroyed ESI was relevant to the plaintiff's claims and, if so, to identify an appropriate sanction.[308]

In dissent, Judge Leslie Stein largely took issue with the factual interpretation adopted by the appellate division and the majority.[309] Notably, she disagreed with the trial court's conclusion that the failure to institute a litigation hold constitutes per se gross negligence, instead concluding that a detailed analysis of the facts surrounding the document destruction supported that finding.[310]

V. EVIDENCE OF THIRD-PARTY CULPABILITY

The Court of Appeals in 2016 decided a pair of cases addressing the question of when a criminal defendant may properly introduce evidence that someone else committed the crime.[311] In *People v. DiPippo*, the Court issued a rare decision reversing a conviction on the grounds that the trial court improperly excluded evidence of third-party culpability.[312] In another opinion released the same day, *People v. King*, the Court refused to reverse upon the same argument.[313]

People v. DiPippo was a further twist in a long and tragic saga. In 1994, a twelve-year-old girl was found murdered in Putnam County.[314] The defendant and another man were arrested two years later and convicted of rape and murder.[315] More than a decade after the conviction, the appellate division vacated it on ineffective assistance of counsel grounds, because the defendant's attorney had previously represented (in another case) a different suspect who, the defendant argued, actually committed the crime.[316]

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308. *Id.*

309. *Id.* at 559, 46 N.E.3d at 610, 26 N.Y.S.3d at 227 (Stein, J., dissenting).

310. *Id.* at 559–60 n.9, 46 N.E.3d at 610–11 n.9, 26 N.Y.S.3d at 227–28 n.9 (first citing Food Pageant, Inc. v. Consol. Edison, Co., 54 N.Y.2d 167, 172, 429 N.E.2d 738, 740, 445 N.Y.S.2d 60, 62 (1981); and then citing Dalton v. Hamilton Hotel Operating Co., 242 N.Y. 481, 487, 152 N.E. 268, 270 (1926)).

311. People v. DiPippo, 27 N.Y.3d 127, 130–31, 50 N.E.3d 888, 889–90, 31 N.Y.S.3d 421, 422–23 (2016); People v. King, 27 N.Y.3d 147, 158, 50 N.E.3d 869, 876, 31 N.Y.S.3d 402, 409 (2016) (first citing People v. Schulz, 4 N.Y.3d 521, 528, 829 N.E.2d 1192, 1196, 797 N.Y.S.2d 24, 28 (2005); and then citing People v. Primo, 96 N.Y.2d 351, 357, 753 N.E.2d 164, 169, 728 N.Y.S.2d 735, 740 (2001)).

312. *DiPippo*, 27 N.Y.3d at 131, 141, 50 N.E.3d at 890, 897, 31 N.Y.S.3d at 423, 430.

313. *King*, 27 N.Y.3d at 151, 158–59, 50 N.E.3d at 871, 876–77, 31 N.Y.S.3d at 404, 409–10.

314. *DiPippo*, 27 N.Y.3d at 131, 50 N.E.3d at 890, 31 N.Y.S.3d at 423.

315. *Id.* at 131, 134, 50 N.E.3d at 890, 892, 31 N.Y.S.3d at 423, 425.

316. People v. DiPippo, 82 A.D.3d 786, 791, 918 N.Y.S.2d 136, 140 (2d Dep't 2011)

During the retrial, the defendant sought to introduce evidence that another man had committed the murder.[317] DiPippo could point to several pieces of evidence potentially implicating the other man: there was a purported jailhouse confession, a history of sexual misconduct, strong evidence that he knew the victim, access to a car that fit the description of one that left the scene of the crime, somewhat equivocal identifications, and a pair of previous assaults that bore some similarity to the crime.[318] The trial court held a hearing to consider the admissibility of the third-party culpability evidence, deciding to exclude it based on the lack of direct evidence and the weakness of the purported identification.[319]

The Court of Appeals in *DiPippo* reiterated the general principle for evaluating the admissibility of third-party culpability evidence as, essentially, the usual standards for admissibility of any evidence.[320] The Court of Appeals had previously rejected a standard unique to such third-party culpability arguments.[321] Accordingly, the question for a defendant seeking to introduce evidence that someone else did it is whether the evidence is more probative than prejudicial.[322] However, "[t]he admission of evidence of third-party culpability may not rest on mere suspicion or surmise."[323] Speculation is not enough; the defendant must explain the basis for third-party responsibility and point to evidence tying the third party to the crime.[324] "[T]he strength of the evidence necessary

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(first citing People v. Harris, 99 N.Y.2d 202, 210, 783 N.E.2d 502, 506, 753 N.Y.S.2d 437, 441 (2002); then citing People v. Ortiz, 76 N.Y.2d 652, 657, 564 N.E.2d 630, 633, 563 N.Y.S.2d 20, 23 (1990); and then citing People v. Longtin, 92 N.Y.2d 640, 644, 707 N.E.2d 418, 421, 684 N.Y.S.2d 463, 466 (1998)).

317. *DiPippo*, 27 N.Y.3d at 131, 50 N.E.3d at 890, 31 N.Y.S.3d at 423.

318. *Id.* at 131–33 n.1, 50 N.E.3d at 890–91 n.1, 31 N.Y.S.3d at 423–24 n.1 (first citing State v. Gombert, 836 A.2d 437, 441 (Conn. App. Ct. 2003); and then citing Gombert v. Warden, No. CV104003855S, 2013 Conn. Super. LEXIS 1895, at *1 (Conn. Super. Ct. Aug. 22, 2013)).

319. *Id.* at 133–34, 50 N.E.3d at 891–92, 31 N.Y.S.3d at 424–25.

320. *Id.* at 135, 50 N.E.3d at 893, 31 N.Y.S.3d at 426 (citing People v. Primo, 96 N.Y.2d 351, 356, 753 N.E.2d 164, 168, 728 N.Y.S.2d 735, 739 (2001)).

321. *See Primo*, 96 N.Y.2d at 356, 753 N.E.2d at 168, 728 N.Y.S.2d at 739.

322. *DiPippo*, 27 N.Y.3d at 135–36, 50 N.E.3d at 893, 31 N.Y.S.3d at 426 (first citing *Primo*, 96 N.Y.2d at 355, 753 N.E.2d at 167, 728 N.Y.S.2d at 738; and then citing People v. Negron, 26 N.Y.3d 262, 268, 43 N.E.3d 362, 366–67, 22 N.Y.S.3d 152, 156–57 (2015)).

323. *Id.* at 136, 50 N.E.3d at 893, 31 N.Y.S.3d at 426 (alteration in original) (quoting *Primo*, 96 N.Y.2d at 357, 753 N.E.2d at 169, 728 N.Y.S.2d at 740) (first citing Holmes v. South Carolina, 547 U.S. 319, 327 (2006); and then citing People v. Schulz, 4 N.Y.3d 521, 529, 829 N.E.2d 1192, 1197, 797 N.Y.S.2d 24, 29 (2005)).

324. *Id.* at 136, 50 N.E.3d at 893–94, 31 N.Y.S.3d at 426–27 (first citing *Primo*, 96 N.Y.2d at 357, 753 N.E.2d at 169, 728 N.Y.S.2d at 740; then citing People v. King, 27 N.Y.3d 147, 157–58, 50 N.E.3d 869, 876, 31 N.Y.S.3d 402, 409 (2016); and then citing People v. Gamble,

to establish the admissibility of proof relating to a third party's culpability will depend, among other things, on the nature of the crime."[325]

What accounts for the divergent outcomes in *DiPippo* and *King*? Different facts. In *DiPippo*, the Court pointed to several categories of evidence, albeit all circumstantial, as supporting admission of third-party culpability evidence: the third party's jailhouse admission, the purported corroboration of several facts in this statement, and "reverse *Molineux*" evidence—that is, evidence that a person has committed similar bad acts (a "reverse" here because the person at issue was not the defendant).[326] In contrast, in *King*, the defendant sought to introduce evidence from a single witness reporting on a conversation the witness had several days before the crime in which someone else reportedly threatened the victim.[327] The trial court found this testimony to be inadmissible as hearsay, and too speculative, and the Court of Appeals affirmed.[328] The *DiPippo* defendant had more evidence, and offered a narrative in which the various pieces fit together, if not perfectly, at least coherently.[329] The *King* defendant had a single, vague piece of testimony without corroboration or any narrative thread tracing it through to the crime.[330]

In his *DiPippo* dissent, Judge Fahey argued that all of the evidence of third-party culpability in that case was inadmissible hearsay,[331] which, as presented at the evidentiary hearing, was correct: the defendant offered his investigator to describe statements given by others.[332] As the majority conceded, these statements (other than the purported killer's jailhouse confession) would need to be made by the declarants at trial to be

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18 N.Y.3d 386, 398, 964 N.E.2d 372, 378–79, 941 N.Y.S.2d 1, 7–8 (2012)); *see also King*, 27 N.Y.3d at 158, 50 N.E.3d at 876, 31 N.Y.S.3d at 409 (citing *Primo*, 96 N.Y.2d at 356, 753 N.E.2d at 168, 728 N.Y.S.2d at 739).

325. *DiPippo*, 27 N.Y.3d at 140, 50 N.E.3d at 896, 31 N.Y.S.3d at 429.

326. *Id.* at 138–40, 50 N.E.3d at 895–96, 31 N.Y.S.3d at 428–29 (first citing *Schulz*, 4 N.Y.3d at 528, 829 N.E.2d at 1197, 797 N.Y.S.2d at 29; then citing People v. Bunge, 70 A.D.3d 710, 711, 894 N.Y.S.2d 97, 97 (2d Dep't 2010); then citing United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984); then citing State v. Garfole, 76 N.J. 445, 451 (1978); and then citing *Primo*, 96 N.Y.2d at 357, 753 N.E.2d at 169, 728 N.Y.S.2d at 740).

327. *King*, 27 N.Y.3d at 152, 157–58, 50 N.E.3d at 872, 876–77, 31 N.Y.S.3d at 405, 409–10.

328. *Id.* at 157–58, 50 N.E.3d at 876, 31 N.Y.S.3d at 409 (citing People v. King, 110 A.D.3d 1005, 1006, 973 N.Y.S.2d 353, 354 (2d Dep't 2013)).

329. *DiPippo*, 27 N.Y.3d at 138, 140–41, 50 N.E.3d at 895–97, 31 N.Y.S.3d at 428–30.

330. *King*, 27 N.Y.3d at 157–58, 50 N.E.3d at 876, 31 N.Y.S3d at 409 (citing *Primo*, 96 N.Y.2d at 357, 753 N.E.2d at 169, 728 N.Y.S.2d at 740).

331. *DiPippo*, 27 N.Y.3d at 141, 143, 145, 50 N.E.3d at 898–900, 31 N.Y.S.3d at 431–33 (Fahey, J. dissenting).

332. *Id.* at 142–43, 50 N.E.3d at 898, 31 N.Y.S.3d at 431.

admissible.[333] Judge Fahey, however, would require that at least some of the evidence proffered to support admission of third-party culpability evidence be admissible as proffered, not just potentially admissible in a different form when presented at trial.[334] In this case, Judge Fahey would have gone even further, finding that even if admissible, the evidence proffered by the defendant was properly found lacking.[335] Unlike in *Primo*, the Court of Appeals' previous decision reversing a conviction for failure to admit third-party culpability evidence, there was no physical evidence, and no one placing the defendant at the scene of the crime.[336]

VI. ADMISSION OF PHOTOGRAPHS

In *Mazella*, discussed above, the Court also considered the trial court's admission of a photograph of the decedent's gory suicide.[337] The defendant had opposed admission of the photograph, arguing that there was no dispute about the method of death and that the picture would be unduly prejudicial.[338] The trial court admitted the photo, both as evidence of the manner of death and as evidence of pain and suffering.[339] The Court of Appeals affirmed:

> The photograph depicted the manner in which decedent committed suicide and was relevant to plaintiff's theory that the violent nature of the suicide—death by self-inflicted knife wounds—was a result of decedent's extreme mental and emotional condition, induced by the long-term use of prescription drugs. Nor was its admission unduly prejudicial since there was already testimony from a paramedic describing the condition in which he found the body, and the official autopsy report from the Medical Examiner's Office was admitted into evidence without objection.[340]

CONCLUSION

This concludes a review of notable decisions on evidentiary issues by the Court of Appeals and other New York courts. The appellate courts

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333. *Id.* at 139–40 n.3, 50 N.E.3d at 896 n.3, 31 N.Y.S.3d at 429 n.3 (majority opinion).

334. *Id.* at 143, 50 N.E.3d at 899, 31 N.Y.S.3d at 432 (Fahey, J. dissenting).

335. *Id.* at 144, 50 N.E.3d at 899, 31 N.Y.S.3d at 432.

336. *DiPippo*, 27 N.Y.3d at 144–45, 50 N.E.3d at 900, 31 N.Y.S.3d at 433 (Fahey, J. dissenting) (citing *Primo*, 96 N.Y.2d at 353–54, 357, 753 N.E.2d at 165–66, 169, 728 N.Y.S.2d at 736–37, 740).

337. Mazella v. Beals, 27 N.Y.3d 694, 705, 57 N.E.3d 1083, 1090, 37 N.Y.S.3d 46, 53 (2016).

338. *Id.* at 703, 57 N.E.3d at 1088, 37 N.Y.S.3d at 51.

339. *Id.*

340. *Id.* at 709, 57 N.E.3d at 1093, 37 N.Y.S.3d at 56.

continue to wrestle with many evidentiary questions and no doubt will do so this year.