Hearsay Testimony Through the Expert Witness

State of New York v. Floyd Y.

By Elliott Scheinberg

> *It is a basic tenet of the law of evidence that in order to be admissible, evidence must be relevant, material and competent.*
> – *People v. Dixon*, 149 A.D.2d 75, 80 (2d Dep't 1989).

> *Legally sufficient evidence [is] defined as "competent evidence" . . . meaning evidence not subject to an exclusionary rule, such as the prohibition against hearsay.*
> – *People v. Swamp*, 84 N.Y.2d 725, 730 (1995).

McCormick on Evidence, citing Wigmore, defines hearsay as "a tale of a tale" or "a story out of another's mouth."[1] Hearsay contemplates two witnesses: "The 'in-court' witness can be tested for perception, memory, narration, and sincerity, the out-of-court declarant cannot."[2] There is a "well-established preference for cross-examination of hearsay declarants."[3]

Wagman v. Bradshaw[4] emphasized that

> [t]he rules of evidence are the palladium of the judicial process. . . . The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience. Venerable rules of evidence should not be casually discarded to accommodate convenience and speed in the gathering and presentation of facts or evidence.[5]

There is a wealth of "venerable time-tested" precedence from the state's highest court, dating back over a century, regarding hearsay testimony through the expert witness (now called the professional reliability rule). Yet the three most recent pronouncements from the Court on this issue – *State v. Floyd Y.*,[6] *Hinlicky v. Dreyfuss*,[7] and *People v. Goldstein*[8] – treat it as though it had never been reviewed and firmly resolved. *Floyd Y.* and *Goldstein* pursue complicated courses of conflicting reasoning only to be ensnarled in the psychological interaction between the expert's testimony and the psyche of the factfinder.

Experts' formulaic recitation that the information from the unvetted out-of-court declarant is commonly relied upon within that profession is often seen as sufficient to bypass the hearsay rule.[9] However, precedent authority mandates that "professional reliability" be construed to read that reliability derives exclusively from a professional source: to wit, the learning/data-pool from within the expert's discipline. A contrary interpretation opens the floodgates for all manner of impermissible hearsay. Unvetted data in any discipline is irresponsible science that could never withstand peer review.

What follows is an in-depth review of the Court's precedent decisions.

Opinion Evidence

Wagman summarized the four sources of opinion evidence: (1) personal knowledge of the facts upon which the opinion rests; (2) where the expert does not have personal knowledge, the opinion may derive from facts and material in evidence, real or testimonial; (3) material not in evidence provided that the out-of-court material derives from a witness subject to cross-examination; and

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(4) material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion, and the out-of-court material is accompanied by evidence establishing its reliability.[10] Experts also may not reach conclusions by assuming material facts not supported by evidence.[11] Cross-examination is "the greatest legal engine ever invented for the discovery of truth"[12] and is the exclusive litmus test. The expert's availability for cross-examination does not cure the ills of incompetent hearsay because an expert's opinion is only as sound as the facts upon which it is based.[13]

Expert Opinion, an "Authorized Encroachment"

Expert opinion may rely on data that is ordinarily incompetent hearsay only if it helps clarify issues calling for professional, scientific/technical knowledge, or skill possessed by the expert and beyond the ken of the typical juror/factfinder.[14] "Expert opinion is often used in partial substitution for the jury's otherwise exclusive province to draw conclusions from the facts. It is a kind of authorized encroachment in that respect."[15] Determination of credibility is, however, within the ability of the average person.

Strait, Keough, and *Samuels*

Historically, admissibility through expert testimony of extrajudicial statements by non-testifying out-of-court declarants has been governed by age-tested wisdom: in *People v. Strait*,[16] *People v. Keough*,[17] and *People v. Samuels*[18] the appeals court, speaking of psychiatrists, warned that the witness, a psychiatrist, "was an expert on the diseases of the mind, but not an expert on determining the facts, where such facts had to be obtained from the statements of others."[19]

Strait added:

> It was essential that the jury should be informed as to the facts upon which the expert based his conclusions in order to determine whether they were well founded. If the facts were not disclosed, his conclusions could not be controverted. He might have been deceived by a false statement prepared for the occasion, and for the purpose of making him a valuable witness upon the trial.[20]

Strait cited then precedent authority:

- "In Abbott's Trial Evidence, 117, it is said that a medical witness must give the facts on which his opinion is founded . . . If those facts . . . include information given him by the attendants of the patient, his opinion is not competent, for those communications are hearsay.'"[21]
- "In *People v. Hawkins* (109 N. Y. 408, 410) . . . '[t]he witness was permitted to testify as an expert concerning the mental condition of the [prisoner], and his opinion would be of value only when founded on facts observed by himself or proved by other witnesses under the obligation of an oath . . .'"[22]

In *Keough*, the Court echoed and expanded its holding in *Strait*:

> [Expert] opinions based in whole or in part upon statements other than those of the person whose sanity is in question related to the expert . . . are not admissible. . . . The ultimate decision . . . rests with the jury, and, in general, must be based upon facts presented before it and not opinions. An exception, however, is made in the case of experts, because "The opinion of the witness may be based upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury, and it is because the facts are of such a character that they cannot be weighed or understood by the jury that the witness is permitted to give an opinion as to what they do or do not indicate." Where his opinion . . . is based upon statements of third persons not in the presence of the jury, the latter not only is in ignorance of what these statements contain, but also has no opportunity to pass on the truth and probative force of the statements or to determine whether the statements were not concocted to reproduce a desired result.[23]

Keough, Samuels, and *Strait* are among the forerunners of *De Long, Cronin*, and *Santi*.[24]

People v. Sugden

People v. Sugden[25] is popularly deemed to have birthed the term "the professional reliability rule." *Sugden* simply reaffirmed the soundness of *Strait, Keough*, and *Samuels,* which permit the expert to opine "upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury,"[26] while simultaneously requiring extrajudicial declarants to undergo the scrutiny of cross-examination. *Sugden* states, "The significance of the requirement, that the person, whose statement has been used by the expert, testify at the trial, is obvious. The quality and content of the statement is exposed to cross-examination upon the trial and all of the evils of hearsay are obviated."[27]

The *Sugden* Exceptions

The Court of Appeals juxtaposed *Sugden* and *People v. Stone*[28] to offer "two exceptions to the prohibition for which the *Samuels* and *Keough* cases once stood."[29] An expert may rely on material of out-of-court origin:

- "if it is of a kind accepted in the profession as reliable in forming a professional opinion and . . . distinguish[es] between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely"; and
- "[h]e may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial."[30]

These "exceptions," however, were neither novel nor groundbreaking. Rather, they were continued time-

honored principles allowing experts to apply their science as an exception to the hearsay rule.[31] The discretely honed language of each "exception" proves that the exclusive pathway into evidence of out-of-court statements is by cross-examination and that the professional reliability rule refers only to "generally accepted" doctrines within the expert's discipline. Subsequent authority from the Court does not permit a contrary interpretation. *Sugden* only repackaged prior authority with a different ribbon.

In re Leon RR

In *In re Leon RR*,[32] the Court further insulated the professional reliability rule by stating that inadmissible hearsay "raises a substantial probability of irreparable prejudice . . . for there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact. Nor is notice or an opportunity to respond afforded."[33]

This has roots in *Samuels*:[34]

> Nor can the error be regarded as trivial or harmless. . . . [I]f the exhibits were at all admissible, they should have been submitted to the jury; if it was improper that the jury should see them, they should not have been received in evidence as a basis for the experts' opinions.

The "Double Duty" Rule

Leon RR engaged the "double-duty" rule in *Johnson v. Lutz*[35] – that is, to constitute an exception to the hearsay rule "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct [to report and enter] or the declaration must meet the test of some other hearsay exception."[36] *Leon RR* cautioned that the truth or reliability of the underlying statement is not "guaranteed" simply because an expert who is under a duty has written it down because so doing would "open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy – cross-examination and impeachment of the declarant."[37]

Hambsch v. New York City Transit Authority

In *Hambsch v. New York City Transit Authority*,[38] the Court of Appeals hermetically sealed the professional reliability rule: "to qualify for the 'professional reliability exception' there must be evidence establishing the reliability of the out-of-court material."[39] Since material from professional databases had already long been an exception to the hearsay rule, *Hambsch* could only have been referring to out-of-court statements.

Borden v. Brady,[40] cited in *Hambsch*, held that "the modification of the strict *Keough* rule . . . was not intended to carve out such a new exception to the hearsay rule."[41] The concurring opinion emphasized that "reliability of the material is the touchstone."[42]

People v. Wernick: *Sugden* Means Only Data That Satisfies *Frye v. United States*

People v. Wernick,[43] citing *People v. Angelo*,[44] *Hambsch*, and *People v. Jones*,[45] held that hearsay is inadmissible under the professional reliability rule unless it passes the *Frye* test.[46] *Frye*, not *Daubert*,[47] is the standard of admissibility for scientific matters in New York. *Wernick* confirmed that the professional reliability exception only refers to scientific data from within the discipline:

> That [*Frye*] protocol requires that expert testimony be based on a scientific principle or procedure which has been "'*sufficiently established to have gained general acceptance in the particular field in which it belongs.*'"[48]

These *Sugden* exceptions "'*specifically incorporate the customary admissibility test for expert scientific evidence – which looks to general acceptance of the procedures and methodology as reliable within the scientific community.*'"[49]

To satisfy *Frye*, the Court, in *People v. Wesley*,[50] established a three-tiered methodology, couched in language of scientific formulae capable of repetition and of netting scientifically predictable results and conclusions: "The test pursuant to *Frye* . . . poses the more elemental question of (1) whether the accepted techniques, (2) when properly performed, (3) generate results accepted as reliable within the scientific community generally."[51] Once the general reliability concerns of *Frye* are satisfied, the court will consider whether there is a proper foundation "for the reception of the evidence at trial."[52]

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In light of *Wernick* and *Wesley*, extrajudicial statements can never satisfy any of the three criteria. This is due to the varied human dynamics and foibles that render quantifiable accuracy – or even predictability – impossible: undetectable bias on the part of the out-of-court declarant or even by the expert who may be desirous of a particular outcome; flawed recollection; misperception or miscomprehension of events; inability to offer an accurate narrative of event(s); and weaknesses of the expert, including intelligence and aptitude. State of mind may be affected as well, by illness, distraction or overconfidence, etc.

People v. Goldstein

People v. Goldstein[53] is an arduously unclear decision hampered by dictum. The defendant pushed a woman to her death in front of a train; his principal defense was insanity. The dispute before the Court focused on the prosecution's psychiatrist, Angela Hegarty, whose testimony contained information derived from interviews of third parties (including multi-tiered hearsay).

The purpose of forensic psychiatry, Hegarty testified, is "to get to the truth," and interviews of people with firsthand knowledge are an important way of achieving that goal. The defendant argued that Hegarty's testimony, recounting statements of interviewees, was inadmissible hearsay pursuant to *Sugden* because the prosecution failed to show that the extrajudicial statements were information of a kind commonly relied on by members of Hegarty's profession, a test it could have never passed under precedent authority, and the admission of the interviewees' statements violated the defendant's constitutional right to confront the witnesses against him under the Sixth Amendment.[54] The Court of Appeals rejected his argument regarding the hearsay but agreed that his "right to confrontation was violated."[55]

The Court, nevertheless, citing the exceptions in *Sugden*,[56] rejected the defendant's argument that Hegarty's testimony was not "accepted in the profession as reliable in forming a professional opinion."[57] The second exception, if the testimony "'comes from a witness subject to full cross-examination on the trial,'"[58] did not apply because the "defendant had no opportunity to cross-examine the interviewees whose statements [we]re in issue."[59]

The Court Supplanted *Frye* With Another Test

Puzzlingly, the *Goldstein* court held that Hegarty satisfied the burden even though she testified that her methodology was accepted by "several researchers," including past presidents of the Academy of Psychiatry and Law.[60] Yet "several researchers" is not "general acceptance" and cannot satisfy *Frye*. By focusing on the reputations of these "several researchers," the Court created a new respect-based test and shifted the burden of proof: "Widespread acceptance by professionals of good reputation is enough." This is a quantum leap from general acceptance:

> The case would be different if the procedures at issue found support only among a faction of outliers not generally respected by their colleagues. But in this case, the trial court had a sufficient basis for finding that the third-party interviews were material of a kind accepted in the profession as reliable, and that therefore Hegarty's opinion was admissible under *Stone* and *Sugden*.[61]

Under *Frye*, the several psychiatrists, irrespective of their reputations, constitute the "faction of outliers."

Goldstein's Rollercoaster Dictum

To avoid any misinterpretation of its holding, the *Goldstein* Court delved into mind-numbing dictum to "point out the existence of a New York law issue that the parties have not addressed and we do not reach"[62] – but the defendant did raise a hearsay objection. The appeals court engaged in an analysis of the professional reliability rule, which is frustratingly unclear and inconsistent with its own precedent authority:

> We have held . . . only that Hegarty's *opinion*, although based in part on statements made out of court, was admissible because those statements met the test of acceptance in the profession. Both parties seem to assume that, if that test was met, Hegarty was free, subject to defendant's constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based. That is a questionable assumption.[63]

The above paragraph loses sight of a century's worth of precedent authority that the acceptance-in-the-profession test refers only to science within the discipline. It is, therefore, not at all "questionable"; the answer is a resounding "no" because the factfinder must be made aware of the facts through admissible evidence, not by way of the expert where no out-of-court-declarant had been cross-examined. This should not have been buried under the headstone of dictum.

The dictum warned that "there should be *at least some limit* on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay.'"[64] "Some limit" is like somewhat pregnant – tainted "facts," irrespective of how minimal, poison the well and produce tainted verdicts and decisions because the smallest amount of hearsay can tip Wigmore's scale as to burden of proof. "Some limit" suggests that modulated and tempered hearsay is tolerable; however, under this scheme it is the expert who tempers and modulates the hearsay, which the factfinder then believes to be thorough and accurate. *Keough*, *Strait*, and *Samuels* require the factfinder to hear all the information synthesized by the expert, conditioned upon its independent admissibility.

Goldstein added that "*Sugden* and *Stone* were concerned with the admissibility of a psychiatrist's opinion, not the facts underlying it. There is no indication in either case that the prosecution sought to elicit from the psychiatrist the content of the hearsay statements he relied on."[65] This is counterintuitive because the expert's opinion and the facts meld and are perceived as inextricably intertwined. Irrespective of any direct effort to elicit the content of the hearsay, the Court, in both cases, emphasized the importance of having the expert "distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely,"[66] which indubitably elicits the hearsay through the backdoor.

The Court's stare decisis evidences this issue's intense review dating back before 1896. Yet the *Goldstein* court stated that

> the distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it, when offered by the proponent, has received surprisingly little attention in this state. . . .

> We have found no New York case addressing the question of when a party offering a psychiatrist's opinion pursuant to *Stone* and *Sugden* may present, through the expert, otherwise inadmissible information on which the expert relied.[67]

To cite one precedent, in *People v. Jones*,[68] (post-*Sugden*), the Court held:

> Authorized use of facts from outside the evidentiary record does not [] alter "the basic principle that an expert's opinion not based on facts is worthless" . . . because "[a]n expert's opinion is only as sound as the facts upon which it is based."[69]

And years earlier, in *Keough*, the Court had warned:

> Where [the expert's] opinion . . . is based upon the statements of third persons not in the presence of the jury, the [factfinder] not only is in ignorance of what these statements contain, but also has no opportunity to pass on the truth and probative force of the statements or to determine whether the statements were not concocted to produce a desired result.[70]

In *Strait*, the Court had issued the same admonition that without proper disclosure of the facts, controverting the expert's conclusions is impossible:

> "Juries are to judge facts, and, although the opinions of professional gentlemen on facts submitted to them have justly great weight attached to them, yet they are not to be received as evidence, unless predicated upon facts testified either by them or by others." . . . [T]he opinion of a physician as to the insanity of the defendant could not be received in evidence where it was based upon declarations made to him by third persons . . .[71]

It is, therefore, surprising that *Goldstein* presented the issue as a "questionable assumption."

The Psychological Impact of Expert Opinion: What Did the Factfinder Think It Heard?

Albeit within its analysis of the defendant's Sixth Amendment right to confront his accuser, the *Goldstein* court emphasized the pervasive psychological dynamics that lurk throughout this issue:

> [T]he interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty's opinion, and thus were not offered to establish their truth…We do not see how the jury could use the statements of the interviewees to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . . The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context, . . . ["(T)he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition."].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.[72]

When an expert hears unvetted extrajudicial statements, the dilemma is its unquantifiability as a pollutant in the expert's conclusions and its imperceptible transmission to the factfinder. Once the expert states an opinion, actual facts become almost irrelevant to the factfinder because of the perception that experts do not base opinions on inaccurate facts. It is a *post hoc, ergo propter hoc* process.

As noted in *Wagman*, "with no opportunity to cross-examine . . . or offer his own evidence or expert testimony to rebut it or controvert . . . the potential exist[s] for a jury to give undue probative weight to out-of-court material."[73] This usurps the role of the factfinder and erodes the judicial process.

Pressing questions persist: (1) if Hegarty's opinion was hearsay because the testimony was submitted for its truth, then the Court should not have dismissed the defendant's objection on hearsay grounds; and (2) in light of *Hambsch*, that "to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material,"[74] how did *Goldstein* conclude that Hegarty's testimony, based on unvetted information from third parties, was or could even be of a kind relied upon by experts?

Wagman v. Bradshaw

In *Wagman*, the Appellate Division remanded for a new trial due to "prejudicial error" because the treating chiropractor testified as to the contents of an inadmissible written report. The report interpreted an MRI prepared by another doctor, who did not testify, from which the chiropractor formed plaintiff's diagnosis. The MRI was not in evidence and there was no proof that the report was reliable. Inasmuch as the written report was inadmissible, testimony as to its contents was similarly inadmissible.

Wagman held that without receipt in evidence of the underlying out-of-court evidence, "a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness."[75] In addition to CPLR 4532-a, *Wagman*, citing *Sugden*, detailed the foundational failures of the written report and rejected the applicability of the first "exception" of sufficient reliability within the profession as the pathway to the admissibility of the MRI. *Wagman* emphasized that expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation is unproduced.

Wagman further reversed prior decisions that "have not limited application of the 'professional reliability'

basis for opinion evidence to permit an expert witness to testify that he or she relied upon out-of-court material which is of a type ordinarily relied upon by experts in the field to formulate an opinion, and have not required proof that the out-of-court material was reliable."[76]

If proof of reliability of the expert's reliance upon out-of-court material to form an opinion renders it receivable in evidence, the desired testimony as to the express contents of the out-of-court material should be likewise admissible.

Hinlicky v. Dreyfuss

Hinlicky v. Dreyfuss[77] involved a medical malpractice action where the decedent suffered a heart attack and died 25 days later, after otherwise successful surgery: "One question predominated: were defendants negligent in not obtaining a preoperative cardiac evaluation to insure that decedent's heart could tolerate the surgery?"[78]

Dr. Aleph testified that he followed clinical guidelines published by the American Heart Association in association with the American College of Cardiology, which he incorporated into his practice because they help determine whether patients need a prep-op cardiac evaluation or can proceed directly to the operating room.

> There is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact.

Hinlicky stated that the algorithm would only be "classic hearsay" if offered to prove the truth asserted therein. Aleph offered the algorithm only as a demonstrative aid to help the jury understand the process he had followed; it was, therefore, unrelated to the question of whether it is of the type of material commonly relied on in the profession.

Citing *Goldstein*, *Hinlicky* added, "[W]hether evidence may become admissible solely because of its use as a basis for expert testimony remains an open question . . . we have acknowledged the need for limits on admitting the basis of an expert's opinion to avoid providing a 'conduit for hearsay.'"[79]

Wagman and at least one other decision that it reversed[80] might well have been decided differently had *Hinlicky* already been handed first.

State of New York v. Floyd Y.

Floyd Y.[81] narrowed the issue to "whether, and to what extent, a court may admit hearsay evidence when it serves as the underlying basis for an expert's opinion in an article 10 proceeding."[82] The majority reversed and remanded for a new trial because "the Due Process Clause protects against the admission of unreliable hearsay evidence, where such hearsay is more prejudicial than probative, regardless of whether it serves as the basis for an expert's properly proffered opinion testimony."[83]

While the concurring opinion is far better reasoned, offering multiple foundational arguments to either entirely obviate or severely restrict *Floyd Y.*'s precedential value, neither majority nor concurrence addressed the professional reliability rule: that the only data an expert may tap into is information from within the expert's discipline. Significantly, much of the hearsay in *Floyd Y.* came from his treatment records, which finds ready exception under a variety of theories, including *Hinlicky*'s algorithm of psychiatric treatment, and *People v. Ortega*,[84] below.

Facts in *Floyd Y.*

Floyd was convicted of sexual abuse and of endangering the welfare of a child. Prior to his release from prison, he was transferred to a psychiatric facility where he was diagnosed with pedophilia. He was treated by Dr. Catherine Mortiere and also examined by Dr. Michael Kunz.

The parties heavily contested the extent to which the state could present hearsay evidence through the testimony of these doctors. Floyd argued that their opinions were inadmissible because they relied on unproven, unreliable accusations, and that the testimony would include impermissible hearsay. The Supreme Court admitted both the opinion testimony and the underlying basis hearsay. The Appellate Division affirmed.

Mortiere testified as to the great likelihood of Floyd's recidivism based on the affidavits of victims who did not testify, police reports, court records, three reports by Kunz and one by Floyd's expert, and her own personal therapeutic relationship as Floyd's treating psychologist. Some of her testimony also concerned unproven sex offenses.

Mortiere lacked personal knowledge of certain events but, nevertheless, detailed sexual abuse against nine individuals. Kunz, who agreed with Mortiere, based his testimony on personal interviews with Floyd, clinical records, and written reports concerning Floyd's sex crimes. Kunz also testified about previous incidents of sexual abuse, including several uncharged instances. Mortiere testified that experts in her field "'rely heavily upon witness statements, affidavits, [and] victim statements . . . because in treatment there are issues of confronting a sexual offender with exactly what happened.'"[85]

The concurrence compares Hegarty (in *Goldstein*) to Mortiere/Kunz, stating that *Goldstein* discussed but did not decide whether statements like those recounted by Hegarty (and concomitantly by Mortiere/Kunz) fall within an exception to the hearsay rule, that the unanswered question is whether this exception permits the proponent of the expert's testimony to elicit not only the opinion, but also the underlying hearsay statements. However, the distinction between Hegarty and Mortiere/Kunz is stark. Hegarty's extrajudicial statements were

gleaned through sleuthing for testimonial purposes, "to get at the truth." Mortiere/Kunz relied on data from hospital treatment records that are deemed inherently "trustworthy as they are 'designed to be relied upon in affairs of life and death.'"[86]

The Majority, Article 10 Proceedings

As in *Goldstein*, the majority and the concurrence conflate century-old settled law, which has etched the parameters of the professional reliability rule around discipline-specific science, and continues to describe as undecided the issue of the admissibility of an expert's underlying basis information, even though it consists of hearsay otherwise subject to exclusion.

The majority's maze-like review of due process combined with its finessing of the hearsay rule in Article 10 proceedings overarch and overwhelm the rules of evidence:

- "In many cases, including article 10 trials, the admission of the hearsay basis is crucial for juries to understand and evaluate an expert's opinion. An inflexible rule excluding all basis hearsay would undermine the truth-seeking function of an article 10 jury by keeping hidden the foundation for an expert's opinion";
- "Basis hearsay does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions," "in order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field"; and
- "Factfinders in article 10 trials cannot comprehend or evaluate the testimony of an expert without knowing how and on what basis the expert formed an opinion."[87]

That said, the majority, nevertheless, shares the concurrence's concern, raised in *Goldstein*: (1) over the "high risk that jurors will rely on unreliable material only because it was introduced by an expert";[88] and (2) that allowing admission of hearsay statements simply because an expert testifies to them as the basis for the expert's opinion "'might effectively nullify the hearsay rule by making [an] expert [into] a conduit for hearsay.'"[89] Extrajudicial basis statements can likely influence the outcome "by undue probative weight."[90]

The concurrence:

- queries, à la *Goldstein*, the absence of explanation for the theory that, if they do not come in for their truth, how do the victims' statements "possibly bolster the State's experts' opinions if the jury did not accept the statements as true";[91] and
- stresses that "[r]eliance on inadmissible evidence is a weakness, not a strength, in an expert's opinion; an opinion that a jury cannot 'understand and evaluate' without hearing inadmissible evidence is a worthless opinion"[92] (consonant with *People v. Jones*[93] and *Caton v. Doug Urban Construction Co.*[94]).

The majority states that "even if the jury 'might' accept basis evidence as true, that is not a problem because the respondent in an article 10 case may present 'a competing view' by calling his own expert."[95] The concurrence rejects this theory: "doctors who testify at article 10 trials are not experts in veracity. They cannot tell a jury whether an alleged victim's statement is true or false – and if they could, the hearsay rule does not permit the substitution of an expert's opinion for cross-examination,"[96] per *Strait, Keough* and *Samuels*.

The majority's solution cuts against the grain of the rules of evidence: that even if the factfinder accepts basis evidence as true, Article 10 allows the respondent "to challenge the State's expert by presenting a competing view of the basis evidence through the testimony of the respondent's expert."[97] The financial incursion of retaining a pricey expert is highly prejudicial, and is avoidable by properly precluding improper hearsay. This writer has found no other decision where the Court of Appeals has imposed the burden, financial or otherwise, of going forward to defend the indefensible. *Wagman* captured it well:

> [Without the underlying evidence], a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the [evidence], through his or her own expert witness.[98]

Leon RR also pined over the "substantial probability of irreparable prejudice" from inadmissible hearsay because "there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact."[99] Similarly, in *Samuels*:[100]

> Nor can the error be regarded as trivial or harmless . . . [I]f the exhibits [evidence] were at all admissible, they should have been submitted to the jury; if it was improper that the jury should see them, they should not have been received in evidence as a basis for the experts' opinions.

The concurrence aptly summed up:

- The basic point of the hearsay rule is that a party is entitled to test by cross-examination a statement that is presented to the jury as true, and for the jury to determine its reliability;
- Reliability should ordinarily be determined through cross-examination;
- Cross-examination tests whether an apparently reliable statement is as good as it looks; and
- "Why could not the State call the victims as witnesses, and let Floyd's lawyer cross-examine them? [N]o one wants to subject victims to inconvenience or unpleasantness. But that is what usually happens when the State wants to incarcerate someone."[101]

Even limiting or curative instructions cannot substitute for what is undoubtedly percolating in the

factfinder's mind: how was the expert shepherded through his reasoning process? The factfinder spackles the gaps with facts, speculative at best, not with evidence.

The Concurring Opinion

Both concurring judges concluded that *Floyd Y.* would have resolved on hearsay grounds without implicating a constitutional issue or a "special rule" to relax the hearsay rule in Article 10 cases. They compellingly challenge the admissibility of basis hearsay because there is nothing inherently trustworthy about it:

> In general, exceptions to the prohibition on hearsay have been recognized only when the hearsay fits within a class of statements (e.g., excited utterances, business records, dying declarations) in which the risk of error or wilful misrepresentation – and hence the need for cross-examination of the declarant – is relatively small. But there is nothing about basis hearsay that makes it inherently trustworthy. And the authorities confirm the conclusion that this reasoning suggests. Basis hearsay, when offered by the proponent of the expert's testimony, is generally considered inadmissible.[102]

Despite the precedential value of *Hambsch*, et al., the concurrence only cited *Wagman*[103] and *New York Evidence Handbook*[104] and no other precedent.

People v. Ortega

The majority's desire to relax the hearsay rule in Article 10 proceedings, which involve therapeutic and diagnostic treatment, neither needed to venture into new territory to carve out a fresh exception nor to relax the rule because the Court had already laid the foundation in *People v. Ortega.*

Ortega was groundbreaking because it expanded public policy to amplify the role of diagnosis, safety plans, and treatment of domestic-violence victims as a basis to modify the rule that had until then excluded such statements in hospital records from the business record rule:

> The references to "domestic violence" and to the existence of a safety plan [in medical records] [a]re admissible under the business records exception. Not only were these statements relevant to complainant's diagnosis and treatment, domestic violence was part of the attending physician's diagnosis in this case. . . . In this context, a doctor faced with a victim who has been assaulted by an intimate partner is not only concerned with bandaging wounds. In addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment. Developing a safety plan, including referral to a shelter where appropriate, and dispensing information about domestic violence and necessary social services can be an important part of the patient's treatment.[105]

Worry over Floyd's diagnosis as a violent sexual offender and his institutionalization, rather than release, following incarceration similarly constitutes society's potential "safety plan," diagnosis and treatment for violent sex offenders.

Conclusion

Inexplicably, notwithstanding a history of firmly evolved authority dating back to the 19th century and affirmed throughout the 20th, the Court has entered the first decade of the new millennium struggling for a solution that lies in its archives. The epicenter of this issue is appeals-court precedent, which demarcates admissibility of extrajudicial statements to discipline specific science as necessary to facilitate comprehension of matters outside the factfinder's ken. Other extrajudicial statements must be subjected to cross-examination because a party is guaranteed a trial by a judge or jury, not an expert.

The majority in *Floyd Y.* aims to relax the standard of basis hearsay in Article 10 proceedings, which leaves the following query: has the majority crafted different standards of admissibility for hearsay depending on the nature of the litigation, i.e., hearsay in an Article 10 proceeding gets a preponderance-of-the-evidence standard? In which cases does hearsay get a "clear-and-convincing" standard or "beyond-a-reasonable-doubt" standard? Caution should be exercised before citing this ruling broadly.

The wisdom of *Wagman* fixes the compass that the fuel driving the expert-opinion engine must be of a high reliability octane because "rules of evidence are the palladium of the judicial process"; they derive from "common sense and experience"; and their violation "destroys the vitality of that judicial process." ■

1. 2 Broun, McCormick on Evidence § 244 (7th ed.)
2. 2 Broun, § 245.
3. *People v. Buie*, 86 N.Y.2d 501 (1995).
4. 292 A.D.2d 84 (2d Dep't 2002).
5. *Id.* at 91.
6. 22 N.Y.3d 95 (2013).
7. 6 N.Y.3d 636 (2006).
8. 6 N.Y.3d 119 (2005).
9. *See, e.g., Greene v. Robarge*, 104 A.D.3d 1073 (3d Dep't 2013).
10. 292 A.D.2d at 86–87.
11. *Quinn v. Artcraft Constr., Inc.*, 203 A.D.2d 444 (2d Dep't 1994).
12. Wigmore, 5 Evidence § 1367 (3d ed., 1940).
13. *People v. Jones*, 73 N.Y.2d 427 (1989).
14. *De Long v. Erie Cnty.*, 60 N.Y.2d 296 (1983); *People v. Cronin*, 60 N.Y.2d 430 (1983); *see People v. Santi*, 3 N.Y.3d 234 (2004).
15. *People v. Drake*, 7 N.Y.3d 28 (2006); *People v. Miller*, 91 N.Y.2d 372 (1998).
16. 148 N.Y. 566 (1896).
17. 276 N.Y. 141 (1937).
18. 302 N.Y. 163 (1951).
19. *Id.*

20. 148 N.Y. at 570.
21. *Id.* at 570–71.
22. *Id.* at 571–72.
23. 276 N.Y. at 145–46.
24. *See De Long*, 60 N.Y.2d 296; *Cronin*, 60 N.Y.2d 430; *Santi*, 3 N.Y.3d 234.
25. 35 N.Y.2d 453 (1974).
26. *Keough*, 276 N.Y. at 145.
27. *Sugden*, 35 N.Y.2d at 459.
28. 35 N.Y.2d 69 (1974).
29. *Id.* at 460.
30. *Id.* at 460–61.
31. *See Strait*, 148 N.Y. 566; *Keough*, 276 N.Y. 141; *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
32. 48 N.Y.2d 117 (1979).
33. *Id.* at 122.
34. *People v. Samuels*, 302 NY. 163, 172 (1951).
35. 253 N.Y. 124 (1930).
36. 48 N.Y.2d at 122.
37. *Id.* at 123.
38. 63 N.Y.2d 723 (1984).
39. *Id.* at 724. *See Scanga v. Family Practice Assocs. of Rockland, P.C.*, 27 A.D.3d 547 (2d Dep't 2006); *Kovacev v. Ferreira Bros. Contracting*, 9 A.D.3d 253 (1st Dep't 2004); *Erosa v. Rinaldi*, 270 A.D.2d 384 (2d Dep't 2000).
40. 92 A.D.2d 983 (3d Dep't 1983).
41. *Id.* at 984.
42. *Id.*
43. 89 N.Y.2d 111 (1996).
44. 88 N.Y.2d 217 (1996).
45. 73 N.Y.2d 427 (1989).
46. 293 F. 1013; *see Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013); *People v. Oddone*, 22 N.Y.3d 369 (2013); *People v. LeGrand*, 8 N.Y.3d 449 (2007).
47. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
48. *Wernick*, 89 N.Y.2d at 115 (emphasis in original).
49. *Id.* at 117 (emphasis in original).
50. 83 N.Y.2d 417 (1994).
51. *Id.* at 422.
52. *Id.* at 429; *see People v. LeGrand*, 8 N.Y.3d 449 (2007).
53. 6 N.Y.3d 119 (2005).
54. *Crawford v. Washington*, 541 U.S. 36 (2004).
55. *Goldstein*, 6 N.Y.3d at 124.
56. *Id.* at 124: "As we explained in *Sugden*, a psychiatrist 'may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion,' or if it 'comes from a witness subject to full cross-examination on the trial.'"
57. *Id.*
58. *Id.*
59. *Id.* at 125.
60. *Id.*
61. *Id.*
62. *Id.* at 126.
63. *Id.*
64. *Id.*
65. *Id.*
66. *People v. Stone*, 35 N.Y.2d 69, 76 (1974): "In evaluating the worth of [the psychiatrist's] opinion, the jury should be informed of his sources and how he evaluated those sources in arriving at his conclusion. On cross-examination, the validity of his reasoning process may be probed and any 'shaky factual basis' of the opinion exposed." *People v. Sugden*, 35 N.Y.2d 453, 459–61 (1974): "It is important that the expert witness distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely."
67. *Goldstein*, 6 N.Y.3d at 126.
68. 73 N.Y.2d 427 (1989).
69. *Id.* at 430.
70. *People v. Keough*, 276 N.Y. 141, 145–46 (1937).
71. *People v. Strait*, 148 N.Y. 566, 572 (1896).
72. *Goldstein*, 6 N.Y.3d at 127–28.
73. *Wagman v. Bradshaw*, 292 A.D.2d 84, 89 (2d Dep't 2002).
74. *Hambsch v. N.Y. City Tr. Auth.*, 63 N.Y.2d 723 (1984).
75. *Wagman*, 292 A.D.2d at 87; *see In re Leon RR*, 48 N.Y.2d 117 (1979).
76. *Wagman*, 292 A.D.2d at 90.
77. 6 N.Y.3d 636 (2006).
78. *Id.* at 639.
79. *Id.* at 648.
80. *Peag v. Shahin*, 237 A.D.2d 271 (2d Dep't 1997).
81. *State of N.Y. v. Floyd Y.*, 22 N.Y.3d 95, 98 (2013).
82. *Id.*
83. *Id.; see* McCormick on Evidence, § 252, (Broun, 7th ed.):

> The constitutional issues related to admission of hearsay focus primarily on the Confrontation Clause of the Sixth Amendment [which] . . . requires "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . Due process has an impact on hearsay admission and the right to cross-examine, but a far less significant role.
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> One of the major issues in the debate . . . has been whether confrontation recognizes the validity of the traditional hearsay rule – whether it effectively accords hearsay exceptions constitutional status or stands independent of the hearsay rule and imposes its own limits on what hearsay is covered and excluded by the Clause.

84. 15 N.Y.3d 610 (2010) (citing *Williams v. Alexander*, 309 N.Y. 283 (1955)).
85. *Floyd Y.*, 22 N.Y.3d at 107.
86. *Ortega*, 15 N.Y.3d 610; *see also Williams*, 309 N.Y. 283; 6 Wigmore, Evidence § 1707, at 36 (3d ed. 1940).
87. *Floyd Y.*, 22 N.Y.3d at 107–08.
88. *Id.* at 106.
89. *Id.* at 107.
90. *Wagman*, 292 A.D.2d at 89.
91. *Floyd Y.*, 22 N.Y.3d at 117.
92. *Id.* at 116.
93. 73 N.Y.2d 427 (1989).
94. 65 N.Y.2d 909 (1985).
95. *Floyd Y.*, 22 N.Y.3d at 117.
96. *Id.*
97. *Id.* at 108.
98. *Wagman*, 292 A.D.2d at 87.
99. *In re Leon RR*, 48 N.Y.2d 117, 122 (1979).
100. 302 N.Y. at 172.
101. *Floyd Y.*, 22 N.Y.3d at 118.
102. *Id.* at 112–13.
103. 292 A.D.2d at 85–86: "[W]hile the expert witness's testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible."
104. Martin, Capra and Rossi, § 7.3.4, 625 (2d ed. 2003).
105. *People v. Ortega*, 15 N.Y.3d 610, 619 (2010).