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LAW AND MERCY: A FEW WORDS ON EXTREME EMOTIONAL DISTURBANCE

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INTRODUCTION:

Defendants charged with murder who kill while under the influence of an extreme emotional disturbance (EED) reflected in a profound loss of control for which there is a reasonable explanation may, upon a sufficient factual showing (whether by his/her words and/or conduct and, where appropriate, psychiatric testimony), seek to persuade the court to give an appropriate instruction to the jurors who may then, if convinced by a preponderance of the evidence, show the defendant mercy by finding him guilty of Manslaughter 1st degree instead of Murder 2d degree. (People v Casassa 49 NY2d 660 [1980]).

As the Court in Casassa observed, “the purpose of EED is to give full scope to what amounts to a plea in mitigation based upon a mental or emotional trauma of significant dimension that (seeks to have) the jury show empathy (and lenience) if it can.” (49 NY2d 660).

And, as noted in People v Patterson 39 NY2d 288 (1976), EED affords the defendant in appropriate cases an opportunity to demonstrate that his/her actions were caused by a MENTAL INFIRMITY (not rising to the level of insanity), which (if accepted by the fact finder as an understandable human response to some overwhelming event or circumstance that overtakes his/her sense of reason), may earn him/her some measure of mercy. (See also People v Shelton 86 Misc2d 136 [Sup. Ct. NY County 1976]).

AN AFFIRMATIVE DEFENSE:

Unlike Justification (or Alibi), EED is NOT a DEFENSE which the People must DISPROVE beyond a reasonable doubt, but rather is an AFFIRMATIVE DEFENSE which the defendant must prove by a PREPONDERANCE of the evidence, BUT ONLY if the People have first established the elements of Murder 2d degree beyond a reasonable doubt. (People v Patterson 39 NY2d 288 [1976]).

If the defendant is ACQUITTED of the Murder charge, there is no need for the jury to go any further in search of mitigating factors when there is nothing left to mitigate. And, since the People always carry the burden of proof, and the option to offer evidence in mitigation (or argue EED based upon the People’s evidence), only arises in the event of an initial finding of guilt with respect to the murder charge, courts have held that there is no violation of the defendant’s due process rights. (People v Patterson supra, People v Herloski 112 AD2d 5 [4th dep’t 1985]).

Jurors are always instructed to follow and apply the law objectively and dispassionately, but EED represents one of the few times that they are actually given the power, when the facts so warrant, to exercise their subjective discretion to soften the blow (by convicting the defendant of the lesser charge) when they're satisfied that the defendant's mind was actually overborne by some mental infirmity (EED), for which there was a reasonable explanation, and that when viewing the situation as he/she saw it (however inaccurately), whatever he/she did to cause the death of another, (e.g. stabbing, shooting, strangling), while far from worthy of absolution, merits some degree of human understanding and forgiveness.

HEAT OF PASSION OR SLOW BURN :

People often think of EED in terms of (and the common law used to require) the HEAT OF PASSION triggered by some unexpected occurrence, discovery or revelation (e.g. spousal infidelity, chronic abuse/humiliation, betrayal) that causes the defendant to "flip his/her lid" and strike out immediately and spontaneously in act of uncontrollable rage, anger or distress. (People v Ferraro 161 NY 365 [1900]).

That has not been the case for quite some time. As noted in People v Patterson supra in 1976, "an action influenced by an EED is NOT one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected the defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore." (39 NY2d @ p.303).

See also People v Parmes 114 Misc2d 503 [1982]): a COOLING OFF period does NOT necessarily negate an EED, and a SPONTANEOUS EXPLOSION is NOT necessarily required where the defendant can show that that he/she had been stewing for some time due to mental trauma and eventually lost it and struck out in violence.

SIGNS OF EED:

The determination whether to allow the defendant to obtain a jury instruction on EED (let alone deciding whether to extend the defendant its mitigating effects), is a fact-sensitive determination that turns on any number of factors including the defendant's mental/emotional state, (seemingly together or undone), his/her conduct and demeanor before the homicide (progressive unraveling or deliberate premeditation), during the homicide i.e. the manner in which it was carried out (was it cold, calm and dispassionate or an act of volcanic rage evincing a loss of control), the resulting injuries (a single, killing wound or multiple injuries suggesting a loss of control), the defendant's conduct after-the-fact (controlled cover-up and self-serving falsehoods or erratic, irrational behavior), and the nature of the provocation, (considering the defendant's relationship with the victim and any other relevant player in the story).

See, for example, People v McKenzie 19 NY3d 463 (2012): the subjective component of EED may be inferred from the circumstances indicating an extreme LOSS OF CONTROL, and can be established without psychiatric evidence. (See also People v Israel 26 NY3d 236 [2015]).

In the end, it may come down to whether jurors can truly put themselves in the defendant's shoes deep enough to understand what he/she was going through and find it in their hearts to grant him/her a modicum of human consideration in the form of a conviction for a lesser crime than murder as charged. It may also be easier for a jury to exercise empathy for the defendant in cases where the victim, while certainly undeserving of a homicidal demise, is a less-than-sympathetic character.

SOME EED CASES:

In People v Harris 95 NY2d 316 (2000), the Court of Appeals reversed the AD's affirmance of the trial court's decision which rejected the defendant's request for an instruction on EED, holding that sufficient facts had, in fact, been presented for the jury to find by a preponderance of the evidence that the elements of the affirmative defense had been met. (citing People v Moye 66 NY2d 887 [1985]).

The defendant in Harris confessed to the police that he had completely lost control when his long-time friend (who had been carrying on with the defendant's girlfriend),crudely and repeatedly taunted him about having sex with his girlfriend who he said was going to leave the defendant for him. The defendant proceeded to hack his old "friend" to death with a machete which he described as being like watching a movie (characterized by the defense psychiatrist as "derealization"), that he could not stop. After cutting the victim to pieces, the defendant was crying and vomiting uncontrollably.

In the Court's view, viewing the evidence in the light most favorable to the defendant, there was enough for a rational jury to conclude that the defendant suffered a severe loss of control (associated with the subjective element of EED), and for which there was a reasonable excuse (objective component) in that he was provoked to rage by his girlfriend's past indiscretions with the victim and her expected future infidelity which the victim cruelly rubbed in his face.

In response to the People's argument that the defendant acted only out of jealous anger, the Court found that this only raised a question of fact for the jury to resolve.

In contrast, consider the case of People v Hassan 2018 NY Slip Op. 01741 (4th dep't 3/16/18) where the defendant, who ambushed his unsuspecting wife in the dark hallway of his office and cut off her head with two hunting knives that he'd bought an hour earlier, claimed (unsuccessfully), that he acted in self defense as a victim of long-term domestic violence instead of asserting that he lost control as a result of an EED.

The Court said that the facts in Harris were virtually indistinguishable from the facts of People v Moye supra where the defendant told police that he had snapped and "gone bananas" when the victim teased and ridiculed him for his sexual impotence whereupon he proceeded to decapitate and eviscerate her. The Court concluded that there was sufficient evidence of a reasonable excuse for the defendant's claimed loss of control to submit the affirmative defense for the jury's consideration.

But in People v Roche 98 NY2d 70 (2002), the Court of Appeals reversed the AD's reversal of the trial court's determination to deny the defendant's request for the EED jury instruction, finding that the record was lacking in evidence that the defendant actually suffered a mental infirmity (subjective element) inasmuch as he told police that his wife must have killed herself and his conduct (including attempts to evade identification and changing his story), did not evince a loss of control.

The initial trial of this case, (in which the defendant did NOT seek an EED instruction), resulted in a reversal of the murder conviction based on an improper Allen charge. In the second trial, the evidence established that the defendant had stabbed his wife a dozen or more times in the face, chest and back during a violent altercation which left the victim lying on her back on the kitchen floor and blood all over the walls and furniture in their apartment building dwelling.

Witnesses had observed the defendant arguing in the lobby earlier in the day and others testified to hearing the defendant complaining weeks before that the wanted to leave his "crazy wife" (who he said was hooked on drugs), but couldn't move in with his sister.

Late in the afternoon on the day of the homicide, witness overheard a loud argument and the sound of glass breaking in the defendant's apartment. Shortly thereafter, the defendant was observed running down the hallway with a brown bag, saying, "she killed herself, call the police." Later on, a couple residents peeked through the open apartment door and saw blood on the walls and the defendant emerged, carrying a duffel bag and saying, "I gotta take everything out because the cops will be coming. I'll return later to talk to them."

The defendant left the apartment building and went to an adjacent building where he visited the tenant and removed and inspected his sweaters. He exclaimed, "mama's dead. I killed her." He then expressed concern over being seen by a visitor who had also come to that apartment. He then went to his sister's house where he told her son-in-law that his wife had tried to kill herself two days ago. He later told his sister that he had hit his wife during an argument and she "may be dead."

At the sister's urging, the defendant went to the police station and said, "'my wife killed herself. I want to find out who did this." The defendant was then advised of his Miranda rights after which he gave a written statement describing how he and his wife went out all night after which they came home and she slept most of the morning. That afternoon, she sent him out on several errands after which he came home, found the door open, blood on the walls and his wife lying dead on the kitchen floor. So he ran out declaring that "mama had killed herself."

The thrust of the defendant's trial defense was that the police had rushed to judgment and arrested the wrong guy. They called a forensic pathologist who was allowed to opine that the injuries (which included no evidence of mutilation or disfigurement), were consistent with an attack by a stranger. At the charge conference, defense counsel requested an EED instruction based on what the DA had argued in summation in the first trial (that the defendant killed his wife in a fit of murderous rage). The trial court denied the request and the defendant was convicted of Murder 2d degree which the AD reversed (ruling that EED should have been charged).

The Court of Appeals reversed, holding that there was insufficient evidence that the defendant was suffering from a mental infirmity at the time of the killing (other than perhaps an intense desire to be rid of his allegedly drug-addicted wife). Moreover, even though the advancement of inconsistent defense theories ("I didn't do it," vs "I did it under the influence of EED"), may not necessarily preclude the EED jury instruction (People v White 79 NY2d 900, [1992]), a denial of responsibility for the crime can certainly affect the sufficiency of evidence in support of an EED claim. (Id @p.903).

In People v White supra, the defendant killed his wife in their apartment but denied any involvement in her death. There were no statements evincing any loss of control or other evidence (psychiatric or otherwise), suggesting that he actually was experiencing an EED at the time of her death. As in Roche, there was no basis in the record to support the charge.

The Court in Roche also said that there was no basis to permit an EED instruction based on the prosecutor's arguments in summation in the first trial (rage-filled stabbing), because those comments were/are NOT EVIDENCE and, therefore, did not supply proper facts in support of the affirmative defense.

In People v Casassa supra, the Court of Appeals traced the history of EED (from the former Heat of Passion/Spontaneous Combustion construct to the modern formulation recognizing that a mental infirmity can percolate and progress over a period of provocation before resulting in a violent outburst), and REJECTED the defendant's argument that the REASONABLENESS of the infirmity should be measured upon an ENTIRELY SUBJECTIVE STANDARD.

The defendant was dating the victim for about two months before she ended the relationship with the pronouncement that she was not in love with him. Crestfallen, the defendant eavesdropped on the victim from the lower apartment that he'd broken into and then broke into her apartment with a knife when she was absent. Some time later, he visited her with bottles of wine and liquor which he offered as gifts that she rejected. He then stabbed her in the throat several times and then dragged her into the bathtub where he submerged her in water to make sure that she was dead.

During the ensuing police investigation, the defendant offered to be helpful and stated that he had been in the victim's apartment (but did not kill her). After Miranda warnings, he eventually confessed to the murder during the course of a nine hour interrogation (which was not suppressed). At trial, a defense psychiatrist testified that the defendant was obsessed with the victim and that his personality "peculiarities" and the relationship put him into an EED.

The trial court acknowledged that EED can be triggered by a sequence of events (rather than just a single precipitating factor), but the defendant must also establish that his emotional reaction to such events was REASONABLE such that a jury, in considering the totality of the circumstances, could UNDERSTAND how someone in his situation might come unglued because his reason was overwhelmed.

The trial court concluded however, (and the Court of Appeals agreed), that the defendant's emotional reaction at the time of the crime was so PECULIAR TO HIM as to be lacking in objective reasonableness, thereby precluding a reduction from murder to manslaughter. In short, in the Court's view, there was no reasonable explanation or excuse for the defendant's emotional disturbance. As the Court saw it, the defendant's conduct was more a matter malevolence than an understandable human response deserving of mercy.

The Court explained that a jury (or judicial fact-finder), may find mitigation if it finds that the defendant was indeed suffering from an EED at the time of the crime for which there was a reasonable explanation which must be considered from the defendant's point of view (however inaccurate), but which must also be one that a fact finder could accept as understandable. As such, the test is both a subjective and objective one.

In People v White supra, the Court of Appeals held that it was NOT ERROR to deny the defendant's EED charge request, finding that while the defendant may have satisfied the objective part of the equation (requisite provocation by his wife's repeated humiliation of him), the subjective element (mental infirmity/loss of control) could NOT be inferred from the provocation itself which occurred weeks before the homicide which the defendant repeatedly denied committing anyway.

The court observed that while the passage of time alone (i.e. "cooling off" period) is not enough to defeat an EED claim as a matter of law (People v Patterson supra 39 NY2d @ p.288), there still must be some evidence that a temporally remote provocative act (still) affected the defendant at the time of the homicide to such a degree that the jury could reasonably conclude that he acted under an EED.

The court also rejected as speculative the defendant's argument that his peculiar conduct, after allegedly finding his wife's dead body in their apartment, (including stuffing her body in a closet and going about his daily routines as usual), was evidence of a mental infirmity. (citing People v Walker 64 NY2d 741 [1984]): (Evidence showed only that the defendant shot the victim out of anger or embarrassment over a money dispute in a bar, but there was no evidence beyond speculation to support the subjective element of mental infirmity).

See also People v Finney 181 AD2d 789 [2d dep't 1992]): Defendant's post-stabbing conduct of cleaning up the scene, wiping away fingerprints and removing the victim's clothes was deemed to be INCONSISTENT with the LOSS OF CONTROL associated with EED.

And in People v Glaser 168 AD2d 941 (4th dep't 1991]), the defendant was deemed to be NOT entitled to an EED instruction for killing his estranged wife and her parents (out of dissatisfaction with his divorce), because the defendant failed to show that there was a reasonable explanation/excuse for his alleged disturbance.

See also People v Croom 11 AD3d 253 [1st dep't 2004]): the defendant's anger, embarrassment and heart break over rejection by his girlfriend, did not, under the circumstances, provide a reasonable explanation for the defendant's claim of EED. (And see People v Rivera 123 AD2d 794 [2d dep'tv1986]: Defendant's shooting of wife based on a long-lasting, strife-filled relationship did not qualify as an understandable human response meriting mercy. And see People v Marinacci 190 AD2d 819 [2d dep't 1993]): Defendant's calm and controlled pointing of gun and shooting of his wife and son during argument did not warrant an EED instruction.

THE NOTICE REQUIREMENT: CPL 250.10

1 (b): Evidence of mental disease or defect TO BE OFFERED BY THE DEFENDANT in connection with the affirmative defense of EED as defined in PL 125.25(1)(a) qualifies as PSYCHIATRIC EVIDENCE and, as such...

2. is NOT ADMISSIBLE upon a trial UNLESS the defendant SERVES upon the People and FILES with the court a WRITTEN NOTICE of his intention to present psychiatric evidence.

SUCH NOTICE MUST BE SERVED AND FILED BEFORE TRIAL AND NOT MORE THAN 30 DAYS AFTER ENTRY OF THE PLEA OF NOT GUILTY TO THE INDICTMENT.

IN THE INTEREST OF JUSTICE AND FOR GOOD CAUSE SHOWN, HOWEVER, THE COURT MAY PERMIT SUCH SERVICE AND FILING TO BE MADE AT ANY LATER TIME PRIOR TO THE CLOSE OF EVIDENCE.

As is evident, while the statute imposes a 30-day notice requirement upon the defendant (if he intends to offer psychiatric or other evidence in support of EED), it also provides for a wide window of flexibility in the interests of justice if good cause (for late notice of such intent) is demonstrated.

In People v Gonzalez 22 NY3d 539 (2014), the Court of Appeals held that while a defendant who seeks to introduce expert or lay testimony in support of an EED affirmative defense MUST COMPLY with the NOTICE REQUIREMENT before the instruction may be given to the jury, CPL 250.10 does NOT require such notice where the defendant requests an EED charge at trial based SOLELY upon the evidence presented by the People in their case-in-chief.

The defendant in this case killed and dismembered his boss and thereafter confessed on video tape and in writing. He initially served notice of intent to offer psychiatric evidence in support of EED whereupon the People had the defendant submit to an examination by their own expert. Just before the start of trial, the defense advised that they were not going to present any psychiatric evidence and the People stated their intention to offer into evidence the videotaped statement which, unlike the written one, contained facts supporting EED.

Prior to summations, the defense requested an EED instruction based on the videotaped confession, but the People noted that the defense had withdrawn its CPL 250.10 notice and should not be permitted such an instruction unless the People could call their expert to the stand. The trial court was satisfied that there was a basis for the instruction but denied the request unless the People called their expert (presumably to rebut the affirmative defense).

The AD affirmed the defendant's Murder conviction, ruling that the defendant's 11th-hour request was tantamount to late notice under CPL 250.10. The Court of Appeals reversed, holding that inasmuch as the defense, rather than OFFERING EVIDENCE OF EED, was relying solely on the People's own evidence to advance the affirmative defense (and hence, there was no unfair surprise), there was no need to provide notice. The Court also found that the trial court erred in conditioning its ruling on the People's first being allowed to call an expert to rebut EED arising from evidence which they, themselves, produced.

While the defense strategy in Gonzalez was clever (if not risky), the safer practice in light of the new rules regarding discovery and reciprocal discovery, may be to provide notice of intent to offer evidence in support of EED as soon as practicable (even if relying solely on the People's proof, especially if the defense is considering re-calling a prosecution witness), rather than chance waiting to the last minute only to have the door to the affirmative defense slammed shut right before closing argument only to hope for a reversal on appeal.

In People v Taglianetti 2020 NY Slip Op. 02561 (4th dep't 5/1/20), the Fourth Department held that the trial court did NOT abuse its discretion in denying the defendant's request to offer PSYCHIATRIC EVIDENCE in support of his EED claim because: 1. he did not provide notice of intent until SIX MONTHS after the 30-day deadline and 2. he FAILED to show good cause to warrant permitting such evidence in the interests of justice. In particular, in the court's estimation, the defendant failed to demonstrate that there would be any MERIT to the affirmative defense in this case.

Even if there was error in such denial, the court deemed it to be HARMLESS in view of the overwhelming evidence to support the People's position that the defendant's shooting of the victim (twice in the chest and then once in the back at close range), after driving all the way from Virginia to Chautauqua County to confront the victim, (unsuccessfully at work then fatally in the latter's driveway where the defendant laid-in-wait), was pre-mediated and purposeful. (The defendant had also twice threatened the victim a month before via text messages after discovering that his wife was carrying on an amorous on-line relationship with him).

Also deemed harmless error was the trial court's summary denial of the defendant's pre-trial request for an EED instruction before any evidence was presented since, (as noted above), support for such instruction can derive from the People's proof alone. (People v Gonzalez, supra)

THE EED JURY INSTRUCTION:

If (and only if) you find that the People have proven beyond a reasonable doubt that the defendant intentionally caused the death of the victim in this case, you must then consider the affirmative defense of EED which does not relieve the defendant of responsibility for the homicide, but REDUCES the degree of the crime from Murder 2d degree (or Attempted Murder 2d degree [People v White 69 NY2d 856 (1987)] to Manslaughter 1st degree (or Attempted Manslaughter 1st degree).

There are THREE COMPONENTS to the affirmative defense:

1. the defendant must have had an EMOTIONAL DISTURBANCE SO EXTREME as to result in and become manifest as a PROFOUND LOSS OF SELF CONTROL;
2. there must have been an EXPLANATION or EXCUSE for such EED that was REASONABLE. The reasonableness of that explanation/excuse MUST be determined from the VIEWPOINT OF A PERSON IN THE DEFENDANT'S SITUATION UNDER THE CIRCUMSTANCES AS THE DEFENDANT BELIEVED THEM TO BE; and
3. in committing the homicide, the defendant must have acted UNDER THE INFLUENCE of the EED.

Your determination of the REASONABLENESS of the explanation/excuse MUST be made initially by DETERMINING the SITUATION in which the defendant found him/herself, including the the CIRCUMSTANCES as he/she BELIEVED THEM TO BE AT THE TIME, HOWEVER INACCURATE THAT BELIEF MAY HAVE BEEN.

THEN YOU MUST DETERMINE WHETHER, FROM THE VIEWPOINT OF A PERSON IN THAT SITUATION, THE EXPLANATION/EXCUSE WAS REASONABLE.

IT IS NOT THE ACT OF KILLING THAT MUST BE SUPPORTED BY A REASONABLE EXPLANATION/EXCUSE BUT THE EED FOR WHICH THERE MUST BE A REASONABLE EXPLANATION/EXCUSE.

It is NOT, however, a reasonable explanation/excuse that the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's: SEXUAL ORIENTATION, SEX, GENDER, GENDER IDENTITY, GENDER EXPRESSION, OR SEX ASSIGNED AT BIRTH.

The defendant has the burden of proving the affirmative defense by a PREPONDERANCE OF THE EVIDENCE (i.e. the greater part of the credible and reliable evidence such that the evidence that supports it is of such convincing quality as to outweigh any evidence to the contrary). In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider ANY RELEVANT EVIDENCE WHETHER INTRODUCED BY THE PEOPLE OR THE DEFENDANT.

If you find that the defendant has NOT proven the affirmative defense by a preponderance of the evidence, then, based on your initial determination, you must find the defendant GUILTY of Murder 2d degree.

If you find that the defendant HAS PROVEN the affirmative defense by a preponderance of the evidence, then you must find the defendant NOT GUILTY of Murder 2d degree but you must find the defendant GUILTY of Manslaughter 1st degree.

FINAL THOUGHT:

The common thread in all EED cases, then, is a severe LOSS OF CONTROL stemming from a demonstrable mental disruption triggered by some external event (or a series of upsetting circumstances) that knock(s) the defendant off of his/her emotional rails and which the jury can accept as an understandable human response to a provocative situation. And, while criminal defense lawyers may often swing for the fences and seek total exoneration of their clients, in some murder cases, the evidence may only permit a credible plea for mercy and forgiveness. When that happens, a conviction for Manslaughter 1st degree can be chalked up as a victory.