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The Elements of Arson: Sifting Through the Fire, Smoke, and Damage

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THE ELEMENTS OF ARSON : SIFTING THROUGH THE FIRE🔥 SMOKE💨 AND DAMAGE 🏚

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INTRODUCTION:

Arson prosecutions are not particularly common, but when charges are brought, the cases can often provide the foundation for interesting and (in cases of homicide or serious injury to innocent parties), tragic stories where science, law and human nature coalesce in the clutter and smoke of circumstantial evidence.

In cases where the fire has been deemed (by proper cause and origin investigations conducted by qualified experts) to have been intentionally set, the clearance (i.e. arrest) rate nationwide is below 10 percent, and the conviction rate is even less than that (i.e. under one percent). (See excerpts from Anatomy of an Arson Case by Guy E. Burnette Jr. Esq @interfire.org).

This may be, as the author suggests, because fires, by their very nature, consume and destroy evidence in their wake, (though leaving clues behind as to cause an origin), fire scenes can be misinterpreted by the untrained, misinformed or shortsighted investigator, the perpetrator may be long-gone before the fire is even detected, there may well be no eyewitnesses, and the time, energy and resources required to put a successful prosecution together (assuming the arson is provable and the perpetrator has been identified and apprehended), may be lacking.

That is why investigators (and criminal defense attorneys who cross examine them), must not only be sufficiently schooled in the anatomy of fires and science of arson detection, (including discerning the point of origin, detecting evidence of accelerants, and burn patterns), they cannot overlook the fundamentals of basic detective work including looking for signs of forcible entry into the premises (assuming there is enough structure left to make such a determination), determining whether personal property was removed (e.g. items of particular pecuniary or sentimental value), or combustibles were placed in a location and manner to maximize burning.

Given that arsonists are seldom observed in the act of starting a fire (whether by throwing a match into a vapory trail of gasoline poured on a stairway, tossing a Molotov cocktail through a window or jerry-rigging the electrical wiring), fire investigators must undertake the basic police work of interviewing neighbors (e.g.any strange comings and goings, any unusual behavior on the part of the building owner or others), to determine whether the suspect (assuming one has come into focus), had the OPPORTUNITY and a MOTIVE to set the fire (or, perhaps, enlist someone else to do it), whether financial (e.g. to collect on a fire insurance policy and pay off debts or just “cash in and move on”), or personal (e.g. animus towards a spouse).

MOTIVE:

Perhaps more than in any other type of case, evidence of MOTIVE (assuming there is sufficient evidence of an incendiary fire and of the defendant's opportunity to have committed it), is of critical importance in arson prosecutions, even though it is NOT an element of the crime at any level.

As the CJI states: While INTENT (i.e. a person's conscious objective or purpose to engage in certain conduct or to bring about an unlawful result), is an element that the People must prove beyond a reasonable doubt, (e.g. Arson 5th degree, Arson 3d degree, Arson 2d degree, Arson 1st degree), MOTIVE (i.e. the reason why a person chooses to engage in certain conduct), is NOT an element of the crime.

HOWEVER, the CJI instructs, "evidence of motive (or its absence) MAY BE CONSIDERED by (the jury). If (the jury) finds that the defendant had a motive, that it is a circumstance that (the jury) MAY WANT TO CONSIDER AS TENDING TO SUPPORT A FINDING OF GUILT."

Conversely, evidence of the ABSENCE of any motive for the defendant to have committed the crime MAY BE CONSIDERED by the jury as tending to support a finding of NOT GUILTY.

Undoubtedly, investigators focusing on a particular suspect will go to great lengths to identify a plausible motive for the defendant to have committed so serious (and dangerous) a crime, and if they find evidence of it, (e.g. serious debt, expressions of hostility toward the occupant, desire for a new beginning with someone else), prosecutors can be expected to beat it like a 55-gallon drum especially where the remaining evidence is (as most often is the case), entirely circumstantial.

In People v Coldiron KA-09-01941 (4th dep't 9/30/11), the Appellate Division affirmed the defendant's conviction for Arson 3d degree and Attempted Grand Larceny 2d degree (trying to collect on a recently-purchased fire insurance policy) in connection with a fire to the defendant's Elmwood Ave coffee shop while the defendant (who had significant gambling debts), fled down a fire escape from his apartment two floors above.

The court held that evidence that the defendant had admitted (to his business partner) that he he had torched his vehicle several years earlier to collect under his landlord's premises insurance policy was relevant to establish his MOTIVE and to explain his conduct in the case on trial. (citing People v Collins 29 AD3d 437). See also People v Parsons 30 AD3d 1071 [4th dep't 2006]: Evidence of prior acts of DOMESTIC VIOLENCE by defendant properly admitted on the issue of MOTIVE.

In contrast, see People v Richardson 55 AD3d 934 (3d dep't 2008) where firefighters were not able to pinpoint an actual cause of the fire, (there were multiple appliances plugged into the kitchen's single outlet where the defendant kept a can of paint thinner while painting the kitchen), and the prosecution FAILED TO ADDUCE ANY EVIDENCE OF MOTIVE sufficient to support the conclusion that the defendant had perpetrated an arson.

BEWARE OF BAD SCIENCE:

Expert opinions, it seems, can sometimes be adopted and passed on like heirlooms from one generation to the next even though their assumptions may be grounded in junk science or based on little more than anecdotal evidence unsupported by any real scientific method.

In an article entitled ON THE NEW SCIENCE AND PAST MISTAKES OF FIRE INVESTIGATIONS-JUST ABOUT EVERYTHING WE THOUGHT WE KNEW WAS WRONG by Edward Humes (crimereads.com 1/18/19), the author points to certain startling evidence found in the remains of houses that had been burned down in the early 1990's by devastating, wind-driven fires in the parched Oakland Hills area of San Francisco that cast serious doubt on the cause of fires that had once been attributed to arson.

In over a quarter of the homes inspected, investigators found "crazing" (small, hairline fractures) in the window glass which, in other cases, had been formerly attributed to fast-moving heat (commonly associated with arson). In these "natural" fires, the phenomenon was found to have been caused by rapid cooling due to the application of water from fire hoses.

LIME STREET FATAL FIRE IN FLORIDA:

In a 1990 Florida case, prosecutors were intent on prosecuting a suspect for allegedly killing his pregnant wife, her sister, nieces and nephews in a house fire (on Lime Street), that he was believed to have set off with flammables.

The defendant told police that his son had accidentally started the fire while playing with a lighter on the couch, but fire investigators concluded from the "V-pattern" of the fire damage and apparent pour patterns (of suspected flammables) on the floor that the defendant had splashed gasoline at different locations and set them on fire.

Prosecutors brought in a former police forensic expert (John Lentini), to test and "disprove" the defendant's "accidental fire on the couch" story. Toward that end, the investigator (now a nationally recognized fire investigation consultant), staged a nearby home that was slated for demolition, set the couch on fire and let it burn for the same amount of time as the suspect house until firefighters intervened to put it down.

To the investigator's (and prosecutor's) surprise, the demo-house (in which no flammable liquids were used), revealed an almost identical burn pattern to the suspect's house which the investigator attributed to the phenomenon of FLASHOVER (described as the transformation of a fire IN A ROOM to into a ROOM CONSUMED BY FIRE).

The investigator concluded that this fire called into question the commonly-held assumption that the largest V patterns (from fires burning up and outward) and areas of greatest damage in a burning structure generally indicate the starting point of the fire (i.e. the most damage typically occurs where the fire burns the longest).

This rule-of-thumb, in the investigator's view, did not provide a reliable explanation in a situation where flashover (where large V-patterns can form in areas away from the point of origin), occurred and left burn marks that mimicked flammable-liquid pour patterns.

As a consequence, the prosecutor, now believing that there was a plausible alternative theory that was consistent with the defendant's version of events, declined to go forward, and the defendant was spared what, undoubtedly, would have been a life-time in prison had he been tried and convicted.

CALIFORNIA MOTHER GRANTED CLEMENCY AFTER 29 YEARS IN PRISON:

On January 12, 2021 JoAnn Parks who had been sentenced in 1993 to LIFE IN PRISON WITHOUT PAROLE, was granted clemency and allowed release to parole by California's governor, after after several years of advocacy by the California Innocence Project (CIP).

According to an article by Alex Riggins appearing on January 12, 2021 in the San Diego Union-Tribune: (California Innocence Project client, convicted of murdering three children in house fire, released), the defendant's convictions of three counts of Murder 1st degree (of her own children) were based on faulty science that would not stand up to the standards of modern fire science. (sandiegouniontribune.com).

The evidence at the defendant's trial established that the defendant was awakened in her home around midnight to the sounds of her children screaming. She was unable to get to them on account of a raging fire in their apartment, so she went to a neighbor's house to call police who could not arrive in time to save them.

Fire investigators initially thought the fire was accidental but later changed their minds to arson based on what they determined were two points of origin (one in the living room, the other in a bedroom). They also found a hamper which they believed had been placed in front of a closed closet door behind which the burnt body of one of the children had been discovered.

At a hearing held in 2016 in Los Angeles County Supreme Court on motion to set aside the convictions, lawyers for the CIP called the same investigator (John Lentini) who had investigated the Lime Street fatal fire in Florida and found that it was most likely an accident.

He concluded that the fire investigators in the Parks case erroneously identified two points of origin (consistent with arson) when, in fact, there was only one that resulted in a FLASHOVER which the investigators misconstrued as a separate starting point. He also cast doubt on the evidence that the closet door had been barricaded, concluding that the child most likely sought refuge from the fire inside the closet. (see californiainnocenceproject.org).

After the hearing, the court, reportedly characterizing the dispute as a "'battle of the experts," denied the defendant's motion. Although the defendant's convictions have not been overturned, the CIP lawyers have pledged to persist in their efforts to exonerate the defendant. (californiainnocenceproject.org)

COUNSEL MUST CONFER WITH THE EXPERTS:

These cases clearly underscore the importance of defense counsel consulting with qualified experts in the field to review the evidence from the scene and the investigative steps taken and conclusions reached to determine whether the fire investigators: did everything they could have and should have done, whether they compromised or contaminated the evidence, and whether their conclusions are based on sound science and proper investigative techniques. (Alicia Lilley, the Deputy of Forensic Practice at ACP, can help connect counsel find an appropriate outside expert, when needed. (alilley@assigned.org).

It may also be important to see if there are plausible alternative explanations for the fire that are consistent with innocence or, where the proof of arson is strong, counsel should look to see if there is evidence pointing to other possible suspects who may have had the motive, means and opportunity to set the fire.

A sound and sensible place to start any arson defense (while reading up on the art and science of fire investigation and cause and origin determination), would be to consult with the ACP'S Supervising Investigator, David Kubiak (dkubiak@assigned.org). He is: board certified by the International Association of Arson Investigators in fire investigation, and by the National Association of Fire Investigators in fire and explosion investigations. He has also been qualified as an expert in fire investigation in federal district court (WDNY). He has investigated several hundred fire scenes in criminal and civil cases and can provide counsel with a wealth of knowledge and perspective in these cases.

Counsel would be well advised to confer with him before arriving at a theory of defense or cross examining fire investigators and and/or prosecution experts on cause and origin. These are not the kinds of cases that counsel can "try on the fly" and expect to obtain a favorable outcome (let alone avoid a claim of ineffective assistance of counsel).

LEVELS OF ARSON: (FIVE DEGREES OF CONFLAGRATION)

ARSON 5TH DEGREE: PL 150.01 (CLASS A MISDEMEANOR)

A person is guilty of this offense when he INTENTIONALLY DAMAGES property of another without the consent of the owner by INTENTIONALLY STARTING A FIRE OR CAUSING AN EXPLOSION.

There are two layers of intent for this offense: (intent to damage property of another (without the latter's consent) and intentionally (rather than recklessly, negligently or accidentally) starting a fire.

Intent can be inferred from the defendant's words, conduct (before, during or after the fire or explosion) and other evidence that may circumstantially establish the defendants conscious objective or purpose. (PL 15.05[1]).

In People v Dillard 2020 NY Slip Op 07789 (4th dep't 12/23/20), the court found the evidence legally sufficient to support the element of intent (to damage a building) by starting a fire (so as to uphold the defendant's conviction of Arson 3d degree [PL 150.10] as a lesser included offense of Arson 2d degree), upon proof that the defendant splashed a small amount of gasoline on the front steps of a house belonging to someone with whom he had been arguing. He then threw a lighted match and watch the fire ignite. He later told the police that he did it "to make a statement" to the other person.

The amount of damage required is relatively small and the CJI notes that even the "slightest damage" (e.g charring evidence of short duration) will suffice. (People v McDonald 68 NY2d 1 [1986]). (see also People v Jackson 265 AD2d 343 [2d dep't 1999]).

Similarly, in People v McGowan 149 AD3d 1161 (3d dep't 2017), the defendant's intent to start a fire (which began when the defendant lit up his estranged wife's lingerie), was sufficiently supported by his throwing the flaming lingerie onto a pile of her other underwear in the bathtub after she rebuffed his sexual advances and he said, (before the fire caused damage to the home), "if I can't have you, nobody will." (citing People v Bracy 41 NY2d 296 [1977]).

ARSON 4TH DEGREE: PL 150.05 (1) (CLASS E FELONY):

A person commits this offense when he/she RECKLESSLY DAMAGES a building (or a motor vehicle) by INTENTIONALLY STARTING a fire (or causing an explosion).

Unlike Arson 5th degree, the defendant need only INTEND TO START A FIRE, but to be guilty of Arson 4th degree, the defendant must also engage in conduct that CREATES A SUBSTANTIAL AND UNJUSTIFIABLE RISK that such damage will occur AND he CONSCIOUSLY DISREGARDS that risk.

For example, a defendant who intentionally throws a lit cigarette into a brimming waste paper basket in the doorway of a straw hut can arguably be said to have intended to start a fire and, under the circumstances, it would not be a stretch to imagine that such a structure would go up in flames in no time.

RECKLESSNESS also requires that the risk be of such nature and degree that its disregard amounts to a GROSS DEVIATION from the standard of care that a reasonable person would observe in the situation. (PL 150.5[3]); People v Boutin 75 NY2d 692 [1990]).

A BUILDING, per PL 150.00(1), consists of any structure, vehicle or watercraft used for overnight lodging or for carrying on business therein. If the building consists of two or more units (e.g. an apartment or office building) separately secured or occupied, each unit is NOT deemed to constitute a separate building.

In contrast, see PL 140.00[2] which, for purposes of criminal trespass and burglary, states, "(w)here a building consists of two or more units separately secured or occupied, each unit shall be deemed BOTH a separate building in itself AND a part of the main building.

Consequently, if an ambitious burglar were to enter unlawfully into 100 separate apartments in a multi-unit building with intent to commit a crime in each one, he/she could properly be charged with 100 counts of Burglary 2d degree (PL 140.25[2]). If, instead, he/she set fire to the building, thereby destroying all 100 apartments, he/she could only be charged with committing one act of Arson (which may or may not be covered by different theories of the same offense).

However, he/she could conceivably be charged with multiple counts of felony murder for every unfortunate occupant who perished in the fire and perhaps also for any fire fighter who was killed or died while responding to it. (see, for example People v Lozano 107 Misc2d 345 [Sup Ct NY County 1980] and People v Arzon 92 Misc 2d 739 [Sup Ct NY County 1978] discussed below).

A building also encompasses a temporary structure (e.g. a make-shift overnight shelter for homeless people used over the course of a few months). (see People v Fox 39 AD3d 577 [2d dep't 2004]).

A MOTOR VEHICLE includes every vehicle operated or driven on a public highway and which is propelled by any power other than muscular power. (See PL 150.00 [2], VTL 125). This definition EXCLUDES electrically driven chairs (e.g. a Rascal) operated by a handicapped person and vehicles that run only on rails or tracks and snowmobiles.

It should also be noted that there is an AFFIRMATIVE DEFENSE to this crime (which the defendant must prove by a preponderance of the evidence if the People have first proven the elements of the crime beyond a reasonable doubt), that no one other than the defendant had a possessory or proprietary interest in the building or motor vehicle.

ARSON 3RD DEGREE: PL 150.10 (CLASS C FELONY):

A person commits this crime when he/she INTENTIONALLY damages a building or motor vehicle by starting a fire or causing an explosion.

The CJI states that is an affirmative defense to Arson 3d degree that:

1. no person other than the defendant had a possessory or proprietary interest in the building (or motor vehicle), or if others had such interests, they all consented to the defendant's conduct; and
2. the defendant's only intent was to destroy or damage the building (or motor vehicle) for a lawful and proper purpose (e.g. demolition of a dilapidated building or junking of an old car); and
3. the defendant had no reasonable ground to believe that his/her conduct might endanger the life or safety of another person or damage another building or motor vehicle.

As indicated above, whether or not the jury would consider the affirmative defense would depend on the jury first being satisfied that the People had met their burden of having established the elements of this crime beyond a reasonable doubt. If they did not meet that burden, then the defendant would have to be acquitted irrespective of any affirmative defense.

ARSON 2D DEGREE: INTENTIONALLY DAMAGING A BUILDING BY FIRE WHEN ANOTHER PERSON IS PRESENT: PL 150.15 (CLASS B FELONY):

Like Arson 3d degree, this crime involves the INTENTIONAL DAMAGING of a building (or motor vehicle) by STARTING A FIRE, but it also requires the PRESENCE OF ANOTHER PERSON (who is a non-participant in the crime) whose presence therein is KNOWN to the defendant, or the circumstances are such that the other person's presence is a REASONABLE POSSIBILITY.

So, for example, if a defendant, intending to cause damage to a neighbor's house by starting a fire, were to throw a flaming object through the living room window, knowing that there are people inside (or he/she sees that the television is on or the front door is ajar), he/she would likely be guilty of this crime.

Not surprisingly, there is no affirmative defense to this level of arson inasmuch as the known or reasonably possible presence of innocent persons on the premises would negate any argument that the defendant had no reasonable ground to believe that his/her conduct might might endanger the life or safety of other persons.

It should be noted, however, that for this element (presence of another person) to be satisfied, such other person(s) must be ALIVE when the fire is started.

In People v Taylor 2018 NY Slip Op 00709 (4th dep't 2018 2/2/18), the court upheld the defendant's murder convictions (for stabbing a mother and daughter who were pet-sitting in a friend's home), but reduced the conviction for Arson 2d degree to Arson 3d degree (intentionally damaging a building by starting a fire), because the People failed to establish beyond a reasonable doubt that the victims were still alive when the fire was started.

According to the medical examiner, the mother was already dead when the fire started and the daughter would have died within no more than a minute after she was stabbed in the chest.

Though PL Article 150 does not define "person," the court took some guidance from PL 125 and 130 and concluded that there can only be danger to human life when a person is still drawing breath.

The circumstantial evidence of the defendant's guilt in Taylor was quite compelling inasmuch as the police found the victims' blood (per DNA testing) in the defendant's apartment and vehicle (which had been seen outside the crime scene by neighbors), along with items taken from the house that had burned.

ARSON FIRST DEGREE: PL 150.20 (CLASS A-1 FELONY):

1. A person is guilty of this crime when he/she INTENTIONALLY DAMAGES a building or motor vehicle by CAUSING AN EXPLOSION OR FIRE and when:

a. such explosion/fire is CAUSED BY AN INCENDIARY DEVICE propelled, thrown or placed inside or near such building or motor vehicle; or when such explosion/fire is caused by an EXPLOSIVE, or when such explosion/fire either:
i. CAUSES SERIOUS PHYSICAL INJURY TO ANOTHER PERSON OTHER THAN A PARTICIPANT, or
ii. the explosion or fire was CAUSED WITH THE EXPECTATION OF FINANCIAL ADVANTAGE OR PECUNIARY PROFIT BY THE ACTOR; and when

b. a non-participant in the crime is present in such building or motor vehicle at the time; and
c. the defendant knows that fact or the circumstances render the presence of such other person a reasonable possibility.

2. INCENDIARY DEVICE means a breakable container designed to explode or produce uncontainable combustion upon impact, containable flammable liquid and having a wick or a similar device capable of being ignited.

EXPERT OPINION TESTIMONY AND THE ULTIMATE ISSUE:

At common law (see, for example, People v Grutz 212 NY 72 [1914]), the People were not allowed to have a witness opine or imply that a fire was not accidental because such an opinion was deemed to invade the province of jurors who were considered capable of reaching their own conclusions as to the nature of the fire if presented with all the pertinent evidence.

However, as the science of arson investigations became more complex and sophisticated, conclusions as to cause and origin were considered to be beyond the everyday experience of the average juror, and opinion testimony from a properly qualified expert would be allowed to eliminate all possible causes except for the so-called "human element."

In People v Kanner 277 AD2d 866 (4th dep't 2000), an Erie County case, the Fourth Department upheld the defendant's arson and (depraved indifference) murder convictions, ruling that the trial court did not err in allowing a fire investigator to testify that the fire was not mechanically, electrically, accidentally or naturally caused, thereby eliminating everything but the human factor. (citing People v Herrera 136 AD2d 567 [2d dep't 1988]).

The trial court was also deemed to have properly admitted evidence of the defendant's prior threats to burn down the victim's house and kill her children as relevant proof of his INTENT to commit arson and of the reckless creation of a grave risk of death with respect to the homicide charge.

More recently, the Court of Appeals in People v Rivers 2011 NY Slip Op 08455 (2011) razed the Grutz "no expert opinion testimony" rule and replaced it with one that views such testimony as a permissible, partial encroachment on the jury's domain.

In that case, the defendant fraudulently came into possession of a Brooklyn apartment building by a false deed and contracted to sell the property on the condition that it be free of all leases and tenancies.Toward that end, the defendant recruited a third party (who testified against him) to set fires in the occupied apartments in order to drive out the tenants.

With respect to one of the fires, a battalion chief testified that it appeared that a flammable liquid had been poured on the stairs and set on fire (with no other apparent causes identified). A fire investigator also testified to the same conclusion and said that the fire must have originated in the vapors of a flammable liquid that had been introduced onto the steps.

As to another of the fires, a fire marshal testified that he eliminated all natural causes and determined that the fire had been caused by the ignition of a flammable liquid by an incendiary device such as a Molotov cocktail.

Noting that the old New York rule represented a distinct minority position (described as anomalous and confusing), the Court of Appeals held that the modern trend is to abolish the ultimate issue opinion prohibition in favor of a rule that permits expert opinion testimony (on the ultimate issue as well as matters of lesser significance), when it would help to clarify an issue calling for scientific or technical knowledge possessed by the expert and which is beyond ken (i.e. knowledge and every day experience), of the typical juror. (citing People v Cronin 60 NY2d 430 [1983]).

See also People v Stevens 84 AD3d 1424 (3d dep't 2011): testimony that the expert ruled out all other causes in conjunction with evidence of heavy petroleum distillates found in floor samples from the scene, (confirmed by burnt holes in the floor and K-9 dogs trained in flammable liquid detection) was deemed legally sufficient to support the conviction.

But see People v Murray 2021 NY Slip Op 00722 (4th dep't 2/5/21) where the admission of a fire investigator's opinion that the house fire was an arson was not only of marginal relevance (ostensibly to complete the narrative of the investigation), but UNDULY PREJUDICIAL where the defendant (wife of co-defendant husband who was convicted in a separate trial), was on trial for Insurance Fraud and Falsifying Business Records (but not arson), in connection with her attempt to collect the claimed cash value of personal property that was reportedly destroyed by the fire.

The evidence established that the defendant: sought $5000.00 for an $1800.00 sectional couch and claimed items that with did not exist (e.g flat screen TVs, video game system camcorders and computer) or which had been put in the apartment by the landlord.

Although the AD found the evidence of guilt to be legally sufficient to support the convictions, it reversed them in the interest of justice because the investigator's opinion that the fire had been intentionally set was unduly prejudicial in that it strongly suggested (notwithstanding the trial court's admonition: "every time you hear 'arson' you should not link it to the defendant"), that the defendant had set the fire in order to collect on the insurance policy.

But see People v Abraham 22 NY3d 140 (2013) where the defendant's acquittal on the charge of Arson 3d degree (in connection with a suspicious fire at his failing commercial business for which he subsequently submitted an insurance claim), did not render the evidence insufficient to sustain the conviction for Insurance Fraud 2d degree.

CAUSATION:

In cases where innocent people die in arson fires, courts have taken a fairly expansive view of the meaning of causation when evaluating the relationship between the defendant's conduct (e.g. in starting the fire) and the circumstances leading to the victim's demise. In this context, courts tend to look more at the dangerous riskiness of the conduct, the inherently destructive nature of fires and the foreseeability of harm rather than limit their focus to direct and immediate causes and effects.

In People v Lozano 107 Misc2d 345 (Sup Ct NY County1980), the court found the evidence before the grand jury to be legally sufficient to sustain the charge of Felony Murder (and Arson 2d and 3d degrees) where a responding firefighter, (who was later diagnosed as having an enlarged heart and coronary artery disease), suffered a heart attack while carrying a hundred feet of hose into the lobby of an apartment building that the defendant had set on fire.

While the M.E. could not definitively state that the victim might not have had a fatal heart attack while at rest, in his view, the exertion involved in responding to the fire coupled with the inhalation of carbon monoxide (which was detected in his system), contributed to the occurrence of the myocardial infarction (i.e. heart attack).

Preliminarily, the court, noting that Felony Murder requires the causation of death of an innocent party IN THE COURSE OF AND IN FURTHERANCE OF OR IMMEDIATE FLIGHT FROM certain specified crimes (including robbery, burglary kidnapping, ARSON, rape 1st degree sex abuse 1st degree, aggravated sex abuse 1st degree or escape 2d degree [or attempts at such crimes]), concluded that such language is meaningless in the context of arson since, unlike the other offenses, there is seldom, if ever, a direct confrontation between the perpetrator and the victim.

In analyzing the concept of causation in the arson context, the court, citing, inter alia, People v Brengard 265 NY 100 (1934), noted that the defendant's conduct need only have FORGED A LINK in the chain of events which brought about death. The court also cited People v Kane 213 NY 260 (1915) where the court upheld a murder conviction after the defendant shot a pregnant woman and intervening negligence in her treatment at the hospital played some part in her death. The court noted that only where death was SOLELY ATTRIBUTABLE to the secondary agency, and NOT AT ALL INDUCED by the primary one will the defendant be absolved for the fatality.

In contrast, see People v Stewart 40 NY2d 692 (1976) where the Court of Appeals set aside the defendant's manslaughter conviction because the surgeons, after successfully repairing the victim's abdominal knife wound, took it upon themselves to repair an unrelated hernia which resulted in the victim suffering fatal heart failure and brain damage. The Court concluded that had the doctors not embarked on this surgical detour, the victim would, in all likelihood, have survived the knife injury.

The court in Lozano found the facts of that case to be more akin to People v Kibbe 35 NY2d 407 (1974) where the Court of Appeals found a sufficiently direct connection between the defendant's acts of leaving a nearly naked, shoeless and intoxicated victim (without his eyeglasses) on the side of a dark road in below-freezing weather and his death from being hit by a vehicle, so as to uphold the defendant's murder conviction.

In Lozano, the court deemed the fire fighter's compromised heart to be of little moment, noting that any such person (whether fit or frail), when responding to a fire of this nature, is in a constant state of vulnerability from flames, smoke, falling beams, collapsing walls, and that a person's heart might fail under such circumstances, in the court's estimation, was manifestly foreseeable.

Similarly in People v Arzon supra the court found a sufficient connection between the defendant's act of setting a fire on a couch on the fifth floor of an old wooden abandoned building (that he knew was occupied by "winos" and "junkies" whom he wanted to run out by burning the building), and a fire fighter who died while caught up on the second floor where another fire (which may or may not have been set by the defendant) blocked his exit.

The court, citing People v Stewart supra, stated that it is not necessary that the ultimate harm be intended by the actor. Rather, it is enough if it can be said beyond a reasonable doubt that the ultimate harm is something which SHOULD HAVE BEEN FORESEEN AS REASONABLY RELATED TO THE ACTS OF THE ACCUSED. Moreover, while a probable connection is not enough, the actor's conduct, as noted above, must have forged a link in the chain of causes which actually brought about death.

In the court's view, the fire set by the defendant was an indispensable link in the chain of events resulting in the fire fighter's death. The fire continued to burn out of control, blocking an access route. As in People v Kibbe, supra, the defendant's conduct placed the victim in a position where he was PARTICULARLY VULNERABLE to the threat of the separate fire on the second floor. The defendant's motion to dismiss the charges (felony murder and depraved indifference murder) for legally insufficient evidence of causation, was therefore denied.

The CJI's definition of causation (of death) states that a person causes the death of another when that person's conduct is a SUFFICIENTLY DIRECT CAUSE of death of another person. (citing, inter alia, People v Marks 83 NY2d 509 [1994]).

A person's conduct is a sufficiently direct cause of death when: 1. the conduct is an ACTUAL CAUSE OF DEATH and 2. the death was a REASONABLY FORESEEABLE RESULT OF THE CONDUCT.

A person's conduct is an actual contributory cause of another person's death when such conduct FORGED A LINK in (i.e. set or continued in motion) the chain of events which actually brought about the death.

The defendant's conduct NEED NOT BE THE SOLE CAUSE, nor does it matter that a PRE-EXISTING CONDITION also contributed to the death, or that death did not immediately follow the injury.

Death is a reasonably foreseeable result of the defendant's conduct when the death SHOULD HAVE BEEN FORESEEN AS BEING REASONABLY RELATED TO THE DEFENDANT'S CONDUCT. DEATH NEED NOT BE THE INEVITABLE OR MOST LIKELY RESULT.

RIGHT TO COUNSEL VIOLATED IN 25-COUNT ARSON CASE.

In August 2020, the Court of Appeals denied the People's application for leave to appeal the Appellate Division's decision which affirmed County Court's order of suppression, on RIGHT TO COUNSEL grounds, of the defendant, Jonathan Young's inculpatory statements made to Pennsylvania State Police (in the presence of Jamestown police) about several Jamestown arsons in which he was the prime suspect in the Spring of 2017.

After Jamestown police questioned the defendant about two of the local fires, he left the area for Butler PA where he was arrested for an arraigned upon a new and unrelated arson charge. At the arraignment proceeding, the defendant requested assignment of counsel.

When Jamestown police learned of the defendant's situation, a police captain asked the PA troopers whether he was represented by counsel on that matter. (Though requested by the defendant, counsel had not yet formally entered the picture).

Jamestown officers sat in on the interview of the defendant by the Pennsylvania troopers who interrogated him about the Jamestown fires. County Court (Chautauqua), suppressed the defendant's statements as being obtained in violation of his right to counsel, an order which the AD affirmed (and dismissed the indictment). (People v Young 2020 NY Slip Op 01825 [3/13/20]).

The AD observed that it is well settled that once a defendant in custody on a particular matter is REPRESENTED BY OR REQUESTS COUNSEL, custodial interrogation on ANY SUBJECT, whether RELATED OR UNRELATED to the charge upon which representation is sought (in this case, the PA charge for which he requested counsel), MUST CEASE.

The court noted further that the defendant's indelible right to counsel attached upon his request for representation at the arraignment, and it was improper for him to be interrogated about the New York State fires even though counsel had not yet been assigned by the court on the PA charges. (citing People v Huntsman 96 AD3d 1390 [4th dep't 2012]).

It did not matter, in the court's view, that the Jamestown police only observed in silence since the PA troopers were acting as their surrogates (i.e. agents) when they inquired about the Jamestown fires. The court also rejected the People's argument that the police captain made a REASONABLE INQUIRY into the defendant's counsel status since he did not ask whether the defendant had REQUESTED counsel (beyond asking whether he had one).

FAILURE TO TURN OVER EXCULPATORY ARSON REPORT REQUIRES NEW TRIAL UNDER BRADY V MARYLAND 373 US 83 (1963):

In People v Vilardi 76 NY2d 67 (1990), the Court of Appeals held that the People's failure to turn over a bomb squad investigator's initial report (concluding "no evidence of an explosion") in a case where the defense specifically requested any/all reports of explosive experts created a REASONABLE POSSIBILITY of a different outcome, thereby warranting reversal of the defendant's conviction for Arson 1st degree.

According to the People's proof, the defendant and four others (two of whom were tried separately), conspired to set off pipe bombs in the basements of a pizzeria and a nearby laundromat in Brooklyn NY. The pizzeria bomb proved to be a dud but the People contended (based on a re-investigation and new report prepared by the same investigator one year later), that the one planted under the laundromat actually went off.

The initial report had been disclosed to counsel for the co-defendants who were acquitted of arson. However, although the new prosecutor who tried the defendant turned over several reports as part of discovery, the investigator's initial report was not among them. The defendant only became aware of it after his appellate counsel reviewed the transcript of the co-defendant's trial. (Why defendant's trial counsel did not review that transcript before the defendant's trial is another matter). Not surprisingly, the investigator was not taken to task over his conclusion with respect to the explosion.

The defendant brought a CPL 440 motion to set aside the conviction which the trial court summarily denied (concluding that it was a matter more properly addressed on direct appeal even though it implicated matters outside the trial record).

The AD reversed, holding that the defendant's claim of a Brady violation was the proper subject of a CPL 440 motion and that the failure to disclose exculpatory material (in the face of a specific request by the defense) created a reasonable possibility that the undisclosed material contributed to the defendant's conviction. (150 AD2d 819-820).

The Court of Appeals affirmed, rejecting the People's argument that New York courts should follow the federal "one-size-fits-all" approach espoused in US v Bagley 473 US 667 (1985) that regardless of whether or not certain material was requested by the defense, the standard for measuring the materiality of such information (for purposes of deciding whether a new trial is warranted) is whether there is a REASONABLE PROBABILITY that disclosure (of such information) would have altered the outcome of the trial.

Noting that the state constitutional standard of due process focuses on "elemental fairness" to the defendant and a prosecutor's ethical and professional obligations, the Court concluded that assessment of the seriousness of the prosecution's failure to disclose exculpatory evidence should take into account whether the prosecution was put on notice of the possible existence (and importance) of such evidence by a demand for same. (citing, inter Alia, People v Novoa 70 NY2d 490 [1987]).

Consequently, in New York, the failure to turn over specifically requested material is subject to a different (i.e. reasonable possibility of a different outcome) standard of review than when the material is not requested, (i.e. reasonable probability of a different outcome).

Accordingly, the Court of Appeals declined to apply the federal approach set forth in US v Bagley supra as a matter of state law and held that the People's failure to disclose the investigator's first report (concluding "no evidence of explosion"), created a reasonable possibility that the outcome of the trial (not unlike that of the co-defendant's) would have been different.

FINAL THOUGHT:

It will be interesting to see whether and how the new AUTOMATIC DISCOVERY rules may affect the standard of review for Brady violations. Since the defense no longer has to demand discovery material in order to get it, the question is whether the courts will overturn convictions on Brady violations if there is only a reasonable possibility (as opposed to a reasonable probability) of a different outcome had the material been disclosed.

Then again, it is worth remembering that under the Rules of Professional Conduct (RPC), prosecutors are under an ETHICAL OBLIGATION to make TIMELY DISCLOSURE to defense counsel of the existence of EVIDENCE OR INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED (or) MITIGATE THE DEGREE OF THE OFFENSE. (RPC 3.8 [b]). (The rule says nothing about the need for any DEMAND for such information).

See also CPL 245.20(k) which directs the prosecution to disclose:

"ALL EVIDENCE AND INFORMATION (INCLUDING THAT WHICH IS KNOWN TO POLICE OR OTHER LAW ENFORCEMENT AGENCIES ACTING ON THE GOVERNMENT'S BEHALF IN THE CASE),THAT TENDS TO: i. NEGATE THE DEFENDANT'S GUILT AS TO A CHARGED OFFENSE; ii. REDUCE THE DEGREE OF OR MITIGATE THE DEFENDANT'S CULPABILITY AS TO A CHARGED OFFENSE; iii. SUPPORT A POTENTIAL DEFENSE TO A CHARGED OFFENSE; iv. IMPEACH THE CREDIBILITY OF A TESTIFYING PROSECUTION WITNESS; v. UNDERMINE EVIDENCE OF THE DEFENDANT'S IDENTITY AS A PERPETRATOR OF A CHARGED OFFENSE; vi. PROVIDE A BASIS FOR A MOTION TO SUPPRESS EVIDENCE; OR vii. MITIGATE PUNISHMENT."

In view of the rule's automatic and expansive mandate, it would seem that the prosecution's duty to identify and timely disclose Brady material would render the failure to comply a serious transgression of both procedural and ethical rules sufficient to warrant serious sanctions regardless of whether such material was requested specifically, generally or at all. (If nothing else, it could render any declaration of trial readiness illusory).

This would seem to be especially true in cases like arson where the information and evidence is often voluminous, complicated and subject to differing expert interpretations depending on one's level (and accuracy) of understanding of the nature and dynamics of fires which, depending on the analysis, may or may not be arson.