RULES OF CORROBORATION

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INTRODUCTION:

THE BURDEN PROOF BEYOND A REASONABLE DOUBT:

In criminal cases, it is axiomatic that the prosecution bears the burden at a criminal trial of proving the defendant's guilt beyond a reasonable doubt. (see NYCJI: Burden of Proof, In Re Winship 397 US 358 [1970], People v Antommarchi 80 NY2d 247 [1992].

The CJI defines a reasonable doubt as an honest and actual one for which a reason exits based either on the evidence that was presented or the lack of convincing evidence. (People v Radcliffe 232 NY 249 [1921]). To say that the People have met their burden means that the evidence was of such convincing quality as to leave no reasonable doubt in the jury's collective mind as to the existence of any element of the crimes(s) charged or of the defendant's identity as the the perpetrator. (Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 Tex. L. Rev. 105 [1999]).

The CJI instructs that in deciding whether the People have met their burden of proof, jurors should be guided by a "full and fair evaluation of the evidence," rather than speculation, (Victor v Nebraska 511 US 1 [1994]), and as long as they find the evidence of guilt credible and reliable, they are justified (indeed, expected) to return a guilty verdict.

As noted in People v Bretagna 298 NY 323 (1949), a defendant's guilt of a charged crime may be proven if, STANDING ALONE, the evidence satisfies the jury beyond a reasonable doubt of the defendant's guilt of the crime(s) charged.

DIRECT AND CIRCUMSTANTIAL EVIDENCE:

The evidence of guilt, of course, may be DIRECT (i.e. facts based on a witness' own observation/perception) or CIRCUMSTANTIAL (i.e. proof of one or more facts that permit an inference of another/other fact[s]), and the law makes no distinction between the two in terms of weight or importance (People v Benzinger 36 NY2d 29 [1974]). Consequently, a defendant can be found guilty upon the former if the jury finds the witness(es)'s testimony to be credible and their observations reliable, or upon the latter if the circumstantial evidence permits a reasonable inference of guilt. (People v Roldan 211 AD2d 366 [1st dep't 1995]).

It used to be that in cases based entirely on circumstantial evidence, (which may lend itself to competing inferences), the People's proof had to exclude to a MORAL CERTAINTY every reasonable hypothesis of innocence (a cringeworthy proposition for many prosecutors), but the

rule has evolved such that any reasonable inference of innocence must now be excluded BEYOND A REASONABLE DOUBT. (People v Sanchez 61 NY2d 1022 [1984]). In short, then, the inference of guilt must be the only one that can be fairly and reasonably drawn from the evidence.

A HIGH PROFILE, LOCAL CIRCUMSTANTIAL EVIDENCE CASE: 🔍

PEOPLE V SEIFERT 1. 113 AD2d 80 (4TH DEPT 1985)
PEOPLE V SEIFERT 2. 152 AD2d 433 (4TH DEPT 1989)

It could be argued that prosecutors and juries prefer a good circumstantial evidence case to one based on eyewitness witness testimony because it allows the jury to connect the evidentiary dots and reach a logical conclusion (e.g. that the defendant had the motive, means and opportunity to commit the crime), rather than rely solely on the testimony of witnesses whose ability to identify the defendant as the perpetrator may have been situationally compromised (e.g. bad vantage point, poor lighting, intoxication) or their credibility impugned (e.g. by evidence of bias, criminal history or an attempt to curry favor with the prosecution).

In People v Seifert 1. supra, the Fourth Department (AD) reversed an order of the Supreme Court (Erie County) which dismissed the indictment charging the defendant (William Seifert) with Murder 2d degree (of his brother Mark Seifert) and Arson 3d degree (for torching his car) 🚗🔥 after shooting him in the head 😖🔫), on the grounds that: 1. the circumstantial evidence was LEGALLY INSUFFICIENT to provide reasonable cause to believe that the defendant had murdered his brother (or that he was even dead), (People v Leonardo 89 AD2d 214 [4th dep't 1982]), and 2. there was no jurisdiction in Erie County to prosecute the defendant for a crime that occurred in Cattaraugus County.

BAD BLOOD 😕💧☹BETWEEN BROTHERS:

The evidence presented established that the defendant, a contractor, hated his brother, (also a contractor), in part, because he (the brother), was gay. At one point, the brother brought criminal charges against the defendant in the Elma Town Court for damaging his car, and the defendant was overheard to say that he would "kill the bastard before the case got to court."

In early February 1984, the defendant took his rifle to an East Aurora gunsmith for repair and insisted that he had to have it back by February 11th. On February 8th, he cooked up a scheme to lure his brother to an isolated location on Pleasant Valley Road in Yorkville by having a friendly waitress at an East Aurora diner telephone the brother, pretending to be the secretary of an out-of-state developer who supposedly wanted to recruit the brother to be the lead contractor on a big recreation center project in Cattaraugus County.

The defendant (known only to the waitress as "Bill"), stated that he and Mark Seifert (who he didn't mention was his estranged brother), were not on good terms and he was afraid that he would say no if he knew that the defendant would also be part of the project.

Per the defendant's instructions, the waitress called the victim, read from a bogus letter provided by the defendant and relayed the information (inviting him to a meeting with a

representative of Tri-State Developers on February 13th at 10:00am on a remote section of Pleasant Valley Road).

Despite being instructed to keep the meeting a secret, the victim apparently couldn't help talking about his expected good fortune, and at 9:30am on that fateful morning, he told a fellow customer at a Yorkshire Diner that he had a big meeting with a developer on Pleasant Valley Road, and he verified that his directions to the site (some ten minutes away), were accurate. That was the last time the victim was ever seen alive. Residents on Pleasant Valley Road reported hearing a gun shot somewhere between 9:30 and 10:00am.

At 10:45am, local firefighters were called to Pleasant Valley Road to put out a fire that had engulfed an abandoned Lincoln Continental. The victim's engraved lighter was found under the driver's seat but there was no evidence of a body or anyone having been harmed therein.

State Police and forensic investigators called to the scene found what turned out to be pools of human blood (within twenty feet of the car), bone fragments (consistent with a human skull) and what appeared to be brain matter. There was no animal blood at the scene. Medical examiners concluded that a human being had most likely been killed by a gunshot to the head.

Blue and orange-colored fibers (which were later matched up to fibers found in the defendant's abandoned blue van), were also found at the scene. (The van also contained a freshly cut out piece of carpet near the back and bloody wood chips on the driver's side. The blood, which was human, was found to contain a rare enzyme (found in 6% of the population), which was also detected in blood identified (from VA hospital records) as the victim's.

For his part, on February 12th, the defendant had called in off from work for Monday morning and claimed that he drove a borrowed Cadillac that morning to a health club (for which there was no record). His whereabouts that day were unverified until he showed up for work later that afternoon.

A State Police investigator interviewed the defendant that night and described him as being extremely nervous and jerky. During the encounter, the defendant said nothing about his brother's supposed meeting with a representative of an out-of-state developer which he had told the waitress that he was a part of. In a follow-up interview the next day, when asked why he was so nervous the day before, the defendant said it was because he knew that one of his vehicles was unregistered.

On February 14th, the waitress called the police after seeing the victim's photo and hearing his name in connection with a news story about a missing-person/ burned-out car on Pleasant Valley Road. She suspected that she may have been used by the defendant to lure the victim to that remote location. (The defendant told police that he hadn't been to that area in a long time but a witness testified that he was there often for motorcycle rides).

As of February 15th, the defendant left town for several days and his van was found in an East Aurora supermarket parking lot, stripped of its license plates, inspection sticker and registration. The police impounded the vehicle upon consent of the defendant's wife who had reported him missing.

The defendant returned home on February 20th and he explained to the troopers (after being confronted with the waitress' story and script) that he did use the waitress to get his brother to

the meeting site because “Jim” from Tri-State wanted both of them for the job and he knew that his brother wouldn’t go along if he knew that the defendant was also involved.

SEIFERT 1: FOURTH DEPARTMENT UPHOLDS MURDER INDICTMENT:

The court held, first of all, that there was a sufficient factual basis to establish by a preponderance of the evidence that the defendant FORMED THE INTENT TO KILL HIS BROTHER in Erie County (e.g. expressing animus toward his brother, getting his rifle repaired and picking it up just before the brother went missing and the plan to lure him to the “meeting” site), and therefore, as to that count, there was a sufficient jurisdictional basis to charge the defendant in Erie County pursuant to CPL 20.40(1)(a).

ARSON CHARGE GOES DOWN; 🔥

As to the Arson charge, however, absent any proof that the defendant formed an intent in Erie County to set fire to the victim’s vehicle after killing him (e.g. local purchase of an accelerant or incriminating statements made in Erie County), there was nothing to refute the possibility that the decision to torch the vehicle wasn’t made on the spot (i.e on Pleasant Valley Road). Accordingly, the AD affirmed the dismissal of that charge.

As to the Murder count, the court also found that viewing the evidence in the light most favorable to the People, the circumstantial evidence was legally sufficient to support the conclusion that the defendant had the motive (though not an element of the crime), means and opportunity to kill his brother.

SEIFERT 2: MURDER CONVICTION AFFIRMED:

In Seifert 2 supra, the AD affirmed the defendant’s Murder conviction, finding that the evidence was legally sufficient to establish his culpability for his brother’s death and excluding any reasonable hypothesis of innocence, notwithstanding the fact that the victim’s body was never found, nor was it established that the brain matter, skull fragments or blood at the scene were definitively his.

In an opinion by Justice Samuel L Green, the court noted that the law in Homicide cases (e.g. People v Lipsky 57 NY2d 560 [1982]), no longer requires DIRECT PROOF of death and of the criminal agency that caused it. Rather, the CORPUS DELICTI (e.g. evidence of criminality) MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE.

In the court’s view, the failure to locate the victim’s body is NOT AN IMPEDIMENT to conviction as long as the circumstantial evidence (as here) is sufficient to prove beyond a reasonable doubt that the defendant intentionally killed the victim.

The court was satisfied that the jury’s verdict was based not on speculation, assumptions or inferences upon inferences (People v Kennedy 47 NY2d 196 [1979]), but rather was supported by a continuous chain of compelling circumstantial facts (before and after-the-fact) that sufficiently proved that: a killing occurred, the victim was Mark Seifert and that the defendant intentionally caused his death (by shooting him in the head after enticing him to the site of his impending demise with a false story conveyed by an unwitting accomplice).

SOME EVIDENCE REQUIRES CORROBORATION:

While a jury may return a guilty verdict upon direct and/or circumstantial evidence that it finds both credible and reliable, some types of evidence (e.g. admissions/confessions, unsworn witness testimony, accomplice testimony), CANNOT, without other supporting evidence, provide the basis for a criminal conviction at trial.

THE OLD RULES: SEX OFFENSE CASES:

It used to be (e.g. see People v Friedman 139 AD 795 [1910]), that a defendant could not be convicted of rape upon the uncorroborated testimony of the victim because such crime was considered to be easy to allege but difficult to disprove. Therefore, all of the elements of the crime, forcible compulsion, penetration and identity of the perpetrator required additional evidence. (It could be that whomever came up with the idea that rape was easy to allege never met a rape victim and never heard of Rape Trauma syndrome).

AGE OF ENLIGHTENMENT:💡⚖️

Over time, society and the law moved away from the idea that rape victims were somehow inherently less believable than other crime victims, and the corroboration rule (PL 130.15) was repealed. Ten years later, the strict corroboration rule in child sex offense cases was also undone in favor of a more generic rule (CPL 60.20) that addresses what witnesses can and cannot give sworn testimony (based on age and mental competency) regardless of the offense charged.

Now, the only sex offenses requiring corroboration are those in which the victim's inability to consent is based solely on mental defect or incapacity. In such cases, PL 130.16 instructs that a defendant cannot be convicted solely on the victim's testimony unsupported by other evidence that TENDS TO ESTABLISH that 1. an ATTEMPT was made to engage the victim in sexual intercourse (or oral/anal sexual conduct), sexual contact and 2. TENDS TO CONNECT the defendant with the commission of the (attempted) offense.

See People v Lamphier 302 AD2d 864 (4th dep't 2003): no corroboration required to support victim's sworn testimony with respect to sex abuse where the basis for non-consent was due to the victim's age rather than any claim of mental incapacity.

But see People v Carroll 95 NY2d 375 (2000): victim's vague recollection of feeling "pressure" in her private area without any meaningful details provided (e.g. whether she and D were dressed or undressed, whether there was any pain), was insufficient to support claim of penetration required to sustain claim of unlawful sexual intercourse.

CPL 60.20: TESTIMONIAL CAPACITY: EVIDENCE GIVEN BY CHILDREN: 👶

According to this statute:

1. ANY PERSON may be a WITNESS in a criminal proceeding unless the court finds that by reason of INFANCY, or MENTAL DISEASE OR DEFECT, he/she lacks sufficient INTELLIGENCE or CAPACITY to justify receipt of his/her evidence.

2. every witness MORE THAN NINE YEARS OLD (formerly 12), may testify UNDER OATH UNLESS the court finds that such witness cannot, as a result of MENTAL DISEASE OR DEFECT, UNDERSTAND the NATURE OF AN OATH.

To understand the nature of an oath means to: 1. UNDERSTAND the difference between truth and falsehood, 2. to APPRECIATE the importance of telling the truth, and 3. COMPREHEND that one can be PUNISHED for lying. (People v McIver 15 AD3d 559 [2d dep't 2005]).

Every witness LESS THAN NINE YEARS OLD MAY NOT TESTIFY UNDER OATH UNLESS the court finds that he/she UNDERSTANDS THE NATURE OF AN OATH.

In a trial setting, the COURT conducts a voir dire (i.e. inquiry of the child witness) to determine testimonial capacity, and while the defendant may submit proposed questions, there is NO CONSTITUTIONAL RIGHT to interrogate the witness as to competency to give sworn testimony. (People v Byrnes 33 NY2d 343 [1974]).

In the GRAND JURY, it is the PROSECUTOR who conducts the inquiry and determines whether or not the child can give sworn testimony. (see CPL 190.30, People v Groff 71 NY2d 101 [1987]).

3. The upshot of rule 60.20 is that a defendant MAY NOT be convicted of an OFFENSE (sexual or otherwise), solely upon UNSWORN EVIDENCE. (see People v Maldonado 199 AD2d 563 [2d dep't 1993], People v Tomczak 189 AD2d 926 [3d dep't 1993]).

Whether any particular witness (e.g. a child under age nine) can be allowed to give sworn testimony, is a case-specific determination that will likely turn on the child's intelligence and ability to appreciate the nature of an oath. In People v Mendoza 49 AD3d 559 (2d dep't 2005), for example a five-year-old child was deemed to have been properly qualified, while in People v Nisoff 36 NY2d 560 (1975), an eight-year-old child clearly could not be sworn. (However, the child was deemed to have sufficient intelligence to give unsworn testimony.).

Conversely, a child over age nine (or an adult with an intellectual disability) who is shown to lack the ability to understand the nature of an oath may not be permitted to give sworn testimony (but may be allowed to give unsworn testimony which would require corroboration to a support a conviction).

PEOPLE V GROFF 71 NY2D 101 (1987): (RAPE/CHILD SEX ABUSE CASE)

DA SUFFICIENTLY DETERMINES CHILD VICTIM COULD GIVE UNSWORN GJ TESTIMONY; THE CHILD'S TESTIMONY WAS SUFFICIENTLY CORROBORATED:

In this case, the Court of Appeals REVERSED the AD's affirmance of County Court's dismissal of the indictment, finding that while the DA may not have explicitly made a finding that the three-year-old victim had sufficient intelligence to justify receipt of her testimony, the record reflected that the DA conducted an appropriate voir dire examination of the child relative to her testimonial capacity (eliciting her knowledge about family and ability to relate relevant facts), and stated that she could not be sworn to testify under oath. Hence the requisite determination was apparent from the record. (People v Johnson 185 NY 219 [1906]).

The Court also rejected the old strict corroboration standard in child-victim cases (set forth in dictum in People v Oyala 6 NY2d 259 [1959]) in favor of one that is satisfied by independent

evidence tending to establish that the crime was committed and that the defendant committed it. (citing, inter alia, People v Daniels 37 NY2d 624 [1975]: evidence tends to connect the defendant to the crime if it reasonably satisfies the jury that the witness is telling the truth. See also People v Smith 55 NY2d 945 [1982]: "matters which themselves may be of seeming indifference may be so HARMONIZED with the witness' narrative as to have a tendency to furnish the NECESSARY CONNECTION between the defendant and the crime.").

The evidence in Groff established that the victim was at a family picnic (of nine or ten people) when she she was gone for about 15 minutes while everyone else (except for the defendant, a 26-year-old relative), was otherwise engaged. The defendant was also unaccounted for in this time frame.

When the child returned from the woods, she was crying and complaining about prickers that had gotten stuck to her. Later, she complained of pain on urination and developed a rash in her private area. She was taken to a doctor who examined her and determined that her pain was unrelated to any infection. During a follow-up visit, the doctor expressed concern that the child may have been sexually abused. The mother inquired of the child who said that the defendant had taken her (and his) pants off, put her on top of him and tried to insert himself into her. (Although the child's hymen was undisturbed, doctors could not rule out partial penetration).

In upholding the charges, the Court noted that the purpose of the corroboration rules is to ensure the trustworthiness of unsworn evidence. A witness who cannot comprehend the meaning and importance of an oath, in the court's view, may not appreciate the need for truthfulness or comprehend the gravity of bearing false witness against another. Hence, in such cases, the law requires corroboration to bring such evidence to the level of sworn testimony. (People v Howard 122 AD2d 811 [2d dep't 1986]).

Noting the evolving standards of justice and societal attitudes toward victims of sex offenses, including children, the Court concluded that the standard for corroboration of unsworn testify is and should be the same regardless of the nature of the accusation. And in certain cases, such as this one, evidence of the defendant's opportunity to commit the crime can be enough to establish his identity as the perpetrator. (People v Massie 5 NY2d 217 [1959]).

The evidence here established that that victim and the defendant were both absent during the 15-minute period and the child returned, crying and covered in prickers (consistent with her story of laying down in the woods). In the Court's analysis, this evidence sufficiently harmonized with the victim's unsworn testimony to provide the necessary corroboration under CPL 60.20.

CPL 60.50: CORROBORATION OF CONFESSIONS/ADMISSIONS:

This statute (and the CJI) state that a person may NOT be convicted of an offense SOLELY upon evidence of a confession or admission made by that person WITHOUT ADDITIONAL PROOF that the offense charge has been committed. (People v Daniels supra, People v Booden 69 NY2 185 [1987]).

Unlike corroboration of the testimony of unsworn witnesses, mentally impaired sex offense victims or of accomplices, the additional evidence need only establish (by no particularly great weight), that the crime to which the defendant has copped was actually committed BY SOMEONE.

As noted in People v Safian 46 NY2d 181 (1978), CPL 60.50 only requires that the confessed crime be proven to have occurred by INDEPENDENT EVIDENCE without any connection to the confession. (See, for example, People v Parks 41 NY2d 36 [1976], a pre-DNA case: proof of victim's underage pregnancy was enough to corroborate the defendant's admission to having sex with a minor. But see also People v Maynard 143 AD3d 1249 [4th dep't 2016] where D'S confession was NOT supported by any testimony from the victim with respect to Sex Abuse 1st degree. Other offenses were so supported, however).

Case law (e.g. People v Booden supra), points out that the requirements of CPL 60.50 are NOT especially rigorous, and sufficient corroboration will be found when the confession is supported by independent evidence of the corpus delicti such as the defendant's presence at the crime scene, guilty behavior after-the-fact or other circumstances indicating that the crime confessed actually happened. (See, for example, People Eisenhauer 39 NY2d 810 [1976]: defendant's admission to karate chopping child corroborated by expert testimony on Battered Child syndrome.).

In People v. Booden supra, a DWAI case, the Court of Appeals found sufficient evidence to corroborate the defendant's admission to driving the vehicle that ended up in a ditch facing the wrong direction on a non-rainy day based on the defendant's presence (along with two others) next to the vehicle, the fact that it was his father's car, and he manifested symptoms of alcohol impairment (slurred speech, odor of alcohol, failed field sobriety tests). When the officer arrived on the scene and asked, "who was driving," the defendant immediately said, "I was," and produced his driver's license.

The Court noted, first of all, that CPL 60.50 does not require corroboration of an admission in every detail but rather, some proof of whatever weight that the offense charge has been committed by someone. (citing People v Daniels supra). The purpose of the rule, as the court observed, is to avoid prosecuting someone who, for whatever reason, admits to a crime that has not, in fact, occurred. (citing People v Lipsky supra).

In the Court's view, while these circumstances may have been susceptible to an innocent explanation, they still supported the inference that someone had driven the vehicle under the influence of alcohol, and the defendant's admission was key to explaining the circumstances (of the car ending up in a ditch facing in the opposite direction of traffic).

The dissenting justice (Bellacosa, J.), stated that while the statute is intended to protect people from their own criminal fantasies, the majority's generous reading of CPL 60.50 was so fantastical as to rendering it ineffectual.

In the dissenter's view, the evidence was, at best, equivocal, akin to an "amorphous mist" which fell short of establishing that a DWI had just been committed. In other words, beyond the defendant's admission to driving, there was no independent evidence of someone driving under the influence of alcohol.

In contrast, see People v Allaico 2021 NY Slip Op 50026 (U) (2d dep't 1/25/21): circumstantial evidence including D found asleep behind the wheel with the engine running and headlights on at 12:50 am in a parking lot (which closed four hours earlier) was sufficient to corroborate his admission that he was driving home. (see also People v Blake 5 NY2d 118 [1958]: where D was found seated by himself in his car which was up against the guardrail and damaged. Evidence was deemed sufficient to corroborate his admission to "returning home from a party," despite lack of any direct evidence that he was driving. [citing People v Booden supra).

PRESERVATION:

It is worth noting that if the defense wishes to be heard on appeal on the issue of insufficient corroboration, it is critical to address the issue with the trial court, by raising it in a motion to dismiss and/or by requesting the appropriate jury instruction. Otherwise, the issue will likely be deemed unpreserved, (unless the AD is moved to consider the matter in interest of justice.) (see People v Schleyer 236 AD2d 835 (4th dep't 1997]). Also, a court's failure to give a corroboration instruction will not be deemed reversible error if there is clearly sufficient corroborative evidence in the record. (People v Maille 136 AD2d 829 [3d dep't 1988]).

PEOPLE V STACKHOUSE 2021 NY SLIP OP 01833 (4TH DEPT 3/26/21):

CORROBORATION OF ADMISSION: ROBBERY/ FELONY MURDER/CPW:
RIGHT TO COUNSEL VIOLATION:
INEFFECTIVE ASSISTANCE OF COUNSEL:

In this recent case, the AD took up the defendant's otherwise unpreserved "insufficient corroboration" claim in the interests of justice in large measure, it seems, out of concern over the trial court's initial summary disregard of the defendant's specific complaints about his lawyer. The defendant reported a total of two jail visits from counsel in nine months and not providing case-related documents). The trial court also ignored the defendant's request for new counsel for several months, laying the groundwork, in the AD's view, for ineffective assistance of counsel by refusing to adjourn the trial date, thereby giving new counsel all of ten days to prepare for a complicated murder trial.

The proof at trial established that the victim was fatally stabbed in the back in downtown Syracuse after approaching the defendant and three cohorts (including the defendant's cousin, a juvenile and a third party named Tony)m to score some drugs.

Sensing that he had a live one, Tony escorted the victim down an alley (intending to steal his wallet), after which he rejoined the others, holding the victim's now torn tee shirt. Tony told the others, "he still has $10.00" which the juvenile said he wanted. The victim said that he was going to come back with a gun.

It what proved to a fatally unwise decision, the victim returned, now wearing a sweatshirt, and the juvenile restated his interest in the ten dollars. A fight ensued involving the victim, the juvenile, the cousin and the defendant. (Some of their movements were caught on video tape).

Following his arrest, the defendant admitted to police that he helped his cousin get the $10.00 and that he stabbed the victim in the back. He said he was aware that the victim's wallet (later recovered in a nearby field), had been taken (presumably by Tony during the initial confrontation

in the alley), and that the victim still had (or was believed to have) the $10.00 that Tony did not steal from him.

Several months post indictment, the defendant sent a letter to the judge complaining that his lawyer had only visited him in jail twice and still had not complied with his request for case paperwork. On an ensuing court date, the court forged ahead with a Huntley hearing without addressing the defendant's concerns with respect to his respresentation.

The court denied suppression of the defendant's statements but granted counsel's request to take up the issue of proposed redactions, including the defendant's reference to his own criminal history.

A couple months later, the defendant advised the court that he and his lawyer were not "seeing eye-to-eye" but rather ask him to explain himself, the Court said ," I don't know what that means," then proceeded to spout platitudes about the importance lawyer-client communication.

The defendant subsequently moved for new assigned counsel which was denied. Then, a month later, just several days before the scheduled "day certain" trial date, the defendant wrote the court a letter advising that a different lawyer had agreed to accept the assignment. The court agreed to the substitution but refused to grant more time for trial preparation.

At trial, the People presented their case which included the defendant's un-redacted confession. (The AD deemed the failure to object to introduction of the entire statement to be without legal rhyme or reason, and considered the possibility that if new counsel had not been rushed into trial, the redaction issue, raised by previous counsel, might not have gone unaddressed).

The People's theory was that there was, in essence, one robbery of the wallet and the $10.00 as part of a single transaction even though the victim had left and then returned 15 minutes later.

On appeal, the defendant argued that the felony murder count was legally insufficient for lack of corroborating evidence of his admission to the robbery. The court disagreed, reasoning that all that is required is independent proof, whether direct or circumstantial, that the crime occurred. (citing, inter alia, People v Chico 90 NY2d 585 [1997], People v Cuozzo 292 NY 85 [1944]).

The court also noted, that in cases of FELONY MURDER, CPL 60.50 does NOT require independent corroboration of the underlying predicate crime. (citing People v Davis 46 NY2d 780 [1978], People v Harper 132 AD3d 1230 [4th dep't 2013]). All that the statute requires is proof of the corpus delicti, which in the case of felony murder, is a dead body resulting from someone's criminal conduct. (citing People v Murray 40 NY2d 327 [1976], People v Harper supra at 1236). Hence, the fact that the victim died from a knife wound to the back was more than sufficient corroboration of the defendant's admission that he did just that.

With respect to the robbery counts, however, while the Court found sufficient evidence of intent (to participate in the forcible theft of property from the victim), it was not clear whether the jury convicted the defendant for the robbery of the wallet or of the ten dollars.Moreover, in the court's view, the evidence did not establish the defendant's complicity in the taking of the wallet, nor was there any corroborating evidence that ten dollars was actually stolen from the victim. So, while there was sufficient corroboration of the felony murder count, the same conclusion could not be reached with respect to the robbery counts.

Regarding the counsel issues, the court observed that the right to counsel is no less important for an indigent client than it is for one who can afford to retain his/her own lawyer. And, for its part, the trial court has an ON-GOING DUTY to safeguard that right. (People v Linares 2 NY 3d 507 [2004]). When a defendant makes specific complaints about counsel, the court must make at least a MINIMAL INQUIRY (People v Sides 75 NY2d 822 [1990]), to see if the complaint has merit and determine whether any disagreement can be reconciled.

By delaying any consideration of the defendant's complaints for almost nine months, proceeding with a substantive hearing with the issue still unaddressed, and then fluffing it off only to grant the defendant's request with little time for new counsel to prepare, the court was deemed to have effectively denied the defendant his Sixth Amendment right to counsel.

The court also held that new counsel was ineffective for not moving to redact the references in the defendant's own statement to his criminal history which should not have been admitted inasmuch as the defendant neither testified nor put his character in issue. (People v Miller 41 NY2d 475 [1975]). The failure to seek redaction in the court's view, was devoid of any discernible strategic or tactical basis. (People v Benevento 71 NY2d 712 [1992]).

As the AD saw it, the lower court's mishandling of the defendant's request for a new lawyer CREATED A CIRCUMSTANCE that rendered the second lawyer's representation ineffective to such an extent that reversal of the convictions and a new trial (on felony murder and weapon's count) was warranted. (The robbery counts were dismissed).

CPL 60.22: CORROBORATION OF ACCOMPLICE TESTIMONY:

This statute states that:

1. a defendant may not be convicted of an offense upon the testimony of an accomplice unsupported by corroborative evidence that TENDS TO CONNECT the defendant to the commission of the offense.

Unlike corroboration of an admission/confession which only requires independent proof that the crime was committed, this rule requires additional evidence that tends to link the defendant to the crime in such a way that reasonably satisfies the jury that the accomplice was telling the truth about the defendant's involvement in it. (People v McCrae 65 AD3d 1382 [2d dep't 2009]).

This is because the law is (and juries should be) skeptical of those who participate in crime only to flip on their alleged co-defendants in exchange for some expectation or promise of a benefit (e.g reduced plea/lesser sentence) from the prosecution. As the CJI (Accomplice as a Matter of Law), states," our law is especially concerned about the testimony of an accomplice who implicates another in the commission of crime, particularly when he/she has received or expects/hopes for a benefit in return for his/her testimony.

CPL 60.22 (2) defines an ACCOMPLICE as a witness in a criminal action who, according to the evidence adduced therein, may REASONABLY BE CONSIDERED to have participated in

a. THE OFFENSE CHARGED or
b. AN OFFENSE BASED ON THE SAME OR SOME OF THE SAME FACTS CONSTITUTING THE OFFENSE CHARGED.

In many instances (e.g. where an admitted or identified participant in a crime testifies), the witness will be an ACCOMPLICE AS A MATTER OF LAW. As noted in People v Adams 307 AD2d 475 (3d dep't 2003), a witness so qualifies when the jury could reach no other conclusion or than that the witness participated in the offense charged or another offense based on the same facts constituting the crime charged.

In Adams, it was deemed error not to charge the jury on corroboration of an accomplice where the wife of one of the burglars who pled guilty testified that she babysat the defendant's children so that he would be able to participate in the crime.

In contrast, see People v LeGrand 61 AD2d 815 (2d dep't 1978) where the wife who failed to report her husband's commission of a homicide (in which she did not participate) and who prevented others from observing the disposal of the body did NOT qualify as an accomplice to the homicide. (see also People v Lynch 158 AD2d 472 [2d dep't 1990]: a receiver of stolen property is not an accomplice to the underlying theft unless it is established that he aided the thief in stealing the property).

In other cases, the witness may or may not be an ACCOMPLICE IN FACT which requires the jury (before deciding whether there is a need for corroborating evidence), to determine from the evidence presented whether the witness participated in the conduct (e.g. planning or perpetration) of the crime charged. (People v Major 143 AD3d 1155 [3d dep't 2016]).

See People v Sage 23 NY3d 16 (2014): trial court erred in not instructing jury on Accomplice-in-Fact where the witness admitted to punching the victim in the head and neck and the defense argued that those blows could have caused or contributed to the victim's death (which drew support from a pathologist who examined the victim).

As with corroboration of admissions and unsworn witnesses, defense counsel MUST RAISE the issue of accomplice corroboration at trial (i.e. request an instruction on accomplice-in-fact when there is a reasonable basis to believe the witness qualifies as such), in order to PRESERVE the argument for appeal. (People v Young 235 AD2d 441 [2d dep't 1998]).

QUANTUM OF PROOF: ✚ ✖ ✔

It should be noted that the corroboration requirement DOES NOT REQUIRE proof that establishes the defendant's guilt in its own right. (People v Smith 138 AD3d 1382 [3d dep't 2016]). All that is necessary is enough non-accomplice evidence that allows the jury to fairly conclude that the accomplice was truthful about the defendant's involvement in the crime. (People v Harrison 251 AD2d 893 [3d dep't 1998], People v Breeland 83 NY2d 896 [1994]).

In this regard, the CJI instructs the jury: "you may consider whether there is MATERIAL, BELIEVABLE EVIDENCE, apart from the testimony of the accomplice which, while it does not itself tend to connect the defendant with the commission of the crime charged, it nevertheless SO HARMONIZES with the accomplice' s narrative as to satisfy you that the accomplice is telling the truth about the defendant's participation in the crime and THEREFORE TENDS TO CONNECT THE DEFENDANT WITH THE COMMISSION OF THE CRIME. (People v Reome 15 NY3d 188 [2010]).

PL 20.00 ACCOMPLICE: 👪

In assessing whether a witness qualifies as an accomplice to a crime, counsel defense counsel should be mindful of PL 20.00 which states that "when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the STATE OF MIND required for the commission of that offense, he/she SOLICITS, REQUESTS , COMMANDS, IMPORTUNES, OR INTENTIONALLY AIDS such person to engage in such conduct.

Mere presence at the scene of the crime, or association with the perpetrator, without evidence of common criminal intent and some participation before or during the crime, does NOT transform someone into an accomplice by association with the person or place involved. (People v Slacks 90 NY2d 850 [1997]).

CPL 60.22(3) notes, however, that a person who does qualify as an accomplice is no less so because a prosecution or conviction of him/her would be barred by some defense or exemption (e.g. infancy, immunity, previous prosecution) amounting to a collateral impediment to such prosecution/conviction not affecting the conclusion that the the person engaged in the conduct constituting the offense with the same mental state required for the commission thereof.

PEOPLE V REOME 15 NY3D 108 (2010):

CORROBORATING EVIDENCE NEED NOT BE ENTIRELY INDEPENDENT OF ACCOMPLICE'S TESTIMONY AS LONG AS IT IS IN "HARMONY" WITH IT.

In this case, the Court stepped away from the rule set forth in People v Hudson 51 NY2d 233 [1980], which required that corroborative evidence be truly independent of the accomplice's testimony to satisfy CPL 60.22. In the majority's view, rather than consider the corroborating evidence in isolation, it should be evaluated IN CONJUNCTION with the accomplice's testimony to see whether it harmonizes with it in such a way as to lend credence to his/her testimony implicating the defendant in the crime. (People v Breeland 83 NY2d 286 [1994]). In other words, the validity and persuasive weight of the corroborative evidence can be determined in relation to the accomplice's narrative of the events rather than apart from it.

In this case, the victim who was intoxicated, made the ill-advised decision to seek a ride from four individuals, including the defendant, who drove her to a remote location outside of Syracuse and gang raped her after tying her up. They eventually drove her back downtown and dumped her off at a hotel.

The victim could not identify her assailants but described them (including one of the back-seat passengers identified by a testifying accomplice as the defendant). DNA evidence connected the other defendants (driver and front seat passenger)m but not the defendant who, according to the accomplice, was wearing a condom.

In evaluating the evidence, the Court noted that corroborating evidence need not be powerful in its own right but need only satisfy the jury that the accomplice was being truthful in his implication of the accused in the crime charged. (People v Dixon 231 NY 111 [1921]).

The defendant argued, however that while the victim's testimony may have corroborated some details of the accomplice's testimony, there was no corroboration of the accomplice's

IDENTIFICATION of the defendant as one of the perpetrators. Consequently, there was insufficient independent evidence that tended to connect the defendant to the crime. (citing People v Hudson 57 NY2d at 38).

As noted at the outset, the Court rejected the Hudson rule and concluded that there was enough evidence, viewed in conjunction with the accomplice's testimony, to connect the defendant to the rape including: 1. that he was a close friend of one of the codefendants (the driver), 2. cell phone records showing numerous phone calls between the defendant and another codefendant (front seat passenger) before and after the rape but NONE during the period of time in which the victim claimed that she had been raped, 3. the defendant's extremely nervous behavior (sweating, shaking, loss of facial color) when confronted by police and 4. his hair color which matched the victim's initial description of the back-seat passenger on her right (whom the accomplice identified as the defendant).

The Court was not particularly bothered that proof of the defendant's identity as perpetrator came exclusively from the accomplice where the victim's testimony, viewed light thereof, sufficiently harmonized with it to render his testimony on that issue credible. Citing People Dixon supra, the Court said "matters in themselves of seeming indifference or light trifles of the time and place or persons meeting may so harmonize with the accomplice's narrative as to have a tendency to furnish the necessary connection between the defendant and the crime."(213 NY at 116-117).

The dissenting justice (Jones, J.) argued that the majority was wrong to abandon the Hudson corroboration rule, and that there was insufficient evidence INDEPENDENT of the accomplice's testimony to connect the defendant to the crime. The dissenter rejected the People's argument that the absence of the defendant's DNA (unlike the others), was inculpatory rather than exculpatory, based on the testimony of the accomplice who initially lied to the police about his own involvement and then later claimed that he had given the defendant a condom.

The dissenter was similarly unmoved by the marginal probative value of cell phone calls between the defendant and the front-seat passenger without any evidence of their content. Also not lost on the dissenter was the fact that the victim could not identify any of the perpetrators despite having spent hours in a car with them.

In the dissenter's view, People v Hudson should have controlled the analysis, and absent truly independent corroborative evidence, the conviction should have been overturned. (citing People v Sternberg 79 NY2d 677 (1992). As the dissenter observed, "the purpose of the statute is to protect the defendant from the risk of motivated fabrication, to insist on proof other than that alone which originates from a possibly unreliable or or self-interested accomplice. For this reason, the (corroborating) evidence must STAND ON ITS OWN." (citing People v Daniels supra at 627).

OTHER CORROBORATION RULES:

PL 165.65 CRIMINAL POSSESSION OF STOLEN PROPERTY (CPSP):

1. A person charged with CPSP who participated in the larceny thereof may NOT be convicted of criminal possession of such property solely upon the testimony of an ACCOMPLICE in the larceny unsupported by corroborating evidence tending to connect the defendant with such criminal possession.

2. Unless inconsistent with subdivision one, a person charged with CPSP may be convicted thereof solely upon the testimony of one from whom he obtained such property or solely upon the testimony of one to whom he disposed of such property.

INCEST (PL 255.25) AND ADULTERY (PL 255.17)

The law requires corroboration in cases involving sexual intercourse/conduct with someone he/she knows to be related to him/her whether through marriage or not, as an ancestor, descendant, brother or sister of the whole or half blood, an uncle, aunt, nephew or niece.

Per PL 255.30(2), a person cannot be convicted of incest (or attempted incest), solely upon the testimony of the other party unsupported by other evidence tending to establish that the defendant was married to the other party or was a relative of the party as defined above.

ADULTERY:

A person commits this offense (Class B misdemeanor) when he/she engages in sexual intercourse with another person at a time when he/she or the other person has a living spouse.

PL 255.30(1) states that a person shall not be convicted of adultery (or attempted adultery) upon the testimony of the other party to the adulterous act unsupported by other evidence tending to establish that the defendant attempted to engage with the other party in sexual intercourse and that the defendant or other party had a living spouse at the time of the (attempted) adulterous act.

PERJURY: PL ARTICLE 210:

Perjury offenses include:

SWEARING FALSELY (i.e. making a false sworn statement that the person believes to be untrue while a. GIVING TESTIMONY, or b. UNDER OATH in a subscribed written instrument. (PL 210.00[5]).

Perjury 3d degree (PL 210.05),which involves false swearing, is a Class A Misdemeanor, Perjury 2d degree, a class E felony (PL 210.10) involves swearing falsely in a subscribed written instrument with the intent to mislead a public servant in the performance of his/her official duties and which is material to the action/proceeding, and Perjury 1st degree (PL 210.15), a Class D Felony, encompasses the giving of false material testimony under oath.

Pursuant to PL 210.50, in any prosecution for Perjury, except for one based on irreconcilably inconsistent statements (PL 210.20[2]), or making an apparently false written statement, the falsity of such statement may not be established by the uncorroborated testimony of a single witness.

See People v Fitzpatrick 404 NY2d 44 (1976): in a perjury prosecution based on the defendant's denial of stealing another employee's pay check proceeds, endorsements by a bartender who cashed the check containing the employer's company name amounted to sufficient corroboration of an officer's testimony that he saw the defendant cash the check and pocket the proceeds since it was reasonable to infer that the bartender would not have endorsed the check if the payee hadn't cashed it.

FINAL THOUGHT:

While the corroboration bar is not particularly high even for accomplice testimony, counsel should be on the alert to ensure that the court instructs the jury on the requirements of supporting evidence especially where the People's proof is thin, apart from any admission attributed to the defendant, or the People's case depends, at least in part, upon unsworn testimony, or relies upon the testimony of a turncoat accomplice or former co-defendant. In such cases, the CJI instruction expressing the law's special concern about the reliability of accomplice testimony is worth foreshadowing in summation. Such language, in conjunction with the instruction on "'FALSUS IN UNO, FALSUS IN SUM" can be a powerful one-two punch.