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By Thomas P. Franczyk

ADMISSIBILITY OF EXCULPATORY HEARSAY ON CONSTITUTIONAL GROUNDS

SENTENCING OF DV OFFENDERS/SURVIVORS UNDER PENAL LAW 60.12

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INTRODUCTION:

In criminal cases, defense attorneys generally think of the Rules of Evidence in defensive terms. This is to be expected because so much of the defense efforts at trial are directed at keeping out evidence that is harmful to their client's case. In contrast, prosecutors are commonly concerned about finding ways (e.g., exceptions to the Hearsay Rule) to ensure that inculpatory evidence (e.g., out-of-court statements) are admitted for the jury's consideration so that the prosecution can meet its burden of establishing the defendant's guilt of the charges beyond a reasonable doubt.

Consequently when defense counsel objects to a proffered statement on hearsay grounds, the prosecutor may argue, depending on the nature and circumstances of the evidence being offered, that it qualifies as: an excited utterance, a present sense impression, a statement of a party opponent (i.e., an admission), a declaration against penal interest, a statement relevant to diagnosis and treatment, a dying declaration, and in the case of documentary evidence, that it is a business record or public document that is sufficiently reliable to warrant its admission into evidence.

Occasionally, prosecutors may seek to admit the out-of-court statement for some purpose other than establishing the truth of its content (i.e., a non-hearsay purpose) such as establishing the effect of the statement on the listener (insofar as explaining his/her ensuing conduct), or revealing the state of mind of the declarant (assuming it is relevant to a material issue in the case).

PREVIOUS TESTIMONY (CPL 670.10):

When a declarant who has testified in a previous proceeding (e.g., a trial, preliminary hearing, conditional examination pursuant to CPL 660), is unavailable for trial, the prosecution may seek to introduce that witness' earlier sworn testimony into evidence in the current trial in lieu of live testimony. To accomplish this, they must meet the requirements of CPL 670.10 which states:

> Under the circumstances of this Article, testimony given by a witness at: a. a TRIAL of an accusatory instrument, or a HEARING upon a FELONY COMPLAINT (per CPL 180.60) or a CONDITIONAL EXAMINATION UNDER OATH per CPL ARTICLE 660 (of a material witness who will not be amenable/responsive to legal process or available to testify because he/she will be out of state for a substantial period of time or is physically ill or incapacitated), MAY, WHERE OTHERWISE ADMISSIBLE, BE RECEIVED INTO EVIDENCE AT A SUBSEQUENT PROCEEDING IN OR RELATED TO THE ACTION

INVOLVED WHEN, AT THE TIME OF SUCH SUBSEQUENT PROCEEDING, THE WITNESS IS UNABLE TO ATTEND BY REASON OF DEATH, ILLNESS OR INCAPACITY, OR IS OUT OF STATE, OR IN FEDERAL CUSTODY AND, CANNOT WITH DUE DILIGENCE, BE BROUGHT BEFORE THE COURT.

UPON BEING RECEIVED INTO EVIDENCE, SUCH TESTIMONY MAY BE READ AND ANY VIDEOTAPE OR RECORDING THEREOF PLAYED. WHERE ANY RECORDING IS RECEIVED INTO EVIDENCE, THE STENOGRAPHIC TRANSCRIPT OF THE EXAM SHALL ALSO BE RECEIVED.

CROSS EXAMINATION:

One of the keys to admissibility of prior testimony is the opportunity of the defendant to CROSS EXAMINE the witness at such proceeding which is at the heart of the right of CONFRONTATION under the Sixth Amendment of the Constitution (Crawford v Washington, 521 US 36 [2004]). However, even where such opportunity was presented, prior testimony may not be admissible where the court unfairly restricted counsel's ability to probe the witness on a material such as identification of the perpetrator (*see* People v Simmons 36 NY2d 126 [1976]).

NEW YORK EVIDENCE RULE 8.02 (CONFRONTATION CLAUSE):

A TESTIMONIAL statement of a person who does not testify at trial is NOT ADMISSIBLE against a defendant for its truth UNLESS such person is UNAVAILABLE as a witness at trial and the defendant had a PRIOR OPPORTUNITY for CROSS EXAMINATION, OR the defendant ENGAGED IN OR ACQUIESCED IN WRONGDOING INTENDED TO AND DID PROCURE THE UNAVAILABILITY OF THE WITNESS.

See People v Geraci 85 NY2d 359 (1995): out-of-court statements including Grand Jury testimony may be admitted as direct evidence where the witness is unavailable to testify and the witness' unavailability was procured by the defendant's direct or indirect misconduct.

A statement is considered TESTIMONIAL when it was: a.) given under oath at a preliminary hearing, before a grand jury or at a former trial; b(i).) provided to "state actors" (e.g., law enforcement) in a formal interrogation conducted for the purpose of obtaining evidence for use at trial; or b(ii).) made under circumstances indicating that the PRIMARY PURPOSE was to obtain an out-of-court statement to prove criminal conduct or past events relevant to a later prosecution, or serve as a substitute for trial testimony (as opposed to helping police MEET AN ONGOING EMERGENCY) (*see* Michigan v Bryant 562 US 344 [2011]).

Generally speaking, the rule (CPL 670.10) permitting the use of prior testimony is LIMITED to the prior proceedings set forth therein (i.e., prior trial, felony hearing or conditional examination) where there was an opportunity for cross examination.

Consequently, prior Grand Jury testimony of a witness OFFERED BY THE PROSECUTION to establish the defendant's identity as the perpetrator was ruled INADMISSIBLE in People v Green, 78 NY2d 1029 (1991), and absent any proof that the defendant or anyone on his behalf tampered with prospective witnesses, there was no basis to admit witness Grand Jury testimony (People v Hamilton 70 NY2d 1029 [1988]) (*see also* People v Perkins 289 AD2d 940 [4th Dep't 2001]: error to permit introduction of witness' Grand Jury testimony where threats came from co-defendant but NOT from the defendant).

Similarly, testimony given by a witness at a SUPPRESSION HEARING is NOT ADMISSIBLE at trial because it is not listed among the authorized prior proceedings under CPL 670.10 (*see* People v Ayala 75 NY2d 422 [1990]; *see also* People v Rosa 302 AD2d 231 [1st Dep't 2003]: suppression hearing testimony of defense witness disallowed).

BUT SEE NY EVIDENCE RULE 8.0 (1)(b) which states that:

THE FEDERAL AND NEW YORK STATE CONSTITUTIONS REQUIRE THE ADMISSION OF HEARSAY NOT ENCOMPASSED WITHIN A HEARSAY EXCEPTION WHEN THE COURT FINDS THAT THE DECLARANT IS UNAVAILABLE TO TESTIFY, AND THE HEARSAY IS MATERIAL, EXCULPATORY AND HAS SUFFICIENT INDICIA OF RELIABILITY.

This rule derives from the CONSTITUTIONAL (i.e., DUE PROCESS) rights of the defendant not only to CONFRONT witnesses but also to PUT FORTH A DEFENSE by calling witnesses (and otherwise presenting affirmative evidence) in his/her own behalf. (Chambers v Mississippi 410 US 289 [1973]). The keys to admissibility are: UNAVAILABILITY of the declarant, the MATERIALITY AND EXCULPATORY NATURE of the testimony, and sufficient indicators of its RELIABILITY (People v Burns, 6 NY3d 793 [2003])

PEOPLE V ROBINSON 89 NY2D 648 (1997):

In this case, the Court of Appeals affirmed the Fourth Department's reversal of the defendant's conviction for Sex Abuse 3d degree (as a lesser included offense of Sex Abuse 1st degree) on the grounds that the trial court (in a bench trial) violated the defendant's Due Process rights by refusing to receive into evidence the exculpatory Grand Jury testify of the defendant's wife who had become unavailable to testify.

The Court held that on the facts of this case, where the hearsay evidence was exculpatory (i.e., supported the defendant's claim of consensual sex with the complainant while his then-fiancée was present) and had sufficient indicia of reliability, then the failure to admit such testimony (notwithstanding its exclusion from CPL 670.10) constituted reversible error.

FACTS:

After a night out of drinking and dancing at a night club, the defendant, his fiancé, and their friend (the complainant) returned to the couple's apartment where the defendant proceeded to have sex with the complainant in the presence of his fiancé. The complainant testified that it was non-consensual and that she screamed and tried to fight off the defendant while the fiancé, who was not in the room, did not respond or intervene. The defendant testified (in the Grand Jury and at trial) that it was all consensual and that his fiancé was right there.

The fiancé, who had since left the defendant after they were married (and before trial), testified in the Grand Jury and supported her then-boyfriend's story, claiming that if the complainant had objected (which she allegedly did not) and the defendant persisted, she would have beaten him over the head with her trusty stick that she kept in her apartment to ward off intruders.

At some point in time after the Grand Jury indicted the defendant on charges of Sex Abuse 1st degree and Sexual Misconduct (but not Rape 1st degree), the defendant and his girlfriend were married. Although she was on the defendant's list of trial witness, she left the jurisdiction and

refused to return despite diligent efforts on the defense's part to secure her presence per CPL 640.10.

It is unclear from the record why the wife left and refused to come back. It could have been that she and the defendant had a falling-out; or perhaps she no longer wanted to vouch for someone who would brazenly have sexual contact with someone else while they were engaged; or maybe, she did not want to further perpetuate a false claim of consent. The Court of Appeals confined its focus, however, to the fact that she was an unavailable witness, despite the defense's due diligence, and was satisfied that her Grand Jury testimony had sufficient signs of reliability to warrant its admission into evidence.

ARGUMENTS ON APPEAL:

On appeal, the People did not contest the issues of unavailability and due diligence, but they noted that Grand Jury proceedings (where there is seldom any cross examination of witnesses and the defense is not present, unless the defendant testifies) are not a proper source of former testimony for trial purposes, and there was insufficient indicia of reliability of the fiancée's testimony in any event (citing, *inter alia*, People v Green *supra* and People v Harding 37 NY2d 130 [1975].

Notwithstanding the general exclusion of Grand Jury testimony from the statute defining former testimony, the Court concluded that "certain circumstances" can sanction its admission at a later trial. For example, the Court pointed out that in People v Geraci, *supra* the Grand Jury testimony of a witness who the defendant had threatened and caused to not be available to testify was admitted on public policy grounds to reduce the incentive for targeting of prospective witnesses.

DUE PROCESS:

Here, the Court noted, the defendant had sought to introduce his wife's testimony on Due Process grounds, arguing that he had a fundamental right to present witnesses in his own defense (citing Chambers v Mississippi, *supra,* and Washington v Texas, 388 US 14 [1967]: the 6th Amendment, applicable to the states via the 14th Amendment expressly requires compulsory process for presenting witnesses in a criminal defendant's favor; *see also* NY Civil Rights Law section 12).

The Court stated that a defendant's right to "offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to PRESENT A DEFENSE, the right to present the defendant's version of the facts… to the jury so it may decide where the truth lies" (citing Washington v Texas, *supra.*)

The Court also noted that prosecutors have significant responsibility and authority as legal advisor and wide discretion as evidence presenters in deciding what (and how much evidence) to present to the Grand Jury. And while they typically elicit incriminating testimony from prosecution witnesses as if on direct examination, they also, on occasion, get the opportunity to cross examine defendants who testify upon a waiver of immunity (with defense counsel present but unable to object), as well as witnesses who may testify and provide exculpatory evidence on the defendant's behalf.

Where, as here, the defendant sought to admit Grand Jury testimony adduced by the prosecutor, the Court concluded that considerations of constitutional dimension should permit its introduction into evidence as an exception to the Hearsay Rule because the testimony met

certain standards for admissibility (e.g., witness unavailability, materiality, and indicia of reliability).

As the court observed, “a defendant has a constitutional right to introduce a secondary form of evidence such as prior testimony when two circumstances are present: first, the evidence bears sufficient evidence of reliability * * * and second, the witness who gave (such) testimony is no longer unavailable. Moreover, the proffered testimony…must be material (citing Rosario v Kuhlman, 839 F2d 918 [2d Circ. 1988]).

The issue of MATERIALITY of the testimony, the Court noted, was not in dispute inasmuch as the issue of CONSENT (or the lack thereof) was central in the case, as noted by the Appellate Division (224 AD2d 1001.) There was also no dispute on the issues of witness unavailability and due diligence.

RELIABILITY OF TESTIMONY:

The only point of contention was over the issue of reliability of the testimony. On this matter, the Court noted that the prosecutor (despite the limited format of the proceedings and lesser burden of proof) had ample opportunity to cross examine the defendant’s fiancé and, in fact, was able to call her credibility into question by bringing out her bias (in favor of the defendant), and the fact that she and the defendant left town when they heard that the complainant was going forward with charges.

The prosecutor also confronted her with a letter from the defendant wherein he pressed her to “break down” the complainant without getting herself into trouble with the District Attorney’s office. The prosecutor also explored other issues in depth including the relationships among all three parties involved and the details of the sexual encounter, including their states of sobriety on the night in question.

In the court’s view, there were sufficient indicators of testimonial reliability to ensure a level of trustworthiness to justify admissibility of the fiancée’s Grand Jury Testimony (citing Ohio v Roberts 448 US 56 [1980]). And the fact that this witness may have been biased did not preclude admissibility since witness credibility, while always a matter for the jury to determine, does not necessarily render the testimony unreliable (citing People v Settles 46 NY2d 154 [1976].)

EXCLUSION OF FIANCÉ’S GRAND JURY TESTIMONY VIOLATED DEFENDANT’S RIGHTS;

Accordingly, the trial court’s refusal to admit the fiancé’s Grand Jury testimony constituted reversible error warranting a new trial (and dismissal of other charges with leave to present to a new Grand Jury) (citing US v Agurs 427 US 97 [1976]).

IN CONTRAST, SEE PEOPLE V HAYES, 17 NY3D 46 (2001):

In this movie-house stabbing/self-defense case, the Court of Appeals, in a split decision, held that:

1. the People met their obligation under Brady v Maryland, 373 US 83 (1963) by informing the defense that a police lieutenant who was securing the scene, overheard two bystanders (whose identities or statements he did not bother to obtain) separately say that the victim first had the knife (and “got what he deserved.”) In the Court’s view, while the People are

required to disclose exculpatory information in their possession and control (or under the control of law enforcement), the police were NOT under any affirmative duty to seek out and provide information favorable to the defense (e.g., witness names and contact information that they did not possess).

2. the trial court did NOT err in prohibiting the defense from eliciting the witness' hearsay statements on cross examination of the police sergeant for the purpose of establishing the inadequacy of the police investigation.

FACTS:

Shortly after midnight in a Manhattan movie theater, the victim and about ten of his friends got into an argument with the defendant and several of his friends who were seated in the balcony above them. Apparently, the victim and his people were making too much noise, prompting one of the defendant's people to yell, "SHUT UP!"

The altercation spilled into the hall when the upstairs crew came downstairs and confronted the alleged noisemakers. One witness described the defendant as pacing back and forth, saying, "who wants it?" The victim confronted the defendant who grabbed his left wrist and blocked the victim's right arm. He then punched the victim twice in the stomach and ran out of the theater. The victim realized that he'd just been stabbed.

The defendant testified that he went to the lower level to ask the victim and his friends "politely" to "refrain from talking" during the movie. The victim jumped out of his seat, confronted the defendant and made a move with his hand toward his belt. He then pulled a knife from his waistband and swung it at the defendant with his left arm. The defendant grabbed the victim's arm with his left hand and used his right hand to grab the knife away from the victim.

During the fracas, the defendant was pushed onto the stairs leading to the balcony, and while he was leaning back on the stairs, he tried to block another punch from the victim. That forward momentum, according to the defendant, brought the victim into contact with the knife in the defendant's hand.

The defendant was apprehended outside the theater by a police sergeant who had seen him fighting in the vestibule. The defendant was also observed ditching a metal object which turned out to be a gravity knife.

In the aftermath, several police officers tried to sort out and secure the scene. In the process, A police sergeant overheard two individuals say, "that's the guy (i.e., the victim)… he had the knife first… he got what he deserved." If it ever occurred to this officer to get their names and contact information, the record established that he never did so.

During trial preparation, the sergeant did provide this information to the prosecutor who promptly disclosed it to the defense. The defendant argued, however, that the police failure to obtain and provide the identities of these witnesses constituted a *Brady* violation. The trial court ruled, however, that the prosecution was not under any affirmative duty to look for and provide information from unknown bystanders (unknown only for lack of police follow-up) that might be favorable to the defense.

DEFENDANT OFFERS HEARSAY STATEMENTS FOR NON-HEARSAY PURPOSE:

The defendant also argued that he should be allowed to cross examine the police about these statements, not for their truth (i.e., that the victim had the knife first and lunged at the defendant), but to show the shoddiness of the police investigation (in failing to follow-up on clearly relevant [and exculpatory] statements with respect to which party was the first aggressor (citing Kyles v Whitley 514 US 419 [1995]).

APPLICATION DENIED:

The trial court denied the defendant's request, ruling that there was too great a risk that the jury would accept those anonymous hearsay statements for their truth, and the defendant's right to confront witnesses and present a defense is not so expansive as to provide him carte blanche to circumvent the Rules of Evidence (People v Cepeda, 208 AD3d 364 [1st Dep't 1994]).

DEFENDANT FOUND GUILTY OF ASSAULT 2D DEGREE AND CPW 2D DEGREE. AD AFFIRMS.

The defendant was convicted of Assault 2d degree (as a lesser included offense of Assault 1st degree) and Criminal Possession of a Weapon 2d degree. The Appellate Division (72 AD3d 441 [1st Dep't 2010]) affirmed in a 3-2 decision, holding that there was no *Brady* violation and that the trial court did not abuse its discretion in curtailing the cross examination with respect to the thoroughness of the police investigation (or lack thereof).

COURTS OF APPEALS ALSO AFFIRMS: NO *BRADY* VIOLATION AND NO ABUSE OF DISCRETION:

The Court of Appeals affirmed finding, first, that while Brady v Maryland, *supra* condemns the prosecution's suppression and/or non-disclosure of exculpatory (or impeaching) information that prejudices the defendant (People v Fuentes 12 NY3d 259 [2009]), it does not impose an affirmative obligation upon them to go out and look for evidence not in their possession or under their control that may be helpful to the defense (citing *inter alia* People v Alvarez 70 NY2d 275 [1987] and People v Kelly 62 NY2d 516 [1984]).

As the Court observed, "there is a difference between preserving evidence (that the People) already have and affirmatively obtaining evidence for the benefit of (the defendant) …The *Brady* protection extends to discoverable evidence GATHERED BY THE PROSECUTION and seeks to ensure the disclosure (or prevent destruction) of exculpatory evidence already in the People's possession (citing People v Kelly, *supra* at 520)

Consequently, in the Court's view, the People satisfied their *Brady* obligation when they informed the defense of the content of the witness statements but did violate the defendant's rights by not disclosing identifying information that was unknown to them and which was not in their possession or under their control.

CPL 245.20(1)(K): *BRADY* MATERIAL:

In this connection, it is worth taking note of CPL 245.20 (1)(k) (effective 1/1/20) which states that the People shall disclose (and permit the defendant to discover, inspect copy, photograph and test), all items and information relating to the subject matter of the case AND (WHICH) ARE IN POSSESSION, CUSTODY AND CONTROL of the prosecution (or of persons under their direction and control):

all evidence/information (whether or not in tangible form) which is known to police or other law enforcement agency 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 OR MITIGATE THE DEFENDANT'S CULPABILITY with respect 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 the perpetrator of a charged offense;
v. PROVIDE A BASIS for a MOTION TO SUPPRESS or
iv. MITIGATE PUNISHMENT.

While the statute codifies the People's *Brady* obligations, it appears to apply to evidence/information in the prosecution's possession or control (or known to law enforcement), it does not seem to impose an affirmative obligation (beyond disclosing what is already known/possessed, as in Robinson), to ascertain the identities and provide the names of witnesses who may have information that could be helpful to the defense.

ETHICAL AND PRACTICAL CONSIDERATIONS:

Prosecutors, nevertheless, must be mindful of their overriding obligations to seek justice (rather than only convictions), and not turn a blind eye to potentially verifiable information that could exculpate the defendant (*see generally* RPC 3.8). Similarly, it doesn't seem too much to expect that the police, upon learning of information (from potential eyewitnesses) that is relevant to a crime that just happened, will take the time to question those individuals who are standing right in front of them or at least obtain their identities and contact information for future reference and follow up. By doing so, they not only do what is right, but enhance their credibility by demonstrating the thoroughness and impartiality of their investigation rather than coming across as nincompoops who are too distracted or uninterested to carry out the basic tasks of everyday police work.

That, it seems, is what defense counsel was attempting to accomplish in Robinson by seeking to elicit the content of the witnesses' hearsay statements on cross examination of the police sergeant. Nevertheless, the majority of the Court stressed that the right to present a defense is not unfettered by the Rules of Evidence (People v Williams 81 NY2d 303 [1993]) and saw no great evidentiary significance in the victim's first possessing the knife (in relation to the defendant's justification claim) since, at the moment of the stabbing, he was no longer armed and (in the majority's view), no longer capable of instilling a reasonable fear of serious physical injury in the defendant.

The Court also expressed concern that probative value of those statements was outweighed by the risk of undue prejudice (to the People) in that they could confuse or mislead the jury (People v Davis 43 NY2d 17[1977]). In the Court's estimation, there was also an unfair risk that the jury could accept the content of this hearsay for its truth (that the victim had the knife first) which, as noted above, was of no great moment to the majority in any event.

STRENUOUS DISSENT:

The dissenting justice (former CJ, Jonathan Lippman), agreed with the majority that there was no Due Process violation under Brady v Maryland, *supra* but strenuously disagreed that the trial court did not commit reversible error in precluding inquiry on cross examination into the hearsay statements for the purpose of exposing the inadequacy of the police investigation (citing, *inter alia*, Kyles v Whitley, *supra*).

Contrary to the majority's interpretation, the dissenter felt that the trial judge failed to exercise any demonstrable discretion in summarily denying the defendant's request by saying, "I decide whether (the hearsay evidence) comes in, …and if I rule that you're bringing it in for an impermissible purpose and it's hearsay, (then), it doesn't come in." In the dissenter's view, the trial court misapprehended the permissible NON-HEARSAY purpose for which the evidence was offered.

To the extent that any discretion may have been exercised, the dissenter concluded that it was an abuse thereof, because the probative value of the evidence (insofar as revealing the existence of witnesses who possessed relevant information on the issue of who was the initial aggressor [but whose identities were never obtained]), outweighed the risk of prejudice because it cast doubt on the People's case against justification.

As the dissenter saw it, if the stabbing occurred as the defendant described (with him leaning back on the stars and the victim continuing to advance on him in close quarters), the fact that the defendant had disarmed the victim would not necessarily (as the majority seemed to conclude) have ruled out a justification defense (citing People v Huntley, 59 NY2d 868 [1983]). The dissenter also noted that the trial court could have given a limiting instruction which a jury is presumed to heed (People v Tosca 98 NY2d 660 [2002]).

In the dissenter's view, while the State may not have any affirmative duty to seek out exculpatory evidence, where the failure to do so (in this case, not obtaining the witness identities and information), may reasonably be seen as undermining the proof of guilt, judicial discretion should not be used to shield the alleged infirmity from the jury's view.

DECLARATION AGAINST PENAL INTEREST THAT EXCULPATES THE DEFENDANT:

NY Evidence Rule 8.01(1) (NYS EVIDENCE ADVISORY COMMITTEE) states, *inter alia*, that a statement made by a declarant upon his/her PERSONAL KNOWLEDGE which, at the time of its making, the declarant KNEW was AGAINST HIS/HER PENAL INTEREST (i.e., tended to subject him/her to criminal liability), is ADMISSIBLE, IF THE DECLARANT IS UNAVAILABLE as witness (*see* People v Settles, supra.)

Subdivision 1(c) states that where a statement tends to subject the declarant to criminal liability, and is offered to EXCULPATE the defendant, the statement is admissible ONLY when

INDEPENDENT EVIDENCE of the statement establishes a REASONABLE POSSIBILITY that the statement MIGHT BE TRUE.

PEOPLE V SOTO, 26 NY3d 455 (2015):

In People v Soto, 26 NY3d 455 (2015), the Court of Appeals held that the trial court ERRED in refusing to admit a signed handwritten statement given by the defendant's friend to a defense investigator wherein the friend said that she (not the defendant) was driving the vehicle which struck a parked car and left the scene. The Court noted that the four prongs of the test described in People v Settles, *supra*, were met: 1. the witness was unavailable since she had invoked her Fifth Amendment right to remain silent (the DA refused the defense's request for the court to grant her immunity for testimony); 2. she demonstrated sufficient awareness of possible criminal consequences at the time she gave her statement and was aware it was against her penal interest; 3. the declarant had direct knowledge of the facts underlying the statement (as to whether she was driving the car); and 4. there was independent evidence supporting the possible truth of her statement (fifteen minutes before the hit-and-run a witness saw her seated behind the wheel of the defendant's car, with defendant in the passenger seat.)

FACTS:

A prosecution witness testified that he saw the defendant's vehicle driving up and down the street before striking a parked car at about 15 miles-per-hour. The witness approached and saw the defendant (the only person in the vehicle) get out and start dancing around in an apparent state of intoxication. The defendant told police, "I started drinking and got lost. I f'd up. I couldn't drive for shit." He registered a BAC .22. He was charged (and later convicted) with multiple counts of DWI.

A couple weeks later, the defendant, a bus driver, saw his friend, (a 19-year-old woman whom he had previously met on his bus) and told her of his predicament arising from the night in question. He asked her for help and she provided a statement to a defense investigator. She stated that she that she had driven the defendant's car (despite only having a learner's permit) so that he could drink. She added that they saw the defendant's friend and she promised that she would get the defendant home safely. She added that she took a turn too fast and hit a car. After the defendant yelled at her, she got scared and took off.

Immediately after signing the statement, the witness expressed concern that she could get in trouble for what she was saying and was worried about her parents finding out (that she was with the defendant and driving when she should not have been). She inquired several times whether she could contact an attorney but the investigator provided no particular guidance in that regard.

TRIAL COURT REFUSES TO ADMIT DEFENSE WITNESS' STATEMENT:

The defendant offered the witness' statement into evidence as a declaration against penal interest. After a hearing, the court denied the application, ruling that there was insufficient proof that the witness knew that she could be charged with a Vehicle and Traffic offense for leaving the scene. The court also noted that she only expressed concerns AFTER signing the statement (rather than before or while she gave it). The court also questioned whether a minor V&T offense was of sufficient magnitude to truly make the statement against penal interest,

APPELLATE DIVISION REVERSES:

The Appellate Division (113 AD3d 153) reversed, holding that the witness' statement of concern about getting into trouble (coupled with her repeated inquiries about an attorney) were enough to indicate an awareness of potential penal consequence and that such knowledge was expressed close enough in time to the statement to warrant its admission.

COURT OF APPEALS AGREES:

The Court of Appeals affirmed, ruling that the witness' stated concerns sufficiently expressed an awareness of potential criminal liability, and that the exposure need be not so dramatic or serious (e.g., an admission to murder) to qualify as a declaration against interest (citing People v Brown, 26 NY2d 88 [1970]). The Court also found that there was sufficient independent support in the other witness' statement (he saw the defendant in the passenger seat and the witness behind the wheel shortly before the accident) to lend some credence to the young woman's story. The Court was also not bothered by the fact that the witness' expression of concern were made right after (rather than before) she signed the statement.

ANOTHER STRENUOUS DISSENT:

The dissenting justice (Pigott, J.) concluded that the record supported the trial judge's finding that that witness was not aware that her statement could subject her to prosecution for a V&T violation. At most, in the dissenter's view, her worries were more parental than penal in nature.

This justice also commented that the defendant, who had a lot to lose if convicted (i.e., his ability to continue his livelihood as a bus driver), had asked the young woman if she could "help him out" two weeks after he was charged with DWI.

…

DOMESTIC VIOLENCE SURVIVOR JUSTICE ACT: 2D DEPARTMENT REVERSES SENTENCE AS UNDULY HARSH.

In People v Addimando, 2021 NY Slip Op 04364 (2d Dep't 7/14/21) the AD held that the trial court erred in finding that the defendant, who had been subjected to several years of sadistic sexual abuse (including forcible sex with foreign objects and burning of her private parts), was not entitled to reduced sentence consideration under PL 60.12 (effective in 2019), upon her convictions for Murder 2d degree and Criminal Possession 2d degree.

After rejecting her plea for lenience, the lower court sentenced her to 19 years-to life on the murder charge and 15 years determinate (+ five years PRS), concurrent on the weapons count. The proof at trial established that the defendant shot her husband at close range in the head while he was dozing shortly after he told her that he was going to kill her, then kill himself, leaving their children without parents. Despite evidence of abuse documented in hospital records and photographs of injuries to her face, breasts and genitalia, the jury rejected her claim of self-defense based on Battered Wife Syndrome.

CPL 60.12 HEARING:

At a pre-sentence hearing, the defendant presented even more evidence of abuse which the court concluded was “undetermined”. The court focused instead on the fact that the defendant had less violent options available to her (e.g., leaving the defendant) other than shooting him in the head. In the court’s view, the choice she made and the manner in which she carried it out outweighed any abuse that she may have suffered.

APPELLATE DIVISION REJECTS LOWER COURT’S CONCLUSIONS:

The AD rejected the lower court’s conclusion that the defendant’s history of abuse was “undetermined,” pointing, for example to evidence that the victim had sexually abused her for years including forcible sex by strangulation and burning her with a hot metal spoon.

The court noted that CPL 60.12 (1) allows a court to impose a lesser sentence (than would otherwise be authorized by PL 70.00, 70.02, 70.06 or 70.71) where the defendant can show that at the time of the offense:

a. she was a VICTIM OF DOMESTIC VIOLENCE (and was) subjected to SUBSTANTIAL PHYSICAL, SEXUAL OR PSYCHOLOGICAL ABUSE inflicted by a member of the same family or household as the defendant (CPL 530.11), and that
b. such abuse was a SIGNIFICANT CONTRIBUTING FACTOR to the defendant’s criminal behavior; and
c. having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, a traditional sentence (as authorized by the above-referenced sections) would be UNDULY HARSH.

BURDEN OF PROOF:

Though the statute is silent with respect to the BURDEN OF PROOF at a hearing under PL 60.12, the court, referencing CPL 440.30 (6) (motion to vacate judgment and set aside sentence), determined that the defendant must establish entitlement to less punitive sentencing by a PREPONDERANCE OF THE EVIDENCE (i.e., evidence that produces a “reasonable belief in the facts asserted” (Jarrett v Madifari, 67 AD2d 396 [1st Dep’t 1979]).

The court determined that the defendant more than sufficiently met her burden, and chided the lower court for taking such an antiquated view of the behavior of Domestic Violence victims which, in the court’s estimation, ran afoul of the intent of the statute to afford judges the discretion, in appropriate cases, to show some compassion in sentencing defendants who are the victims of domestic abuse (*see generally* People v Andujar 30 NY3d 160 [2017]).

The court noted that the defendant presented a detailed history of physical, sexual and psychological abuse at the hands of the victim who, among other sordid behaviors, compelled her to reenact scenes he viewed in violent pornographic movies. He also told her in graphic detail how he could shoot her in different parts of her brain and either kill or disable her.

The defendant also presented and expert witness who testified about the adverse affects of such on-going abuse on the victim including her belief that she would not get out of this

relationship alive. Just before she shot him, the victim had sexually assaulted and threatened the defendant.

APPELLATE DIVISION REDUCES DEFENDANT'S SENTENCE SUBSTANTIALLY:

Determining that the defendant had met the requirements of PL 60.12, the court REDUCED THE SENTENCES to 7 and 1/2 years (determinate) plus five years PRS for the murder, and 3 and 1/2 years (determinate) plus five years PRS, to run CONCURRENTLY.

FINAL THOUGHT:

Counsel should not hesitate when representing clients who may be victims of on-going Domestic Violence to do a detailed work-up of their history (including obtaining any prior medical records, police reports, DIR'S, etc.) to determine whether there is a sound basis for asserting a defense at trial (e.g., justification) or, in the event of a conviction, for presenting mitigating evidence at a hearing under PL 60.12.

ACP social workers can provide valuable assistance in interviewing clients, assessing their background and any treatment needs. Our mitigation specialist (Tara Evans, Esq.) can, in appropriate cases, gather relevant information and prepare a report that could well mean the difference between a lifetime in prison or in the community under appropriate supervision.