Table of Contents

RENUNCIATION: SECOND THOUGHTS ABOUT CRIMINAL CONDUCT

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INTRODUCTION

In the pivotal scene of the Godfather in which Michael Corleone cements his role as the new don of the Corleone family, while he renounces Satan and all his works at his infant son's baptism, his henchmen carry out his orders to eliminate several of the family 's key enemies in a hellish rain of gunfire in an elevator, a revolving doorway, a bedroom, on a massage table and on the steps of City Hall.

What the once-reluctant heir to the Corleone thrown renounced when water was poured and blood was spilled was his aversion to his family's life of organized crime which his late father, Vito, professed never to want for him. However, his hot-headed, older brother, Santino was unavailable on account of death and his feckless other brother, Fredo was ill-suited to any position of leadership.

RENUNCIATION

Most real-life crimes are much more mundane and haphazard than dramatically methodical, but once criminals set their minds on their objective and put things in motion, they seldom suffer a crisis of conscience that causes them to RENOUNCE or reject their criminal purpose and abandon their venture.

But sometimes it happens and when it does, a defendant charged as an accomplice to a crime, or with an inchoate or anticipatory crime (e.g., attempt, facilitation, solicitation, conspiracy) bears the burden of proving by a preponderance of the evidence that he/she VOLUNTARILY AND COMPLETELY RENOUNCED HIS CRIMINAL PURPOSE and MADE A SUBSTANTIAL EFFORT to prevent the commission of the crime (e.g., accomplice liability, facilitation) or prevented the commission of the object crime (e.g., attempted crime, solicitation and conspiracy).

Renunciation is not available to a lone defendant who has completed his/her crime (e.g., returning the stolen jewelry does not undo the crime) and it typically applies when the defendant acts along with others but then backs out (based on a true desire to thwart the criminal purpose) and takes steps to prevent the completion of the crime.

RELEVANT STATUTES

Penal Law § 40.10(1) states that in any prosecution for an offense, (other than an ATTEMPT to commit a crime) in which the defendant's guilt depends upon his criminal liability for the conduct of another person per Penal Law § 20.00, it is an AFFIRMATIVE DEFENSE that under circumstances manifesting a VOLUNTARY AND COMPLETE RENUNCIATION of his/her criminal purpose, the defendant WITHDREW

from participation in such offense PRIOR to the commission thereof and made a SUBSTANTIAL EFFORT to prevent the commission thereof.

Pursuant to Penal Law § 20.00, a defendant is liable for criminal conduct of another when, acting with the mental culpability required for the commission of the offense, he/she SOLICITS, REQUESTS, COMMANDS, IMPORTUNES OR INTENTIONALLY AIDS such person to engage in such conduct.

To be guilty of a crime as an accomplice, the defendant must share the same culpable mental state (e.g., intent) as the principal actor, and do something to instigate or aid in its commission (*See People v Carter*, 96 AD3d 1520 [4th Dept 2012]). While the defendant need not physically participate in the commission of the intended crime, his/her mere presence at the scene (even with knowledge of its commission or association with the perpetrator) is not enough to impose accomplice liability (*People v Slacks*, 90 NY2d 850 [1997]).

If a defendant wishes to claim renunciation, it is NOT enough that he/she withdrew out of fear that he/she (or another participant) would be found out or caught, or because the achievement of their criminal objective was made more difficult by the circumstances. Also, putting the crime off to another day or re-focusing the criminal effort to another victim or another (similar) criminal objective constitutes only a change (or delay) in the plan but NOT a renunciation of its purpose. (PL 40.10 [5]).

CRIMINAL FACILITATION

Penal Law § 40.10 (2) states that in any prosecution for CRIMINAL FACILITATION (PL Art. 115.00), it is an affirmative defense that PRIOR to the commission of the FELONY which he/she facilitated, the defendant made a SUBSTANTIAL EFFORT to prevent the commission of such felony.

There are four levels of Criminal Facilitation from fourth degree (class A misdemeanor) to first degree (class B felony) which escalate based on the level of the crime facilitated and the relative ages of the persons involved.

Under Penal Law § 115.00 (1), a person commits fourth degree facilitation (a class A misdemeanor) when, BELIEVING IT PROBABLE THAT HE IS RENDERING AID to a person who intends to commit a CRIME, he/she engages in conduct which provides such person with MEANS OR OPPORTUNITY for the commission thereof and which IN FACT AIDS such person to COMMIT A FELONY; or

2. believing it probable that he/she is rendering aid to a PERSON UNDER AGE 16 WHO INTENDS TO ENGAGE IN CONDUCT WHICH WOULD CONSTITUTE A CRIME, he, BEING OVER AGE 18, ENGAGES IN CONDUCT WHICH PROVIDES SUCH PERSON WITH MEANS OR OPPORTUNITY FOR THE COMMISSION THEREOF and which in fact AIDS SUCH PERSON TO COMMIT A CRIME.

So, when the person facilitated by an adult defendant is under 16-years-old, the offense committed need only be a crime (i.e., a misdemeanor or a felony) whereas the crime committed by someone over 16-years old (under subdivision one) must be a felony.

CRIMINAL FACILITATION 3RD DEGREE, PL 115.01, (CLASS E FELONY)

A defendant (who is over age 18) commits this offense when, believing it probable that he is rendering aid to a person under age 16 who intends to commit a felony, provides such person with means or opportunity for the commission thereof and, in fact, aids such person to commit a felony.

CRIMINAL FACILITATION 2nd DEGREE, PL 115.05, (CLASS C FELONY)

A defendant is guilty of this offense when, believing it probable that he is rendering aid to a person who INTENDS TO COMMIT A CLASS A FELONY, provides such person with means or opportunity for the commission thereof, and, in fact, aids such person to commit such class A felony.

CRIMINAL FACILITATION 1ST DEGREE, PL 115.08, (CLASS B FELONY)

The elements of this crime are the same as for 2d degree criminal facilitation except that the defendant is over age 18 and person to whom the defendant rendered aid in the commission of a class A felony is under age 16.

NO DEFENSE

Pursuant to PL 115.10 it is no defense that:

1. The person facilitated was not guilty of the underlying felony due to lack of criminal responsibility or some other legal incapacity or exemption, or to a lack of awareness of the criminal nature of the conduct in question or to other factors precluding the mental state required for the commission of the of such felony; or
2. The person facilitated has not been prosecuted or convicted of the underlying felony, or has previously been acquitted thereof; or
3. The defend him/herself is not guilty of the felony which he/she facilitated because he did not act with the intent or other culpable mental state required for the commission thereof.

As stated in PL 115.15, a person cannot be convicted of criminal facilitation upon the testimony of a person who has committed the felony charged to have been facilitated without other (corroborating) evidence that TENDS TO CONNECT the defendant with such facilitation.

ATTEMPT TO COMMIT A CRIME AND RENUNCIATION

Penal Law § 40.10(3) states that in any prosecution for attempt to commit a crime (PL 110.00) it is an AFFIRMATIVE DEFENSE that, under circumstances manifesting a VOLUNTARY AND COMPLETE RENUNCIATION of his/her criminal purpose, the defendant AVOIDED THE COMMISSION OF THE CRIME ATTEMPTED BY ABANDONING HIS/HER CRIMINAL EFFORT, and if MERE ABANDONMENT was INSUFFICIENT to accomplish such avoidance, by taking FURTHER AND AFFIRMATIVE STEPS WHICH PREVENTED THE COMMISSION THEREOF.

A person ATTEMPTS to commit a crime when, with INTENT to commit a crime, he/she engages in conduct which TENDS TO EFFECT the commission of such crime (Penal Law § 110.00). Conduct which

goes beyond mere planning and preparation and comes DANGEROUSLY CLOSE to the completion of the intended crime has been found to satisfy this requirement (*People v Mahboubian*, 72 NY2d 174 [1989]).

In *People v Naradzay* (11 NY3d 460 [2008]), the Court of Appeals found the evidence legally sufficient to support the charges of attempted murder and attempted burglary where the mentally unstable defendant (who was obsessed with the victim and wrote out a detailed "to-do" list outlining his intended crime) was stopped by police just outside the victim's home and a loaded shotgun (that the defendant had recently obtained) was recovered in a nearby snowbank. In the Court's view, the defendant's conduct had reached a point that went well beyond mere planning and preparation, and the fact that he had not (yet) entered the victim's home with gun in hand did not render the charges insufficient.

"KILL MY WIFE (AND MOTHER-IN-LAW), PLEASE!"

But in *People v Lendof-Gonzalez* (36 NY3d 87 [2020]) the Court of Appeals affirmed the Fourth Department's reversal of the defendant's attempted murder conviction because the evidence failed to establish that the defendant and his would-be accomplice (a fellow inmate at the Niagara County Holding Center who went straight to law enforcement when asked to kill the defendant's wife and mother-in-law) took any actual steps to effectuate the defendant's plan.

While the defendant was cooling his heels in custody on a domestic violence charge, he offered his cell neighbor (who was complaining about being evicted) a house to live in if he would kill his wife and mother-in-law (by a drug overdose made to look like a suicide) and arrange to move his children to a friend's house.

The inmate who expected to be released presently, played along but promptly informed a jail guard who connected him with law enforcement. Thereafter, the defendant provided the informant with the intended victims' address, the location of house keys and a place (friend's house) where the children should be taken when the job was done. The informant later called the defendant to tell him in code that "the car was fixed" and the "tires (kids) are with me." Believing that his plan was fulfilled, the defendant replied, "I'm happy now."

On appeal, the defendant argued that the evidence only supported planning and preparation but failed to establish that the plan ever came dangerously close to completion. The Fourth Department (170 AD3d 1508 [2018]) agreed and overturned the conviction.

In its affirmance, the Court of Appeals noted that the law does not punish evil thoughts (*People v Bracey*, 41 NY2d 296 [1977]), and to constitute an attempt, the defendant's conduct needed to pass the point of mere intent or preparation to commit the intended crime (citing *People v Naradzay*, 11 NY3d at 46). While the conduct need not represent the final step toward completion, it must come so close to it that the crime would likely have been accomplished but for timely interference (*People v Rizzo*, 246 NY 224 [1927]).

Factors to be considered in determining whether preparation becomes an attempt to commit a crime include the need for further steps to be taken for completion of the crime and the possibility of ABANDONMENT and RENUNCIATION.

In the majority's view, there were too many unfulfilled contingencies to completion including the fact that no steps were taken to purchase the fatal drugs much less bring them anywhere near the location where the crime was supposed to have occurred. And while, as the People argued, it is no defense that that the facts were not as the defendant believed them to be (i.e., that the hitman was legit), the Court said that the intended crime, on these facts, did not come dangerously close to completion.

The defendant's conviction for Criminal Solicitation 2d degree was undisturbed.

DUBIOUS DISSENTER

The dissenting judge (Hon. Jenny Rivera) faulted the majority for creating unnecessary hurdles for murder-for-hire prosecutions and pointed out that the defendant did everything he could do under the circumstances (e.g., providing names and address of the intended victims, describing the location of the house keys, giving directions on what to do, offering a financial incentive and requesting confirmation of completion) to effectuate his murderous plan. The sufficiency of the evidence, in the dissenter's view, should be gauged by the defendant's own conduct rather than that of the informant.

SKITTISH SEX OFFENDER

In *People v Gilmore* (134 AD2d 653 [3d Dept 1987]), the Third Department affirmed the defendant's Attempted Sex Abuse conviction and rejected his claim that it was error to permit evidence of a prior, similar crime -- offered to rebut his claim of renunciation.

In this case, the defendant grabbed a female jogger off the street and dragged her into a nearby wooded area where he attempted to sexually abuse her by putting his hand on the front of her shorts and fiddled with the waistband. As he accosted the victim, the defendant muttered, "I want you, baby." The victim screamed and struggled in resistance. When she said that she had her period, the defendant stopped what he was doing and took off. He argued that this constituted renunciation.

Over objection, the trial court allowed the People to introduce evidence of a prior incident in which the defendant entered a woman's home and awakened her by fondling her. She struggled and screamed, whereupon the defendant left the scene.

The AD held that it was proper to admit this prior bad act because it rebutted the defendant's renunciation claim by tending to show that his cessation was based not on an abandonment of his criminal purpose but rather upon a fear of being discovered when the victim started screaming (citing *People v Bauer*, 43 AD2d 833 [2d Dept 1974], *People v Allweiss*, 48 NY2d 40 [1979]).

DISSENT

The dissenting justice (Hon. Paul J Yesawich Jr.) disagreed with the majority's consideration of renunciation in a case involving only one defendant and where the only crime charged is an attempted crime. In the dissenter's view, a defendant whose conduct qualifies as an attempt should not be allowed to have it forgiven because it has already passed the point of renunciation (citing *People v Johnston*, 87 AD2d 703 [3d Dept 1982]).

Rather, renunciation more properly applies to a multiple defendant situation where the defendant who has already committed acts constituting an attempt can escape punishment by showing that he voluntarily abandoned the criminal enterprise before completion of the substantive crime already

attempted and took affirmative steps which prevented its commission (citing *Rodriguez v Smith*, 428 F. Supp. 892 [S.D.N.Y. 1977]).

Consequently, since there was no basis to consider renunciation, the admission of the prior crime, in the dissenter's estimation, was not only irrelevant but unfairly prejudicial because it constituted evidence of criminal predisposition.

RELUCTANT ROBBERS: "IF AT FIRST YOU DON'T SUCCEED…"

In *People v Johnston*, supra, the defendant and his partner-in-crime entered a gas station in Vestal N.Y. and after disabling the pay phone, pointed a gun at the attendant and demanded money. The attendant held up a $50.00 bill, saying, "this is all I have," to which the defendant replied, "forget it happened, just kidding," whereupon they left.

Within an hour, the two would-be bandits entered a gas station in nearby Union N.Y. and stole cash at gunpoint. One of them fired a gun into the ceiling, leaving behind a spent .45 caliber shell.

The defendants were convicted of Attempted Robbery 1st degree (armed with a deadly weapon) for the first one and Robbery 1st degree for the second. The defendant argued on appeal that based on his discontinuance of the Vestal robbery, the jury should have found him not guilty by reason of renunciation. He argued further that the trial court erred in not allowing the jury to consider menacing as a lesser included offense because the jury could reasonably have found that the victim had been placed in reasonable fear of serious injury by the display of the weapon before the defendant renounced the robbery by saying "forget it," and walking out.

The court noted first that the jury had rejected his claim of renunciation (as evidenced by the attempted robbery conviction) and saw no reasonable view of the evidence that would support the conclusion that he had committed menacing but not attempted robbery.

The court explained that renunciation does NOT negate the commission of the inchoate crime of attempt. As per Penal Law § 40.10 (3), the affirmative defense applies only when the defendant avoided the commission of the crime attempted. And, as noted above, under no reasonable view of the evidence could the jury have found that demanding money at gunpoint (after disabling the only working phone) amounted to menacing but not attempted robbery.

RESOURCEFUL VICTIM, NOT RENUNCIATION

In *People v Taylor* (80 NY2d 1 [1992]), the Court of Appeals held that the trial court did not err in denying the defendant's request for a jury instruction on renunciation where the only reasonable view of the evidence was that a rape was averted by the victim's quick thinking rather than by any renunciation of the defendant's criminal purpose.

The defendant (who was also charged with an unrelated rape) forced his way into the victim's apartment at knifepoint and took her to the bedroom while rubbing himself against her. The victim stated, "you don't have to do it this way." The defendant began to pull down her pants and she said, "you can come to my house anytime." The defendant then removed his surgical gloves and said, "I won't be needing these anymore."

The defendant accepted the victim's suggestion that they go out and "buy a bottle" to celebrate their new-found relationship, whereupon he grabbed her by the arm and escorted her into the hallway. Claiming to have forgotten her pocketbook, the victim wriggled free and slipped back through the still open door of her apartment and locked it in front of her. She called the police while the defendant kicked at the door and demanded that she let him back inside.

In rejecting the defendant's claim of error, the Court stressed that entitlement to a renunciation charge requires some evidence of a voluntary and complete abandonment of the criminal purpose (i.e., a genuine change of heart) rather than a withdrawal based on cold feet caused by fear of detection, apprehension, or perceived obstacles in the way of successful completion.

Based on the victim's testimony (the defendant did not testify), the only plausible conclusion was that the defendant persisted in pursuing his criminal purpose (at best, by putting it off until they bought some booze) which was stymied by the victim's evasive action. Hence, since there was no indication either voluntary or complete abandonment, the instruction request was properly refused.

The dissenting judge, Joseph W. Bellacosa, (who disagreed with the majority's resolution of a hearsay issue involving past recollection recorded), argued with respect to renunciation that the defendant did absolutely nothing to deserve an "exculpatory escape hatch" from the clearly criminal objective he had undertaken against this victim. In the dissenter's view, the majority's extended discussion of the issue was both unnecessary and misleading insofar as it suggested that renunciation is more broadly available than the legislature intended.

CRIMINAL SOLICITATION, CONSPIRACY AND RENUNCIATION

Penal Law § 40.10 (4) states that in any prosecution for criminal solicitation (Penal Law § 100.00) or for conspiracy (Penal Law § 100.05) in which the crime solicited or contemplated by the conspiracy was NOT in fact committed, it is an AFFIRMATIVE DEFENSE that, under circumstances manifesting a VOLUNTARY and COMPLETE RENUNCIATION of his/her criminal purpose, the defendant PREVENTED the commission of such crime.

Unlike criminal facilitation and crimes based on accomplice liability which only require a SUBSTANTIAL EFFORT to prevent the commission of the crime, for solicitation and conspiracy, the defendant must PREVENT the crime to establish the affirmative defense of renunciation.

FIVE DEGREES OF SOLICITATION

The levels of solicitation depend on the nature of the conduct solicited and the ages of the participants. (*People v Lubow*, 29 NY2d 58 [1971]).

Penal Law § 100.00 (5^{th} degree), a violation: the defendant INTENDS that another person engage in conduct constituting a crime and SOLICITS, REQUESTS, COMMANDS, IMPORTUNES, or otherwise ATTEMPTS TO CAUSE such person to engage in such conduct.

Penal Law § 100.05 (4^{th} degree), a class A misdemeanor: 1. the defendant intends that the other person commit a FELONY and solicits etc. such person to engage in such conduct or

2. being over 18 years old, with intent that a person under age 16 years engage in a CRIME, he/she solicits etc. such person to engage in such conduct.

Penal Law § 100.08 (3rd degree), a class E felony: The defendant who is over 18 years old, with intent that another person under age 16 years engage in a FELONY, solicits etc. such person to engage in such conduct.

Penal Law § 100.10 (2nd degree), a class D felony: the defendant intends that another person commit a Class A felony and solicits etc. such person to engage in such conduct.

Penal Law § 100.13 (1st degree), a class C felony: The defendant who is over 18 years old, with the intent that a person under age 16 years commits a class A felony, solicits etc. such person to engage in such conduct.

Per Penal Law § 110.15, it is NO DEFENSE that the person solicited could not be guilty of the crime solicited due to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct solicited or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the crime in question.

Per Penal Law § 100.20, a person is not guilty of criminal solicitation when his/her solicitation constitutes conduct that is necessarily incidental to the commission of the crime solicited. When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the defendant is guilty of such related and separate offense only and not of criminal solicitation (*See People v Allen*, 92 NY2d 378 [1998]).

UNLAWFUL AGREEMENTS

Under Penal Law § 105.00, a person is guilty of CONSPIRACY 6th degree (class B misdemeanor) when with INTENT that conduct constituting a CRIME be performed, he AGREES with one or more persons to engage in or cause the performance of such conduct.

It is worth noting that with any conspiracy charge, the prosecution must PLEAD and PROVE that one of the conspirators committed an OVERT ACT in furtherance of the conspiracy (Penal Law § 105.20; *People v McGee*, 49 NY2d 48 [1979]).

Penal Law § 105.05 (1), (5th degree), a class A misdemeanor: the defendant intends that a FELONY be performed and AGREES with one or more persons to engage in or cause the performance of such conduct; or

2. the defendant intends that a CRIME be performed and, being over 18 years old, agrees with one or more persons under age 16 years to engage in or cause the performance of such conduct.

Penal Law § 105.10 (1), (4th degree), a class E felony: the defendant intends that a CLASS B or C FELONY be performed and agrees with one or more persons to engage in such conduct; or

2. the defendant intends that a FELONY be performed and, being over 18 years old, he/she agrees with one or more persons under age 16 years to engage in or cause the performance of such conduct; or

3. the defendant intends that the felony of Money Laundering 3d degree be performed and agrees with one or more persons to engage in or cause the performance of such conduct.

Penal Law§ 105.13 (3rd degree), a class D felony: the defendant intends that a class B or C felony be performed and, being over 18 years old, he/she agrees with one or more persons under age 16 years to engage in or cause the performance of such conduct.

Penal Law § 105.15 (2nd degree), a class B felony: the defendant intends that a class A felony be performed and agrees with one or more persons to engage in or cause the performance of such conduct.

Penal Law § 105.17 (1st degree), a class A-1 felony: the defendant intends that a class A felony be performed and, being over 18 years old, agrees with one or more persons under age 16 years to engage in or cause the performance of such conduct.

SOME CASES

In *People v Ozarowski* (38 NY2d 481 [1976]), the Court of Appeals rejected a renunciation claim in this conspiracy/ rival gang assault case where several teenagers including the defendant participated in a meeting to discuss retaliation against a Nathan's fast-food employee who had threatened one of their members with a knife. After this get-together, several of them (including the defendant) went to victim's job site with baseball bats, and a couple of them proceeded to clobber the employee when he took out the garbage.

The defendant claimed that when he arrived at the mall in question with the others, he and a couple others wandered off to a nearby candy store which turned out to be closed. They then went back to the Nathan's garbage area where the assault occurred.

The Court stated that renunciation requires more than mere withdrawal from a conspiracy, and absent evidence that the object crime of the conspiracy was not committed and that the defendant, under circumstances manifesting a complete and voluntary rejection of the criminal purpose, there was no basis to disturb the verdict.

"DON'T MESS WITH THE GIRLFRIEND!"

In *People v Sisselman* (147 AD2d 261 (3rd Dept 1989), the Third Department held that the trial court erred in instructing the jury that to find renunciation, it had to conclude that the defendant's conduct (in calling off the hit on the man who was carrying on with the defendant's extra-marital girlfriend) was the SOLE and MOTIVATING inducement for the hitman (undercover officer's) abandonment of the crime.

In fact, the undercover had no intention of killing anyone, and in the Court's view, the instruction deprived the defendant of the opportunity to argue that under these circumstances, his efforts should be deemed successful if they would have prevented the crime where the person solicited actually had intended to carry out the crime in question.

The Court noted that renunciation does not negate the commission of the inchoate crime (here, conspiracy and solicitation) but offers the defendant an opportunity to take steps to prevent the object crime and thereby avoid criminal liability. The law does NOT, however, go so far as to require that the defendant's efforts be the sole reason that the object crime was not committed. If it did so require, then

two co-conspirators who acted in concert to prevent the object crime could not claim the affirmative defense of renunciation.

FINAL THOUGHT

Renunciation is not a particularly common defense strategy, probably because most people who back out of a criminal venture likely do so for reasons other than an eleventh-hour epiphany or pang of conscience. It is more likely a matter of aversion to prosecution or imprisonment which the statute does not recognize as an acceptable reason.

However, in cases where the defendant realizes the error of his/her ways before it is too late and takes affirmative steps to stop the commission of the crime, it may be worth having him/her (and others if available) testify to his/her abandonment of the criminal enterprise and hope that the jury gives him/her credit for seeing the light and doing the right thing. Hopefully, the defendant does not have a criminal record that suggests otherwise.