THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

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INTRODUCTION

Prosecutors and judges sometimes get spooked when defense attorneys offer evidence (e.g., hearsay from unavailable declarants, expert testimony, forensic reports) that tends to exculpate the defendant or suggest an alternative explanation for criminal conduct.

The likely response is an objection on evidentiary grounds and, absent a clear-cut exception or other pathway to admissibility, the result is often preclusion. Beyond advancing technical, evidence-based arguments, counsel should never hesitate to remind the court that rulings which summarily shut the door to relevant evidence can deprive the defendant of a meaningful opportunity to present a complete defense. As noted in *Chambers v Mississippi* (410 US 204 [1973]), "few rights are more fundamental than that of the accused to call witnesses in his/(her) own defense" (see also *People v Foy*, 32 NY2d 473 [1973]).

Of late, the Court of Appeals has increasingly analyzed evidentiary rulings in the broader context of the right to advance a defense, but its attempts to balance such right against the orderly administration of trials (in accordance with the rules of evidence) and potential prejudice to the prosecution (e.g., by allowing late notice of a psychiatric defense as in *People v Sidbury*, [_NY3d_, 2024 N.Y.Slip.Op 03318 (2024)]), appear to be somewhat circular if not unpredictable.

As noted in *People v Carroll* (95 NY2d 375 [2000]), a court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense. However, the right to present a defense does not give the defendant carte blanche to circumvent the rules of evidence (People v Hayes, 17 NY3d 46 [2001]).

And, while evidentiary rulings will generally survive appellate scrutiny if neither arbitrary nor out of proportion to their intended purposes (*Rock v Arkansas*, 483 US 44 [1987]), courts caution that such rules should not be applied mechanistically to defeat the ends of justice (*People v Oddone*, 22 NY3d 369 [2013]).

NEW YORK EVIDENCE GUIDE

The Guide to New York Evidence (GNYE) 4.26.1 (1) states that a defendant in a criminal proceeding has the CONSTITUTIONAL RIGHT to present a defense.

2. Depending on the circumstances, such right MAY AUTHORIZE the admission of evidence that would normally be precluded by the State's rules of evidence, albeit the right to present a defense

(as noted in *People v Hayes*, supra), does NOT give a defendant carte balance to circumvent the State's evidence rules.

3. Erroneous evidentiary rulings precluding MEANINGFUL defense evidence may constitute a violation of the defendant's constitutional right to present a defense.

As indicated, sometimes the rules of evidence may be forced to yield to the defendant's due process right to assert a defense. In fact, GNYE 8.01 (1)(b) states that the federal and state constitutions require the ADMISSION of HEARSAY not encompassed within a hearsay exception when the court finds that the DECLARANT is UNAVAILABLE to testify, the HEARSAY is MATERIAL, EXCULPATORY and has SUFFICIENT INDICIA of RELIABILTY.

SOME CASES

In *People v Robinson* (89 NY2d 648 [1997]), for example, the Court of Appeals affirmed the Fourth Department's reversal of the defendant's sex abuse conviction based on the trial court's refusal to admit the exculpatory grand jury testimony of the defendant's wife (then fiancée who became unavailable before trial) that the defendant's sexual encounter with the victim (while the fiancée was in the next room) was consensual.

The Court noted that the DA had a full opportunity to cross examine her about alcohol consumption, bias and her receipt of a letter from the defendant asking her to "break the victim down" without antagonizing the prosecutor.

Under these circumstances, the defendant, in the Court's view, was deprived of his 6th Amendment right (applicable to the states via the 14th Amendment) to compulsory process to present witnesses (here, by prior testimony) which had sufficient indicia of reliability (*Washington v Texas*, 388 US 14 [1967], *Ohio v Roberts*, 448 US 56 [1980]).

BUT SEE *People v Burns* (6 NY3d 793 [2006]) where the Court found NO ERROR in the trial court's refusal to admit a hearsay statement from a bystander/declarant who, just prior to a fatal shoot-out between the defendant and several Hispanic gang members, was told by one of gang members (a few blocks from the scene) to leave the area (after being given some heroin) because they had something they were going to do.

After hearing gunshots, the witness observed the gang member, and his cohorts leave the scene in two vehicles. The following day, the gang member told the witness that "everything had been taken care of last night." The defense offered these statements as declarations against interest in support of the defendant's self-defense claim.

The Court held that there was no violation of the right to present a defense because the bystander's statement which may have been a declaration against interest (with respect to heroin possession) was not relevant since, in such circumstances, only that part which disserves the declarant would be admissible (see GNYE 8.11 [2][b]). Also, the gang banger's statements presented a double hearsay issue.

The Court also noted that the statement lacked sufficient indicia of reliability (*People v Robinson*, supra), and the trial court had given the defense an opportunity to subpoena the bystander which apparently was not pursued.

It does not appear that the defense ever argued that since the out-of-court statements were offered to exculpate rather than inculpate the defendant, there need only be a reasonable possibility of their truthfulness (see GNYE 8.11 [2][c]). Nor did he argue that the gang member's statements should have been admitted as a declaration of future intent, (GNYE 8.13 [1][a], *Mutual Life Ins Co v Hillmon*, 145 US 285 [1892]), or perhaps to show that he was the first aggressor (*People v Petty*, 7 NY3d 277 [2006]). It could well be argued, however, that these statements were too vague to be probative.

SIMILAR FACTS, DIFFERENT OUTCOME

In *People v Deverow* (38 NY3d 157 [2022]), the Court held that the trial court ERRED in excluding as collateral defense testimony from the girlfriend of the People's only eyewitness to a shooting which contradicted his version of events and called into question his powers of perception and recall on a material issue in the case.

The boyfriend testified that he had travelled with his girlfriend by train to the scene and walked her home immediately after which he observed the defendant and a friend (whom he recognized) shooting across the street at a group of unarmed people, one of whom was hit in the head and killed. (The defendant's version was that he fired in self-defense after others across the street opened fire on him and his friend).

The girlfriend would have testified that she and her boyfriend were not together at all that day which, in the Court's view, could well have affected the jury's assessment of his ability to perceive and recall the events in question, (not to mention his ability to describe them truthfully).

As the Court observed, where evidence is clearly probative of a witness' ability to perceive and recall the details of a relevant event accurately, it is NOT COLLATERAL and is admissible (citing *People v Jenkins*, 68 NY2d 896 [1986]).

The Court also faulted the lower court's refusal to admit 911 calls from three different people (one of which impeached the witness' trial testimony regarding the appearance of the shooters and the vehicle they reportedly left in) which clearly qualified as either excited utterances and/or present sense impressions (e.g., regarding multiple volleys of shots) which were corroborated by physical evidence at the scene.

INADMISSIBLE HEARSAY

In *People v Hayes* (17 NY3d 46 [2001]), the Court held that the People had met their *Brady* obligation by disclosing statements (brought to their attention by a police sergeant) from two bystander/witnesses (whose contact information the sergeant did not obtain) to a movie-house stabbing that the victim had the knife first and "got what he deserved."

Also, the trial court was deemed to have properly excluded those statements (offered to show the ineptitude of the police investigation) because there was too great a risk that they would've been accepted for their truth. (The defendant testified that as he argued with the victim for being too loud in the theater, the victim pulled a knife, swung it at him, whereupon the defendant grabbed his arm and removed the knife. The victim's forward momentum brought him into contact with the knife).

The Court stated that the defendant's right to present a defense does not give him carte balance to skirt the rules of evidence (citing *People v Cepeda*, 208 AD3d 364 [1st Dept 1994]). Also, in the Court's view, the People's *Brady* obligation did not include looking for exculpatory evidence (name and identity of the bystanders) not in their possession or under their control (*People v Alvarez*, 70 NY2d 275 [1987]).

FORENSIC REPORTS/ RAPE SHIELD LAW

In *People v Cerda* (40 NY3d 369 [2023]), the Court held that it was ERROR for the trial court to exclude a forensic report in this child sex abuse case which, in the Court's estimation, provided an alternative explanation for the victim's vaginal injuries.

The victim testified that she was seated on a couch next to the defendant under a blanket when he forcibly inserted his finger in her private area. She went to the bathroom, texted her mother and told her what happened. The defendant denied the abuse and claimed the victim made it up because he had bad-mouthed her father.

The defendant moved in limine to introduce a report that identified the victim's saliva on a vulvar swab as well as prostate-specific antigens from two male sources which was insufficient to include or exclude the defendant. There was also evidence of a dark stain in the victim's underpants that the defense argued could have been a source of irritation (petechiae) in the victim's vaginal area, possibly self-inflicted, if not from a different source.

The People argued that such evidence violated the Rape Shield Law (CPL 60.42) because it would tend to paint the victim as engaging in sexual activity either by herself or with someone else, thus suggesting that she was not credible on account of alleged promiscuity. (Defense counsel did suggest that she was not as naive and innocent as she appeared).

The trial court agreed with the People, finding that the report was inconclusive and unfairly prejudicial to the child victim.

The Appellate Division AFFIRMED the defendant's conviction for Sex Abuse 1st and 2nd degrees, finding that there was no abuse of discretion in excluding the forensic report, especially where the defense was able to develop its alternative-source theory on cross examination of the prosecution pediatrician.

The Court of Appeals REVERSED, finding that exclusion of medical evidence which tended to rebut the People's theory that the defendant was the only possible source of the victim's injuries by offering an innocent alternative explanation (i.e., masturbation), deprived the defendant of his constitutional right to present a defense (citing *People v Diaz*, 20 NY3d 569 [2013]).

The Court also found that the inconclusiveness of the report's findings was more a matter of weight than admissibility (citing *People v Wesley*, 83 NY2d 47 [1994]).

The dissent concluded that the forensic report was far too inconclusive to have probative value (the DNA mixture from multiple sources yielded no meaningful comparisons), and the idea that such evidence should be admissible in the interest of justice (CPL 60.42[5]) undermines the protective purpose of the Rape Shield Law (citing, inter alia, *People v Primo*, 96 NY2d 357 [2001]).

In the dissenter's view, such a speculative report did not offer a plausible alternative explanation for the victim's injuries and was properly disallowed.

LATE NOTICE OF PSYCHIATRIC DEFENSE

In *People v Sidbury*, (_NY3d_, 2024 N.Y. Slip.Op 03318 [2024]), the Court held in this jail-house arson case that the trial court abused its discretion in denying the defendant's 11th-hour application (made almost four years after he was in custody for an unrelated murder) to offer psychiatric testimony in support of his claim of not responsible by reason of mental disease or defect.

In the Court's view, the trial court erroneously relied on CPL 730 competency reports (which found the defendant competent but suffering only from a personality disorder) and its own lay observations of the defendant on multiple occasions to conclude that he was a malignant malingerer bent on delaying the trial as long as possible.

The trial court also determined there was no indication that an insanity defense would have any chance of success. (The defense had proposed to have the defendant examined by a psychiatrist who had previously found him incompetent in an unrelated matter. The trial court denied this request).

The Court also concluded that the trial court erred in ruling that the defendant's notice per CPL 250.10 was way too late (he was represented all along by the Public Defender's Office), and insufficient for failing to properly identify a psychiatric diagnosis and its relationship to a defense (*People v Almonor*, 93 NY2d 571 [1999]).

As the Court saw it, the trial court also failed to balance the possibility of prejudice to the People (none was claimed) and the defendant's right to present a defense (citing *People v Berk*, 88 NY2d 257 [1996]). And, absent a showing of willful misconduct intended to obtain a tactical advantage (the PD's office pled law office failure), such a harsh remedy as preclusion was uncalled-for (citing, inter alia, *Michigan v Lucas*, 500 US 145 [1991], *People v Hartman*, 64 AD3d 1002 [3rd Dept 2009].

The dissenter stated that the majority misconstrued Supreme Court precedent to require a balancing test when none was required, and the defense's notice, beyond being ridiculously late, was patently insufficient in its failure to meet the procedural and substantive requirements of CPL 250.10.

As the dissenter observed, "not very exclusion violates the 6th Amendment... (which) does not confer the right to present testimony free from the legitimate demands of the adversarial system" (citing *United States v Nobles*, 422 US 225 [1975]).

The dissenter also disagreed that only willful misconduct can justify preclusion, and noted that the trial judge, having observed the defendant's dilatory (and abusive) courtroom tactics over several years, was in as good a position as any shrink to call out a manipulative phony when he saw one.

FINAL THOUGHT

While it is difficult to say precisely what evidence the courts will deem admissible to satisfy a defendant's constitutional right to present a complete defense, even where the evidence rules seem to fall short, counsel should not be reticent to point out how such evidence (e.g., hearsay, forensic reports, 911 calls, expert testimony) is essential to the defendant's ability to advance a meaningful defense. This is especially so where, for example, a witness is unavailable, and his/her testimony is material, exculpatory and has indicia of reliability.

If nothing else, a thorough and cogent offer of proof will preserve the record for appeal purposes in the event the proffered evidence is denied.