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ISSUES TO DEVELOP AT TRIAL

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This month's issue discusses the use of prior bad acts against non-defendant witnesses in three contexts: (1) against civilian or police witnesses; (2) to further a defense of third-party culpability; and (3) against the victim when the defendant is asserting a claim of self-defense. Two recent cases from the Court of Appeals make the issue of "reverse Molineux" a timely one for us to address and for you to ponder. Happy July!

Bottom line:

- **The defense has the right to cross examine a civilian or law enforcement witness with prior bad acts, including, in the latter case, with the underlying allegations in a civil law suit. But be prepared to demonstrate relevance and good faith if the prosecution objects.**

- **As current New York law poses a high evidentiary burden on a defendant who wants to introduce third-party *modus operandi* evidence or evidence of the victim's prior acts of violence, argue (assuming you're unable to meet the burden) for the more relaxed standards accepted in other jurisdictions (discussed below).**

The Issue: To what degree can the defense use prior bad acts against non-defendant witnesses and what showing must the defense make?

Relevant Law:

Non-defendant witnesses: In People v. Smith, 2016 WL 349644 (June 28, 2016), the Court of Appeals reaffirmed that all prosecution witnesses may be cross-examined on prior bad acts as long as the defense counsel has a good faith basis for inquiry and can establish relevance to credibility. In particular, law enforcement's prior bad acts that have not been proven in a criminal prosecution or other court proceeding can still be proper for cross-examination, nor do bad acts lose their relevance to the witness's credibility simply because the alleged act is not always regarded as criminal or immoral. In People v. Walker, 83 N.Y.2d 455, 461 (1994), the Court held that impeachment may be proper where the act in question "demonstrates an untruthful bent or significantly reveals a willingness . . . to place . . . individual self-interest ahead of principle or of the interests of society." Therefore, although the fact that the officer was sued may not be used against a police officer if the lawsuit did not result in an adverse finding or if it ended in settlement, "defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness." Smith, supra. Additionally, the Court noted that defense counsel is "not required to make a proffer of

bad acts prior to trial, but could simply choose to question the officers on cross-examination, and then upon any objection by the People, make a showing of relevance and good faith." Id.

Third-party culpability: In People v. DiPippo, 27 N.Y.3d 127 (2016), the Court of Appeals held admissible a third-party's declarations to a witness suggesting his commission of the victim's rape and murder, finding it trustworthy, and "compelling and highly probative of the question of who killed the victim." Id. at 138. The Court also found that the defendant's proffer of "reverse *Molineux*"— that the same third-party committed prior acts of sexual assault—satisfied the strict "*modus operandi*" standard that applies to evidence proffered against the defendant and therefore was admissible.

Mentioned, although left open in DiPippo, and presenting litigation opportunities going forward, is whether there should be a more relaxed standard for *modus operandi* in the context of third-party culpability defenses. While this question is yet to be settled in New York courts, federal circuit courts and other state courts have held that because propensity concerns do not apply to non-defendants, a lower standard of similarity governs the admissibility of third-party propensity proof. See e.g., United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984). United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991), for example, adopted the more relaxed *modus operandi* standard for third-party bad acts set forth in State v. Garfole, 76 N.J. 445 (1978), in considering the admissibility of such evidence under Federal Rule 404(b). Under that standard, admissibility depends "on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusing of the issues." The defendant "need not show that there has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or that the other crime was sufficiently similar to be called a 'signature' crime." Stevens 935 F.2d at 1405. These criteria may be used to measure the probative value of the defendant's proffer, but should not be erected as absolute barriers to its admission. Instead, the defendant must demonstrate that the reverse *Molineux* has "a tendency to negate his guilt" and that it passes the balancing test. Id.

***Victim's prior violence*:** With respect to introducing the bad acts of a victim in self-defense cases, New York follows the minority rule, requiring that the defendant must be aware of the victim's prior bad acts at the time of the incident to introduce such reverse *Molineux* evidence. Capra et al, New York Evidence Handbook § 4.8.2 at 205-206 & § 4.8.5 at 211-218 (2d ed). New York courts have justified the rule by emphasizing that "the law protects everyone from unlawful violence, regardless of his character." See People v. Rodawald, 177 N.Y. 408, 422-423 (1904). This rule has been criticized, however, and abandoned by the majority of other jurisdictions, including by Federal Rule of Evidence 404(a)(2). Such courts have noted that the minority rule oddly inquires into subjective belief, concentrating on what the defendant probably thought the deceased was going to do, rather than the objective occurrence of what the deceased probably did do. New York courts have also criticized the rule. In Matter of Robert S, 52 N.Y. 2d 1046, 1049 (1981), Judge Fuchsberg dissented, disapproving of the majority's adherence to an outdated rule abandoned by a majority of other jurisdictions, and in Williams v. Lord, 996 F.2d 1481 (2d Cir. 1993), although the Court abided by the New York rule in a habeas corpus case, Judge Cardamone, in concurring, suggested that "New York may want to reconsider its restrictive rule that . . . like sand thrown in the face of the wind, bucks the more enlightened modern trend," and hampers the truth-seeking process by keeping evidence potentially relevant to the question of guilt or innocence from the jury. Id. at 1485.

Preserving the issue:

- As noted earlier, if you are seeking to impeach a prosecution witness with a prior bad act, be it a civilian or police officer, simply undertake your cross-examination. Be aware of the need to establish a good faith basis and relevance, should the prosecutor object. And, if you're using a lawsuit against the police officer-witness, be aware of the limitations in Smith concerning what is a proper subject for impeachment. Have your proffer at the ready.

- If your third-party culpability defense would be furthered by *modus operandi* evidence concerning that third-party, assess whether you can meet the unique *modus operandi* standard that currently prevails. If not, or if you try but fail to convince the court, argue that the court should adopt the more liberal standard accepted in federal courts and other jurisdictions (citing the above cases) and both that the evidence would tend to negate guilt and that its probative value outweighs any prejudicial considerations. Of course, the more similarities you can show, the better, and you must have the appropriate witness for presenting the evidence. Support your argument by referencing your client's constitutional right to confrontation and to effective cross-examination secured by the 6th Amendment (Davis v. Alaska, 415 U.S. 308 (1974), as well as his constitutional right to present a defense (Chambers v. Mississippi, 410 U.S. 284 (1973)) .

- If your client's defense is self-defense, and you have evidence that the victim committed prior acts of violence — but you cannot establish your client's awareness of them — make a proffer to the court, arguing that the present rule is outdated and antiquated and citing the cases discussed above. Invoke your client's constitutional rights to confrontation, cross-examination, and to present a defense. Even if you fail, at the very least, the issue might eventually reach the Court of Appeals.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client, unless you specifically join in it, on the record.

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Challenges to fingerprint evidence