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Evidence of Prior Uncharged Criminal Acts Admissable to Rebut Defendant's Claim of Legal Insanity

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may be adduced, should be irrelevant to the viability of the cause of action. Thus, it is submitted, as between cohabiting parties, *Morone* should not be read to preclude the assertion of a cause of action in implied-in-fact contract to recover for personal services rendered.¹²⁴

Joseph J. Tesoriero

Evidence of prior uncharged criminal acts admissible to rebut defendant's claim of legal insanity

In order to reduce the possibility that a defendant in a criminal prosecution will be convicted on the basis of his criminal propensity, evidence of prior uncharged criminal acts generally is excluded.¹²⁵ Nevertheless, in limited circumstances, the prosecutor may introduce evidence of the defendant's prior criminal acts provided that the evidence is relevant¹²⁶ to a material issue in the

¹²⁴ In *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980), the Supreme Court of Alaska affirmed the trial court's denial of a motion to dismiss the plaintiff's case against her former live-in partner based on an express or implied-in-fact agreement. *Id.* at 603. On appeal, the court remarked that since the woman had abandoned her claim in quantum meruit at trial and relied only upon an express or implied contractual theory of recovery, there would be no need to address the "questions" raised by *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *Levar v. Elkins*, 604 P.2d at 603 & n.2. It is submitted that the tacit refusal by the court to distinguish between express and implied-in-fact agreements, notwithstanding that the parties to the agreement were cohabitants, evinces the recognition that the fact of cohabitation should not preclude the application of general principles of contract law. See generally *Adams & Co. Real Estate v. E. & B. Super Markets, Inc.*, 26 App. Div. 2d 365, 366, 274 N.Y.S.2d 776, 778 (1st Dep't 1966); Note, *Property Rights of Nonmarital Partners in Meretricious Cohabitation*, 13 NEW ENGLAND L. REV. 453, 472 (1978).

¹²⁵ The general rule excluding from the trier of fact evidence of prior criminal acts of the defendant is based on the recognition that

[t]he deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court.

J. WIGMORE, EVIDENCE § 57, at 456 (Chadbourn rev. ed. 1970). This "exclusionary rule" is "universally recognized" and "firmly established." *People v. Molineux*, 168 N.Y. 264, 191-93, 61 N.E. 286, 293-94 (1901); see, e.g., *People v. Allweiss*, 48 N.Y.2d 40, 46, 396 N.E.2d 735, 738, 421 N.Y.S.2d 341, 344 (1979); *People v. Fiore*, 34 N.Y.2d 81, 84, 312 N.E.2d 174, 176, 356 N.Y.S.2d 38, 41 (1974); *People v. Dales*, 309 N.Y. 97, 101, 127 N.E.2d 829, 830-31 (1955); *People v. Shea*, 147 N.Y. 78, 99, 41 N.E. 505, 511 (1895); *People v. Sharp*, 107 N.Y. 427, 460, 14 N.E. 319, 340 (1887); *Coleman v. People* 55 N.Y. 81, 90 (1873).

¹²⁶ The relevancy of evidence has been described as "the tendency of the evidence to

case.¹²⁷ Where the insanity defense is raised,¹²⁸ however, the extent to which the prosecutor may introduce prior uncharged criminal acts to rebut the defense has been unclear.¹²⁹ Recently, in *People*

establish a material proposition." C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 185, at 435 (2d ed. 1972) (footnote omitted). The most common test of relevancy is whether the evidence offered renders the truth of the fact sought to be proved more probable than it would have been without the evidence. *Id.* at 437-38. Thus, evidence which advances the factfinding process and has probative value is prima facie admissible. *Id.* Even relevant evidence, however, may be excluded in certain circumstances. *Id.* at 438-40.

¹²⁷ *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). The *Molineux* Court authorized the use of evidence of prior criminal, immoral or vicious acts to impeach a defendant's testimony, despite its potentially prejudicial effect:

[G]enerally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

Id. at 293, 61 N.E. at 294 (citation omitted). The *Molineux* "exceptions" are essentially tests of relevance to be applied to particular pieces of proffered evidence in the distinctive factual situations in which their use is necessary either to obtain or sustain a conviction. Subsequent to *Molineux*, the Court recognized additional exceptions to admit evidence of prior uncharged criminal acts in cases where the defendant asserts the defense of alibi, *People v. Thau*, 219 N.Y. 39, 113 N.E. 556 (1916), or entrapment, *People v. Calvano*, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 430 (1972), or where relevant to prove that the defendant and a companion were "acting in concert," *People v. Jackson*, 39 N.Y.2d 64, 346 N.E.2d 537, 382 N.Y.S.2d 736 (1976).

¹²⁸ A defendant may avoid criminal responsibility for even admitted acts by satisfying the mental disease or defect test codified in the New York Penal Law. Section 30.05 of the Penal Law provides, in part:

(1) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

- (a) The nature and consequences of such conduct; or
- (b) That such conduct was wrong

N.Y. PENAL LAW § 30.05 (McKinney 1975).

In New York, the presumption that a defendant is sane is "rationally based on a fact of common experience that most men are sane." *People v. Silver*, 33 N.Y.2d 475, 480-81, 310 N.E.2d 520, 523, 354 N.Y.S.2d 915, 920 (1974). In order to rebut the presumption and put his sanity in issue, New York requires the defendant to offer a quantum of proof less than substantial and more than a mere scintilla of proof. *Id.* at 481, 310 N.E.2d at 523-24, 354 N.Y.S.2d at 920-21; *Brotherton v. People*, 75 N.Y. 159, 162-63 (1878). Once the defense has been asserted, however, the People are required to prove a defendant sane beyond a reasonable doubt. See N.Y. PENAL LAW § 25.00(1) (McKinney 1975). See generally Corbett, *The Defense of Insanity*, 29 BROOKLYN B. 99 (1978); Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236 (1976); Hellenbrand, *Mental Issues in Criminal Trials*, 31 BROOKLYN B. 6 (1979).

¹²⁹ Compare *People v. Molineux*, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901) with *People v. Carlin*, 194 N.Y. 448, 452, 87 N.E. 805, 807 (1909). Other jurisdictions which have considered the question have held that the events from the entire life of a defendant are admissible as relevant for determining sanity at the time of the commission of the crime

v. Santarelli,¹³⁰ the Court of Appeals held that the scope of the evidence admissible on the prosecutor's rebuttal was limited to that which bore directly on the People's theory of sanity and which had a natural tendency to refute the defendant's specific theory of legal insanity.¹³¹

Defendant Santarelli admitted killing his brother-in-law with a sawed-off shotgun, but interposed the defense of legal insanity.¹³² On his direct case, the defendant introduced lay and expert testimony that at the time of the incident he was suffering from a paranoid delusion intensified by the influence of amphetamines and, hence, was legally insane.¹³³ On rebuttal, the People introduced evidence of prior uncharged criminal conduct by Santarelli to show that at the time of the slaying he was suffering from a personality disorder not rising to the level of legal insanity.¹³⁴ Counsel for the

charged. *See* *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972); *McLeod v. State*, 317 So.2d 389 (Miss. 1975); *Mears v. State*, 83 Nev. 3, 422 P.2d 230 (1967); *State v. Huson*, 73 Wash.2d 660, 440 P.2d 192 (1968). *But see* *Watts v. State*, 282 Ala. 245, 210 So.2d 805 (1968). Notably, Professor Wigmore favors the broad admissibility of "any and all conduct" of the defendant to rebut the insanity defense since "if a specific act does not indicate insanity it may indicate sanity." J. WIGMORE, *supra* note 125 § 228, at 9 (emphasis in original).

¹³⁰ 49 N.Y.2d 241, 401 N.E.2d 199, 425 N.Y.S.2d 77 (1980), *rev'g*, 64 App. Div. 2d 803, 407 N.Y.S.2d 744 (3d Dep't 1978) (mem.).

¹³¹ 49 N.Y.2d at 248, 401 N.E.2d at 204, 425 N.Y.S.2d at 82.

¹³² *Id.* at 244, 401 N.E.2d at 201, 425 N.Y.S.2d at 79. Apprehended shortly after the killing, Santarelli acknowledged responsibility for his brother-in-law's death. *Id.*

¹³³ *Id.* at 245-46, 401 N.E.2d at 202, 425 N.Y.S.2d at 80. Lay witnesses, including the defendant's wife, testified to the defendant's nervous and distracted behavior in the days prior to the shooting. *Id.* Defendant's expert witnesses testified that Santarelli was in a psychotic state and legally insane within the meaning of the Penal Law at the time of the killing. *Id.* at 246, 401 N.E.2d at 202, 425 N.Y.S.2d at 80; *see* N.Y. PENAL LAW § 30.05 (McKinney 1975).

¹³⁴ On cross-examination, the defendant's expert witnesses had agreed that an individual suffering from the personality disorder of an "explosive personality" might also behave in a manner similar to defendant Santarelli and be deemed legally sane. 49 N.Y.2d at 246, 401 N.E.2d at 202, 425 N.Y.S.2d at 80. Moreover, the witnesses had acknowledged that one suffering from an explosive personality would "probably have a history of violent, antisocial conduct and would have a tendency to react with disproportionate violence in the face of relatively mild provocation." *Id.* Hence, over objection, the prosecutor sought to demonstrate that the defendant fit such description by eliciting testimony from a witness who had seen the defendant participate in a barroom scuffle, a police officer who had seen the defendant throwing bottles around the barroom, a friend of the defendant who had been his accomplice to a premeditated assault, and the defendant's probation officer who stated that the defendant had been convicted of possession of a sawed-off shotgun. *Id.* at 250-52, 401 N.E.2d at 205-06, 425 N.Y.S.2d at 83-84. In addition, Santarelli's probation officer testified to incidents where the defendant reacted violently in the face of mild provocation. *Id.* at 252, 401 N.E.2d at 206, 425 N.Y.S.2d at 84. Evidence of the defendant's association with organized crime, introduced for the purpose of demonstrating that the defendant had been

defense argued that this evidence was not relevant to any material element of the People's case and that it was highly prejudicial to the defendant because it tended only to demonstrate the defendant's propensity to commit violent crimes.¹³⁵ The trial court, nevertheless, admitted the evidence over the "continuing objection"¹³⁶ of the defense and, ultimately, Santarelli was convicted of murder in the second degree.¹³⁷ The Appellate Division, Third Department, affirmed the conviction,¹³⁸ holding that the introduction of evidence of uncharged criminal acts was proper since once the defense of insanity is raised, "any and all prior conduct of the accused having a bearing on the subject is admissible, even though it might also tend to show him guilty of other crimes."¹³⁹

On appeal, the Court of Appeals reversed the conviction.¹⁴⁰ Writing for the majority,¹⁴¹ Judge Gabrielli noted that while the People may introduce evidence of prior criminal conduct probative of the defendant's sanity once that issue is raised, the evidence must nevertheless meet the test of "relevancy."¹⁴² Maintaining that there exists no pre-ordained formula for ascertaining the relevancy of a particular uncharged criminal act,¹⁴³ the *Santarelli* Court reiterated the balancing test it enunciated in *People v. Molineux*,¹⁴⁴ requiring that the proffered evidence not only "[bear] some articulable relation to the issue" of the case, but also "that its probative value in fact warrants its admission despite the potential for

subjected to considerable emotional stress, also was admitted. *Id.* at 252-53, 401 N.E.2d at 206, 425 N.Y.S.2d at 84-85.

¹³⁵ *Id.* at 246-47, 401 N.E.2d at 202, 425 N.Y.S.2d at 80-81.

¹³⁶ *Id.* at 247, 401 N.E.2d at 202, 425 N.Y.S.2d at 81. A continuing objection is granted by a trial court to eliminate the constant repetition of objections and is deemed desirable because, while preserving objections for appellate review, it allows a trial to progress without interruption. *United States v. Hall*, 348 F.2d 837, 843 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965).

¹³⁷ 49 N.Y.2d at 247, 401 N.E.2d at 202, 425 N.Y.S.2d at 81.

¹³⁸ 64 App. Div. 2d 803, 407 N.Y.S.2d 744 (3d Dep't 1978) (mem.).

¹³⁹ *Id.* at 804, 407 N.Y.S.2d at 746 (citations omitted). The appellate division further stated that the admitted evidence "carried little potential for prejudice . . . since the central issue was one of criminal responsibility, not credibility or propensity to commit crime." *Id.*

¹⁴⁰ 49 N.Y.2d at 247, 401 N.E.2d at 203, 425 N.Y.S.2d at 81.

¹⁴¹ Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg and Meyer joined with Judge Gabrielli. Judge Jasen dissented in a separate opinion.

¹⁴² 49 N.Y.2d at 247, 401 N.E.2d at 203, 425 N.Y.S.2d at 81. *See generally* note 126 *supra*.

¹⁴³ 49 N.Y.2d at 248, 401 N.E.2d at 203, 425 N.Y.S.2d at 81.

¹⁴⁴ 168 N.Y. 264, 61 N.E. 286 (1901); *see* note 127 *supra*.

prejudice."¹⁴⁵ Analogizing an insanity defense to the affirmative defense of entrapment, the Court posited that just as the accused places his predisposition to commit the crime in issue when entrapment is asserted, so too, a defendant asserting the defense of insanity places facets of his character and past history in issue.¹⁴⁶ Nevertheless, while a defendant's interposition of an insanity defense "opens the door" to the People's "character evidence," the scope of admissible evidence, according to the Court, is limited by a two-tiered test.¹⁴⁷ Only that evidence which has a "natural tendency to disprove [the defendant's] specific claim" of legal insanity¹⁴⁸ and which has a "direct bearing" on the People's theory of the defendant's sanity¹⁴⁹ is deemed relevant and admissible. Applying this test, the majority concluded that since the trial judge had failed to evaluate each piece of evidence with sufficient particularity to ensure its "relevancy," a reversal of this conviction was required.¹⁵⁰

¹⁴⁵ 49 N.Y.2d at 250, 401 N.E.2d at 204, 425 N.Y.S.2d at 83.

¹⁴⁶ *Id.* at 248, 401 N.E.2d at 203, 425 N.Y.S.2d at 81-82.

¹⁴⁷ *Id.* at 249, 401 N.E.2d at 204, 425 N.Y.S.2d at 82.

¹⁴⁸ *Id.* The Court emphasized that interposition of an insanity defense does not automatically place the defendant's "entire character" in issue. *Id.* The Court distinguished the case of *People v. Carlin*, 194 N.Y. 448, 87 N.E. 805 (1909), in which it was stated that "[t]he whole previous career of a man, in its general aspects at least, may throw some light on [a defendant's] mental condition at the time when he is alleged to have committed a criminal offense, and when insanity is relied upon as a defense in his behalf." *Id.* at 452, 87 N.E. at 807 (dicta). This statement, the *Santarelli* majority noted, referred only to the scope of evidence the defendant can use to rebut the presumption of sanity and not to that which the People can use to prove the defendant sane. 49 N.Y.2d at 250 n.3, 401 N.E.2d at 205 n.3, 425 N.Y.S.2d at 83 n.3.

¹⁴⁹ 49 N.Y.2d at 249, 401 N.E.2d at 204, 425 N.Y.S.2d at 82.

¹⁵⁰ *Id.* The majority examined each piece of proffered evidence, *see* note 134 *supra*, to determine if each was material and relevant to the People's theory of "explosive personality." 49 N.Y.2d at 249, 401 N.E.2d at 204, 425 N.Y.S.2d at 83. In the majority's view, evidence of a defendant's participation in a barroom scuffle did not indicate a tendency to react violently without adequate provocation absent testimony as to how the incident began and, hence, should not have been admitted. *Id.* at 250-51, 401 N.E.2d at 205, 425 N.Y.S.2d at 83. Similarly, the Court stated, testimony by the defendant's accomplice to a premeditated assault and testimony to the defendant's prior conviction for possession of a sawed-off shotgun should have been excluded on the ground that such did not support the People's theory that the defendant was impulsively violent. *Id.* at 250-52, 401 N.E.2d at 205-06, 425 N.Y.S.2d at 84. Testimony to incidents where the defendant had reacted violently when mildly provoked, on the other hand, were deemed competent and properly admitted, as was testimony to the defendant's organized crime activities. *Id.* at 252-53, 401 N.E.2d at 206, 425 N.Y.S.2d at 84-85.

Although commending the trial judge for conducting an advance hearing to determine the nature and relevance of the People's rebuttal proof and for giving limiting instructions to the jury concerning the use of the evidence that was admitted, *id.* at 253-54, 401 N.E.2d

In a vigorous dissent, Judge Jasen stated that all acts in a defendant's prior career should be admissible provided that "such evidence is material and relevant to the issue of defendant's sanity at the time of the offense and [that] it would be helpful to the jury in evaluating the defense of insanity."¹⁵¹ Permitting a broad range of evidence of a defendant's prior acts, he argued, would not enhance the risk of convictions based on the defendant's criminal propensity where, as here, the defendant's commission of the crime already had been resolved by the defendant's admission.¹⁵² At the same time, opening the defendant's entire past life to scrutiny aids the People in satisfying the heavy burden of proving the defendant sane beyond a reasonable doubt.¹⁵³ Judge Jasen opined that the majority had "overemphasize[d] the possibility of prejudice to the defendant" and "withheld from the jury logically probative and clearly relevant proof of defendant's sanity" by restrictively delineating the scope of evidence of prior crimes and antisocial conduct which may be offered to prove a defendant's sanity.¹⁵⁴ In so doing, the dissenting judge concluded, the majority had unduly restricted the People to one theory of sanity, and unnecessarily increased the People's heavy burden of proving the defendant sane beyond a reasonable doubt.¹⁵⁵

In limiting the extent to which prior criminal acts of a defendant are admissible to rebut the insanity defense, the *Santarelli* Court foreclosed the People from launching an unbridled attack upon a defendant's past character. Indeed, the Court implicitly recognized that the unrestricted use of prior criminal acts would discourage defendants from pleading insanity for fear that they

at 206-07, 425 N.Y.S.2d at 85, the *Santarelli* Court disapproved of the use of a continuing objection since the trial judge was not given an opportunity to discern the relevance of each item of testimonial evidence proffered. *Id.* at 253, 401 N.E.2d at 207, 425 N.Y.S.2d at 85. The Court instead suggested that individual objections may have moved the trial judge to "require the prosecutor to articulate his theory of relevancy with more specificity" and may have avoided the defects in the trial. *Id.*

¹⁵¹ 49 N.Y.2d at 255, 401 N.E.2d at 208, 425 N.Y.S.2d at 86 (Jasen, J., dissenting).

¹⁵² *Id.* at 254-55, 401 N.E.2d at 207-08, 425 N.Y.S.2d at 86 (Jasen, J., dissenting). Echoing the view of the appellate division, *see* note 139 *supra*, Judge Jasen contended that no risk of prejudice to the defendant exists when the fact of the crime's commission is undisputed and the admitted evidence merely affects the issue of criminal responsibility. In such cases, the dissenting judge maintained, the restrictive rule of *Molineux* was inapplicable. 49 N.Y.2d at 255, 401 N.E.2d at 207-08, 425 N.Y.S.2d at 86 (Jasen, J., dissenting).

¹⁵³ 49 N.Y.2d at 254, 401 N.E.2d at 207, 425 N.Y.S.2d at 86 (Jasen, J., dissenting).

¹⁵⁴ *Id.* at 254, 401 N.E.2d at 207, 425 N.Y.S.2d at 86 (Jasen, J., dissenting).

¹⁵⁵ *Id.* at 256-57, 401 N.E.2d at 208-09, 425 N.Y.S.2d at 87 (Jasen, J., dissenting).

may be confronted with every alleged criminal act of their past lives.¹⁵⁶ Nevertheless, by using the prosecutor's theory of sanity as a benchmark for determining the relevance and, hence, the admissibility of prior criminal acts,¹⁵⁷ the Court inadvertently may have undermined the salutary effect of its holding.¹⁵⁸ It is submitted that in the wake of *Santarelli*, prosecutors will no longer emphasize one discrete theory of the defendant's sanity, for fear that evidence of prior crimes lacking a "direct bearing" on that particular theory would be excluded. Hence, as prosecutors tend toward more general rebuttal theories, the range of admissible evidence conceivably may approach "the whole previous career of a man," in derogation of the tenor of *Santarelli*.¹⁵⁹ Despite the Court's cautious approach to admissibility, the possibility exists that evidence bearing upon a defendant's criminal propensity may be revealed to the jury under the guise of relevancy to an overly broad theory of sanity.¹⁶⁰ To avoid this result, it is submitted that specific procedures

¹⁵⁶ *Id.* at 250, 401 N.E.2d at 204-05, 425 N.Y.S.2d at 83. An analogous situation was presented in *People v. Sandoval*, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). In *Sandoval*, the Court limited the use of prior crime to impeach a defendant-witness on cross-examination. The Court reasoned that a contrary rule might lead defendants to avoid testifying in their own behalf for fear of being confronted with all prior criminal or immoral acts that they had allegedly committed. *Id.* at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 853-54. See generally note 160 *infra*.

¹⁵⁷ See 49 N.Y.2d at 248-49, 401 N.E.2d at 204, 425 N.Y.S.2d at 82. Had the prosecution relied on a less specific insanity defense, the Court suggested, the scope of admissible evidence would have been wider. *Id.* at 249 n.2, 401 N.E.2d at 204 n.2, 425 N.Y.S.2d at 83 n.2.

¹⁵⁸ It is submitted that in light of *Santarelli*, prosecutors will be encouraged to rebut an insanity defense by relying on a compilation-of-factors approach rather than on one discrete theory, see generally *People v. Reade*, 1 N.Y.2d 459, 136 N.E.2d 497, 154 N.Y.S.2d 27 (1956); *People v. Rentz*, 57 App. Div. 2d 640, 393 N.Y.S.2d 456 (3d Dep't 1977) (mem.), thus rendering the second tier of the *Santarelli* relevance test of little practical significance.

¹⁵⁹ See note 148 *supra*.

¹⁶⁰ Notably, it has been established in studies on jury behavior that the admission of evidence of prior convictions substantially diminishes a defendant's chances for acquittal. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 160-61 (1966); see Comment, *Prior Conviction Evidence and Defendant Witnesses*, 53 N.Y.U. L. REV. 1290, 1301-12 (1978); Comment, *State v. Protash—Threatening Impeachment and Influencing Defendant's Decision to Testify: Prohibited Use of Compelled Testimony*, 31 RUTGERS L. REV. 815, 823-24 (1978). See generally Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CINN. L. REV. 168 (1968). It is submitted that admission of evidence of prior criminal, vicious and immoral acts similarly would reduce a defendant's chances for acquittal on the basis of legal insanity at the time of the commission of the alleged crime. In light of this possibility, it may be presumed that a defendant will be deterred from pleading insanity to avoid "opening the door" to rebuttal evidence consisting of prior vicious, criminal or immoral acts.

and guidelines must be enunciated so as to aid trial courts in making consistent evidentiary determinations regarding the admissibility of prior criminal acts.¹⁶¹ In this way, notwithstanding the assertion of an insanity defense, a defendant's right to a fair trial and an impartial jury may be preserved without unduly impinging the prosecutor's efforts to establish the sanity of the defendant.

Annette L. Guarino

Speaking to an analogous situation, in hearings regarding the adoption of Rule 609 of the Federal Rules of Evidence, one legislator expressed concern about the effect the use of prior convictions for impeachment purposes would have on a defendant's decision to testify on his own behalf:

[A] very large proportion of the miscarriages of justice which occur are in those cases where either we prejudice the man because he does take the witness stand in his own defense, or we scare him off and he does not tell his story because of that rule.

120 CONG. REC. 1419 (1974) (remarks of Rep. Dennis); see Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 CORNELL L. REV. 416, 419 (1979); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. J. 763, 778 (1961); Comment, *Prior Conviction Evidence and Defendant Witnesses*, 53 N.Y.U. L. REV. 1290, 1309-12 (1978). But see 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan). Notably, these concerns led to the adoption of Rule 609, which strictly limits the prosecutor's ability to introduce evidence of prior convictions for impeachment purposes. See FED. R. EVID. 609.

¹⁶¹ It is submitted that a pretrial hearing would be beneficial for evaluating specific items of prior criminal conduct. Indeed, in connection with criminal prosecutions pretrial hearings frequently have been dictated by courts in circumstances where precious constitutional rights may be implicated. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). Factors to be considered at a proposed "*Santarelli* hearing" to evaluate the admissibility of a defendant's prior acts might include lapse of time between commission of the prior act and the crime charged, age of the defendant at the time of the prior act, the act's tendency to rebut the insanity defense as defined in section 30.05 of the Penal Law, and its tendency to establish a character trait inconsistent with defendant's specific claim of insanity. See *People v. Sandoval*, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). In *Sandoval*, the Court of Appeals gave more specific guidelines for the evaluation of the admissibility of evidence than it did in *Santarelli*. See *id.* at 376-78, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56. It is suggested that the specificity provided by the Court in *Sandoval* has eased the operation of what was essentially a novel judicial rule. But see Note, *The Dilemma of a Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129, 150-51 (1975). It is therefore unfortunate that the *Santarelli* Court did not address the practical problems faced by the trial judge in examining each piece of proffered evidence with "sufficient particularity" to ensure its relevance to the defendant's claim of insanity. 49 N.Y.2d at 249, 401 N.E.2d at 204, 425 N.Y.S.2d at 82.