

# CPL § 60.35: Affirmative Damage Required for Impeachment of One's Own Witness

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the acts alleged in *Puig* occurred in New Jersey, that state has primary jurisdiction over the offense. Absent a "particular effect" in New York, this State could not properly deny New Jersey its authority to prosecute by assuming extraterritorial jurisdiction.

The *Puig* holding appears to be in harmony with the legislative intent underlying CPL section 20.20(2)(b). The only apparent purpose of the provision is to protect New York from offenses which, although committed without the state, have the effect of corrupting this state's governmental processes.<sup>184</sup> Nothing in the legislative history supports an expansion of extraterritorial jurisdiction beyond such offenses. Under the *Puig* holding, therefore, out-of-state criminal conduct cannot generally be prosecuted in New York absent an in-state act in furtherance thereof. The constitutional obstacles to any contrary result are simply too substantial to overcome.

*CPL § 60.35: Affirmative damage required for impeachment of one's own witness.*

When the legislature enacted section 60.35 of the CPL<sup>185</sup> it drastically changed the method for impeaching one's own witness

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prosecution by the state after a federal conviction or acquittal was barred when the crimes charged were too similar. In *Cirillo v. Justices of the Sup. Ct.*, 43 App. Div. 2d 4, 349 N.Y.S.2d 129 (2d Dep't 1973), a New York prosecution for possession of heroin was dismissed where there had been a prior federal indictment charging the defendant with an attempt to distribute heroin. The court did, however, approve the State's indictment against the defendant for possession of cocaine on the same date. See *People v. LoCicero*, 17 App. Div. 2d 31, 230 N.Y.S.2d 384 (2d Dep't 1962), *modified*, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964) (state prosecution barred after federal acquittal on substantially identical charges).

In general, however, New York courts have adopted the state-federal exception to the double jeopardy rule. See *People v. Broady*, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230, *cert. denied*, 361 U.S. 8 (1959) (state law against wiretapping punishes different conduct than does federal law); *accord*, *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S.2d 622 (2d Dep't 1974); *People v. Adamchesky*, 184 Misc. 769, 55 N.Y.S.2d 90 (Ct. Gen. Sess. 1945). In determining whether a sister-state prosecution bars subsequent indictment in New York, courts consider the nature of the relationship between the offenses prosecuted. See generally 7B MCKINNEY'S CPL § 40.20, commentary at 105 (1971). In *People ex rel. Hefin v. Silbergliit*, 2 App. Div. 2d 767, 153 N.Y.S.2d 279 (2d Dep't 1956), the defendant had stolen a car in New York, driven it in Massachusetts, and was convicted there for operating a stolen vehicle. He then returned to New York and pleaded guilty to petit larceny. Later, however, he brought a writ of habeas corpus, claiming that the New York indictment, containing counts for the taking, removing, operating, and driving of the car in New York, subjected him to double jeopardy. The court held there was no violation of his rights because the two indictments involved different crimes, each of which was prosecuted in the state where it had been committed.

<sup>184</sup> See note 181 *supra*.

<sup>185</sup> Section 60.35 of the CPL provides:

1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such

in a criminal trial. Under the previous statute, if a witness' trial testimony was inconsistent with either a prior written statement signed by him or a prior oral statement under oath, the party calling the witness was permitted to use such a prior statement for impeachment purposes.<sup>186</sup> Use of the witness' prior testimony for impeachment purposes under the current statute, however, requires not only that the testimony meet the previous criteria, but also that it be "upon a material issue of the case" and "tend to disprove the position" of the party calling the witness.<sup>187</sup> Recently, in *People v. Fitzpatrick*,<sup>188</sup> the Court of Appeals had its first opportunity to interpret section 60.35. With three judges dissenting, the Court construed the statute in a particularly strict and narrow manner.

The *Fitzpatrick* defendant, a union official, was convicted of perjury in the first degree for having given false testimony to a grand jury investigating the receipt of kickbacks from employers.<sup>189</sup> In testimony before the grand jury, a key prosecution witness stated that he had cashed an incriminating check for the defendant. When called by the People at trial, however, he testified that he was unable to recall any of the events in question. On the district attorney's motion, the trial judge allowed the prosecutor to use the witness' prior grand jury testimony for impeachment purposes.<sup>190</sup> The defendant appealed, maintaining that section 60.35

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witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

3. When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

<sup>186</sup> CCP § 8-a.

<sup>187</sup> CPL § 60.35. Previously, the rule was the same for both criminal and civil cases. Compare CCP § 8-a, with CPA § 243-a. This rule still prevails in civil cases. See CPLR 4514.

<sup>188</sup> 40 N.Y.2d 44, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976).

<sup>189</sup> *Id.* at 46, 351 N.E.2d at 676, 386 N.Y.S.2d at 29. In testimony before the grand jury, the defendant had denied receiving kickbacks "in the guise of salary checks made payable to non-employees designated by him." *Id.*, 351 N.E.2d at 676, 386 N.Y.S.2d at 29. At trial, the prosecution sought to prove that the defendant, in the company of an undercover police officer, presented such a check for payment at a tavern, received the cash, and pocketed the same. In addition to the police officer, the prosecution called the bartender who cashed the check.

<sup>190</sup> The witness' grand jury testimony had, to some degree, supported the police officer's testimony. Certain answers, however, tended to create suspicion as to whether he actually recalled the events. For example, "[o]n being asked if he had cashed a check for Fitzpatrick

prohibits such impeachment of one's own witness.

Judge Fuchsberg, writing for the majority,<sup>191</sup> found that "CPL 60.35 manifestly permits impeachment only when the testimony of the witness in court *affirmatively damages* the case of the party calling him."<sup>192</sup> Thus, impeachment was declared improper in *Fitzpatrick* since the inability of the prosecution's witness to recall what occurred "did not contradict or disprove any testimony or other *factual* evidence presented by the prosecution . . . ."<sup>193</sup> The testimony merely failed to corroborate such other evidence. The majority's primary reasons for requiring that the witness' testimony affirmatively damage the prosecution's case were the danger of prosecutorial abuse<sup>194</sup> and the difficulty, despite instructions to the contrary, in preventing juries from considering impeachment material as evidence-in-chief.<sup>195</sup> The Court also noted that the Peo-

. . . he replied, 'I probably did.'" *Id.* at 47, 351 N.E.2d at 676, 386 N.Y.S.2d at 29. The dissent pointed out that on direct examination, after testifying that he could not recall what happened, the witness was asked if he had testified before the grand jury that Fitzpatrick had cashed a check made out to someone else and he replied, "No, I don't think so." *Id.* at 56, 351 N.E.2d at 682, 386 N.Y.S.2d at 35.

It is interesting to note that the Court discussed the witness' reason for testifying as he did at the grand jury hearing even though such discussion was not dispositive of the issue before it. The Court stated that the witness

had responded to the leading questions before the Grand Jury as he had because he thought that was what the District Attorney wanted him to do, because he assumed that there was independent proof that things had happened the way they were presented to him in the questions, and because he had been unable to cope with three interrogators at once.

*Id.* at 47, 351 N.E.2d at 676, 386 N.Y.S.2d at 29. The Court's pointed discussion of this collateral issue may indicate its willingness to consider the continuing validity of current prosecutorial practices at grand jury hearings given the proper case.

Also of interest is the fact that the Court noted that many commentators suggest that admission of out-of-court statements does not create prejudice when the person who made the statement is available for cross-examination, and thus, such statements should be admitted as evidence-in-chief. *Id.* at 50 n.1, 351 N.E.2d at 678 n.1, 386 N.Y.S.2d at 31 n.1. The Court stated that such considerations were irrelevant in the instant case because it was bound by § 60.35, "which makes the admissibility of such material turn on criteria other than its hearsay nature." *Id.* Since the Court conceded the irrelevancy of this question, one wonders if the Court is subtly asking the legislature to consider redrafting § 60.35.

<sup>191</sup> Joining Judge Fuchsberg were Judges Cooke, Jones, and Wachtler. Judge Gabrielli was joined in the dissent by Chief Judge Breitl and Judge Jasen.

<sup>192</sup> *Id.* at 51, 351 N.E.2d at 679, 386 N.Y.S.2d at 32 (emphasis in original) (footnote omitted). As further support for its affirmative damage test, the Court pointed out that since the previous rule had no such requirement, the legislature could have simply reenacted CCP § 8-a had it not wanted to include a damage requirement. *Id.* at 51-52, 351 N.E.2d at 679, 386 N.Y.S.2d at 32. For a discussion of damage requirements for impeachment of one's own witness, see Note, *Impeaching One's Own Witness*, 49 VA. L. REV. 996, 1004-09 (1963).

<sup>193</sup> 40 N.Y.2d at 52, 351 N.E.2d at 679, 386 N.Y.S.2d at 32 (emphasis in original).

<sup>194</sup> *Id.* at 50, 351 N.E.2d at 678-79, 386 N.Y.S.2d at 31. *People v. Welch*, 16 App. Div. 2d 554, 229 N.Y.S.2d 909 (4th Dep't 1962). Fear of prosecutorial abuse has often been mentioned as a reason for requiring affirmative damage. See, e.g., Note, *Impeaching One's Own Witness*, 49 VA. L. REV. 996, 1004-09 (1963); Note, *Prior Statements of One's Own Witness to Counteract Surprise Testimony: Hearsay and Impeachment Under the "Damage" Test*, 62 YALE L.J. 650, 653-58 (1953).

<sup>195</sup> 40 N.Y.2d at 49-50, 351 N.E.2d at 678, 386 N.Y.S.2d at 31, citing *People v. Freeman*,

ple were not suffering from any prejudicial surprise since the prosecutor was aware of his witness' "memory lapse" before the trial.<sup>196</sup>

The dissent, however, felt there was no doubt but that impeachment of the witness was proper. Speaking for the minority, Judge Gabrielli stated that the witness' "claimed inability to recall the incident at trial cast doubt upon the ability of the prosecution to prove defendant guilty and, therefore, 'tended to disprove' the prosecution case."<sup>197</sup> The minority also pointed out that if the prosecution were not allowed to use the witness' prior testimony to impeach him, the jury might well wonder why he was called to testify at all, since he could not remember anything about the events in question.<sup>198</sup> Particularly significant to the dissent was the first draft of section 60.35, which contained the wording "intrinsically unfavorable" testimony.<sup>199</sup> The dissent felt that the subsequent substitution of the language "tends to disprove" for "intrinsically unfavorable" was indicative of a legislative intent "to broaden the perspective of the statute and permit greater latitude . . . [for] impeachment of one's own witness."<sup>200</sup>

Although the commentators disagree concerning what constitutes sufficient grounds for a party to impeach his own witness,<sup>201</sup>

9 N.Y.2d 600, 176 N.E.2d 39, 217 N.Y.S.2d 5 (1961); *People v. Ferraro*, 293 N.Y. 51, 55 N.E.2d 861 (1944).

<sup>196</sup> 40 N.Y.2d at 53, 351 N.E.2d at 680, 386 N.Y.S.2d at 33.

<sup>197</sup> *Id.* at 58, 351 N.E.2d at 683, 386 N.Y.S.2d at 36. As further support for their position, the dissent quoted from Professor Wigmore's treatise, wherein it is stated that a witness "is clearly false in one or the other of his statements, [where] one of them in effect asserts he knows about the affair and the other asserts he does not." 3A J. WIGMORE, EVIDENCE § 904(8) (Chadbourn rev. ed. 1970). The minority found further support for its position in another section of Professor Wigmore's work in which it is stated that "where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction." *Id.* § 1043 (emphasis in original).

<sup>198</sup> 40 N.Y.2d at 58, 351 N.E.2d at 683, 386 N.Y.S.2d at 36. This factor is considered to be significant in other jurisdictions. *See, e.g., People v. Pickens*, 190 Cal. App. 2d 138, 11 Cal. Rptr. 795 (Dist. Ct. App. 1961).

The majority recognized the potential psychological damage to the prosecution's case, but pointed out that in the instant case the prosecution was fully aware that the witness would testify that he was unable to recall the pertinent facts, *see* 40 N.Y.2d at 52-53, 351 N.E.2d at 680, 386 N.Y.S.2d at 33, and could have easily avoided any such possible harm by not calling the witness to the stand. Furthermore, if such a witness is called, he may be handled in a manner that would minimize any damage. *Id.*

<sup>199</sup> TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW § 60.35, Staff Comment at 68-69 (1967).

<sup>200</sup> 40 N.Y.2d at 57-58, 351 N.E.2d at 683, 386 N.Y.S.2d at 36. The majority, in contradistinction, declared the change of language to be irrelevant since *Fitzpatrick* involved not a question of the degree of harm done to the prosecution case, but rather whether the witness' testimony harmed the prosecution's case at all. *Id.* at 51 n.2, 351 N.E.2d at 679 n.2, 386 N.Y.S.2d at 32 n.2.

<sup>201</sup> Compare 11A MCKINNEY'S CPL § 60.35, commentary at 252-54 (1971) and W. RICHARDSON, EVIDENCE § 511 (10th ed. J. Prince 1973), with 3A J. WIGMORE, EVIDENCE §§ 904, 1043 (Chadbourn rev. ed. 1970).

it is submitted that the Court's interpretation of section 60.35 is the proper one. The decision, however, does leave some unanswered questions. The first of these involves the case where the prosecution is genuinely surprised at trial by a witness who claims that he cannot recall the events in question. Faced with this additional circumstance, future courts may distinguish *Fitzpatrick* and allow the district attorney to use prior statements for impeachment purposes.<sup>202</sup>

Another troublesome question is whether *Fitzpatrick* is applicable to a defendant who wishes to impeach one of his witnesses through the use of a prior inconsistent statement. The Supreme Court of the United States, in *Chambers v. Mississippi*,<sup>203</sup> held that where a witness who has made prior exculpatory statements is called by the defense and gives trial testimony which is merely neutral towards the accused, the defendant may not be denied the right to cross-examine and impeach the witness. In *Chambers*, the defendant was accused and convicted of murder. A witness called by the defense had confessed to the killing on four separate occasions. On one of these occasions he had in fact executed a sworn statement.<sup>204</sup> Later, however, he repudiated the confessions. Subsequent to the introduction of the sworn confession into evidence by the defense, the prosecution elicited its retraction on cross-examination. The defense then moved for permission to examine the witness as an adverse witness. The motion was denied, and on appeal the Mississippi Supreme Court upheld conviction, reasoning that the witness' testimony was not adverse because it did not accuse the defendant of the crime charged.<sup>205</sup> The State of Mississippi maintained that no right of confrontation existed until a witness testified *against* an accused, and since the witness' testimony did not accuse the defendant of a crime, he was not testifying against the defendant. The Supreme Court, finding this argument

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<sup>202</sup> The difficulty inherent in such a rule is that the only way the trial court can determine if the district attorney is genuinely surprised is to excuse the jury and examine the witness to discover whether he had informed the prosecutor that he could not recall the events in question. If the witness should tell the court that he had so informed the district attorney, the court would be bound by *Fitzpatrick*. If the witness had not so notified the prosecution, and if the court allowed impeachment via prior inconsistent statements, then the problem of juror acceptance of such prior statements as evidence-in-chief would reappear. Moreover, if the witness has been suborned by the defendant, he would probably tell the court that he had informed the district attorney.

<sup>203</sup> 410 U.S. 284 (1973).

<sup>204</sup> The other confessions were made to three friends on different occasions. The trial court refused to allow these people to testify on the ground of hearsay. Mississippi, although recognizing an admission against pecuniary interest as an exception to the hearsay rule, does not recognize an admission against penal interest as such an exception. *Id.* at 310-11.

<sup>205</sup> *Id.* at 291-92.

unconvincing, stated that the "retraction inculpated . . . [the defendant] to the same extent that it exculpated . . ." the witness.<sup>206</sup> The Court rejected the idea that the right of confrontation in a criminal trial can be governed by such an "unrealistic definition of the word 'against.'"<sup>207</sup>

It is submitted that if the New York courts apply the "affirmative damage" rule of *Fitzpatrick* in a mechanical manner they may well run afoul of the *Chambers* decision. Such questions, however, will be definitively answered only in subsequent cases.

#### DEVELOPMENTS IN NEW YORK PRACTICE

##### *Landowners held to single duty of reasonable care towards all entrants.*

Through a series of cases decided over the course of the past century, common law courts developed a complex system whereby the degree of duty owed by a landowner<sup>208</sup> to a person upon his premises varied with the classification of that person.<sup>209</sup> At common law, a trespasser was one who entered or remained upon the premises without privilege or the consent of the owner.<sup>210</sup> To him the occupier owed only the slight duty to refrain from inflicting wanton or wilful injury.<sup>211</sup> In contrast, a licensee was defined as

<sup>206</sup> *Id.* at 297.

<sup>207</sup> *Id.* at 298. See *United States v. Norman*, 518 F.2d 1176 (4th Cir. 1975) (a party does not "vouch" for the testimony of his witnesses); *United States v. Perez*, 493 F.2d 1339 (10th Cir. 1974) (denial of right of confrontation to permit government agent to testify as to what an informer told him without producing the informer at trial).

<sup>208</sup> Although considerable legal differences may exist between the status of land owner and land occupier, for the purposes of this Survey the terms are used interchangeably to denote one in control of real property.

<sup>209</sup> See, e.g., *Haefeli v. Woodrich Eng'r Co.*, 255 N.Y. 442, 175 N.E. 123 (1931); *Vaughan v. Transit Dev. Co.*, 222 N.Y. 79, 118 N.E. 219 (1917); *Indermaur v. Dames*, L.R. 1 C.P. 274 (1866), *aff'd*, L.R. 2 C.P. 311 (Ex. 1867). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 351-415 (4th ed. 1971) [hereinafter cited as PROSSER]; Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953) [hereinafter cited as Marsh].

<sup>210</sup> *Vaughan v. Transit Dev. Co.*, 222 N.Y. 79, 118 N.E. 219 (1917); RESTATEMENT (SECOND) OF TORTS § 329 (1965). Consent may be implied when a landowner has knowledge that persons enter and use a particular area in substantial numbers. Such persons are then treated as licensees. *Id.* § 330.

<sup>211</sup> *Mendelowitz v. Neisner*, 258 N.Y. 181, 179 N.E. 378 (1932); Marsh, *supra* note 209, at 187. An early exception to the rule equated the setting of a spring-gun to trap a trespasser with the intentional infliction of injury. *Bird v. Holbrook*, 130 Eng. Rep. 911 (C.P. 1828). New York courts have expanded the notion of trap to include deceptively innocent, artificially created dangerous conditions in the land. *Mayer v. Temple Props., Inc.*, 307 N.Y. 559, 122 N.E.2d 909 (1954) (55-foot-deep hole covered with flimsy piece of wood). The concept of trap also includes the negligent control of a dangerous instrumentality. *Kingsland v. Erie County Agricultural Soc'y*, 298 N.Y. 409, 84 N.E.2d 38 (1949) (fireworks). Another early exception to the rule prohibiting recovery for injuries sustained by trespassers can be found in *Barnes v. Ward*, 137 Eng. Rep. 945 (C.P. 1850), wherein the court held an unfenced excavation on the side of a road to be a nuisance, for which the occupier would be liable to anyone injured by it. Another exception differentiated between discovered and