# STATE OF NEW YORK

7527

2021-2022 Regular Sessions

# IN SENATE

November 17, 2021

Introduced by Sens. HOYLMAN, BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the criminal procedure law, in relation to rules of evidence concerning the admissibility of evidence of a defendant's creative expression

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. The criminal procedure law is amended by adding a new section 60.77 to read as follows:

**§ 60.77 Rules of evidence; admissibility of evidence of defendant's creative expression.**

**1. Evidence of a defendant's creative or artistic expression, whether original or derivative, may not be received into evidence against such defendant in a criminal proceeding unless such evidence is determined by the court to be relevant and admissible, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and an on-the-record statement by the court of the findings of fact essential to its determination.**

**2. In order to overcome the presumption of inadmissibility of evidence of defendant's creative expression, the proffering party must affirmatively prove by clear and convincing evidence:**

**(a) literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement;**

**(b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;**

**(c) relevance to an issue of fact that is disputed; and**

**(d) distinct probative value not provided by other admissible evidence.**

**3. Where the court admits creative expression as criminal evidence, the court has a duty to apply careful redactions, provide limiting**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD13206-02-1

**instructions, and consider the least prejudicial means of presenting the creative expression to the fact-finder.**

§ 2. Section 1.20 of the criminal procedure law is amended by adding a new subdivision 46 to read as follows:

**46. "Creative expression" means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including but not limited to music, dance, performance art, visual art, poetry, literature, film and other such objects or media.**

§ 3. This act shall take effect immediately.