

# STATE OF NEW YORK

1738

2023-2024 Regular Sessions

## IN SENATE

January 13, 2023

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

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:

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

3 § 60.77 Rules of evidence; admissibility of evidence of defendant's  
4 creative expression.

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

12 2. In order to overcome the presumption of inadmissibility of evidence  
13 of defendant's creative expression, the proffering party must affirma-  
14 tively prove by clear and convincing evidence:

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

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

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

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

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

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1 3. Where the court admits creative expression as criminal evidence,  
2 the court has a duty to apply careful redactions, provide limiting  
3 instructions, and consider the least prejudicial means of presenting the  
4 creative expression to the fact-finder.

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

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

12 § 3. This act shall take effect immediately.