

4.22 Complainant's Sexual Conduct or Dress (CPL 60.42; 60.43; 60.48)¹

(1) Admissibility of Evidence of Victim's Sexual Conduct in Sex Offense Cases [CPL 60.42]

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty or in section 230.34 [sex trafficking] of the Penal Law, unless such evidence:

(a) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or

(b) proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the Penal Law within three years prior to the sex offense which is the subject of the prosecution; or

(c) rebuts evidence introduced by the People of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or

(d) rebuts evidence introduced by the People which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

(e) is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

(2) Admissibility of Evidence of Victim’s Sexual Conduct in Non-Sex Offense Cases [CPL 60.43]

Evidence of the victim’s sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, 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 a statement by the court of its findings of fact essential to its determination.

(3) Admissibility of Evidence of Victim’s Manner of Dress in Sex Offense Cases [CPL 60.48]

Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any offense, or an attempt to commit an offense, defined in article one hundred thirty of the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, 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 a statement by the court of its findings of fact essential to its determination.

Note

Subdivision (1) restates verbatim CPL 60.42 (“Rules of evidence; admissibility of evidence of victim’s sexual conduct in sex offense cases”).

CPL 60.42, known as the “rape shield law,” was enacted in 1975 (L 1975, ch 230, § 1) to address the “concerns that testimony about the sexual past of the victims of sex crimes often serves solely to harass the victim and confuse the jurors . . . At the same time, by providing exceptions to the general evidentiary prohibition

of section 60.42, our Legislature acknowledged that there are instances where evidence of a complainant’s sexual history might be relevant and admissible. The exceptions also recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution’s witnesses.” (*People v Williams*, 81 NY2d 303, 312 [1993]; see *Michigan v Lucas*, 500 US 145, 146 [1991]; see also *People v Scott*, 16 NY3d 589, 594 [2011] [evidence of a complainant’s sexual conduct “must be precluded if it does not tend to establish a defense to the crime because it will only harass the victim and possibly confuse the jurors”]; *People v Halbert*, 80 NY2d 865 [1992] [example of a court appropriately balancing the prohibition and the defense]; *People v Halter*, 19 NY3d 1046 [2012] [same].)

Subdivision (5) of CPL 60.42 (Guide to NY Evid rule 4.22 [1] [e]) provides an exception to the rape shield law when the evidence is “relevant and admissible in the interests of justice,” thereby allowing the introduction of relevant evidence that may be required pursuant to a defendant’s constitutional right to present a defense (*People v Cerda*, — NY3d —, 2023 NY Slip Op 05305 [2023]). In *Cerda*, the defendant was prosecuted for sexual abuse of a minor, and the Court held that, in accord with a defendant’s constitutional right to present a defense, the trial court should have, pursuant to subdivision (5) of CPL 60.42, permitted the defendant to introduce “forensic evidence confirming the presence of the complainant’s saliva in the vicinity of her internal injuries, [which when] juxtaposed against the expert testimony that such injuries were consistent with digital penetration, speaks to an alternative, innocent explanation for the cause of the identified injuries and bears on the issue of guilt or innocence” (— NY3d at —, 2023 NY Slip Op 05305, *3).

Subdivision (2) restates verbatim CPL 60.43 (“Rules of evidence; admissibility of evidence of victim’s sexual conduct in non-sex offense cases”). It was enacted in 1990 (L 1990, ch 832, § 1) and shares the same concerns as CPL 60.42.

Subdivision (3) restates verbatim CPL 60.48 (“Rules of evidence; admissibility of evidence of victim’s manner of dress in sex offense cases”). It was enacted in 1994 (L 1994, ch 482, § 1) and also shares the same purpose as the other subdivisions.

¹ In December, 2023, subdivision (1) was amended to reflect an amendment of the statute that added: “or in section 230.34” of the Penal Law.