

4.26. Culpability of a Third Party

(1) Evidence of the culpability of a person other than the defendant for the offense for which the defendant is charged is admissible when the probative value of the proffered evidence outweighs any countervailing risks of delay, prejudice, and confusion and is not so remote and speculative that it does not sufficiently connect the third party to the offense.

(2) A defense application to present third-party culpability evidence should be made, in the court's discretion, in writing or orally, at the earliest reasonable opportunity and must include an offer of proof in support of the application and, in particular, explain what evidence the defense would introduce to implicate a third party's culpability for the offense. The People must then have an opportunity to be heard. The court may then conduct any hearing that may be necessary to assess the arguments and, with or without the hearing, render a decision that includes a clear directive as to what evidence, if any, the court will and will not allow.

Note

Subdivision (1) is derived from a series of Court of Appeals cases, the seminal case being *People v Primo* (96 NY2d 351 [2001]).

Primo held that the admissibility of evidence of third-party culpability should be addressed under the “general balancing analysis” of whether the proponent has demonstrated that the proffered evidence has a probative value that outweighs the “countervailing risks of delay, prejudice and confusion.” (*Primo* at 356-357.) “Courts thus have been careful to exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion (*see, Greenfield v People*, [85 NY 75, 89 (1881)] [excluding evidence of ‘(r)emote acts, disconnected and outside of the crime itself’ to prove that someone else is the guilty party] . . .). The admission of evidence of third-party culpability may not rest on mere suspicion or surmise.” (*Primo* at 357.)

That the application of the *Primo* standard may exclude a proffered defense “does not infringe upon a defendant’s constitutional right to present a complete defense as set forth in the Sixth and Fourteenth Amendments.” (*People v Powell*,

27 NY3d 523, 526 [2016].)

The proffered evidence of third-party culpability in *Primo* was a ballistics report that linked a third person to the gun used to shoot the complainant coupled with proof that the third party was at the scene of the shooting. On those facts, *Primo* determined that the “probative value” of the evidence of the culpability of a third party proffered in that case “plainly outweighs the dangers of delay, prejudice and confusion.” (*Primo* at 357.)

Powell (27 NY3d at 531) reinforced *Primo*, holding that “courts should ‘exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion’ or where the evidence is so remote and speculative that it does not sufficiently connect the third party to the crime” (citation omitted).

Given that the proffered evidence of third-party culpability in *Powell* was based on a speculative assertion that “others could have had access to [the deceased’s] home or might have had reason to kill her—the trial court did not abuse its discretion by precluding the proffered evidence (*see People v Gamble*, 18 NY3d 386, 398-399 [2012] [speculative assertions that other unidentified individuals had a motive to harm a victim are insufficient to support admission of third-party culpability evidence]).” (*Powell* at 531-532; *see People v King*, 27 NY3d 147, 158 [2016] [the court properly rejected a defense proffer of a witness to testify to hearsay statements by two unidentified individuals, not including the defendant, that they had a motive to harm the victim]; *cf. Gamble* at 399 [“That the People introduced evidence establishing defendant’s motive for the shootings does not . . . open the door to generalized, speculative evidence of possible motives by unidentifiable persons” (internal quotation marks omitted)].)

Powell made it clear, however, that a third-party culpability claim “does not necessarily require a specific accusation that an identified individual committed the crime. For example, a proffer of an unknown DNA profile may be sufficient.” (*Powell* at 532.)

People v DiPippo (27 NY3d 127, 136 [2016]) followed *Primo*, adding that the absence of “proof directly linking the third party to the *crime scene*” was not necessarily fatal to the introduction of third-party culpability evidence.

On its facts, *DiPippo* found that notwithstanding the absence of proof linking the third party to the “crime scene,” the evidence of a culpable third party was sufficient in that it included a declaration against penal interest by the third party that implicated him in the crime, as well as a showing that the third party had committed other crimes with a unique *modus operandi* that paralleled the crime charged.

With respect to the “*modus operandi*” evidence, *DiPippo* explained that

“[w]hile unlikely to be sufficient standing alone,” it “is relevant to, and can support, a third-party culpability proffer where the crimes reflect a ‘modus operandi’ connecting the third party to the charged crimes.” (*Id.* at 138; *cf. People v Schulz*, 4 NY3d 521, 528 [2005] [the defendant offered “no evidence which shows a modus operandi”; but only evidence that an identified third party committed the same type of crime in the area of the charged crime and around the time of its occurrence].)

In permitting evidence of third-party culpability, the trial court retains discretion to determine what evidence would be appropriate. (*See Primo* at 357 [the court will “make its determination (of an application to admit third-party culpability) followed by clear directives as to what it will and will not allow”]; *People v Boyd*, 31 NY3d 953, 955 [2018] [where the defense was permitted to pursue a third-party culpability defense, the court did not abuse its discretion by refusing to admit in evidence facts concerning the arrest of the third party (who had inculpated himself and later recanted)]; *People v Hemphill*, 35 NY3d 1035, 1036 [2020] [where the defense presented a third-party culpability defense, “the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pleaded guilty to possessing a firearm other than the murder weapon”].)

Subdivision (2) is derived from *Primo* (at 357):

“In practice, the balancing [of whether the probative value outweighs the countervailing risks] is best performed by requiring the defense, at the earliest reasonable opportunity, to make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow.”