ARE YOU "AVAILABLE?": AN ANALYSIS OF THE PORCO APPEAL BEFORE THE N.Y. COURT OF APPEALS

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This article was previously published on the *Albany Government Law Review Fireplace* on February 28, 2011. *See* David Szalda, *Are You Available? An Analysis of the Porco Appeal Before the N.Y. Court of Appeals,* ALB. GOV'T L. REV. FIREPLACE (Feb. 28, 2011), http://aglr.wordpress.com/2011/02/28/are-you-%E2%80%98available%E2%80%99-an-analysis-of-the-porco-appeal-before-the-n-y-court-of-appeals/.

INTRODUCTION

On the morning of November 15, 2004, the quiet Albany suburb of Delmar, New York, awoke to the news of the murder and attempted murder of Peter and Joan Porco, respectively.[1] Sometime in the night, while the two were sleeping, an intruder entered their home and savagely attacked the sleeping couple with an ax.[2] Hours later, police investigators and paramedics arrived at the Porco residence to discover Mr. Porco murdered and Mrs. Porco in her bed barely surviving her traumatic head injuries.[3] Soon after his arrival on the scene, Police Detective Bowdish began his investigation of the attack.[4] Eventually, the investigator asked Mrs. Porco if her son Christopher had done this to her and her husband.[5] As the investigator and paramedics would later testify, Mrs. Porco responded with an up-and-down "nod," signaling, yes.[6]

Relying on the "nod" and an abundance of circumstantial evidence, the jury convicted the victim's son, Christopher Porco, for the murder of his father and the attempted murder of his mother.[7] Porco's appeal to the Appellate, Division, Second Department was premised among several legal errors, most notably the trial court's error in admitting the police detective's and paramedics' testimony as to Mrs. Porco's nod as an excited utterance.[8] Upon appeal, the Second Department disagreed, and found the nod inadmissible hearsay. However, the court held that error harmless because of the "overwhelming evidence of the defendant's guilt without reference to the error and the absence of any substantial probability that the error might have contributed to his conviction."[9] On September 21, 2010, the New York Court of Appeals granted Porco's defense motion for leave to appeal the Second Department's holdings.[10] The central issue now before the New York Court of Appeals is whether Christopher Porco's Sixth Amendment right was violated

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[1] Brendan J. Lyons, *Porco Murder Appeal Hinges on a Mother's Nod*, TIMES UNION (Albany, N.Y.), Jan. 21, 2011.
[2] *Id.*
[3] *48 Hours Mystery: Memory of Murder* (CBS television broadcast Nov. 4, 2006).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Lyons, *supra* note 1.
[9] People v. Porco, 896 N.Y.S.2d 161, 163 (App. Div. 2010).
[10] People v. Porco, 935 N.E.2d 824 (N.Y. 2010).

because, as he argues, Mrs. Porco was constitutionally unavailable to testify.[11]

I. EXCITED UTTERANCE

The Court of Appeals will likely reverse the Second Department's finding that Mrs. Porco's "nod" was not an excited utterance. To qualify as an excited utterance the statement must be "spontaneous and trustworthy"[12] and "made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication."[13] The rationale for this hearsay exception is "that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication and, accordingly, any utterance he makes will be spontaneous and trustworthy."[14] The Second Department found that, "[i]n light of the lapse of time between the attack on the defendant's mother, and her responses to the detective's questions, the nod in question cannot be deemed an excited utterance."[15]

The fact that Mrs. Porco's assertive nod was made in response to a directed question by the police does not automatically preclude its admission as an excited utterance.[16] An utterance is in response to an inquiry, like the time lapse, is "merely one factor bearing on spontaneity" within the meaning of the excited utterance rule.[17] The Court of Appeals has reasoned that "the nature, extent and purpose of the questions and the identity, position and manner of the questioner" are all factors for the hearing court's determination of whether the statements were made under the continuing excitement. Unless the questioning "causes some interruption of or moderation in declarant's continued stress and excitement" from the catalyst, police questioning standing alone does not defeat the admissibility of the declarant's responses as excited utterances.[18]

Therefore, the Second Department erred by finding in conclusory terms, absent any factual analysis, that Mrs. Porco's

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[11] *Id.*
[12] People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979).
[13] People v. Johnson, 804 N.E.2d 402, 405 (N.Y. 2003).
[14] *Id.* (quoting *Edwards*, 392 N.E.2d at 1231).
[15] People v. Porco, 896 N.Y.S.2d 161, 163 (App. Div. 2010).
[16] *Johnson*, 84 N.E.2d at 406 (citing People v. Brown, 517 N.E.2d 515 (N.Y. 1987)).
[17] *Brown*, 517 N.E.2d at 518.
[18] *Id.* at 520.

nod was inadmissible as an excited utterance solely because it was in response to a police question.[19] Although Mrs. Porco was able to follow simple directions of the paramedics, there are no facts to suggest that her nod was "not made under the impetus of studied reflection" to make its veracity suspect.[20] Nor did the court find that Mrs. Porco was not in a continued excited state from the initial attack, nor that her excited state ended because of the police officer's questions. It is plausible from the savagery of the attack, the pain, and the mortal head injuries sustained by Mrs. Porco that she was still in an excited state initiated by the attack.

II. "AVAILABILITY" UNDER *CRAWFORD*

The true argument before the court is whether Porco's Sixth Amendment right of confrontation under *Crawford v. Washington*[21] was violated because Mrs. Porco, although physically present for cross-examination at trial, could not recall either nodding to the police investigator, nor the underlying facts of the attack. The U.S. Supreme Court considered in *Crawford* whether the Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits admission of out-of-court statements which are otherwise admissible if not subject to cross-examination.[22] The Court held the Confrontation Clause prohibits the admission of out-of-court testimonial statements by a declarant, unless that declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine.[23]

The Second Department found that Porco's Sixth Amendment right to confrontation was not violated by the trial court's error in admitting testimony of Mrs. Porco's "nod" because she was available to testify at trial, and did.[24] As the Second Department determined, Mrs. Porco's nod was testimonial hearsay, because the assertive conduct was done for "the primary purpose . . . to establish or prove past events potentially relevant to later criminal prosecution"[25] and not in the police effort to combat an

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[19] *See Porco*, 896 N.Y.S.2d at 163.
[20] People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979).
[21] 541 U.S. 36 (2004).
[22] *See id.*
[23] *Id.*
[24] *Porco*, 896 N.Y.S.2d at 163–64.
[25] Davis v. Washington, 547 U.S. 813, 822 (2006).

ongoing emergency.[26] Therefore, the court's determination will turn on whether or not Mrs. Porco was constitutionally available as the Supreme Court articulated in *Crawford*, and is required by the Confrontation Clause.

The New York Court of Appeals never directly ruled on whether the availability requirement under *Crawford* is satisfied when the declarant is physically able to testify, but cannot recall the underlying events leading to her statement, nor making the hearsay statements. Therefore, the court must begin its analysis by looking to other jurisdictions. Since *Crawford* was decided by the Supreme Court a good place for the court to begin its research is in federal law.

The Confrontation Clause guarantees an "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extend, the defense might wish."[27] The Ninth Circuit in *United States v. Valdez–Soto*[28] stated that it was not aware of any "Supreme Court case, or any other case, which holds that introduction of hearsay evidence can violate the Confrontation Clause where the putative declarant is in court, and the defendants are able to cross-examine him."[29] Moreover, the Supreme Court held that a witness's inability to remember what happened does not make him unavailable for Confrontation Clause purposes.[30] Lower federal courts have held that a defendant's opportunity to bring out impeachable information from the witness while on the stand such as "his lack of care and attentiveness, his poor eye sight, and even . . . the very fact that he has a bad memory" satisfies the Confrontation Clause.[31]

If the New York Court of Appeals decides to adopt federal jurisprudence in the matter it could find precedent to affirm the Second Department's holding that Porco's confrontation rights were satisfied. To do so the Court of Appeals must conclude that "availability" in the *Crawford* context requires only that defendants have the opportunity to cross-examine hearsay declarants, no matter their inability to recall either the underlying facts of or making their out-of-court statement. In other words, that Mrs. Porco was available because she physically

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[26] *See id.*
[27] Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).
[28] 31 F.3d 1467, 1470 (9th Cir. 1994).
[29] *Id.* at 1470.
[30] United States v. Owens, 484 U.S. 554, 557 (1980).
[31] Ledesma v. Felker, 2010 WL 129694, at *4 (C.D. Cal. 2010).

testified, the defense had the opportunity to test her knowledge of the attack and the making of the hearsay statement, and that opportunity included the chance to impeach her hearsay statements on any permissible ground, including memory loss. On the other hand, the Court is well within its grant of power to find that the New York State constitution provides New York defendants a greater degree of protection under its Confrontation Clause, than its federal counterpart.[32] Thereby the court would establish new precedent, and a new obstacle for state prosecutors to overcome to sustain criminal convictions.

It will be an interesting spring term.

[32] *See* People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009).