DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
FRANK A. SEDITA, III
ERIE COUNTY

July 16, 2014

The Honorable Andrew M. Cuomo
New York State Capitol Building
Albany, New York 12224

RE: A8780, S7188 (Schimminger, Gallivan)

Dear Governor Cuomo:

I am writing on behalf of the District Attorneys Association of the State of New York ("DAASNY") to support the above-referenced legislation. This legislation, which would allow for a caregiver to provide assistance to a vulnerable elderly person during a Grand Jury proceeding, will provide dignity to this growing class of crime victims. DAASNY strongly supports **A8780, S7188** (Schimminger, Gallivan) as part of an important multi-pronged effort to safeguard vulnerable elderly victims.

In 2013, DAASNY unveiled a White Collar Crime Task Force Report ("The Report;" excerpt attached). The findings, not surprisingly, highlighted the increasing victimization – particularly with regard to financial exploitation -- of older adults. From The Report:

> Financial elder abuse is a growing problem across the United States. That is especially true in New York State, which has the third-largest older adult population in the country. Due to physical or mental infirmities, the elderly are particularly vulnerable to financial exploitation, especially at the hands of their own caregivers. The elderly are also an attractive target: as a group they hold the largest percentage of the nation's wealth. Combined, these factors have led to staggering rates of financial elder abuse nationwide. According to one study, "the annual financial loss by victims of elder financial abuse is estimated to be at least $2.9 billion, a 12% increase from the $2.6 billion estimated in 2006." (Citations omitted)

Legislators quickly recognized the importance of addressing this vulnerable population and introduced a six-point package.

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A8780, S7188 (Schimminger, Gallivan) addresses one of these six points – the experience of older adults in the Grand Jury. The Report is careful to note that: "Many older adults suffer from age-related cognitive disorders, rendering them unable to understand basic arithmetic, let alone their finances. They may not remember signing checks, wills or deeds, or giving permission or authority to transfer ownership of their bank accounts or real estate." In addition, some suffer degenerative conditions that make communication increasingly difficult – particularly over the long life of an investigation and court proceedings. For these and other reasons, an elderly victim's mental infirmity can complicate a prosecution.

A8780, S7188 accommodates the special needs of this population by allowing a social worker or caregiver for a vulnerable elderly person to provide assistance during Grand Jury proceedings. It does not permit the caregiver to provide answers to the witness or assist with recall. It does permit the caregiver to preserve the dignity of the witness by providing immediate physical and emotional assistance while the witness is on the stand without disrupting the proceedings or forcing the witness to endure an embarrassing situation.

But the sad fact is that the more our population grays, the more predators emerge who are ready to exploit that population. And while providing dignity in the Grand Jury is an incredibly important first step, it is only that – a first step.

The Report called on the legislature to update a number of provisions in the law to reflect the increasing victimization of vulnerable elderly persons. DAASNY is now calllng on the legislature to enact the remainder of the package in the 2015 legislative session. The 2014 bills, which we anticipate will be reintroduced in 2015, include:

- **A8776** (Schimminger) creates a new Penal Law §155.00(1)(10) to define "mentally disabled" under the Larceny statutes.

- **A8777, S7177** (Schimminger, Gallivan) creates a new Penal Law §155.10(2) to establish that it is no defense to Larceny that the victim consented to give property in instances where the defendant knew or had reason to know that the victim was mentally disabled.

- **A8778, S7179** (Schimminger, Valesky) adds a new Civil Practice Laws and Rules §4504(e) to allow for the sharing of medical records for the purposes of establishing mental disability pursuant to a Grand Jury subpoena and a Superior Court endorsement.

- **A8781, S7187** (Schimminger, Nozzolio) amends Penal Law §155.05(2)(d) to establish that partial performance of a promise does not preclude a jury from finding an individual guilty under the Larceny statute.

- **A8779, S7178** (Schimminger, Gallivan) creates a new Criminal Procedure Law §660.20(2)(c) to allow for the conditional examination of individuals over the age of 75.

Personally, I view financial elder abuse as an especially odious crime given the vulnerability of the victim. Indeed, the devastating impact of these crimes against the elderly is strikingly similar to what we encounter with sexual assault victims. Given the growing number of seniors in our state's overall population, I believe it is imperative that we do everything possible to protect this incredibly important constituency and would welcome the opportunity to personally discuss this important agenda with you.

DAASNY strongly supports **A8780, S7188** and urges you to sign the legislation. At the same time, DAASNY recognizes that this one bill alone does not address the urgent matter of the criminal exploitation of the elderly. Accordingly, we ask our lawmakers to take the remaining five bills outlined above under serious consideration as a much-needed service to this growing constituency.

Sincerely,

Frank A. Sedita, III
President, DAASNY
District Attorney, Erie County

Enclosures

A. Theft from Mentally Disabled Adults

New York's Penal Law was recently amended to target *physical* assaults committed against elderly victims.[303] In contrast with most other states in the country, however, New York has not addressed the *financial* exploitation of impaired adults.[304] The sad fact is that older adults who suffer from age-related cognitive disorders may be unable to understand basic arithmetic, let alone their finances. They may not remember signing checks, wills or deeds, or giving permission or authority to transfer ownership of their bank accounts or real estate. Some can barely communicate.

For those reasons, an elderly victim's mental infirmity can complicate a Larceny prosecution. The Penal Law requires proof that the defendant wrongfully took, obtained or withheld property from an owner – in other words, that the property was taken without consent.[305] A mentally disabled victim, however, cannot give meaningful consent; more saliently, such a victim cannot testify (nor, for that matter, execute a sworn certification) that his property was taken without consent. To prove this element, the prosecution often relies on evidence that at the time of the taking, the victim lacked the mental capacity to consent.

That is precisely what occurred in *People v. Camiola*.[306] There, the defendant stole from his victim, a senile elderly woman, over a two-year period.[307] At trial, the defendant testified that the funds he took were gifts from the victim, who had by then passed away. The trial court permitted the prosecution to introduce evidence of the victim's mental condition at the time of the transfer, deeming it relevant to whether she had the capacity to consent. The First Department affirmed the conviction, explaining:

> The jury was not instructed that the victim's capacity or incapacity was an element of the offense, but only that they could evaluate her capacity under the circumstances of this case in determining whether a trespass had occurred or whether, as defendant contended, he had acted with her knowledge and consent. Although we note the paucity of case law in this State equating a trespass for purposes of larceny with an ostensibly donative victim's inability to consent to the taking, neverthe-

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[303] PENAL LAW §§ 120.05(12) (Assault in the Second Degree); 260.32, 260.34 (Endangering the Welfare of a Vulnerable Elderly Person, or Incompetent or Physically Disabled Person in the Second and First Degrees, respectively).

[304] ROSE MARY BAILLY AND ELIZABETH LOEWY WITH MARGARET A. BOMBA & JAMES J. LYNCH, CIVIC RESEARCH INSTITUTE, FINANCIAL EXPLOITATION OF THE ELDERLY 3-2 (2007) (listing 43 states' penal laws on financial abuses of elderly or infirm victims, which classify victims based upon advanced age, physical disability or mental impairment, relationship between victim and abuser, or a combination of these factors).

[305] PENAL LAW § 155.05(1).

[306] 225 A.D.2d 380 (1st Dept. 1996), *app. denied* 88 N.Y.2d 877 (1996).

[307] *Id.* at 380.

> less, these factors are properly considered in the context of a traditional understanding of the larceny statute.[308]

The "paucity of case law" has seeded confusion in Larceny cases with mentally disabled victims. Basic questions have been left unanswered: Is evidence of the victim's disability admissible? If so, what is the appropriate jury instruction? The Task Force suggests that this confusion be ameliorated by codifying the holding of *Camiola* to make it applicable statewide. This amendment to the Larceny law would clarify that one cannot obtain valid consent from an owner who the defendant knew or had reason to know is incapable of understanding the nature of the transaction. The proposed language would be a new subsection (2) to section 155.10 of the Penal Law, and would state:

> It is no defense to a prosecution for larceny that the defendant obtained consent to take, withhold, or obtain property, where such consent was obtained from a person who the defendant knew or had reason to know was mentally disabled.

This proposal is analogous to, and consistent with, existing law regarding sex offenses. Article 130 of the Penal Law similarly provides that the mental disability of a victim makes that person legally incapable of consent.[309] The Task Force's proposal is derived from the definition of "mentally disabled" in the sex offenses article.[310] The full proposal is set out in Appendix F.

B. Access to Medical Records

An elderly victim's medical records may be required to prove the existence of a mental disability that demonstrates the incapacity to consent, and are certainly crucial evidence in that regard. The experience of Task Force members in seeking to obtain these records is that in some parts of New York State, health care providers produce medical records in response to subpoenas *duces tecum* issued by grand juries. In others, however, providers refuse to comply with subpoenas on the ground that doing so would violate the physician-patient privilege codified in CPLR 4504.[311] Although victims in other types of cases routinely waive their privilege so that prosecutors can obtain crucial medical records, in the case of a mentally-impaired victim, that may be impossible.[312] That victim, of course, cannot consent to waiving her medical privilege any more than she can consent to having her property taken. As a result, law enforcement efforts against elder fraud have suffered.

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[308] *Id.* at 380-81.
[309] PENAL LAW § 130.05(3)(b).
[310] PENAL LAW § 130.00(5) ("'Mentally disabled' means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct").
[311] *See, e.g.*, Matter of a Grand Jury Subpoena Duces Tecum Served on Peconic Bay Medical Center Dated May 18, 2009 (Sup. Ct. Suffolk Co., Grand Jury No. 0901954) (Kahn, J.) (denying Suffolk County District Attorney's Office application for an order compelling compliance with a subpoena *duces tecum* based on state "physician-patient confidentiality") (on file with the Task Force).
[312] *See* CPLR § 4504(a) (providing for the waiver of the privilege).

As the Court of Appeals has recognized, "the purpose of the privilege is to protect the patient, not to shield the criminal."[313] For that reason, it is plainly in the public interest to allow courts to order the production of the records of mentally-impaired victims. Because the privilege is a creature of statute, such change can only come from the Legislature.[314] The Task Force therefore recommends amending CPLR 4504 to allow a prosecutor to obtain medical records with a subpoena, endorsed by the court, based upon a showing that the patient suffers from a mental disability (as defined in the Larceny proposal described above), and that the patient has been the victim of a crime.[315] Proposed language is set forth in Appendix F.

C. Conditional Examinations of Elderly Victims

Many elderly adults live isolated existences, interacting only with their home health aide or other caregiver. Consequently, in the typical elder fraud case, the victim is the sole witness to the defendant's crimes. Months, or even years, may pass between the outset of an investigation and trial. Even if an elderly victim is healthy and cogent at the beginning of the process, he or she may become incapacitated or pass away prior to trial, rendering the case impossible to prove.

A recent prosecution illustrates this unfortunate phenomenon. An elderly man in his 90s was the victim of a theft by his long-time home aide. Although the victim was in good health when the complaint was brought to the District Attorney's Office, he passed away shortly after the investigation began. The case was prosecuted, but only because the defendant had confessed to the police.[316]

Elder abuse prosecutions should not depend on the chance that the defendant makes a statement to the police. Nor, for that matter, should defendants be permitted to "run the clock" by delaying the trial until their elderly victims become incapacitated or pass away, as has been known to happen.

The law already contains a solution to this problem: the conditional examination. Article 660 of the Criminal Procedure Law provides that a criminal court may "order that a witness or prospective witness . . . be examined conditionally under oath."[317] That testimony may be received into evidence at a later hearing or trial. Under current law, however, wit-

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[313] Matter of Grand Jury Proceedings (Doe), 56 N.Y.2d 348, 352-53 (1982).
[314] Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 134 (1983).
[315] This proposal would not run afoul of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 300gg, 29 U.S.C §§ 1181 *et seq*., and 42 U.S.C. §§ 1320d *et seq*. The HIPAA privacy rule makes exceptions for judicial and administrative proceedings, 45 C.F.R. § 164.512(e)(1), and law enforcement purposes, 45 C.F.R. § 164.512(f)(1). *See also* United States v. Wilk, 572 F. 3d 1229, 1236 (11th Cir. 2009) (HIPAA "authorized the disclosure of confidential medical records for law enforcement purposes, or in the course of a judicial proceeding, in response to a court order or grand jury subpoena").
[316] People v. Tabara Koroma, Ind. No. 04991/2006 (Sup. Ct. N.Y. Co. 2006).
[317] CPL § 660.10.

nesses of advanced age are eligible for conditional examinations only if they suffer from demonstrable physical illness or incapacity when the application for the examination is made.[318] The unfortunate result is that in some cases, victims who are not suffering from such conditions – but are nevertheless elderly – become totally incapacitated or pass away without a conditional examination having been performed.

For that reason, the Task Force recommends that CPL Article 660 be amended to permit prosecutors and defense counsel to seek the conditional examination of witnesses 75 years of age or older, whether or not they suffer from demonstrable illness or incapacity.[319] Unlike current law, this amendment would help the victim of advanced age who appears to be in good health when the defendant is arrested but incapacitated (or has passed away) by the time trial begins. Proposed language is set forth in Appendix F.

D. Caregivers in the Grand Jury

As prosecutors and defense attorneys know, testifying before the grand jury can be a stressful experience for a crime victim. That is even more so for elderly witnesses, who often suffer from physical, mental or emotional impairment. These vulnerable individuals are frequently afraid to testify against the defendant, fearing that an abusive home health aide might seek retribution, or an abusive family member might place the victim in a nursing home. Moreover, many of these victims have physical limitations that make testifying difficult and, on occasion, embarrassing. To calm these concerns, the Assistant District Attorney often wears two hats in the grand jury: prosecutor and temporary caregiver.

What does this mean? While introducing evidence, the prosecutor must also lend physical or emotional support to the older witness. Stories studied by the Elder Abuse Working Group are legion: a prosecutor who elicited evidence while wiping drool from the chin of a Parkinson's sufferer; another who introduced documents into evidence while turning the pages for a wheelchair-bound victim; another who had to stop testimony so that a victim's hearing aid could be reinserted into his ear. Despite these and other prosecutors' best efforts, vulnerable elderly witnesses often remain overwhelmed with anxiety, or suffer physical indignities before an audience of 23 grand jurors. And as a practical matter, the presentation of evidence may be slowed considerably.

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[318] CPL § 660.20(2)(b).

[319] Fixing a threshold age is inevitably somewhat arbitrary. However, data from the Centers for Disease Control indicates that the average American's life expectancy is 78.7 years. CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2012 2 (2012), *available at* www.cdc.gov/nchs/data/hus/hus12.pdf. Additionally, a 2002 study found that roughly one in seven Americans over the age of 70 has dementia, suggesting that approximately 3.4 million individuals in this age group have Alzheimer's Disease. B.L. Plassman et al., *Prevalence of Dementia in the United States: the Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 125 (2007), *available at* www.ncbi.nlm.nih.gov/pmc/articles/PMC2705925/pdf/ned0029-0125.pdf. Based on these data, the Task Force believes that drawing the line for conditional examinations at 75 years of age is reasonable.

The Criminal Procedure Law currently permits a social worker, rape crisis counselor, psychologist or other professional to accompany a child witness into the grand jury.[320] Such individuals are prohibited from providing witnesses with answers, must take an oath to maintain the secrecy of the proceeding, and may only fulfill their function with the consent of the prosecutor. The Task Force recommends that a similar provision be added for vulnerable elderly witnesses. Under the proposal, which is set forth in Appendix F, an "informal caregiver" or "professional social worker" could accompany a "vulnerable elderly person" into the grand jury with the prosecutor's consent.

A few points bear mention. First, members of the Task Force noted that not all elderly victims have social workers or other professional counselors. For that reason, the proposal applies to the "informal caregiver," who might be a trusted family member or neighbor. Second, the proposal would use the current definition of "vulnerable elderly person" from the Penal Law.[321] Lastly, as in the child witness context, the prosecutor would serve as gatekeeper, to prevent wrongdoers or their agents from piercing the secrecy of the grand jury.

Although cases involving older victims certainly differ from child abuse prosecutions, it is a simple fact that many elderly witnesses suffer from age-related physical and mental infirmities that warrant the addition of a caregiver in the grand jury. Both prosecutors and vulnerable elderly witnesses would be better served by a caregiver who is permitted to assist the older grand jury witness in a limited fashion.

E. Larceny by False Promise

Elderly people are frequently the victims of home improvement scams throughout New York State. In the typical scheme, a dishonest contactor persuades his victim to make a full upfront payment; after performing a minimal amount of the promised work, he absconds with the victim's money.

Ambiguity in New York State Law has made it difficult to prosecute these scams. In *People v. Churchill*,[322] the defendant, a home improvement contractor, entered into contracts with four different homeowners for a variety of projects, and was paid for substantially more work than he ultimately performed. He was convicted of Larceny on a false promise theory, which requires a unique burden of proof in New York law: "exclu[sion] to a moral certainty [of] every hypothesis except that of the defendant's intention or belief that the promise would not be performed."[323] In *Churchill*, the Court of Appeals reversed the conviction and dismissed the indictment, holding that from the evidence adduced at trial, it was "impossible

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[320] CPL § 190.25(3)(h).

[321] PENAL LAW § 260.31 ("'Vulnerable elderly person' means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.").

[322] 47 N.Y.2d 151 (1979).

[323] PENAL LAW § 155.05(2)(d).

to conclude that the proof excludes to a moral certainty every hypothesis except guilty intent."[324]

Although *Churchill* appears simply to be a case where the evidence was insufficient to sustain the charge, it has thrown a wrench into home improvement scam prosecutions in some parts of the state. In one case, the Appellate Division reversed a conviction for Larceny by false promise because the "defendant took significant steps" to fulfill his promises.[325] In another, the Appellate Division reversed a contractor's conviction for Larceny by false promise despite the fact that he had "received deposits to build" two pole structures and "never built them or refunded the down payments."[326]

The Court of Appeals' seminal decision in *People v. Norman*, decided 16 years after *Churchill*, spelled out the legal standard applicable to Larceny by false pretense and Larceny by false promise cases, holding that for purposes of legal sufficiency, false promise cases should be held to no greater or lesser standard than any other Larceny case.[327] Pointedly, and contrary to the standard of review applied in *Churchill*, the *Norman* Court held that "Penal Law § 155.05(2)(d)'s 'moral certainty' standard is not an appropriate criterion for measuring the sufficiency of the People's proof."[328] Unfortunately, although *Norman* distinguished *Churchill* on its facts, the Court neither overruled *Churchill* nor clarified that partial performance of a promise, by itself, does not defeat an otherwise legally-sufficient Larceny charge.[329]

To eliminate the ambiguity in case law since *Churchill*, the Task Force proposes amending Penal Law § 155.05(2)(d) to specify explicitly that in a prosecution for Larceny by false promise, "partial performance of such promise does not, by itself, preclude a reasona-

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[324] 47 N.Y.2d at 159.

[325] People v. Smith, 161 A.D.2d 1160, 1161 (4th Dept. 1990).

[326] People v. Rogers, 192 A.D.2d 1092 (4th Dept. 1993). The *Rogers* court held that the People failed to satisfy the "moral certainty" standard based on the evidence that the

> defendant had previously constructed pole structures in New York and that he had a materials account at 84 Lumber where the deposits were placed. Additionally, when defendant was contacted by Mr. Horton regarding his failure to commence construction, defendant told him that he was having problems retaining employees with employees' thefts and that he was having difficulties and delays on other jobs. That testimony was consistent with the testimony of defendant and his wife. Three of the contractees also testified that, when they entered into the contract, defendant indicated that he was seeking multiple contracts to obtain a substantial price reduction on materials. Moreover, there is no evidence that defendant used the deposits for his personal debts, that he made himself unavailable to the complainants, that he absconded to another State or that he had engaged in similar transactions involving a common scheme without a business purpose.

Id. at 1092-93 (internal citations omitted).

[327] 85 N.Y.2d 609, 620-21 (1995).

[328] *Id.* at 620.

[329] *Id.* at 623-24.

ble jury from making such finding from all the facts and circumstances."[330] This language would not alter the "moral certainty" standard generally applicable to such prosecutions, nor change the standard of review.[331] It would, however, clarify present law and assist in combating a common fraud committed against elderly New Yorkers.

F. Other Proposals

The Task Force believes that the above proposals, in addition to our proposed revamping of Scheme to Defraud, discussed in Section IV(B), would greatly assist the efforts of prosecutors around the state to protect the elderly from the scourge of financial exploitation. In addition to the proposals in this section, which are the product of the work of the Elder Abuse Working Group, the Task Force makes one additional recommendation with respect to protecting the elderly. As part of its report on Cybercrime and Identity Theft, the Task Force proposes to create the crime of Aggravated Identity Theft in the Second Degree, a Class E felony, which would apply to defendants who committed Identity Theft in the Fifth Degree, a Class A misdemeanor, knowing that his or her victim was a vulnerable elderly person. This recommendation is described in Section V(B)(2), above.

[330] The full text of the proposal is set forth in Appendix F.
[331] PENAL LAW § 155.05(2)(d).