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Legal Precedent Doesn't Let Facts Stand in the Way

By Sabrina Tavernise

The case was familiar, if disturbing. A Bronx man had been accused of punching and threatening his girlfriend. But the woman refused to testify. Prosecutors, though, soon got a break. A Bronx Criminal Court judge appeared to stake out some novel legal ground just weeks after a United States Supreme Court decision. He ruled that prosecutors could use 911 recordings of the woman's anguished call for help as evidence, even though she would not testify.

Within weeks, prosecutors and judges around the country seized on the March 25 decision, by Judge Ethan Greenberg, citing it as important precedent as they wrestled with their own cases. In all, the decision would be referenced in 15 high-level court cases, from North Carolina to Nevada, and it was included in the 2004 edition of a widely used law textbook.

There was a problem, however, with the decision rendered by Judge Greenberg in *People v. Moscat*. None of the assumptions the judge based his opinion on were actually fact. The person captured on the tape in that particular case was, it turned out, a neighbor, not the victim. The call had been made some nine hours after the alleged assault, not while it was happening. And prosecutors eventually abandoned the case.

Defense lawyers and prosecutors alike say the judge was simply eager to be one of the first to interpret the Supreme Court's ruling, a way to get attention in the legal world. The judge says that prosecutors told him the victim was on the tape, an assertion that prosecutors deny. He says he is comfortable with the heart of his decision.

Whatever the case, none of this seems likely to blunt the impact of the ruling, which continues to have a legal life of its own. And in that, *People v. Moscat* provides an interesting window into the world of court decisions: how a ruling in March by a lower-court judge in the Bronx almost instantly traveled through a network of lawyers and judges eager to make new law, and how little it mattered that the facts of the case did not apply.

"*Moscat* is leading the charge," said Richard D. Friedman, of the University of Michigan Law School and a criminal law expert. Judge Greenberg's ruling "is the most frequently cited decision in the 911 area."

The Bronx decision came as courts across the country were wrestling with questions about how to prosecute crimes when accusers would not appear for cross-examination. Courts were trying

to find the balance between punishing abusers and making sure they got the chance to challenge their accusers, a right laid out in the Sixth Amendment to the Constitution.

Shortly before the Bronx ruling, the United States Supreme Court took up a piece of this complicated world. It ruled in *Crawford v. Washington*, on March 8, that certain statements could not be considered evidence at trial unless the defendant has the chance to confront the person who made them.

The ruling shook up criminal courts across the country. Convictions were overturned. Statements that used to be allowed at trial were barred. In domestic violence cases, it had become common to prosecute without the victim's participation, a practice that emerged from a political push to crack down on domestic violence. The court's ruling made that tougher.

But the decision left open the question of what kind of statements could be considered evidence at trial, leaving lower courts to work out the meaning. A central area of confusion was whether 911 calls could be used in court. "*Crawford* left the outer boundaries so fuzzy," said Jeffrey L. Fisher, the Seattle-based defense lawyer who argued the case before the Supreme Court. "The natural instinct was to have a life preserver at sea – to say, someone here has dealt with the question."

Judge Greenberg was one of the first to try to make sense of it.

He wrote that the Bronx case was "an early opportunity for trial courts like this one to begin to work out in practice the meaning" of *Crawford*. He said through a spokesman that he had thought about the subject for days before writing the ruling, as it became clear that the victim would not testify and the trial could not proceed without the tape.

In his opinion, Judge Greenberg sought to define 911 calls under *Crawford*, arguing broadly that they should be allowed at trial, as electronic equivalents of "a loud cry for help," and that the clause in the Sixth Amendment that spells out the right of defendants to confront their accusers, "was not directed at such a cry."

Several weeks after the ruling, defense lawyers, bracing for a fight in court, listened to the tape. They could not believe what they heard.

"We were stunned," said David M. Jaros, the defense lawyer in the case, who works for the Bronx Defenders, a group that provides legal representation to the indigent. "All the essential facts the judge assumed turned out to be wrong. And those facts were the basis for his opinion."

Defense lawyers and prosecutors said the ruling came abruptly (it was dated March 25, the same day the defense asked that the 911 tape be barred) and seemed to indicate that the judge wanted to make a name for himself – a charge the judge, through a spokesman, denied.

Judge Greenberg said that the ruling was simply a pretrial finding on evidence and that he had taken care to state that prosecutors still had to prove that the tape met the requirements for evidence at trial.

But the decision had already taken flight, carrying all over the country the name of the Bronx case. In California, prosecutors cited it in an appeal of a case in which a 911 caller identified a gunman. A North Carolina appeals court judge quoted it in a kidnapping case. In Washington State, prosecutors used it in arguing an appeal of a domestic violence case that involved a 911 call.

John M. Tyson, the North Carolina judge who cited the ruling extensively in a ruling in May, said that he was surprised to learn the facts of the *Moscat* case, but that, simply put, Judge Greenberg's reasoning fitted. "We were looking for a legal precedent," Judge Tyson said. "*Moscat* was the case in point."

Legal history is not without cases of judges making decisions based on mistaken assumptions. In a landmark ruling for personal injury cases, Benjamin N. Cardozo, a Court of Appeals judge in New York, ruled in 1916 that a driver should be able to recover damages from a car maker, after one of the driver's car wheels collapsed.

But at trial, a more nuanced picture had emerged. The driver had been speeding and had hit a large patch of gravel in the road, said James A. Henderson Jr., a professor at Cornell Law School, who discovered the inconsistencies while studying the case for an academic article in 2002. "It's like an old friend you assumed you knew, and it turns out you didn't," he said, referring to the case.

Judge Cardozo "thought a good appellate judge should not let the facts of a particular case bind him," Mr. Henderson said. "The case was screaming for that new rule of law, and the facts were kind of annoyingly in the way."

Judge Greenberg's ruling, like Judge Cardozo's, is going down in the legal history books for its reasoning. Prosecutors and judges who cited it said in interviews this month that its legal thinking was sound.

The defense lawyer, Mr. Jaros, for his part, has made the unusual request that Judge Greenberg's opinion be taken off the books "in the interest of justice."

Prosecutors were unfazed.

"If the facts turn out to be wrong, it's an interesting historical footnote," said James M. Whisman, a prosecutor for King County, Wash., who has cited *Moscat*. "But I don't know that it changes much."

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