440 NEWS

A748 has been signed by Governor Cuomo. The new law, which takes effect immediately, amends the closing paragraph of County Law § 722 to read as follows:

Assignment of counsel upon an appeal in a criminal action pursuant to this subdivision, or pursuant to paragraph b of subdivision one of section thirty-five of the judiciary law, includes authorization for representation by appellate counsel, or an attorney selected at the request of appellate counsel by the administrator of the plan in operation in the county (or city in which a county is wholly contained) where the conviction was entered, with respect to the preparation and proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set aside a sentence or on a motion for a writ of error coram nobis; compensation and reimbursement for such representation and expenses shall be governed by sections seven hundred twenty-two-b and seven hundred twenty-two-c of this article.

Here is a link to sample motions: https://www.ils.ny.gov/content/sample-440-motions. *To request a copy of an outline on CPL 440.10 and 440.20 motions, send an email to: Cynthia.feathers@ils.ny.gov*.

CRIMINAL

FIRST DEPARTMENT

People v Rosario, 11/7/19 – **IDENTITY THEFT / "FINANCIAL LOSS"**
The defendant appealed from a NY County Supreme Court judgment, convicting him of 1st degree identity theft and other crimes. The First Department affirmed. The trial court correctly responded to a jury note, asking for clarification of the term "financial loss," as used in Penal Law § 190.80 (2) ("causes financial loss to such person or to another person or persons in an aggregate amount that exceeds two thousand dollars"). "Financial loss" is the value of what was taken, not the ultimate harm suffered by the victim, the court stated. In the absence of a statutory definition, the lower court properly adopted a definition found in federal law to interpret the NY statute consistently with its purpose—to ensure maximum deterrence of unauthorized conduct. The Legislature could not have intended to equate financial loss with the victim's out-of-pocket loss. Such approach would create a unique offense, in which criminal liability was extinguished by restitution, and would not advance the purpose of the statute.
http://nycourts.gov/reporter/3dseries/2019/2019_08006.htm

SECOND DEPARTMENT

People v Hollander, 11/6/19 – ***MOLINEUX* / SUMMATION / NEW TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of the unauthorized practice of a profession in violation of Education Law § 6512 (1). The Second Department reversed and ordered a new trial. There was evidence that, while inside a dental office, on one occasion, the defendant stated that he was a dentist, and, on another occasion, appeared to examine a patient and prescribe treatment. The defendant claimed that he merely acted as the office clinical director. Certain *Molineux* evidence should not have been admitted. Proof that the defendant had voluntarily surrendered his license to practice dentistry was proper. But prosecution evidence went too far in indicating that the defendant had been investigated for fraud and moral turpitude. Probative value was outweighed by prejudice. Moreover, during summation, the People misled the jury by intimating that the instant crime was similar to the prior one—which involved fraudulent billing practices. Supreme Court added insult to injury via a jury instruction erroneously indicating that the prior crime may have been part of a common scheme—an unpreserved claim reviewed in the interest of justice.
http://nycourts.gov/reporter/3dseries/2019/2019_07950.htm

People v Kennedy, 11/6/19 – **LIMITED CROSS / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree assault, reckless driving, and leaving the scene of an incident without reporting. The Second Department reversed and ordered a new trial. The trial court's limitation of defense counsel's cross-examination regarding DNA transfer was an abuse of discretion, since the testimony sought would have been relevant and would not have confused or misled the jury. The error was not harmless. Further, the defendant's right to a fair trial was violated. Defense counsel attacked the credibility of certain police officers regarding wanted posters; and an errant jury instruction indicated that the jury was bound to accept the officers' explanations. Richard Willstatter represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07899.htm

People v Fisher, 11/6/19 – **SORA / REVERSED/ DOWNWARD DEPARTURE**
The defendant appealed from an order of Kings County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and reduced his status to level one. The defendant was convicted of sexual misconduct. When he committed the offense, he was 19 and the victim was 13. It was undisputed that lack of consent was solely based on her age. The court declined the defendant's request to downwardly depart. But in statutory rape cases, strict application of the Guidelines may result in risk overassessments. That was the case here, where the instant crime was the defendant's only sex offense, and his overall score was near the low end of level two. Appellate Advocates (William Kastin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07893.htm

THIRD DEPARTMENT

People v Bowden, 11/7/19 –**APPEAL WAIVER / HARSH SENTENCE**
The defendant appealed from a judgment of Ulster County Court, convicting him of 2nd degree murder. He contended that the waiver of the right to appeal did not preclude his challenge to the severity of the sentence because, at the time of the plea, the court did not specifically advise him of the maximum possible sentence. The Third Department agreed. Because of the plea court's omission, the waiver did not encompass the defendant's right to appellate review of his argument that the sentence was harsh and excessive. However, the reviewing court did not find the sentence unduly severe, and it affirmed the judgment.
http://nycourts.gov/reporter/3dseries/2019/2019_07961.htm

FOURTH DEPARTMENT

People v Williams, 11/8/19 – **SUPPRESSION / REVERSAL**
The defendant appealed from a judgment of Erie County Court, convicting him of 2nd degree CPW and 3rd degree criminal possession of a controlled substance. The Fourth Department reversed and vacated the plea. The weapons conviction arose from a police encounter triggered by an anonymous 911 call to an officer regarding drugs being sold out of a vehicle. The officer observed a legally parked vehicle matching the description by the caller and saw the defendant in the driver's seat. The patrol car was parked so as to block the defendant, thus effectively seizing the vehicle. Police, who did not make confirmatory observations of the criminal behavior reported, lacked the requisite reasonable suspicion. At most, they had a founded suspicion that criminal activity was afoot, which permitted only a common-law inquiry of the vehicle occupants. Therefore, County Court erred in refusing to suppress the weapon and marihuana found in the vehicle and the statements the defendant made upon arrest. The counts relating to the weapon and the marijuana were dismissed. Further, although the CPCS conviction arose from a separate search of the defendant's home, the plea of guilty was expressly conditioned on the negotiated agreement that he would receive concurrent sentences. Thus, the plea was vacated in its entirety. The matter was remitted for further proceedings on the remaining counts. The Legal Aid Bureau of Buffalo (Deborah Jessey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08048.htm

People v Ferguson, 11/8/19 – **PSR / REMITTAL**
The defendant appealed from a judgment of Oneida County Court, convicting her of 1st degree manslaughter and other charges. The Fourth Department affirmed, except for relief as to the presentence report (PSR). The defendant sent a letter to County Court objecting to certain portions of the PSR, including references to her failure to cooperate with law enforcement and invocation of the right to counsel. At sentencing, the court said that it agreed with some of the objections but did not specify which portions of the PSR should be redacted. Thus, the reviewing court remitted for further proceedings. The appellate court rejected assertions that the defendant was entitled to be resentenced based on PSR errors; there was no indication that the sentencing court relied on the information. Peter DiGiorgio represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08016.htm

People v Denis, 11/8/19 – **WAIVER OF INDICTMENT / DEFECTIVE**
The defendant appealed from a Supreme Court judgment, convicting him of attempted 2nd degree assault. The waiver of indictment was found jurisdictionally defective because it did not contain the approximate time of the offense. The judgment was reversed and the SCI dismissed. The Ontario County Public Defender (Rebecca Konst, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08047.htm

People v Richards, 11/8/19 – **IAC CLAIM / REJECTED**
The defendant appealed from a judgment of Ontario County Court, convicting him of attempted 2nd degree arson and 2nd degree aggravated harassment. The Fourth Department affirmed, rejecting the defendant's claim of ineffective assistance. Counsel did not retain a fire expert; but the defendant did not establish that expert testimony was available and would have assisted the jury or that he was prejudiced by its absence. Also found unpersuasive was the assertion that the defense was defective in waiving opening and closing statements at the suppression hearing. The omnibus motion set forth a cogent theory, and counsel ably cross-examined the People's witnesses. Further, counsel was not ineffective in failing to object with respect to the alleged bias of a sworn juror based on comments by the court. The defendant failed to demonstrate the absence of strategic explanation, and the record did not indicate juror bias.
http://nycourts.gov/reporter/3dseries/2019/2019_08031.htm

SECOND CIRCUIT

USA v Murphy, 11/4/19 – **VICTIM'S AGE / CONVICTION VACATED**
The defendant appealed from a judgment of District Court (Conn), convicting him of traveling interstate for the purpose of engaging in illicit conduct with a minor. The Second Circuit vacated the conviction and remanded. Intent—including knowledge that the intended victim was under age 16—was a critical element of the crime. The defendant was not informed of that element in the indictment or plea agreement or at plea or sentencing proceedings. Moreover, he was never told of a statutory defense: the defendant's reasonable belief that the victim was 16. Nothing in the record indicated that the victim, age 14, told the defendant that she was under 16 or that he believed her to be underage. Serious doubt was cast on the voluntariness of the plea, where District Court failed to inform the defendant of the nature of the charge, and there was a lack of a factual basis for the plea. There was a reasonable probability that, but for the errors, the defendant would not have entered the plea. The Air Force sought to dishonorably discharge the defendant, but he successfully invoked a military-code mistake-of-age defense and was honorably discharged. Had District Court properly advised him, the defendant would likely have argued that he had not violated the federal statute—and might have prevailed. A request for remand to a different judge was denied, because the prosecutor and defense counsel, not just the court, had erred.
http://www.ca2.uscourts.gov/decisions/isysquery/0ed0c4f9-145e-4f50-bb3f-880c9eb6fd22/4/doc/17-3056_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/0ed0c4f9-145e-4f50-bb3f-880c9eb6fd22/4/hilite/

USA v Brome, 11/7/19 – **FORFEITURE / AFFIRMED**
The defendant appealed from an order of District Court–WDNY, denying his challenge to the administrative forfeiture of $21,019 found in his pocket upon arrest. The Second Circuit affirmed. The right to set aside a federal forfeiture is limited to claims of lack of adequate notice. The Government need not provide actual notice; it is enough to *attempt to* provide actual notice. There was a split among the Circuits regarding what constituted adequate notice. The Second Circuit joined the Third and Fourth Circuits in holding that the Government generally must demonstrate the existence of procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action. Ordinarily, it would suffice if the Government sent notice by certified return receipt to the correctional facility where the prisoner was detained, and the facility's mail distribution procedures were reasonable. Such standard was met here.
http://www.ca2.uscourts.gov/decisions/isysquery/6afaea01-c47d-438d-8e9f-9376b5725bca/2/doc/18-858_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/6afaea01-c47d-438d-8e9f-9376b5725bca/2/hilite/

FAMILY

FOURTH DEPARTMENT

Gonzalez v Bebee, 11/8/19 – **CONTEMPT / RIGHT TO COUNSEL**
In a proceeding pursuant to Family Court Act Article 4, the father appealed from a Wayne County Family Court order that sentenced him to jail for contempt of court. The Fourth Department reversed. The appeal was not moot, given the enduring consequences flowing from a civil contempt finding. The Support Magistrate erred in allowing the father's attorney to withdraw as counsel and proceeding in the father's absence. An attorney may withdraw as counsel only upon a showing of good cause and reasonable notice to the client. The father's attorney did not make a written motion, and there was no proof of notice to the father. The matter was remitted for a new hearing and new counsel for the father. Robert Dinieri represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08027.htm

Matter of Heinsler v Sero, 11/8/19 – **CUSTODY / REVERSED**
The mother appealed from orders of Genesee County Family Court, which dismissed her custody modification petitions. The Fourth Department reversed, reinstated the petition, and remitted. A prior order granted the great aunt custody of the three children, and there had been a determination of extraordinary circumstances. Family Court erred in granting a motion to dismiss on the ground that the mother failed to show a change in circumstances. At the time of the prior order, the mother did not have a car or job, and she lived with a man prohibited from having contact with the children. By the time of the hearing, she owned a car, worked full-time, and no longer lived with the objectionable man. Indeed, the court noted that the mother had made impressive progress. Because the petitions were dismissed before the presentation of the respondent's case, the reviewing court lacked an

adequate record to make a determination in the interest of judicial economy. Thus, the matter was remitted for a hearing on the children's best interests.
http://nycourts.gov/reporter/3dseries/2019/2019_08052.htm

ARTICLE

CUSTODY EVALUATORS / BEWARE OF PSEUDOSCIENCE
By Tim Tippins, 11/5/19 NYLJ
"Practice makes perfect!" Not really. Custody evaluators often offer opinions that have no scientific support, defending their views based on many years of clinical experience. However, research findings contradict common beliefs about the value of experience. Psychological assessment skills do not improve as a result of experience. Consistently, clinicians fail to make more valid ratings of personality and psychopathology than do graduate students. "Accumulated clinical experience" may mean nothing more than "accumulated personal bias." Further, "best interests of the child" is an amorphous goal, and custody evaluators do not have a way to measure the accuracy of their evaluations, since there is no system to track how children fare. Unfortunately, many custody evaluators employ pseudoscience or have anti-science attitudes; ignore relevant research; and cling to subjective intuition. These practices pose a clear danger to custody decision-making. Many courts wrongly assume that mental health experts know what they are talking about, and encourage them to opine about matters far beyond what available data can support. Experts offering facile solutions may be favored over superior peers who decline to speculate.

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