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ISSUES TO DEVELOP AT TRIAL

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This month's issue explains how to use recent bad law from the Court of Appeals to craft a constitutional challenge to a predicate the prosecution wants to use to enhance your client's sentence. Bad law into good? What kind of magic trick is this? No magic trick; more sow's ear into silk purse — for while the Court of Appeals closed one door on bringing a predicate challenge in People v. Smith, 28 N.Y.3d 191 (2016), the Court (perhaps inadvertently) opened another....

In a nutshell:

- The story begins in 1995, when the Court of Appeals held in People v. Ford, 86 N.Y.2d 397(citing Supreme Court case law), that courts must advise pleading defendants of the direct consequences of their plea for the plea to be knowing, voluntary and intelligent.

- The story continues in 1998, with Jenna's Law. All violent felonies would thereafter carry determinate sentences **with a mandatory period of post-release supervision.**

- The story reaches an exciting climax in 2005, when the Court of Appeals held in People v. Catu, 4 N.Y.3d 242, that a court's failure to advise a defendant of post-release supervision, a direct consequence of the plea, required plea vacatur on appeal, without regard to whether the defendant would or would not have pleaded guilty. Catu led to all kinds of litigation, including constitutional challenges to predicate pleas that the prosecution used, or wanted to use, to enhance a defendant's sentence.

- The story reaches its disappointing conclusion in 2016, when, in People v. Smith, the Court of Appeals essentially said enough was enough, and held that Catu did not apply retroactively to predicate challenges.

- But in a surprise epilogue, practitioners can still challenge predicate pleas by arguing that the plea court failed to advise the defendant about post-release supervision **and** that the defendant would not have pleaded guilty had he been so advised.

Predicate Challenges Before Smith:

In the wake of Catu, practitioners began to successfully challenge predicate pleas that the prosecution used to enhance the defendant's sentence, where the court had failed to advise the defendant about post-release supervision during the predicate plea proceeding. Practitioners either directly challenged the predicate as having been unconstitutionally obtained at the sentencing proceeding, or did so via post-conviction 440.20 motions arguing that the enhanced sentence was illegal.

Two cases made their way up to the Court of Appeals on People's appeals, after the lower court set aside the original enhanced sentence and resentenced the defendants more favorably, and the Appellate Division affirmed, People v. Smith and People v. Fagan.

In Smith/Fagan, a majority of the Court of Appeals (Judge Rivera dissented) shut off the spigot, holding that Catu did not apply retroactively to pleas entered before Catu was decided. More specifically, the Court held that Catu set forth a new rule when it said that defendants were automatically entitled to plea vacatur if they weren't told about post-release supervision at the plea. Before Catu, the Court said, a defendant who wasn't told about post-release supervision had to show that he wouldn't have entered the plea if he had known about the post-release supervision. However, the Court did not disturb the notion that post-release supervision was a direct consequence of the plea before Catu was decided.

Post-Smith Predicate Challenges:

Based on Smith, a predicate challenge still remains, one perfectly consistent with the law as stated in Smith. Since the Court accepted that courts (under Ford) needed to tell defendants about post-release supervision before Catu and only identified the remedy set forth in Catu as being the "new" rule, you can and should still challenge a violent predicate the prosecution wants to use to enhance your client's sentence if:

- the court didn't advise your client about post-release supervision at the predicate plea proceeding (best practices: order the minutes when you get the prosecution's predicate felony statement and always ask your client); and

- your client says he wouldn't have entered the plea had he known that he would have to serve PRS and could testify to that at a predicate hearing (it is not at all uncommon for clients to have very plausible reasons why they would never have accepted the plea had they known about the PRS).

In short, **Ford plus prejudice = predicate challenge.**

This challenge should at least entitle you to a hearing. And the earlier you investigate the potential challenge, the better, as whether a plausible challenge lies to the predicate can affect plea negotiations as well.

REMINDER:

Don't forget challenges to out-of-state (including federal) predicates! Such challenges will be a future newsletter topic, but a few general reminders:

Always examine the elements of the foreign offense under **the statute**, for it is the statute, **not** the underlying facts or the basis for the arrest that will determine whether the conviction can be used!

If the foreign statute is in **any way** broader, so that it is possible to violate the foreign statute without engaging in **felonious** conduct in New York, the foreign statute may not serve as a predicate! Does the foreign statute omit an element altogether (a mens rea requirement, for example). Are certain key terms defined differently? Does the foreign statute permit prosecution for conduct that is not even criminalized in NY?

And remember that a challenge to the foreign predicate can lie on the ground that it's not the equivalent of a **violent** felony in New York, even if it **is** a felony. Don't give an inch you don't have to!