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CHALLENGING YOUR CLIENT'S PREDICATE FELONY ADJUDICATION

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AND
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The Center for Appellate Litigation (CAL)

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Predicate Felony Challenges

By Barbara Zolot & David Klem
Center for Appellate Litigation

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I. WHY YOU NEED TO KNOW THIS STUFF

A. Obligation to provide good advice

Defense counsel has the obligation to offer advice as to the advisability of any plea, and, therefore, needs to know the client's potential sentencing range prior to engaging in plea bargaining or taking any plea. One cannot properly advise a client without knowing the sentence he is facing and knowing the sentence requires understanding the client's predicate status.

Missouri v. Frye, 132 S.Ct. 1399 (2012): recognizing that because 97% of federal and 94% of state court cases determined by plea bargaining right to effective assistance of counsel during plea negotiations is necessary.

People v. Bennett, 60 A.D.3d 478 (1st Dep't 2009): finding plea not knowing and voluntary where defendant was not properly advised as to his predicate status.

B. Ineffective if wrong about predicate status

-Failure to properly determine your client's predicate status constitutes ineffective assistance of counsel. See Mask v. McGinnis, 28 F. Supp. 2d 122 (S.D.N.Y. 1989) (counsel's failure to recognize that defendant was a second felony offender, rather than a persistent felony offender constituted ineffective assistance of counsel), aff'd., 233 F.3d 132 (2d Cir. 2000); People v. Fagan, 116 A.D.3d 451 (1st Dep't 2014) (holding that counsel was ineffective for failing to raise meritorious challenge to predicate); People v. Thomson, 46 A.D.3d 939, 940 (3d Dept.2007) (finding counsel's failure to ascertain that a prior New Jersey conviction did not constitute a predicate felony constituted inadequate legal assistance); see also People v. Wimberly, 86 A.D.3d 651, 653 (3d Dep't 2011) ("we find a question as to whether counsel provided inadequate legal assistance by failing to detect and correct the mistaken impression of defendant's sentencing status. . . . Under these circumstances, defendant raised an issue sufficient to require a hearing as to whether counsel's representation was deficient and, if so, whether defendant was prejudiced thereby."); People v. Garcia, 19 A.D.3d 17 (1st Dep't 2005) (same).

Lafler v. Cooper, 132 S.Ct. 1376 (2012): where client rejected plea following deficient advice from counsel, defendant entitled to relief on IAC grounds; need to show a reasonable chance that prosecution would have offered plea, that court would have accepted it and as a result outcome would have been more favorable. Right to effective assistance of counsel is not a trial right, but extends to all critical stages of criminal proceedings.

C. Failure to challenge at sentencing binds the client

-"Failure to challenge the previous conviction . . . constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge" C.P.L. § 400.21(7)(b).

-A predicate adjudication is "binding upon that defendant in any future proceeding in which the issue may arise." C.P.L. § 400.21(8).

-A predicate adjudication cannot thereafter be challenged when then made a persistent felony offender. See People v. Cooper, 241 A.D.2d 553 (2d Dep't 1997). And cannot thereafter be challenged in a DLRA resentencing, People v. Dais, 19 N.Y.3d 335 (2012), or a PRS resentencing, People v. Edwards, 23 Misc. 3d 793 (Sup. Ct., N.Y. Cty., 2009).

-A predicate adjudication (based on an out-of-state offense or an allegedly unconstitutional offense) cannot necessarily be challenged on appeal unless objection made below. See People v. Samms, 95 N.Y.2d 52 (2000); People v. Smith, 73 N.Y.2d 961 (1989); People v. Odom, 61 A.D.3d 896, 897 (2d Dep't 2009) ("Having failed to challenge the constitutionality of the 2000 conviction at the predicate felony proceeding held at the time he pleaded guilty in the matters before us, the defendant waived his current claim."); People v. Odom, 63 A.D.3d 408, 409 (1st Dep't 2009) ("Where a defendant fails to challenge the constitutionality of a prior conviction at the appropriate time, and fails to demonstrate good cause for such failure, he waives any future challenge to the constitutionality of the prior conviction for sentence enhancement purposes.").

-At least in the First Department, a challenge to an out of state conviction cannot be directly raised in a C.P.L. § 440.20 motion (but probably can be raised as part of an ineffective assistance of counsel claim). See People v. Jurgins, 107 A.D.3d 595 (1st Dep't 2013), leave to appeal granted __ N.Y.3d ___ (June 24, 2014); People v. Kelly, 65 A.D.3d 886 (1st Dep't 2009).

D. Burden is on the prosecution at sentencing, but defense thereafter if no challenge

-Thus, the only way to challenge an out-of-state predicate as being invalid when not challenged by counsel at sentencing is to allege ineffective assistance of trial counsel in a C.P.L. § 440.20 motion. But, the burden is then on the defendant to prove the relevant facts and produce the relevant documents. See C.P.L. § 440.30(6).

-Yet, if challenge made at sentencing, "[t]he burden of proof is upon the people and a finding that the defendant has been subjected to such a predicate felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt." C.P.L. § 400.21(7)(a).

II. CONSTITUTIONALITY OF PREDICATE

A. The Statute

C.P.L. § 400.15(7)(b) provides that "A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction." See also C.P.L. § 400.16(2)(same for persistent violent offenders); C.P.L. § 400.21(7)(b) (same for second felony offender and second drug felony offender).

-Note that by its terms, this is limited to violations of the United States Constitution, not New York's.

-This rule is based on the Supreme Court's ruling in Burgett v. Texas, 389 U.S. 109, 115 (1967), that a conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for another offense.

B. The Procedure

"Once the fact of the prior conviction has been established, it is then incumbent upon the defendant to allege and prove the facts underlying the claim that the conviction was unconstitutionally obtained." People v. Harris, 61 N.Y.2d 9, 15 (1983). "[I]t is the defendant's burden to allege and prove facts to establish his claim that the conviction was unconstitutionally obtained." People v. Konstantinides, 14 N.Y.3d 1, 15 (2009). "[T]o obtain a hearing, a defendant must do more than make conclusory allegations that his prior conviction was unconstitutionally obtained. He must support his allegations with facts." Id.

C. No Appeal Necessary

A constitutional challenge to the predicate can be made even if no appeal was taken and even if the claim was not raised on the appeal from the predicate. See People v. Santiago, 91 A.D.3d 438 (1st Dep't 2012) ("Defendant's failure to appeal the 2004 conviction did not constitute a forfeiture of his right to independently challenge its constitutionality within the context of a predicate felony proceeding."); see also People v. Harris, 61 N.Y.2d at 16 ("an alleged second or third felony offender could question the validity of the predicate conviction at the time he was resentenced") (quoting People v. Wilkins, 28 N.Y.2d 213, 218 (1971)).

However, a prior failure to challenge the predicate at a prior predicate adjudication will bar a future challenge. See C.P.L § 400.21(7)(b), (8). So, if your client was previously adjudicated a predicate and no challenge was made to the predicate at that prior sentencing, you will not be able to challenge that previously- utilized prior felony in your sentencing proceeding.

Example:

- 2000 - Rob 1 conviction (D pleads guilty)
- 2003 - D is convicted of Rob 2 and adjudicated a second violent felony offender based on the 2000 Rob 1 conviction. No challenge is made to the 2000 conviction.
- 2014 - D is convicted of Att. Rob 2. A potential challenge to the constitutionality of the 2003 conviction is available, but not to the 2000 conviction.

D. PRS

The failure to advise the defendant of the post-supervision component of his sentence renders the plea involuntary and unknowing. See People v. Catu, 4 N.Y. 3d 242 (2005); see also People v. Hill, 9 N.Y.3d 189, 191 (2007)(describing Catu error as a "constitutional defect" and constitutional infirmity")

A court's failure to advise the defendant about PRS can provide the basis for a challenge to a defendant's status as a second, violent second, or persistent felony offender in a subsequent case. See People v. Fagan, 116 A.D.3d 451 (1st Dep't 2014)(finding defense counsel ineffective for failing to lodge a challenge to a Catu-violative predicate felony conviction). Your argument is that the predicate was "unconstitutionally obtained" in violation of People v. Catu.

The issue arises if the **PREDICATE WAS A PLEA** to **A VIOLENT FELONY** and **THE SENTENCE ON THE PREDICATE WAS A DETERMINATE SENTENCE.** Only in those circumstances would PRS have been a necessary part of the sentence and would the Catu issue arise.

> ***Practice Tip**: New York County Supreme Court judges were routinely failing to mention PRS at the plea proceedings and failing to impose PRS at sentencing between 1998 and 2005. If your client's predicate conviction is in that Catu "sweet spot," MAKE THE CHALLENGE, whether you have the minutes or not.*

It doesn't matter whether the current case is violent or non-violent, because you are challenging the PREDICATE insofar as it makes your client a second or persistent offender. You should consider this issue for any client who appears to be a second felony offender or a persistent offender as a result of an alleged (but potentially assailable) predicate.

You will need to investigate and determine your client's true predicate status to make a Catu-predicate challenge:

- use your client's rap sheet to identify your client's prior felony convictions
- determine if any fit the criteria above (guilty pleas to violent convictions, with a determinate sentence imposed).
- Best practices : ORDER THE PLEA MINUTES to determine whether the court advised the client about PRS.

***Practice Tip**: There is a well-developed body of case law around whether the court properly informed the defendant about PRS. The allocution must be specific. E.g., People v. Boyd, 12 N.Y.3d 390 (2009)(trial court must state duration of PRS term during plea allocution); People v. Cornell, 16 N.Y.3d 801 (2011), aff'g 75 A.D.3d 1157 (4th Dep't 2010)(allocution insufficient where court never informed defendant that he faced a mandatory PRS term, even though prosecutor mentioned PRS in a pre-plea discussion). Its subsequent removal because its imposition at a resentencing violated Double Jeopardy does not cure a Catu error if the defendant served any PRS. See Fagan, 116 A.D.3d at __, 983 N.Y.S.2d at 29.*

Strategic considerations and potential risks:

- If your client has not been either convicted or sentenced, there is no risk in investigating and challenging his status as a second or persistent offender. It should inform your plea negotiations and your advice to the client about taking a plea versus going to trial.
- If your client has been convicted but is awaiting sentence after trial, there is probably no risk in challenging his status as a second or persistent offender. However, make sure you know all the relevant sentencing ranges; a non-violent, non-drug first offender sentence could result in a higher maximum for your client if the court focuses on a particular minimum sentence (3-6 versus 3-9).
- If your client has been convicted by a bargained-for plea but is awaiting sentence, there is a some risk in challenging his status, since, if the People do not get the benefit of the plea bargain, they could ask for plea withdrawal. [More likely they will renegotiate based on his true predicate status, though again, be aware of sentencing ranges, see above]. To assess the risk of plea v. trial, consider the deal versus the charges your client would face at trial with his true predicate status, along with the potential sentencing exposure (multiple counts? concurrent? consecutive?).

E. Lopez

The predicate conviction may be challengeable as an unknowing plea, violating federal due process. Where a defendant's factual recitation negates an essential element of the crime pleaded to, casts significant doubt on an essential element of the crime pleaded to, or raises the possibility of a defense, the court may not accept the plea without inquiry to ensure that the defendant understands the nature of the charge and that the plea is intelligently entered. See People v. Lopez, 71 N.Y.2d 662 (1988). See, e.g., People v. Mox, 20 N.Y.3d 936 (2012)(defendant's allocution statements that he was "in a psychotic state" and "hearing voices" on the day of the crime triggered court's duty to inquiry whether defendant's decision to waive a potentially viable insanity defense was an informed one such that the guilty plea was knowing and voluntary): People v. LaVoie, 304 A.D.2d 857 (3rd Dep't 2003)(defendant's statements during plea colloquy indicated a possibly agency defense; further inquiry was required to ensure voluntariness of plea); People v. Daniels, 75 A.D.2d 605 (2d Dep't 1980)(plea to attempted burglary vacated where colloquy made out, at best, crime of receiving stolen property); People v. Ramirez, 42 A.D.3d 671 (3rd Dep't 2007)(plea to burg 2 vacated where defendant insisted he had permission to enter the residence and to retrieve the items and gave inconsistent answers regarding intent to steal).

F. Padilla

The failure of counsel to advise the defendant of the immigration consequences of his plea constitutes ineffective assistance of counsel. See Padilla v. Kentucky, 130 S.Ct. 1473 (2009). But Padilla is not retroactive. See Chaidez v. United States, 568 U.S. ___ (2013); People v. Baret, 2014 WL 2921420 (NY June 30, 2014).

However, a non-citizen defendant's lack of understanding of the immigration consequences of his plea may render the plea unknowing and involuntary. See People v. Peque, 22 N.Y.3d 168 (2013). The retroactivity of the Peque rule is yet to be decided. See People v. Brazil (argued April 2014 in 1st Dep't).

G. Tyrell/ Boykin

In People v. Tyrell, 22 N.Y.3d 359 (2013), the Court reaffirmed that a quicky plea without sufficient waivers of Boykin rights does not pass constitutional muster.

H. Lafler

Deficient advice regarding the advisability of taking a plea constitutes ineffective assistance of counsel. See Lafler v. Cooper, 132 S.Ct. 1376 (2012). Plea bargaining constitutes a critical stage of proceedings.

III. OUT OF SEQUENCE PREDICATES

A. The Statutes

Penal Law § 70.06(1)(b)(ii) ("sentence upon such prior conviction must have been imposed before commission of the present felony."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.10 (persistent felony offender); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

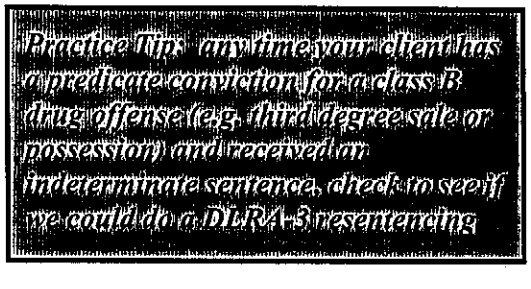
> Thus, "to serve as the basis for predicate status, a sentence must have been rendered before the commission of the instant underlying felony." Murray v. Goord, 298 A.D.2d 94 (2002) ("imposition of sentence, not date of conviction, . . . criterion of predicate status"), aff'd 1 N.Y.3d 29 (2003)
>
> A "sentence" as the word is used in the statutes is the sentence imposed at the final judgment, or when a legal sentence is imposed upon resentencing. See People v. Bell, 73 N.Y.2d 153 (1989), reversing for reasons stated in dissenting opn 138 A.D.2d 298 (1st Dep't 1988) (Sullivan, J., dissenting).

B. PRS Resentencings

People v. Sparber, 10 N.Y.3d 457 (2008), has led to the resentencing of approximately 20,000 violent felony offenders due to the failure of the original sentencing judge to pronounce post-release supervision at sentencing. But a Sparber resentencing, whether instigated by the defense or by the government, does not affect the sequentiality of the conviction. See People v. Boyer, 22 N.Y.3d 15 (2013); People v. Acevedo, 17 N.Y.3d 297 (2011).

C. DLRA Resentencings

In 2004, 2005, and 2009 the Legislature passed three Drug Law Reform Acts which, among other things, provided retroactive resentencing relief to convicted A-I, A-II, and B drug offenders. While the A-I and A-II provisions generally required that a defendant still be in custody on his drug offense at the time of resentencing, the provisions governing class B resentencings seemingly permit a defendant out on parole (in the "custody" of the "Department of Corrections and Community Supervision") to be resentenced. So although rare that an A-I or A-II drug predicate will be out of sequence, not uncommon to see a defendant who might have an out-of-sequence class B drug offense.



D. Violation of Probation

Resentencing based on a revocation of a valid sentence of probation does "nothing to invalidate the original sentence." People v. Davis, 93 A.D.3d 524 (1st Dep't 2012)(revocation of probation on prior offense may not be employed to "leapfrog the sentence forward so as to vitiate its utility as a sentencing predicate").

IV. OUT OF TIME PREDICATES

A. The Statutes

-Penal Law § 70.06(1)(b)(iv) ("Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted."); but see Penal Law § 70.07(3) (making the period 15 years for second child sexual assault felony offender).

-Penal Law § 70.06(1)(b)(v) ("In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

-C.P.L. § 400.15(2) ("such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation").

-C.P.L. § 400.11 ("The certificate of the commissioner of correction [or other such items] . . . shall be prima facie evidence of the imprisonment and discharge of any person under the conviction stated and set forth in such certificate for the purposes of any proceeding under section 400.20).

B. Case Law

People v. Johnson, 196 A.D.2d 408, 410 (1st Dep't 1993) (finding the requirement that the predicate felony statute set forth timing to be "mandatory" and finding that the failure "to comply with the statutory mandate" renders the sentence fatally defective); see also People v. Ortiz, 19 A.D.3d 281, 282 (1st Dep't 2005) ("Defendant was improperly sentenced as a second violent felony offender because, even with the tolling period relied upon by the People in their predicate felony statement, defendant's predicate offense occurred more than 10 years before the instant offense."). But see People v. Evans, 88 A.D.3d 1029 (3d Dep't 2011) (finding error to state tolling period harmless because record revealed that prior convictions were within time frame); People v. Haynes, 70 A.D.3d 718 (2d Dep't 2010) (same).

C. Practical Tips

Get the "in-out" reports (also called "custody reports") from the City Department of Corrections and the State Department of Corrections and Community Supervision.

For city: email Ms. Harris-Selman at Debbie.harris-selman@doc.nyc.gov with the client's name, NYSID, and time frame (how far back you want the reports)

For state: Call DOCCS' Office of Sentencing Review at 518-457-4652 with the client's name, DIN, and bids for which you want the dates.

V. RANDOM ISSUES

A. Apprendi Challenges (to discretionary persistent statute)

Nope, or at least, not yet. See Portalatin v. Graham, 624 F.3d 69 (2d Cir. 2010) (en banc); People v. Rivera, 5 N.Y.3d 61 (2005); People v. Rosen, 96 N.Y.2d 329 (2001).

B. A Penal Law § 265.02(4) Predicate

CPW3rd based on possession of a loaded firearm was repealed in 2006 (when that offense was elevator to CPW2nd). As part of the repeal, the Legislature delisted Penal Law § 265.02(4) as a violent felony offense. See Penal Law § 70.02. So is a predicate offense for CPW3rd based on subdivision (4) a violent predicate?

-Issue pending in First Department. See People v. Bowens (argued 9/10/14).

But see People v. Morse, 62 N.Y.2d 205 (1984) (holding that a prior offense need not have been designed a "violent felony offense" at the time of its commission).

C. Murder as a Violent Predicate In Drug Cases

Second-degree murder **is not classified as a violent offense under Penal Law § 70.70.** See People v. Lynes, 106 A.D.3d 433 (1st Dep't 2013) (declining to rewrite § 70.70 to including the same language as § 70.04).

VI. OUT OF STATE PREDICATES

A The Statute

Penal Law § 70.06(1)(b)(i) ("For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply: The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed."); see also Penal Law § 70.04 (Definition of second violent felony offender"); Penal Law § 70.07 (second child sexual assault felony offender); Penal Law § 70.08 (persistent violent felony offender).

A different rule may apply to persistent felony offenders. See Penal Law § 70.10 (merely requiring that defendant have been "sentence[d] to a term of imprisonment in excess of one year" and that he was imprisoned on that offense prior to commission of New York felony). The issue is under consideration by the Court of Appeals. See People v. Clemon Jones, 109 A.D.3d 1108 (4th Dep't 2013) (leave granted 3/5/14).

B. The Factors

(i) Looking at the foreign "conviction"; so the statute under which the defendant was convicted, not the underlying facts or the arrest.

(ii) Foreign statute must be a felony in that state ("a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized").

(iii) Foreign statute must criminalize acts that in New York would be felony.

Practice Tips: Any time the predicate felony is not from New York, object, make the prosecution explain which New York felony it is equivalent too, and get the underlying records.

C. The Case Law

In determining whether an out-of-state conviction qualifies as a valid predicate under this provision, a court "must examine the elements of the foreign statute and compare them to an analogous Penal Law felony," for "it is the statute upon which the indictment was drawn that necessarily defines and measures the crime." See People v Gonzalez, 61 N.Y.2d 586, 589 (1984), quoting People v. Olah, 300 N.Y. 96, 98 (1949). "Any recital in the indictment beyond what was provided in the foreign statute would be 'immaterial and surplusage." See People v. Olah, 300 N.Y. at 102. The test is one of "strict equivalency" such that "technical distinctions between the New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing." People v. Ramos, 19 N.Y.3d 417, 419 (2012) (quoting Matter of North v. Board of Examiners of Sex Offenders of State of N.Y., 8 N.Y.3d 745, 751 (2007)).

Thus, "[w]hen a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a felony in New York, the foreign statute may not serve as a predicate." People v. Yusuf, 19 N.Y.3d 314, 321 (2012).

When a foreign statute can be violated in ways that constitute both a felony and a misdemeanor in New York, courts can look to the foreign accusatory instrument to determine which section of the foreign statute was violated. See People v. Muniz, 74 N.Y.2d 464 (1989). Courts cannot, however, look to superceded or preliminary charging documents, such as criminal court complaints. See People v. Yancy, 86 N.Y.2d 239 (1995).

Example #1

Your client was previously charged in New Jersey with breaking into a home, raping a child, assaulting an adult, and taking some property. He ended up pleading guilty to one count on the indictment which stated that he was "guilty of third-degree burglary because, with purpose to commit a theft therein he unlawfully entered a building."

New Jersey Statute Annotated § 2C:18-2, provides that a person is guilty of third-degree burglary when, "with purpose to commit an offense therein he knowingly and unlawfully enters a building."

New York Penal Law § 140.20 provides that "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein."

Example #2

The predicate felony statement alleges that on December 15, 2004, in the Circuit Court, Greensville County, in the State of Virginia, defendant was convicted of assault on a corrections officer in violation of Va. Code Ann. § 18.2-55(A).

The Virginia indictment alleges that on May 12, 2004, while your client was "confined in a state correctional facility he knowingly and willfully inflicted bodily injury on a corrections officer by stabbing him with a shank."

The Virginia statute (Va. Code Ann. § 18-2-55) provides, in relevant part, that:

> *A. It shall be unlawful for a person confined in a state, local or regional correctional facility . . . to knowingly and willfully inflict bodily injury on an employee thereof; or*
> *B. It shall be unlawful for an accused, probationer or parolee under the supervision of . . . a probation or parole officer . . . to knowingly and willfully inflict bodily injury on such officer while he is in the performance of his duty, knowing or having reason to know that the officer is engaged in the performance of his duty.*

New York Penal Law § 120.05(7) provides that: "A person is guilty of assault in the second degree when: Having been charged with or convicted of a crime and while confined in a correctional facility . . pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person" [D felony]

Assume that subpart B of the Virginia statute is broader than any New York felony because the relevant New York statutes don't cover those people merely "accused" of an "offense," but are limited to people "convicted" of or at least charged with a "crime." Do we prevail for that reason alone?

Example #3

Is your client a predicate violent felony offender?

He was charged by indictment in Florida with first-degree murder for intentionally killing a nurse while in prison. He pleaded guilty to a violation of Florida Law § 782.04.

Florida Law § 782.04 provides:

(1) (a) The unlawful killing of a human being

1. *When perpetrated from a premeditated design to effect the death of the person killed or any human being;*

2. *When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: a. Trafficking offense prohibited by § 893.135(1), b. Arson, c. Sexual battery, d. Robbery, e. Burglary, f. Kidnapping, g. Escape, h. Aggravated child abuse, i. Aggravated abuse of an elderly person or disabled adult, j. Aircraft piracy, k. Unlawful throwing, placing, or discharging of a destructive device or bomb, l. Carjacking, m. Home-invasion robbery, n. Aggravated stalking, o. Murder of another human being, p. Resisting an officer with violence to his or her person, q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or*

3. *Which resulted from the unlawful distribution of any substance controlled under § 893.03(1), cocaine as described in § 893.03(2)(a)4., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,*

is murder in the first degree ...

D. Advanced topics

1. Plea downs: What if your client in the foreign jurisdiction did not plead guilty to the charged offense, can the "subsection exception" be used by the prosecution to narrow the foreign jurisdiction?

   See People v. Gonzalez, 61 N.Y.2d 586 (1984) (concluding that reference to the Florida indictment was not appropriate where Florida law permits plea downs which may or may not be included in the charged offense).

2. Variance in proof: What if the foreign jurisdiction permits a defendant to be found guilty of a different subsection of the statute than the subsection the defendant was indicted on?

3. Differences in defenses: What if the foreign jurisdiction has a more limited agency defense, justification defense, or entrapment defense?

   Compare People v. Lee, 251 A.D.2d 261, 261 (1st Dep't 1998) ("Defendant's Virginia conviction for distribution of a controlled substance was analogous to criminal sale of a controlled substance under New York law, and the availability of defenses is irrelevant.") (emphasis added), and People v. Estrada, 78 A.D.3d 408, 409 (1st Dep't 2010) ("the unavailability of the agency defense in a foreign jurisdiction has no bearing on whether a foreign felony qualifies as the equivalent of a New York felony"), and People v. Reilly, 273 A.D.3d 143, 143 (1st Dep't 2000) (same); with People v. Cardona, 9 A.D.3d 337, 340 (1st Dep't 2004) (rejecting out of state predicate because the mistake of fact defense was broader in New York; "We do not find these expressions of the availability of a general mistake-of-fact defense in unspecified cases equivalent to New York's statutory provision for relieving a person of criminal liability on the ground of mistake of fact.").

4. Differences in treatment of juveniles: What if Youthful Offender treatment would have been available in New York but was not in the foreign jurisdiction? What if foreign jurisdiction permitted a prosecution of a juvenile that would have been barred in New York?

   -People v. Meckwood, 20 N.Y.3d 69 (2012) (even if the foreign offense would have been eligible for YO treatment had it occurred in New York, the foreign offense could be used as a predicate); People v. Kuey, 83 N.Y.2d 278 (1994) (so long as foreign YO conviction could be used as a predicate in that state, the foreign YO could constitute a predicate conviction in New York); People v. Santiago, 22 N.Y.3d 900 (2013) (finding the Pennsylvania conviction would not constitute a conviction in New York because the defendant was 15 years old at the time of conviction, and a 15–year–old could not be convicted in New York of manslaughter in the second degree).

5. Conspiracy. What if the foreign jurisdiction does not require proof of over acts, while New York does?

   See People v. Ramos, 19 N.Y.3d 417 (2012) ("Because New York law requires proof of an element [an overt act] that federal law does not, defendant's federal conspiracy conviction cannot serve as a predicate.").

6. Attempt. What if the foreign jurisdiction permits a conviction for attempt even if the acts did not come comes "dangerously close or very near to the completion of the intended crime"?

   See People v. Gillard, 2002 WL 264359 (Sup. Ct., N.Y. Cty, Feb. 5, 2002) ("Because the Washington attempt statute prohibits activity not similarly outlawed in New York and because the defendant's Washington conviction was for an Attempt . . . and not the completed crime, the use of the foreign conviction as grounds to adjudicate the defendant a predicate felon is precluded.").

VII. STRATEGIES

✔ Collect the information as soon as possible.
-get the predicate statement;
-review the rap sheet;
-order papers from any out of state predicate;
-order plea and sentencing minutes from predicate; and
-review court files of predicate.

✔ Ask for an early judicial ruling
-see C.P.L. § 400.10 (permitting court to hold a "pre-sentence conference" to "assist the court in its consideration of any matter relevant to the sentence to be pronounced");
-do it before negotiating a plea so that you can properly advise your client.

✔ Preserve any claim challenging a predicate
-make sure your challenge is on the record;
-remind the court of your objection at the predicate arraignment;
-constitutionalize your challenge where appropriate.

✔ File a Notice of Appeal
-even a valid waiver of the right to appeal (and not many are valid) does not prevent review of the legality of a sentence.