CRIMINAL

COURT OF APPEALS

People v Grimes, 10/23/18 – **NO STATE CONST. RIGHT / LEAVE APP / SHARP DISSENT**
For an intermediate appeal as of right, the coram nobis procedure is available to a criminal defendant seeking to "bypass" the CPL 460.30 one-year grace period because counsel did not comply with his timely request. *See People v Syville*, 15 NY3d 391. But as to a criminal leave application (CLA) seeking review by the Court of Appeals, a defendant does not have the same right. The COA previously held that counsel's failure to file a timely CLA or seek a CPL 460.30 extension does not constitute ineffective assistance in violation of the 6th and 14th Amendments. *See People v Andrews*, 23 NY3d 605. The instant case holds that the same rule applies under the State Constitution. Due process does not mandate counsel for meaningful review of CLAs. Resolution of such motions turns not on whether there was a correct adjudication of guilt, but on whether issues of "significant public interest" or legal principles of "major significance" are implicated. Even if counsel's CLA failure violates ethical duties, it does not constitute ineffective assistance. Chief Judge DiFiore authored the majority opinion. **In dissent**, Judge Wilson opined that the majority had "veered sharply off course." The real issue was whether, given the statutory right to file a CLA and to counsel for that purpose, counsel must be competent. Effectiveness should be judged the same for a CLA as for an appeal as of right. The majority was right that lower courts are "governed by intricate rules that to a layperson would be hopelessly forbidding." But that is equally true for the COA. "Try Karger for bedtime reading," the dissenter advised. The slim odds for CLAs do not justify denying the right to effective representation. The majority's conclusions are "anathema to…our centuries-old conviction that the right to counsel matters more in New York than elsewhere." Judge Rivera concurred in the dissent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_07038.htm

FIRST DEPARTMENT

People v Rodriguez, 10/23/18 – **INEFFECTIVE ASSISTANCE / FLAWED IMMIGRATION ADVICE**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree criminal possession of a controlled substance. The First Department held the appeal in abeyance and remitted. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to conclude that he was deprived of effective assistance when counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation and instead merely advised him that deportation was a possibility. The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty had he been made aware of deportation consequences. The Center for Appellate Litigation, New York (Barbara Zolot of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07061.htm

People v Johnson, 10/23/18 – **MORE INEFFECTIVE ASSISTANCE / REMITTAL**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree burglary and 1st degree robbery. The First Department held the appeal abeyance and remitted. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to conclude that he was deprived of effective assistance when counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation. Counsel merely told the defendant that his plea would have "immigration consequences;" would "impact his ability to stay in the country;" and "will probably very well end up with [defendant] being deported from this country." The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. The Center for Appellate Litigation, New York (Scott Henney, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07072.htm

SECOND DEPARTMENT

People v Johnson, 10/24/18 – **LINEUP / RIGHT TO COUNSEL VIOLATION**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of multiple counts based on two robberies, one at a grocery store and another at an apparel store. The Second Department reversed. The trial court should have suppressed testimony regarding lineup identifications relevant to the grocery store robbery, since the detective who conducted the lineup violated the defendant's right to counsel. As a general rule, a defendant does not have the right to counsel at a pre-accusatory, investigatory lineup. There are two exceptions: (1) when a defendant is actually represented by an attorney in the matter under investigation and the police know, or can be charged with knowledge, of that representation; and (2) when a defendant who is already in custody and represented by an attorney in an unrelated case invokes the right by requesting his or her attorney. Once the right to counsel has been triggered, the police may not proceed with the lineup without apprising the lawyer of the situation and giving him or her a reasonable opportunity to appear. In the instant case, the first exception applied, but the detective did not notify the attorney. Evidence of identity was not overwhelming; reversal was required as to the grocery store robbery. Reversal of the convictions related to the apparel store robbery was also required due to the spillover effect. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07147.htm

People v Stokeling, 10/24/18 – **RIGHT TO CONFRONTATION / VIOLATION**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of leaving the scene of an incident without reporting, 1st degree aggravated unlicensed operation of a motor vehicle, and unlicensed operation of a motor vehicle. The Second Department vacated the AUO and UO convictions and ordered a new trial. The DMV testimony was improperly allowed to establish that the defendant operated a motor vehicle knowing that his license was suspended or revoked. Supreme Court permitted testimony of a DMV supervisor about the process of mailing notices of revocation/suspension. The supervisor stated "upon information and belief" that the notice was mailed to the defendant;

but she had no personal knowledge of the mailing, and the People did not produce the 1999 affidavit of mailing. Such testimony violated the defendant's Sixth Amendment right of confrontation. He was never given the opportunity to cross-examine a DMV employee directly involved in sending out notices and possessing personal knowledge of his driving record. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07158.htm

People v Breazil, 10/24/18 – **RIGHT TO CONFRONTATION / NO VIOLATION**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of attempted 2nd degree murder, 1st degree robbery, and 1st degree burglary. The Second Department held that the testimony of an analyst from the Office of the Chief Medical Examiner did not violate his right to confrontation. That testimony established that: (1) the analyst used her independent analysis on raw data to conclude that the complainant's DNA was on a wallet recovered from the defendant, as well as on a broken knife found near the arrest site; and (2) it was 157 billion times more likely than not that the defendant's DNA was included in a mixture of skin cells on a sweatshirt found by the knife. The analyst did not act as a conduit for the conclusions of others. The reviewing court reduced the sentence for attempted murder from 25 to 20 years and for the other crimes from 25 to 10 years and ordered that they all run concurrently. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07138.htm

THIRD DEPARTMENT

People v Hernandez, 10/25/2018 – **ASSAULT / JUSTIFICATION / REVERSAL**
The defendant appealed from a judgment of Albany County Court convicting him of 1st degree assault and 4th degree CPW. The victim was the paramour of the defendant's estranged wife. These three individuals gave sharply conflicting accounts. The defendant asserted the defense of justification. The Third Department found that the People did not prove that the defendant could have retreated with complete personal safety before he used deadly physical force. The appellate court accepted the trial court's implied finding that the victim was the first to use deadly physical force. Both the defendant and the victim agreed that the fight went on continuously after the knife emerged. Bloody prints on the defendant's car provided objective support for his assertion that, as he tried to close the door and flee, the victim tried to pull it open. The victim's multiple wounds were consistent with defendant's testimony that he had to swing the knife repeatedly to defend himself as the victim continued to attack. The indictment was dismissed. Amanda FiggsGanter represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07196.htm

Matter of Miguel II. v State of NY, 10/25/18 – **MHL ART. 10 / *FRYE* HEARING NEEDED**
The petitioner appealed from an order of St. Lawrence County Supreme Court. In a Mental Hygiene Law article 10 proceeding, the petitioner moved to preclude all testimony regarding the psychiatric diagnosis of other specified paraphilic disorder (OSPD) (nonconsent) or for *Frye* hearing. Supreme Court denied the application, a hearing was held, and Supreme Court released the petitioner to a regimen of strict and intensive

supervision and treatment. The Third Department noted that the Second Department and numerous trial courts have concluded that OSPD (nonconsent) does not meet the *Frye* standard. Given the controversial nature of the diagnosis, the denial of the *Frye* application was error. The matter was remitted. Mental Hygiene Legal Service, Albany (Matthew Bliss, of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07210.htm

FAMILY COURT

SECOND DEPARTMENT

Matter of Sult v Sult, 10/24/18 – **FAMILY OFFENSE PETITION / REINSTATED**
The father appealed from an order of Nassau County Family Court which dismissed his family offense petition on the ground that it failed to state a cause of action. The Second Department reversed, reinstated the petition, and remitted the matter. The petition stated that, following an argument over a Skype video call where the mother screamed and threatened the children, she went to the father's house and damaged his doorbell, address number, and car. The petition also alleged that, on multiple occasions, the mother physically and verbally attacked the father, screamed at the children, and physically hurt them. Affording the petition a liberal construction, it adequately alleged that the mother committed criminal mischief and 2nd degree harassment. The father was not required to specify the value of the destroyed property. Furthermore, the petition adequately alleged that, with the intent to harass, annoy, or alarm another person, the mother engaged in a course of conduct which alarmed and seriously annoyed another person and served no legitimate purpose. The father represented himself upon appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_07132.htm

Matter of Jaimes v Gyerko, 10/24/18 – **CUSTODY MOD PETITION / REINSTATED**
The father appealed from an order of Westchester County Family Court granting the mother's motion to dismiss his petition to modify a prior custody order and enjoin her from relocating. The Second Department reversed, reinstated the petition, and remitted the matter. Family Court should not have summarily dismissed the petition. No agreement of the parties can bind the court to a disposition that does not meet the children's best interests. The parties' agreement as to relocation was not dispositive, and the father demonstrated that the move might not serve the children's best interests. Essential facts were in dispute; a hearing was required. The father represented himself on appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_07125.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131