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REPORT OF THE CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING AMENDING COUNTY LAW § 722 TO AUTHORIZE COMPENSATION TO ASSIGNED COUNSEL FOR INVESTIGATING AND FILING APPROPRIATE POST-CONVICTION MOTIONS UNDER CRIMINAL PROCEDURE LAW ARTICLE 440

Some legal issues cannot be effectively litigated on direct appeal because they involve off-the-record material. These include claims based on newly-discovered evidence, certain illegal sentence issues, and claims of ineffective assistance of trial counsel, which may be suggested by appellate counsel's review of the record but which often demand presentation of additional facts. See People v. Brown, 45 N.Y.2d 852 (1978). However, assigned appellate lawyers in New York are not statutorily-entitled to compensation for investigating meritorious post-conviction motions and for drafting and filing papers in support of such motions. Compensation is only authorized for representation provided after a "hearing has been ordered in a 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." County Law § 722 (4).

The practical result of this funding restriction is that many potentially meritorious motions under Article 440 of the Criminal Procedure Law are not pursued. A two-tiered system of appellate representation has emerged. As documented below, offices with salaried lawyers (legal aid societies, public defender offices and other organized providers in New York City) develop and file CPL Article 440 motions when meritorious issues are identified during the course of appellate representation. Assigned appellate lawyers who are dependent on hourly compensation (referred to as 18-B lawyers and who provide the bulk of appellate representation in upstate regions) do not.

Upon information and belief, based on statistics gathered by and conversations with Mr. Al O'Connor of the New York State Defenders Association in Albany, in the past several years, virtually no 440 motions were filed by individual 18-B lawyers working in jurisdictions covered by the Appellate Divisions, Third and Fourth Departments. Conversely, it is the policy of the four institutional appellate providers in New York City (the Legal Aid Society, Office of the Appellate Defender, Appellate Advocates, and Center for Appellate Litigation) to investigate meritorious post-conviction claims and draft and file a 440 motion if appropriate.

Notably, the statistics show that these institutional providers have been extremely prudent in filing such motions: over the past five years (2005-2009), a 440 motion was filed in only 2.4% of the cases assigned to these organizations. Moreover, some of these motions addressed unlawful sentencing issues only, under C.P.L. § 440.20, which are typically simpler to investigate and draft.

The quality of representation offered to indigent criminal appellants should not be affected by the employment status of their lawyers. Professional standards require assigned appellate lawyers to consider the possibility of filing a post-judgment motion (such as a CPL Article 440 motion) as part of an effective appellate strategy. See, e.g., ABA Standards for Criminal Justice, Criminal Appeals 21-3.2.[1] For economic reasons, some attorneys are unable to comply with this obligation.

Accordingly, we recommend the following proposed amendment to paragraph 5 of section 722 of the County Law (appearing underlined):

> 5. In classification proceedings under article six-C of the correction law or from an appeal thereof, representation shall be according to a plan described in subdivisions one, two, three or four of this section. If such plan includes representation by a private legal aid bureau or society, such private legal aid bureau or society shall have been designated to give legal assistance and representation to persons charged with a crime.
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> Upon an appeal in a criminal action, and on any appeal described in section eleven hundred twenty of the family court act, article six-C of the correction law or section four hundred seven of the surrogate's court procedure act, wherein the party is financially unable to obtain counsel, the appellate court shall assign counsel furnished in accordance with the plan, conforming to the requirements of this section, which is in operation in the county or in the city in which a county is wholly contained wherein the judgment of conviction, disposition, or order of the trial court was entered; provided, however, that when such county or city has not placed in operation a plan conforming to that prescribed in subdivision three or four of this section and such appellate court is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when such county or city has not placed in operation any plan conforming to that prescribed in this section, such appellate court may assign any attorney in such county or city and, in such event, such attorney shall receive compensation and reimbursement from such county or city which shall be at the same rate as is prescribed in section seven hundred twenty-two-b of this chapter. Assignment of counsel upon an appeal in a criminal action pursuant to this paragraph includes authorization for representation provided in both investigating and filing a motion under article four hundred forty of the criminal procedure law with respect to the judgment or judgments of conviction being appealed. Compensation and reimbursement for such representation and expenses shall be governed by sections 722-b and 722-c of this chapter.

Given the statistics cited above, this amendment should not have significant financial repercussions. On the contrary, the institutional providers noted above, which together represent thousands of indigent defendants per year -- and cover the vast majority of the indigent defendant appeals in New York City -- file 440 motions in only a tiny percentage of their cases. There is no reason to think that 18-B attorneys would file 440 motions at a higher rate than these organized providers. Like all lawyers, 18-B attorneys are ethically required to refrain from filing

frivolous motions. Moreover, if a court determined that a CPL Article 440 motion was frivolous, it could properly refuse to order compensation. A court also has the authority to cut voucher payments if it believes the fees sought by an attorney are excessive. Finally, the proposed amendment is limited in scope: it covers only cases in which the defendant has a direct appeal pending and the CPL Article 440 motion relates to the judgment of conviction being appealed.

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