APPELLATE DIVISION

Plea Cases – Immigration Issues

People v Griffith, 1/9/19 – ***PEQUE* VIOLATION / REMITTAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him, upon his plea of guilty, of 2nd degree criminal sale of a controlled substance and 2nd degree conspiracy. The **Second Department** remitted to allow the defendant to move to vacate his plea. The plea court had failed to make the required short, straightforward statement on the record about the possibility of deportation. In order to withdraw or obtain vacatur of a plea based on a violation of *People v Peque*, the defendant had to show that there was a reasonable probability that he would not have pleaded guilty and would have gone to trial, had Supreme Court provided information regarding potential deportation. Kristina Schwarz represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00141.htm

Plea Cases – Other Issues

People v Ward, 1/8/19 – **NO INQUIRY RE COMPETENCE / AFFIRMED**
The defendant appealed from a judgment of New York County Supreme Court, convicting him upon his plea of guilty of attempted 2nd degree robbery and sentencing him as a second felony offender to four years. The **First Department** affirmed. The defendant's challenge to his plea was unpreserved because he failed to move to withdraw the plea or vacate the judgment; and the case did not fall under the narrow exception to the preservation requirement. The appellate court declined to review the claim in the interest of justice. As an alternative holding, the reviewing court found that the plea court was not required to conduct a sua sponte inquiry into the defendant's mental condition. He had been found competent, following CPL Article 730 proceedings a few months before the plea. Further, his responses to the court's questions established that his plea was knowing, intelligent, and voluntary.
http://nycourts.gov/reporter/3dseries/2019/2019_00062.htm

People v Washington, 1/8/19 – **NO *RODRIGUEZ* HEARING / AFFIRMED**
The defendant appealed from a judgment of New York County Supreme Court, convicting him upon his plea of guilty of 1st degree robbery and sentencing him as a second violent felony offender to 12 years. The **First Department** affirmed. The motion court properly denied the defendant's application to suppress identification testimony, without granting a *Rodriguez* (79 NY2d 445) hearing. The hearing was sought to test the People's assertion that a witness who had a prior relationship with the defendant had made a confirmatory identification. In opposition to the defendant's motion, the People set forth detailed factual assertions regarding the relationship—including the witness' frequent interactions with the defendant over a period of years and the witness' knowledge of the defendant's nickname. Since the defendant failed to submit a reply or otherwise controvert the People's allegations, there was no factual issue requiring a hearing.
http://nycourts.gov/reporter/3dseries/2019/2019_00070.htm

People v Venzen, 1/10/19 – **SUPPRESSION / PROPERLY DENIED**
The defendant appealed from a judgment of New York County Supreme Court, convicting him, upon his plea of guilty, of 3rd degree criminal possession of a controlled substance. The **First Department** held the trial court properly denied the defendant's suppression motion. There was no basis for disturbing the hearing court's credibility determinations. That court properly determined that the police had probable cause to arrest the defendant after seeing a rapid exchange of small objects for money that reasonably appeared to be a drug transaction. The record also supported the hearing court's alternative finding that, irrespective of probable cause, the defendant abandoned a bag containing drugs as the officers approached and identified themselves.
http://nycourts.gov/reporter/3dseries/2019/2019_00186.htm

People v Taylor, 1/10/19 – **VALID PLEA / ATTORNEY NOT ADVERSE**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him, upon his plea of guilty, of 1st degree manslaughter. The **First Department** held that the record established the voluntariness of the plea, and the plea court properly denied the defendant's motion to withdraw it. He did not raise an intoxication defense during the plea colloquy. To the extent he did so at sentencing, the court properly rejected his claim that his plea should be withdrawn on that basis. The defendant's claim that his plea was the product of a misunderstanding about his predicate felony status was unpreserved and unsupported by the record. Further, Supreme Court appointed new counsel for purposes of the pro se plea withdrawal motion. When the new attorney declined to adopt the motion and stated that there were no legal grounds for making such a motion, that did not reach the level of taking a position adverse to his client. There was no need to appoint yet another attorney. In any event, the motion claims were patently insufficient. The defendant made a valid waiver of his right to appeal, which foreclosed suppression and excessive sentence arguments. Moreover, the warrantless taking of a blood sample while he was hospitalized was supported by exigent circumstances. There was no basis for reducing the sentence.
http://nycourts.gov/reporter/3dseries/2019/2019_00199.htm

CIRCUIT COURTS

Federal Case Summaries: Two Cases Highlighted
VOL. 96, NO. 1, INTERPRETER RELEASES, ART. 15, 1/1/19

Idrees v Whitaker, 12/13/18 (9th Cir) –
CERTIFYING DEFECTIVE APPEAL / NO JUDICIAL REVIEW
Under 8 CFR § 1003.1(c) regarding appellate jurisdiction by certification over IJ decisions, the BIA is empowered to accept and certify a procedurally improper appeal. The regulation contains no standard regarding how BIA discretion should be exercised. In a case of first impression, the Ninth Circuit held that the decision under such regulation was committed solely to BIA discretion; the appellate court did not have jurisdiction to review a decision not to certify. In so holding, the Ninth Circuit joined the Second Circuit (*Vela-Estrada v Lynch*, 817 F3d 69), as well as the Eighth and Tenth Circuits.
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/13/15-71573.pdf

Hernandez-Perez v Whitaker, 12/14/18 (6th Cir) –
REMOVAL / MOTION TO REOPEN / IMPROPERLY DENIED
A panel of the Sixth Circuit reviewed the BIA'S denial of the petitioner's motion to reopen his removal proceedings. A Mexican citizen, the petitioner had lived and worked in the U.S. since 2000. He and his wife, also a Mexican citizen, had one daughter, a U.S. citizen. In 2011, the petitioner was placed in removal proceedings and applied for cancellation of removal. The IJ noted that the petitioner had committed mainly misdemeanor traffic offenses and commended him for maintaining steady employment and providing for his family. Yet the IJ denied the application for cancellation of removal. In an application to reopen, the petitioner alleged that his family circumstances had changed. He had been aware that an eight-year-old U.S. citizen named A.W. might be his son. Then a DNA test confirmed that the petitioner was indeed the child's father. Further, the petitioner learned that the child's mother was too ill to care for him. The motion to reopen cited hardship to the boy. The BIA denied the motion. The Sixth Circuit reversed. The BIA erred in finding that the newly submitted evidence had previously been available and failed to address the hardship: A.W. could become a ward of the state. Because the Board did not consider relevant facts or cite legal authority, its decision did not allow for meaningful judicial review, and remand was necessary. The petitioner would be required to show a reasonable likelihood that the statutory requirements for relief from removal had been satisfied.
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0269p-06.pdf

DISTRICT COURT

Wang v Brophy, 1/4/19 – **HABEAS CORPUS / BOND HEARING GRANTED**
The petitioner, who has been detained at the Buffalo Federal Detention Facility in Batavia since 2016 due to removal proceedings, sought a writ of habeas corpus. A Chinese citizen, the petitioner first entered the U.S. in 1990 and filed for asylum in 1993 and 1995. Both applications were denied. They were filed using different names, birth dates, grounds for seeking asylum, and dates of entry. The petitioner married a U.S. citizen and then became a LPR in 2000. In 2010, he was convicted of grand larceny and trademark infringement, arising from a single scheme of misconduct in Virginia. In 2014, he renewed his LPR status. Two years later, after taking a trip to Canada, he was detained upon attempted re-entry. The petitioner was charged with being inadmissible as an alien who had committed a crime involving moral turpitude and who, by fraud or willful misrepresentation of a material fact, procured an immigration benefit. The District Court for the Western District found that the petitioner was entitled to an individualized bond hearing, at which the Government would have to prove by clear and convincing evidence that his continued detention was justified based on flight risk or danger to the community. The two-year detention without a bond hearing was unreasonable and unconstitutional as applied to the petitioner.