FEDERAL COURTS

Cruz-Quintanilla v Whitaker, 2/1/19 – **TORTURE / WRONG STANDARD**

The petitioner, a native of El Salvador and LPR of the U.S., faced removal as a result of two criminal convictions. As a former MS-13 gang member, he feared that he would be tortured if forced to return to El Salvador, and thus he sought relief under the Convention Against Torture. To qualify, he had to establish that: (1) it was more likely than not that he would be tortured if removed, and (2) the government would acquiesce in that torture. On the "acquiescence" prong, the petitioner alleged that Salvadoran officials would turn a blind eye to efforts by either MS-13 or rival gang members to target him and that government officials might even actively target him themselves. The petitioner introduced into evidence the U.S. State Department's 2015 Human Rights Report on El Salvador, which detailed extrajudicial killings by government officials. The IJ denied relief based on the failure to establish the acquiescence element, and the BIA affirmed. The **Fourth Circuit** concluded that the BIA had applied the wrong standard of review. Whether the petitioner established the acquiescence element was a mixed question of law and fact. The IJ's determination that the evidence did not meet the relevant standard was a legal judgment subject to de novo review. But the BIA failed to bring to bear its independent judgment as to whether the predictive facts found by the IJ satisfied the regulatory standard for government acquiescence. Thus, the appellate court remanded so that the BIA could review the IJ's determination under the correct standard.
https://cases.justia.com/federal/appellate-courts/ca4/17-2404/17-2404-2019-02-01.pdf?ts=1549049418

Campbell v USA, 1/29/19 – **INEFFECTIVE ASSISTANCE / REJECTED**

The petitioner, a citizen of Jamaica, pleaded guilty in **District Court – EDNY** to conspiring to import more than 1,000 kilograms of marijuana. After he was sentenced to 128 months followed by supervised release, he moved pro se to vacate his conviction, based on effective assistance during the plea negotiation process. The petitioner asserted that counsel failed to inform him that he would be subjected to mandatory deportation; pressured him into pleading guilty by demanding more money to go to trial; and failed to negotiate a plea that would not result in mandatory deportation. However, during the plea hearing, the petitioner affirmed that he understood that his plea would cause him to be removed. He later testified that he was aware that he "will be removed or deported"—regardless of any contrary information from counsel. The written plea agreement warned that the guilty plea made removal presumptively mandatory. When a defendant learns of the deportation consequences from a source other than counsel, he has not suffered prejudice. Moreover, although close family ties and long-term residency in the U.S. may support a prejudice argument, the petitioner did not point to other factors indicating that deportation was determinative. Rather than showing that he was motivated to plead guilty primarily by a desire to avoid deportation, he fled to Jamaica after his plea. Finally, the petitioner had not shown that he was prejudiced by counsel's alleged failure to negotiate a hypothetical plea bargain to avoid deportation; his argument was too speculative.

APPELLATE DIVISION

Plea Cases – Other Issues

People v Dessasau, 1/23/19 – **CPW2 CONVICTION / SUPPRESSION / REVERSED**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree CPW. The appeal brought up for review the denial of his motion to suppress the gun. The **Second Department** reversed, granted suppression, and dismissed the indictment. When the defendant pleaded guilty, he did not waive his right to challenge the ruling. The appellate court disagreed with the hearing court's sua sponte determination that the defendant lacked standing to challenge the search of the minivan where the gun was found. The defendant, who had been sitting in the front passenger seat, told the police that the van was his work vehicle. No evidence was presented to contradict his testimony. The defendant exercised sufficient dominion and control over the van to demonstrate his legitimate expectation of privacy. Under the circumstances, where the defendant already had been removed from the van and no one else was in the vehicle, the police lacked probable cause to conduct a warrantless search. The Legal Aid Society of NYC (Rachel Pecker and Lawrence Hausmen, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00456.htm

People v Tchiyuka, 2/1/19 – **UNFULFILLED PROMISE / VACATED**
The defendant appealed from a judgment of Oneida County Court convicting him, upon his plea of guilty, of 2nd degree robbery. He contended that his plea was induced by a promise of jail time credit that could not legally be fulfilled. The **Fourth Department** agreed. Where a guilty plea was induced by an unfulfilled promise, the sentencing court must vacate the plea or honor the promise. If the promised sentence cannot be imposed, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations. The appellate court vacated the sentence and remitted the matter. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00754.htm

People v Jordan,2/1/19 – ***CATU* VIOLATION / VACATED**
The defendant appealed from a judgment of County Court convicting him, upon his plea of guilty, of 3rd degree criminal possession of a controlled substance. The **Fourth Department** reversed, vacated the plea, and remitted the matter. As the defendant contended and the People correctly conceded, at the time of the plea, County Court failed to properly advise the defendant of the period of post-release supervision that would be imposed at sentencing. *People v Catu*, 4 NY3d 242. Although the defendant also contended that his waiver of the right to appeal was invalid, resolution of that issue was of no moment, inasmuch as the post-release issue would survive even a valid waiver. The Niagara County Public Defender (Theresa Prezioso, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00712.htm

People v Keller, 1/30/19 – **MISSTATED MAXIMUM / VACATED**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of criminal possession of a firearm. The **Second Department** reversed, vacated the plea, and remitted. The defendant was charged with criminal possession of a firearm and 2nd degree criminal contempt. During the plea proceeding, defense counsel stated that he had advised the client that he could face consecutive sentences, if convicted at trial. The defendant was not presented with legitimate alternatives about the maximum. The firearm count was a class E felony, and the longest sentence a SFO could receive was 2 to 4 years. The criminal contempt charge was a class A misdemeanor, punishable by one year. Pursuant to Penal Law § 70.35, the sentences had to run concurrently. The threat of the higher sentence rendered the plea involuntary. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00620.htm

People v Mack, 1/30/19 **– MISSTATED EXPOSURE / AFFIRMED**
The defendant appealed from three judgments of Rockland County Court, convicting her of drug sale and possession charges and 4th degree conspiracy. The **Second Department** affirmed. The defendant validly waived her right to appeal. The contention that her pleas were defective was unpreserved for appellate review, and the preservation requirement exception did not apply. In any event, the pleas were validly entered. The defendant, who had the assistance of an attorney and had a lengthy criminal history, admitted her guilt after a thorough allocution. She acknowledged that she had enough time to discuss the matter with counsel; indicated that no one had pressured her; and sufficiently allocuted to the facts. Further, she understood that she was forfeiting enumerated rights. To the extent the Supreme Court misstated the sentencing exposure, that could not have influenced the decision to plead guilty. Finally, the valid waiver of the right to appeal precluded review of the suppression determination.
http://nycourts.gov/reporter/3dseries/2019/2019_00621.htm

People v Faulkner, 1/31/19 – **ADVERSE POSITION / NEW COUNSEL**
The defendant appealed from a Schenectady County Court judgment convicting him of 3rd degree rape. At a court proceeding following his plea of guilty, the defendant made an oral pro se motion to withdraw the plea, and defense counsel repeatedly asserted that there was no basis for the motion. Yet County Court did not assign new counsel, and it denied the motion on the merits. On appeal, the defendant contended that his right to effective assistance was violated; and new counsel should have been assigned. The People and the **Third Department** agreed. Counsel may not become a witness against the client; make remarks that affirmatively undermine a client's arguments; or otherwise take a position adverse to the defendant. When counsel does so, a conflict of interest arises. The matter was remitted for assignment of new counsel and reconsideration of the defendant's motion. Robert Gregor represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00645.htm

People v Hampton, 1/22/19 – **DISSATISFIED / NO NEW COUNSEL**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree murder and other crimes. He argued that the plea court should have

granted his request for new counsel. The **First Department** disagreed. Supreme Court provided the defendant with an adequate opportunity to state his reasons for substitution and conducting the required inquiry. When the defendant said that his attorney was not fighting for him, the court reviewed the proceedings to show the work defense counsel had done. The court assured the defendant that his attorney would communicate with him, and directed counsel to do so. Vague conclusory allegations of frustration did not warrant a substitution. Further, after the defendant's request, at the plea hearing, he was asked by the court if he was satisfied with the services from defense counsel, and he said yes.
http://nycourts.gov/reporter/3dseries/2019/2019_00398.htm

People v Barr, 2/1/19 – **DISSATISFIED / NO NEW COUNSEL**
The defendant appealed from a judgment of Monroe County Court convicting him, upon his plea of guilty, of attempted 2nd degree burglary. The **Fourth Department** affirmed, rejecting the defendant's assertion that the plea court failed to make an appropriate inquiry into his request for substitution of counsel. Such contention was encompassed by his plea and his valid waiver of the right to appeal, except to the extent that it implicated the voluntariness of the plea. In any event, the defendant abandoned his request for new counsel when he decided to plead guilty, while still being represented by the same attorney. To the extent that the defendant alleged ineffective assistance, that contention did not survive the plea and valid waiver of the right to appeal. The defendant had not demonstrated that any allegedly ineffective assistance infected the plea bargaining process or that he entered the plea because of his attorney's poor performance.
http://nycourts.gov/reporter/3dseries/2019/2019_00773.htm

People v Donely, 1/22/19 – **PLEA VOLUNTARY / AFFIRMED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of attempted 3rd degree burglary. The **First Department** affirmed. The defendant claimed that his plea was involuntary, but did not show how the events of his uncompleted first trial impaired the voluntariness of the plea. In any event, the only relief he requested was the dismissal of the indictment, rather than vacatur of the plea. He expressly requested the appellate court to affirm the conviction, if it did not grant a dismissal. The fact that the defendant has been released on parole did not warrant dismissal, especially where he was a predicate felon.
http://nycourts.gov/reporter/3dseries/2019/2019_00403.htm

People v Walton, 1/23/19 – **PLEA VOLUNTARY / AFFIRMED**
The defendant appealed from a judgment of Westchester County Court convicting him of 1st degree assault and other crimes. The **Second Department** affirmed. His contention—that his plea was not knowing, voluntary, and intelligent and was coerced—was unpreserved. In any event, the court was merely informative, not coercive, when explaining to the defendant that the prior offer was no longer available, and the current offer would be withdrawn if he proceeded with the suppression hearings. Moreover, the record revealed that the defendant acknowledged under oath that he was not forced to plead guilty and was entering the plea freely and voluntarily.
http://nycourts.gov/reporter/3dseries/2019/2019_00476.htm

People v Standardo, 2/1/19 – **PLEA VOLUNTARY / AFFIRMED**
The defendant appealed from a judgment of Monroe County Court convicting him, upon his plea of guilty, of possessing a sexual performance by a child. The **Fourth Department** affirmed. The defendant contended that, as a result of brain damage he allegedly sustained, his plea was not knowingly and voluntarily entered. The plea court conducted a relevant inquiry, specifically addressing issues relating to the defendant's cognitive functioning, as referenced in the pre-plea investigation report. In response to the court's inquiries, the defendant indicated that his medical condition did not affect his ability to understand the proceedings.
http://nycourts.gov/reporter/3dseries/2019/2019_00793.htm

People v Davis, 1/29/19 – **NO YO / AFFIRMED**
The defendant appealed from an order of New York County Supreme Court convicting him, upon his pleas of guilty, of attempted 1st degree assault in the first degree and 2nd degree CPW and sentencing him to concurrent terms of eight years. The **First Department** affirmed. The record established that the sentencing court fully discharged its obligations regarding consideration of youthful offender treatment. The court decided that there were no mitigating circumstances that would render the defendant eligible for YO treatment on an armed felony conviction. The appellate court found that, where the defendant fired shots at another person on a busy street, no mitigating circumstances were present, and YO treatment would be inappropriate. The reviewing court perceived no basis for reducing the sentence. The claim that counsel rendered ineffective assistance by failing to argue for YO treatment or a lesser sentence was unreviewable on direct appeal because it involved matters not reflected in the record.
http://nycourts.gov/reporter/3dseries/2019/2019_00579.htm

People v Hamlett, 1/22/19 – **PLEA WITHDRAWAL / DENIAL AFFIRMED**
The defendant appealed from (1) a judgment of New York County Supreme Court convicting him of attempted 2nd degree burglary upon his plea of guilty and (2) a judgment convicting him after a jury trial of 2nd degree assault. The **First Department** affirmed. As to the plea, the court providently exercised its discretion in denying the defendant's motion to withdraw the plea. The nature and extent of the fact-finding inquiry rested largely in the discretion of the judge, and a hearing should be granted only in rare instances. Here, permitting the defendant to set forth his claims in detail constituted a suitable inquiry. The record showed that the guilty plea was validly made; and claims of coercion and innocence were contradicted by statements during the plea colloquy. The defendant pleaded guilty after the victim and other witnesses testified at trial, when the defendant represented himself and was assisted by an attorney/legal advisor. Claims of ineffective assistance by the legal advisor were unsupported. The plea resulted from the strength of the People's case, which included evidence that the defendant phoned the victim to admit his guilt and apologize.
http://nycourts.gov/reporter/3dseries/2019/2019_00382.htm

Trial Cases

People v Fulgencio, 1/30/19 – **DISSATISFIED / NO NEW COUNSEL**
The defendant appealed from a judgment of Westchester County Supreme Court convicting him, upon a jury verdict, of 1st degree assault and 4th degree CPW. The **Second Department** affirmed, rejecting arguments regarding the right to counsel. That constitutional right did not encompass the right to an attorney of one's own choosing; and the right to a court-appointed lawyer did not include a right to successive lawyers at a defendant's option. Upon the defendant's request for substitute counsel, the trial court properly discharged its inquiry duty.
http://nycourts.gov/reporter/3dseries/2019/2019_00617.htm

People v Mallet, 1/22/19 – **440 MOTION / DENIAL AFFIRMED**
The defendant appealed from an order of Bronx County Supreme Court which denied his pro se motion to vacate a 1999 judgment of conviction for murder, rendered after a jury trial. The **First Department** affirmed. The motion court properly denied the application, which was based on newly discovered evidence and actual innocence. Both claims failed because they were not supported by sworn, non-hearsay allegations from the source of the proffered new evidence—the sole eyewitness at trial. In addition, the motion was not made with due diligence; it was filed years after the discovery of the alleged new evidence, without any valid excuse. In any event, the witness's statements did not establish that the alleged new evidence would probably change the result if a new trial were granted.
http://nycourts.gov/reporter/3dseries/2019/2019_00376.htm

Family Court

Chance R. (Andrew W. – Taeisha R.), 1/22/19 – **NEGLECT / CORPORAL PUNISHMENT**
The father appealed from an order of New York County Family Court which found that he neglected the child Christopher and derivatively neglected the other children. The **First Department** affirmed. The evidence supported the finding that respondent, who had a three-year relationship with the mother, was a person legally responsible for the children. He dropped them off at, and picked them up from, school; and he disciplined them when they were disrespectful. There was evidence that he lived in the apartment with the mother and the two children who resided with her. Furthermore, he was the biological father of the mother's newborn child and was present daily, for at least the first month of the child's life. The finding of neglect based on excessive corporal punishment of Christopher was supported by the evidence, including the children's out-of-court statements, medical records, and the caseworker's observations. The finding of neglect warranted the finding of derivative neglect as to the other children.
http://nycourts.gov/reporter/3dseries/2019/2019_00391.htm

Justice L. (Jessica L.), 1/30/19 – **NEGLECT / CORPORAL PUNISHMENT**
The mother appealed from Suffolk County Family Court orders finding that she neglected the subject children. The **Second Department** affirmed. She neglected the children by inflicting excessive corporal punishment. In addition, the mother failed to exercise a

minimum degree of care in supplying them with adequate food. Further, the evidence supported the finding of neglect as to the child Alaysia L., based on the mother allowing her to ride in a car driven by the intoxicated father.
http://nycourts.gov/reporter/3dseries/2019/2019_00598.htm

Melo v Zuniga, 1/23/19 – **ORDER OF PROTECTION / AFFIRMED**
The appellant appealed from an order of protection issued by Kings County Family Court. The order followed a finding that he committed the family offenses of forcible touching and harassment. The **Second Department** affirmed. The determination that the appellant had committed the family offenses was based on credibility determinations. The challenged order was necessary to provide the petitioner with protection.
http://nycourts.gov/reporter/3dseries/2019/2019_00439.htm

Matter of Lliguicota, 1/30/19 – **ORDER OF PROTECTION / AFFIRMED**
The father appealed from an order of protection issued by Kings County Family Court, made after a finding that he committed the family offenses of 3rd degree assault, 3rd degree menacing, 2nd degree harassment, and 4th degree stalking. The **Second Department** held that order was reasonably necessary to provide meaningful protection to the petitioner and eradicate the root of the domestic disturbance.
http://nycourts.gov/reporter/3dseries/2019/2019_00599.htm

ARTICLES

OCA May Limit ICE Courthouse Arrests, *DOCUMENTED*, 1/30/19
Chief Administrative Judge Lawrence Marks told Albany lawmakers on Jan. 29 that OCA is considering steps to limit ICE officers from conducting civil immigration arrests inside courthouses. He reiterated the position of Chief Judge DiFiore that ICE will not be banned from entering courts, but left open the possibility of prohibiting detentions in the absence of a judicial warrant, rather than the administrative warrants typically carried by ICE officers. DOCUMENTED reported over the weekend that internal OCA documents showed that, in some cases, court officers coordinated with ICE prior to arrests. (The IDP report showing that courthouse arrests greatly increased from 2017 to 2018 was shared on this listserv.)
NEW YORK LAW JOURNAL, 1/29/19
In an interview with the *NYLJ*, Marks said: OCA was considering requiring a warrant signed by a federal judge. The rule would be similar to a bill currently being considered in the state Legislature. The courthouse arrests had been an ongoing problem for several years. OCA was concerned about the impact it might have on people being likely to return to court, and had chosen not to prohibit ICE officers from entering state courthouses, given constitutional concerns over public access to those buildings. "It's a very, very difficult question for us," Marks said. "We're the court system, we have to be neutral around the Legislature and the governor."

RIGHT TO COUNSEL / FACING DEPORTATION

An informal opinion by the chair of the NACDL Immigration Law Committee appearing in the current edition of *The Champion*, opines that there should be a right to appointed counsel for all indigent persons facing deportation. It does not make sense that a person facing one day in jail for shoplifting gets counsel; but a person who could be killed if deported is denied an appointed lawyer. The problem could be solved through legislation or litigation. The goal is to recognize a right to counsel for indigent persons facing deportation by establishing something like the current Federal Criminal Justice Act. There should be a government-funded network of highly capable immigration lawyers to defend indigent persons. These offices should represent all persons the government seeks to deport who cannot afford counsel, not only children or the mentally challenged. Justice requires no less.

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