FEDERAL COURTS

USA v Navarro-Garcia, 2/7/19 – **9th CIRCUIT / PLAIN ERROR**
The defendant pleaded guilty to being a deported alien found unlawfully in the U.S. The parties recommended a sentence of time served. The District Court made an upward departure from the Guidelines and imposed a sentence of 18 months. The **Ninth Circuit** vacated and remanded. At sentencing, the Government recommended a downward departure because of time served in state custody. The District Court held that: (1) it could not grant such credit because the time was served on a separate, unrelated conviction; and (2) the court could not take into consideration the factor that the defendant would be automatically deported following his release, because the Government was having difficulty deporting people, especially in the Ninth Circuit. The appellate court held that the District Court committed plain error in failing to recognize that it had discretion to grant credit for the time served in state custody, and in finding that the defendant was unlikely to be deported. This was not the first time the District Court had relied on its erroneous findings concerning Government deportation policies in sentencing undocumented defendants. In these circumstances, reassignment to a new judge was advisable to preserve the appearance of justice.
https://cdn.ca9.uscourts.gov/datastore/memoranda/2019/02/04/18-10147.pdf

APPELLATE DIVISION

Plea Cases – Immigration Issues

People v Cabrera, 2/7/19 – **PEOPLE'S APPEAL / IMMIGRATION ERROR**
The People appealed from an order of Bronx County Supreme Court which granted the defendant's CPL 440.10 motion and vacated a 2006 conviction for a domestic violence felony. The First Department affirmed. The motion court properly granted the defendant's application on the ground of ineffective assistance, consisting of counsel's affirmative misadvice about the deportation consequences of the defendant's guilty plea. *See People v McDonald, 1 NY3d 109 (2003).* The motion court conducted a hearing that included testimony from the defendant and prior counsel. Evidence credited by the court established that counsel advised that the defendant would not become deportable and would likely be granted citizenship five years after he completed probation, if he stayed out of trouble. Counsel's affirmative misrepresentations fell below an objective standard of reasonableness. Although the People disputed whether, at the time of the plea, the defendant's conviction rendered him deportable, they established at most that deportability was less clear in 2006 than today. Further, counsel's errant advice was not that defendant *might* avoid deportation, but that he *would* do so. The People did not challenge the finding that the defendant was prejudiced, that is, he would not have pleaded guilty had he received correct immigration advice. Jonathan Edelstein represented the respondent.
http://nycourts.gov/reporter/3dseries/2019/2019_00976.htm

People v Hor, 2/6/19 – **REMITTAL / IMMIGRATION ERROR**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault. He contended that the plea court never advised him of the possibility that he would be deported as a consequence of his guilty plea. The Second Department agreed and held that the plea court violated *People v Peque*, 22 NY3d 168 (due process requires that court apprise noncitizen pleading guilty to felony of possibility of deportation). To vacate a plea based on such defect, a defendant must demonstrate that there was a reasonable probability that, had the plea court given the deportation warning, he or she would not have pleaded guilty and would have gone to trial. The Second Department remitted to give the defendant an opportunity to move within 60 days to vacate his plea. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00899.htm

People v McDonald, 2/7/19 **– DISMISSED / INVOLUNTARY DEPORTATION**
The defendant appealed from an order of Bronx County Supreme Court which denied his CPL 440.10 motion after a hearing. The **First Department** dismissed the permissive appeal due to the defendant's involuntary deportation, citing *People v Harrison*, 27 NY2d 281 (criminal defendant has fundamental right to direct appeal under CPL 450.10; but that statute has no application to permissive appeals pursuant to CPL 450.15; and intermediate appellate court may dismiss such appeals due to defendant's involuntary deportation).
http://nycourts.gov/reporter/3dseries/2019/2019_00984.htm

People v Ramos, 2/7/19 – **DISMISSED / 440 NEEDED**
The defendant appealed from a judgment convicting him of a drug possession crime. The **First Department** affirmed. The argument, asserting ineffective assistance regarding the immigration consequences of the plea, was unreviewable on direct appeal. Such claim involved matters not reflected in the record and thus required a CPL 440.10 motion. The defendant erroneously asserted that a claim pursuant to *Padilla v Kentucky*, 559 US 356, may be established based on the *absence* of record evidence of counsel's immigration advice.
http://nycourts.gov/reporter/3dseries/2019/2019_00965.htm

Plea Cases – Other Issues

People v Moore, 2/7/19 – **INEFFECTIVE ASSISTANCE / 440 NEEDED**
The defendant appealed from a judgment of Albany County Court convicting him upon his plea of guilty of 1st degree attempted reckless and another crime. Upon appeal, he contended that defense counsel was ineffective in failing to adequately investigate his case, explore a potential defense, and research his prior criminal history. The **Third Department** observed that those arguments involved matters outside the record more appropriately addressed in a CPL 440.10 motion. As to counsel's failure to insist on a CPL 400.21 hearing, no harm no foul: the People conceded at sentencing that the defendant was a predicate felon, and his sentence was adjusted accordingly. Moreover, counsel secured an advantageous plea agreement.
http://nycourts.gov/reporter/3dseries/2019/2019_00928.htm

People v Walker, 2/6/19 – **INACCURATE SENTENCE INFO / PLEA KNOWING**
The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of attempted 2nd degree CPW. The **Second Department** affirmed. The defendant, who had two prior violent felony convictions, was indicted for various offenses, with a top count of CPW2. Pursuant to a plea agreement, he pleaded guilty to attempted CPW2. During the allocution, Supreme Court explained that, if the defendant were convicted of the top count, the sentence range would be from 16 years to life, to 25 years to life. The defendant's ensuing motion to withdraw his plea was denied. He was sentenced, as a persistent violent felony offender, to 12 years to life. On appeal, the defendant contended that he was not informed that, if he went to trial, he could be convicted of a nonviolent offense and sentenced to a determinate term. Generally, a guilty plea may not be withdrawn, absent some evidence or claim of innocence, fraud or mistake in inducement. That the defendant received inaccurate information regarding sentence exposure was germane, but not dispositive. He had extensive criminal system experience, and during the allocution said that he had enough time to consult with counsel and was pleading guilty of his own free will. The explanation of the sentence range for the top count was accurate.
http://nycourts.gov/reporter/3dseries/2019/2019_00913.htm

People v Gumbs, 2/7/19 – **MENTAL HEALTH ISSUES / AFFIRMED**
The defendant appealed from a judgment of Albany County Court convicting him of 1st degree robbery. The **Third Department** affirmed, rejecting arguments attacking the voluntariness of the plea. The defendant's allocution statements regarding his overall mental health did not cast doubt on his guilt so as to trigger the narrow preservation exception. Moreover, mental health issues alone did not necessarily render the defendant incompetent to enter a valid plea or to require a CPL Article 730 competency hearing. Nothing in the plea or sentencing minutes indicated that the defendant suffered from a mental defect that impacted the plea.
http://nycourts.gov/reporter/3dseries/2019/2019_00933.htm

People v Mercer, 2/7/19 – **MENTAL HEALTH ISSUES / AFFIRMED**
The defendant appealed from a judgment of Ulster County Court convicting him of a drug sale crime. He contended that his plea was not knowing, voluntary, and intelligent because he suffered from bipolar disorder and was not taking his medication at the time of the plea. The **Third Department** was unpersuaded. The defendant's claim was unpreserved, as was his contention that he was deprived of effective assistance because his two attorneys did not move to withdraw his guilty plea based on his mental illness.
http://nycourts.gov/reporter/3dseries/2019/2019_00929.htm

People v Hines, 2/8/19 – **FACTUAL SUFFICIENCY CHALLENGE / FORECLOSED**
The defendant appealed from a judgment of Ontario County Supreme Court, convicting him upon a plea of guilty of drug sale and possession charges. The **Fourth Department** affirmed. The defendant's contention that his plea was not knowing, voluntary, and intelligent because he did not recite the elements of the crimes, and replied only "yes" or "no" to many questions, was a challenge to the factual sufficiency of the allocution and was foreclosed by the valid appeal waiver.
http://nycourts.gov/reporter/3dseries/2019/2019_01028.htm

Family

Matter of Antonio T. (Franklin T.), 2/6/19 – **NEGLECT / AFFIRMED**
The appellant appealed from orders of Queens County Family Court which determined that he sexually abused two children and neglected two other children. The **Second Department** affirmed. The out-of-court statements of the abused children cross-corroborated each other and were substantiated by the mother's testimony. Moreover, a derivative finding of abuse as to other children was warranted, given the impaired parental judgment creating a substantial risk of harm for any child in the appellant's care. The finding of neglect as to two children was supported by proof of excessive corporal punishment.
http://nycourts.gov/reporter/3dseries/2019/2019_00872.htm

Matter of Feliciano v Cooper, 2/6/19 – **ORDER OF PROTECTION / AFFIRMED**
The father appealed from an order of protection of Kings County Family Court. After a hearing, and upon a finding regarding family offenses, the order directed the father to stay away from the mother and the children. The **Second Department** affirmed. The proof established that the father committed acts which constituted 3rd degree assault, 3rd degree menacing, and criminal obstruction of breathing or circulation. There was sufficient evidence to show aggravating circumstances, warranting a five-year order of protection.
http://nycourts.gov/reporter/3dseries/2019/2019_00888.htm

ARTICLE

***People v Suazo* / Consequences**
BY HON. BARRY KAMINS, *NYLJ*, 2/1/19
Last year, the Court of Appeals held in *People v Suazo* that a noncitizen defendant charged with a deportable class B misdemeanor is entitled to a jury trial under the 6th Amendment, even though the maximum authorized sentence is a term of imprisonment of less than six months. Consequences of that decision will include that, for the first time, NYC Criminal Court judges will be placed in the middle of litigation involving a defendant's immigration status and the potential deportation consequences associated with pending charges. Moreover, courts will now be required to make specific findings as to the immigration impact of specific class B misdemeanors—more than 70 of which carry potential immigration consequences. Courts should also anticipate motions raising an equal protection challenge, based on the denial of jury trials to *citizens* facing charges that would entitle non-citizens to a jury trial. *See Issues to Develop at Trial*, Center for Appellate Litigation, Vol. 3, Issue 7 (link below). A bill introduced by Sen. Brad Hoylman would provide for jury trials for defendants charged with class B misdemeanors in NYC Criminal Court (S. 9198).
https://www.ils.ny.gov/files/Appellate/CAL/CAL%20Newsletter%20Issues%20to%20Develop%20at%20Trial/November%202018.pdf