FEDERAL COURT

USA v Nataniel, 2/13/19 – **IAC CLAIM / REJECTED**
After pleading guilty to importing cocaine, the petitioner moved to vacate his conviction, pursuant to 28 USC § 2255. **District Court – EDNY** denied the petition. The plea agreement stated that the defendant understood that the subject offense would likely result in removal and that he nevertheless wished to plead guilty. During the plea hearing, the judge discussed the possibility of removal, and the petitioner said that he understood and acknowledged that his attorney had explained the plea agreement. His pro se motion, based on ineffective assistance, contended that he was not made aware of immigration consequences. But the record contradicted such claim, and the petitioner made only bare assertions of prejudice, without any contemporaneous, substantiating evidence. His conclusory allegations did not plausibly support either prong of the *Strickland* test. Thus, no hearing was warranted.

APP DIVISION / APP TERM

Plea Cases – Other Issues

People v Jeffery, 2/20/19 – **COUNSEL / ADVERSE POSITION**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2nd degree attempted robbery. The **Second Department** remitted for a hearing on the defendant's application to withdraw his guilty plea. On the sentencing date, the defendant said that he wanted to take his plea back, briefly describing the reasons. Defense counsel disagreed with some of the defendant's assertions, and the court proceeded to impose sentence. The appellate court held that the defendant was not afforded a reasonable opportunity to present his contentions. Moreover, his right to counsel was violated when counsel took an adverse position. New counsel should have been assigned. Appellate Advocates (David Greenberg, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01229.htm

People v Willis, Posted 2/8/19 – **ACCUSATORY INSTRUMENT / DEFECTIVE**
The defendant appealed from a judgment of Richmond County Criminal Court, which convicted him of 5th degree criminal possession of marihuana. The **Appellate Term – Second Department** reversed and dismissed the accusatory instrument. The defendant pleaded guilty in satisfaction of the two-count accusatory instrument. On appeal, he contended that the count to which he pleaded guilty was facially insufficient. This was a jurisdictional defect that was not forfeited by a guilty plea. An accusatory instrument charging a violation of Penal Law § 221.10 (1) must plead the public nature of the defendant's location, for example, by alleging that he was standing on a sidewalk or in a park when he or she possessed the marihuana. Here the allegation that the defendant possessed marihuana at "r/o" (presumably "rear of") a stated address was insufficient. There was little penological purpose to remitting the case on the remaining count—unlawful possession of marihuana, a violation—where the defendant has already served

his sentence. In the interest of justice, the entire accusatory instrument was dismissed. The Legal Aid Society, NYC (Arthur Hopkirk, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_50150.htm

People v Wiltshire, 2/25/19 – **ACCUSATORY INSTRUMENT / DEFECTIVE**
The defendant appealed from a judgment of Bronx County Criminal Court, convicting him upon a plea of guilty, of 7th degree criminal possession of a controlled substance. The **Appellate Term – First Department** reversed and dismissed the accusatory instrument. The instrument recited that, on a particular date and time, "underneath the overpass of the Bruckner Boulevard Expressway," a police officer observed the defendant "to have in his custody and control, on a concrete ledge where defendant was seated, one zip lock bag containing a white powdery residue" determined to be crack cocaine. These facts did not demonstrate reasonable cause to believe that the defendant constructively possessed the cocaine. There was no allegation: (1) that the defendant had control over, or a possessory interest in, the location, also described as "NYC property" with "no trespass" signs posted; (2) that he was engaged in drug-related activity; or (3) describing where the defendant was "seated" in relation to the drug residue and whether it was in plain view.
http://nycourts.gov/reporter/3dseries/2019/2019_50206.htm

People v Mudd, 2/21/19 – ***Catu*** **Error / REVERSAL**
The defendant appealed from a judgment of Clinton Court, convicting him of drug sale and possession crimes. When he appeared in court, the People made an offer, which included a prison term of six years with post-release supervision. Two weeks later, the same offer was extended, the defendant did not accept, and it was withdrawn. Later, he pleaded guilty, with a promise from the court to not sentence him to more than the time offered by People. During the plea proceeding, the court said that it would not be bound by the six-year cap if the defendant committed a crime before sentencing. At sentencing, the defendant admitted his predicate felony, and the court imposed concurrent six-year terms plus PRS. The **Third Department** reversed, since County Court had failed to advise the defendant that the sentence would include PRS. *See People v Catu*, 4 NY3d 242. Preservation of the claim was not required, as the defendant had no practical ability to object to the PRS. Rebecca Fox represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01265.htm

Family – Immigration Issues

Norma U. v Herman T. R. F., 2/27/19 – **SIJS DENIED / REVERSAL**
The petitioner appealed from two orders of Nassau County Family Court, which denied her applications pursuant to SIJS. The **Second Department** reversed. The record supported a finding that reunification of the children with their mother was not viable due to parental abandonment and that it would not be in their best interests to return to Honduras, where they were mistreated by relatives. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01421.htm

Rina M. G. C. (Oscar L. G.), 2/27/19 – **SIJS DENIED / REVERSAL**
The father appealed from an order of Nassau County Family Court, which denied his application pursuant to SIJS. The **Second Department** reversed. The record supported a finding that reunification of the child with the mother was not viable due to parental abandonment and that it would not be in the child's best interests to return to El Salvador, where she was threatened by gang members. Although the father had previously unsuccessfully moved for relief that would enable the child to petition for SIJS, the law of the case doctrine did not bind appellate courts. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01407.htm

Family – Other Issues

Matter of Deandre C. (Luis D.), 2/28/19 – **NEGLECT / AFFIRMED**
The respondent appealed from an order of New York County Family Court, which determined that he had neglected the subject children. The **First Department** affirmed. A preponderance of the evidence supported the finding that respondent neglected Shayla and Deandre by engaging in acts of domestic violence, which involved choking their mother, kicking her, slapping her face, and throwing objects at her in their presence. The respondent also neglected Deandre by subjecting him to excessive corporal punishment, including pushing him into a bathtub, where he hit his head.
http://nycourts.gov/reporter/3dseries/2019/2019_01490.htm

Matter of Wilson v Wilson, 2/28/19 – **ORDER OF PROTECTION / AFFIRMED**
The respondent appealed from an order of Broome County Family Court, which granted the petitioner's application, finding the respondent to have committed family offenses and issuing an order of protection. The petitioner testified that respondent's crystal meth habit and related issues caused escalating marital disputes. The respondent was physically abusive on several occasions. He admitted that he had physically restrained the petitioner and punched a wall during their arguments. Family Court implicitly found that respondent harbored an intent to annoy, harass or alarm. The **Third Department** held that the petitioner sufficiently showed that the respondent had committed, at the very least, the family offense of 2nd degree harassment. Thus, even if the petitioner failed to establish the commission of all the alleged offenses, Family Court properly granted the petition, and there was no reason to disturb the ensuing order of protection.
http://nycourts.gov/reporter/3dseries/2019/2019_01462.htm

Isaiah L., 2/20/19 – **JD / DUE PROCESS DENIAL / UNREASONABLE DELAY**
In a juvenile delinquency proceeding, the presentment agency appealed from an order of Suffolk County Family Court that dismissed the petition based on a due process violation. The **Second Department** affirmed. In March 2018, the agency filed a petition alleging that in November 2017, the respondent had committed acts constituting attempted 1st degree robbery. The due process right to a speedy trial extends to JD proceedings. An unreasonable delay in prosecution following arrest can violate due process. Relevant factors included the extent of, and reason for, the delay; the nature of the charge; whether there had been extended pretrial incarceration; and whether the delay caused prejudice. Courts must honor the goals, character, and unique nature of JD proceedings. The central

goal—rehabilitation through prompt intervention and treatment—was dishonored when the agency delayed in filing a petition. While the charges were serious and the respondent did not show prejudice, the agency gave no valid reason for delay. Maryanne Reiss represented the respondent.
http://nycourts.gov/reporter/3dseries/2019/2019_01215.htm

ARTICLE

Reduce Misdemeanor Sentence / TO PREVENT DEPORTATION
NYLJ, 2/22/19
Reducing the maximum prison sentence for misdemeanors in New York by one day could prevent undocumented immigrants from facing deportation when convicted, Gov. Cuomo and Democrats say. That was the impetus for new legislation, set forth in Cuomo's executive budget proposal and as a standalone bill sponsored by State Senator Jessica Ramos. Assemblyman Marcos Crespo has signed on to sponsor the bill in the Assembly. The proposal from Ramos would reduce the maximum sentence from one year to 364 days, and would allow a one-year sentence, imposed before enactment of the legislation, to be set aside if the defendant shows that it would result in severe collateral consequences. While the District Attorneys Association of the State of New York, does not have a position on the legislation, DAASNY President David Soares said that he personally supports the idea.

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